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

Topic:

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SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 2]

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

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EXPLANATORY NOTE

The text of the draft articles on succession of States in respect of matters other than treaties, adopted by the Commission on first reading, is reproduced in *Yearbook . . . 1980*, vol. II (Part Two), pp. 7 *et seq.*

The *oral comments* of representatives of Member States at the Sixth Committee of the General Assembly are recorded:

For *1979*, in "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fourth session of the General Assembly" (A/CN.4/L.311);

For *1980*, in "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326).

The *written comments of Governments*, which were originally reproduced as mimeographed documents (A/CN.4/338 and Add.1–4), are reproduced in *Yearbook . . . 1981*, vol. II (Part Two), annex 1.

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Conventions referred to in the present report

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)

Hereinafter referred to as "1969 Vienna Convention" (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287)

Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)

Hereinafter referred to as "1978 Vienna Convention"
(*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185)

Introduction

1. For the purpose of facilitating a second reading of the draft articles on succession of States in respect of matters other than treaties, the Special Rapporteur, who has received very few comments from only a small number of States, sets out below the written comments of Governments and, where he has deemed it necessary, the comments made orally by representatives of Member States during the discussion in the Sixth Committee of the General Assembly, at its thirty-fourth session, in 1979, and its thirty-fifth session, in 1980.

In a task of this kind, the usual and the most appropriate approach in evaluating such comments is to consider the draft articles one by one.

Comments on various provisions of the draft articles

PART I: INTRODUCTION

ARTICLE 1. (Scope of the present articles)

2. In view of General Assembly resolution 33/139 of 19 December 1978, recommending that the Commission should aim at completing at its thirty-first session the first reading of the "draft articles on succession of States in respect of State property and State debts", the Commission considered the question of reviewing the words "*matters other than treaties*" in order to reflect that further limitation in scope. The Commission decided, however, to do so at its second reading of the draft, in the light of the comments of Governments and any decision on the future programme of work on this topic. At its thirty-first session, in 1979, the Commission nevertheless decided to replace the definite article "*les*" by "*des*" before the word "*matières*" in the French version of the title of the topic, and consequently the title of the present set of draft articles and the text of article 1, so as to align that version with the other language versions.[1]

Oral comments—1979

3. In the Sixth Committee, in 1979, one representative expressed his agreement with the Commission that the term "effects" should be used to indicate that the draft provisions were concerned, not with the replacement of one State by another in the responsibility for international relations of territory, but with its legal effects, i.e., the rights and obligations deriving from it.

4. In the opinion of another representative, article 1, which was meant to serve as an introduction to the draft as a whole, missed the point in that respect. In particular, the expression "matters other than treaties" was too negative. He suggested that the article should be redrafted with the aim of stating specifically the matters to which the articles did apply, rather than implying the matters to which they did not apply. In that regard, article 1 of the 1969 Vienna Convention would provide a better model than article 1 of the 1978 Vienna Convention.

Written comments

5. The *German Democratic Republic* endorses article 1 and welcomes the Commission's decision to seek on second reading a more precise formulation of the field of application of the article and hence of the title of the future convention. It would seem possible, in its view, to make explicit reference to the matters that are the subject of the draft, i.e. State property, State archives and State debts.

6. *Italy* also considers that the title should reflect the matters dealt with in the draft and therefore proposes that the text of article 1 should be amended accordingly. In fact, it considers that the part of the draft on States archives should, because of its special nature, be distinct from the other two parts and should form the object of an autonomous body of rules. In practice, this would mean clarifying the articles on State property so as to exclude archives from the general category of State property and find a place for them in the new arrangement.

7. *Austria* also takes the view that the vague nature of the title of the draft is unsatisfactory as the title for an international instrument and does not make it immediately apparent what matters are covered by the draft articles. It proposes that the Commission should amend the wording of the title and of article 1, and thus indicate that the draft has dealt with only three matters.

8. *Czechoslovakia* is of the same opinion as the German Democratic Republic and Austria in considering that the wording of the title and of article 1 is too broad in scope and, in view of the more limited content of the draft, might well be misleading.

9. The Czechoslovak Government, pointing out that several delegations in the Sixth Committee had expressed the wish that the draft articles should be harmonized with the 1978 Vienna Convention, is of the opinion that such harmonization should also cover the fields of application of the two texts. However, it states that:

> Article 1 of the [Vienna] Convention limits the scope of the Convention to treaties between States. In the case of article 1 [of the present draft], in view of the conception of debts contained in article 16, where State debts are defined much more widely than merely as debts between States, the parallel between the 1978 Vienna Convention.[2]

Opinion of the Special Rapporteur

10. The Commission's decision to replace the definite article "*les*" by "*des*" before the word "*matières*" in the French title of the draft has unquestionably improved the text, for unlike the previous title, it is now clear that the draft covers not *all* matters other than treaties but only *some* matters. Nevertheless, it has to be recognized that this new title is still not satisfactory, because it does not enumerate from the outset *which* matters are covered by the draft articles.

It would seem desirable for the matters actually dealt with to be reflected more comprehensively in the title. Besides, the parallelism between this set of draft articles and the articles on succession in respect of treaties does not in any way imply that the title of the present draft should be retained; that would have been the case if the draft covered *all* matters other than treaties, which was the original intention. The matters would have been so great in number that they could not have been listed exhaustively in the draft articles. Since the Commission has limited the scope to State property and debts, the situation is quite different, and such parallelism now requires articles on succession in respect of State property and debts, in the same way as articles exist on succession in respect of treaties.

[1] See *Yearbook ... 1979*, vol. II (Part Two), p. 15, para. (3) of the commentary to article 1.

[2] *Yearbook ... 1981*, vol. II (Part Two), annex I. sect. 4, para. 5.

11. A problem does arise, however, in the case of State archives. Some members of the Commission and some States consider that State archives are indeed State property, but they are so special in character that they must be distinguished from State property. Accordingly, the title, if it is to reflect the content of the draft articles faithfully, should read: "Succession of States in respect of State property, archives and debts".

The Special Rapporteur has always maintained that State archives do indeed form a special category of State property, but they are none the less State property in essence. Here, the concern of the Commission should be not only to reflect in the title all of the matters actually dealt with in the draft but also to prevent any problems of *substance* from arising. If State archives form a category of State property, they must be governed by the provisions concerning State property and also by the more specific provisions concerning State archives. If State archives were listed separately both in the title of the draft and in the body of the draft as a set of autonomous rules contained in a special part, the implication might be that the rules on State property could in no case apply, even on a residual basis, to State archives.

12. The Special Rapporteur none the less considers that the risk is not very great and that the Commission can avoid it by adding somewhere in the text on archives a suitable formula clearly indicating that State archives form a category of State property. He therefore suggests that the Commission should agree to the following title:

"Draft articles on succession of States in respect of State property, archives and debts"

and reformulate article 1 accordingly.

13. The point of departure of the Czechoslovak Government's comment concerning harmonization of the draft articles with the 1978 Vienna Convention from the standpoint of their field application, is the fact that State debts are not defined as debts owed by a State exclusively to another State. The Czechoslovak Government believes that the inter-State relationship (between the successor or predecessor State on the one hand and the third State on the other) in succession of States in respect of treaties is a feature of the succession of States, whereas it is in fact only a feature of the treaty. In the case of property, or archives, a legal relationship between the predecessor or successor State and the third State does not necessarily exist in the context of State succession. Such a relationship does, on the other hand, exist in succession of States in respect of treaties, and also in respect of debts when the debt is owed to a State. Hence it is not a question of the field of application of the draft articles but rather a question of the essence or the specific nature of each matter: property, debts, archives or treaties.

ARTICLE 2. (Use of terms)

Oral comments

1979

14. In the Sixth Committee, in 1979, it was considered fitting that the definitions of terms in article 2 corresponded to those contained in the 1978 Vienna Convention, since the Convention and the draft articles referred to the same phenomenon in a number of instances.

Subparagraph 1(e)

15. Doubts were expressed as to whether the definition of the term "newly independent State" was the most appropriate, since in providing that the territory of such a State should have been a dependent territory "immediately before the date of the succession of States" it seemed intended to eliminate cases which there was no reason to exclude, such as the emergence of a new State as a consequence of the separation of part of an existing State or from the uniting of two or more existing States. It was maintained that the definition was very restrictive; it should have included all new and emergent State or States which became independent by means other than voluntary transfer of part of the territory of a State, and the benefit conferred on the "newly independent State" formed from a dependent territory should be conferred upon all new States without distinction.

Subparagraph 1(f)

16. In regard to the definition of "third State", the view was expressed that it was necessary to avoid attributing new, and not necessarily clear, meanings to established expressions. It was incumbent on the Commission, given its central role in the development of international law, to preserve the integrity and clarity of the lexicon of that law.

Paragraph 2

17. It was also pointed out that terminology was a secondary matter; the real purpose of the provision, as conceived in the law of treaties, was to safeguard the internal law and usages of States in general.

1980

18. In the opinion of one representative in the Sixth Committee, there appears to be a contradiction between subparagraph 1(*a*) and subparagraph (*b*) of article 16 (see para. 142 below).

19. Another representative considered that paragraph 2 is superfluous because it repeats what is said in paragraph 1, and also because every treaty is an autonomous text, a "closed system" of legal rules. Moreover, it is unnecessary to refer to the "use" of terms or even to refer to "the meanings which may be given to them". If the paragraph is to be maintained, the words "or in international treaties" should be added.

Written comments

20. The *German Democratic Republic* welcomes draft article 2. *Czechoslovakia* suggests that the article should be supplemented by the definitions of the terms "State property", "State debts" and "State archives", which are at present scattered throughout the various parts of the draft. In addition, it considers that the definition of the term "third State" is not very clear.

OPINION OF THE SPECIAL RAPPORTEUR

21. No remarks or objections have been made in connection with subparagraphs 1(*a*), (*b*), (*c*) and (*d*) of article 2, and they seem to command general acceptance. A problem has been raised in connection with the definition of "*newly independent State*" in subparagraph 1(*e*). Admittedly, the Commission may not have found the most suitable terminology, but it is quite clear that it has sought to deal here with succession of States resulting *from decolonization*. Through the rules it has elaborated, it has clearly shown the very special nature of this type of succession. The difference between "*newly independent States*" formed as a result of decolonization and "*new States*" created by the separation of part of an existing State or the uniting of two or more existing States lies in the situation of "dependence" of the territory of the newly independent State up to the eve of the succession of States.

The Special Rapporteur is not in favour of complete and straightforward assimilation of these two different types of State succession, despite certain similarities between them.

22. For the purposes of the draft articles, the Commission has given the most straightforward, well-balanced and appropriate definition of the term "third State", contained in article 2, subparagraph 1(*f*). The Special Rapporteur does not believe that the definition will create confusion regarding the intelligibility of a concept that is indeed well established in international law. In any case, he does not see how the proposed definition could be improved on.

23. The Commission could well adopt the Czechoslovak Government's suggestion that article 2 should be supplemented by the definitions of the terms "State property", "State debts" and "State archives". This would simply mean transferring to article 2 the definitions contained in article 5, article 16 and article A. However, it has to be realized that the definitions contained in article 2 were placed there because they apply to the draft as a whole and are frequently used in all parts of the draft; this does not apply in the case of State property, State debts or State archives, for the relevant terms are used only in the parts relating specifically to those matters. It was for this reason that the definitions of each matter were proposed at the beginning of each of the parts concerned.

24. It has been recommended that the provision contained in paragraph 2 should be deleted, but the Special Rapporteur regards it as useful and recommends that it should be retained.

ARTICLE 3. (Cases of succession of States covered by the present articles)

Oral comments—1979

25. Some representatives stressed the importance of article 3. It was said, with reference to this provision, that the draft articles did not seek to undo what succession of States had entailed in the past. The draft looked to the future, instead of attempting to harmonize past practices. It was also pointed out that the 1978 Vienna Convention contained a similar rule in its article 6.

26. One representative said that, in principle, article 3 was acceptable for the time being, for in the light of the commentaries to article 6 of the 1978 Vienna Convention and the Commission's report on its work on the article at its twenty-fourth session,[3] it appeared to reflect settled law. However, the time had come for a more dispassionate appraisal of the rules of international law as embodied in the Charter of the United Nations. In the recent past, those rules had been flagrantly abused to serve selfish national interests, and wars of aggression had been waged by States on the pretext that they had been acting in self-defence or collective defence authorized by the Charter. Those acts of aggression, which were in no way proportionate to the acts that had prompted them, often resulted in armies of occupation becoming entrenched, and were not in conformity with the rules of international law as laid down in the Charter.

27. One representative, while approving of article 3, nevertheless considered that the text should be amended, since it incorrectly referred to the Charter of the United Nations, which was an instrument of an essentially political character. In the opinion of another representative, it would have been better if that article had been phrased in more general terms and had stipulated that the articles "apply to the effects of a succession of States occurring in conformity with international law".

Written comments

28. The *German Democratic Republic* finds the wording of article 3 acceptable. *Czechoslovakia* also regards the article as acceptable.

OPINION OF THE SPECIAL RAPPORTEUR

29. Article 3 is unquestionably useful and even necessary. Moreover, it has its counterpart in article 6 of the 1978 Vienna Convention. The drafting could still be improved, but to state simply, as was proposed, that the articles "apply to the effects of a succession of States occurring *in conformity with international law*" could well lead to endless debate on what "international law" is. It will be remembered that, in the draft of the Charter of the Economic Rights and Duties of States, the industrialized countries had maintained that nationalization should be carried out "in accordance with international law".[4] To require States to conform to international law meant, at that stage in the development of international law, imposing the idea of "prompt, adequate and effective compensation" and, therefore, confining them to a system of traditional norms that have evolved in the meanwhile. At its Sixth Special Session, the General Assembly had therefore been compelled to give up the idea of making nationalization dependent on its "conformity with international law".

[3] *Yearbook ... 1972*, vol. II, p. 236, document A/8710/Rev.1, chap. II, sect. C, commentary to article 6.

[4] TD/B/AC.12/4 and Corr. 1, p. 10.

30. In formulating article 3, the Commission did not simply refer to a succession of States occurring in conformity with international law. It also mentioned the principles of international law embodied in the Charter of the United Nations. It is true that the Charter is a political document, but it would be rash to maintain that it is a political document without any juridicial framework and that it does not contain any principles of international law. Again, through the reference to the Charter, the article incorporates other principles set forth in major resolutions of the General Assembly that are viewed as interpreting the Charter, such as the momentous resolution adopted on 24 October 1970, namely resolution 2625 (XXV), which set forth the seven "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

Hence, the Special Rapporteur takes the view that the Commission should retain the present wording of article 3.

PART II: STATE PROPERTY

SECTION 1. GENERAL PROVISIONS

ARTICLE 4. (Scope of the articles in the present Part)

Oral comments—1979

31. One representative thought that articles 4 and 15 could have been combined for the purposes of defining the scope and application of the draft articles.

Written comments

32. The *German Democratic Republic* generally agrees with the definition of State property in Part II, section 1 (arts. 4 to 9) and the rules governing succession. State property is, in particular, a vital material basis for establishing a State and ensuring its sovereignty.

33. *Czechoslovakia* proposed that article 4 (and article 15, its equivalent in the case of State debts) should be deleted, once article 1 is reformulated to make express reference to State property, State archives and State debts as the matters dealt with by the draft.

OPINION OF THE SPECIAL RAPPORTEUR

34. The purpose of article 4, as pointed out in the commentary thereto, is simply to make it clear that the articles in Part II deal with only one category of the "matters other than treaties" referred to in article 1.[5] It seems difficult to do without such an article, or to do without article 15, which is its counterpart in the case of State debts. The Special Rapporteur does not see how, in response to the comment by one representative in the Sixth Committee, articles 4 and 15 could be combined for the purpose of defining the scope and application of the draft articles. In fact, the scope and application of the draft as a whole were already determined in article 1. The field of application of the articles in each part on each matter then had to be made clear. This was the object of article 4, concerning State property, and of article 15, concerning State debts.

35. Unlike the Czechoslovak Government, the Special Rapporteur does not think that article 4 can be deleted by rewording article 1 to mention specifically each of the matters covered. The purpose of article 4 is quite different from that of article 1. Whereas article 1 indicates the matters covered by the draft, the purpose of article 4 is to indicate that the articles on each matter apply exclusively to that matter. This will also raise the problem, mentioned earlier, of whether the articles on State property apply to State archives if the latter are regarded as constituting a special category of State property.

ARTICLE 5. (State property)

Oral Comments

1979

36. One representative suggested that the definition of State property be included, together with the definitions of State debt and State archives, under article 2, so as to provide a ready indication of the matters covered by the draft.

37. Another representative considered that the definition, which contained a *renvoi* to the internal law of the predecessor State, would have to be re-examined later. Such a *renvoi* appeared logical, as the question of succession to State property would not have arisen had the property not been owned by the predecessor State under its internal law. However, the possibility could not be ruled out that the same property could be owned by several States under their respective internal laws, which might conflict, or that the property might be part of the common heritage of mankind, such as the sea-bed or the subsoil beyond national jurisdiction, which was regulated by international law and not by internal law. Thus, further reference to international law or to settlement by the international legal system might be necessary.

1980

38. The representative of the United Arab Emirates proposed that the words "movable or immovable" should be added to the text and the title of article 5, concerning State property.

39. Since article 5 contains a definition, it should form part of article 2, paragraph 1. Moreover, because "property" means rights and the term "interests" makes sense only if it means "rights", the representative of

[5] See *Yearbook ... 1979*, vol. II (Part Two), p. 17.

Greece wondered why three terms have been used to define "State property".

In article 5, the words "including private international law" should be inserted after the words "internal law", because a State may have rights in accordance with the law of another State if the private international law of the first State so provides.

Written comments

40. The *German Democratic Republic* welcomes the fact that article 5 contains an all-embracing definition of State property that is justifiable under international law. This allows a universal regulation which does not refer to the internal structures of individual countries' State property (for instance, the division of State property into public domain and private domain).

41. *Czechoslovakia* finds that the reference to the internal law of the predecessor State, as a criterion for defining the concept of "State property" is logical. It none the less notes that:

> the fact that the same property may, according to the internal law of the predecessor State, be regarded as property belonging to that State, while according to the internal law of another State or according to international law, it may be regarded as property belonging to a State other than the predecessor State, requires that this question be studied again by the Commission. It is desirable that, at least to some extent, international law should also be brought into the solution of this question.[6]

OPINION OF THE SPECIAL RAPPORTEUR

42. In his reports, the Special Rapporteur had made it clear that the reference to the internal law of the predecessor State, as the criterion for determining State property, was logical because the question of the succession of States would not arise if the property in question had not belonged to the predecessor State according to its internal law. In determining what property belongs to the predecessor State or the property that the predecessor State considers as such, its internal law inevitably has to be consulted. But the Special Rapporteur had also cited numerous historical examples[7] in which the internal law of the predecessor State had not been applied either by the successor State, which had substituted its own internal law, or by international courts, which had preferred their own decisions. The situation was one that had not escaped the attention of the Commission, which had nevertheless decided to opt for the most logical, usual and frequent solution.

43. This position ought not to be affected by the views, either of representatives in the Sixth Committee or of Governments themselves, to the effect that a place should also be given to international law. Admittedly, some property may belong to two or more States according to their internal law or other property may belong to the predecessor State according to international law, for example, according to the new law of the sea, which provides in particular for an exclusive economic zone and a common heritage of mankind. But it is clear that the texts of international law which establish that particular property belongs to a State are generally incorporated in the internal law of that State. For example, ratification of the future convention of the law of the sea will make it possible for every State ratifying it to "absorb" that convention in its own internal law. Accordingly, the criterion adopted for determining the property of the predecessor State is the internal law of that State, as supplemented by the "absorption" of all of the relevant texts of international law.

