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Twelfth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur - Draft articles on succession to State archives, with commentaries

Topic:
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SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 1]

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**Twelfth report on succession of States in respect of matters other than treaties
by Mr. Mohammed Bedjaoui, Special Rapporteur**

***Draft articles on succession to State archives, with commentaries
(continued)***

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ABBREVIATIONS

UNESCO United Nations Educational, Scientific and Cultural Organization

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that in the passage immediately preceding the asterisk the italics have been supplied by the Special Rapporteur.

Introduction

1. This study is the sequel to the Special Rapporteur's eleventh report, which was submitted to the Commission at its thirty-first session and dealt with succession in respect of State archives.¹ The purpose of the present study is to make a few additions and changes to that report, which none the less remains the basic document for the Commission's future deliberations, in so far as it did not fully complete its consideration of the report at the last session. The Special Rapporteur hopes that the Commission will consider this study in conjunction with the parts of his eleventh report that were not touched on at that session.

2. The additions and changes proposed below to the eleventh report are based on:

(a) the deliberations at the General Assembly's thirty-fourth session on the subject of the *restitution of works of art to countries victims of expropriation*, in so far as those deliberations have a bearing on the problems of succession to State archives as property of historical and cultural value;

(b) the latest work by UNESCO in this field, more particularly the work of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*, which ended its first session on 9 May 1980 in Paris;

(c) the Sixth Committee's discussion, at the thirty-fourth session of the General Assembly, of the Special Rapporteur's eleventh report and the views expressed by delegations on the problem of succession in respect of State archives;

(d) the opinions expressed by members of the Commission at its thirty-first session, when the Commission considered the Special Rapporteur's eleventh report and provisionally adopted two articles on succession to State archives.

3. Before proceeding further, the Special Rapporteur wishes to sum up briefly the state of progress of the Commission's work on the subject of succession of States in respect of matters other than treaties.

4. As its title indicates, the topic "Succession of States in respect of matters other than treaties" covers all subjects other than treaties, more particularly, succession to public property, public debts, the legislation and the internal law of the predecessor State, the legal status of the inhabitants (in particular, their nationality), territorial problems, acquired rights and other matters. Since the subject was seen to be both vast and complex, the Commission, at the Special Rapporteur's request, first of all restricted it to *succession of States in economic and financial matters*.

5. However, even as so circumscribed, the topic proved to be too broad for that first stage of codification. Even if, as the Special Rapporteur had proposed, "succession of States in economic and financial matters" was confined to a study of succession to public property and public debts and other important matters were omitted, the field still remained too wide-ranging, for public property and public debts might be regarded as covering not only the property and debts of the State but also those of territorial authorities other than States and of public enterprises or public bodies, not to mention the property and debts of the territory to which the succession of States relates. For that reason, from 1973 onwards, the Special Rapporteur, with the Commission's concurrence, confined his study to a single category of public property and public debts, namely, the category concerning the State itself. Hence, the draft articles adopted by the Commission on the topic from 1973 to 1978 deal exclusively with the succession of States in respect of State property and State debts.²

6. In response to the wish of some members of the Commission and of a number of representatives in the Sixth Committee, and also in keeping with his own inclination, the Special Rapporteur proposed at the Commission's thirty-first session, in 1979, that the draft articles should be supplemented with provisions covering the case of succession in respect of State archives, a topic which, in his view, came under the heading of succession to State property. Accordingly, in his eleventh report he proposed six additional articles (A-F). The Commission adopted in first reading two draft articles, A and B,³ the first containing a definition of state archives and the second relating to succession in respect of State archives in the case of newly independent States.

7. At the General Assembly's thirty-fourth session, in 1979, the Sixth Committee considered all of the draft articles on succession of States in respect of matters other than treaties as adopted by the Commission in first reading, and also the two draft articles (A and B) concerning succession in respect of State archives.⁴ The Sixth Committee and the General Assembly, which referred these texts to States for their comments, expressed the wish that the Commission should complete its work on this topic by preparing some further draft articles on succession to State

² See *Yearbook... 1978*, vol. II (Part Two), pp. 111-113, document A/33/10, chap. IV, sect. B.1.

³ Corresponding to articles A and C initially proposed by the Special Rapporteur in his eleventh report. See *Yearbook... 1979*, vol. II (Part Two), pp. 79 and 81-82, document A/34/10, chap. II, sect. B, addendum.

⁴ *Ibid.*, pp. 15 *et seq.*, document A/34/10, chap. II, sect. B.

¹ See *Yearbook... 1979*, vol. II (Part One), p. 67, document A/CN.4/322 and Add.1 and 2.

archives, in order that there should be a set of draft articles covering succession to State archives in cases of State succession other than decolonization (draft articles B, D, E and F of the Special Rapporteur's eleventh report, not yet considered by the Commission).

8. By its resolution 34/141 of 17 December 1979, the General Assembly noted with appreciation that "at its thirty-first session the International Law Commission, pursuant to General Assembly resolution 33/139 of 19 December 1978, completed the first reading of its draft articles on succession of States in respect of matters other than treaties". But it recommended that the Commission should:

Continue its work on succession of States in matters other than treaties with the aim of completing, at its thirty-second session, *the study of the question of State archives** and, at its thirty-third session, the second reading of all of the draft articles on succession of States in respect of matters other than treaties,

taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly.

