

**REPORT**  
**OF THE**  
**INTERNATIONAL LAW**  
**COMMISSION**  
**on the work of its thirty-third session**

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**4 May-24 July 1981**

**GENERAL ASSEMBLY**  
OFFICIAL RECORDS: THIRTY-SIXTH SESSION  
SUPPLEMENT No. 10 (A/36/10)



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New York, 1981

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word Yearbook followed by suspension points and the year (e.g. Yearbook ... 1977) indicates a reference to the Yearbook of the International Law Commission.

A typeset version of the report of the Commission will be included in Part Two of volume II of the Yearbook of the International Law Commission 1981.

(19 August 1981)

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\* \* \*

EXPLANATORY NOTE: EMPHASIS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the emphasis has been supplied by the Commission.



## CHAPTER I

### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-third session at its permanent seat at the United Nations Office at Geneva from 4 May to 24 July 1981.

2. The work of the Commission during this session is described in the present report. Chapter II of the report, on succession of States in respect of matters other than treaties, contains a description of the Commission's work on that topic, together with 39 draft articles constituting the whole draft on succession of States in respect of State property, archives and debts and commentaries thereto, as finally approved by the Commission. Chapter III on the question of treaties concluded between States and international organizations or between two or more international organizations contains a description of the Commission's work on the topic, together with 26 draft articles and commentaries thereto, as finally approved by the Commission at the thirty-third session. Chapter IV on State responsibility, chapter V on international liability for injurious consequence arising out of acts not prohibited by international law, chapter VI on jurisdictional immunities of States and their property and chapter VII on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, contain a description of the work of the Commission at its present session on each of those respective topics. Finally, chapter VIII deals with the second part of the topic of relations between States and international organizations and the programme and methods of work of the Commission as well as a number of administrative and other questions.

#### A. Membership

3. During the present session, the membership of the Commission was composed as follows:

Mr. George H. ALDRICH (United States of America)

Mr. Julio BARBOZA (Argentina)

Mr. Mohammed BEDJAOUI (Algeria)

Mr. B. BOUTROS GHALI (Egypt)

Mr. Juan José CALLE y CALLE (Peru)

Mr. Jorge CASTAÑEDA (Mexico)

Mr. Emmanuel Kodjoe DADZIE (Ghana)  
Mr. Leonardo DÍAZ-GONZÁLEZ (Venezuela)  
Mr. Jens EVENSEN (Norway)  
Mr. Laurel B. FRANCIS (Jamaica)  
Mr. S.P. JAGOTA (India)  
Mr. Frank X.J.C. NJENGA (Kenya)  
Mr. Christopher Walter PINTO (Sri Lanka)  
Mr. R.Q. QUENTIN-BAXTER (New Zealand)  
Mr. Paul REUTER (France)  
Mr. Willem RIPHAGEN (Netherlands)  
Mr. Milan ŠAHOVIĆ (Yugoslavia)  
Mr. Sompong SUCHARITKUL (Thailand)  
Mr. Abdul Hakim TABIBI (Afghanistan)  
Mr. Doudou THIAM (Senegal)  
Mr. Senjin TSURUOKA (Japan)<sup>1/</sup>  
Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics)  
Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland)  
Mr. Stephan VEROSTA (Austria)  
Mr. Alexander YANKOV (Bulgaria)

4. On 6 May 1981, the Commission elected Mr. George H. Aldrich (United States of America) to fill the casual vacancy caused by the resignation of Mr. Stephen M. Schwebel upon his election to the International Court of Justice.
5. At the 1688th meeting of the Commission, held on 10 July 1981, the Chairman stated that he had received a letter addressed to him from Mr. Senjin Tsuruoka in which he tendered his resignation from membership in the Commission. The Chairman announced that at a private meeting the Commission had taken note of the letter of Mr. Tsuruoka and that a letter had been sent to Mr. Tsuruoka informing him accordingly. In addition, the Chairman announced that, as had been requested by Mr. Tsuruoka, a letter had been addressed to the Secretary-General transmitting a copy of the letter of resignation.

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<sup>1/</sup> See para. 5 below.



## B. Officers

6. At its 1643rd and 1688th meetings, on 4 May and 10 July 1981, the Commission elected the following officers:

Chairman: Mr. Doudcu Thiam

First Vice-Chairman: Mr. Robert Q. Quentin-Baxter

Second Vice-Chairman: Mr. Milan Šahović

Chairman of the Drafting Committee: Mr. Senjin Tsuruoka  
later, Mr. Leonard Díaz-González

Rapporteur: Mr. Laurel B. Francis

7. At the present session of the Commission, its Enlarged Bureau was composed of the officers of the session, former Chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the present session. On the recommendation of the Enlarged Bureau, the Commission, at its 1650th meeting, on 19 May 1981, set up for the present session a Planning Group to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Enlarged Bureau appointed Mr. Robert Q. Quentin-Baxter Chairman of the Planning Group, which was composed as follows: Mr. Julio Barboza, Mr. Mohammed Bedjaoui, Mr. Laurel B. Francis, Mr. Frank X.J.C. Njenga, Mr. Christopher W. Pinto, Mr. Willem Riphagen, Mr. Milan Šahović, Mr. Abdul Hakim Tabibi, Mr. Nikolai A. Ushakov and Sir Francis Vallat.

## C. Drafting Committee

8. At its 1647th meeting, on 8 May 1981, the Commission appointed a Drafting Committee composed of the following members: Mr. George H. Aldrich, Mr. Mohammed Bedjaoui, Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Leonardo Díaz-González, Mr. S.P. Jagota, Mr. Frank X.J.C. Njenga, Mr. Paul Reuter, Mr. Abdul Hakim Tabibi, Mr. Nikolai Ushakov, Sir Francis Vallat and Mr. Alexander Yankov. Mr. Senjin Tsuruoka was elected by the Commission at its 1647th meeting as Chairman of the Drafting Committee. Upon his resignation from the Commission, the Commission, at its 1688th meeting, elected Mr. Leonardo Díaz-González Chairman of the Drafting Committee. Mr. Laurel B. Francis also took part in the Committee's work in his capacity as Rapporteur of the Commission. Members of the Commission not members of the Committee were invited to attend and a number of them participated in the meetings.

#### D. Secretariat

9. Mr. Erik Suy, Under-Secretary-General, the Legal Counsel, represented the Secretary-General at the session. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Eduardo Valencia-Ospina, Senior Legal Officer, acted as Deputy Secretary to the Commission. Mr. Andronico O. Adede, Senior Legal Officer, Mr. Larry D. Johnson and Mr. Shinya Murase, Legal Officers, served as Assistant Secretaries to the Commission.

#### E. Agenda

10. At its 1643rd meeting, on 4 May 1981, the Commission adopted an agenda for its thirty-third session, consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Succession of States in respect of matters other than treaties
3. Question of treaties concluded between States and international organizations or between two or more international organizations
4. State responsibility
5. International liability for injurious consequences arising out of acts not prohibited by international law
6. The law of the non-navigational uses of international watercourses
7. Jurisdictional immunities of States and their property
8. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
9. Relations between States and international organizations (second part of the topic)
10. Programme and methods of work
11. Co-operation with other bodies
12. Date and place of the thirty-fourth session
13. Other business.

11. The Commission held substantive discussions on all the items on its agenda with the exception of items 6, "The law of the non-navigational uses of international watercourses", and 9, "Relations between States and international organizations (second part of the topic)". In the course of the session, the Commission held 55 public meetings (1643rd to 1697th) and two private meetings (on 6 May and 7 July 1981). In addition, the Drafting Committee held 19 meetings, the Enlarged Bureau of the Commission five meetings and the Planning Group two meetings.

12. Owing to the time required to complete the second reading of the draft articles on succession of States in respect of State property, archives and debts, and to commence the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations, the Drafting Committee was unable to consider all the draft articles which had been referred to it during the present session relating to the latter topic as well as to other topics on its agenda. It should be understood, however, that the Drafting Committee remains seized of such articles and will consider them in the course of the thirty-fourth session of the Commission, unless the Commission at that session decides otherwise. The articles in question are the following: article 2, subparagraph 1 (h) and articles 27 to 41 of the draft articles on treaties concluded between States and international organizations or between international organizations; articles 1 to 5 relating to part 2 of the draft articles on State responsibility; articles 7 to 11 of the draft articles on jurisdictional immunities of States and their property; and articles 1 to 6 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

## CHAPTER II

### SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

#### A. Introduction

##### 1. Historical review of the work of the Commission

13. At its first session, held in 1949, the International Law Commission listed the topic "Succession of States and Governments" among the 14 selected for codification but did not give priority to its study.<sup>2/</sup> At its fourteenth session, held in 1962, the Commission decided to include that topic on its programme of work, in view of the fact that by paragraph 3 (a) of General Assembly resolution 1686 (XVI) of 18 December 1961 entitled "Future work in the field of codification and progressive development of international law", the General Assembly had recommended that the Commission should include "on its priority list the topic of Succession of States and Governments".<sup>3/</sup>

14. During its fourteenth session, at the 637th meeting, held on 7 May 1962, the Commission set up a Sub-Committee on the Succession of States and Governments, which it requested to submit suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation. The Sub-Committee consisted of the following 10 members: Mr. Lachs (Chairman), Mr. Bartoň, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin.<sup>4/</sup> The Sub-Committee held two meetings, on 16 May and 21 June 1962.<sup>5/</sup>

15. In the light of the Sub-Committee's suggestions, the Commission took some procedural decisions at its 668th and 669th meetings, held on 26 and 27 June 1962. It decided, inter alia, that the Sub-Committee should meet at Geneva in January 1963 to continue its work, the Secretariat should undertake specific studies,<sup>6/</sup> and the agenda for the Commission's fifteenth session should include the item "Report of the Sub-Committee on Succession of States and Governments".<sup>7/</sup>

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<sup>2/</sup> Yearbook of the International Law Commission 1949, p. 281, document A/925, para. 16.

<sup>3/</sup> Yearbook ... 1962, vol. II, p. 190, document A/5209, para. 60.

<sup>4/</sup> Ibid., p. 189, para. 54.

<sup>5/</sup> Ibid., pp. 189-190 and 191, paras. 55 and 70-71.

<sup>6/</sup> Ibid., pp. 191-192, para. 72.

<sup>7/</sup> Ibid., p. 192, para. 74.

16. The Secretary-General sent a circular note to the Governments of Member States, in accordance with the relevant provisions of the Commission's Statute, inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence etc., concerning the procedure of succession relating to the States which had achieved independence after the Second World War.<sup>8/</sup>

17. By its resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission should

"continue its work on the succession of States and Governments, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments, with appropriate reference to the views of States which have achieved independence since the Second World War."

18. The Sub-Committee on the Succession of States and Governments met at Geneva from 17 to 25 January 1963 and again on 6 June 1963, at the beginning of the International Law Commission's fifteenth session. On concluding its work, the Sub-Committee approved a report by its Chairman, which was annexed to the report of the International Law Commission on the work of its fifteenth session.<sup>9/</sup> The Sub-Committee's report contains its conclusions on the scope of the topic of Succession of States and Governments and its recommendations on the approach the Commission should adopt in its study. In the Yearbook of the International Law Commission, 1963, the Sub-Committee's report is accompanied by two appendices, reproducing respectively the summary records of the meetings held by the Sub-Committee in January 1963 and on 6 June of the same year, and the memoranda and working papers submitted to the Sub-Committee by Mr. Elias, Mr. Tabibi, Mr. Rosenne, Mr. Castrén, Mr. Bartoš<sup>V</sup> and Mr. Lachs (Chairman of the Sub-Committee).<sup>10/</sup>

19. The report of the Sub-Committee on the Succession of States and Governments was discussed by the Commission during its fifteenth session (1963), at the 702nd meeting, after being introduced by the Chairman of the Sub-Committee, who explained the Sub-Committee's conclusions and recommendations. The Commission unanimously approved the Sub-Committee's report and gave its general approval to the recommendations contained therein. The Sub-Committee proposed that the Commission should remind Governments of the Secretary-General's circular note,<sup>11/</sup>

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<sup>8/</sup> Ibid., p. 192, para. 73.

<sup>9/</sup> Yearbook ... 1963, vol. II, p. 260, document A/5509, annex II.

<sup>10/</sup> See Yearbook ... 1963, vol. II, pp. 262 and 282, document A/5509, annex II, appendices I and II.

<sup>11/</sup> See para. 16 above.

and the Commission gave instructions to the Secretariat with a view to obtaining further information on the practice of States. At the same time, the Commission appointed Mr. Lachs as Special Rapporteur on the topic of the succession of States and Governments.<sup>12/</sup>

20. The Commission endorsed the Sub-Committee's view that the objectives should be "a survey and evaluation of the present state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law". Several members emphasized that in view of the modern phenomenon of decolonization, "special attention should be given to the problems of concern to the new States". The Commission considered that "the priority given to the study of the question of State succession was fully justified" and stated that the succession of Governments would, for the time being, be considered "only to the extent necessary to supplement the study on State succession". Likewise, the Commission considered it "essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, State responsibility, and the succession of States". The Sub-Committee's opinion that succession in the matter of treaties should be "considered in connexion with the succession of States rather than in the context of the law of treaties" was also endorsed by the Commission. The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were agreed to by the Commission, it being understood that the purpose was to lay down "guiding principles to be followed by the Special Rapporteur" and that the Commission's approval was "without prejudice to the position of each member with regard to the substance of the questions included in the programme". The heading into which the topic was divided, were as follows: (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than treaties; (c) succession in respect of membership of international organizations.

21. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the topic of succession of States and Governments was proceeding satisfactorily, recommended that the International Law Commission should continue its work on the topic,

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<sup>12/</sup> See Yearbook ... 1963, vol. II, pp. 224-225, document A/5509, paras. 56-61.

"taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War."

22. At its sixteenth session, in 1963, the Commission adopted its programme of work for 1965 and 1966 and decided to devote its sessions during those two years to the work of codification then in progress on the law of treaties and on special missions. Succession of States and Governments would be dealt with as soon as the study of those two other topics and of relations between States and intergovernmental organizations had been completed.<sup>13/</sup> Consequently, the Commission did not consider the topic of succession of States at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions. In 1966, the Commission decided to place the topic of the succession of States and Governments on the provisional agenda for its nineteenth session (1967).<sup>14/</sup>

23. In its resolutions 2045 (XX) of 8 December 1965 and 2167 (XXI) of 5 December 1966, the General Assembly noted with approval the Commission's programme of work referred to in the reports on its sixteenth, seventeenth and eighteenth sessions. In resolution 2045 (XX) the Assembly recommended that the Commission should continue, "when possible", its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)". Resolution 2167 (XXI) in turn recommended that the Commission should continue that work, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

24. At its nineteenth session, in 1967, the Commission made new arrangements for the work on succession of States and Governments.<sup>15/</sup> In doing so it took account of the broad outline of the subject laid down in the report submitted by its Sub-Committee in 1963,<sup>16/</sup> and of the fact that Mr. Lachs, the Special Rapporteur on the topic had ceased to be a member of the Commission. Acting on a suggestion previously made by Mr. Lachs and in order to advance its study more rapidly, the

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<sup>13/</sup> Yearbook ... 1964, vol. II, p. 226, document A/5809, paras. 36-37.

<sup>14/</sup> Yearbook ... 1966, vol. II, p. 278, document A/6309/Rev.1, part II, para. 74.

<sup>15/</sup> Yearbook ... 1967, vol. II, p. 368, document A/6709/Rev.1/Corr.1, paras. 38-41.

<sup>16/</sup> See para. 20 above.

Commission decided to divide the topic of succession of States and Governments among more than one Special Rapporteur. On the basis of the division of the topic into three headings originally proposed in the report of the Sub-Committee, which was agreed to by the Commission, it decided to appoint Special Rapporteurs for two of these. Sir Humphrey Waldock, formerly Special Rapporteur on the law of treaties, was appointed Special Rapporteur for "succession in respect of treaties" and Mr. Mohammed Bedjaoui, Special Rapporteur for "succession in respect of rights and duties resulting from sources other than treaties". The Commission decided to leave aside, for the time being, the third heading in the division made by the Sub-Committee, namely, "succession in respect of membership of international organizations", which it considered to be related both to succession in respect of treaties and to relations between States and intergovernmental organizations. Consequently, the Commission did not appoint a Special Rapporteur for this heading.

25. With regard to "succession in respect of treaties", the Commission observed that it had already decided in 1963 to give priority to this aspect of the topic, and that the convocation by General Assembly resolution 2166 (XXI) of 5 December 1966 on a conference on the law of treaties in 1968 and 1969 had made its condification more urgent. The Commission therefore decided to advance its work on that aspect of the topic as rapidly as possible as from its twentieth session in 1968. The Commission considered that the second aspect of the topic, namely, "succession in respect of rights and duties resulting from sources other than treaties", was a diverse and complex matter which would require some preparatory study. At its twentieth session, in 1968, the Commission deemed it desirable to complete the study of succession in respect of treaties if possible during the remainder of the Commission's term of office in its composition at that time.<sup>17/</sup>

26. The Commission's decisions referred to in paragraphs 24 and 25 above received general support in the Sixth Committee at the General Assembly's twenty-second and twenty-third sessions. The Assembly, in its resolution 2272 (XXII) of 1 December 1967, noted with approval the International Law Commission's programme of work for 1968, and, repeating the terms of its resolution 2167 (XXI), recommended that the Commission should continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)". At the General Assembly's

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<sup>17/</sup> Yearbook ... 1968, vol. II, pp. 223-224, document A/7209/Rev.1, paras. 100-101 and 103-104. See also paras 26-27 below.



twenty-third session, it was noted with satisfaction that the International Law Commission, following the recommendation of the General Assembly, had begun to consider in depth the topic of succession of States and Governments, and that some progress had already been achieved at the Commission's twentieth session. Once again, the General Assembly, in its resolution 2400 (XXIII) of 11 December 1968, noted with approval the programme of work planned by the International Law Commission and recommended that the Commission continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)". Subsequently, the same recommendation was made by the Assembly in its resolution 2501 (XXIV) of 12 November 1969.