44. It remains to be seen whether reference should not also be made to private international law, as has been suggested. If property can be regarded as the property of the predecessor State in the light of the rules of private international law, here again it is likely that these rules of "characterization" or "*renvoi*" form an integral part of the internal law of the predecessor State. Besides, it is not possible for a (predecessor) State to have rights according to the law of another State and in application of the private international law in force in that State without allied "absorption" of that property in the internal law of the predecessor State. The law, *lato sensu*, of that State will have expressed the "taking over" of that property in the assets of that State.

45. The words "property, rights and interests" have been criticized by the representative of Greece. In his earlier reports on this topic the Special Rapporteur has afforded numerous examples of how the concept of "property" can be covered. In fact, it covers everything that can constitute an asset, ranging from corporeal property, through straightforward "interests", to incorporeal property such as rights, debt-claims, shares, bonds, etc. As the Special Rapporteur has pointed out in earlier reports, the formula "property, rights and interests" has often been used in international legal instruments. The Commission pointed this out in its commentary to this article.[8] The Special Rapporteur suggests that this formula and, generally speaking, the existing wording of article 5, should be retained.

ARTICLE 6. (Rights of the successor State to State property passing to it)

Oral comments—1979

46. One representative considered that the rule laid down in article 6 should deal with any legal encumbrances, rights and duties on or over the property which passed to the successor State. Assuming, for example, that the predecessor State had granted a concession for the instalment of kiosks and snackbars in the stations of its State-owned railway system, the Government of the successor State should not be obliged to maintain that

[6] *Yearbook ... 1981*, vol. II (Part Two), annex I, sect. 4, para. 9.

[7] See "Third report on succession of States in matters other than treaties", *Yearbook ... 1970, vol. II, pp. 137 et seq.*, document A/CN.4/226.

[8] *Yearbook ... 1979*, vol. II (Part Two), p. 18, para. (10) of the commentary to article 5.

concession on a proper passing of the State property from the predecessor State to the successor State. That was the view expressed by the Supreme Court of his country and one that his Government accepted.

47. Another representative said that the term "arising" did not embrace all the possible cases of succession of States that article 6 was supposed to cover, particularly the possible case of a territory which had had the structures of a State prior to colonization. In the latter case, instead of speaking of rights as "arising", it might be more appropriate to say that they had "arisen once again" after having been suspended during the colonial period. That view appeared to be supported by the choice of terms normally used in the same context in the international agreements cited in paragraph (2) of the commentary to article 6.[9] In using the terms "to acquire" and "to cede", the Treaties of Lausanne, Versailles, Saint-Germain-en-Laye, Neuilly-sur-Seine and Trianon expressed the idea of continuity in the existence of rights. It should be added that the last part of article 6 provided clarification by means of the idea of the "passing" of the State property of the predecessor State to the successor State.

48. The same representative considered that, in order to introduce the idea of the continuity of the existence of rights, it would be tempting to use the term "acquire", which conveyed the idea of the prior existence and the survival of those rights, but the adoption of that notion was problematic owing to the way it was used in the context of private international law, particularly regarding nationality. He recalled that the Commission and the Conference on Succession of States in Respect of Treaties had not only adopted the basic principle of *tabula rasa* in that regard but also combined it with the need for continuity, which was an essential element in the juridical security of international relations. Just as succession of States in respect of treaties did not always mean starting *ex nihilo*, succession of States in respect of State debts and State property, even though it entailed, *de facto* and *de jure*, the extinction of the rights of the predecessor State, did not always entail the "arising" of rights for the successor State. In order to introduce those clarifications into draft article 6, he wished to propose the following formulation:

> "A succession of States entails the extinction of the rights of the predecessor State and the obtaining by the successor State of those same rights in respect of such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part."

Written comments

49. The *German Democratic Republic* considers that the provisions whereby a succession of State entails the extinction of the rights of the predecessor State and the arising of those of the successor State are important and appropriate.

50. *Czechoslovakia* takes up the question of the terms "*extinction*" and "*arising*" of rights and wonders whether the elements of a *break* in the legal relationship concealed behind those two terms are in accord with the other term used in article 6, i.e., the *passing* of property, and above all with the idea of the *continuity* of the legal relationship. It therefore urges the Commission to reflect on the terminology used.

OPINION OF THE SPECIAL RAPPORTEUR

51. The problem has been raised as to whether the extinction of the rights of the predecessor State to State property involves the disappearance of all "legal *encumbrances*, *rights* and *duties* on or over the State property passing to the successor State". The question is not only very delicate but also highly complex; it deserved to be raised, because it was not dealt with so radically as by the representative who had brought up the point in the Sixth Committee.

This part of the draft relates to property and, therefore, to everything that constitutes an *asset* of the nation. The subsequent part of the draft deals with a *liability* of the nation, i.e., debts, which were in fact studied by the Commission, but the latter did not, in that context, have time to consider succession to other aspects of liability, such as succession to encumbrances or to contractual or other kinds of obligations. But it is difficult in the part under discussion, relating to property and rights, to bring in questions pertaining to encumbrances and obligations.

52. In conclusion, it may therefore be said that the sole object of article 6 is to deal with the fate of the rights that pass to the successor State, without prejudice to what is to become of related obligations and encumbrances. The latter are governed by the next part of the draft, on State debts, in cases where, for example, the predecessor State has contracted debts in order to create the property or has accepted mortgages or various other encumbrances on the property in question. As to any other obligations connected with the property, the Commission has not examined the overall problem of succession to obligations. Beneath the surface lies, more particularly, the problem of the acquired rights of third States or third persons.

53. Hence, it is difficult to affirm with any certainty that all encumbrances and obligations disappear with the extinction of the rights to the property that passes to the successor State. The opposite may even be inferred, not only on the basis of the provisions of the part of the draft dealing with succession to State debts, or the general theory of obligations, but also, indirectly, on the basis of draft article 9, which provides that:

> A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

It is possible in this context to think of certain property "encumbrances and obligations" that constitute, for the third State, the "rights and interests" mentioned in and protected by draft article 9.

54. The comment by one representative who referred to the case of a territory which had the structures of a State

[9] *Ibid.*, p. 19.

prior to colonization is indeed relevant. The rights of the successor State do not "arise" in that instance; they arise once again. But the formula suggested by that representative for article 6 does not take account of his own remark, for he proposes that "A succession of States entails the extinction of the rights of the predecessor State and the *obtaining* by the successor State of those same rights in respect of such of the State property as passes to the successor State in accordance with the provisions of the articles of the present Part". The word "obtaining", which is very weak, does not take sufficient account of the fact that the rights of the successor State *arise once again.*

55. Czechoslovakia has expressed a wish for the terminology of article 6 to be reconsidered, so as to take better account of the element of legal continuity encountered in practice, an element which is not taken into account in article 6 because of the emphasis on a break implied by the words "extinction" and "arising". Similarly, one representative in the Sixth Committee stressed that the successor State did not, in practice, immediately benefit from the passing of the property and the "arising" of its right. The Special Rapporteur admits that he does not know how to take these remarks into consideration in the context of the wording of article 6.

ARTICLE 7. (Date of the passing of State property)

Oral comments

1979

56. One representative considered that, in view of the existence of various types of succession of States, article 7 should stipulate that the date of the passing of State property should be determined by the type of succession involved.

57. Some representatives criticized the phrase "unless otherwise agreed or decided", which occurred in article 7 and elsewhere in the draft. In the opinion of one representative, the expression was a pleonasm, and its use could not be justified by the explanation given in paragraph (4) of the commentary to article 7. He therefore suggested that it be replaced by "unless otherwise determined". Another representative considered that article 7 should be brought into line with article 2, subparagraph 1(*d*). He was pleased to note that the same phrase did not appear in article 11, and he fully endorsed the views set forth in the commentary to article 11, particularly the statement in paragraph (5) explaining why the phrase had been omitted. In his view, there should be no loophole that could operate to the detriment of newly independent States when the date of the passing of State property or State archives was determined. Article 7, as drafted, was too permissive and would favour the interests of those metropolitan countries that were reluctant to relinquish their claims to certain State property or works of art and culture expropriated by them. He therefore trusted that the Commission would examine the article objectively at its thirty-second session.

1980

58. With reference to draft articles 7 and 8, and in particular to the words "unless otherwise agreed or decided", the representative of Greece points out that the decision could be either bilateral or unilateral; yet if it is bilateral it will be agreement, and decision therefore means a unilateral decision, in which case the question arises of who is to take the decision. In article 13, paragraph 1, and article 14, paragraph 1, there is no reference to a decision.

Written comments

59. The *German Democratic Republic* agrees with the wording of article 7.

60. *Austria* criticizes the expression "unless otherwise agreed", which appears in a number of articles and notably in article 7. The Austrian Government writes:

> "Such frequent reference to the freedom of States to deviate from the rules set forth in the draft articles would seem to call into question the notion of codification as such, and indeed raises doubt as to the appropriateness of codifying rules which obviously are meant to be only of a residual character. It is true that similar language is also used in existing instruments of codification, but in those cases such language is authorizing almost exclusively deviations in form or procedure, and not in substance."[10]

OPINION OF THE SPECIAL RAPPORTEUR

61. The date of the passing of State property should normally coincide with that of the succession of States. But what happens in fact is that State property passes gradually as the implementation agreements regulate the detailed procedure for the passing of the property or the successor State effectively takes possession, sector by sector, of the State property to which it is entitled. It is nevertheless true that some predecessor States take advantage of certain situations in order to delay the passing of State property to the successor State for as long as possible.

62. The Special Rapporteur drew attention ten years ago, in his fourth report,[11] to the complexity of the problem of the date of the passing of State property. This may depend in the first place on the date of determination or particularization of the property. In the case of the peace treaties that brought the First World War to an end, one of the first points of reference was the date of ratification of the peace treaties which involved territorial changes giving rise to problems of succession of States. A second point of reference was the date by which the Reparation Commission set up under the treaties was to define the transferable property and determine what it consisted of, thus clarifying the meaning and scope of the expressions "all property, rights and interests" or "all goods and property" found in several articles of the peace treaties. In addition to determining what constituted the

[10] *Yearbook ... 1981*, vol. II (Part Two), annex I, sect. 1, para. 3.

[11] *Yearbook ... 1971*, vol. II (Part One), pp. 170 *et seq.*, document A/CN.4/247 and Add.1, commentary to article 3.

property, the Commission had also to assess it, and its value was to be deducted from the reparations which Germany was required to pay to the various Allied and Associated Powers.

63. In fact, the Reparation Commission was not able to complete its task of assessing the "property, rights and interests". It drew up a list of the property, a list which it stated could not be exhaustive but only declaratory, and left the successor State free and entitled to consider itself retroactively in possession of the property designated by the Commission, as from the date of ratification of the peace treaties.

64. The Special Rapporteur also provided numerous historical examples, in his fourth report, of the fixing by treaty of the date of the passing of State property. In the first place, the passing may be effected *de jure* where no period of time or date is laid down in the agreement. In this case, the passing of the State property is legally effected as soon as the agreement enters into force, by virtue of the general law of treaties, i.e. normally from the date on which the instrument is ratified.

65. But the Special Rapporteur also discussed a second case in which State property is passed before ratification. He cited the Treaty of Versailles, which is decidedly an instrument containing a little of everything. Article 51 retroactively fixed the date of the return of Alsace-Lorraine to France, and consequently of the passing of State property, as from the date of the Armistice on 11 November 1918.

66. Furthermore, in some cases it has been decided that the property passes after a fixed period of time or by instalments, or again the passing may have been dependent upon the fulfilment of a suspensive condition. Sometimes too, an agreement is concluded with a reference to another agreement, to be concluded subsequently, which will fix the date of the passing of property. Lastly, there have been occasions when it was decided to restore sovereignty retroactively, as happened with Ethiopia or Albania, and in this case the problem of the date of the passing of the property does not arise legally, for the property is considered as never having left the possession of the restored State.[12]

67. These few examples show clearly the variety and complexity of *de facto* situations which cannot be ignored. While it is true that unfair treaties can be imposed on a newly independent State for the purpose of unduly delaying the passing of certain State property, the Special Rapporteur would none the less point out, in order to allay the concern expressed in the Sixth Committee, that the articles applying to this type of succession of States, such as article 11, on State property, and article B, on State archives, include *in fine* provisions which make it possible to invalidate such one-sided agreements.

In conclusion, the Special Rapporteur is of the opinion that the Commission's text is appropriate and that it meets not only some concerns expressed in the Sixth Committee but also the variety of cases known to international practice. In particular, it does not seem wise to respond to the call to delete or alter the formula "unless otherwise agreed or decided", which covers all the eventualities of international life, involving as it does special agreements of all kinds, as well as legal decisions on this problem.

[12] For all these historical examples, *ibid.*, sect. B–D of commentary.

ARTICLE 8. (Passing of State property without compensation)

Written comments

68. The *German Democratic Republic*, has stated that, in general, it agrees with the text of article 8 and that it attaches importance to the provisions stipulating that State property shall pass without indemnification or compensation.

69. The *Union of Soviet Socialist Republics* considers that the draft articles (and consequently the article under discussion here) can as a whole be used as an acceptable basis for drafting the corresponding international legal instrument.

Opinion of the Special Rapporteur

70. The Special Rapporteur notes that no objection has been raised regarding draft article 8. He therefore proposes that the Commission should retain it in its present form.

ARTICLE 9. (Absence of effect of a succession of States on third party State property)

Oral comments

1979

71. Some representatives approved of article 9. One representative considered that it could be safely deleted. Another representative wondered whether it was absolutely necessary to retain it, since it was perfectly clear that the articles relating to the passing of property dealt only with property owned by the predecessor State or States and not with the property of other States.

72. One representative noted that, although it followed from article 5 that the draft articles did not apply to property owned by third States, the Commission had decided to include article 9. While he agreed with the terms of the article, he considered that the wording should be simplified. It seemed unnecessary to refer to property, rights and interests "situated in the territory of the predecessor State" for succession does not, *a fortiori*, affect property, rights and interests situated outside the territory of the predecessor State. Deletion of the reference to the location of third State property, rights and interests would also improve the drafting of the article and remove the practical difficulty of determining the geographical location of a right or interest.

1980

73. In the opinion of one representative, the words "including private international law" should be added after the words "internal law", because a State might have

rights in accordance with the law of another State if the private international law of the first State so provides.

Written comments

74. The *German Democratic Republic* supports the provision in article 9 that State succession shall in no way affect property owned by a third State.

75. *Czechoslovakia* considers that draft article 9 is superfluous,

because it is self-evident—and this follows, moreover, from the provisions of article 5—that the provisions of Part II will apply only to the property of the predecessor State and therefore under no circumstances to the property of third States. It should also be stressed that, just as the succession of States does not affect the property of third States, neither does it concern . . . ownerless property. Such property is not affected thereby, whether it is situated in the territory of the predecessor State or elsewhere. From this point of view, the present provisions of article 9 raise more problems than they resolve.[13]

OPINION OF THE SPECIAL RAPPORTEUR

76. Initially, the Special Rapporteur had not included in the draft articles a provision expressly protecting the property of third States. He considered that this went without saying. But the discussions in the Commission have shown that what goes without saying is the better for being said. Hence the express provision set forth in article 9, even if it rightly seems superfluous.

77. As for the proposals to improve the wording of the text, they do not appear to be easily acceptable. It may well seem unnecessary to refer to property, rights and interests "*situated in the territory of the predecessor State*" for the succession does not, *a fortiori*, affect property situated outside that territory. Moreover, deletion of the phrase would obviate the practical difficulty of determining the geographical location of a "right" or an "interest". But one can, to begin with, turn back the argument and say that, obviously, third State property situated outside the territory of the predecessor State must remain unaffected by a succession of States. If therefore all reference to the location of property outside the territory is deleted, retention of article 9 would be all the more superfluous. It may then be claimed that it is the location of the property in question in the territory of the predecessor State that makes article 9 of some value, because if a problem arose in relation to third State property in the context of a succession of States, it could only be in the territory of the predecessor State. Lastly, it should be noted that third State property can be determined in this connection only by reference to the internal law of the predecessor State, which makes it necessary for the property to be situated in the territory of the predecessor State.

78. It has been suggested that "internal law" should be followed by the words "including private international law". The Special Rapporteur takes the view that the rules of private international law form part of internal law inasmuch as they are "absorbed" and integrated by internal law. Furthermore, to say "*including*" private international law is proof enough that it is so integrated. However, the Special Rapporteur is not totally hostile to the addition. He leaves it to the Commission to decide.

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

ARTICLE 10. (Transfer of part of the territory of a State)

Oral comments—1979

79. One representative reserved his country's position on articles 10 to 14.

Written comments

80. The *German Democratic Republic*, referring to articles 10 to 14, welcomes the priority orientation towards agreement between the States concerned, the differentiation between movable and immovable State property and the differentiated passing of such property.

81. *Italy* has referred to the types of succession in the following terms:

While aware of the motives that may have induced the Commission to make a distinction between the case of *transfer* of part of the State's territory and that of *separation* of part of such territory followed by its union with another pre-existing State, the Italian Government is at pains to understand why the two cases—which are closely related, if not identical, conceptually—should be treated differently from one another (see art. 10 as compared to art. 13, para. 2; art. 19 as compared to art. 22, para. 1).[14]

OPINION OF THE SPECIAL RAPPORTEUR

82. Agreeing with the Special Rapporteur, the Commission, in the commentary to article 10, clearly emphasized the fact that, compared with other types of succession, "succession in respect of part of territory" is of a unique nature. While it is true that "succession in respect of part of territory" covers the case of a minor frontier adjustment—which, moreover, is effected through an agreement providing for a general settlement of all the problems involved, without the need to consult the population—it is nevertheless a fact that this type of succession also includes cases affecting territories and tracts of land that may be densely populated. It is this situation that accounts for the ambiguities, the uniqueness and, hence, the difficulty of the specific case of "succession in respect of part of territory" in the context of succession of States in respect of matters other than treaties.

83. It should be added that such cases of succession do not always involve agreements, particularly when a densely populated part of the territory of a State passes to another State, in other words, precisely when specific problems of State property, currency, Treasury, State funds and movable and immovable equipment actually arise. The Commission therefore considered it more

[13] *Yearbook . . . 1981*, vol. II (Part Two), annex I, sect. 4, para. 9.

[14] *Ibid.*, sect. 8, para. 6.

appropriate to distinguish and to deal separately in the present draft with three cases (which, in the 1974 draft on succession of States in respect of treaties, were covered in a single provision, article 14): (*a*) the case in which part of the territory of a State is transferred from one State to another, which is the subject of article 10, now under consideration; (*b*) the case where part of the territory of a State separates from that State and unites with another State, which is the subject of paragraph 2 of article 13 (Separation of part or parts of the territory of a State); and (*c*) the case in which a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, which forms the subject of article 11, paragraph 3 (Newly independent State).[15]

ARTICLE 11. (Newly independent State)

Oral comments

1979

84. It was considered that because the topic of succession of States in respect of matters other than treaties had important political implications, the draft articles had taken account of contemporary reality so far as decolonization and elimination of the consequences of oppression and domination were concerned. The changes in the United Nations over the past three decades were largely attributable to the process of decolonization; it was gratifying that the Commission had seen fit to give legal form to the basic principals underlying that process. The need for rules concerning succession of newly independent States was further justified by the fact that many of the problems involved had not been solved even after independence had been attained.