9. The Commission has thus been given the mandate of preparing at its 1980 session some draft articles on succession in respect of State archives in various situations of State succession. In this connection, the Special Rapporteur draws the Commission's attention to his eleventh report and in particular to draft articles B, D, E and F,⁵ which may usefully supplement the two draft articles already adopted by the Commission. In addition, he invites the Commission to take into consideration the present study, the object of which is to provide some more information on the topic and to propose some changes concerning the draft articles which appear in his eleventh report.

⁵ *Ibid.*, vol. II (Part One), pp. 108, 119, 122 and 123, document A/CN.4/322 and Add.1 and 2, paras. 140, 189, 204 and 206 respectively.

CHAPTER I

Action by the United Nations

10. In his eleventh report, the Special Rapporteur discussed at length UNESCO's work concerning succession to State archives, but touched only briefly on the deliberations and recommendations of the United Nations⁶ on the same subject. The few details he provided did not reflect sufficiently the importance which the General Assembly attaches to the problem.

11. The question was included in the Assembly's agenda for the first time at its twenty-eighth session, at the request of Zaire. At that session, the General Assembly affirmed, in resolution 3187 (XXVIII) of 18 December 1973, that:

The prompt restitution to a country of its *objets d'art*, monuments, museum pieces, *manuscripts** and *documents** by another country, without charge, is calculated to strengthen international co-operation.

It recognized in addition "the special obligations in this connection of those countries which had access to such valuable objects only as a result of colonial or foreign occupation". Finally, it invited the Secretary-General of the United Nations, in consultation with UNESCO and Member States, to submit a report to the General

Assembly at its thirtieth session on the progress achieved in that connection.

12. The General Assembly discussed the matter again at its thirtieth session. By resolution 3391 (XXX) of 19 November 1975, it invited, *inter alia*:

(a) Member States to ratify the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the UNESCO General conference in 1970;⁷

(b) The Secretary-General of the United Nations to submit a report to the General Assembly at its thirty-second session.

In the same resolution, the General Assembly stated that it looked forward to the meeting of the Committee of Experts to Study the Question of the Restitution of Works of Art, established by UNESCO, which was scheduled to be held in Cairo early in 1976.

13. At its thirty-second session (resolution 32/18 of 11 November 1977), the General Assembly:

(a) renewed its appeal to Member States to sign and ratify the UNESCO Convention of 1970;

⁶ The action by the United Nations was summed up in one paragraph (para. 54).

⁷ UNESCO, *Records of the General Conference, Sixteenth Session, Resolutions*, p. 135.

(b) Affirmed that the restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts, documents and any other cultural or artistic treasures constituted a step forward towards the strengthening of international co-operation and the preservation and development of cultural values; and

(c) decided to review at its thirty-fourth session the progress achieved and, in particular, the action taken in that regard by UNESCO.

14. At its thirty-third session, in resolution 33/50 of 14 December 1978, the General Assembly welcomed the long-awaited establishment of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.⁸

15. By the beginning of the Assembly's thirty-fourth

⁸ *Ibid.*, *Twentieth Session, Resolutions* (Paris, 1978), p. 97, resolution 4/7.6/5. Text reproduced in document A/34/529 and Corr.1, annex, appendix I.

session, 43 States had ratified or accepted the UNESCO 1970 Convention.

16. In resolution 34/64 of 29 November 1979, the General Assembly appealed to Member States:

to encourage the mass information media and educational and cultural institutions to strive to arouse a greater and more general awareness with regard to the return or restitution of cultural property to the countries of origin.

17. In the course of the discussion at the thirty-fourth session on the restitution of works of art to the countries which had suffered expropriation, a number of representatives referred specifically to the problem of archives. The representative of Senegal stated that:

UNESCO has established at Timbuctoo, in Mali, the Ahmed Baba Centre to encourage the collection of documents, manuscripts and scriptural materials, and in the archives of Iran, Iraq and India, of course, as in China, Europe and America, are stored many pieces of African history awaiting examination by researchers.⁹

⁹ See *Official Records of the General Assembly, Thirty-fourth Session, Plenary meetings*, 51st meeting, para. 46.

CHAPTER II

Action by UNESCO

18. The Director-General of UNESCO submitted a report, covering the period from September 1977 to June 1979, on the most recent activities undertaken by his organization to promote the return or restitution of cultural property to the countries of origin.¹⁰ The report describes the action taken by the Director-General to develop awareness among the general public and experts and to lay down the principles which might form the basis for the restitution or return of cultural property and define the terms of reference, means of action and working methods of an inter-governmental committee.

19. The object of the public information activities was to dispel the misunderstanding propagated by the press regarding the question of the return or restitution of cultural property to the countries of origin, and also to develop awareness of this operation, not only among experts but also among the general public. In his appeal to the General Assembly of the International Council of Museums (ICOM), at its twelfth session held in Moscow in May 1977, and later in his solemn appeal of 7 June 1978 to the world at large, the Director-General of UNESCO stressed "the importance for the countries of origin of the return of objects with a particular significance from the point of view of the spiritual values and the cultural heritage of the

peoples concerned".¹¹ Information on the nature and scope of the action needed in this field, and on the ethical reasons for it, was disseminated by the specialized publications of UNESCO. At present, preparations are in progress for a seminar of journalists and museum curators and for the publication of a brochure aimed at leaders of public opinion.