27. In 1974, on the basis of the provisional draft articles which it had adopted earlier and in the light of the observations received thereon from Governments of Member States, the Commission adopted a final set of 39 articles on succession of States in respect of treaties.<sup>18/</sup> The General Assembly, by its resolution 3496 (XXX) of 15 December 1975, decided to convene a conference of plenipotentiaries in 1977 to consider those draft articles and "to embody the results of its work in an international convention and such other instruments as it may deem appropriate". Pursuant to General Assembly resolution 31/18 of 24 November 1976, the United Nations Conference on Succession of States in Respect of Treaties met in Vienna from 4 April to 6 May 1977. The Conference approved a report recommending that the General Assembly decide to reconvene the Conference in the first half of 1978, for a final session of four weeks.<sup>19/</sup> Upon its consideration of that report, the General Assembly, by its resolution 32/47 of 8 December 1977, approved the convening of the resumed session of the Conference at Vienna for a period of three weeks, or if necessary four, starting 31 July 1978. At the resumed session, held at Vienna from 31 July to 23 August 1978, the Conference concluded the

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<sup>18/</sup> Yearbook ... 1974, vol. II (Part One), pp. 174 et seq., document A/9610/Rev.1, chap. II, Sect. D.

<sup>19/</sup> 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. 140, document A/CONF.80/15, para. 26. See also Official Records of the General Assembly, Thirty-second Session, Supplement No. 32 (A/32/32), p. 57.

consideration of the draft articles and adopted, on 23 August 1978, the text of the Vienna Convention on Succession of States in Respect of Treaties.<sup>20/</sup>

28. Following his appointment as Special Rapporteur, Mr. Bedjaoui submitted to the Commission, at its twentieth session, in 1968, a first report on succession of States in respect of rights and duties resulting from sources other than treaties.<sup>21/</sup> In that report he considered, inter alia, the scope of the subject that had been entrusted to him and, accordingly, the appropriate title for the subject, as well as the various aspects into which it could be divided. Following the discussion of that report, the Commission, in the same year, took several decisions, one of which concerned the scope and title of the topic and another the priority to be given to one particular aspect of succession of States.

29. Endorsing the recommendations contained in the first report by the Special Rapporteur, the Commission considered that the criterion for demarcation between the topic entrusted to him and that concerning succession in respect of treaties should be "the subject-matter of succession", i.e. the content of succession and not its modalities. It decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to sources, in order to avoid any ambiguity regarding its delimitation. The Commission accordingly changed the title of the topic and replaced the original title, "Succession in respect of rights and duties resulting from sources other than treaties", by the title "Succession in respect of matters other than treaties".<sup>22/</sup>

30. That decision was confirmed by the General Assembly in paragraph 4 (b) of its resolution 2634 (XXV) of 12 November 1970, which recommended that the Commission should continue its work with a view to making "progress in the consideration of succession of States in respect of matters other than treaties". The absence of any reference to "succession of Governments" in that recommendation by the

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<sup>20/</sup> For the text of the Convention (hereinafter referred to as "1978 Vienna Convention"), see Official Records of the United Nations Conference on Succession of States in Respect of Treaties, vol. III, Documents of the Conference (op. cit), pp. 185 et seq. The Convention was open for signature by all States until 31 August 1979 at United Nations Headquarters in New York. It is subject to ratification and remains open for accession by any State.

<sup>21/</sup> Yearbook ... 1968, vol. II, p. 94, document A/CN.4/204.

<sup>22/</sup> Ibid., p. 216, document A/7209/Rev.1, para. 46. See also para. 25 above and paras. 65-66 below.

General Assembly reflected the decision taken by the Commission at its twentieth session to give priority to State succession and to consider succession of Governments for the time being "only to the extent necessary to supplement the study on State succession".<sup>23/</sup>

31. As mentioned above,<sup>24/</sup> the first report by the Special Rapporteur reviewed various aspects of the topic of succession of States in respect of matters other than treaties. The report of the Commission on the work of its twentieth session notes that, during the debate,

"some members of the Commission referred to certain particular aspects of the topic (public property; public debts; legal régime of the predecessor State; territorial problems; status of the inhabitants; acquired rights) and made a few preliminary comments on them."

It adds that, in view of the breadth and complexity of the topic,

"the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later."<sup>25/</sup>

The report also notes that the predominant view of members of the Commission was that the economic aspects of succession should be considered first. It states:

"At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources so as to cover problems of succession in respect of the different economic resources (interests and rights), including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic 'Succession of States in economic and financial matters' and instructed the Special Rapporteur to prepare a report on it for the next [twenty-first] session."<sup>26/</sup>

32. The second report by the Special Rapporteur,<sup>27/</sup> submitted at the twenty-first session of the Commission (1969), was entitled "Economic and financial acquired rights and State succession". The report of the Commission on the work of that session notes that, during the discussion on the subject, most of the

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<sup>23/</sup> Yearbook ... 1963, vol. II, p. 224, document A/5509, para. 57.

<sup>24/</sup> Para. 28.

<sup>25/</sup> Yearbook ... 1968, vol. II, pp. 220-221, document A/7209/Rev.1, paras. 73 and 78.

<sup>26/</sup> Ibid., p. 221, para. 79.

<sup>27/</sup> Yearbook ... 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

members were of the opinion that the topic of acquired rights was extremely controversial and that its study at a premature stage could only delay the Commission's work on the topic as a whole, and therefore considered that "an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts".<sup>28/</sup> The report notes that the Commission "requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters". It further records that "the Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts".<sup>29/</sup>

33. Between 1970 and 1972, at the Commission's twenty-second to twenty-fourth sessions, the Special Rapporteur submitted three reports to the Commission: his third report<sup>30/</sup> in 1970, his fourth<sup>31/</sup> in 1971 and his fifth<sup>32/</sup> in 1972. Each of those reports dealt with succession of States to public property and contained draft articles on the subject. Being occupied with other tasks, the Commission was unable to consider any of those reports during its twenty-second (1970), twenty-third (1971) or twenty-fourth (1972) sessions. However, it included a summary of the third and fourth reports in its report on the work of its twenty-third session<sup>33/</sup> and an outline of the fifth report in its report on the work of its twenty-fourth session.<sup>34/</sup>

34. At the twenty-fifth (1970), twenty-sixth (1971) and twenty-seventh (1972) sessions of the General Assembly, during the Sixth Committee's consideration of the report of the Commission, several representatives expressed the wish that progress should be made in the study on succession of States in respect of matters

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<sup>28/</sup> Ibid., p. 228, document A/7610/Rev.1, para. 61.

<sup>29/</sup> Ibid., pp. 228-229, para. 62.

<sup>30/</sup> Yearbook ... 1970, vol. II, p. 131, document A/CN.4/226.

<sup>31/</sup> Yearbook ... 1971, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

<sup>32/</sup> Yearbook ... 1972, vol. II, p. 61, document A/CN.4/259.

<sup>33/</sup> Yearbook ... 1971, vol. II (Part One), pp. 341 et seq., document A/8410/Rev.1, paras. 77-98.

<sup>34/</sup> Yearbook ... 1972, vol. II, p. 323, document A/8710/Rev.1, para. 71.

other than treaties.<sup>35/</sup> On 12 November 1970, the General Assembly adopted resolution 2634 (XXV), in paragraph 4 (b) of which it recommended that the Commission should continue its work on succession of States with a view to making progress in the consideration of the subject. On 3 December 1971, in paragraph 4 (a) of part I of its resolution 2780 (XXVI), the General Assembly again recommended that the Commission should make progress in the consideration of the topic. Lastly, on 28 November 1972, in paragraph 3 (c) of part I of its resolution 2926 (XXVII), the General Assembly recommended that the Commission should "continue its work on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

35. In 1973, at the twenty-fifth session of the Commission, the Special Rapporteur submitted a sixth report,<sup>36/</sup> dealing, like his three previous reports, with succession of States to public property. The sixth report revised and supplemented the draft articles submitted earlier in the light, inter alia, of the provisional draft on succession of States in respect of treaties adopted by the Commission in 1972.<sup>37/</sup> It contained a series of draft articles relating to public property in general. The articles divided public property into the following three categories: property of the State; property of territorial authorities other than States or of public enterprises or public bodies; and property of the territory affected by the State succession.

36. The Special Rapporteur's sixth report was considered by the Commission at its twenty-fifth session, in 1973. In view of the complexity of the subject, the Commission decided, after full discussion and on the proposal of the Special Rapporteur, to limit its study for the time being to only one of the three categories

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<sup>35/</sup> See Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 72; ibid., Twenty-sixth Session, Annexes, agenda item 88, document A/8537, para. 135; ibid., Twenty-seventh Session, Annexes, agenda item 85, document A/8892, para. 194.

<sup>36/</sup> Yearbook ... 1973, vol. II, pp. 3 et seq., document A/CN.4/267.

<sup>37/</sup> Yearbook ... 1972, vol. II, pp. 230 et seq., document A/8710/Rev.1, chap. II, sect. C.

of public property dealt with by the Special Rapporteur, namely, property of the State.<sup>38/</sup> In the same year, it adopted on first reading the first eight draft articles.<sup>39/</sup>

37. The General Assembly, in paragraph 3 (d) of its resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission should "proceed with the preparation of draft articles on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

38. In 1974, at the twenty-sixth session of the Commission, the Special Rapporteur submitted a seventh report, dealing exclusively with succession of States to State property.<sup>40/</sup> The report contained 22 draft articles, together with commentaries, forming a sequel to the eight draft articles adopted in 1973. The Commission was unable to consider that report at its twenty-sixth session since, pursuant to paragraph 3 (a) and (b) of General Assembly resolution 3071 (XXVIII), it had to devote most of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.<sup>41/</sup>

39. In the same year the General Assembly, in section I, paragraph 4 (b), of its resolution 3315 (XXIX) of 14 December 1974, recommended that the Commission "proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties". Subsequently, the General Assembly made the same recommendation in paragraph 4 (c) of resolution 3495 (XXX) of 15 December 1975, paragraph 4 (c) (i) of resolution 31/97 of 15 December 1976 and paragraph 4 (c) (i) of resolution 32/151 of 19 December 1977. In the last mentioned resolution, the General Assembly added that the Commission should so proceed "in an endeavour to complete the first reading of the set of articles concerning State property and State debts".

40. At its twenty-seventh session, in 1975, the Commission considered draft articles 9 to 15 and X, Y and Z contained in the Special Rapporteur's seventh report

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<sup>38/</sup> Yearbook ... 1973, vol. II, p. 202, document A/9010/Rev.1, para. 87.

<sup>39/</sup> For the text of articles 1 to 8 and the commentaries thereto adopted by the Commission at its twenty-fifth session, see Yearbook ... 1973, vol. II, pp. 202 et seq., document A/9010/Rev.1, chap. III, sect. B.

<sup>40/</sup> Yearbook ... 1974, vol. II (Part One), p. 91, document A/CN.4/282.

<sup>41/</sup> Ibid., p. 304, document A/9610/Rev.1, para. 160.

and referred them to the Drafting Committee, with the exception of article 10, relating to rights in respect of the authority to grant concessions,<sup>42/</sup> on which it reserved its position. Having examined the provisions referred to it (with the exception, for lack of time, of articles 12 to 15), the Drafting Committee submitted texts to the Commission for articles 9 and 11 and, on the basis of articles X, Y and Z, texts for article X and for subparagraph (e) of article 3. The Commission adopted on first reading all the texts submitted by the Committee, subject to a few amendments.<sup>43/</sup>

41. At the twenty-eighth session of the Commission, in 1976, the Special Rapporteur submitted an eighth report,<sup>44/</sup> dealing with succession of States in respect of State property and containing six additional draft articles (articles 12 to 17) with commentaries. The Commission, at that session, considered the eighth report and adopted on first reading texts for subparagraph (f) of article 3 and for articles 12 to 16.<sup>45/</sup>

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<sup>42/</sup> Draft article 10 read as follows:

"Article 10. Rights in respect of the authority to grant concessions"

"1. For the purpose of the present article, the term 'concession' means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

"2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

"3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory."

<sup>43/</sup> For the texts of subpara. (e) of article 3 and of articles 9, 11 and X and the commentaries thereto as adopted by the Commission at its twenty-seventh session, see Yearbook ... 1975, vol. II, pp. 110 et seq., document A/10010/Rev.1, chap. III, sect. B, 2. Articles 9 and 11, as adopted at the twenty-seventh session, were deleted during the review at the thirty-first session for purposes of completing the first reading of the draft (see para. 53 below).

<sup>44/</sup> Yearbook ... 1976, vol. II (Part One), p. 55, document A/CN.4/292.

<sup>45/</sup> For the texts of subpara. (f) of article 3 and of articles 12 to 16 and the commentaries thereto as adopted by the Commission at its twenty-eighth session, see Yearbook ... 1976, vol. II (Part Two), pp. 127 et seq., document A/31/10, chap. IV, sect. B, 2.

42. Also at its twenty-eighth session, when the Commission considered the eighth report of the Special Rapporteur, some members expressed the hope that he would supplement his draft articles concerning State property, which were drafted in abstract terms, by some articles specifically relating to State archives. The Commission, reflecting that hope, stated in its 1976 report that "the Special Rapporteur may ... submit a report containing a special study on archives, in order that the Commission may complete its work on the succession of States in the matter of State property."<sup>46/</sup>

43. At the twenty-ninth session of the Commission, in 1977, the Special Rapporteur submitted a ninth report,<sup>47/</sup> dealing with succession of States to State debts and containing 20 draft articles, with commentaries. At the same session the Commission considered those draft articles, except one (article W), together with two new draft articles submitted by the Special Rapporteur during the session, and adopted on first reading the texts for articles 17 to 22.<sup>48/</sup>

44. At the thirtieth session of the Commission, in 1978, the Special Rapporteur submitted a tenth report,<sup>49/</sup> in which he continued his examination of succession of States to State debts and proposed two additional articles relating, respectively, to the passing of State debts in the case of separation of part or parts of the territory of a State (article 24) and the devolution of State debts in the case of dissolution of a State (article 25).

45. The Commission considered articles 24 and 25, as well as article W contained in the Special Rapporteur's ninth report, and adopted texts for articles 23<sup>50/</sup>

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<sup>46/</sup> Yearbook ... 1976, vol. II (Part Two), p. 126, document A/31/10, para. 103. It should be noted that various questions relating to succession of States to archives had been dealt with by the Special Rapporteur in some of his earlier reports, notably the third report (Yearbook ... 1970, vol. II, p. 132, document A/CN.4/226), the fourth report (Yearbook ... 1971, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1), the sixth report (Yearbook ... 1973, vol. II, p. 3, document A/CN.4/267), and the seventh report (Yearbook ... 1974, vol. II (Part One), p. 91, document A/CN.4/282).

<sup>47/</sup> Yearbook ... 1977, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1.

<sup>48/</sup> For the texts of articles 17 to 22 and the commentaries thereto as adopted by the Commission at its twenty-ninth session, see Yearbook ... 1977, vol. II (Part Two), pp. 59 et seq., document A/32/10, chap. III, sect. B.2.

<sup>49/</sup> Yearbook ... 1978, vol. II (Part One), p. 229, document A/CN.4/313.

<sup>50/</sup> Subsequent to the adoption of article 23, one member of the Commission submitted a memorandum on the subject of para. 2 of that article (ibid., document A/CN.4/L.282 and Corr.1).



(on the basis of article W), 24 and 25. These three articles completed section 2 (Provisions relating to each type of succession of States) of part II of the draft (Succession to State debts).<sup>51/</sup>

46. In its report the Commission again referred to the question of State archives, stating that it "may consider, at its thirty-first session, ... provisions concerning archives, on which the Special Rapporteur is expected to submit a report".<sup>52/</sup>

47. Also at the thirtieth session, the Commission received a volume of the United Nations Legislative Series entitled Materials on succession of States in respect of matters other than treaties,<sup>53/</sup> containing a selection of materials relating to the practice of States and international organizations regarding succession of States in respect of matters other than treaties. The publication, which was compiled by the Codification Division of the United Nations Office of Legal Affairs at the request of the Commission,<sup>54/</sup> contains materials provided by Governments of Member States and by international organizations, as well as materials collected through research work conducted by the Division.

48. The General Assembly, in Part I, paragraph 4 (b) of resolution 33/139, of 19 December 1978, recommended that the Commission "continue its work on succession of States in respect of matters other than treaties with the aim of 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".

49. At the thirty-first session, the Special Rapporteur submitted an eleventh report on succession to State archives, containing the texts of six additional articles (articles A, B, C, D, E and F).<sup>55/</sup>

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<sup>51/</sup> For the text of articles 23 to 25 and the commentaries thereto as adopted by the Commission at its thirtieth session, see Yearbook ... 1978, vol. II (Part Two), pp. 113 et seq., document A/33/10, chap. IV sect. B.2.