85. Several representatives expressed support for the Commission's reference, with regard to succession in the case of a newly independent State, to the statement in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations[16] that a dependent or Non-Self-Governing Territory possessed by virtue of the Charter a status separate and distinct from the territory of the State administering it, and the reference to the Declaration on the granting of independence to colonial countries and peoples[17] under which every people, even if it was not politically independent at a certain stage of its history, possessed the attributes of national sovereignty inherent in its existence as a people. In this connection, it was stated that, although a closer correlation between the various articles and a more detailed coverage of the situations brought about by decolonization would serve to clarify the rules and to facilitate their implementation, it was gratifying to note that the Commission had established a link with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, as well as with the Charter of Economic Rights and Duties of States,[18] and that, when drafting article 11, it had borne in mind the requirements of the new international economic order and had based itself on article 16, paragraph 1, of that Charter.

86. Specific mention was also made with approval of the Commission's reference to the principle of the permanent sovereignty of every people over its wealth and natural resources.

87. Some representatives stressed that the principles on which the Commission had based itself and the rules of article 11 regarding newly independent States were of *jus cogens*, ultimately deriving from the right of all peoples to self-determination. It would be a positive factor if Member States conducted their international relations in a manner that reflected that fact.

88. In the opinion of one representative, the rules relating to the passing of State property in the case of newly independent States must be based on the principles of the viability of the territory and on equity. The introduction of the concept of the contribution of the dependent territory to the creation of certain movable property of the predecessor State was likely to reinforce the legal guarantees.

89. One representative pointed out that, with respect to succession to State property, British colonial practice appeared to have provided that on the attainment of independence, the property of the territorial Government that had been held by the corporation named "The Chief Secretary" would be transferred to and vested in the Crown in right of the newly independent State. For his country, its administration was assigned to the Minister of Finance. Thus the differentiations made in draft article 11 did not appear to have been made by the British colonial authorities in respect of property held by the Chief Secretary either prior to or on the granting of independence to their former dependent territories.

90. In the view of one representative, one recurring case not expressly covered by draft article 11 concerned the situation where the metropolitan or predecessor State held property of the dependent State that in due course became recognized as the property of the successor State: precious stones and historical artifacts had all too often been appropriated and kept in palaces or museums of the metropolitan State. He called for the elaboration of a basic rule of law declaring the past appropriation of highly valued property under such circumstances to be unlawful *ab initio*, and for the acceptance of a strong presumption to the effect that such property in principle belonged to the newly independent successor State.

91. One representative suggested, in regard to *paragraph 1*, that immovable property should be dealt

[15] See *Yearbook ... 1979*, vol. II (Part Two), pp. 25–26, para. (5) of the commentary to article 10.

[16] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[17] General Assembly resolution 1514 (XV) of 14 December 1960.

[18] General Assembly resolution 3281 (XXIX) of 12 December 1974.

with before movable property, so as to bring the article into line with articles 10, 13 and 14.

92. With regard to *subparagraph 1(d)*, one representative considered that it was necessary to determine whether provision should also be made for the passing to the successor State of immovable property, irrespective of its location, if it had belonged to the territory to which the succession of States related and had become State property of the predecessor State during the period of dependence.

93. One representative drew attention to a discrepancy in the French text between *paragraph 3* of article 11, which used the term "*territoire dépendant*", and paragraph (24) of the commentary to the article, which referred to "*un Etat dépendant*".*

94. One representative, supporting the formulation of *paragraph 4*, expressed agreement with paragraph (29) of the commentary to article 11. In the opinion of another representative in regard to paragraph 4, it would perhaps be appropriate to draw further on legal instruments that referred not only to natural wealth and resources but also to economic activities, such as the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order. In this connection, the view was also expressed that the principle of sovereign equality of States was largely an illusion if the economic dimensions of independence were ignored. It was therefore necessary to adapt the formulation of that principle to modern conditions so as to restore to the State the elementary bases of its national economic independence. Such must be the aim of the new economic co-operation, which, in accordance with the Declaration and the Programme of Action on the Establishment of a New International Economic Order,[19] must be based on equity, sovereign equality and independence, and must be reflected in practice by an inequality which favoured the least developed States. The Commission had therefore rightly considered that the validity of co-operation agreements should depend on their degree of respect for the principles of political self-determination and economic independence, in conformity with contemporary international law.

1980

95. One representative considered that it was the duty of the predecessor State to disclose the nature of the property to be transferred, for the successor State might have no knowledge of it. The obligations on the part of the predecessor State under article 11 also included, in his view, the return, at the predecessor State's expense, of any property that had been removed from the territory, wherever such property might be.

96. With regard to article 11, *subparagraph 1(a)*, the words "having belonged to the territory" should, for the sake of legal precision, be replaced, since property did not belong to a territory but to a person, natural or legal, such as a State.

97. In the opinion of the Chinese delegation, it was quite appropriate that *paragraph 4* should emphasize that agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 of the article should not infringe the principle of permanent sovereignty of every people over its wealth and natural resources. However, in addition to enjoying permanent sovereignty over its natural resources, an independent State also had to have the right to adopt suitable means to exercise effective control over those resources and their exploitation. If the agreements between the predecessor State and the newly independent State merely acknowledged the right to permanent sovereignty and contained various restrictive provisions regarding the newly independent State's economic activities, then that State would still find it very difficult to shake off its economic subordination. It was completely correct that the Declaration on the Establishment of a New International Economic Order should stress that the new order should be founded on full respect for certain principles, including the principle of full permanent sovereignty of every State over its natural resources and all its economic activities. The Chinese delegation therefore proposed that the words "and all economic activities" should be added after the words "natural resources" in article 11, paragraph 4, in order to protect more effectively the interests of newly independent States.

Written comments

98. *Italy* finds that the wording and meaning of article 11, subparagraph 1(*a*), are not at all clear and that the expression "movable property, having belonged to the territory to which the succession of States relates" is inexact, because property cannot be attributed to a territory, but rather to this or that *subject*, to a natural or legal person. It points out that the predecessor State may have temporarily ceded to the dependent territory property, such as works of art, which was legitimately purchased by the predecessor State, and therefore did not have to be "returned" by the predecessor State to the successor State.

99. Italy also states that the word "contribution" used in subparagraph 1(*c*) is not at all clear. In the English version, this expression seems to refer to the contribution that the territory in question has made to the creation of the property, but its counterpart in the French version is vaguer and open to a broader interpretation.

100. The *German Democratic Republic* welcomes the distinction drawn between movable and immovable State property and the solutions adopted for the passing of such property.

101. *Czechoslovakia* notes with satisfaction that the principle of sovereignty over wealth and natural resources is clearly enunciated in article 11, paragraph 4, as one of the principles to which any agreement between the

* This comment relates only to the mimeographed text of the Commission's report (*Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 10* (A/34/10)).

[19] General Assembly resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974.

predecessor State and the newly independent State relating to the passing of State property must be subordinated.

102. Czechoslovakia also points out that the Commission has employed two different criteria for determining the proportion in which certain movable property passes to the successor State, as can be seen from a comparison of the wording of article 11, subparagraph 1(*c*), and that of article 13, subparagraph 1(*c*). Czechoslovakia considers that it would be advisable to bring the wording of article 13, subparagraph 1(*c*), into line with that of article 11, subparagraph 1(*c*), which it finds preferable.

OPINION OF THE SPECIAL RAPPORTEUR

103. The Special Rapporteur cannot but welcome the idea of strengthening article 11, subparagraph 1(*a*), to enable precious stones, works of art and historical artifacts to be returned to the newly independent State, but the fact of the matter is that subparagraph 1(*a*) is already worded in such a way that it unquestionably allows for such restitution in cases of this kind. The Special Rapporteur is nevertheless open to any suggestions for drafting improvements. It is also necessary to correct the unsatisfactory wording of this subparagraph, which makes a territory the owner of property, as though it were a natural or legal person, a subject possessing rights. However, unless the expression "newly independent State" is used in anticipation, it is difficult to find an expression other than "territory". On the other hand, this might lead to further criticism, because a newly independent State may be regarded as having a separate and distinct personality from the entity which existed before it became dependent on the predecessor State. Hence it is not possible in juridical terms to say "movable property, having *belonged* to the newly independent State", because two different subjects of law are involved, except in a case of the re-establishment of a State.

104. The Special Rapporteur would like to comply with the request that, in article 11, immovable property should be dealt with before movable property, in line with the wording and the presentation adopted in articles 10, 13 and 14. The subparagraphs should therefore be rearranged.

105. One comment warrants special attention. Subparagraph 1(*d*) of article 11 reads as follows:

> immovable State property of the predecessor State *situated in the territory** to which the succession of State relates shall pass to the successor State.

What is to become of State property which is situated outside that territory, but was either purchased by the territory with funds from its own budget while it was dependent or was the property of the entity which existed before it became dependent? It might, in other words, be necessary to supplement subparagraph (*d*) by a text equivalent to subparagraph (*a*) for the case of immovable property and worded along the following lines:

> "immovable property situated outside the territory to which the succession of States relates and belonging to that territory shall pass to the newly independent State".

106. It is also necessary to correct the French text of paragraph (24) of the commentary to article 11, which contains the unfortunate term "*Etat dépendant*", because the two expressions are plainly contradictory. This is an oversight, and the term "dependent territory" should be used.**

107. The comment that property taken out of the territory should be returned at the predecessor State's expense reflects not only equity, but the practice followed. This should be made clear, at least in the commentary, if it cannot be embodied in a specific provision in article 11.

108. The Special Rapporteur does not agree that the French text of article 11, subparagraph 1(*c*), is open to too broad an interpretation. It refers not to the *general* "contribution" of the territory, but solely to the contribution which permitted the "creation" of the property in question.

In the opinion of the Special Rapporteur, the comment that the wording of article 13, subparagraph 1(*c*), should be brought into line with that of article 11, subparagraph 1(*a*), is not justified. Article 13 deals with a case that, although similar, yet is different. The idea of a "contribution" could not be used in article 13, subparagraph 1(*c*), because the part of the territory that separates had no separate identity making it possible to determine its specific "contribution".

109. The Special Rapporteur takes the view that paragraph 4 should be supplemented in keeping with all of the resolutions relating to the principle of sovereignty over natural resources. This principle should therefore be referred to in its entirety as the "principle of the sovereignty of every people over its wealth, natural resources *and economic activities*".

ARTICLE 12. (Uniting of States)

OPINION OF THE SPECIAL RAPPORTEUR

110. Comments on article 12 were made only by the *German Democratic Republic*, which finds it acceptable. The Special Rapporteur has no suggestions for improving it, and therefore recommends that the Commission should retain it in its present form.

ARTICLE 13. (Separation of part or parts of the territory of a State)
and
ARTICLE 14. (Dissolution of a State)

Oral comments—1979

111. One representative noted that article 14 did not make any reference to the possible existence of a priority in favour of one or the other part of the territory which might have "retain[ed] or perpetuate[d] the personality of the State which has ceased to exist", as provided in the draft code of international law by E. Pessoa quoted in paragraph (7) of the commentary to the article.[20]

** See above, the footnote relating to para. 93.

[20] *Yearbook ... 1979*, vol. II (Part Two), p. 38.

Written comments

112. *Italy* points out that, with regard to article 14, relating to dissolution of a State, the solution indicated in subparagraph 1(*b*) might raise problems in the case of property located outside the territory of the predecessor State. It could well be asked what criteria should, in such an instance, determine the attribution of property to one successor State rather than another.

113. The *German Democratic Republic* endorses articles 13 and 14.

OPINION OF THE SPECIAL RAPPORTEUR

114. No comments were made on article 13.

As to article 14, the Commission has never been so naive as to think that the solutions it is proposing, particularly in subparagraph 1(*b*), would never give rise to problems. It is quite clear that the passing to one of the successor States of property situated abroad, with compensation to the other successor States, may give rise to difficulties. But the Commission has no means of going further and elaborating on the solution it has proposed. In any event, if more than one successor State prefers to receive the property rather than compensation, the resulting problem can be settled only by agreement. There is no reliable criterion for designating one successor State rather than another as the recipient of the property in question, except to devise a whole set of different criteria that would be difficult to control and would relate to population, the way in which the property was acquired, the history of each part of the territory that had become a successor State, the length of time during which that part of the territory had belonged to the dissolved State, etc. That would undoubtedly be quite an undertaking . . .

115. If one of the successor States "retains or perpetuates the personality of the State which has ceased to exist", to use the wording of the Pessoa code, reference is no longer being made to the dissolution of a State as such, because the fact that the personality of the State which has ceased to exist has been retained or perpetuated obviously means that that State has not ceased to exist.

PART III: STATE DEBTS

SECTION 1. GENERAL PROVISIONS

ARTICLE 15. (Scope of the articles in the present Part)

Oral comments—1979

116. One representative was of the opinion that articles 15 to 18 improved the draft as a whole.

Written comments

117. There were no written comments from Governments on draft article 15.

OPINION OF THE SPECIAL RAPPORTEUR

118. The Commission, wishing to maintain the closest possible parallelism between the provisions concerning succession to State debts in the present part and those relating to succession to State property in Part II, decided to include at the beginning of Part III a provision on the scope of the articles contained in this part. Article 15, therefore, provides that the articles in Part III apply to the effects of succession of States in respect of State debts. It corresponds to article 4 of the draft and reproduced its wording, except for the required replacement of the word "property" by the word "debts". The article is intended to make it clear that Part III of the draft deals with only one category of public debts, namely, State debts, as defined in article 16.

119. Article 15 as proposed by the Commission is, therefore, fully justified. Moreover, there was no objection to the article on the part of any Government. The provision should therefore, be retained.

ARTICLE 16. (State debt)

Oral comments

1979

120. One representative considered that Part III of the draft, concerning State debts, was, generally speaking, an improvement by comparison with the earlier versions submitted by the Commission.

121. Some representatives drew attention to the problems that the Commission had faced on the question of succession of States in respect of State debts. It was very difficult to define State debts, and the Commission had held lengthy discussions on the question whether State debts should be viewed strictly as international obligations governed only by public international law and covering only subjects of international law or whether the definition might also provide for a possible relationship under private international law between a debtor State and a private creditor. The scope of the proposed articles would depend on which approach was chosen. It was pointed out that two alternative criteria had been adopted in article 16: the *international personality of the creditor* and the fact that the *financial obligation was chargeable to a State*, regardless of the public or private, national or international character of the creditor.

122. One representative considered that although article 16 provided for two categories of obligation, it was not clear what purpose would be served by making such a distinction, particularly since the subsequent articles did not do so. It might therefore be simpler to adopt as the definition of "State debt" the phrase "any financial obligation chargeable to a State" or some similar wording.

Subparagraph (a)

123. Most of the representatives who spoke on the article supported subparagraph (*a*). In the view of one representative, however, the introduction of a reference to international organizations, in article 16 and elsewhere, seemed to be an unnecessary complication and it might therefore be advisable to confine the draft to the effects of succession "between", rather than "of" States, and to modify article 1 accordingly. For another representative, the meaning of the phrase "any other subject of international law" was a theoretical question on which a consensus was very difficult to achieve.

Subparagraph (b)

124. One representative pointed out that the Commission had decided to adopt article 16, subparagraph (*b*), although with reservations.[21] The reservations to its inclusion dated back to the twenty-ninth session, when the adjective "international" appearing before the words "financial obligations" in the former article 18 had been placed between square brackets.[22] Thus, the controversy remained, though the wording was different.

125. Many representatives supported subparagraph (*b*), according to which State debt was defined as covering any financial obligation chargeable to a State, without exception. It was stated that subparagraph (*b*) had been deliberately so drafted by the Commission in order to cover State debts whose creditors were not subjects of international law.

126. One representative indicated that, although some members of the Commission were of the opinion that article 16, subparagraph (*b*) should not be applied when the creditor was a national of the debtor predecessor State, that was not the view which had prevailed. Moreover, it was difficult to see how the provisions requiring that an equitable proportion of the State debt of the predecessor State should pass to the successor State (art. 19, para. 2; art. 22, para. 1; art. 23) could be applied. It would be equally difficult to apply those provisions requiring that an agreement between a predecessor State and a newly independent successor State should not "endanger the fundamental economic equilibria of the newly independent State" (art. 20, para. 2), if the State debts of which the creditors were nationals of the predecessor State were left out of account.

127. One representative, speaking in favour of subparagraph (*b*), stressed that international law had always dealt with the relationship between a State and nationals of other States. Although those nationals could not claim their rights directly at the international level and had to exhaust the resources provided by domestic law, it was recognized that the "receiving State" had an obligation to treat such persons in conformity with international law and that the State of which those persons were nationals had authority to act on their behalf with a view to ensuring that they were so treated. At the current stage in the development of international law, when both theory and practice were moving towards recognition of the rights of individuals, it did not seem right to exclude the possibility that a successor State might be a debtor of subjects other than subjects of international law.

128. Another representative found the new wording of article 16, subparagraph (*b*), fully appropriate from both the legal and economic standpoints. From the legal standpoint, it was internationally accepted that any natural person was capable of constituting the basis of a relationship in international law, and since such persons could be only subjects in respect of a legal relationship, they must be considered as subjects of international law. In international relations, international rights existed side by side with internationally protected rights, particularly in the context of diplomatic protection. The maintenance of article 16 with its two subparagraphs was an important contribution to the progressive development of international law. From the economic standpoint, the Commission had sought to maintain the balance between States and private bodies by guaranteeing the rights of those bodies and facilitating the access of developing countries to the private capital market.

129. A number of representatives supported the definition of State debt contained in article 16, subparagraph (*b*), as corresponding to the economic reality of the world today, particularly because of the importance of the credit extended to States from foreign private sources. Deletion of that provision would not only restrict the sources of credit available to States and international organizations, but would also be detrimental to the interests of the international community as a whole, particularly the developing countries. In the opinion of one representative, although theoretically only the category of obligations mentioned in subparagraph (*a*) could constitute a State debt for the purpose of the draft articles, that category should also be mentioned, for practical reasons, in subparagraph (*b*).

130. Some representatives, while in favour of retaining subparagraph (*b*), nevertheless expressed some reservations. One representative doubted whether there actually was a causal link between the availability of credit, on the one hand, and the retention or deletion of subparagraph (*b*) on the other. It would surely, be reading too much into the text to see in it conclusive evidence of such a link. The availability of credit was indeed determined by the risk factor, but other factors, not the least important of which was the profit motive, also played their role; thus, if subparagraph (*b*) was deleted, the plight of developing countries would not be as dramatic as some would suggest. The solution would perhaps be to retain subparagraph (*b*), together with the reservations on it, until such time as a conference of plenipotentiaries dealt with the draft article. Another representative considered that the general effect of subparagraph (*b*) was to divest subparagraph (*a*) of its substance. In the circumstances, he felt that subparagraph (*b*) should be reformulated in the light of the points raised during the discussion.

131. On the other hand, many representatives criticized the provision of subparagraph (*b*) and proposed its

[21] *Yearbook ... 1979*, vol. II (Part Two), p. 47, para. (45) of the commentary to article 16.

[22] *Yearbook ... 1977*, vol. II (Part Two), p. 58.

deletion. It was said in this connection that the words "any other financial obligation chargeable to a State" seemed unduly broad and might give rise to improper interpretations. It was also said that, whereas subparagraph (*a*) clearly referred to the two parties to a financial obligation, the debtor and the creditor, subparagraph (*b*) referred only to the debtor, and that by the use of the word "chargeable". There was nothing to indicate who the creditor was, nor did the commentary throw much light on the matter; yet it was obvious that creditors who were not subjects of international law were private institutions operating as legal or natural persons. The question, therefore, was whether such persons fell outside the framework of a set of draft articles concerned with international financial obligations. That question became even more pointed when set against the position in regard to debts contracted by public enterprises. The intent of the article in that respect was only partially clarified in the commentary, which stated quite properly that, irrespective of the State's responsibility for such debts, under article 7 of the draft they were not subject to the rules on succession of States.