20. In addition, the establishment by UNESCO of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation¹² responded to the necessity of seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to the countries having lost them as a result of colonial or foreign occupation.

21. This committee, whose members are 20 States elected by the UNESCO General Conference, acts in an advisory capacity. Its chief function is to facilitate bilateral negotiations for the restitution of works of art, and to promote bilateral and multilateral co-operation, to foster a public information campaign and to guide the planning and implementation of the UNESCO programme of activities in this field. It is also responsible for encouraging the necessary research and studies for the establishment of coherent programmes for the

¹⁰ See A/34/529 and Corr.1, annex.

¹¹ *Ibid.*, para. 5.

¹² See footnote 7 above.

constitution of representative collections in countries whose cultural heritage has been dispersed, encouraging the training of the necessary scientific and technical personnel and promoting international exchanges of cultural property.

22. The Intergovernmental Committee concluded its first session on 9 May 1980, at UNESCO headquarters, Paris, by adopting unanimously a set of recommendations to be submitted to the next General Conference of UNESCO. It took note of, and fully

supported, the Director-General's proposals. It also proposed the establishment of a world-wide inventory of cultural property, action to curb the unlawful traffic in such property, the conducting of public information campaigns and the co-ordination of all forms of co-operation among interested member States. It set out for the first time in specific terms the problem of the return or restitution of cultural property, and suggested appropriate solutions. The Committee was to meet again in September 1981 at UNESCO headquarters.

CHAPTER III

Discussion of the topic in the Sixth Committee

23. At the thirty-fourth session of the General Assembly, in 1979, the Sixth Committee considered the draft articles on succession of States in respect of matters other than treaties which had been adopted in first reading by the Commission. To those articles was added, in the form of an addendum, two draft articles (A and B) on succession in respect of State archives. The Sixth Committee decided to invite the Governments of Member States to comment on the draft as a whole, in order that the Commission should be able to complete its second reading and conclude consideration of the topic before the expiration of its term of office in 1981.

24. A number of issues were raised in the course of the debate in the Sixth Committee. The Special Rapporteur will deal with five of these:

- (a) the title of the draft articles;
- (b) the need to include provisions on State archives;
- (c) the exact legal nature of State archives;
- (d) the definition of State archives;
- (e) the need to supplement articles A and B by other articles covering other types of State succession.

A. Title of the draft articles

25. A number of delegations were of the view that the Commission *should modify the title of the topic under consideration*.¹³ Their reason was that, as it stands, the title suggests that the content of the draft

articles covers all matters other than treaties, whereas the Commission has expressed its intention to restrict the scope of the draft articles, for the time being, to State property, State debts and State archives. The existing wording does not accurately reflect the content of the draft articles, may suggest that other matters will be incorporated later and, in any event, gives the impression that it is not complete.

26. In accordance with the wish of the Commission and its Special Rapporteur, the General Assembly, in its resolution 33/139, expressed the wish that work on this topic should be brought to a speedy conclusion, and it is not the Commission's intention for the moment to codify the succession of States in respect of matters other than the property, debts and archives of the State. It is this decision and this intention actually which raise the problem of the title of the draft articles. Most of the representatives who favoured a change of title suggested that the draft articles should be entitled "Succession of States in respect of State property, State debts and States archives", in line with the title of the Vienna Convention on Succession of States in respect of Treaties. One speaker suggested that the existing title should be retained, with the necessary clarification being added. Accordingly, he proposed the following title: "Succession of States in respect of *certain** matters other than treaties".¹⁴

27. Conversely, some representatives felt that a genuine parallel would exist between the Convention on Succession of States in respect of Treaties and the draft on succession of States in respect of matters other than treaties if the existing wording of the title of the study remained unchanged. The representative of Nigeria, Mr. Sanyaolu, said that, in addition, the existing title was consistent with General Assembly resolution 2634 (XXV).¹⁵

¹³ See the statements by Mr. Barboza (Argentina) (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 46th meeting, para. 41, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Rios (Chile) (*ibid.*, 48th meeting, para. 43, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Tolentino (Philippines) (*ibid.*, 44th meeting, para. 27, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Jezil (Czechoslovakia) (*ibid.*, 48th meeting, para. 50, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Mickiewicz (Poland) (*ibid.*, 48th meeting, para. 59, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Yimer (Ethiopia) (*ibid.*, 43rd meeting, para. 10, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Mazilu (Romania) (*ibid.*, 51st meeting, para. 5, and *ibid.*, *Sessional fascicle*, corrigendum).

¹⁴ Statement by Mr. Yimer (Ethiopia) (*ibid.*, 43rd meeting, para. 10; and *ibid.*, *Sessional fascicle*, corrigendum).

¹⁵ *ibid.*, 49th meeting, para. 45; and *ibid.*, *Sessional fascicle*, corrigendum.