<sup>52/</sup> Yearbook ... 1978, vol. II (Part Two), p. 110, document A/33/10, para. 122.

<sup>53/</sup> United Nations publication, Sales No. E/F.77.V.9.

<sup>54/</sup> See Yearbook ... 1973, vol. II, p. 202, document A/9010/Rev.1, para. 90.

<sup>55/</sup> To appear in Yearbook ... 1979, vol. II (Part One), document A/CN.4/322 and Corr.1 and Add.1 and 2.

50. The Commission considered articles A and C and adopted texts for articles A and B (the designation of article C having been changed to article B) and decided to append them to the draft, together with the corresponding commentaries, it being understood that in so doing the Commission intended that the question of their ultimate place in the draft should be decided in the light of comments by Governments.

51. Also at the thirty-first session the Commission, in the light of the General Assembly recommendation referred to above,<sup>56/</sup> decided that the Drafting Committee should review the first 25 articles of the draft. Those articles had been adopted on the understanding that the final contents of their provisions would depend to a considerable extent on the results achieved by the Commission in its further work on the topic. On the basis of that understanding, the Commission, at its twenty-fifth and twenty-seventh to thirtieth sessions, decided that "during the first reading of the draft it would reconsider the text of the articles adopted ... with a view to making any amendments which might be found necessary".<sup>57/</sup>

52. The Drafting Committee reviewed the 25 articles provisionally adopted by the Commission at its twenty-fifth and twenty-seventh to thirtieth sessions and submitted to the Commission texts for articles 1 to 23, recommending the deletion of articles 9 and 11 provisionally adopted at the twenty-seventh session.<sup>58/</sup> The Commission adopted on first reading the texts recommended by the Drafting Committee for articles 1 to 23 and thereby endorsed the Committee's recommendations on certain pending matters relating to texts or parts thereof which had previously appeared in square brackets in former articles X, 14, 18 and 20, as explained below in the commentaries to the corresponding articles: 12, 15, 31 and 34, respectively.<sup>59/</sup>

53. On the recommendation of the Drafting Committee, the Commission decided that the former article 9, entitled "General principle of the passing of State property", had become unnecessary in view of the fact that in the part of the draft entitled "State property" the question of the passing of State property had been dealt with in detail, as regards both movable and immovable property, for each of the types

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<sup>56/</sup> See para. 48 above.

<sup>57/</sup> Yearbook ... 1973, vol. II, p. 202, document A/9010/Rev.1, para. 91. See also Yearbook ... 1978, vol. II (Part Two), p. 110, document A/33/10, para. 123.

<sup>58/</sup> See para. 53 below.

<sup>59/</sup> For the recommendations made by the Drafting Committee in this connection, see A/CN.4/L.299/Rev.1.

of succession of States. Article 9, as provisionally adopted, had become insufficient and could have led to serious problems of interpretation in the light of the detailed categorized treatment of the passing of State property followed by the Commission after its provisional adoption of that article. The Commission therefore concluded that no useful purpose would be served by attempting to re-draft the former article 9 in order to cover all the specific situations contemplated in the draft, and that it was appropriate to delete it. Having taken that decision, the Commission endorsed the Drafting Committee's recommendation not to retain former article 11, entitled "Passing of debts owed to the State", which had been placed in square brackets in view of the reservations expressed by several members of the Commission concerning the text and in order to draw attention to the questions they raised. As the Commission itself had indicated in paragraph (3) of its commentary to article 11, its main concern in including the article in the draft had been to make debts to a predecessor State an exception to the physical situation rule set forth in article 9.<sup>60/</sup>

54. As recommended in General Assembly resolution 33/139, the Commission completed at its thirty-first session the first reading of the draft articles on succession of States in respect of State property and State debts. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft articles, through the Secretary-General, to Governments of Member States for their observations.

55. The General Assembly, in paragraph 4 (a) of resolution 34/141 of 17 December 1979, recommended that the Commission "continue its work on succession of States in respect of matters other than treaties with the aim of completing, at its thirty-second session, the study of the question of State archives, and, at its thirty-third session, the second reading of the entire draft articles on succession of States in respect of matters other than treaties, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly".

56. At the thirty-second session of the Commission, in 1980, the Special Rapporteur submitted a twelfth report<sup>61/</sup> on succession to State archives, containing the

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<sup>60/</sup> Yearbook ... 1975, vol. II, p. 112, document A/10010/Rev.1, chap. III, sect. B, 2.

<sup>61/</sup> To appear in Yearbook ... 1980, vol. II (Part One), document A/CN.4/333.

texts of four additional articles (articles Bl, D, E and F) covering succession to State archives in cases of State succession other than decolonization, the latter case having been already dealt with in article B. The report introduced a few changes and additions to the eleventh report that the Special Rapporteur had submitted to the Commission at its thirty-first session.<sup>62/</sup> This latter report, dealing with succession to State archives, remained the basic document for the Commission's consideration of the question, in so far as the Commission had not completed its study at that session.

57. The Commission considered the question of State archives, on the basis of the Special Rapporteur's eleventh and twelfth reports and adopted texts for articles C, D, E and F. With the adoption of those four additional articles the Commission completed, at its thirty-first session, the first reading of the series of draft articles on succession to State archives.

58. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit also draft articles C, D, E and F, through the Secretary-General, to Governments of Member States for their observations.

59. The General Assembly, in paragraph 4 (a) of resolution 35/163 of 15 December 1980, recommended that, "taking into account the written comments of Governments and views expressed in debates in the General Assembly", the Commission should, at its thirty-third session "complete, as recommended by the General Assembly in resolution 34/141, the second reading of the draft articles on succession of States in respect of matters other than treaties adopted at its thirty-first and thirty-second sessions".

60. At its present session the Commission re-examined the draft articles in the light of the comments of Governments (A/CN.4/338 and Add.1-4).<sup>63/</sup> It had before it the thirteenth report submitted by the Special Rapporteur (A/CN.4/345 and Add.1-3) which summarized the written comments of Governments and also those made orally by delegations in the General Assembly, and contained proposals on the revision of the articles, as well as proposals for new articles G, H, I, J and K on State archives and 17 bis on State debts.

61. The Commission considered the thirteenth report of the Special Rapporteur at its 1658th to 1662nd, 1671st, 1672nd, 1675th and 1688th to 1690th meetings and

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<sup>62/</sup> To appear in Yearbook ... 1979, vol. II (Part One), document A/CN.4/322 and Corr.1 and Add.1 and 2.

<sup>63/</sup> See Annex I to the present report.

referred all the articles contained therein to the Drafting Committee. At its 1692nd and 1694th meetings, the Commission considered the reports of the Drafting Committee containing proposals on the articles referred to it, as well as proposals for new articles (3 bis, 3 ter, 3 quater) in Part I and article L in Part III. At its 1694th meeting, the Commission adopted the final text in English, French and Spanish of its draft articles on succession of States in respect of State property, archives and debts, as a whole. In accordance with its Statute it submits them herewith to the General Assembly, together with a recommendation.<sup>64/</sup>

## 2. General features of the draft articles

### (a) Form of the draft

62. As recommended by the General Assembly, the Commission cast its study of the succession of States in respect of matters other than treaties in the form of a group of draft articles. The draft articles have been prepared in a form to render them capable of serving as a basis for the conclusion of a convention should this be the decision taken by the Assembly. The Commission was in any event of the view that the preparation of draft articles was the most appropriate and effective method of studying and identifying or developing the rules of international law relating to succession of States in respect of State property, archives and debts.

63. Reiterating what was said in the introduction to the Commission's final draft on succession of States in respect of treaties,<sup>65/</sup> the Commission considers that there are substantial grounds to affirm the value of a codifying convention as an instrument for consolidating legal opinion regarding the generally accepted rules of international law concerning succession of States in respect of State property, archives and debts. As the Commission stated in 1974, a new State, though not formally bound by the convention, would find in its provisions the norms by which to be guided in dealing with questions arising from the succession of States. Although much the same might be said of a declaratory code or a model, experience has shown that a convention is likely to be regarded as more authoritative in character, and accordingly, to be more effective as a guide. Moreover, such a convention has important effects in achieving general agreement as to the content of the law which it codifies and thereby establishing it as the accepted

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<sup>64/</sup> See para. 86 below.

<sup>65/</sup> Yearbook ... 1974, vol. II (Part One), p. 162, document A/9610/Rev.1, paras. 62-64.

customary law on the matter. The extent to which this might in fact prove to be the case would depend, of course, on the intrinsic merit of the draft articles, as reflecting customary international law or as providing sensible and acceptable solutions in areas of doubt, and on the support consequently given by States to the convention. If the majority of States became parties to the convention within a reasonable period of time, the establishment of a convention would have proved worthwhile. On the assumption that a convention on succession of States in respect of State property, archives and debts would receive wide support, the contribution to the development of customary international law does appear to be a good reason for adopting this form. Besides, a convention has already been adopted on the first aspect of the topic of succession of States, namely the 1978 Vienna Convention on Succession of States in Respect of Treaties. This being so, it seems right to regard the articles on succession of States in respect of State property, archives and debts as a complement to that Convention. Accordingly, if these articles receive general support in the General Assembly, it would be appropriate to give these articles the same status as the 1978 Vienna Convention, i.e., to establish them in the form of a convention. If satisfactory provision was made, as is done in article 4 for the participation of a successor State in the convention with effect from the date of the succession, the convention would have the merit of making possible the regulation by treaty of the effects for the successor State of the succession of States in respect of the property, archives and debts of the predecessor State.

64. In submitting the final text of the draft articles on the succession of States in respect of State property, archives and debts, the Commission reaffirms the view which it accepted at the outset of its work on the topic and which it expressed when submitting its provisional draft to the consideration of Governments. A corresponding recommendation is made below.<sup>66/</sup>

(b) Scope of the draft

65. As noted above,<sup>67/</sup> the expression "matters other than treaties" did not appear in the titles of the three topics into which the question of succession of States and governments was divided in 1967, namely (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than

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<sup>66/</sup> See para. 86 below.

<sup>67/</sup> See paras. 24 and 29 above.

treaties; (c) succession in respect of membership of international organizations. In 1968, in a report submitted at the twentieth session of the Commission, Mr. Bedjaoui, the Special Rapporteur for the second topic, pointed out that if the title of that topic (succession in respect of rights and duties resulting from sources other than treaties) were compared with the title of the first topic (succession in respect of treaties), it would be found that the word "treaty" was considered, in the two titles, from two different points of view. In the first case the treaty was regarded as a subject-matter of the law of succession, and in the second as a source of succession. The Special Rapporteur pointed out that, in addition to its lack of homogeneity, such division of the question had the drawback of excluding from the second topic all matters that were the subject of treaty provisions. He noted that in many cases State succession was accompanied by the conclusion of a treaty regulating inter alia certain aspects of the succession, which were thereby excluded from the second topic as entitled in 1967. Since those aspects did not come under the first topic either, the Commission would have been obliged, had that title been retained, to leave aside a substantial part of the subject-matter in its study on State succession.<sup>68/</sup>

66. Consequently, the Special Rapporteur proposed taking the subject-matter of succession as the criterion for the second topic and entitling it "Succession in respect of matters other than treaties".<sup>69/</sup> That proposal was adopted by the Commission, which stated in its report on the work of its twentieth session:

"All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was 'the subject-matter of succession', i.e. the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to 'sources', since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession."<sup>70/</sup>

67. In the context of the first reading of the draft articles the Commission found it appropriate to retain the title of the draft, which, like article 1 of the

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<sup>68/</sup> Yearbook ... 1968, vol. II, pp. 96-97, document A/CN.4/204, paras. 18-21.

<sup>69/</sup> For reference to the General Assembly's insertion of the words "of States" after the word "succession" in the title of the topic, see para. 30 above.

<sup>70/</sup> Yearbook ... 1968, vol. II, pp. 216-217, document A/7209/Rev.1, para. 46.

first reading draft, referred to "succession of States in respect of matters other than treaties".<sup>71/</sup> The Commission was, however, conscious that in the light of the decision to restrict the contents of the draft to succession of States in respect of State property, archives and debts and of the recommendations of the General Assembly in resolutions 33/139, 34/141 and 35/163 regarding the completion of the first and second readings of that draft, the title of the draft did not accurately reflect the scope of the present articles. The Commission had deferred its decision on the matter in order to take account of the observations that Governments might wish to make on the subject.

68. At its present session the Commission, on the proposal of the Special Rapporteur made in the light of the oral and written observations of Governments, concluded that a specific formula was more appropriate in that regard. Consequently, it decided to entitle the final draft: "Draft articles on succession of States in respect of State property, archives and debts".

(c) Structure of the draft

69. The 25 articles constituting the draft provisionally adopted up to the thirtieth session of the Commission were divided into two parts, preceded by articles 1 to 3: part I, entitled "Succession of States to State property", which comprised articles 4 to 16, and part II, entitled "Succession of States to State debts", which comprised articles 17 to 25. At its thirty-first session, the Commission decided, in order to maintain the correspondence between the structural division of the draft and that of the 1978 Vienna Convention on Succession of States in Respect of Treaties<sup>72/</sup> and of the 1969 Vienna Convention on the Law of Treaties,<sup>73/</sup> to restructure the provisional draft in three parts so as to cover the first three articles in a first part entitled "Introduction". The former parts I and II were re-numbered accordingly. The introduction contained the provisions that applied to the draft as a whole, and each of the following parts contained those that applied exclusively to one or the other

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<sup>71/</sup> For an indication of a change in the French version of the title, see below, sect. D. para. (3) of the commentary to article 1.

<sup>72/</sup> For reference, see footnote 20 above.

<sup>73/</sup> For the text of the Vienna Convention on the Law of Treaties, see 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. 289. The Convention is hereinafter referred to in this chapter as "1969 Vienna Convention".



category of specific matters covered. As regards the titles of the last two parts, the Commission, in the circumstances outlined above,<sup>74/</sup> and conscious of their different treatment in the various language versions as well as of the need to make them properly relate to the articles covered by each part, decided to have them read simply "State property" and "State debts" respectively. With regard to the present part I, and again, in order to maintain structural conformity with the corresponding parts of the 1969 and 1978 Vienna Conventions, the Commission decided to reverse the order of articles 2 and 3 as previously adopted so as to make the article on "Use of terms" follow article 1, on the scope of the articles.

70. At the present session the Commission decided that the articles on State archives adopted on first reading at its thirty-first and thirty-second sessions, which had been annexed to the provisional draft, together with the additional articles containing general provisions on that matter adopted at the present session, should constitute a separate part, to be placed immediately after the part devoted to State property. As a result, the final draft consists of four parts. Part I, which contains articles and provisions of which are generally applicable to the draft as a whole, is now entitled "General Provisions". Parts II, III and IV (former part III) are entitled, respectively, "State property", "State archives" and "State debts".<sup>75/</sup>

71. As described above,<sup>76/</sup> the Commission, in the course of eight sessions, adopted 39 articles: six in part I of the draft, eleven in part II, twelve in part III and ten in part IV. Parts II, III and IV are each divided into two sections, entitled respectively "Introduction" (section 1) and "Provisions concerning specific categories of succession of States" (section 2). In part II, section 1 is formed of six articles (articles 7 to 12) and section 2 of five articles (articles 13 to 17). In part III, section 1 is formed of seven articles (articles 18 to 24) and section 2 of five (articles 25 to 29). In part IV, five articles (articles 30 to 34) form section 1, while five (articles 35 to 39) form section 2. To the extent possible, having in mind the characteristics

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<sup>74/</sup> Paras. 35 and 36.

<sup>75/</sup> As to the correspondence between the draft articles as finally approved by the Commission at the present session and the draft articles provisionally adopted at previous sessions, see Annex III to the present report.

<sup>76/</sup> See paras. 36, 40, 41, 43, 45, 50, 57 and 61.

proper to each category of specific matters dealt with in each part, the articles forming sections 1 and 2 of parts III and IV parallel those in the corresponding sections of part II. Thus, section 1 of each part has an article determining the "scope of the articles in the present part" (articles 7, 18 and 30); articles 8, 19 and 31 respectively define the terms "State property", "State archives" and "State debt". Other articles in section 1 of each of the three parts parallel each other: articles 9, 20 and 32 dealing with the effects of the passing; and articles 10, 21 and 33 concerning the date of the passing. Further articles in section 1 of parts II and III correspond to each other: articles 11 and 22 on passing without compensation and articles 12 and 23 relating to the absence of effect of a succession of State on the property and archives of a third State, respectively. Similarly, section 2 of each part has an article on "Transfer of part of the territory of a State" (articles 13, 25 and 35), an article on the "newly independent State" (articles 14, 26 and 36), an article on "Uniting of States" (articles 15, 27 and 37), an article on "Separation of part or parts of the territory of a State" (articles 16, 28 and 38) and an article on "Dissolution of a State" (articles 17, 29 and 39). The text of each set of parallel articles has been drafted in such a manner as to maintain as close a correspondence between the language of the provisions concerned as the subject matter of each allows.