132. It was further stated that, insofar as subparagraph (*b*) of article 16 extended the application of the provisions of part III of the draft to State debts owed to creditors who were not subjects of international law, it gave rise to an obvious contradiction, since the draft articles embodied rules of international law and were therefore applicable only to subjects of international law. The draft articles should deal only with the international debts of States. The concept of State debt should include only the international financial obligations of States to other States, international organizations or another subject of international law. The transfer of debts that were not international could constitute interference in the internal jurisdiction of the successor State. Matters relating to the financial obligations of a State to private creditors or, in other words, to creditors who were not subjects of international law should be regulated by internal law and could not be the subject of international codification. Subparagraph (*b*) might even come to include debts contracted with the nationals of a State, which should obviously be governed by national laws. The draft articles should not apply to debts owed by the State to its own citizens or to foreign nationals or corporate bodies. Article 16, subparagraph (*b*), in its existing form, would have virtually the same effect as the deletion from article 18, as originally worded, of "international", a deletion for which there was no justification. It was also said that the recourse of a State to diplomatic protection of its nationals in accordance with the rules of international law was also a matter which should be considered outside the scope of the current articles on State succession. In the opinion of certain representatives, the deletion of subparagraph (*b*) would not imply exemption of a State from its obligations to private parties; former article 18, paragraph 1, provided a sufficient safeguard for the interests of all creditors, including those who were not subjects of international law.

133. One representative, referring to the transfer of State debts, stressed the importance of his earlier suggestion to insert the adjective "international" in the phrase "any other financial obligation chargeable to a State" in article 16, subparagraph (*b*), in keeping with the decision in the *Barcelona Traction* case.[23] It was regrettable that the suggestion had not been adopted. Before a final decision was reached as to whether article 16 should be retained as it stood or amended in accordance with his suggestion, it would be desirable for the Commission to look into that point more closely by studying the consequences and implications in that regard of both international case law and multilateral conventional rules, such as the convention signed at Washington on 18 March 1965[24] or the provisions of standard bilateral conventions on the protection and guarantee of foreign investment in third world countries. More precise drafting could serve as the basis for a compromise.

134. In the view of another representative, a solution to the remaining substantial problem, the definition of State debts, was not to be found in taking sides as to the inclusion or exclusion of the second subparagraph of article 16, but rather in making positive contributions which would provide new material for the Commission in its second reading. In that context, he emphasized the need for the draft to remain relevant to the situation of all States, and not of certain States only.

The question of odious debts

135. A number of representatives noted that, although the question of "odious debts" had been discussed by the Commission, no provisions relating to it had been included in the draft articles. It was pointed out that the Commission had decided against drafting general provisions on "odious debts" in the expectation that the rules being drafted would be sufficiently wide to cover that situation. "Odious debts" were considered to be those imposed upon a country without its consent and contrary to its true interests, and debts intended to finance the preparation for or the prosecution of war against the successor State. In that connection, some representatives deemed the Special Rapporteur's earlier proposals to be quite interesting. Reference was made to the draft articles submitted by the Special Rapporteur in his ninth report,[25] under which odious debts contracted by the predecessor State—debts which were contrary to the major interests of the successor State or were not in conformity with the principles of international law—would be excluded from the provisions on succession to State debts. One representative disagreed with the Commission's conclusion that there was no point in defining the concept of "odious debts" and stipulating that such debts could never be transferred. Another representative deemed it particularly important to clarify that point, since the intent behind the

[23] See *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, *I.C.J. Reports 1970*, p. 3.

[24] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations, *Treaty Series*, vol. 575, p. 159).

[25] *Yearbook ... 1977*, vol. II (Part One), pp. 67–70, document A/CN.4/301 and Add.1, chap. III.

draft articles was that succession to State debts should be a general obligation on all States other than newly independent States. He therefore considered that a provision should be included in the draft to cover that point.

136. Some representatives expressed the hope that, in view of the importance of the question, the Commission would review its decision regarding "odious debts" when it took up the articles on second reading.

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137. In the opinion of the New Zealand representative, the most important point in the draft articles was still the definition of "State debt". Almost the first rule of codification on a universal scale was a law of coexistence: a draft that manifestly suited the circumstances of a capitalist economy better than those of a socialist economy, or one that suited a socialist economy better than a capitalist economy, would not appeal to the world at large. It might serve a regional purpose, but not the cause of global codification. That, ultimately, was why the definition of debt was so important. The draft articles could do no more than deal with the moment of time in which one State replaced another in responsibility for the international relations of a particular piece of territory. After that, the normal rules of State responsibility towards other States had their natural play. The present rules could only determine by which international person debts were owed; and, from the standpoint of those rules, it was immaterial whether a debt was owed to another State or to a private individual.

138. Another delegation said that it seemed unjustified to make a distinction between debts according to the nature of the debts or the creditor, and that the relevant part of the draft should be re-examined. It would seem essential that, if adopted, the draft articles should apply both to debts arising from loans contracted on the basis of intergovernmental agreements and to debts arising from loans raised in a free market. It seemed unnecessary to maintain the present division of the article into two clauses, but it was essential to retain the whole of the article's existing scope.

139. One representative said that the provisions of article 16 were very unclear as to the question whether the term "State debts" included private debts. For example, what did "subject of international law" refer to? The problem was a controversial one. Did the words "any other financial obligation" include obligations which came about illegally? Judging from the language of article 16, the creditor might be a State, an international organization, a foreign natural or juridical person, or even a natural or juridical person of the debtor State. Actually, the purpose of the action of the draft articles in question was mainly to settle debts between States. The debts a State owed to private persons, especially the debts owed to its own people and enterprises, should be regulated under domestic law and were beyond the scope of the present topic.

140. One delegation was of the view that article 16 contained a definition, and that its substance should therefore be reproduced in article 2, paragraph 1, concerning the "use of terms".

141. One delegation observed that the expression "any other subject of international law", used in article 16, subparagraph (*a*), might cause problems because it was held in some quarters that it could include private individuals. Terms liable to give rise to theoretical disputes should not be used in legal texts.

142. One representative drew attention to an apparent contradiction between article 2, subparagraph 1(*a*) and article 16, subparagraph (*b*): study of the former provision gave the impression that the only obligations to be taken into account were those established by international law within the context of an inter-State relationship, or, in other words, the obligations referred to in article 16, subparagraph (*a*); article 16, subparagraph (*b*), however, referred to "any other financial obligation chargeable to a State", and therefore covered more than the area defined in article 2, subparagraph 1(*a*).

Written comments

143. The *Byelorussian Soviet Socialist Republic* considered that further work was necessary on article 16(*b*). The fact that the subparagraph referred to "any other financial obligation chargeable to a State" was totally unacceptable, since such obligations were governed not by international law, but by the relevant provisions of municipal law. Subparagraph (*b*) should accordingly be deleted from article 16.

144. The *German Democratic Republic* felt compelled to reaffirm the reservations which had been voiced in the Sixth Committee by its representative concerning the definition of State debts in article 16.[26] Since succession to State debts was still a very controversial matter and the draft established, except for newly independent States, the obligation of succession, implying a progressive development of international law, the draft formula must be studied very thoroughly.

145. The German Democratic Republic welcomed the fact that article 16, subparagraph (*a*), confined itself to defining as State debts the financial obligations of States towards other subjects of international law. On the other hand, it found it highly objectionable that, despite the dissenting votes of several members, the majority of the Commission should have abandoned, in article 16, subparagraph (*b*) its otherwise consistent orientation with regard to that question, and that it should have deviated completely from the provisional draft submitted in 1977. Article 16, subparagraph (*b*) would result in an obligation for the successor State to continue without change its predecessor's relations under private law towards foreign natural and juridical persons. The same would apply, with all the consequences that entailed, to its own citizens. Factually, subparagraph (*b*) would bind a new State to the domestic jurisdiction of its predecessor. That would

[26] *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 43rd meeting, para. 27.

constitute unacceptable interference in the successor State's sovereignty and was, therefore, incompatible with the principles of sovereign equality of States and non-interference in other States' internal affairs. A successor State must have the right to establish its own constitutional and legal order, including the right to the independent conduct of its relations under civil law with natural and juridical persons. When a State believed that, for instance, nationalizations or general expropriations affected the interests of its citizens with regard to their property in a way contrary to international law, it was able to exercise protective rights on behalf of its citizens through diplomatic channels. That was the internationally accepted way of protecting the interests of citizens in foreign countries. It could not be accepted, however, that an international convention should *a priori* bind a new State to the unqualified continuation of its predecessor's relations under private law. Consequently, the German Democratic Republic held that the matter to be regulated by the convention should, as a matter of principle, be confined to the debt relations of the predecessor State under international law, as was the case with regard to all other matters (treaties, State property, and State archives).

146. The German Democratic Republic also felt that it was necessary to include in the convention a provision on non-transferable debts and, consequently, clearly to define the term "odious debts". In that connection, it would be desirable if, on second reading, the Commission reconsidered the pertinent proposals which had been submitted by the Special Rapporteur in 1977.[27] Article C could provide a good platform for the definition of such debts, which were excluded from obligatory succession on the grounds that they were inconsistent with international law.

147. The *Ukrainian Soviet Socialist Republic* hoped that the Commission would delete subparagraph (*b*) of article 16, which it felt to be of dubious value, since, by its very nature, it went beyond the group of problems covered by the draft.

148. *Czechoslovakia* requested the Commission to review the definition of State debt which it proposed in article 16, for that definition created a "difficult problem" by exceeding the system of legal relationships regulated by public international law. According to Czechoslovakia, public international law did not regulate the succession of States to State debts subject to the internal law of the predecessor State, nor could it govern succession to State debts owed by the predecessor State to private or juridical persons, particularly when such persons were nationals of the predecessor State, for in no such case would the debt have arisen from an international obligation of the predecessor State. Succession to such debts was possible only if, on the date of the succession of States, there existed an international obligation of the predecessor State towards a third State concerning their payment. The case would then be one of State responsibility and, as such, would be excluded from the scope of the present draft.

149. For *Italy*, the aim in article 16, subparagraph (*b*) seemed to have been to cover as wide a field as possible, whereas the succeeding provisions, particularly articles 19 and 23, were far more limited in scope, referring solely to inter-State relations. Contemporary State practice showed that debts owed by a predecessor State to foreign private persons had been the subject of State succession, and international laws had existed in that regard for some time, especially since the First World War.

150. Italy recognized, however, that the subject-matter of article 16, subparagraph (*b*) "is highly controversial and does not lend itself readily to the formulation of a solution acceptable to the entire international community". For that reason of political import, the Italian Government suggested that the draft articles should be limited to the lowest common denominator, or, in other words, that they should be restricted, in the hope of reaching a consensus, to the topic of debts between subjects of international law.

151. *Austria* expressed regret that, although the various categories of State debt, such as national debt, local debt and localized debt, had been mentioned in the lengthy commentary to the article, the Commission had not included definitions of those categories in article 16.

Opinion of the Special Rapporteur

152. The Special Rapporteur has given a detailed account of all the written comments of Governments and all the oral remarks made during the past two sessions of the Sixth Committee in order to show the Commission that its long and arduous debate on the topic has been extensively echoed, both in the Sixth Committee and in national chancelleries. In the light of that situation, he recommends that, at the present stage of the second reading of the draft, the Commission should refrain from resuming a substantive discussion which would merely be a further sterile reflection of the sharp controversy by which it has itself been divided and which continues to trouble the international community.

153. In any event, now that its own term of office is drawing to an end and the second reading of the draft articles is under way, it would seem impossible for the Commission to find sufficient time to reopen its substantive debate on article 16, for, as the Government of Italy pointed out in its written comments, any fresh in-depth exploration of the subject might well be extremely long and complex and necessitate the revision of several clauses of the draft articles.

In such circumstances, to attempt to reply to each of the differing comments that have been made would serve no useful purpose, for it would merely add fresh fuel to the fire. Moreover, the legal arguments that have been put forward are of widely differing value; it is the political element that is of the essence in this affair, and goes beyond the scope of legal reasonings.

154. The Commission is, then, left with the choice between two possible attitudes. The first would consist in

[27] See *Yearbook ... 1977*, vol. II (Part One), p. 70, document A/CN.4/301 and Add.1, para. 140.

maintaining article 16, subparagraph (*b*) as it stands and leaving the solution of the question to a possible conference of plenipotentiaries. The Special Rapporteur is reluctant to propose such a course, if only because it tends to ignore the aim of consistency which he has pursued throughout the draft articles. In that respect, several Governments, including that of Italy, have justly drawn the Commission's attention to the concept of an inter-State relationship governed by international law that underlies the draft as a whole. The Commission has limited the scope of its articles to this kind of relationship. The inclusion in article 16 of subparagraph (*b*) is at variance with this otherwise harmonious approach and, as the Government of Italy has pointed out, the provision jars with the rest of the draft, particularly articles 19 and 23.

155. There is a second possibility. It is to accept *whatever* is capable of engendering consensus and *nothing* more, that is to say, merely to seek out and set down the minimum foundations for agreement within the international community. This means that the draft should limit itself to expressing the lowest denominator common to all States. Clearly, such an aim can be achieved only by retaining subparagraph (*a*) and deleting subparagraph (*b*). In that event, the commentary for the General Assembly and the possible conference of plenipotentiaries should draw attention to subparagraph (*b*) and to the reasons which led to its deletion *for the time being*. It would be for the conference of plenipotentiaries to launch a fresh debate and, if it so wished, to extend the scope of the draft articles to debts owed to foreign private individuals and to undertake the consequent in-depth recasting of certain other provisions of the draft.

But it would not be in the best of taste for the Commission to transmit to that possible conference of plenipotentiaries a draft which would, on a fundamental point, be hotly contested by part of the international community. That would be equivalent to offering the conference a time bomb.

156. Limiting the draft articles to an inter-State relationship governed by public international law would in no way mean that the fate of debts owed by the predecessor State to foreign private individuals should be ignored. It would simply be stated that it was not the purpose of the draft article to investigate this aspect of the problem, although the conference might wish to expand the field of study because of the importance of the question.

157. As to article 16, subparagraph (*a*), the written comments of Governments and the statements made by representatives to the Sixth Committee will undoubtedly be of help in improving its drafting. There is, however, no denying that the Commission laid itself open to problems when it defined State debt as a financial obligation of a State towards not only another State, but also an international organization, and in particular, "any other subject of international law". The Commission could hardly have avoided dealing with the kinds of financial relations that are so important in the modern world and that exist between a State and an international organization such as the World Bank or the IMF. But the expression "any other subject of international law" has inevitably given rise to criticism because of the doctrinal and other differences that exist concerning the question of what constitutes a generally acceptable definition of a "subject of international law". Theories abound in support of the extension of that term not only to a State or an international organization—a notion that has gained universal acceptance—but also to national liberation movements, transnational corporations or multinational companies, and even to individuals—a notion that remains controversial.

158. Since some now consider that the rules of international law are ultimately directed to the individual, and since, in particular, there have been welcome advances in the human rights chapter of the theory of international law, to the point where the tendency is now to make the individual a "subject of international law", the differences of opinion encountered by the Commission would not end with the deletion of article 16, subparagraph (*b*). They would re-emerge through the interpretation that would be given to the expression "subject of international law" and by means of which article 16 could be held to refer to debts owed to individuals, whether nationals or foreigners.

The Special Rapporteur considers it even more unacceptable to recognize any degree of international personality whatsoever to multinational companies. It is common knowledge that this problem has long been under study by the Institute of International Law and that there is much doctrinal controversy concerning the nature of contracts, particularly investment contracts, concluded between a State (which may one day be involved in a succession of States) and a transnational corporation.

159. In order to avoid all these difficulties, which are likely to divide the Commission, and perhaps a conference of plenipotentiaries too, the best course would, once again, be to aim for the lowest common denominator, by deleting from subparagraph (*a*) of article 16 the expression "or any other subject of international law".

160. With regard to the question of "odious debts", the Special Rapporteur, who earlier advanced on this subject a number of arguments and articles to which there was some response in the Sixth Committee, is perfectly willing to resume the study of those provisions before the Commission, should that be considered expedient at the current stage of second reading and in the final year of the Commission's term of office.

ARTICLE 17. (Obligations of the successor State in respect of State debts passing to it)

Oral comments—1979

161. In the opinion of one representative, article 17 should be amended to provide that the successor State would take over State debts that passed to it subject to any lawful encumbrances.

Written comments

162. The *German Democratic Republic* held that article 17 would be unacceptable unless it was expressly stated

that it applied only to State debts contracted in accordance with international law, thereby excluding from the scope of the future convention debts contracted for a purpose not in conformity with such law.

OPINION OF THE SPECIAL RAPPORTEUR

163. There seems to have been almost universal tacit approval of draft article 17. The article contains a rule equivalent to that set out in article 6 concerning the rights of a successor State to such of the property as passes to it. The German Democratic Republic wishes it to be stated that article 17 applies only to State debts contracted in accordance with international law. In expressing that wish, it has in mind the problem of "odious" debts mentioned above. With regard to the comment by a representative to the Sixth Committee, the Special Rapporteur considers it correct to say that the successor State must take over the State debts that pass to it under article 17, subject to any lawful encumbrances.

DRAFT ARTICLE 17 *bis*. (Date of the passing of State debts)

164. The Special Rapporteur proposes to the Commission a draft article 17 *bis* which corresponds to article 7 concerning the date of the passing of State property. The article is its own justification and fills what had been a gap in the draft. It reads as follows:

Article 17* bis. *Date of the passing of State debts

Unless otherwise agreed or decided, the date of the passing of State debts is that of the succession of States.

165. It should, however, be noted that the assumption by the successor State from the date of the succession of States of the servicing of the State debt that passes to it will probably not be feasible *in practice*. The predecessor State may continue to service the debt directly for some period of time, and that for practical reasons, since the debt, as a State debt, will have given rise to the issuance of acknowledgements signed by the predecessor State, which is bound to honour its signature. Before the successor State can honour directly the acknowledgements pertaining to a debt that passes to it, it must endorse them; until that operation, which constitutes novation in the legal relationship between the predecessor State and the creditor third State, has been completed, it is the predecessor State which remains accountable to the creditors for its own debt.

166. But there can be no question of such temporal or practical constraints altering the legal principle of the passing of the debt on the date of the succession of States. In reality, until such time as the successor State endorses or takes over the acknowledgements of the debts that pass to it, it will pay the predecessor State the servicing charges associated with those debts, and the predecessor State will provisionally continue to discharge the debts to the creditor third State.

167. The principal purpose of article 17 *bis* is to show that, however long the transitional period required for the resolution of the organizational problems associated with the replacement of one debtor (the predecessor State) by another (the successor State), the legal principle is clear and must be observed: interest accrues on the State debt that passes to the successor State, and that debt is chargeable to that State, from the date of succession of States. Should a predecessor State which has been released from certain debts by virtue of the Commission's articles none the less provisionally continue, for material reasons, to service those debts to the creditors, it must receive due repayment from the successor State.

ARTICLE 18. (Effects of the passing of State debts with regard to creditors)

Oral comments—1979

Paragraph 1

168. In the opinion of one representative, paragraph 1 could be read to imply that the creditor maintained his claim against the predecessor State and did not automatically obtain a claim against the successor State. Moreover, paragraph (10) of the commentary to article 18 stated that the creditor did not, in consequence only of the succession of States, have a right to recourse or a right to take legal action against the State which succeeded to the debt. In cases where the predecessor State ceased to exist, however, the creditor would be seriously prejudiced if he did not automatically obtain rights, as a result of succession, against the successor State or States.