28. The Special Rapporteur would like to make two comments on this question, in connection with the Commission's work at its thirty-first session. First, it is quite clear that the question of the title of the topic has no bearing on the Commission's decision to append the study on State archives to the original draft articles. On the contrary, the decision to add to State property and State debts a further topic (although one which is directly related to State property) did not in itself raise the question of the title, which would inevitably have been raised in any event. Indeed, it was more likely to arise with two topics (property and debts) than with three (property, debts and archives). The Special Rapporteur's second comment is that preferably the Commission should not take any decision to change the title for the time being; it would be wiser to await the comments of Governments of Member States. The Committee will be able to take a final decision on the matter during the second reading of the draft articles. Consequently, the Special Rapporteur proposes no change in the title for the moment.

B. The need to codify succession in respect of State archives

29. None of the representatives who spoke in the Sixth Committee's debate on the Commission's report questioned the need to include specific provisions governing succession to State archives in the draft articles on succession in respect of matters other than treaties. There were very few speakers who expressed the wish that the scope of the codification of this topic should be as modest as possible, and then it was not so much because they were unaware of the intrinsic importance of State archives as because they feared that complications would result from a systematic and rigid codification of this topic.¹⁶ On the other hand, all other representatives stressed both the exceptional importance of State archives and the need to codify the various aspects of State succession in this area in the context of all cases of succession.

30. For example, our colleague Mr. Díaz González (Venezuela), speaking also on behalf of the States parties to the Cartagena Agreement,¹⁷ said that State archives "constituted a very special case in the context of succession of States", and that it was important to

¹⁶ See the statement by Mr. Hisaeda (Japan), who said that:

"the scope of the draft articles devoted to that question should be limited, in so far as possible, so that they included, for example, only those documents indispensable for administrative purposes. As for other types of archives, such as historical archives, they could very well be covered by the provisions relating to State property. With regard to article B... It was... necessary to formulate more explicit wording in order to minimize possible disputes... If the scope of the draft articles was limited to official documents connected with administration, drafting difficulties would be reduced to some extent". (*Ibid.*, 42nd meeting, para. 2; and *ibid.*, *Sessional fascicle*, corrigendum).

¹⁷ Subregional integration agreement (Andean Pact) (Bogotá, 26 May 1969).

carry out the necessary codification work "to preserve the rights of people to conserve and recover their historical and cultural heritage." He added,¹⁸

The Latin American countries had been particularly concerned with that question, as was shown by the "Andrés Bello" Cultural Convention,¹⁹ to which the Andean Pact countries were parties.²⁰

Mr. Díaz González considered, therefore, that the two draft articles A and B prepared thus far by the Commission represented a "minimum" in the respective areas covered by them.²¹

31. The same view was shared by many representatives. The representative of Bangladesh, Mr. Sircar, stated that:

His delegation attached great importance to the protection and restitution of historical archives and works of art, and it therefore welcomed the Commission's decision to include provisions on State archives in the draft articles.²²

The representative of Mongolia, Mr. Damdindorz, said that his country, too,

attached great importance to the topic of State archives and welcomed the inclusion of the two draft articles on that topic. Archives were of special significance to newly independent States and must serve to ensure the right of the peoples of those States to development and to information concerning their history and cultural heritage. For that reason, the Commission should at its next session undertake a more detailed study of all aspects of the Question...²³

32. The Special Rapporteur could cite other examples. For the moment, he will do no more than infer that a large majority of States would like the draft articles to contain provisions concerning succession to State archives in all types of territorial succession. Consequently, he urges the Commission to continue its work in this area. In so doing, the Commission will also be responding to the concern clearly expressed by the General Assembly, which drew the appropriate conclusions from the debate in the Sixth Committee, and in its resolution 34/141, of 17 December 1979, recommends that the Commission should "continue its work on succession of States in respect of matters other than treaties with the aim of completing, at its thirty-second session, the study of the question of State archives".* The mandate is therefore quite specific, and the Commission should adhere to it.

C. The exact legal nature of State archives

33. In the opinion of the vast majority of the representatives in the Sixth Committee, State archives

¹⁸ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 44th meeting, para. 14; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁹ Andrés Bello convention on educational, scientific and cultural integration of the Andean region countries, signed at Bogotá 31 January 1970.

²⁰ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 44th meeting, para. 14; and *ibid.*, *Sessional fascicle*, corrigendum.

²¹ *Ibid.*

²² *Ibid.*, 50th meeting, para. 29, and *ibid.*, *Sessional fascicle*, corrigendum.

²³ *Ibid.*, para. 36, and *ibid.*, *Sessional fascicle*, corrigendum.

are essentially *State property*, even though it is a special type of property calling for special treatment. Nevertheless, such special treatment should not be taken as grounds for excluding State archives from the general class of State property.

34. For example, Mr. Riphagen (Netherlands) said that "State archives were normally State property in the sense of article 5²⁴ and were covered by the relevant provisions on movable State property, although they were a particular type of State property".²⁵

35. Mr. Barboza (Argentina) accurately summed up the position of the majority of the representatives in the following terms:

Although archives might be regarded to some extent as included under the heading of State property, and the rules applying to State property might also be applied to archives, his delegation thought that the special characteristics of archives made it appropriate to deal with them separately. Some of the criteria applying to their passing by succession as specified in the draft articles were different from the criteria that applied to State property. . . . However, that did not mean that the provisions on that subject could not be included in part II, under State property, as special rules.²⁶

36. A very few representatives took the opposite view that State archives should be treated differently from other movable property, although they did not expressly say that archives differed intrinsically from

movable property.²⁷ Others held the view that State archives should not be classed among State property, on the grounds that they constituted "a special case within the context of State succession".²⁸