(d) Choice of specific categories of succession

72. For the topic of succession of States in respect of treaties, the Commission, in its 1972 provisional draft<sup>77/</sup> adopted four specific categories of succession of States: (a) transfer of part of a territory; (b) newly independent States; (c) uniting of States and dissolution of unions; and (d) secession or separation of one or more parts of one or more States. Nevertheless, at its twenty-sixth session in 1974, in the course of its second reading of the draft articles on succession of States in respect of treaties the Commission made certain changes which had the effect of redefining the first specific category of succession more fully and clearly and of combining the last two into one. First of all, "transfer of part of a territory" was referred to as "succession in respect of part of territory". The Commission incorporated into this category of succession the case in which "any territory, not being part of the territory of a State for the international relations of which the State is responsible, becomes part of the territory of

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<sup>77/</sup> Yearbook ... 1972, vol. II, pp. 230 et. seq., document A/8710/Rev.1, chap. II, sect. C.

another State".<sup>78/</sup> The Commission meant by this formula to cover the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State. Any such case is assimilated, for the purposes of succession of States in respect of treaties, to the first category of succession, namely, "succession in respect of part of territory". In addition, the Commission combined the last two categories of succession of States under one heading: "Uniting and separation of States".

73. For the purposes of the draft on succession of States in respect of treaties, the Commission summarized its choice of types of succession as follows:

"The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the treaties of the predecessor State of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of one or more new States as a result of the separation of parts of the territory of a State; formation of a union of States; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States".<sup>79/</sup>

74. In its work of codification and progressive development of the law relating to succession of States in respect of treaties and to succession of States in respect of matters other than treaties, the Commission constantly bore in mind the desirability of maintaining some degree of parallelism between the two sets of draft articles and in particular, as far as possible, the use of common definitions and common basic principles, without thereby ignoring or dismissing the characteristic features that distinguish the two topics from one another. The Commission considered that, so far as was possible without distorting or unnecessarily hindering its work, the parallelism between the two sets of draft articles should be regarded as a desirable objective. Nevertheless, as regards the present draft, the required flexibility should be allowed in order to adopt such texts as best suited the purposes of the codification, in an autonomous draft,

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<sup>78/</sup> Yearbook ... 1974, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D, article 14.

<sup>79/</sup> Ibid., p. 172, para. 71.

of the rules of international law governing specifically succession of States in respect of matters other than treaties and, more particularly, in respect of State property, archives and debts.

75. In the light of the foregoing, the Commission, while reaffirming its position that for the purpose of codifying the modern law of succession of States in respect of treaties it was sufficient to arrange the cases of succession of States, as it did in the 1974 draft, under the three broad categories referred to above,<sup>80/</sup> nevertheless found that in view of the characteristics and requirements peculiar to the subject of succession of States in respect of matters other than treaties, particularly as regards State property, archives and debts, some further precision in the choice of categories of succession was necessary for the purpose of the present draft. Consequently, as regards succession in respect of part of territory, the Commission decided that it was appropriate to distinguish and deal separately in the present draft with three cases: (1) the case where part of the territory of a State is transferred by that State to another State, which is the subject of articles 13, 25 and 35; (2) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State, which forms the subject of paragraphs 3 of article 14 and 6 of article 26 (Newly independent State); (3) the case where a part of the territory of a State separates from that State and unites with another State, which is the subject of paragraphs 2 of articles 16 and 38 and 5 of article 28 (Separation of part or parts of the territory of a State). Also, as regards the uniting and separation of States, the Commission, while following the pattern of dealing in separate articles with those two categories of succession, nevertheless found it appropriate to distinguish between the "separation of part or parts of the territory of a State", which is the subject of articles 16, 28 and 38 and the "dissolution of a State", which forms the subject of articles 17, 29 and 39.

(e) The principle of equity

76. The principle of equity is one of the underlying principles in the rules regarding the passing of State property, archives and debts from the predecessor State to the successor State. As regards the Part on State property, that

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<sup>80/</sup> See para. 73 above.

principle is implicit, in particular, in the rules concerning the passing of movable State property when that property is connected with the activity of the predecessor State in respect of the territory to which the succession of States relates. In that context the principle of equity, although important, does not occupy the pre-eminent position, since the whole rule would then be reduced to a rule of equity. At the limit, that rule would make any attempt to codification unnecessary, and all that would be required would be one article stating that the rule of equitable apportionment of property must be applied in all cases of succession to movable State property. Equity cannot be assigned the main role, because there is also a material criterion concerning the connection of the property with the activity of the predecessor State in the territory. In fact, the principle of equity is more a balancing element, a corrective factor designed to preserve the "reasonableness" of the linkage between the movable State property and the territory. Equity makes it possible to interpret the concept of "property ... connected with the activity of the predecessor State in respect of the territory ..." in the most judicious fashion and to give it an acceptable meaning.

77. The principle of equity, however, is called upon to play a greater role in connection with the rules established for certain specific categories of succession involving the passing from the predecessor State to the successor State or States of movable State property other than that connected with the activity of the former in respect of the territory to which the succession of States relates. It does so as well, regarding the rules provided for similar categories of succession in respect of the passing of State archives and State debts. When in the case of a newly independent State, the dependent territory has contributed to the creation of movable State property, it shall pass to the successor State in proportion to the contribution of the dependent territory (article 14, para. 1 (f)). Also in the case of a newly independent State, the passing or the appropriate reproduction of parts of the State archives of the predecessor State of interest to the territory to which the succession of States relates are to be determined by agreement between the predecessor and the newly independent States in such a manner that each of those States can benefit as equitably as possible from those parts of State archives (article 26, para. 2).

78. In the case of separation of part or parts of the territory of a State movable State property as well as the State debt of the predecessor State shall pass to the successor State or States in an equitable proportion (articles 16, para. 1 (c) and 38, para. 1). Similarly, in the case of dissolution of a State, movable State

property of the predecessor State, other than that connected with its activity in respect of the territories to which the succession of States relates (article 17, para. 1 (d)), as well as its State debt (article 39) shall pass to the successor States in equitable proportions.

79. Also in the case of dissolution of a State, the principle of equity is at the basis of the rule regarding the passing of immovable State property of the predecessor State situated outside its territory to the successor States: that property shall pass in equitable proportions (article 17, para. 1 (b)). Likewise, the State archives of the predecessor State other than those which should be in the territory of a successor State for normal administration of its territory or which relate directly to that territory, shall pass to the successor State in an equitable manner (article 29, para. 2).

80. As regards the cases of separation of part or parts of the territory of a State and dissolution of a State, the rules regarding the passing both of immovable and movable State property are without prejudice to any question of equitable compensation that may arise as a result of a succession of States (article 16, para. 3 and article 17, para. 2).

81. Finally, in the case of the transfer of part of the territory of a State, the State debt of the predecessor State shall, in the absence of an agreement pass to the successor State in an equitable proportion (article 35, para. 2).

82. What is meant by the principle of equity, according to Charles de Visscher, is "an independent and autonomous source of law".<sup>81/</sup> According to a resolution of the Institute of International Law,

"1. ... Equity is normally inherent in a sound application of the law ...;

"2. The international judge ... can base his decision on equity, without being bound by the applicable law, only if all the parties clearly and expressly authorize him to do so".<sup>82/</sup>

Under article 38, paragraph 2, of its Statute, the International Court of Justice may in fact decide a case ex aequo et bono only if the parties agree thereto.

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<sup>81/</sup> Annuaire de l'Institut de droit international, 1934 (Brussels), vol. 38, p. 239.

<sup>82/</sup> Ibid., 1937 (Brussels), vol. 40, p. 271.

83. The Court has, of course, had occasion to deal with this problem. In the North Sea Continental Shelf cases, it sought to establish a distinction between equity and equitable principles. The Federal Republic of Germany had submitted to the Court, in connection with the delimitation of the continental shelf, that the "equidistance method" should be rejected, since it "would not lead to an equitable apportionment". The Federal Republic asked the Court to refer to the notion of equity by accepting the "principle that each coastal State is entitled to a just and equitable share".<sup>83/</sup> Of course, the Federal Republic made a distinction between deciding a case ex aequo et bono, which could be done only with the express agreement of the parties, and invoking equity as a general principle of law. In its Judgment, the Court decided that in the cases before it, international law referred back to equitable principles, which the parties should apply in their subsequent negotiations.

84. The Court stated:

"... it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field."<sup>84/</sup>

In the view of the Court, "equitable principles" are "actual rules of law" founded on "very general precepts of justice and good faith".<sup>85/</sup> These "equitable principles" are distinct from "equity" viewed "as a matter of abstract justice".

The decisions of a court of justice:

"must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles."<sup>86/</sup>

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<sup>83/</sup> North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 9.

<sup>84/</sup> Ibid., p. 47.

<sup>85/</sup> Ibid., p. 46.

<sup>86/</sup> Ibid., p. 48. See also Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3, paras. 69-78 and Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, ibid., p. 175, paras. 61-69.

85. Having in mind the Court's elaboration of the concept of equity, as described in the preceding paragraph, the Commission wishes to emphasize that equity, in addition to being a supplementary element throughout the draft, is also used therein as part of the material content of specific provisions and not as the equivalent of the notion of equity as used in an ex aequo et bono proceeding, to which a tribunal can have recourse only upon express agreement between the parties concerned.

B. Recommendation of the Commission

86. At the 1696th meeting, on 22 July 1981, the Commission decided, in conformity with article 23 of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles on Succession of States in respect of State property, archives and debts and to conclude a convention on the subject.<sup>87/</sup>

C. Resolution adopted by the Commission

87. The Commission, at its 1696th meeting, on 22 July 1981, adopted by acclamation the following resolution:

The International Law Commission,

Having adopted the draft articles on succession of States in respect of State property, archives and debts,

Desires to express to the Special Rapporteur, Mr. Mohammed Bedjaoui, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its work on the draft articles on succession of States in respect of State property, archives and debts.

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<sup>87/</sup> Certain members reserved their position on this recommendation.



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

PART I

GENERAL PROVISIONS

Commentary

Part I, following the model of the 1969 Vienna Convention<sup>88/</sup> and the 1978 Vienna Convention,<sup>89/</sup> contains certain general provisions which relate to the present draft articles as a whole. Its title reproduces that of Part I of the 1978 Vienna Convention. Also, in order to maintain structural conformity with the corresponding parts of those Conventions, the order of the first three articles (articles 1 to 3) follows that of the articles dealing with the same subject-matter in those Conventions.

Article 1

Scope of the present articles

The present articles apply to the effects of a succession of States in respect of State property, archives and debts.

Commentary

- (1) This article corresponds to article 1 of the 1978 Vienna Convention. Its purpose is to limit the scope of the present draft articles in two important respects.
- (2) First, article 1 takes account of the decision by the General Assembly that the topic under consideration should be entitled: "Succession of States in respect of matters other than treaties".<sup>90/</sup> In incorporating the words "of States" in article 1, the Commission intended to exclude from the field of application of the present draft articles the succession of Governments and the succession of subjects of international law other than States, an exclusion which also results from article 2, paragraph 1 (a). The Commission also intended to limit the field of application of the draft articles to certain matters "other than treaties".
- (3) In view of General Assembly resolution 33/139, 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",

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<sup>88/</sup> See foot-note 73 above.

<sup>89/</sup> See foot-note 20 above.

<sup>90/</sup> See para. 30 above.

the Commission considered at that session the question of reviewing the words "matters other than treaties" which appeared both in the title of the draft articles and in the text of article 1, to reflect that further limitation in scope. However, it decided to do so at its second reading of the draft, so as to take into account observations of Governments. The Commission nevertheless decided, at the thirty-first session, to change the article "les" before "natières" to "des" in the French version of the title of the topic, and consequently of the title of the draft articles, as well as the text of article 1, in order to align it with the other language versions. As explained above,<sup>91/</sup> at its present session the Commission, on the basis of governmental observations, decided to entitle the final draft: "Draft articles on succession of States in respect of State property, archives and debts". The present text of article 1 is a relection of that decision. Although the word "State" appears only once for reasons of style, it must be understood that it is intended to qualify all three matters described.

(4) The second limitation is that of the field of application of the draft articles to the effects of succession of States in respect of State property, archives and debts. Article 2, paragraph 1 (a), specifies that "succession of States means the replacement of one State by another in the responsibility for the international relations of territory". In using the term "effects" in article 1, the Commission wished to indicate that the provisions included in the draft concern not the replacement itself but its legal effects, i.e., the rights and obligations deriving from it.

## Article 2

### Use of terms

1. For the purposes of the present articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

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<sup>91/</sup> See paras. 67 and 68 above.

(e) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(f) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

#### Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended to state the meaning with which terms are used in the draft articles.

(2) Paragraph 1 (a) of article 2 reproduces the definition of the term "succession of States" contained in article 2, paragraph 1 (b), of the 1978 Vienna Convention.

(3) The report of the Commission on its twenty-sixth session specified in the commentary to article 2 of the draft articles on succession of States in respect of treaties, on the basis of which article 2 of the 1978 Vienna Convention was adopted, that the definition of succession of States given in that article referred exclusively to the fact of the replacement of one State by another "in the responsibility for the international relations of territory", leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. It went on to say that the rights and obligations deriving from a succession of States were those specifically provided for in those draft articles. It further noted that the Commission had considered that the expression "in the responsibility for the international relations of territory" was preferable to other expressions such as "in the sovereignty in respect of territory" or "in the treaty-making competence in respect of territory", because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case, independently of the particular status of the territory in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The report specified that the word "responsibility" should be read in conjunction with the words "for the international relations of territory" and was not intended to convey any notion of "State responsibility", a topic being studied separately by the Commission. <sup>92/</sup>

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<sup>92/</sup> Yearbook ... 1974, vol. II (Part One), pp. 175-176, document A/9610/Rev.1, chap. II, sect. D, paras (3) and (4) of the commentary to article 2.

(4) The Commission decided to include in the present draft articles the definition of "succession of States" contained in the 1978 Vienna Convention, considering it desirable that, where the Convention and the draft articles refer to one and the same phenomenon, they should, as far as possible, give identical definitions of it. Furthermore, article 1 supplements the definition of "succession of States" by specifying that the draft articles apply, not to the replacement of one State by another in the responsibility for the international relations of territory, but to the effects of that replacement.

(5) Subparagraphs (b), (c) and (d) of paragraph 1 reproduce the terms of paragraph 1, subparagraphs (c), (d) and (e) of article 2 of the 1978 Vienna Convention. The meaning that they attribute to the terms "predecessor State", "successor State" and "date of the succession of States" derives, in each case, from the meaning given to the term "succession of States" in paragraph 1 (a), and would not seem to call for any comment.

(6) Paragraph 1 (e) reproduces the text of article 2, paragraph 1 (f), of the 1978 Vienna Convention, which was based on article 2, paragraph 1 (f), of the draft articles adopted by the Commission in 1974. The part of the commentary to that article relating to the definition is equally applicable in the present case. As the Commission stated:

"... the definition given in paragraph 1 (f) includes any case of emergence to independence of any former dependent territories, whatever its particular type may be [colonies, trusteeships, mandates, protectorates, etc.]. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case ... of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of a uniting of two or more existing States. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression 'newly independent State' has been chosen instead of the shorter expression 'new State'." 93/

(7) The expression "third State" does not appear in article 2 of the 1978 Vienna Convention. This was because the expression "third State" was not available for use in that Convention, since it had already been made a technical term in the 1969 Vienna Convention to denote "a State not a party to the treaty". As regards the draft articles on succession of States in respect of State property,

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93/ Ibid., para. (8) of the commentary.

archives and debts, however, the Commission took the view that the expression "third State" was the simplest and clearest way of designating any State other than the predecessor State or the successor State.<sup>94/</sup>

(8) Lastly, paragraph 2 corresponds to paragraph 2 of article 2 of the 1969 Vienna Convention as well as of the 1978 Vienna Convention, and is designed to safeguard in matters of terminology the position of States in regard to their internal law and usages.

### Article 3

#### Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

#### Commentary

(1) This provision reproduces mutatis mutandis the terms of article 6 of the 1978 Vienna Convention, which is based on article 6 of the draft articles on the topic prepared by the Commission.

(2) As it stated in the report on its twenty-fourth session, the Commission, in preparing draft articles for the codification of general international law, normally assumes that these articles are to apply to facts occurring or situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Thus, when the Commission, at its twenty-fourth session, was preparing its draft articles on succession of States in respect of treaties, several members considered that it was unnecessary to specify in the draft that its provisions would apply only to the effects of a succession of States occurring in conformity with international law.<sup>95/</sup>

(3) Other members, however, pointed out that when matters not in conformity with international law called for specific treatment the Commission had expressly so noted. They cited as examples the provisions of the draft on the law of treaties concerning treaties procured by coercion, treaties which conflict with norms of jus cogens, and various situations which might imply a breach of an international obligation. Accordingly, those members were of the opinion that, particularly in regard to transfers of territory, it should be expressly stipulated that only

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<sup>94/</sup> See Yearbook ... 1975, vol. II, p. 114, document A/10010/Rev.1, chap. III, sect. B, 2, article 3 (e), commentary.

<sup>95/</sup> Yearbook ... 1972, vol. II, p. 236; document A/8710/Rev.1, chap. II, sect. C. paras. (1) and (2) of the commentary to article 6.

transfers occurring in conformity with international law would fall within the concept of "succession of States" for the purpose of the draft articles being prepared. The Commission adopted that view. However, the Commission's report notes that:

"Since to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States, the Commission decided to include amongst the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly, article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law." 96/

(4) At the twenty-fifth session the Commission decided to include in the then introduction to the draft articles on succession of States in respect of matters other than treaties a provision identical with that of article 6 of the draft articles on succession of States in respect of treaties. It took the view that there was now an important argument to be added to those which had been put forward at the twenty-fourth session in favour of article 6: the absence from the present draft articles of the provision contained in article 6 of the draft articles on succession of States in respect of treaties might give rise to doubts as to the applicability to the present draft of the general presumption that the texts prepared by the Commission relate to facts occurring or situations established in conformity with international law. 97/

#### Article 4

##### Temporal application of the present articles

1. Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the articles apply only in respect of a succession of States which has occurred after the entry into force of the articles except as may be otherwise agreed.