169. In the view of certain representatives, it would seem that the commentary had not been fully adapted to the paragraph's new wording. Thus, it was stated in paragraph (10) of the commentary that the word "creditors" in paragraph 1 of article 18 "should be interpreted to mean *third creditors*, thus excluding successor States or, when appropriate, natural or juridical persons under the jurisdiction of the predecessor or successor States".[28] Besides the discrepancy between that interpretation and the wording of the text itself, why should a succession of States as such legally affect the rights and obligations of creditors which were natural or juridical persons under the jurisdiction of the predecessor or successor States? In another part of the commentary, the Commission had demonstrated that the creditor–debtor relationship as such should fall outside the scope of the rules of international law relating to State succession. Indeed, that relationship was normally regulated by municipal law or, where appropriate, by rules of conflict of laws indicating the municipal law to be applied. If the creditor and debtor were States, their relationships might be governed by a treaty, but then the present draft articles would not apply, the effects of State succession on treaties being the subject-matter of the 1978 Vienna Convention. Quite a different matter was the relationship between, on the one

[28] *Yearbook ... 1979*, vol. II (Part Two), pp. 49–50.

hand, the predecessor and successor States and, on the other hand, a third State asserting a claim under international law on behalf of itself or its nationals, when the predecessor or successor State or both failed to meet its or their financial obligations under municipal law. Whether or not such a claim was admissible under the rules of international law and, if so, under what conditions and to what extent it was admissible, were questions outside the scope of the draft articles. They fell within the scope of other rules of international law, namely those relating to diplomatic protection and State responsibility. But to the extent that those other rules allowed a State—or another subject of international law—to assert a claim, a preliminary question might arise in connection with a situation of State succession, namely whether an agreement between the predecessor and the successor State, being an instrument governed by international law, concerning the passage of State debts from the one to the other, could be invoked against a third State. That question was dealt with in the present wording of article 18, paragraph 2. Now it was clear that in the situation contemplated in that paragraph, the creditor, while being a national of the third, claimant State, might fall under the jurisdiction of the predecessor or successor State. That, indeed, was why the third State could not normally assert the claim unless the creditor himself had exhausted the effective local remedies available to him. There was therefore no reason whatsoever to exclude creditors under the jurisdiction of the predecessor or successor State from the scope of article 18.

Paragraph 2

170. Some representatives expressed reservations concerning paragraph 2. In the opinion of one representative, the paragraph and, in particular, the expression "the consequences of that agreement", which appeared in subparagraph (*a*), required clarification. He agreed, however, with the statement in paragraph (10) of the commentary to the effect that the provision was equally valid in cases where the creditors were not States, which was an added reason for deleting the references to international organizations. Another representative did not understand why paragraph 2 was confined to creditor States and creditor international organizations, whereas paragraph 1 dealt with creditors in general.

171. Certain representatives also expressed doubts about the condition laid down in subparagraph 2(*a*), namely, that the consequences of the agreement must be in accordance with the other applicable rules of the articles in part III. For one representative, the only exception to the general rule that the predecessor and successor States could conclude such agreements as they saw fit was to be found in article 20, paragraph 2, but he was not clear whether that was the restriction that had to be observed under article 18, subparagraph 2(*a*). Another, and possibly more reasonable, interpretation was that the agreement could be invoked only if it complied with the general principles of succession which, under articles 19, 20 and 22, had to be applied in the absence of any agreement between the predecessor and successor States. Another representative, likewise, did not understand to which draft articles the words "the other applicable rules" referred.

172. Some representatives referred to the condition laid down in subparagraph (*b*) and to the conclusion that, in their view, could logically be drawn from it, namely, that the predecessor State or the successor State could invoke an agreement concluded between those two States against a third State or international organization which was not a party to that agreement. For one representative, however, there was nothing in article 18 to suggest that the third State or international organization enjoyed a similar right as against the predecessor and successor States, something that did not seem reasonable to him. Another representative, referring to the logical conclusion to be drawn from paragraph 1 and subparagraph 2(*a*), namely that the agreement could be invoked if its consequences were in accordance with certain applicable rules of the draft articles, deemed it to be clearly in conflict with article 34 of the 1969 Vienna Convention. In his view, if the words "a third State or an international organization" used in paragraph 2 meant exclusively a State or an organization party to the draft articles, then the predecessor State or successor State or States were not invoking against the third State the agreement in question, but rather the applicable rules of the draft articles. It was said that the question remained to be analysed in more detail on second reading, in the light of the 1969 Vienna Convention.

Written comments

173. *Italy*, recognizing the international relevance of succession in the case of debts between States and foreign private persons, considered article 18, paragraph 1, all the more important as it had proposed the deletion of subparagraph (*b*) of article 16. With that in mind, it called for the rewording of article 18, paragraph 1, as a general safeguard clause.

174. In the opinion of *Czechoslovakia*, not all the rules in the draft articles were established norms of general international law. Consequently, the question arose whether the agreements mentioned in article 18, paragraph 2, could be enforced against third States or international organizations if those entities were not bound by a future convention containing the draft articles. That question would remain valid even if, as required by article 18, subparagraph 2(*a*), the consequences of the agreements concluded between the predecessor State and the successor State (or between successor States, in the event of the disappearance of the predecessor State) were in accordance with the other applicable rules of the draft.

175. The Government of Czechoslovakia also observed that the definition of a third State contained in article 2, subparagraph 1(*f*), was inadequate because the case referred to in article 18, paragraph 2, might involve two categories of third States: States which would be third States with respect to the agreements between the predecessor State and the successor State (or between successor States), but which would be bound by a future convention containing the draft articles; and States which would be third States with respect both to such a future

convention and to the agreements between the predecessor State and the successor State (or between successor States). In view of the provisions of article 34 of the 1969 Vienna Convention, draft article 18, subparagraph 2(*a*), could only apply to the first category of third States. The Czechoslovak Government therefore invited the Commission to review the proposed text.

Opinion of the Special Rapporteur

176. In view of the criticisms made of article 18, paragraph 1, the Special Rapporteur suggests that this provision, which creates more problems than it solves, should be deleted. The Commission devised the paragraph with the aim of protecting creditors, but the serious reservations to which it gave rise in the Sixth Committee show that it disserves them.

177. First, it is incorrect to state that, legally, succession to State debts does not affect the *rights* of creditors. Naturally, the creditor third State retains title to its debt as a patrimonial right. With respect to the rest of its *rights*, however, the effect of a succession of States is exactly the opposite of what is stated in article 18, paragraph 1: the succession entails *novation* in the legal relationship that previously existed between the predecessor State and the creditor third State with regard to the State debts that pass to the successor State. While the legal effect of a succession of States is to substitute for the *right* of the creditor third State over the predecessor State an equivalent right for the same beneficiary over the successor State, it cannot be said that succession has no effect at all on the right of the third State, however similar that State's rights over two successive debtors may be. Although the creditor's patrimonial right will remain intact, it is clear that, from a strictly technical viewpoint, the novation—by the replacement of the first debtor by a second—in the legal relationship between debtor and creditor alters the creditor's *rights*, particularly in the procedural sphere. In fact, article 18, paragraph 1, can even be said to contradict article 17, which provides that a succession of States "entails the extinction of the obligations of the predecessor State" or, in other words, the extinction of the rights of the creditor third State over the predecessor State. Article 17 further provides that a succession of States "entails ... the arising" of the obligations of the successor State, that is to say the arising for the creditor third State over the new debtor of rights which, while they are equivalent, are fresh. That is no more than the logical outcome of the novation.

178. Hence, unless paragraph 1 of article 18 can be redrafted, it would be better, in order to avoid ambiguity, to delete it, particularly as its underlying idea is also contained in paragraph 2 of the article.

179. Paragraph 2 of article 18 has been the subject of still more outspoken criticism. In this respect, the Special Rapporteur can find no fault with the reasoning of the Government of Czechoslovakia. The 1969 Vienna Convention provides no grounds for asserting that an agreement between a predecessor State and a successor State (or between two or more successor States) may automatically be invoked against a creditor third State even when the latter has neither accepted that agreement nor acceded to a convention containing the present draft articles. This opinion holds true even if the consequences of the agreement between the predecessor State and the successor State (or between two or more successor States) are entirely in keeping with the rules set out by the Commission in the draft articles on State debts.

180. The Commission might, then, wish to delete subparagraph 2(*a*) to leave only subparagraph 2(*b*). That would not be a good choice, for the text would be weakened without covering the case in which the creditor third State is itself a party to the future convention containing the draft articles.

181. Another possibility would be to redraft subparagraph 2(*a*) so as to cover in it the case in which the creditor third State is itself a party to the future convention containing the draft articles. Here, however, the difficulty is twofold. First, article 18 refers to the invocation of the novatory agreement not only against a creditor third State, but also against an international organization, thereby raising the question how far it is possible for an international organization to be a party to the future convention, which will govern only succession of States "between States". The difficulty derives from the fact that reference has been made in the definition of State debt contained in article 16, subparagraph (*a*), to the international organizations that provide loans and that can, therefore, be creditors of States.

Second, the inclusion in article 18, paragraph 2, of a provision covering the case in which a creditor third State is itself a party to the future convention might have a political disadvantage, inasmuch as the presence of such a provision would do anything but encourage States to become parties to the instrument.

182. The problem that must be solved is the following: while the creditor third State is entitled to consider that the agreement on the fate of its claim cannot be invoked against it so long as it refuses to accept that agreement or to become a party to the future convention, it is, on the other hand, utterly without power to oppose the conclusion, or even the execution, of an agreement between the predecessor State and the successor State concerning the future of its claim which releases the predecessor State from that obligation by its replacement as debtor by the successor State. The difficulty lies in reconciling these two facts and incorporating them in an appropriate provision in article 18, paragraph 2.

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

ARTICLE 19. (Transfer of part of the territory of a State)

Oral comments

1979

183. One representative observed that the phrase "taking into account, *inter alia*, the property, rights and

interests which pass to the successor State in relation to that State debt" used in paragraph 2 did not conform to the phrase "taking into account all relevant circumstances" used in articles 22 and 23.

1980

184. In the opinion of one representative, the terms "property, rights and interests" appearing in *paragraph 2* should be replaced by the term "State property".

185. One representative welcomed the adoption of articles 19, 20, 22 and 23, which basically provided for the passing to the successor State of an equitable proportion of the State debt contracted by the predecessor State.

Written comments

186. The *German Democratic Republic* takes the view that the provision concerning the passing, in the light of all relevant circumstances, of an equitable proportion of State debts, as set out in articles 19, 22 and 23, seems broad enough to cover all possible situations. In the final analysis, to be equitable, any passing of State debts will always have to take account of the historical and national circumstances of each particular succession. Equitable apportionment will have to pay regard both to the capabilities of the successor State and to the real gain which would result for the successor State from assuming the debts contracted by its predecessor.

OPINION OF THE SPECIAL RAPPORTEUR

187. Draft article 19 has not given rise to any objections and has indeed commanded clear support. At most, an attempt has properly been made to improve the wording. The latter would not necessarily be more satisfactory if, in the text of paragraph 2, the expression "property, rights and interests" were replaced by the term "State property", as had been proposed.

188. A question has been raised concerning the difference in wording between article 19, in which the phrase used is "taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt", and articles 22 and 23, where it is more a question of "taking into account all relevant circumstances".

In this connection, the Special Rapporteur wishes to point out once again that there is a difference between the circumstances covered by article 19 and those envisaged in articles 22 and 23. Article 19 relates to a case in which the predecessor State transfers, freely and normally by agreement, part of its territory, usually small in area, to another State. The most frequent instance is treaty adjustment of frontiers between two States, for modern international law prohibits any annexation of territory. In a case of this kind, all the problems are settled by agreement, which is why paragraph 1 of article 19 favours that form of settlement.

In the absence of an agreement, equity requires in such a case of State succession that the debt passing to the successor State should be proportional, taking into account, *inter alia*, the property which passes to the successor State in that territory. The problem is not so complex as in the circumstances covered by articles 22 and 23. Moreover, the "equitable proportion" of debts which pass to the successor State is calculated by taking into account "*inter alia*" (and not "exclusively") the property, rights and interests which pass to that State.

189. The cases covered by article 22 involve situations that are normally more complex and sometimes even violent. For example, part of the territory of a State separates from that State after the population of the part in question has, by more or less peaceful methods, claimed its right to self-determination. Such secession of part of the territory of a State is more serious for the predecessor State; normally it affects a larger area of territory than is envisaged in article 19, where it is usually a question of a straightforward frontier adjustment. In contrast to the case covered by article 19, it finally leads to the creation of a new State and thereafter perhaps some difficulties because of geographical proximity.

For this reason, the Commission thought it more prudent to recommend that account be taken of "all relevant circumstances", as the only way to achieve a truly equitable apportionment of State debts.

190. The same concerns prompted the Commission to use the wording "all relevant circumstances" in the case of dissolution of a State, covered by article 23. The break-up of one State into several others creates delicate and complex situations in which account must be taken of all the parameters of the problems involved, so as to ensure an equitable apportionment. These parameters obviously include the one covered by article 19, namely the proportion between the State debts and State property that pass. However, in that case other parameters must also be taken into consideration.

ARTICLE 20. (Newly independent State)

Oral comments

1979

191. A number of representatives supported the provision set forth in article 20. It was said that the article had rightly been based on the "clean slate" principle and that it did not exclude the possibility of an agreement freely arrived at between the predecessor and the successor States. Appreciation was expressed for the Commission's efforts in drafting this positive article. Nevertheless, in the view of some representatives the article should have provided in more direct terms that no debt of the predecessor State would pass to the newly independent State, so as to ensure that the rule would not be open to possible interpretations.

192. One representative expressed his satisfaction that, on the basis of the principle of the permanent sovereignty of every people over its wealth and natural resources, which was a basic element of the right to self-determination, the Commission had decided to adopt as a basic rule the rule laid down in paragraph 1. However, the provision had been greatly weakened by the concluding part of the paragraph, which provided for an exception to

the rule in the case of an agreement between the two States. In view of the special circumstances in which the succession normally took place between a dominant State and a State that had been dominated, he could not see how such an agreement could be freely concluded on both sides. Even after independence, the effect of domination was still felt, and the consent of the successor State in such circumstances could not be regarded as freely given. He hoped that the Commission could study that aspect of the question further in the light of the dominant position of the predecessor State, the different levels of development of the two States, the natural incapacity of the successor State to assume financial burdens resulting from the action of the predecessor State alone without the former's participation, the need to avoid, in the interests both of creditors and of the community as a whole, any adverse effect on the already unfavourable economic situation of a weak country, and the requirements of the new international economic order. Although paragraph 2 of article 20 already provided some protection against excessive claims by the predecessor State, the best protection remained the rule that no State debts should be passed.

193. Other representatives recognized that succession of newly independent States was a distinct type of State succession. In this connection, it was said that the political considerations put forward in support of the rule laid down in article 20 were justified and that the interrelationship between the economic, political and legal factors had been duly reflected; the references to General Assembly resolution 31/158, on the debt problem of developing countries, were likewise relevant. It was also stated that problems of succession in the matter of State debt might be prolonged for decades if the automatic passing of such debt to the newly independent State prevented the latter from achieving real independence. Furthermore, the assumption of State debts by a newly independent State would be incompatible with that State's right to receive compensation for the exploitation of its resources by the colonial Power. That right had been affirmed in the Declaration on the Establishment of a New International Economic Order and in the Charter of Economic Rights and Duties of States[29] and had been proclaimed for the first time at the First Conference of Heads of State or Governments of Non-Aligned Countries, held at Belgrade in September 1961. The assumption of State debts by newly independent States was also incompatible with the legal obligation of the industrialized States to provide assistance to newly independent States. The opinion was also expressed that, considering the scope of the draft articles as a whole, they would be applied most widely mainly in the relations between strong countries and the weak countries that had formerly been colonies or protectorates. In view of the special nature of those relations, it might have been more to the point in that context to deal with the question not in terms of succession of States, but in terms of a mere restoration of rights which did not involve any passing of debts. It was unreasonable that the predecessor State, having profited for decades from the natural and human resources of the successor State, should be allowed to pass on its debts to that State at the very time when, weakened by the colonial experience and the cost of fighting for its independence, it most needed aid and support.

194. Also with reference to article 20, one representative, for whom the position of newly independent States was a particularly interesting aspect of succession, considered that the practice of States that had been analysed appeared to deal extensively with French colonial practice, and to a lesser extent with Belgian, Netherlands and Spanish colonial practice, but much less with British colonial practice, except for a few countries in Asia which had gained their independence in the 1940s and 1950s. There was some difference between those administrative practices; for example, British colonial territories were considered separate administrative units and were largely fiscally autonomous. Consequently, all borrowings by British colonies were made by the colonial authorities and constituted charges on colonial revenues alone. When British colonial territories had needed capital it was raised by the colony itself, under the *Colonial Loans Act* or the *Colonial Development and Welfare Act*, from the World Bank or from the London or local stock markets. Accordingly, in those instances, there was no question of succession to State debts as defined in the draft articles, since the debts were debts not of the predecessor State but of the colonial territory itself. When his country had acceded to independence in 1962, its public debt had consisted of financial obligations under the 1877 *Colonial Stock Act* to the World Bank and to local natural or juridical persons. Those financial obligations had been honoured after independence, and legislation had been enacted just prior to independence to secure that aim, especially in the case of inscribed stock under the *Colonial Stock Act*. It therefore appeared that British colonial practice differed from that of other colonialist countries and, consequently, draft article 20 would have little direct consequence for countries such as his. In its report, the Commission itself acknowledged that, in the light of British colonial practice, such local debts might fall outside the scope of the draft articles concerned with the debts of the predecessor State.[30]

Paragraph 2

195. One representative emphasized that paragraph 2 incorporated two modern concepts favoured by developing countries: the permanent sovereignty of every people over its wealth and natural resources, and the fundamental economic equilibria of newly independent States. In this connection, reference was made with approval to paragraphs (39) and (60) of the commentary to article 20. In the opinion of another representative, however, it would be appropriate to broaden the scope of paragraph 2, as it was difficult to establish the meaning of the words

[29] General Assembly resolution 3201 (S-VI) of 1 May 1974, and General Assembly resolution 3281 (XXIX) of 12 December 1974, respectively.

[30] See *Yearbook ... 1979*, vol. II (Part Two), p. 63, para. (38) of the commentary to article 20.

"endanger the fundamental economic equilibria of the newly independent State".

1980

196. In the opinion of one representative, the article did not seem well balanced.

197. Another representative considered that *paragraph 1* was far from clear and lent itself to various interpretations; the text should therefore be recast.

198. In the view of another delegation, *paragraph 2* raised unnecessary questions which might limit the freedom of action of newly independent States, something that appeared to conflict with the intention of the rest of the draft.

199. Another representative considered that the question of the debts of a newly independent State was a very complicated one and, in dealing with it, that State's right to development must be taken into account and linked with the establishment of the new international economic order. The developing countries' external debt burden should be reduced by the utmost; he therefore proposed that the words "to ensure that the normal development of the newly independent State will not be affected by excessive indebtedness" should be added after the words "the fundamental economic equilibria of the newly independent State" in paragraph 2.

Written comments

200. *Czechoslovakia* fully supports both paragraphs of article 20. In particular, it welcomes the protective provisions contained in paragraph 2.

201. *Austria*, on the other hand, takes the view that article 20 goes beyond reasonable protection of the interests of the newly independent State by failing to draw any distinction between different categories of State debts and by proposing a rule which, in its opinion, has not been confirmed by the practice of States over the past twenty years. The Government of Austria considers that to adduce arguments based on the "weak financial capacity" of the newly independent State or relief or total cancellation of debts is out of place in the context of succession of States. Such considerations pertain to the realm of economic aid or the establishment of a new international economic order. Accordingly, local "*or*" localized debts should, in principle, pass to the newly independent State.