37. One representative, who considered that no decision should be taken on the question for the time being, pointed out that the Commission intended to review draft article 5, concerning the definition of State property, "in the light of the decision which might be taken in the future as to the exact relationship between State property and State archives".²⁹ Accordingly, in his opinion, therefore, "the final decision as to whether to keep articles A and B separate or to combine them with the articles on State property would depend on the decision whether or not the expression 'State property' included 'State archives'".³⁰

38. It seems clear to the Special Rapporteur that State archives are essentially State property and, as such, should be governed by the provisions relating to State property. However, it is equally clear that State archives constitute a distinctive class of State property by reason of their characteristics, nature and function. It is this distinctive quality which justifies the preparation of special rules within the context of succession to State property. However, in all matters not covered by these specific rules, the rules formulated for succession in respect of State property are applicable.

39. At the same time, however, the Special Rapporteur is of the view that at the stage which it has now reached in its work the Commission should not, for the time being, take any decisions as to the context in which the articles relating to State archives should appear in the draft as a whole. That is manifestly an important question of substance, for the decision to include or not to include the articles on State archives in the section of the draft articles dealing with State property will determine the applicability or non-applicability, as the case may be, of the general provisions dealing with State property to State archives.

40. In the view of the Special Rapporteur, the Commission should confine itself for the time being to continuing the drafting of the rules concerning succession to State archives in cases of State succession other than that resulting from decolonization, this case being covered in draft article B, which has already been adopted. The Commission might wait for the

²⁴ See footnote 4 above.

²⁵ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 39th meeting, para. 5, and *ibid.*, *Sessional fascicle*, corrigendum.

²⁶ *Ibid.*, 46th meeting, para. 43; and *ibid.*, *Sessional fascicle*, corrigendum.

See also the statements by Mr. Mickiewicz (Poland), who said that archives were State property which, owing to their special nature and value, required different treatment (*ibid.*, 48th meeting, para. 63; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Laclea (Spain), in whose view State archives, being State property, should be governed by the provisions laid down for State property (*ibid.*, 44th meeting, para. 4; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Meissner (German Democratic Republic), who described archives "both as movable State property and as objects of historical and cultural value", which should be mentioned at the end of the articles on State property "to underline their special character and close relationship with State property" (*ibid.*, 43rd meeting, paras. 26 and 28; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Yimer (Ethiopia), who said that "State archives... were a special type of State property" (*ibid.*, para. 16; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. González Gálvez (Mexico), who said that the definition of State archives in article A should include a reference to article 5, which defined State property (*ibid.*, 41st meeting, para. 44, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Kolesnik (USSR), who said that State archives, while constituting State property, should be subject to special treatment (*ibid.*, 42nd meeting, para. 10; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Damdindorzh (Mongolia), who said that the articles on State archives should be placed at the end of part II, dealing with State property (*ibid.*, 50th meeting, para. 36; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Elaraby (Egypt), who considered that State archives, as State property, should be mentioned under the heading of State property, even though they were of a special nature (*ibid.*, 51st meeting, para. 19, and *ibid.*, *Sessional fascicle*, corrigendum); etc.

²⁷ See statement by Mr. Muchui (Kenya) (*ibid.*, 43rd meeting, para. 1; and *ibid.*, *Sessional fascicle*, corrigendum).

²⁸ Statement by Mrs. Konrad (Hungary) (*ibid.*, 44th meeting, para. 33; and *ibid.*, *Sessional fascicle*, corrigendum). See also the statement by Mr. Tolentino (Philippines) (*ibid.*, para. 27; and *ibid.*, *Sessional fascicle*, corrigendum).

²⁹ *Yearbook... 1979*, vol. II (Part Two), p. 18, document A/34/10, chap. II, sect. B, art. 5, para. (12) of the commentary.

³⁰ Statement by Mr. Asthana (India) (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 51st meeting, para. 61; and *ibid.*, *Sessional fascicle*, corrigendum).

comments of Governments before determining, in the second reading of the draft, the context in which the articles on State archives should be included in the draft as a whole.

41. One question which might arise—and in fact has already arisen—is, if State archives genuinely constitute a category of State property, why should they not be governed by the rules drafted for succession to State property? In other words, if archives were equated with property, there would be no need for further codification. This line of thinking does not take sufficient account of the special character of archives as a particular type of State property, certain aspects of which call for special codification.

42. The representative of Spain, Mr. Laclea, who raised this question in the Sixth Committee, took to their furthest extreme the consequences of the fact that State archives belonged to the general category of State property, and it was only for reasons of practicality that he accepted that the Commission should continue its codification work on State archives. In this connection, he said his delegation believed that:

such archives were State property and would therefore be subject to the provisions of the relevant articles. *Thus, it might not be necessary to add specific articles on State archives.** Nevertheless, the proposed texts might contribute an element of specific interpretation and could therefore be included in part II of the draft articles [State property].³¹

43. The representative of the Netherlands, Mr. Riphagen, adopted a much more subtle approach, saying that:

State archives were normally State property in the sense of article 5 and were covered by the relevant provisions on movable State property, although they were a particular type of State property and of particular importance for newly independent States. Nevertheless, the treatment of State archives in other types of State succession might also require attention, and his delegation appreciated that the General Assembly might request the Commission to study that matter further. It would, however, prefer to leave the matter as it now stood.³²

44. The answer to the Spanish representative's argument can be found in the impeccable presentation of the various aspects of the problem by Mr. Barboza of Argentina, who said:

*Although archives** might be regarded to some extent as included under the heading of *State property*, and the rules applying to *State property* might also be applied to *archives** his delegation thought that the *special characteristics of archives** made it appropriate to deal with them separately. Some of the criteria applying to their passing by succession . . . were different from the criteria that applied to State property.³³

45. Similarly Mr. Yankov of Bulgaria summed up clearly the direction that the Commission's research

³¹ *Ibid.*, 44th meeting, para. 4; and *ibid.*, *Sessional fascicle*, corrigendum.