2. A successor State may, at the time of expressing its consent to be bound by the present articles or at any time thereafter, make a declaration that it will apply the provisions of the articles in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other contracting State or State Party to the

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96/ Ibid., para. (2) of the commentary.

97/ Yearbook ... 1973, vol. II, pp. 203-204, document A/9010/Rev.1, chap. III, sect. B, article 2, para. (4) of the commentary.

articles which makes a declaration accepting the declaration of the successor State. Upon the entry into force of the articles as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the articles shall apply to the effects of the succession of States as from the date of that succession of States.

3. A successor State may at the time of signing or of expressing its consent to be bound by the present articles make a declaration that it will apply the provisions of the articles provisionally in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

4. Any declaration made in accordance with paragraph 2 or 3 shall be contained in a written notification communicated to the depositary, who shall inform the Parties and the States entitled to become Parties to the present articles of the communication to him of that notification and of its terms.

#### Commentary

(1) The Commission, having recommended to the General Assembly<sup>98/</sup> that the present draft articles be studied by a conference of plenipotentiaries with a view to the conclusion of a convention on the subject, recognized that participation by successor States in the future convention would involve problems relating to the method of giving, and the retroactive effect of, consent to be bound by the convention expressed by the successor State. In fact, under the general law of treaties, a convention is not binding upon a State unless and until it is a party to the convention. Moreover, under a general rule, now codified in article 28 of the 1969 Vienna Convention on the Law of Treaties, the provisions of a treaty, in the absence of a contrary intention "do not bind a party in relation to any act or fact which took place ... before the date of the entry into force of the treaty with respect to that party". Since a succession of States in most cases brings into being a new State, a convention on the law of succession in respect of State property, archives and debts would ex hypothesi not be binding on the successor State unless and until it took steps to become a party to that convention; and even then the convention would not be binding upon it in respect of any act or fact which took place before the date on which it became a party. Nor would other States be bound by the convention in relation to the new State until the latter had become a party.

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<sup>98/</sup> See para. 86 and foot-note 87 above.

(2) At its present session the Commission, conscious that in the absence of a provision in these draft articles concerning their temporal application, article 28 of the 1969 Vienna Convention would apply, concluded that it was necessary to include the present article in order to avoid the problems referred to in the preceding paragraph. As in the case of article 3, this article reproduces, mutatis mutandis, the corresponding provision (article 7) of the 1978 Vienna Convention, which is intended to solve in the context of the law of succession of States in respect of treaties as codified in that convention problems similar to those which arise in the case of the present draft, as explained above.

(3) Article 7 of the 1978 Vienna Convention was adopted by the United Nations Conference on Succession of States in Respect of Treaties after long and careful consideration at both the first and resumed sessions of the Conference, with the help of an Informal Consultations Group set up to consider, inter alia, its subject-matter.<sup>99/</sup> Paragraph 1 of article 7 reproduces without change the text of the only paragraph constituting draft article 7 of the final draft on succession of States in respect of treaties adopted by the Commission in 1974.<sup>100/</sup> Paragraphs 2 to 4 of article 7 of the 1978 Vienna Convention were elaborated by the Conference as a mechanism intended to enable successor States to apply the provisions of the Convention, or to apply them provisionally, in respect of their own succession which had occurred before the entry into force of the Convention. Article 4 aims at achieving similar results in the case of a future convention embodying rules applicable to a succession of States in respect of State property, archives and debts.

(4) In its commentary to draft article 7 of the final draft on succession of States in respect of treaties adopted in 1974, the Commission stated, inter alia, the following.<sup>101/</sup>

"Article 7 is modelled on article 4 of the [1969] Vienna Convention but is drafted having regard to the provisions on the non-retroactivity of treaties

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<sup>99/</sup> For a reference to the documents of the Conference, see foot-note 20 above. The summary records of the plenary meetings and of the meetings of the Committee of the Whole held during the first (1977) and resumed (1978) sessions of the Conference appear in Official Records of the United Nations Conference on Succession of States in Respect of Treaties, vols. I and II, respectively (United Nations Publications, Sales Nos. E.78.V.8 and E.79.V.9).

<sup>100/</sup> Yearbook ... 1974, vol. II (Part One), p. 157, document A/9610/Rev.1.

<sup>101/</sup> Ibid., p. 182.



in article 28 of that Convention. The article has two parts. The first, corresponding to the first part of article 4 of the Vienna Convention, is a saving clause which makes clear that the non-retroactivity of the present articles will be without prejudice to the application of any of the rules set forth in the articles to which the effects of a succession of States would be subject under international law independently of the articles. The second part limits the application of the present articles to cases of succession of States which occur after the entry into force of the articles except as may be otherwise agreed. The second part speaks only of 'a succession of States,' because it is possible that the effects of a succession of States which occurred before the entry into force of the articles might continue after their entry into force and this possibility might cause confusion in the application of the article. The expression 'entry into force' refers to the general entry into force of the articles rather than the entry into force for the individual State, because a successor State could not become a party to a convention embodying the articles until after the date of succession of States. Accordingly, a provision which provided for non-retroactivity with respect to 'any act or fact ... which took place before the date of the entry into force of the treaty with respect to that party,'\* as in article 28 of the 1969 Vienna Convention, would, if read literally, prevent the application of the articles to any successor State on the basis of its participation in the convention. The words 'except as may be otherwise agreed' are included to provide a measure of flexibility and reflect the sense of the introductory words to article 28 of the 1969 Vienna Convention."

The foregoing passage, which is applicable to paragraph 1 of article 4 of the present draft is to be read, for the purposes of this draft, keeping in mind the provisions contained in paragraphs 2 to 4 of the article.

#### Article 5

##### Succession in respect of other matters

Nothing in the present articles shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present articles.

##### Commentary

In view of the fact that the present draft articles do not deal with succession of States in respect of all matters other than treaties but are, rather, limited in scope to State property, archives and debts, the Commission, in second reading, deemed it appropriate to include this safeguard clause relating to the effects of a succession of States in respect of matters other than the three to which the draft applies. The wording of article 5 is modelled on that of article 14 of the 1978 Vienna Convention.

## Article 6

### Rights and obligations of natural or juridical persons

Nothing in the present articles shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.

### Commentary

As explained in the commentary to article 31 below the Commission, at its present session, decided not to include in the definition of State debt a reference to any financial obligation chargeable to a State other than those owed to another State, an international organization or any other subject of international law. Other provisions, such as article 12, might be misunderstood as implying some prejudice to the rights of natural or juridical persons. In these circumstances the Commission found it especially appropriate to insert in the draft the safeguard clause contained in article 6. It is intended to avoid any implication that the effects of a succession of States in respect of State property, archives and debts, for which the present articles provide, could in any respect prejudice any question relating to the rights and obligations of individuals, whether natural or juridical persons. The article is cast in general form and has, therefore, been included in the present Part I, containing the "General provisions" applicable to the draft as a whole.

PART II

STATE PROPERTY

Section 1. Introduction

Article 7

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 property.

Commentary

The purpose of this provision is simply to make it clear that the articles in Part II deal with only one of the three "matters other than treaties" mentioned in article 1, namely, State property.

Article 8

State property

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Commentary

- (1) The purpose of article 8 is not to settle what is to become of the State property of the predecessor State, but merely to establish a criterion for determining such property.
- (2) There are in practice quite a number of examples of treaty provisions which determine, in connection with a succession of States, the State property of the predecessor State, sometimes in detail. They include article 10 of the Treaty of Utrecht of 11 April 1713;<sup>102/</sup> article 11 of the Treaty of 30 April 1803 between France and the United States of America for the sale of Louisiana;<sup>103/</sup> article 2 of the Treaty of 9 January 1895 by which King Leopold ceded the Congo to the Belgian State;<sup>104/</sup> article II of the Treaty of Peace of Shimonoseki of 17 April 1895 between

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<sup>102/</sup> F. Israel, ed., Major Peace Treaties of Modern History, 1648-1967 (New York, Chelsea House and McGraw Hill, 1967), vol. I, pp. 207-208.

<sup>103/</sup> G.F. de Martens, ed., Recueil des principaux traités, (Göttingen, Dieterich, 1831), vol. VII, p. 709.

<sup>104/</sup> de Martens, ed., Nouveau recueil général de traités (Göttingen, Dieterich, 1896), 2nd series, vol. XXI, p. 693.

China and Japan,<sup>105/</sup> and article I of the Convention of Retrocession of 8 November 1895 between the same States;<sup>106/</sup> article VIII of the Treaty of Peace of 10 December 1898 between Spain and the United States of America,<sup>107/</sup> and the annexes to the Treaty of 16 August 1960 concerning the establishment of the Republic of Cyprus.<sup>108/</sup>

(3) An exact specification of the property to be transferred by the predecessor State to the successor State in two particular cases of succession of States is also to be found in two resolutions adopted by the General Assembly in pursuance of the provisions of the Treaty of Peace with Italy of 10 February 1947.<sup>109/</sup> The first of these, resolution 388 (V), was adopted on 15 December 1950, with the title "Economic and financial provisions relating to Libya". The second, resolution 530 (VI), was adopted on 29 January 1952, with the title "Economic and financial provisions relating to Eritrea".

(4) No generally applicable criteria, however, can be deduced from the treaty provisions mentioned above, the content of which varied according to the circumstances of the case, or from the two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations. Moreover, as the Franco-Italian Conciliation Commission stated in an award of 26 September 1964, "customary international law has not established any autonomous criterion for determining what constitutes State property".<sup>110/</sup>

(5) Up to the moment when the succession of States takes place, it is the internal law of the predecessor State which governs that State's property and determines its status as State property. The successor State receives it as it is into its own juridical order. As a sovereign State, it is free, within the limits of general international law, to change its status, but any decision it takes in that connection is necessarily subsequent to the succession of States and derives from its competence as a State and not from its capacity as the successor State. Such a decision is outside the scope of State succession.

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<sup>105/</sup> British and Foreign State Papers, vol. 86 (London, H.M. Stationery Office, 1900), p. 800.

<sup>106/</sup> Ibid., p. 1195.

<sup>107/</sup> de Martens, Nouveau recueil ... (Leipzig, Dieterich, 1905), 2nd series, vol. XXXII, p. 76.

<sup>108/</sup> United Nations, Treaty Series, vol. 382, p. 8.

<sup>109/</sup> Ibid., vol. 49, p. 3.

<sup>110/</sup> Award in "Dispute regarding property belonging to the Order of St. Maurice and St. Lazarus", Annuaire français de droit international, 1965 (Paris), vol. XI, p. 323.

(6) The Commission notes, however, that there are several cases in diplomatic practice where the successor State has not taken the internal law of the predecessor State into consideration in characterizing State property. Some decisions by international courts have done the same in relation to the property in dispute.

(7) For example, in its Judgment of 15 December 1933 in the Péter Pázmány University case, the Permanent Court of International Justice took the view that it had "no need to rely upon"<sup>111/</sup> the interpretation of the law of the predecessor State in order to decide whether the property in dispute was public property. It is true that the matter was governed by various provisions of the Treaty of Trianon,<sup>112/</sup> which limited the Court's freedom of judgement. In another case, in which Italy was the predecessor State, the United Nations Tribunal in Libya ruled on 27 June 1955 that in deciding whether an institution was public or private, the Tribunal was not bound by Italian law and judicial decisions.<sup>113/</sup> Here again, the matter was governed by special provisions - in this case those of resolution 388 (V), already mentioned,<sup>114/</sup> which limited the Court's freedom of judgement.

(8) The Commission nevertheless considers that the most appropriate way of defining "State property" for the purposes of part II of the present draft articles is to refer the matter to the internal law of the predecessor State.

(9) The opening words of article 8 emphasize that the rule it states applies only to the provisions of part II of the present draft and that, as usual in such cases, the Commission did not in any way intend to put forward a general definition.

(10) The Commission wishes to stress that the expression "property, rights and interests" in article 8 refers only to rights and interests of a legal nature. This expression is to be found in many treaty provisions, such as article 297 of the Treaty of Versailles,<sup>115/</sup> article 249 of the Treaty of Saint-Germain-en-Laye,<sup>116/</sup>

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<sup>111/</sup> P.C.I.J., Series A, B, No. 61, p. 236.

<sup>112/</sup> British and Foreign State Papers, 1920, vol. 113 (London, H.M. Stationery Office, 1923), p. 486.

<sup>113/</sup> United Nations, Reports of International Arbitral Awards, vol. XII (United Nations publication, Sales No. 63.V.3), p. 390.

<sup>114/</sup> See para. (3) of this commentary, above.

<sup>115/</sup> British and Foreign State Papers, 1919, vol. 112 (London, H.M. Stationery Office, 1922), p. 146.

<sup>116/</sup> Ibid., p. 434.

article 177 of the Treaty of Neuilly-sur-Seine,<sup>117/</sup> article 232 of the Treaty of Trianon<sup>118/</sup> and article 79 of the Treaty of Peace with Italy.<sup>119/</sup>

(11) In article 8, the expression "internal law of the predecessor State" refers to rules of the legal order of the predecessor State which are applicable to State property. For States whose legislation is not unified, these rules include, in particular, those which determine the specific law of the predecessor State - national, federal, metropolitan or territorial - that applies to each piece of its State property.

#### Article 9

##### Effects of the passing of State property

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 property as passes to the successor State in accordance with the provisions of the articles in the present Part.

#### Commentary

(1) Article 9 makes it clear that a succession of States has a dual juridical effect on the respective rights of the predecessor State and the successor State as regards State property passing from the former to the latter. It entails, on the one hand, the extinction of the rights of the predecessor State to the property in question and, on the other hand and simultaneously, the arising of the rights of the successor State to that property. The purpose of article 9 is not to determine what State property passes to the successor State. Such determination will be done "in accordance with the provisions of the articles in the present Part", and more specifically, of articles 12 to 17.

(2) Article 9 gives expression in a single provision to a consistent practice, and reflects the endeavour to translate, by a variety of formulae, the rule that a succession of States entails the extinction of the rights of the predecessor State and the arising of those of the successor State to State property passing to the successor State. The terminology used for this purpose has varied according to time and place. One of the first notions found in peace treaties is that of the renunciation by the predecessor State of all rights over the ceded territories,

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<sup>117/</sup> Ibid., p. 839.

<sup>118/</sup> Ibid., 1920, vol. 113 (1923), p. 839.

<sup>119/</sup> United Nations, Treaty Series, vol. 49, p. 163.

including those relating to State property. This notion already appears in the Treaty of the Pyrenees of 1659,<sup>120/</sup> and found expression again in 1923 in the Treaty of Lausanne<sup>121/</sup> and in 1951 in the Treaty of Peace with Japan.<sup>122/</sup> The Treaty of Versailles expresses a similar idea concerning State property in a clause which stipulates that "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States".<sup>123/</sup> A similar clause is found in the treaties of Saint-Germain-en-Laye,<sup>124/</sup> Neuilly-sur-Seine<sup>125/</sup> and Trianon.<sup>126/</sup> The notion of cession is also frequently used in several treaties.<sup>127/</sup> Despite the variety of formulae, the large majority of treaties relating to transfers of territory contain a consistent rule, namely, that of the extinction and simultaneous arising of rights to State property.

(3) For article 9, the Commission adopted the notion of the "passing" of State property, rather than of the "transfer" of such property, because it considered that the notion of transfer was inconsistent with the juridical nature of the effects of a succession of States on the rights of the two States in question to State property. On the one hand, a transfer often presupposes an act of will on the part of the transferor. As indicated by the word "entails" in the text of article 9, however, the extinction of the rights of the predecessor State and the arising of the rights of the successor State take place as of right. On the other hand, a transfer implies a certain continuity, whereas a simultaneous extinction and arising imply a break in continuity. The Commission nevertheless wishes to make two comments on this latter point.

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<sup>120/</sup> Article XLI (English text in Israel, ed., *op. cit.*, vol. I, p. 51)

<sup>121/</sup> See in particular articles 15, 16 and 17 (League of Nations, *Treaty Series*, vol. XXVIII, p. 23).

<sup>122/</sup> Article 2 (United Nations, *Treaty Series*, vol. 136, pp. 48 and 50)

<sup>123/</sup> Article 256. (British and Foreign State Papers, 1919, vol. 112, p. 125).

<sup>124/</sup> Article 208 (*ibid.*, pp. 412-414).

<sup>125/</sup> Article 142 (*ibid.*, pp. 821-822).

<sup>126/</sup> Article 191 (*ibid.*, 1921, vol. 113, pp. 564-565).

<sup>127/</sup> See, for example, article 1 of the Convention of 4 August 1916 between the United States of America and Denmark concerning the cession of the Danish West Indies (in Supplement to the American Journal of International Law (New York, Oxford University Press), vol. II (1917), p. 54; and article V of the Treaty of 2 February 1951 concerning the cession to India of the free town of Chandernagore (United Nations, *Treaty Series*, vol. 203, p. 158)).