OPINION OF THE SPECIAL RAPPORTEUR

202. The Special Rapporteur regards the Commission's draft article 20 as sufficiently well balanced. The misgivings expressed by some representatives who fear that the predecessor State might profit from its dominant position and impose on the newly independent State a one-sided agreement under the terms of paragraph 1 of article 20 are all the more justified in that they have been considerably reinforced by the disappointing practice followed in the past twenty years of decolonization. It is a fact that, in general, the newly independent States have inherited a burdensome if not disastrous financial situation and have ruined themselves in their attempts to discharge a variety of debts which have been assigned to them and which they have not been able to reject. However, the Special Rapporteur does not advocate a further strengthening of the text of paragraph 1, which is the result of a painstaking compromise. He would point out that, in any case, the text of paragraph 2 makes it possible to protect the newly independent State quite adequately against excessively one-sided agreements.

203. On the other hand, in the view of the Special Rapporteur the comments of the Government of Austria appear to be inadmissible. First of all, it should be emphasized that draft article 20 relates to the State debt *of the predecessor State*, that is to say, a debt contracted by the Government of the colonial Power within the context of its *imperium* and its former *dominium* on the territory of the colony and of its political, economic, social or military strategy in that territory. Clearly, such debts cannot pass to the newly independent State, unless an agreement provides otherwise.

However, when the organs of the colony enjoy a significant degree of autonomy and when the purpose, utilization and benefit of the loans indicate that the debts corresponding to those loans have been contracted in the interest of the colony and *by* the "organs proper to the territory", it is less a question of State debts of the predecessor State than of "local debts", or rather of "debts proper to the territory" to which the succession of States relates. In such a case, it is only natural that those debts should pass to the successor State. Accordingly, it is the agreement between the predecessor State and the newly independent State that identifies and determines this category of debts and assigns them to the successor State. There is nothing in draft article 20 to prevent such an eventuality, which should satisfy the justifiable part of the concerns of the Government of Austria.

204. However, the Government of Austria maintains that the solutions put forward in article 20 relate not so much to the requirements of State succession as to the concerns regarding a new international economic order and a request for aid to the developing countries. That opinion betrays an erroneous conception of the international economic order. The latter is an indivisible whole, one that admittedly has its economic dimensions, but also its political, cultural, legal and other aspects. As the saying goes in French civil law, "You cannot give with one hand and take away with the other". It is not possible to pinpoint norms of international law to bring in a new international economic order and, at the same time, establish in matters of State succession more restrictive rules that contradict such norms. As for so-called "economic aid" to the third world, it has to be remembered that the latter has simply one perfectly legitimate claim, which is to obtain its due, in other words, fair remuneration for its raw materials, commodities and energy. Once this has been achieved, it is a safe bet that the third world will have no need whatsoever of economic "aid". Once the Group of 77 has recovered at the proper

price due to it all or part of the revenue taken away from it for so many years in the form of resources tapped by the industrialized countries, it will be able to build up the conditions for its own development and its own prosperity, without having to resort to this incorrectly named "aid", for on the one hand such aid merely gives back the unfair revenue of the industrialized countries, and on the other, gives back only a very small proportion of it.

205. One representative referred to the British colonial practice whereby colonial territories under the authority of the British Crown were regarded as separate administrative units and were "largely fiscally autonomous". The Special Rapporteur is grateful to that representative for enriching our knowledge of State practice and refers the reader to his comments in paragraph 194 above. Insofar as debts have been contracted by the "organs of the colony" and have benefited the territory, they should be assigned to the newly independent State, which is the solution suggested by the practice reported by that representative, for, in the opinion of the Special Rapporteur they are local debts proper to the territory. Account has to be taken, however, of the second requirement, which is the benefit actually derived by the territory, and does not seem to have concerned that representative, who thus echoes a practice which is far too favourable to the predecessor State. The "organs of the colony" which have contracted the loan in the name of the territory only belong to that colony by a legal fiction: they are, in reality, the representatives of the colonial Power in the territory. The financial commitments that they might have contracted during the discharge of their functions in the territory may have been dictated by considerations (for example, strategic or military considerations such as the construction of a military base in the colony) completely unrelated to that of the economic or social development of the territory to which the succession of States relates.

At all events, on this point, as on others, only an agreement between the predecessor State and the successor State can identify the debts that are proper to the territory to which the State succession relates and the debts which, although contracted by the predecessor State, have directly or indirectly benefited the territory.

206. One representative criticized the phrase "endanger the fundamental economic equilibria of the newly independent State" in paragraph 2 of article 20, the scope of which he would like to see widened. The Special Rapporteur is of the opinion that everything depends on the circumstances and that the phrase in question is indeed broad enough, where necessary, to allow the scope of article 20 to be widened and so satisfy all the considerations of equity and ensure that the economy of the newly independent State is not harmed by an intolerable volume of debts that bears no relation to the capacities of the various economic sectors of that State.

207. One representative expressed a wish for a more precise definition of the meaning of this expression in paragraph 2 by inserting the words "to ensure that the normal development of the newly independent State will not be affected by excessive indebtedness". For his part, the Special Rapporteur believes that such an insertion cannot fail to be beneficial, if the Commission agrees to it.

ARTICLE 21. (Uniting of States)

Oral comments—1979

208. In the opinion of one representative, article 21, paragraph 2, was likely to complicate the payment of debts to a third State, for the State, as a juridical person, could not be shown to be physically divisible for the purpose of attributing debt after the uniting of two or more States into one State.

Written comments

209. No written comments have been made on article 21, except by *Italy*, which takes the view that paragraph 2 is of very doubtful value in that it seems to relate to a matter of purely internal law.

OPINION OF THE SPECIAL RAPPORTEUR

210. As the Commission itself pointed out in paragraph (13) of its commentary to article 21,[31] it was perfectly aware that paragraph 2 may be regarded as unnecessary, since the paragraph relates to the purely domestic allocation of debt-servicing, the international aspect of the passing of debts being defined in paragraph 1. The Commission retained paragraph 2, however, because very often a component part of a successor State continues to be responsible for servicing the debt incurred by it as a State before it united with another State or States. If the possibility of an internal arrangement were not expressly indicated, as it is in paragraph 2, the creditors might experience difficulties in finding out who the debtor is.

211. This is the sole advantage of paragraph 2, which admittedly places us outside the actual succession of States, at a time when the succession has already taken place and the successor State may later have adopted internal legislation that is *not in conformity with the provisions of paragraph 1 of article 21.*

How does such a situation work out? Under the terms of paragraph 1, and if paragraph 2 did not exist, the successor State, and it alone, would be internationally responsible for payment of the debt of the predecessor States that formed the successor State. No special arrangement, based on subsequent internal legislation of the successor State, could have been invoked against the creditor third State. The latter could continue to regard the successor State as its debtor. The provision in paragraph 2, apart from the fact that it adjusts to actual circumstances and enables the creditor to identify his debtor, means that effects of international law are conferred on a provision of internal law adopted later by the successor State. It gives to internal law the sanction of international law simply because it is inserted in the draft.

212. Article 21 thus comprises two distinct and contradictory rules: the first designates the successor State as the State exclusively responsible for the debts of the predecessor States, on the basis of paragraph 1, and the second designates one or more predecessor States as

[31] *Ibid.*, p. 71.

responsible for all or part of those debts, on the basis of paragraph 2. It is true that the latter provision, which enunciates a straightforward and acknowledged right of the successor State, is lower down the scale than is the solution contained in paragraph 1. Legally, however, a *twofold passing* of debts is involved here. The debts are not *maintained* at the level of each of the predecessor States that was previously the debtor. First, they pass to the successor State under the terms of paragraph 1. Once that operation has been carried out, *and only after it has been carried out*, the debts can be passed back to the predecessor States, on the basis of paragraph 2. Indeed, the twofold passing is such that the successor State has the right to transfer *all* or *part* of the debt to any of its predecessor States. Theoretically, paragraph 2 allows it to assign all or part of the debt to one of its component parts, even if the component part was not the original debtor.

213. In the end, this leads to so many legal complications that the initial objective behind the wording of paragraph 2, namely to help the creditor third State identify its debtor and continue to hold the predecessor State responsible, may not be attainable. It may be inferred from paragraph 2 that the debtor of the creditor third State will be neither the successor State, nor even necessarily the predecessor State that was its original debtor, but possibly some other predecessor State that had dissolved in the union—simply because of the terms of the internal law of the successor State once the present draft articles open the door for such an eventuality. Having weighed the advantages and disadvantages of paragraph 2, the Special Rapporteur is finally of the opinion that the Commission might perhaps delete it.

However, if such were to be its decision, the Commission would have to revert to paragraph 2 of article 12, which is, in the case of State property, the counterpart of paragraph 2 of article 21, and the Commission would have to decide whether paragraph 2 of article 12 ought to be retained.

ARTICLE 22. (Separation of part or parts of the territory of a State)
and
ARTICLE 23. (Dissolution of a State)

Oral comments—1979

214. Some representatives expressed the opinion that article 22, paragraph 1, as drafted, could be interpreted to mean that the predecessor State could enter into agreements with the successor State which did not stipulate that an equitable proportion of the State debt of the former must pass to the latter. For one representative, that difficulty could be overcome by deleting the phrase "and unless the predecessor State and successor State otherwise agree". For another representative, the provision in article 22 also appeared to contradict the provision in article 18, paragraph 2, which allowed creditors to deny the effect of such an agreement. He suggested that the Commission should re-examine article 18, paragraph 2, in its relationship with article 22, paragraph 1, during its second reading of the draft articles.

Written comments

215. *Czechoslovakia* expresses the view that in articles 22 and 23 the Commission has proposed, in the cases of separation and dissolution, an automatic division of the debt and the passing of an equitable proportion thereof to the successor. The Government of Czechoslovakia fears that the question of the amount of the equitable share could, in the absence of agreement, lead to litigation between the parties. In such a situation, the position of the creditor would be made more difficult even in relation to the original debtor, because his claim against the latter would become a matter of litigation, at least in respect of the amount. Czechoslovakia also points out that the wording of article 22, paragraph 1, and that of article 23 are open to the interpretation that the predecessor State and the successor State can conclude an agreement which need not necessarily correspond to an equitable division of the debt. The question then arises as to whether such an agreement should apply in respect of a creditor.

OPINION OF THE SPECIAL RAPPORTEUR

216. In the opinion of the Special Rapporteur, the criticism expressed by representatives in the Sixth Committee in 1979 and in writing by the Government of Czechoslovakia with regard to the wording of articles 22 and 23, which could be understood as signifying that the predecessor State and the successor State can by agreement decide not to undertake an equitable apportionment of the State debt of the predecessor State, seems justified. Indeed, this interpretation can be reached by reasoning *a contrario*, but it was not the intention of the Commission when it adopted these two articles. Admittedly, by their own independent will two States could freely agree on any mutually acceptable solution, provided it paid due regard to the rights of the creditors. However, it is difficult to see how two States could conclude an agreement for an *in*equitable division of the debt, since one of the two States would inevitably be opposed to it. For this reason, it does not seem conceivable that the two contracting States would, by agreement, deliberately turn aside from an equitable apportionment or division of the debt. The procedure of "taking into account all relevant circumstances" would certainly not justify such a course of action. There is, consequently, good reason to remedy the defective wording of article 22, paragraph 1, and of article 23 in order to avoid this misinterpretation.

217. It is perfectly clear that, in the case of separation and dissolution, agreement between the predecessor State and the successor State, or among the successor States, depending on the circumstances, is necessary and even indispensable. It goes without saying that the conclusion of an agreement is still the normal procedure in such cases. Is it imperative that such an instrument should observe the rules laid down in articles 22 and 23? Certainly not, since (except in the special case of succession involving newly independent States) the Commission has been careful at all times to respect the independent will of States and to offer them rules of a residual nature. However, for the reasons stated in paragraph 214 above, this does not mean that, conversely,

the agreement can disregard the provisions of articles 22 and 23; because it would inevitably be rejected by one of the contracting parties, the agreement would never be concluded, if it failed to pay due regard to an equitable division of debts necessitated by the relevant circumstances surrounding the separation or dissolution.

Consequently, the agreement is not only indispensable but must also pay regard to the need to take into account equitably all the relevant circumstances. Hence, there seems to be absolutely no need to include the usual expression "unless (they) otherwise agree" in the two articles. Deletion of this phrase makes it possible to avoid the absurd solution that might be feared from an interpretation reached by reasoning *a contrario*.

PART [...]: STATE ARCHIVES

218. The Commission has already adopted articles A to F, dealing with succession of States in respect of State archives. These articles constitute a set, covering the definition of State archives (art. A) and each of the various categories of State succession (arts. B to F). The Special Rapporteur considers it advisable to supplement these rules by general provisions, as was done in the cases of State property and State debts. The new articles will provisionally be identified by capital letters G to K.

219. The Special Rapporteur also considers that State archives are fundamentally State property, but State property of a special nature. Logically, the rules drawn up for State property should be applicable to State archives. Indeed, the Special Rapporteur had initially envisaged examining succession to State archives as an example of succession to State property viewed *in concreto*. Justification for such a study could be found, in particular, in the existence of frequent, protracted and complex disputes between States concerning archives. But it is clear that, although they fall within the general category of State property, State archives have their own intrinsic characteristics which, in turn, impart a specific nature to the disputes they occasion and call for special rules. In order to provide better assistance in resolving such disputes between States, an attempt at drafting appropriate rules more closely adapted to specific cases is required.

220. In these circumstances, the Special Rapporteur is of the opinion that it is, first and foremost, the special rules which should apply to any succession of States in respect of State archives. He is not certain, however, that this precludes entirely the application of the general rules designed to resolve cases of succession of States in respect of State property viewed *in abstracto*. It ought always to be possible to turn to one of the rules relating to succession of States in respect of State property should it transpire, in a particular case, that the special rules are incapable of resolving a dispute concerning archives. In other words, the general rules on succession in respect of State property and the special rules on succession to State archives cannot and must not be contradictory. They can and must be complementary.

221. The Special Rapporteur proposes that, when the Commission decides on the final arrangement of the draft articles as a whole, the part relating to State archives should be moved. He does not wish to propose that it should be merged with the part relating to State property, since that would probably give rise to a number of problems concerning the general structure of the draft. He does, however, think it desirable that the part relating to State archives should come immediately after the part devoted to State property. That is why he has not given a number to the title of the part concerning archives.

222. If that is to be the general structure of the draft, it will be necessary to include in the part on State archives a few introductory articles by way of the general provisions, in keeping with the procedure already followed by the Commission in the part relating to State property and State debts. The Special Rapporteur therefore proposes the articles set out below. He is fully aware that the effect of this proposal is to accentuate the specificity of the subject of State archives by comparison with that of State property, for the general provisions concerning the latter (articles 4 to 9) could have applied automatically to the case of State archives. For this reason, he believes that, in order to avoid creating too great a difference between the two sets of rules, the provisions concerning archives should be very similar to those concerning property already adopted in articles 4 to 9.

SECTION 1. GENERAL PROVISIONS

DRAFT ARTICLE G. (Scope of the articles in the present Part)

223. Article G, which is purely and simply the counterpart of article 4, concerning State property, reads as follows:

Article G. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State archives.

Like article 4, and article 15 defining the scope of the articles in the part concerning State debts, article G is very necessary. It may, however, be thought that the wording does not meet the concerns set out in paragraphs 217 to 219 above. It could, indeed, give the impression of establishing an impenetrable barrier between the articles on State property and those on State archives, so that the combined effect of articles 4 and G is to preclude recourse, where necessary, to the provisions on State property to solve a particular problem in matters of State archives. The Commission might consider it less restrictive to add a complementary provision reading, perhaps, as follows:

> "The application of the articles in the present Part to the effects of a succession of States in respect of State archives shall be without prejudice to, and shall not preclude, the application to such matters, when necessary, of the articles in the Part relating to State property."

ARTICLE A. (State archives)

Oral comments

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224. A number of representatives supported the definition of State archives in article A. It was said in that connection that the definition was a well balanced one. Introducing the formula of *renvoi* to internal law and adding a new element contained in the words "and had been preserved by it as State archives" seemed a very appropriate way of completing the definition. Some representatives also agreed that the widest possible meaning should be given to the word "documents". That word, understood in its widest sense, would make any specific enumeration unnecessary. It was also said that the words "documents of all kinds" were sufficiently clear. Inevitably, there would be cases where the categorization would become difficult, but an enumerative approach in the article would also be difficult and should be avoided. The commentary should perhaps refer in greater detail to cases which it was intended should be excluded from the meaning of the article. It was further stated that the definition was acceptable, since equity was preserved by the supplementary rules concerning reproduction and fair compensation.

225. Certain representatives agreed with the Commission's opinion that it was not an easy matter to define State archives. It was said in that connection that due care should be taken to ensure the preservation of archives and their transmission to the successor State, which had over them a fundamental right inherent in national sovereignty.

226. Some representatives expressed reservations on article A. It was said that the article required further study. Also, in the opinion of one representative, the Commission should consider revising the definition, which had been the subject of reservations by some of its members. There should be an international definition of archives; once it was established, independently of the internal law of States, what archives were, there could be reference to internal law in determining which of the existing collections in a given country belonged to the State and therefore became subject to the rule of succession. He considered that the Commission also took that view, according to paragraph (1) of its commentary to article A.[32] That view likewise seemed to be reflected in the first part of article A, but not in the last part: "and had been preserved by it as State archives". Thus, if the article had been intended to embody the view he had outlined, it did not appear to do so, for the text seemed to provide in a contrary sense, since the documents preserved by a State as State archives were surely those regarded as such in its internal law. Moreover, if the current text was accepted, it might not cover collections which might be held in State museums or libraries but which, not being preserved as State archives—a concept that was not defined—might not be covered by article A. He therefore wondered whether the last part of article A fulfilled its purpose. He was confident that the second reading of the draft articles would result in a text in line with the aim of establishing an international standard for archives that would make it possible to extract from the varied domestic legislations the substance of what was covered by the legal rule. In the view of another representative, it would be preferable to delete the reference to the internal law of the predecessor State from the definition in article A, since certain valuable historical and cultural documents might otherwise be held to fall outside its terms. Another representative considered that the definition still required much more elaboration before it could be considered fully satisfactory. On the one hand, as stated in the Commission's commentary itself, account should be taken of the fact that the concept of archives varied considerably, and that the content of State archives varied, in consequence, from one country to another. On the other hand, if the definition was not sufficiently accurate, the risk arose of confusing documents on facts, situations and persons concerning the territory which was the object of succession with works which had become part of the historical and cultural heritage of a country.

227. One representative noted that the definition had been given a very restrictive interpretation in the commentary. Although paragraph (3) of the commentary stated that the expression "documents of all kinds" was to be understood in its widest sense, and also that documents could be in written or unwritten form and made of a variety of materials, in paragraph (6) it was said that the expression excluded *objets d'art*, which might also have cultural value.[33] He saw no justification for making such an exception. If the expression "documents of all kinds" was to be interpreted in the widest sense, then applying the *sui generis* rule, all documents relating to the cultural heritage of a people, whether written or unwritten, should be regarded as falling within it. Moreover, a definition which excluded works of art and culture presupposed that all civilizations used only writing as their means of expression. Yet, in Africa, the cradle of civilization, documents had also been expressed through the medium of objects of art. He therefore trusted that the definition in its final form would include objects of art and culture, wherever they were housed. Had there been an international convention in force at the time it attained independence, his own country would have been able to recover most of its valuable works of art and culture; he wished to spare other countries the same sad experience as his own when they attained independence. It was also said that the definition should include inscriptions on wood and stone. For the sake of clarity, it would perhaps have been better to define clearly all the various types of document envisaged, instead of using the words "of all types", and then to have made a clearer elaboration in the commentary of what was meant.

228. One representative thought that the definition could cause confusion in its reference to "documents of all kinds". In paragraph (3) of the commentary on the article, the Commission pointed out that the words "documents of

[32] See *Yearbook ... 1979*, vol. II (Part Two), pp. 79–80.