³² *Ibid.*, 39th meeting, para. 5; and *ibid.*, *Sessional fascicle*, corrigendum.

³³ *Ibid.*, 46th meeting, para. 43; and *ibid.*, *Sessional fascicle*, corrigendum.

should take when he said that the question of State archives:

should be treated *mutatis mutandis* within the framework of the rules governing State succession in respect of State property,* with the proviso that *the specific aspects of the subject-matter of State archives should be given due consideration*.*³⁴

46. In sum, the task of the Commission for the present session is to prepare draft articles covering succession to State archives, except for the case of decolonization, which is already covered by article B. The Commission may defer until the second reading a decision as to where these articles are to appear in the draft as a whole. As the representative of Byelorussian SSR, Mr. Rassolko, said his delegation was:

in favour of continuing the work on State archives . . . and studying all aspects of the problems related to the possibility of their transfer in the case of different types of successor States.³⁵

These are the express terms of reference given to the Commission by General Assembly resolution 34/141.

D. Definition of State archives

47. The developments described above demonstrate that the problem of the definition of State archives constituted the core of the debate in the Sixth Committee. All representatives referred to the question, either to express satisfaction with draft article A proposed to this effect by the Commission,³⁶ or, as was more often the case, to request the Commission to review the proposed definition. Some found the definition too vague and uncertain.³⁷ Others appreciated the difficulty of arriving at any definition.³⁸ Some representatives considered that the definition should be limited to purely administrative archives.³⁹ Yet others proposed that the definition should be broadened by deleting the reference therein to the internal law of the predecessor State⁴⁰ or by including a more explicit reference to the historical and cultural element, thus making archives a component of the national cultural heritage of peoples.⁴¹

³⁴ *Ibid.*, para. 59; and *ibid.*, *Sessional fascicle*, corrigendum.

³⁵ *Ibid.*, 44th meeting, para. 21; and *ibid.*, *Sessional fascicle*, corrigendum.

³⁶ Statement by Mr. Al-Khasawneh (Jordan) (*ibid.*, 51st meeting, para. 54; and *ibid.*, *Sessional fascicle*, corrigendum).

³⁷ Statement by Mrs. Konrad (Hungary) (*ibid.*, 44th meeting, para. 33; and *ibid.*, *Sessional fascicle*, corrigendum).

³⁸ Statement by Mr. Quateen (Libyan Arab Jamahiriya) (*ibid.*, 50th meeting, para. 2; and *ibid.*, *Sessional fascicle*, corrigendum).

³⁹ See for example statement by Mr. Hisaeda (Japan) (*ibid.*, 42nd meeting, para. 2; and *ibid.*, *Sessional fascicle*, corrigendum).

⁴⁰ Statement by Mr. Elaraby (Egypt) (*ibid.*, 51st meeting, para. 19; and *ibid.*, *Sessional fascicle*, corrigendum).

⁴¹ Statements by Mr. Sanyaolu (Nigeria) (*ibid.*, 49th meeting, para. 49; and *ibid.*, *Sessional fascicle*, corrigendum) and Mr. Mazilu (Romania) (*ibid.*, 51st meeting, para. 5; and *ibid.*, *Sessional fascicle*, corrigendum).

48. In the view of the Special Rapporteur, the Commission, which has already transmitted the text of draft article A to the Governments of Member States for their comments, should leave it untouched for the time being and should defer a review of the text until the second reading of the complete draft. It will consider the definition of State archives in conjunction with the review of the definition of State property contained in draft article 5.⁴²

E. Need to supplement articles A and B by other articles covering types of succession of States other than decolonization

49. The need to supplement articles A (State archives) and B (Newly independent State) with other

⁴² See statements in the same vein by a number of representatives, in particular the statement by Mr. Asthana (India) (*ibid.*, para. 61; and *ibid.*, *Sessional fascicle*, corrigendum).

articles concerning succession to State archives in respect of other types of State succession was clear to most of the representatives in the Sixth Committee.

50. Although State archives belong to the category of State property, nevertheless, because of their special characteristics it is not always possible to reach solutions valid for State archives on the basis of the general rules relating to State property. Besides, the draft articles on succession of States in respect of matters other than treaties would be incomplete if succession to State archives were considered in the case of only one type of State succession to the exclusion of all others, whereas succession in respect of State property and succession in respect of State debts was considered in relation to all types of succession. It was for this reason that the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 34/141 giving the Commission the mandate to draft additional provisions for State archives, covering the other cases of State succession.