(4) In the first place, the successor State may create a certain element of continuity by maintaining provisionally in force the rules of the law of the predecessor State relating to the régime of State property. Such rules are certainly no longer applied on behalf of the predecessor State, but rather on behalf of the successor State, which has received them into its own law by a decision taken in its capacity as a sovereign State. Although, however, at the moment of succession, it is another juridical order that is in question, the material content of the rules remains the same. Consequently, in the case envisaged, the effect of the succession of States is essentially to change the entitlement to the rights to the State property.

(5) In the second place, the legal passing of the State property of the predecessor State to the successor State is often, in practice, followed by a material transfer of such property between the said States, accompanied by the drawing-up of inventories, certificates of delivery and other documents.

#### Article 10

##### Date of the passing of State property

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

##### Commentary

(1) Article 10 contains a residuary provision specifying that the date of the passing of State property is that of the succession of States. It should be read together with article 2, paragraph 1 (d), which states that "'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

(2) The residuary character of the provision in article 10 is brought out by the subsidiary clause with which the article begins: "Unless otherwise agreed or decided". It follows from that clause that the date of the passing of State property may be fixed either by agreement or by a decision.

(3) In fact, it sometimes occurs in practice that the States concerned agree to choose a date for the passing of State property other than that of the succession of States. It is that situation which is referred to by the term "agreed" in the above-mentioned opening clause. Some members of the Commission suggested that the words "between the predecessor State and the successor State" should be added. Others, however, opposed that suggestion on the grounds that for State property



situated in the territory of a third State the date of passing might be laid down by a tripartite agreement concluded between the predecessor State, the successor State and the third State.

(4) There have also been cases where an international court has ruled on the question what was the date of the passing of certain State property from the predecessor State to the successor State.<sup>128/</sup> The Commission therefore added the words "or decided" after the word "agreed" at the beginning of article 10. However, the Commission did not intend to specify from whom a decision might come.

### Article 11

#### Passing of State property without compensation

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

#### Commentary

(1) Article 11 comprises a main provision and two subsidiary clauses. The main provision lays down the rule that the passing of State property from the predecessor State to the successor State in accordance with the provisions of the articles in the present part shall take place without compensation. It constitutes a necessary complement to article 9 but like that article - and for the same reasons<sup>129/</sup> - it is not intended to determine what State property passes to the successor State.

(2) With some exceptions,<sup>130/</sup> practice confirms the rule set forth in the main

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<sup>128/</sup> See, for example, Judgment No. 7 handed down on 25 May 1926 by the Permanent Court of International Justice in the Case concerning certain German interests in Polish Upper Silesia (P.C.I.J. Series A, No. 7), and its Advisory Opinion of 10 September 1923 on Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland (*ibid.*, Series B, No. 6, pp. 6-43).

<sup>129/</sup> See para. (1) of the commentary to article 9, above.

<sup>130/</sup> These exceptions are to be found, *inter alia*, in four of the peace treaties concluded after the First World War (see article 256 of the Treaty of Versailles (*British and Foreign State Papers*, 1919, vol. 112, p. 125); article 208 of the Treaty of Saint-Germain-en-Laye (*ibid.* p. 413); article 142 of the Treaty of Neuilly-sur-Seine (*ibid.* pp. 821-822); and article 191 of the Treaty of Trianon (*ibid.* 1920, vol. 113, p. 494). Under the terms of these treaties, the value of the State property ceded by the predecessor States to the successor States was deducted from the amount of the reparations due by the former to the latter. It should, however, be noted that in the case of some State property, the treaties in question provided for transfer without any *quid pro quo*. Thus, article 56 of the Treaty of Versailles (*ibid.* 1919, vol. 112, p. 43) specified that "France shall enter into possession of all property and estate within the territories referred to in Article 51, which belong to the German Empire or German States (i.e. in Alsace-Lorraine), without any payment or credit on this account to any of the States ceding the territories".

provision of article 11. In many treaties concerning the transfer of territories, acceptance of this rule is implied by the fact that no obligation is imposed on the successor State to pay compensation for the cession by the predecessor State of public property, including State property. Other treaties state the rule expressly, stipulating that such cession shall be without compensation. These treaties contain phrases such as "without compensation",<sup>131/</sup> "in full Right",<sup>132/</sup> "without payment" ("sans paiement"<sup>133/</sup> or "gratuitement"<sup>134/</sup>).

(3) The first subsidiary clause of article 11, "Subject to the provisions of the articles in the present Part", is intended to reserve the effects of other provisions in part II. One notable example of such provisions is that of article 12 regarding the absence of effect of a succession of States on the property of a third State.

(4) The second subsidiary clause of article 11 reads: "unless otherwise agreed or decided". Its purpose is to provide expressly for the possibility of derogating from the rule in this article. It is identical with the clause in article 10 on which the Commission has already commented.<sup>135/</sup>

#### Article 12

##### Absence of effect of a succession of States on the property of a third State

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.

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<sup>131/</sup> Article III, para. 4 of the Agreement between the United States of America and Japan concerning the Amami Islands, signed at Tokyo on 24 December 1953 (United Nations, Treaty Series, vol. 222, p. 195).

<sup>132/</sup> Article 10 of the Treaty of Utrecht of 11 April 1713 concerning the cession of the Bay and Straits of Hudson by France to Great Britain (Israel, op. cit., p. 207).

<sup>133/</sup> Annex X, para. 1 and Annex XIV, para. 1 of the Treaty of Peace with Italy (United Nations, Treaty Series, vol. 49, pp. 209 and 225); and United Nations General Assembly resolutions 388(V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya" (article 1, para. 1) and 530(VI) of 29 January, 1972 entitled "Economic and financial provisions relating to Eritrea" (article 1, para. 1).

<sup>134/</sup> Article 60 of the Treaty of Lausanne (League of Nations, Treaty Series, vol. XXVIII, p. 53).

<sup>135/</sup> See paras. (2) - (4) of the commentary to article 10, above.

### Commentary

- (1) The rule formulated in article 12 stems from the fact that a succession of States, that is, the replacement of one State by another in the responsibility for the international relations of territory, can have no legal effect with respect to the property of a third State. At the outset the Commission wishes to point out that the article has been placed in part II of the draft, which is concerned exclusively with succession with respect to State property. Consequently, no argument a contrario can be drawn from the absence from article 12 of any reference to private property, rights and interests.
- (2) As emphasized by the words "as such" appearing after the words "a succession of States shall not", article 12 deals solely with succession of States. It in no way prejudices any measures that the successor State, as a sovereign State, might adopt subsequently to the succession of States with respect to the property of a third State, in conformity with the rules of other branches of international law.
- (3) The words "property, rights and interests" have been borrowed from article 8, where they form part of the definition of the term "State property". In article 12 they are followed by the qualifying clause "which, at the date of the succession of States, are situated in the territory of the predecessor State". The Commission regarded it as obvious that a succession of States could have no effect on the property, rights and interests of a third State situated outside the territory affected by the succession, and that the scope of the present article should therefore be limited to such territory.
- (4) The words "according to the internal law of the predecessor State" are also borrowed from article 8. The Commission wishes to refer to observations previously expressed in this connection.<sup>136/</sup>
- (5) Certain members of the Commission considered this article unnecessary.

### Section 2. Provisions concerning specific categories of succession of States

#### Commentary

(1) In section 1 of the present part, the draft articles dealt with various questions relating to succession of States in respect of State property applicable generally to all categories of succession. Articles 13 to 17 comprise section 2, and deal with the question of the passing of State property from the predecessor State to the successor State separately for each category of succession. This method was deemed to be the most appropriate for section 2 of part II of the draft,

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<sup>136/</sup> See para. (11) of the commentary to article 8, above.

as it was for section 2 in parts III and IV as well, in view of the obvious differences existing between various categories of succession, owing to the political environment in each of the cases where there is a change of sovereignty over or a change in the responsibility for the international relations of the territory to which the succession of States relates. In addition, it is justified in the case of part II by the various constraints which the movable nature of certain kinds of property places on the quest for solutions. Before going into the individual draft articles, the Commission wishes to make the following general observations concerning certain salient aspects of the provisions in the present section.

Choice between general rules and rules relating to property regarded in concreto

(2) On the basis of the reports submitted by the Special Rapporteur, the Commission considered which of three possible methods might be followed for determining the kind of rules that should be formulated for each category of succession. The first method consisted in adopting, for each category of succession, special provisions for each of those kinds of State property affected by a succession of States which are most essential and most widespread, so much so that they can be said to derive from the very existence of the State and represent the common denominators, so to speak, of all States, such as currency, treasury and State funds. The second method involved drafting, for each type of succession, more general provisions, not relating in concreto to each of these kinds of State property. A third possible method consisted in combining the first two and formulating, for each type of succession, one or two articles of a general character, adding perhaps one or two articles, where appropriate, relating to specific kinds of State property.

(3) The Commission decided to adopt the method to which the Special Rapporteur had reverted in his eighth report,<sup>137/</sup> namely, that of formulating, for each type of succession, general provisions applicable to all kinds of State property. The Commission decided not to follow the first method, which was the basis of the Special Rapporteur's seventh report and which it had discussed at the twenty-seventh session (1975), not so much because a choice based on property regarded in concreto might be considered as being artificial, arbitrary or inappropriate as because of the extremely technical character of the provisions it would have been obliged to draft for such complex matters as currency, treasury and State funds.

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<sup>137/</sup> Yearbook ... 1976, vol. II (Part One), pp. 55 et seq.  
document A/CN.4/292.

### Distinction between immovable and movable property

(4) In formulating, for each category of succession, general provisions applicable to all kinds of State property, the Commission found it necessary to introduce a distinction between immovable and movable State property, since these two categories of property cannot be given identical treatment and, in the case of succession to State property, must be considered separately, irrespective of the legal systems of the predecessor State and the successor State. The distinction, known to the main legal systems of the world, corresponds primarily to a physical criterion for differentiation, arising out of the very nature of things. Some property is physically linked to territory so that it cannot be moved; this is immovable property. Then there are other kinds of property which are capable of being moved, so that they can be taken out of the territory; these constitute movable property. However, it seems desirable to make it clear that in adopting this terminology the Commission is not leaning towards the universal application of the laws of a particular system, especially those that derive purely from Roman law, because, as is the case with the distinction between public domain and private domain, a notion of internal law should not be referred to when it does not exist in all the main legal systems. The distinction made thus differs from the rigid legal categories found, for example, in French law. It is simply that the terms "movable" and "immovable" seem most appropriate for designating, for the purposes of succession to State property, property which can be moved or which is immobilized.

(5) Referring both categories of State property to "territory" is simply a reflection of the historical fact that State sovereignty developed over land. Whoever possessed land possessed economic and political power, and this is bound to have a far-reaching effect on present-day law. Modern State sovereignty is based primarily on a tangible element: territory. It can, therefore, be concluded that everything linked to territory, in any way, is a base without which a State cannot exist, whatever its political or legal system.

### Criteria of linkage of the property to the territory

(6) Succession of States in respect of State property is governed, irrespective of the specific category of succession, by one key criterion applied throughout section 2 of part II of the draft: the linkage of such property to the territory. Applying this criterion, the basic principle may be stated that, in general, State property passes from the predecessor State to the successor State. It is through the application of a material criterion, namely, the relation which exists between the territory and the property by reason of the nature of the property or where it is situated, that the existence of the principle of the passing of State property

can be deduced. Moreover, behind this principle lies the further principle of the actual viability of the territory to which the succession of States relates.

(7) As regards immovable State property, the principle of the linkage of such property to the territory finds concrete application by reference to the geographical situation of the State property concerned. Consequently, for the types of succession dealt with in section 2 of the present part, as appropriate, the rule regarding the passing of immovable State property from the predecessor to the successor State is couched in the following terms, used in paragraphs 2 (a) of article 13 and 1 (a) of articles 14 and 16:

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

or in the somewhat different form used in paragraph 1 (a) of article 17:

immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated.

As adopted by the Commission, the rule relating to the passing of immovable State property does not apply to such property when it is situated outside the territory to which the succession of States relates, except in the cases of the newly independent State and of dissolution of a State, as is explained in the commentary to articles 14 and 17.

#### Special aspects due to the mobility of the property

(8) As regards movable State property, the specific aspects which are due to the movable nature or mobility of State property add a special difficulty to the problem of the succession of States in this sphere. Above all, the fact that the property is movable, and can therefore be moved at any time, makes it easy to change the control over the property. In the Commission's view, the mere fact that movable State property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automatically entitle the predecessor State to retain it. For the predecessor State to retain or the successor State to receive such property, other conditions must be fulfilled. Those conditions are not unrelated to the general conditions concerning viability, both of the territory to which the succession of States relates and of the predecessor State. They are closely linked to the general principle of equity, which should never be lost from view and which, in such cases, enjoins apportionment of the property between the successor State or States and the predecessor State, or among the successor States if there is more than one and the

predecessor State ceases to exist. The predecessor State must not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the territory to which the succession of States relates and of jeopardizing the viability of the successor State. Attention should therefore be drawn to the limits imposed by good faith, beyond which the predecessor State cannot go without failing in an essential international duty.

(9) Any movable State property of the predecessor State which is quite by chance in the territory to which the succession of States relates at the time when the succession of States occurs should not ipso facto, or purely automatically, pass to the successor State. If solely the place where the property is situated were taken into account, that would in some cases constitute a breach of equity. Moreover, the fact that State property may be where it is purely by chance is not the only reason for caution in formulating the rule. There may even be cases where the predecessor State situates movable property, not by chance, but deliberately, in the territory to which a succession of States will relate, without that property having any link with the territory, or at least without its having such a link to that territory alone. In such a case, it would again be inequitable to leave the property to the successor State alone. For example, it might be that the country's gold reserves or the metallic cover for the currency in circulation throughout the territory of the predecessor State had been left in the territory to which the succession of States relates. It would be unthinkable, merely because the entire gold reserves of the predecessor State were in that territory, to allow the successor State to claim them if the predecessor State was unable to evacuate them in time.

(10) On the other hand, while the presence of movable State property in the part of the territory which remains under the sovereignty of the predecessor State after the succession of States normally justifies the presumption that it should remain the property of the predecessor State, such a presumption, however natural it may be, is not necessarily irrefutable. The mere fact that property is situated outside the territory to which the succession of States relates cannot in itself constitute an absolute ground for retention of such property by the predecessor State. If the property is linked solely, or even concurrently, to the territory to which the succession of States relates, equity and the viability of the territory require that the successor State should be granted a right on that property.

(11) In the light of the foregoing considerations, the Commission came to the conclusion that as far as movable State property is concerned, the principle of the linkage of such property to the territory should not find concrete application by

reference to the geographical situation of the State property in question. Having in mind that, as explained above,<sup>138/</sup> the legal rule applicable to the passing of movable State property should be based on the principle of viability of the territory and take into account the principle of equity, the Commission considered the question of how to give expression to the criterion of linkage between the territory and the movable State property concerned. Various expressions were suggested, including property having a "direct and necessary link" between the property and the territory, "property appertaining to sovereignty over the territory" and "property necessary for the exercise of sovereignty over the territory". Having discarded all these as not sufficiently clear, the Commission adopted the formula "property ... connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". Consequently, for the categories of succession dealt with in section 2 of part II of the draft, as appropriate, the rule regarding the passing of movable State property from the predecessor to the successor State is couched in the following terms, which are used in articles 13 (para. 2(b)), 14 (para. 1(d)), 16 (para. 1(b)) and 17 (para. 1(c)):

movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory [territories] to which the succession of States relates shall pass to the successor State.

#### Article 13

##### Transfer of part of the territory of a State

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

2. In the absence of such an agreement:

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

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

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<sup>138/</sup> Paragraph (8) of this commentary.



Commentary

(1) As was indicated above,<sup>139/</sup> the Commission, when establishing its 1974 final draft on succession of States in respect of treaties, concluded that for the purpose of the codification of the modern law relating to that topic it was sufficient to arrange the cases of succession of States under three broad categories:

(a) succession in respect of part of territory; (b) newly independent States; and (c) uniting and separation of States. In the 1974 draft, succession in respect of part of territory was dealt with in article 14, the introductory sentence of which reads as follows:

"When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State;"

As was also indicated above,<sup>140/</sup> in adopting the foregoing text for the category of succession characterized as "succession in respect of part of territory", the Commission added the case of non-self-governing territory that achieves its decolonization by integration with a State other than the colonial State to the case of part of the territory of a pre-existing State which becomes part of the territory of another State. The Commission considered that, for the purposes of succession in respect of treaties, the two cases could be dealt with together in the same provision, since one single principle, that of "moving treaty-frontiers", was applicable to both of them.

(2) The quite unique nature of "succession in respect of part of territory" as compared with other categories of succession gives rise to difficulties in the context of the topic of succession of States in respect of matters other than treaties. A frontier adjustment, which as such raises a problem of "succession in respect of part of territory", may in some cases affect only a few unpopulated or scarcely populated acres of a territory, but in the case of some States may cover millions of square miles and be populated by millions of inhabitants. It is very unlikely that frontier adjustments affecting only a few unpopulated acres of land, such as that which enabled Switzerland to extend the Geneva-Cointrin airport into what was formerly French territory, will give rise to problems of State property such as currency and treasury and State funds. It should also be borne in mind that minor frontier adjustments are the subject of agreements between the States.

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<sup>139/</sup> See paras. 72-73 above.