[33] *Ibid.*, p. 80.

all kinds" should be understood in the widest sense, and it was added that an archival document was anything that contained "authentic data which may serve scientific, official and practical purposes", whether or not in written form. In addition, tapes, drawings and plans, containing no writing, could also be archival items if a more general term than documents was introduced. There could be still more room for confusion if it was remembered that in paragraph (6) of the commentary it was specifically pointed out that the term "documents of all kinds" excluded objects of art, which might also have cultural and historical value. Other observations in the commentary and, more specifically, the reproduction in paragraph (8) of article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, tended to suggest that what was had in mind as archives were indeed "documents" in a broad sense.[34]

229. In the opinion of another representative, who reserved his position on the article, it was very clear that article A should specify that it referred to State property within the meaning of article 5 of the draft. Again, as the question of determining whether documents were State archives depended, not on what they contained or represented, but on the manner in which they were kept, it might be better to define such State property as documents of any kind which, on the date of the succession of States, were owned by the predecessor State in accordance with its internal law and constituted State archives by virtue of what they contained or represented or the manner in which they were kept.

230. One representative stressed that, in dealing with State archives, it was important to distinguish between two main categories of documents, each of which called for separate treatment: documents of practical importance for the administration of the successor State, which should be handed over to that State, and documents that could be of historical interest to both the successor and the predecessor State, and which might therefore give rise to dispute. Documents in the second category should be treated in the same way as other cultural property, and it would therefore be desirable to study the question in the light of the work being carried out on the cultural property of newly independent States. Modern methods of reproduction made it easier to reach compromise solutions on the transfer of State documents. In the view of another representative, the scope of the draft articles devoted to archives 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.

231. Another representative doubted that the definition could be adopted as final because of its vagueness and ambiguity; he would prefer a definition consisting of as complete a list as possible of the various fields of activity, to be included in article 2. A similar definition could also be considered for State property, if that term did not have the same meaning in the various legal systems in the world.

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232. Several representatives expressed misgivings about the definition of State archives contained in article A and hoped that it would be redrafted on second reading. In the view of one representative, the definition could have been clearer and more precise. It would have been better to omit the reference to the predecessor and successor States and to define State archives as "the collection of documents, irrespective of their kind or date, belonging to a given State". Such a definition would be more in conformity with the concept of State archives as referred to in articles B, C, D, E and F. Another representative considered that more particulars should be given of the nature of the documents referred to, such as maps and so forth.

233. One representative said that at the previous session his delegation had expressed approval of article A because it had considered the definition of the term "archives" satisfactory for the purposes of newly independent States. However, his delegation had also expressed doubts about the usefulness of including further provisions on State archives relating to other types of State succession. He added that it was hard to accept the proposed definition for the other cases considered in articles C, D, E and F, since the real meaning of the second requirement of the definition, embodied in the words "and had been preserved by it as State archives", was difficult to perceive because of the very complex legal issues to which that requirement gave rise. That part of the definition seemed to be based on a circular argument, and was therefore not satisfactory.

234. One delegation reaffirmed the reservation it had made in 1979 with regard to the definition of State archives. It continued to believe that the Commission should examine the concept further, in order to avoid a situation in which the same treatment was accorded to documents dealing with facts, situations and persons linked to the territory which was the subject of the succession as to documents which served only indirectly to facilitate normal administration of the territory but which deserved to be classified in the category of works of art forming part of the historical and cultural heritage of the country in whose territory they were situated.

In the opinion of another representative, to define "State archives" as "the collection of documents of all kinds" would be to leave out historical *objets d'art* which were not documents but were highly cherished by a newly independent State because they represented the civilization and characteristics of its people. Perhaps consideration could be given to broadening the definition of State archives to include not only "the collection of documents of all kinds", but also "other records and cultural *objets d'art* which reflect historical development". If it was difficult to include historical and cultural *objets d'art* in the part on State archives, then the part on State property should contain the necessary provisions on their disposal. Another important question was that of the

[34] *Ibid.*, p. 81 and footnote 438.

restitution of *objets d'art* to their original owners. In drafting the articles on succession to State archives, the Commission should give full attention to that point.

Written comments

235. *Czechoslovakia* was of the opinion that the expression "documents of all kinds" employed in article A was too vague and required more precise definition and that a clearer distinction must be drawn between State archives and other categories of State property.

It also felt that it would be necessary during the second reading to draw a clearer distinction between two categories of documents which, together, constituted State archives in the broadest meaning of the term: namely, between documents of an administrative character—which were essential for the administration of the territory involved in the succession of States—and documents which were predominantly of cultural or historical value. In the case of the former category, it was possible to benefit substantially from modern reproduction techniques, which might influence the thrust of the pertinent rules, but no such possibility existed for the second category.

236. *Italy* said that the Commission should be very careful to distinguish the problems of archives in the traditional sense of the term (namely, collections of documents) from those of works of art. That distinction, while clear enough in itself, might in certain practical cases become difficult in relation to the kind of documentation that the history of a given civilization had produced.

237. *Austria* was of the opinion that the residual nature of the Commission's rules became more apparent than ever in the case of State archives, where no provision, with one exception, would eliminate deviation by agreement between the States concerned. Austria therefore inclined to the view that, with the possible exception of the provision relating to newly independent States, the articles on State archives added little to the draft as a whole and should simply be deleted.

238. If, however, the Commission deemed it absolutely essential to retain the provisions on State archives, the contents and wording must be carefully reviewed. The definition of the term "State archives" contained in article A, while in principle acceptable in the case of article B, seemed inappropriate for the other articles proposed. It should therefore be thoroughly reviewed so as to establish beyond doubt the scope of the provisions that followed.

239. *The German Democratic Republic* felt that, in view of the distinct nature of State archives, which, on the one hand, formed part of State property in general and, on the other, might also be national culture property, it would be appropriate to place the provisions on State archives after article 14, as Part III. That Part III should then be followed by the rules concerning State debts, which would comprise Part IV.

With regard to the definition of the term "State archives" contained in article A, the German Democratic Republic hoped that the Commission would pay greater heed on second reading to the fact that such archives included both historical archives and administrative archives. The insertion in article A of a distinction between the two would ensure greater conceptual clarity in article B, paragraph 1; article C, paragraph 2; article E, paragraph 1; and article F, paragraph 1, with regard to archives passing to the successor State.

OPINION OF THE SPECIAL RAPPORTEUR

240. The first point to be made is that the Commission was not trying to provide a hard and fast definition of State archives; it adopted the definition very tentatively and drew the attention of Governments to that fact in the hope that they would help to improve the provision.[35] If it had been able to devise an international definition of State archives without referring to internal law, the Commission would have been as pleased as the representatives who called on it to do so. However, international law contains no independent criterion for the identification of State archives. Consequently, defining State archives, like defining State property, inevitably seems to require a reference to the internal law of the State. It is moreover, desirable to have a definition of State archives that is as close as possible to that of State property. In this respect, the fact that the property or archives belong to the predecessor State according to its internal law is an element that makes for similarity between the two definitions.

241. The second condition in article A is not the fact that they belong to the archives of the predecessor State, but that they are preserved by that State as State archives. The two conditions are therefore cumulative. Paragraph (1) of the commentary to article A gives the following description of the reasons why the Commission decided to include the second condition in the present text:

> The second condition . . . is not qualified by the words "according to its internal law". By detaching this second element from the internal law of a State, the Commission attempted to avoid an undesirable situation where certain predecessor States could exclude the bulk of public papers of recent origin—the "living archives"—from the application of the present articles simply because they are not designated under their domestic law as State archives. It should be pointed out that in a number of countries such "living archives" are not classified as "State archives" until a certain time, for example 20 or 30 years, has elapsed.

242. After the remarks by representatives on the Sixth Committee and the written comments of Governments, the Special Rapporteur is no longer altogether certain that the Commission has actually succeeded through the present wording of article A in achieving its very laudable objective. It is true that succession may have no effect on contemporary political or administrative archives—those which are also known as "living archives"—unless care is taken to draft article A appropriately. In this respect, the second condition imposed by the article (that of having been "preserved by it as State archives") may produce the opposite of what is intended. Under the internal law of some countries, contemporary political or administrative documents are not legally classed and preserved as "State archives" until 15, 20 or even 30 years have elapsed. Hence, a whole range of papers of the utmost importance

[35] *Ibid.*, p. 81, para. (11) of the commentary to article A.

may be excluded from succession on the basis of a particular interpretation of the second condition.

243. There is a further reason why the Special Rapporteur has doubts about the advisability of maintaining the second condition. The predecessor State may have entrusted cultural or historical archives of great value to another State or foreign institution, on protracted deposit or for the purposes of a lengthy travelling exhibition. If a succession of States occurs during that period, can it be said that the archives in question "*are preserved*" by the predecessor State when they are no longer within its territory? Admittedly, in archival terminology the notion of "conservation" is not tied in with any idea of "situation", but is it certain that article A will be interpreted in that sense?

244. For the above reasons, the Special Rapporteur urges the Commission to consider the possibility of doing away with the second condition, something which would have the added advantage of making article A, defining State archives, an exact replica of article 5, defining State property.

245. Mention was also made of a need to give as broad a definition as possible of State archives, so as to encompass all documents. It was suggested in this respect that the types of archives should be enumerated in article A. In the view of the Special Rapporteur this would be unwise, for lists are never exhaustive and anything that might be overlooked or omitted could well be considered as unaffected by State succession. As for the criticism that the current definition is not broad enough, the Special Rapporteur believes that, on the contrary, the wording of article A does in fact meet the concern to include all types of document, of whatever nature. Furthermore, the commentary explains clearly what is meant by the term "documents of all kinds": documents, whether written or not, of whatever material—paper, parchment, fabric, stone, wood, glass, ivory, film, etc.; of whatever subject matter—scientific, literary, journalistic, political, diplomatic, legislative, judicial, administrative, military, civil, ecclesiastical, historical, geographical, financial, fiscal, cadastral, etc.; of whatever nature—manuscripts, printed works, drawings, photographs, originals or copies, sound recordings, etc.

246. The most the Special Rapporteur feels he can do is to suggest that the Commission should study the possibility of deleting the words "the collection of" from the phrase "means the collection of documents of all kinds". It is possible that the word "collection" ("*ensemble*") may not adequately convey the intention of encompassing all State documents, in so far as it calls to mind the image of a "collection" in the physical sense, and may therefore exclude from succession individual or specific documents which are not interconnected and do not of themselves constitute a complete set of archives. To the Special Rapporteur, this is not a question of fundamental importance.

247. Many countries stressed the need to distinguish between administrative archives and cultural or historical archives. The Special Rapporteur is not sure that it would be helpful to make distinctions of this kind in article A, for a definition should be general in scope. The distinctions in question might find a better place in the latter articles, as is in fact the case.

248. As far as works of art are concerned, it seems to the Special Rapporteur that the Commission cannot make any express mention of such matters in article A. The problem is linked to the internal law of each State. Depending on the country, the "State archives" may or may not include works of art, such as curios, valuable ancient manuscripts, illuminations, medal collections, etc. The commentary to article A is very explicit on this point. Such works of art are to be treated in the same way as actual documents when they have been defined by the internal law of the predecessor State as State "archives".

Naturally, the absence of such a definition in no way implies that works of art such as paintings, statuettes, sculptures, icons, the contents of collections, etc., are excluded from succession. As "State property", works of art of these kinds will be affected by a succession of States as specified in the articles governing State property. It is in any case clear that, all questions of the internal law of States aside, paintings by the great masters have nothing in common with the papers or documents that make up "State archives". They can only be governed by that part of the draft that deals with succession in respect of State property.

DRAFT ARTICLE H. (Rights of the successor State to State archives passing to it)

249. The Special Rapporteur submits for the consideration of the Commission a draft article H, which is modelled on article 6, concerning the rights of the successor State to State property passing to it. On the whole, the article is in no way unusual. It reads as follows:

Article H. Rights of the successor State to State archives passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State archives as pass to the successor State in accordance with the provisions of the articles in the present Part.

250. The Special Rapporteur would, however, like to draw attention to a problem which has no equivalent with respect to State property, the latter being, by definition, irreproducible. It is open to question whether article H is altogether correct in cases in which one of the States involved in the succession is granted the right to copies of State archives. A State which holds copies has rights over them. Should it wish, for example, to offer them against valuable consideration for use or display in the making of a film or for artistic purposes, can it be said to possess a copyright or anything of that nature, in the same way as the State holding the original of the document? The Special Rapporteur is not sure that this is simply an academic question. He wonders, therefore, whether the Commission might not consider it useful to insert in article

H a clause of the following kind: "subject to the rights held by the State which obtains a copy of such State archives".

DRAFT ARTICLE I. (Date of the passing of State archives)

251. This article, which is the counterpart of article 7, concerning the date of the passing of State property, reads as follows:

Article I. Date of the passing of State archives

Unless otherwise agreed or decided, the date of the passing of State archives is that of the succession of States.

To provide that State archives shall pass on the date of the succession of States may, at first sight, appear ill-advised. It may even be thought unreasonable, unrealistic and illusive, inasmuch as archives generally need sorting in order to determine what shall pass to the successor State, and that sometimes requires a good deal of time.

252. In reality, however, archives are usually well identified as such and quite meticulously classified and indexed. They can be transferred immediately. Indeed, State practice has shown that this is possible. The "*immediate*" transfer of the State archives due to the successor State has been specified in numerous treaties. Such archives should be transferrred "*without delay*" according to: (*a*) article 93 (concerning Austria) of the Treaty of St-Germain-en-Laye of 10 September 1919,[36] (*b*) article 77 (concerning Hungary) of the Treaty of Trianon of 4 June 1920,[37] and (*c*) articles 38 and 52 (concerning Belgium and France) of the Treaty of Versailles of 28 June 1919.[38] Provision was also made for the "*immediate*" transfer of archives in article 1, sub-paragraph (2)(*a*), of General Assembly resolution 388 (V) of 15 December 1950, concerning the position of Libya as a successor State.

253. It is, furthermore, necessary to make the date for the passing of State archives the date of the succession of States, even if delays are granted *in practice* for copying, microfilming, sorting or inventory purposes. It is essential to know that the date of the succession is the date on which the successor State becomes the owner of the archives that pass to it, even if practical considerations delay the actual transfer of those archives. It must be made clear that, should a further succession of States affecting the predecessor State occur in the meanwhile, the State archives that were to pass to the successor State in connection with the first succession of States are not affected by the second such event, even if there has not been enough time to effect their physical transfer.

254. Lastly, it should be pointed out that the rule concerning the passing of the archives on the date of the succession of States is tempered in article I by the possibility open to States at all times to agree on some other solution and by the allowance made for whatever may be "decided"—for example, by an international court—contrary to the basic rule. As a matter of fact, quite a number of treaties have set aside the rule of the immediate passing of State archives to the successor State. Sometimes the agreement has been for a period of *three months* (as in article 158 of the Treaty of Versailles)[39] and sometimes *eighteen months* (as in article 37 of the Treaty of Peace with Italy of 10 February 1947,[40] which required Italy to return within that period the archives and cultural artistic objects "belonging to Ethiopia or its nationals").

It has also been stipulated that the question of the handing over of archives should be settled by agreement "*so far as is possible, within a period of six months* following the entry into force of [the] Treaty" (art. 8 of the Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany concerning various frontier areas).[41]

One of the most precise provisions concerning time limits is article 11 of the Treaty of Peace with Hungary, of 10 February 1947,[42] it sets out a veritable calendar for action within a period of *eighteen months*.

In some instances, the setting of a time limit has been left to a joint commission entrusted with identifying and locating the archives which should pass to the successor State and with arranging their transfer.

DRAFT ARTICLE J. (Passing of State archives without compensation)

255. Article J, which is the counterpart of article 8, concerning the passing of State property *without compensation*, is worded as follows:

Article J. Passing of State archives without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives to the successor State shall take place without compensation.

It would, in fact, be more precise to speak in each case of "*gratuitousness*", in the sense of "without payment". Article 8, like article J, refers only to "compensation", or reparation in cash or in kind (provision of property or of a collection of archives in exchange for the property or archives that pass to the successor State), but the notion of "gratuitousness" is broader, in the sense that it not only precludes all compensation but also exonerates the successor State from the payment of taxes or dues of whatever nature. In this case, the passing of the State property or archives is truly considered as occurring "*by right*", entirely free and without compensation.

[36] *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 361.

[37] *Ibid., 1920* (1923), vol. CXIII, p. 518.

[38] *Ibid., 1919*, vol. CXII, pp. 29–30 and 52.

[39] *Ibid.*, p. 81.

[40] United Nations, *Treaty Series*, vol. 49, p. 142.

[41] *Ibid.*, vol. 508, p. 154.

[42] *Ibid.*, vol. 41, p. 178.

Article J is justified by the fact that it reflects clearly established State practice. Furthermore, the principle of non-compensation or of gratuitousness is implicitly confirmed in the later articles, which provide that the cost of making *copies* of archives shall be borne by the requesting State.

DRAFT ARTICLE K. (Absence of effect of a succession of States on third party State archives)

256. Article K, which is the counterpart of article 9, concerning the absence of effect of a succession of States on the third party State property, reads as follows:

Article K. Absence of effect of a succession of States on third party State archives

A succession of States shall not as such affect State archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Two eventualities are conceivable. The first is that in which the archives of a third State are housed for some reason within a predecessor State. For example, the third State might be at war with another State and have deposited valuable archives for safekeeping within the territory of the State where a succession of States occurs. Again, it might simply have entrusted part of its archives for some time, for example for restoration or for a cultural exhibition, to a State where a succession of States supervenes.

The second eventuality is that in which a successor State to which certain State archives should pass fails, for extraneous reasons, to have them handed over immediately or within the agreed time limit. If a second succession of States affecting the same predecessor State occurs in the interim, the successor State from the first succession will be considered as a third State in relation to that second succession. Those of its archives situated within the territory of the predecessor State which it has not by then recovered must remain unaffected by the second succession.

257. Clearly, article K will be of value only if the article on which it is so closely modelled, article 9, is retained. Everything depends on the Commission's decision concerning article 9 during the second reading of the draft.

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

ARTICLE B. (Newly independent State)

Oral comments

1979

258. A number of representatives expressed support for article B. It was said that article B dealt satisfactorily with cases in which State archives might be essential both to the predecessor State and to the successor State and, by their very nature, could not be divided. Modern technology made it possible to provide for their reproduction, which was very important to newly independent States. Often archives constituted a common heritage, not only for the predecessor State and the successor State, but in some instances for several successor States, as had been the case with the Latin American countries when they had achieved their independence from Spain. The large volume of historical archives kept in Spain at Seville represented a common heritage of Spain and Latin America and could not be divided among all the countries concerned. Those archives had, of course, always been accessible to researchers from the Latin American countries and, thanks to modern technology, could be reproduced. It was also said that article B was clear and that its various clauses expressed a proper balance of interests not only between the predecessor and successor States, but also with regard to the preservation of the cultural heritage of peoples.

259. Another representative, however, expressed some doubts about the equitable character of the solutions provided in article B and reserved his position, in the light of resolutions adopted by the General Assembly, the UNESCO General Conference and the Conferences of Heads of State or Government of Non-Aligned Countries on the restitutions to newly independent States of archives of a cultural and historical character.

260. One representative indicated that, since British dependent territories constituted separate administrative units, archives, at least those required for the normal administration of the territory, were already to be found in the territory at independence.

Paragraphs 1 and 2

261. One representative had difficulties with respect to the words "having belonged to the territory" in subparagraph 1(a) when read in conjunction with what was said in paragraph (5) of the commentary.[43] It did not seem appropriate to him to include the archives of such institutions as local missionary bodies or banks in that category. He therefore believed that there was a need for further consideration to be given to the precise nature of the relationship between the territory and the archives in question, which should form the precondition for the operation of the relevant part of draft article B. In the opinion of another representative, the words "having belonged to the territory", and "should be in that territory", in subparagraphs 1(*a*) and 1(*b*), and "of interest to the territory", in paragraph 2, were much too ambiguous to be included in a legal text. It was therefore necessary to formulate more explicit wording in order to minimize possible disputes over those criteria. If the scope of the draft articles was limited to official documents connected with administration, drafting difficulties would be reduced to some extent.