CHAPTER IV

Minor amendments to the draft articles proposed by the Special Rapporteur in his eleventh report

51. The Commission has adopted in first reading, and transmitted to the General Assembly and to the Governments of Member States, the following two draft articles relating to the succession of States in the matter of State archives.

Article A. State archives

For the purposes of the present articles, "State archives" means the collection of documents of all kinds which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been preserved by it as State archives.

Article B. Newly independent State

1. When the successor State is a newly independent State,

(a) archives having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence shall pass to the newly independent State;

(b) the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State

archives which pass to the newly independent State pursuant to other provisions of the present article.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

52. Accordingly, for the purpose of covering all the eventualities arising from succession in respect of State archives, the following points remain to be dealt with:

(a) transfer of part of the territory of one State to another State;

(b) uniting of States;

(c) separation of part or parts of the territory of a State;

(d) dissolution of a State.

53. The Special Rapporteur will not in the present study cite again all the precedents (case law, agreements and State practice) relating to succession in respect of State archives; these will be found in his eleventh report.

A. Transfer of part of the territory of one State to another State

54. In his eleventh report, the Special Rapporteur had proposed a preliminary draft article B, the text of

which is reproduced below as Article B' to avoid confusion with the article B adopted by the Commission, which deals with the case of a newly independent State.

Article B'. Transfer of a part of the territory of one State to another State

Where a part of the territory of one State is transferred by that State to another State:

1. The passing of the State archives connected with the administration and history of the territory to which the succession of States relates shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of agreement,

(a) the following archives pass to the successor State:

(i) archives of every kind belonging to the territory to which the succession of States relates,

(ii) the State archives that concern exclusively or principally the territory to which the succession of States relates, if they were constituted in the said territory;

(b) the following archives remain with the predecessor State:

the State archives concerning exclusively or principally the territory to which the State succession relates, if they were constituted in the territory of the predecessor State.

3. The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives.

55. In order to enable the Commission to form a clear opinion as to the scope of this preliminary draft article, the Special Rapporteur cites below the text of the corresponding provision which lays down the rule concerning succession to State property:

Article 10. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.*

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.*

56. As State archives are a class of movable State property, the provisions proposed in draft article B' should be compared with the terms of subparagraph 2 (b) of article 10. Naturally, draft article B', like article 10, gives preference to agreement between the parties. In the absence of agreement, article 10 provides that the decisive criterion is the connection between the movable State property and the activity of the predecessor State in respect of the territory affected by the State succession. Much the same criterion is applied in draft article B': the test is whether the archives "belong" to the territory in question. The documents involved were produced, created—"generated"—in or by the territory concerned by the State

succession. They may be local archives relating specifically to the territory, and in that case there is no reason to deprive that territory to the benefit of the former predecessor State. They may, however, also be State archives formed in the territory and relating to the predecessor State's activity in the territory. Normally such archives should pass to the successor State.

57. From this point of view it is arguable that the criterion followed in article 10 is significantly broadened in draft article B'. Yet at the same time, and conversely, the criterion applied in article 10 is considerably narrowed in so far as the State archives connected with the predecessor State's activities in the territory transferred *do not pass* to the successor State if they were *constituted* in the predecessor State's territory. In this way, the criterion of the "activity" in the territory which formed the basis of the provisions of article 10 concerning State property is adjusted to the specific case of State archives.

58. One further point to be noted is that, in the case where part of a State's territory is transferred to another State, the provision approved by the Commission was meant to cover essentially transfers of small parcels of land of the kind that are generally arranged by agreement between the States concerned. As a rule, that agreement settles the question of State archives.

59. The Special Rapporteur cannot think of a better solution than that proposed in draft article B'. At most, if the Commission should wish to simplify the operative terms of the article he might (although he would do so with regret) suggest that subparagraph 2(a)(i) might be dropped, that is, the clause concerning "archives of every kind belonging to the territory to which the succession of States relates". Since the archives in question are generally, although not invariably, local archives and not State archives and since, furthermore, they are documents *belonging* to the territory transferred, naturally the predecessor State does not remove them.

60. Similarly, for the sake of simplification it might be said that subparagraph 2(a)(ii) contains the substance of subparagraph 2(b), for if the State archives concerning "exclusively or principally the territory to which the succession of States relates" pass to the successor State "if they were constituted in the said territory" (subparagraph 2(a)(ii)), the inference to be drawn *a contrario* is that they do not pass to the successor State "if they were constituted in the territory of the predecessor State" (subparagraph 2(b)). Hence paragraph 2(b) might be omitted.

61. Accordingly, *though at the risk of some loss of clarity*, the article might be redrafted in simpler language as follows:

Article B'. Transfer of a part of the territory of one State to another State

Where a part of the territory of one State is transferred by that State to another State:

1. The passing of the State archives connected with the administration and history of the territory to which the succession of States relates shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of agreement, the State archives concerning exclusively or principally the territory to which the State succession relates pass to the successor State, if they were constituted in the territory of the predecessor State.

3. The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives for that other State.

B. Uniting of States

62. In his eleventh report, the Special Rapporteur proposed a draft article D in the following terms:

Article D. Uniting of States

1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall, subject to the provisions of paragraph 2, pass to the successor State.