<sup>140/</sup> See para. 72 above.

concerned, whereby they settle all questions arising between the predecessor State transferring territory and the successor State to which it is transferred, without the need to consult a population that may or may not exist. But 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 a general settlement of all the problems involved, without the need to consult the population, it is nevertheless a fact that this category of succession also includes cases affecting territories and tracts of land that may be densely populated. In these cases, problems concerning the passing of State property such as currency and treasury and State funds certainly do arise, and in fact they are particularly acute.

(3) It is this situation - namely, the fact that the area affected by the territorial change may be either very densely populated or very sparsely populated - 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 State property, archives and debts. In short, the magnitude of the problems of the passing of State property varies not just with the size of the territory transferred, but mainly according to whether or not it is necessary to consult the population of the territory concerned. These problems arise in each and every case, but more perceptibly and more conspicuously when the area of the transferred territory is large and densely populated. This incontrovertible reality is simply a reflection of the phenomenon of substitution of sovereignty over the territory in question, which inevitably manifests itself through an extension to the territory of the successor State's own legal order, and hence through a change, for example, in the monetary tokens in circulation. Currency, in particular, is a very important item of State property, being the expression of a regalian right of the State and the manifestation of its sovereignty.

(4) It should be added that cases of "succession in respect of part of territory" do not always involve agreements the existence of which would explain giving a residual character to the rules to be formulated to govern succession of States in respect of State property. Moreover, it is in those cases where a densely populated part of the territory of a State passes to another State - in other words, precisely the cases in which the problems of State property such as currency and treasury and State funds arise on a larger scale - that agreements for the settlement of such problems may be lacking. This is not a theoretical hypothesis. Apart from war or the annexation of territory by force, both of which are prohibited by contemporary

international law, the case can be envisaged of detachment of part of a State's territory and its attachment to another State following a referendum on self-determination, or of secession by part of a State's population and attachment of the territory in which it lives to another State. In such situations, it is not always possible to count on the existence of an agreement between the predecessor State and the successor State, especially in view of the politically charged circumstances which may surround such territorial changes.

(5) It was in the light of the foregoing considerations that the Commission decided that, for the purposes of codifying the rules of international law relating to succession of States in respect of State property, in particular, it was appropriate to distinguish and deal separately in the present part with three cases covered by one single provision in article 14 of the 1974 draft on succession in respect of treaties: (1) the case where part of the territory of a State is transferred by that State to another State, which is the subject of the present article; (2) the case where a part of the territory separates from that State and unites with another State, which is the subject of paragraph 2 of article 16 (Separation of part or parts of the territory of a State); and (3) the case where 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 paragraph 3 of article 14 (Newly independent State).

(6) Article 13 is therefore limited to cases of transfer of part of the territory of a State to another State. The word "transfer", in the title of the article, and the words "is transferred", in paragraph 1, are intended to emphasize the precise scope of the provisions of article 13. The cases of transfer of territory envisaged are those where the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned does not presuppose the consultation of the population of that part of the territory, in view of its minor political, economic, strategic, etc., importance, or the fact that it is scarcely inhabited, if at all. Furthermore, the cases envisaged are always those which, according to article 3 of the draft, occur in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. In most of these cases, problems concerning the passing of such State property as currency, treasury and State funds, etc., do not actually arise or have no great relevance, and it is by the agreement of the predecessor and the successor States that the passing of State property, whether immovable or movable, from one State to the other, is normally settled. This primacy of the agreement in the situation covered by

article 13 is reflected in paragraph 1 of the article, according to which, "When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between them". It should be understood that, according to paragraph 1, such passing of State property should in principle be settled by agreement and that the agreement should govern the disposition of the property, no y to negotiate or agree being thereby implied.

(7) In the absence of an agreement between the predecessor and successor States, the provisions of paragraph 2 of article 13 apply. Subparagraph (a) of paragraph 2 concerns the passing of immovable State property, whereas subparagraph (b) of the same paragraph deals with the passing of movable State property. As explained above, <sup>141/</sup>subparagraph (a) of paragraph 2 states the rule regarding the passing of immovable State property from the predecessor State to the successor State by reference to the geographical situation of the State property concerned, in conformity with the basic principle of the passing of State property from the predecessor State to the successor State. It provides, therefore, that "immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State". It may be convenient to repeat here that this rule does not extend to immovable State property situated outside the territory to which the succession of States relates - property which is and remains that of the predecessor State.

(8) Subparagraph (b) of paragraph 2 states the rule regarding the passing of movable State property from the predecessor State to the successor State by reference to the material criterion of the connection between the property concerned and the activity of the predecessor State in respect of the territory to which the succession of States relates, as explained above. <sup>142/</sup> By that criterion, there is no distinction to be made as to the actual location of the movable State property in question and, consequently, there is no need to refer expressly to the passing of property "on the date of the succession of States", the time element being, moreover, already implied in the definition of State property contained in article 8 of the draft. Subparagraph (b) of paragraph 2 therefore provides that "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State".

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<sup>141/</sup> Introductory commentary to section 2, para. (7).

<sup>142/</sup> Ibid., in particular para. (11).

(9) The situation covered by the provisions of article 13 is to be distinguished from that of a part of the territory of a State which separates from that State and unites with another State, contemplated in paragraph 2 of article 16, as is indicated above.<sup>143/</sup> In the case of such separation, as opposed to the case of transfer of a part of territory, the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned presupposes the expression of a conforming will on the part of the population of the separating part of the territory, in consequence of its extent and large number of inhabitants or of its importance from a political, economic, strategic, etc., point of view. It is in these cases of separation of part of the territory of a State that problems concerning the passing of such State property as currency, treasury and State funds, etc., arise or have a greater significance, and the resolution of these problems is not always achieved by agreement between the predecessor and the successor States, such agreement being unlikely when the territorial change in question is surrounded by politically charged circumstances, as is often the case. An agreement between the predecessor and successor States is certainly to be envisaged, but not with the primacy that is accorded it in article 13, since what is paramount in the case to which paragraph 2 of article 16 relates is the will of the population expressed in the exercise of the right to self-determination. Consequently, the formulation of paragraph 1 of article 16, which applies to the case of separation of part of the territory of a State when that part unites with another State, departs from that of paragraph 1 of article 13 and contains the following clause: "and unless the predecessor State and the successor State otherwise agree".

(10) A further difference between the rules applicable in the cases covered by article 13, on the one hand, and by paragraph 2 of article 16, on the other, resulting likewise from the factual differences between them as described in the preceding paragraph, is reflected in the provision whereby in the absence of the agreement envisaged in both articles, it is only in the latter case that a third category of State property passes to the successor State. Thus, according to article 16, when part of the territory of a State separates from that State and unites with another State (para. 2), unless the predecessor State and the successor State otherwise agree (para. 1), movable State property of the predecessor State other than that connected with activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor

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<sup>143/</sup> Para. (5) of this commentary.

State in an equitable proportion (para. 1 (c) in conjunction with para. 1 (b)).

No such provision is required in the cases covered by article 13.

(11) The rules relating to the passing of State property in cases where part of the territory of a State is transferred to another State (article 13) and where part of the territory of a State separates from that State and unites with another State (article 16, para. 2) are founded in State practice, judicial decisions and legal theory, which admit generally the devolution of the State property of the predecessor State. Some examples may illustrate the point, even if they may seem broader in scope than the rules adopted.

(12) The devolution of such State property is clearly established practice. There are, moreover, many international instruments which simply record the express relinquishment by the predecessor State, without any quid pro quo, of all State property without distinction situated in the territory to which the succession of States relates. It may be concluded that relinquishment of the more limited category of immovable State property situated in that territory should a fortiori be accepted. The immovable State property which thus passes to the successor State is property which the predecessor State formerly used, as appropriate, in the portion of territory concerned, for the manifestation and exercise of its sovereignty, or for the performance of the general duties implicit in the exercise of that sovereignty, such as the defence of that portion of territory, security, promotion of public health and education, national development, and so on. Such property can easily be listed: it includes, for example, barracks, airports, prisons, fixed military installations, State hospitals, State universities, local government office buildings, premises occupied by the main central government services, buildings of the State financial, economic or social institutions, and postal and telecommunications facilities where the predecessor State was itself responsible for the functions which they normally serve.

(13) Two types of case will be omitted from the examples to follow, as being not sufficiently illustrative because the fact that they reflect the application of a general principle of devolution of State property is due to other causes of a peculiar and specific kind. The first type comprises all cessions of territories against payment. The purchase of provinces, territories and the like was an accepted practice in centuries past but has been tending towards complete extinction since the First World War, and particularly since the increasingly firm recognition of the right of peoples to self-determination. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly, these old cases of transfer are no longer demonstrative. On

purchasing a territory, a State purchased everything in it, or everything it wanted, or even, thing the other party wanted to sell there, and the transfer of State property does not here constitute proof of the existence of the rule, but simply of the capacity to pay.<sup>144/</sup>

(14) The second type consists of forced cessions of territory, which are prohibited by international law, so that succession to property in such cases cannot be regulated by international law.<sup>145/</sup> In this connection, reference is made to the provisions of article 3 of the draft.

(15) A third set of cases, which are perhaps only too demonstrative, consists of those involving "voluntary cessions without payment". In these very special and marginal cases, the passing of immovable State property is neither controversial

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<sup>144/</sup> See, for example, the Convention of Gastein of 14 August 1865, whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (British and Foreign State Papers, 1865-1886, vol. 56 (London, Ridgeway, 1870), p. 1026, p. 6); the Treaty of Washington of 30 March 1867, whereby Russia sold its North American possessions to the United States of America for \$1.2 million (W.M. Malloy, ed., Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909 (Washington, D.C., Government Printing Office, 1910), vol. II, p. 1521); the Convention whereby France ceded Louisiana to the United States of America for \$15 million (English and French texts in de Martens, ed., Recueil des principaux traités, vol. VII (op. cit.), p. 706).

<sup>145/</sup> In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XLI of the Treaty of the Pyrenees, which gave France Arras, Béthune, Lens, Bapaume, etc., specified that those places:

"... shall remain ... unto the said Lord the most Christian King, and to his Successors and Assigns ... with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardianship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priories, Dignitys, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countries ... formerly belonging to the said Lord the Catholick King ... And for that effect, the said Lord the Catholick King ... doth renounce [these rights] ... together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests ... the said Lord the Catholick King ... doth consent to be ... united and incorporated to the Crown of France; all Laws, Customs, Statutes and Constitutions made to the Contrary ... notwithstanding."

(Israel, op. cit., vol. I, pp. 69-70)

nor ambiguous, because it takes place not so much under the general principle of succession of States as by an expressly stated wish.<sup>146/</sup>

(16) Territorial changes such as those covered by article 13 and article 16, paragraph 2, have occurred relatively often following a war. In such cases, peace treaties contain provisions relating to territories ceded by the defeated Power. For that reason, the provisions of peace treaties and other like instruments governing the problems raised by transfers of territory must be treated with a great deal of caution, if not with express reservations. Subject to that proviso, it may be noted that the major peace treaties which ended the First World War opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.<sup>147/</sup>

(17) As to the Second World War, a Treaty of 29 June 1945 between Czechoslovakia and the USSR stipulated the cession to the latter of the Sub-Carpathian Ukraine within the boundaries specified in the Treaty of Saint-Germain-en-Laye. An annexed protocol provided for "transfer without payment of the right of ownership over State property in the Sub-Carpathian Ukraine". The Treaty of Peace concluded on 12 March 1940 between Finland and the USSR<sup>148/</sup> provided for reciprocal territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufacturing enterprises, telegraphic installations and electric stations. The Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy also contained provisions applying the principle of the passing of property,

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<sup>146/</sup> Cf., for example, the cession by Great Britain to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; the decision in July 1821, by an assembly of representatives of the Uruguayan people held at Montevideo, concerning the incorporation of the Cisplatina Province; the voluntary incorporation in France of the free town of Mulhouse in 1798; the voluntary incorporation of the Duchy of Courland in Russia in 1795; the Treaty of Rio of 30 October 1909, between Brazil and Uruguay, for the cession without compensation of various lagoons, islands and islets; the voluntary cession of Lombardy by France to Piedmont, without payment, under the Treaty of Zurich of 10 November 1859, etc.

<sup>147/</sup> See articles 256 of the Treaty of Versailles, 208 of the Treaty of Saint-Germain-en-Laye, 191 of the Treaty of Trianon, and 142 of the Treaty of Neuilly-sur-Seine (for references, see foot-note 130 above).

<sup>148/</sup> Supplement to the American Journal of International Law (Concord, N.H.), vol. 34 (1940), pp. 127-131.



including immovable property, from the predecessor State to the successor State. In particular, paragraph 1 of annex XIV to the Treaty (Economic and Financial Provisions Relating to Ceded Territories) provided that "the successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it ...".<sup>149/</sup>

(18) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and a fortiori of State property, and therefore of immovable property. This is true, in the first place, of national courts. According to Rousseau, "the general principle of the passing of public property to the new or annexing State is now accepted without question by national courts".<sup>150/</sup>

(19) Decisions of international jurisdictions confirm this rule. In the Péter Pázmány University case, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "principle of the generally accepted law of State succession".<sup>151/</sup> The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 confirmed the principle of the devolution to the successor State, in full ownership, of immovable State property. This can be readily deduced from one of its decisions. The Commission found that:

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<sup>149/</sup> United Nations, Treaty Series, vol. 49, p. 225.

<sup>150/</sup> C. Rousseau, Cours de droit international public - Les transformations territoriales des Etats et leurs conséquences juridiques (Paris, Les Cours de droit, 1964-1965), p. 139.

Reference is generally made to the judgement of the Berlin Court of Appeal (Kammergericht) of 16 May 1940 (case of the succession of States to Memel - return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939: see Annual Digest and Reports of Public International Law Cases, 1919-1942. Supplementary Volume (London, 1947), case No. 44, pp. 74-76), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 (case of Amine Namika Sultan v. Attorney-General: see Annual Digest ... 1947 (London, 1951), case No. 14, pp. 36-40), which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of article 60 of the Treaty of Lausanne of 1923.

<sup>151/</sup> See Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Péter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61, p. 237.

"The main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including biens communaux within the territories ceded." 152/

(20) As far as movable State property is concerned, the Commission has already explained 153/ the reasons why the principle of the linkage of such property to the territory should not find concrete application by reference to the geographical situation of the property in question, in view of the special aspects due to the mobility of that property. The Commission decided to give expression to the criterion of linkage between the territory and the movable property concerned by the formula: "property ... connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". That concept may be regarded as closely related to that sanctioned by international judicial decisions, which concerns the transfer of property belonging to local authorities necessary for the viability of the local territorial authority concerned. For example, in the dispute concerning the apportionment of the property of local authorities whose territory had been divided by a new delimitation of the frontier between France and Italy, the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947, noted that:

"... the Treaty of Peace did not reflect any distinctions ... between the public domain and the private domain that might exist in the legislation of Italy or the State to which the territory is ceded. However, the nature of the property and the economic use to which it is put have a certain effect on the apportionment.

"The apportionment must, first of all, be just and equitable. However, the Treaty of Peace does not confine itself to this reference to justice and equity, but provides a more specific criterion for a whole category of municipal property and for what is generally the most important category.

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152/ Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, Reports of International Arbitral Awards, vol. XIII (United Nations publication, Sales No. 64, V.3), p. 514).

Annex XIV, para. 1, provided that: "The successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it ..." (United Nations, Treaty Series, vol. 49, p. 225).

153/ See paras. (8)-(11) of the introductory commentary to section 2, above.

"The question may be left open whether the ... [Treaty] provides for two types of agreement ..., one kind apportioning the property of the public authorities concerned, the other ensuring 'the maintenance of the municipal services essential to the inhabitants\* ...'. But even if that were so, the criterion of the maintenance of the municipal services necessary to the inhabitants should a fortiori play a decisive role\* when these services - as will usually be the case - are provided by property belonging to the municipality which must be apportioned. The apportionment should be carried out according to a principle of utility,\* since in this case that principle must have seemed to the drafters of the Treaty the most compatible with justice and equity." 154/

(21) As regards, more specifically, movable State property, the cases of currency (including gold and foreign exchange reserves) and State funds will be discussed in turn below, by way of example, these cases being sufficiently illustrative for the present purpose.

#### Currency

(22) A definition of currency for the purposes of international law should take account of the following three fundamental elements: (a) currency is an attribute of sovereignty, (b) it circulates in a given territory and (c) it represents purchasing power. It has been observed that this legal definition

"necessarily relies on the concept of statehood or, more generally, that of de jure or de facto sovereign authority. It follows from this proposition that media of exchange in circulation are, legally speaking, not currency, unless their issue has been established or authorized by the State and, a contrario, that currency cannot lose its status otherwise than through formal demonetization." 155/

For the purposes of the present topic, this means that the predecessor State loses and the successor State exercises its own monetary authority in the territory to which the succession of States relates. That should mean that, at the same time, the State patrimony associated with the expression of monetary sovereignty or activity in that territory (gold and foreign exchange reserves, and real property and assets of the institution of issue situated in the territory) must pass from the predecessor State to the successor State.

(23) The normal relationship between currency and territory is expressed in the idea that currency can circulate only in the territory of the issuing authority. The concept of the State's "territoriality of currency" or "monetary space" implies, first, the complete surrender by the predecessor State of monetary powers in the

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154/ United Nations, Report of International Arbitral Awards, vol. XIII, (op. cit.), p. 519.