[43] *Yearbook ... 1979*, vol. II (Part Two), p. 82.

262. One representative expressed the view that the particularly delicate problem of documents relating to the *imperium* or *dominium* of the administering Power but of interest to the newly independent State had been tackled by reference to the concept of equity, a concept which was present throughout the draft and which came to the forefront in paragraph 2. That was a good way to deal with the problem, and therefore the wording of the provision would be accepted. Another representative did not share the opinion expressed in paragraph (17) of the commentary to article B[44] and believed that documents of primary interest to the newly independent State—documents in the economic, political and strategic fields and documents whose content might pose a threat to the sovereignty, independence or security of the newly independent State—should be transferred to it immediately. Furthermore, provision might be made for obliging the predecessor State not to utilize duplicates of those archives to promote acts of aggression and sabotage against the newly independent State.

Paragraph 6

263. Several representatives stressed the importance of paragraph 6. In that connection, some of them emphasized the just claim of former colonies to the return of objects belonging to their cultural heritage. It was also emphasized that the paragraph limited the freedom of negotiation of States in the interest of cultural development.

264. One representative, while agreeing entirely with the reference to the right of peoples to information about their history and to their cultural heritage, said he would go still further, since, in his view, all peoples had a right to the restoration of objects of their cultural heritage of which they had been despoiled. That right had already been recognized, under the Treaty of Versailles of 28 June 1919,[45] in connection with a part of Egypt's cultural heritage which had been found in Germany. Scattered throughout the world were many documents of great value to his country's cultural heritage. In some cases, those documents were well maintained and there was full access to them; in others, they were not treated with the degree of care they required. Very often the documents were of no use in the places where they were situated, since the languages in which they were written were not known in those places. There were no scholars to study them and ensure their scientific dissemination, nor a general public anxious to behold part of its national cultural heritage.

265. In the opinion of one representative, paragraph 6, as drafted, appeared to lay down a peremptory norm of international law. Although he accepted the principle that the people of a decolonized territory had a right to information about their history and their cultural heritage, he considered that the peremptory norm in article B, paragraph 6, was inappropriate, given the provisions of paragraph 2 of the same article. Another representative expressed the view that the words "the right of the peoples of those States to development, to information about their history and to their cultural heritage" were ambiguous. An attempt must be made to render the intended meaning in clear legal terms.

1980

266. In the opinion of one representative, subparagraph 1(*b*) of article B would be a little weak without a precise definition of State archives, since it provided for the passing to the newly independent State of archives required for normal administration of the territory. It would be more appropriate to refer to the passing of archives belonging to the territory of the successor State.

267. In the view of one representative, paragraph 2 assumed that archives belonging to the territory of the successor State might not be adequate for its proper administration and consequently allowed for appropriate reproduction of other parts of the archives of the predecessor State and, in particular, of archives of interest to the newly independent territory. Such archives were not necessarily of importance to the territory, and it would be sufficient for them to include any information of benefit to the territory. A distinction had been drawn between "benefit" and "interest" in paragraph 2. Another representative considered that the disposition of archives by mutual agreement was likely to give rise to greater difficulties in the case of the newly independent State than in the event of the dissolution of a State as provided for in article F.

268. One representative was of the view that the provisions of article B and, in particular, of paragraph 3, were consistent with the principle of equity and would facilitate the application of the rule *uti possidetis juris*, concerning the immutability of the frontiers inherited from the colonial era, which was of such importance to the OAU. Another representative thought that the predecessor State should be prepared to provide the newly independent State with the best available evidence of all documents from the State archives of the predecessor State, and he proposed that paragraph 3 should be amended accordingly.

Written comments

269. There were no objections to article B.

OPINION OF THE SPECIAL RAPPORTEUR

270. The Special Rapporteur believes that the wording of draft article B is satisfactory. There is only one comment which he wishes to discuss, namely that of the representative who sought to contrast paragraph 6 with paragraph 2 of the same article (see para. 265 above). The Special Rapporteur considers that paragraph 6 does indeed lay down a peremptory rule of international law. But that is in no way incompatible with the provisions of paragraph 2, which leaves the parties completely free to reach agreement amongst themselves, provided that the agreement permits each of them to "benefit as widely and as equitably as possible" from the archives. The Special Rapporteur can see no contradiction between the right of

[44] *Ibid.*, p. 83.

[45] Art. 153 (*British and Foreign State Papers, 1919* (*op. cit.*).

peoples to development, to information about their history and to their cultural heritage, as affirmed in paragraph 6, and the opportunity for those peoples to benefit as widely and as equitably as possible from the relevant archives, as prescribed in paragraph 2.

ARTICLE C. (Transfer of part of the territory of a State)

Oral comments—1980

271. In the elaboration of article C, the Commission had based itself on the provisions of various peace treaties but, being aware of the victor/vanquished relationship inherent in such instruments, had also sought, instead of relying exclusively on State practice, to find more equitable solutions. The delegation of Trinidad and Tobago supported that approach. The underlying principle in article C was that the part of the territory concerned must be transferred so as to leave the successor State as viable a territory as possible in order to avoid any disruption of management and to facilitate proper administration.

While agreeing with the substance of article C and considering its succinctness appropriate, the same delegation felt that certain ideas reflected in the commentary could be incorporated with beneficial effects in the article. For example, whereas article C stated simply that the predecessor and successor States should resolve the problem of succession to State archives by agreement, it was explained in paragraph (23), subparagraph (*d*), of the commentary that such agreement should be based on principles of equity and take into account all the special circumstances. It was stated explicitly also, in paragraph (22), that local administrative, historical or cultural archives owned in its own right by that part of the territory which was transferred were not affected by the draft articles, which were concerned with State archives, and that the predecessor State had no right to remove them on the eve of its withdrawal from the territory or to claim them later from the successor State.[46] The Commission might wish to consider whether those ideas should be incorporated not only in article C, but also in the provision relating to succession to State archives where the successor State was a newly independent State.

272. One representative referred to paragraph (13) of the commentary to article C, which contained a careful analysis of the problem that arose when the archives were situated in the territory of neither interested party.[47] In such a case, the responsibility of the predecessor State would stem from an obligation of result, in respect of which it would be sufficient to prove that the archives had not passed to the successor State.

273. Several representatives expressed approval of paragraph 1, noting with satisfaction that the Commission had, in article C, given precedence to settlement by agreement between the predecessor and successor States. In the light of that approach, one representative expressed his preference for the point of view expressed in paragraph (23), subparagraph (*d*), of the commentary to article C.

In addition, one delegation remarked that, in paragraph (6) of the commentary, the Commission had pointed out that almost all treaties concerning the transfer of part of a territory contained a clause relating to the transfer of archives.[48] Thus, the rule of international law was embodied mainly in the regulation of the matter by agreement between the predecessor and successor States. That delegation was, therefore, in favour of article C, paragraph 1. It felt that to go any further would be to risk not only conflict with a widespread practice, but failure to take account of the immense range of complex situations that existed in practice. It was often the case, for example, that succession to archives involved a number of successor States.

274. One representative pointed out that, in article C, the Commission had laid down the rules which would apply in the absence of agreement. Those rules were based on the administrative requirements of the predecessor and successor States and took into account both the successor State's responsibility for the administration of the part of the territory transferred and the predecessor State's duty to protect the interests of the successor State. In view of the importance of determining the specific principles underlying those rules, paragraph 1 should stipulate that the agreement must be based on the principles of equity and good faith—especially since the separation of a part of territory was not normally a voluntary act but usually a result of a war or of a peace treaty concluded following a war.

275. One representative emphasized that, in paragraph 2, the Commission had stated two fundamental principles: continuity in the administration of the transferred territory and interdependence between the archives and the territory.

276. Some representatives considered that the drafting of subparagraph 2(*b*) was satisfactory, since, in addition to administrative archives, the successor State would receive that part of the predecessor State's archives which concerned either exclusively or principally the territory to which the succession of States related. It was said in that connection that the "archives-territory" link should be more broadly interpreted and that account should be taken of the principles of "territorial or functional relevance".

277. A number of representatives indicated that they would prefer that subparagraph 2(*b*) make it obligatory for the predecessor State not only to hand over the archives in its possession but also to strive to obtain the transfer of such of the administrative, historical or other archives as were outside the territory. It was also said that all archives, whether situated outside or inside the territory in question, should pass to the successor State.

278. With regard to subparagraph 4(*b*), which provided that the successor State should make available to the

[46] *Yearbook . . . 1980*, vol. II (Part Two), pp. 19 and 18 respectively.

[47] *Ibid.*, p. 16.

[48] *Ibid.*, p. 12.

predecessor State, at the latter's request and expense, reproductions of documents from archives which had passed to it, the delegation of Egypt was of the opinion that account must be taken, on the one hand, of the need for the predecessor State to show valid reasons for requesting the documents, and, on the other hand, of the principle that the security and sovereignty of the successor State must not be imperilled. Since that involved an element of judgement on the part of the successor State, the principle of good faith also must apply in that case. Given the importance of State archives for the administration of the region affected, the draft article should also establish an obligation on the part of the predecessor State to permit those archives to be transferred at the same time as the territory.

Written comments

279. *The German Democratic Republic* was of the opinion that the principle contained in article C whereby the passing of archives should be settled by agreement between the predecessor and successor States was acceptable, since it represented an approach that was in keeping with the basic principles of international law, particularly the principle of the sovereign equality of States.

OPINION OF THE SPECIAL RAPPORTEUR

280. Unquestionably, the only possible basis for the settlement of disputes relating to archives on the occasion of the transfer of part of the territory of one State to another State is an agreement between those two States. There is a clear consensus on this point.

None the less, the wish was expressed that the Commission should include in article C, paragraph 1, the idea that such an agreement must be based on the principles of equity and take into account all the special circumstances of the case. While the Special Rapporteur has no objection to an addition, he wishes to point out that the situation covered by article C generally involves the transfer of a very small part of the territory of one State to another, the best example being that of a minor adjustment of the border between two States. In such a situation, the transfer of territory, which entails delimitation and demarcation, is generally impossible without an agreement in which the two States grant each other benefits and compensation. The very idea of an agreement between two neighbouring States on a minor border adjustment implies that the agreement will inevitably be based on equity and take into account all the special circumstances of the case.

281. One delegation took this situation so literally that it suggested that the Commission should limit article C to a single paragraph, paragraph 1, for it thought that to go any further would be to lose sight of the infinite variety of situations that might arise. The Special Rapporteur does not share this opinion: little would be gained by saying no more than that the solution lies in agreement between the parties. The result would be an article which lacked substance and which, since it would not lay down a rule in the proper sense of the term, it would be better to delete. The Commission would then have failed to give an adequate account of the situation in the event of transfer of part of the territory of a State. It would be impossible to tell what should, as a general rule, be done in the absence of an agreement.

282. The Commission was reproached with failing to give balanced consideration to the two principles of "territorial origin" and "territorial or functional relevance". The Special Rapporteur considers this criticism unjustified.

ARTICLE D. (Uniting of States)

Oral comments—1980

283. A number of representatives said that they had no objection to the text of article D, concerning the uniting of States, for it took due account of the voluntary nature of such uniting, which should suffice to ensure that the transfer of archives took place without any dispute. Paragraph 2 provided that any problems arising in the matter would be settled according to the constitution and the internal law of the successor State.

284. Other delegations said that the case of the uniting of States did not give rise to any major problems, for, as the Commission had pointed out in paragraph (6) of the commentary to article D,[49] when States agreed to constitute a union among themselves, it was to be presumed that they intended to provide it with the means necessary for its functioning and administration, and one of those means could be State archives.

285. One representative considered that the reason why the article did not give rise to any major problems was that the archives would in any case be in the hands of the successor State. It might be asked whether the problem did not relate solely to the internal law of the successor State; if so, it might be sufficient to retain only paragraph 1, since paragraph 2 might be regarded as an interference in the internal affairs of the successor State.

286. Some representatives doubted the usefulness of the article. In the opinion of one representative, article 12 should apply to archives, although even article 12 did not appear to be wholly necessary, since it merely stated in so many words what happened in any case. Under international law, at the moment when two States united their property passed to the successor State, but after that moment there was only one State where there had been two. Hence, international law could not apply, and the only law that could was internal law. However, the representative in question was not opposed to the inclusion of the article, for it did not damage the structure of the proposed instrument and might perhaps rule out any claims by third States.

287. Another representative considered that paragraph 2, in particular, merely referred to internal law a question that obviously could only be governed by that law. One

[49] *Ibid.*, p. 20.

representative hoped that the Commission would take a fresh look at article D, as there appeared to be a discrepancy between the text and the meaning given to it in the commentary. Paragraph (1) of the commentary indicated that whether the State archives of the predecessor States passed to the successor State would depend on the terms of the agreement of union or, if the agreement was silent on that point, on the internal law of the successor State,[50] whereas article D, paragraph 1, appeared to set out a general rule whereby, upon a uniting of States, the State archives should pass to the successor State.

Written comments

288. *Sweden* observed that paragraph 1 of article D provided that the State archives of the predecessor State would pass to the successor State, whereas it appeared from paragraph 2 that the internal law of the successor State would determine whether the archives should belong to the successor State or to its component parts. It noted that article 12 of the draft articles was worded in a similar manner.

While the Swedish Government agreed that the commentary to those articles gave some guidance as to their interpretation, it felt that the text of the articles made it difficult to understand the relationship between paragraph 1 and paragraph 2, which might even appear to be contradictory. It therefore suggested that the Commission should give further consideration to the best way of drafting article D and article 12.

OPINION OF THE SPECIAL RAPPORTEUR

289. Essentially, only two comments were made concerning article D: (*a*) there is a contradiction between paragraph 1 and paragraph 2 of the article; (*b*) there is a contradiction between the wording of the article and the corresponding commentary.

290. The first comment echoes what was said earlier concerning article 12, relating to succession to State property in the event of a uniting of States. Articles D and 12 have the same structure, and whatever solution is ultimately chosen for article 12 should also apply in the case of article D.

291. With regard to the second point, the contradiction between article D and the commentary to the article is only one of outward appearance. The commentary seeks to emphasize above all that the uniting States have sovereign power to decide on the fate of their archives either in the treaty establishing their union or in the internal law of that union. But, whatever the arrangements made *inter se* by the uniting States, or by the union in the "internal" context, the situation from the standpoint of international law remains that described in paragraph 1 of the article. Unless what is created is a confederation, the State archives pass, in the eyes of the international community and of international law, to the successor State, which is the only subject of international law left after the disappearance of the various predecessor States. But over and above this juridical situation which international law imposes on all States, account must be taken of objective reality. Paragraph 2 does this by referring to the possibility that the component parts of the union or the union itself may actually have taken other measures. However, it is perfectly clear that, from the standpoint of international law, it is the successor State—the only subject of international law—that incurs responsibility or must discharge obligations towards third parties with respect to the archives, even if the archives have not actually been surrendered to it by one or other of its component parts.

ARTICLE E. (Separation of part or parts of the territory of a State) *and*

ARTICLE F. (Dissolution of a State)

Oral comments—1980

Article E

292. One representative noted that, under subparagraph 1(*b*), not only the administrative archives but also that part of the archives which related directly to the territory to which the succession of States related would pass to the successor State. In his view, that concept was broader than the concept, mentioned in article C, of the archives concerning exclusively or principally the territory to which the succession of States related.

293. Another representative welcomed the fact that the passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, would, under paragraph 2, be determined exclusively by agreement between the predecessor State and the successor State, because it was impossible to formulate objective criteria in such a case. The principles on which such an agreement should be based were set out in paragraph 4 of the article.

294. One delegation endorsed the opinion expressed in paragraph (20) of the relevant commentary to the effect that, on second reading, the Commission might revise, the drafting of paragraph 5 to bring it into line with the text of paragraph 4 of article C.[51]

Article F

295. In the opinion of one representative, it would be necessary to amend *paragraphs 1, 3, 4 and 5* to bring them into line with the corresponding provisions of article E.

296. Another representative deemed it advisable to clarify the provision in *paragraph 6* of article F, since there was no reference in paragraphs 1 to 5 of the article to the question of the unity of the State archives of the successor States in their reciprocal interest.

[50] *Ibid.*

[51] *Ibid.*, p. 25.

Written comments

Articles E and F

297. *Sweden* observed that the draft articles drew a distinction between the two cases of State succession dealt with in articles E and F and the case of a newly independent State, which was dealt with in article B. Nevertheless, articles E and F seemed to be based on much the same principles as article B. In particular, paragraphs 2 and 4 of article E and paragraphs 2 and 4 of article F extended to the cases of State succession in question the provisions of paragraphs 2 and 6 of article B. Those provisions restricted the freedom of the successor State or of two successor States to conclude agreements with regard to archives of the predecessor State. According to paragraph 2 of articles B, E and F, an agreement between States regarding the passing (in articles B and E, also the reproduction) of archives which were of interest to the territory in question but did not pass to the successor State under paragraph 1 of the said articles should regulate the matter "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives". Furthermore, paragraph 6 of article B and paragraph 4 of article E and article F provided that agreements between the States concerned "shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage".

That meant that the validity of an agreement concluded between the predecessor State and the successor State, in the case dealt with in article E, or between the successor States concerned, in the case dealt with in article F, in regard to State archives of the predecessor State, would depend on whether it conformed to certain principles, which were all of a very general nature. To let such general principles take precedence over agreements concluded between independent States could hardly be justified and might lead to unnecessary disputes regarding the validity of the agreements concluded. In the case of a State succession that was not the result of decolonization, the contracting parties must be presumed to be independent States whose agreements about State archives should be given full legal effect. Sweden therefore suggested that the words "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives" in paragraph 2 of article E and article F, as well as the whole of paragraph 4 of each of those articles, should be deleted.

298. The *German Democratic Republic* considered as acceptable the principle contained in articles E and F that the passing of archives should be settled by means of an agreement between the predecessor and the successor States or between the successor States, as the case might be. In its view, that approach was in keeping with the basic principles of international law, particularly the principle of the sovereign equality of States.

299. *Austria* was of the view that the wording used in articles C, E and F to cover virtually identical situations varied for no obvious reason and should be harmonized.

OPINION OF THE SPECIAL RAPPORTEUR

300. The comments mainly followed two courses. On the one hand, calls were made for maximum harmonization of the provisions of articles C, E and F. On the other hand, it was said that States should not be restricted in their freedom to include whatever they wished in any agreements they concluded on archives.

301. With regard to the second comment, the Special Rapporteur appreciates the objective of the Swedish Government, which is so rightly concerned about the contractual freedom of States. He is, however, uncertain of the wisdom of complying with that Government's request to delete paragraph 4 of articles E and F as well as the phrase reading "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives" in paragraph 2 in both those articles. The agreements should conform to principles which are formulated here in the most general terms. The principles in question are the principle of equity (para. 2) and the principle of the right to development, to information and to the cultural heritage (para. 4). Being general, the principles provide States with general guidelines for concluding their agreements. There is no difficulty in complying with those guidelines, precisely because they are general, equitable, balanced and commonly acceptable and accepted. Hence they cannot be burdensome constraints for States acting in good faith and for the common good. Should some States find such equitable guidelines onerous and depart from them, the agreements they conclude are likely to be unsatisfactory. Such solutions are not to be encouraged within the international community.

302. The question of harmonizing articles E and F, or article C on the one hand and articles E and F on the other, deserves consideration. The Commission will without doubt devote all due care to that task, bearing in mind the differing situations involved in the three types of succession in question.