2. The allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

63. The Special Rapporteur reproduces below, for the sake of comparability, the text of the provision which deals with the succession to State property in the case of a uniting of States:

Article 12. Uniting of States

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

64. The parallel between the two articles is obvious, and the Special Rapporteur has nothing to add to the reasoning set out in his eleventh report in support of draft article D. Without going over the ground covered by the debate in the Commission and in its Drafting Committee, he suggests that draft article D might be brought more closely into line with article 12 if the passage "subject to the provisions of paragraph 2" was deleted from paragraph 1 and an analogous proviso was inserted at the beginning of paragraph 2.

65. Draft article D would then read as follows:

Article D. Uniting of States

1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision in paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

66. The perfect parallel between article D and article 12 raises, of course, *the problem of the usefulness of article D*, for it merely restates and reaffirms, in identical language, the provisions of article 12. However, since the Commission has not settled, and is unlikely to settle at its present session, the problem of the context in which the articles on State archives are to appear in the draft as a whole, the Special Rapporteur suggests that draft article D should stand for the time being. If subsequently the articles dealing with State archives should be inserted under the heading "State property", the Commission would then have to come to a decision on the repetitive draft article D.

C. Separation of part or parts of the territory of a State

67. In his eleventh report, the Special Rapporteur proposed a draft article E dealing with this eventuality and reading as follows:

Article E. Separation of part or parts of the territory of a State

1. Where a part or parts of the territory of a State separate from that State and form a State, the transfer of the State archives of the predecessor State to the successor State shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of an agreement:

(a) the State archives of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates pass to the successor State;

(b) the State archives of the predecessor State, other than those referred to in paragraph 2(a) above, pass to the successor State in an equitable proportion.

3. Each of the two States shall, for the use of the other State and at its request, make an appropriate reproduction of the State archives which it has retained or which have passed to it, as the case may be.

4. The provisions of paragraphs 2 and 3 above are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

5. The provisions of paragraph 1 to 4 above apply where a part of the territory of a State separates from that State and unites with another State.

68. For the sake of good order, the Special Rapporteur reproduces below the text of the corresponding draft article dealing with succession to State property:

Article 13. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree,

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory

to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State other than that mentioned in subparagraph (b) shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraph 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

69. The Special Rapporteur has no fresh proposal to make and no amendment to suggest for improving the text of draft article E, and submits the text as it stands to the Commission for its consideration.

D. Dissolution of a State

70. In his eleventh report, the Special Rapporteur proposed a draft article F reading as follows:

Article F. Dissolution of a State

1. If a predecessor State dissolves and disappears and the parts of its territory form two or more States, the transfer of the State archives to the different successor States shall be settled by agreement between them.

2. In the absence of an agreement,

(a) the State archives of all kinds of the predecessor State, wheresoever they may be, pass to the successor State if they relate exclusively or principally to the territory of that successor State, which shall be responsible for making an appropriate reproduction thereof for the use of the other successor States, and at their request and expense;

(b) State archives which are indivisible or which relate equally to the territories of two or more successor States pass to the successor State in whose territory they are situated, the other

successor States concerned being equitably compensated, and the successor State to which they pass shall be responsible for making an appropriate reproduction thereof for the use of the other successor States concerned and at their request;

(c) State archives of the type referred to in paragraph (b) above which are kept outside the territory of the dissolved predecessor State pass to one of the successor States concerned according to the conditions laid down in paragraph (b).

71. The corresponding article (14) relating to State property is drafted in the following terms:

Article 14. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree,

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor State in an equitable proportion.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

72. For the reasons given in his eleventh report, the Special Rapporteur considers the provisions proposed in his draft article F fully justified and equitable. Consequently, he does not think he can suggest any change in that draft text.

Conclusion

73. In conclusion, the Special Rapporteur would stress once again not only that State archives are an important part of the *historic and cultural heritage* of any national community but also that the production and preservation of the archives have become a more than indispensable means of administration—one of the *keys to power*. The settlement of the problem of archives in the context of State succession is all the more welcome as UNESCO and the General Assembly of the United Nations are taking an active interest in the protection of the national cultural heritage, of which archives form an integral part. The problem of archives should be envisaged at all times in terms of the *right to development*, the *right to information* and the *right to a cultural identity*, in the framework of the establishment of a new international order in all these areas.

74. On the conclusion of his twelve reports (1968–1980) on the succession of States in respect of matters other than treaties, the Special Rapporteur thinks it fitting to point out once again that, despite the Commission's efforts and his own, the topic of succession between subjects of international law is still

far from exhausted. *The Commission has not examined the question of the succession of Governments nor that of the succession of one international organization to another.* Nor has the Commission considered the entire topic of succession of States in respect of matters other than treaties, for it has not dealt with such questions as *succession to territorial rights, the nationality and status of the inhabitants of transferred territories, or succession in respect of legislative and judicial matters*, etc. Even as regards the succession of States in the economic and financial field, the Commission has dealt *only with the property, debts and archives of the State*, and has not covered the problems of succession affecting the *property, debts and archives of public enterprises, national corporations, public establishments or local or provincial territorial units*. Nevertheless, in view of the vastness of the subject of succession in international law, the Commission, which honoured the Special Rapporteur by agreeing to his suggestions, was right in restraining its ambition and limiting the scope of its work in this way, lest the drafting of articles on the topic become a virtually unending task.