155/ D. Carreau, Souveraineté et coopération monétaire internationale (Paris, Cujas, 1970), p. 27.

territory considered and, secondly, its replacement by the successor State in the same prerogatives in that territory. But both the surrender and the assumption of powers must be organized on the basis of a factual situation, namely, the impossibility of leaving a territory without any currency in circulation on the date on which the State succession occurs. The currency inevitably left in circulation in the territory by the predecessor State and retained temporarily by the successor State justifies the latter in claiming the gold and foreign exchange which constitute the security or backing for that currency. Similarly, the real property and assets of any branches of the central institution of issue in the territory to which the State succession relates pass to the successor State under this principle of the State's "currency territoriality" or "monetary space". It is because the circulation of currency implies security or backing - the public debt, in the last analysis - that currency in circulation cannot be dissociated from its base or normal support, which is formed by all the gold or foreign exchange reserves and all assets of the institution of issue. This absolute inseparability, after all, merely describes the global and "mechanistic" fashion in which the monetary phenomenon itself operates.

(24) In the world monetary system as it exists today, currency has value only through the existence of its gold backing, and it would be futile to try, in the succession of States, to dissociate a currency from its backing. For that reason it is essential that the successor State, exercising its jurisdiction in a territory in which there is inevitably paper money in circulation, should receive in gold and foreign exchange the equivalent of the backing for such issue. This, however, does not always happen in practice. The principle of allocation or assignment of monetary tokens to the territory to which the succession of States relates is essential here. If currency, gold and foreign exchange reserves, and monetary tokens of all kinds belonging to the predecessor State are temporarily or fortuitously present in the territory to which the succession of States relates, without the predecessor State's having intended to allocate them to that territory, obviously they have no link or relationship with the territory and cannot pass to the successor State. The gold owned by the Bank of France that was held in Strasbourg during the Franco-German War of 1870 could not pass to Germany after Alsace-Lorraine was annexed to that country unless it were established that that gold had been "allocated" to the transferred territory.

(25) When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.<sup>156/</sup>

(26) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.<sup>157/</sup> Under the peace treaties concluded, the new Soviet régime became fully responsible for the debt represented by the paper money issued by the Russian State Bank in these four countries.<sup>158/</sup> The provisions of some of these instruments indicated that Russia released the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those countries during the war.<sup>159/</sup> At the same time, and in these same treaties, part of the bullion reserves of the Russian State Bank was transferred to each of these States. The ground given in the case of Poland is of some interest: the 30 million gold roubles paid by Russia under this head corresponded to the "active participation" of the Polish territory in the economic life of the former Russian Empire.

#### State funds

(27) State public funds in the territory to which the succession of States relates should be understood to mean cash, stocks and shares which, although they form part of the over-all assets of the State, have a link with that territory by virtue of the State's sovereignty over or activity in that region. If they are connected with the activity of the predecessor State in respect of the territory to which the succession of States relates, State funds, whether liquid or invested, pass to the

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<sup>156/</sup> See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, Treaty Series, vol. 117, p. 19).

<sup>157/</sup> No reference is made here to the cases of Finland, which already enjoyed monetary autonomy under the former Russian régime, or of Turkey.

<sup>158/</sup> See the following treaties: with Estonia, of 2 February 1920, article 12; with Latvia, of 11 August 1920, article 16; with Lithuania, of 12 July 1920, article 12; and with Poland, of 18 March 1921, article 19 (League of Nations, Treaty Series, vol. XI, p. 51, vol. II, p. 212; vol. III, p. 122; and vol. VI, p. 123).

<sup>159/</sup> See B. Nolde, "La monnaie en droit international public", Recueil des cours de l'Académie de droit international de La Haye, 1929-II, (Paris, Hachette, 1930), vol. 27, p. 295.

successor State. The principle of connection with the activity is decisive in this case, since it is obvious that funds of the predecessor State which are in transit through the territory in question, or are temporarily or fortuitously present in that territory, do not pass to the successor State.

(28) State public funds may be liquid or invested; they include stocks and shares of all kinds. Thus, the acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also, according to the Supreme Court of Poland, the transfer to the successor of a share in the capital of an association.<sup>160/</sup>

(29) As part of the "transfer without payment of the right of ownership over State property", the USSR received public funds situated in the Sub-Carpathian Ukraine, which, within the boundaries specified in the Treaty of Saint-Germain-en-Laye of 10 September 1919, was ceded by Czechoslovakia in accordance with the Treaty of 29 June 1945.

#### Article 14

##### Newly independent State

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

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

(b) immovable property, having belonged to the territory to which the succession of States relates, situated outside it and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(c) immovable State property of the predecessor State other than that mentioned in subparagraph (b) and situated outside the territory to which the succession of States relates, to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

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

(e) movable property, having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

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<sup>160/</sup> Digest by the Secretariat of the decision of the Supreme Court of Poland in the Polish State Treasury v. Deutsche Mittelstandskasse case (1929) (Yearbook ... 1963, vol. II, p. 133, document A/CN.4/157, para. 337).

(f) movable State property of the predecessor State other than the property mentioned in subparagraphs (d) and (e), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. 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 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

#### Commentary

(1) Article 14 concerns succession to State property in the case of a newly independent State. The term "newly independent State" as used in the present draft is defined in article 2, paragraph 1 (e), and reference should therefore be made to the relevant paragraph of the commentary to article 2.<sup>161/</sup>

(2) In contrast to other categories of State succession where, until the occurrence of the succession, the predecessor State possesses the territory to which the succession of States relates and exercises its full sovereignty there, the category covered by this article involves a dependent or non-self-governing territory which has a special juridical status under the Charter of the United Nations. As the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations<sup>162/</sup> States, such a territory has

"a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles."

Moreover, in accordance with General Assembly resolution 1514 (XV) of 14 December 1960, every people, even if it is not politically independent at a certain stage of its history, possesses the attributes of national sovereignty

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<sup>161/</sup> Para. (6) of the commentary to article 2, above.

<sup>162/</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

inherent in its existence as a people. There is also no doubt, as is explained below,<sup>163/</sup> that every people enjoys the right of permanent sovereignty over its wealth and natural resources.

(3) Although the question might be raised as to the usefulness of the Commission's making special provisions relating to newly independent States, in view of the fact that the process of decolonization is practically finished, the Commission is convinced of the need to include such provisions in the present draft. A draft of articles on a topic which, like succession of States in matters other than treaties, necessarily presupposes the exercise of a right which is at the forefront of United Nations doctrine and partakes of the character of jus cogens - namely, the right of self-determination of peoples - cannot ignore the most important and widespread form of the realization of that right in the recent history of international relations: that is, the process of decolonization which has taken place since the Second World War. In fact, the Commission cannot but be fully conscious of the precise mandate it has received from the General Assembly, in regard to its work of codification and progressive development of the rules of international law relating to succession of States, to examine the problems of succession of States with appropriate reference to the views of States which have achieved independence since the Second World War.<sup>164/</sup> Although the process of decolonization has already been largely effected, it has not yet been completed, as is confirmed in the 1980 report of the Special Committee of Twenty-five,<sup>165/</sup> which points out that many dependent or non-self-governing territories still remain to be decolonized. Moreover, the usefulness of the present draft articles is not limited to dependent or non-self-governing territories yet to be decolonized. In many instances, the effects of decolonization, including, in particular, problems of succession to State property, remain for years after political independence is achieved. The necessity of including provisions on newly independent States was fully recognized by the Commission in the course of its work on succession of States in respect of treaties and found reflection in the final draft on that topic submitted in 1974 for consideration by the General Assembly, as well as in the

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<sup>163/</sup> Paras. (26)-(32) of the present commentary.

<sup>164/</sup> General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963.

<sup>165/</sup> Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 23 (A/35/23/Rev.1)).



1978 Vienna Convention adopted on the basis of that final draft. In the present case, there is no reason to depart from the categorization established in the draft articles on succession of States in respect of treaties: on the contrary the reasons for maintaining the category of succession involving "newly independent State" are equally if not more compelling in the case of succession of States in respect of State property, archives and debts. Besides, in view of the close link and the parallelism between the two sets of draft articles, there would be an inexplicable gap in the present draft if no provision were made for newly independent States.

(4) Article 14 covers the various situations that may result from the process of decolonization: the commonest case, where a newly independent State emerges from a dependent territory; the case where such a State is formed from two or more dependent territories (paragraph 2); and the case where a dependent territory becomes part of the territory of an existing State other than the State which was administering it (paragraph 3). In all these cases the rules relating to the passing of State property should be the same since the basis for the succession in each case is the same: decolonization. It is for this reason that, as has been indicated,<sup>166/</sup> the Commission considered it appropriate to deal with the last case in the present article, whereas in the 1974 draft on succession of States in respect of treaties, that case was covered by the provisions of article 14 (Succession in respect of part of territory)<sup>167/</sup> since it is a question of the applicability of the same principle - that of the "moving treaty-frontiers" rule - to all the situations covered.

(5) The rules relating to the passing of State property in the case of newly independent States vary somewhat from those relating to other categories of succession, in order to take full account of the special circumstances surrounding the emergence of such States. The principle of viability of the territory becomes imperative in the case of States achieving independence from situations of colonial domination, and the principle of equity requires that preferential treatment be given to such States in the legal regulation of succession to State property. Two main differences are, therefore, to be indicated. First, immovable property situated in the dependent territory concerned and movable property connected with the activity of the predecessor State in respect of the dependent territory concerned should, as a general rule, pass to the successor State upon the birth

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<sup>166/</sup> See para. 75 above.

<sup>167/</sup> That article corresponds to article 15 of the 1978 Vienna Convention.

of a newly independent State, whether it is formed from one or two or several dependent territories, or upon the dependent territory's decolonization through integration or association with another existing State, reference to an agreement being unnecessary, by contrast with the case of the articles relating to other categories of succession. The reason why article 14 does not, with reference to newly independent States, use the expressions "in the absence of an agreement" or "unless the predecessor State and the successor State otherwise agree", which are employed in other articles of section 2, is not so much because a dependent territory which is not yet a State could not, strictly speaking, be considered as possessing the capacity to conclude international agreements, but, principally in recognition of the very special circumstances which accompany the birth of newly independent States as a consequence of decolonization and which lead, when negotiations are undertaken for the purpose of achieving independence, to results that are, in many instances, distinctly unfavourable to the party acceding to independence, because of its unequal and unbalanced legal, political and economic relationship with the former metropolitan country.

(6) The second difference resides in the introduction of the concept of the contribution of the dependent territory to the creation of certain immovable and movable State property of the predecessor State so that such property shall pass to the successor State in proportion to the contribution made by the dependent territory. This provision represents a concrete application of the concept of equity forming part of the material content of a rule of positive international law which is designed to preserve, inter alia, the patrimony and the historical and cultural heritage of the people inhabiting the dependent territory concerned. In cases of newly independent States, entire nations are affected by the succession of States which have contributed to the creation of the predecessor State's property. It is only equitable that such property should pass to the successor State in proportion to the contribution of the dependent territory to its creation.

(7) Paragraph 1 (a) regulates the problem of immovable State property of the predecessor State situated in the territory which has become independent. In accordance with the principle of the passing of State property based on the criterion of linkage of the property to the territory, this subparagraph provides, as in the articles concerning other categories of succession, that immovable property so situated shall pass to the successor State. This solution is generally accepted in legal literature and in State practice, although in neither case is express reference always made to "immovable" property of the predecessor State "situated in the territory"; rather, the reference is frequently to property in

general, irrespective of its nature or its geographical situation. Thus, if general transfer is the rule, the passing to the successor State of the more limited category of property provided for in this subparagraph must a fortiori be permitted.

(8) Reference may be made in this connection to article 19, first paragraph, of the Declaration of principles concerning economic and financial co-operation of 19 March 1962 (Evian agreement between France and Algeria), which provided that:

"Public real estate of the [French] State in Algeria will be transferred to the Algerian State ..." 168/

In fact, all French military real estate and much of the civil real estate (excluding certain property retained by agreement and other property which is still in dispute) has, over the years, gradually passed to the Algerian State.

(9) A great many bilateral instruments or unilateral enactments of the administering or constituent Power simply record the express relinquishment by the predecessor State, without any quid pro quo, of all State property or, even more broadly, all public property without distinction, situated in the territory to which the succession of States relates. For example, the Constitution of the Federation of Malaya (1957) provided that all property and assets in the Federation or one of the colonies which were vested in Her Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or specifications, authorizes the transfer of all the property, of whatever kind, of the predecessor State. 169/

Reference may also be made to the Final Declaration of the International Conference at Tangier, of 29 October 1956, although it is not strictly applicable since the International Administration of Tangier cannot be regarded as a State. Article 2 of the Protocol annexed to the Declaration stated that the Moroccan State, "which recovers possession of the public and private domain entrusted to the International Administration ... receives the latter's property ...". 170/ Among other examples that may be given is the "Draft agreement on Transitional Measures" of 2 November 1949 between Indonesia and the Netherlands, adopted at the end of the

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168/ United Nations, Treaty Series, vol. 507, p. 65.

169/ Materials on Succession of States (United Nations publication, Sales No. E/F.68.V.5), pp. 85-86. See also the Constitution of the Independent State of Western Samoa (1962), which declared "All property which immediately before Independence Day is vested in Her Majesty ... or in the Crown ... shall, on Independence Day, vest in Western Samoa" (Ibid., p. 117).

170/ United Nations, Treaty Series, vol. 263, p. 171.

Hague Round-Table Conference (August-November 1949),<sup>171/</sup> which provided for the devolution of all property, and not only immovable property, in the Netherlands public and private domain in Indonesia. A subsequent military agreement transferred to Indonesia, in addition to some warships and military maintenance equipment of the Netherlands fleet in Indonesia, which constituted movable property, all fixed installations and equipment used by the colonial troops.<sup>172/</sup> Similarly, when the Colony of Cyprus attained independence, all property of the Government of the island (including immovable property) became the property of the Republic of Cyprus.<sup>173/</sup> Libya received "the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration".<sup>174/</sup> In particular, the following property was transferred immediately: "the public property of the State (demanio publico) and the inalienable property of the State (patrimonio indisponibile) in Libya", as well as "the property in Libya of the Fascist Party and its organizations".<sup>175/</sup> Likewise, Burma was to succeed to all property in the public and private domain of the colonial Government,<sup>176/</sup> including fixed military assets of the United Kingdom in Burma.<sup>177/</sup>

(10) The Commission is not unaware of agreements concluded between the predecessor State and the newly independent successor State under which the latter has relinquished in favour of the former its right of ownership to the part of the State property which had passed to it on the occurrence of the succession of

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<sup>171/</sup> Ibid., vol. 69, p. 266.

<sup>172/</sup> Ibid., p. 288.

<sup>173/</sup> Treaties concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. United Nations Treaty Series, vol. 382, annex E. pp. 130-138, article 1 and passim.

<sup>174/</sup> United Nations General Assembly resolution 388 (V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya", article 1.

<sup>175/</sup> Ibid. The inalienable property of the State is defined in articles 822-828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks (i.e. immovable property), arms, munitions, etc. (i.e. movable property).

<sup>176/</sup> Government of Burma Act, 1935.

<sup>177/</sup> United Kingdom, Treaty between the Government of the United Kingdom and the Provisional Government of Burma Regarding the Recognition of Burmese Independence and Related Matters. Annex: Defence Agreement signed on 29 August 1947 in Rangoon. Cmd. 7360 (London, H.M. Stationery Office, 1948).

States.<sup>178/</sup> The independence agreements were followed by various protocols concerning property under which the independent State did not succeed to the whole of the property belonging to the predecessor State. This was usually done in order to provide for common needs in an atmosphere of close co-operation between the former metropolitan State and the newly independent State. The forms those agreements took were, however, varied. In some cases, the pre-independence status quo, with no transfer of property, was provisionally maintained.<sup>179/</sup> In others, devolution of the (public and private) domain of the former metropolitan State was affirmed as a principle, but was actually implemented only in the case of property which would not be needed for the operation of its various military or civilian services.<sup>180/</sup> Sometimes the agreement with the territory that had become independent clearly transferred all the public and private domain to the successor, which incorporated them in its patrimony, but under the same agreement

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<sup>178/</sup> See G. Fouilloux: "La succession aux biens publics français dans les Etats nouveaux d'Afrique", in Annuaire français de droit international, 1965 (Paris), vol. XI (1966), pp. 885-915. Cf. also G. Fouilloux "La succession des Etats de l'Afrique du Nord aux biens publics français", in Annuaire de l'Afrique du Nord, 1966, pp. 51-79.

<sup>179/</sup> Agreement between the Government of the French Republic and the Government of the Republic of Chad concerning the transitional arrangements to be applied until the entry into force of the agreements of co-operation between the French Republic and the Republic of Chad, signed in Paris on 12 July 1960 (Materials on Succession of States (op. cit.), pp. 153-154), article 4. A protocol to a property agreement was signed later, on 25 October 1961. It met the concern of the two States to provide for "common needs" and enabled the successor State to waive the devolution of certain property (see Decree No. 63-271 of 15 March 1963 publishing the Protocol to the property agreement between France and the Republic of Chad on 25 October 1961 (with the text of the Protocol annexed)), in: France, Journal officiel de la République française, Lois et décrets, (Paris), 95th year, No. 69 (21 March 1963), pp. 2721-2722.

<sup>180/</sup> See Decree No. 63-270 of 15 March 1963 publishing the Convention concerning the property settlement between France and Senegal, signed on 18 September 1962 (with the text of the Convention annexed), ibid., p. 2720. Article 1 establishes the principle of the transfer of "ownership of State appurtenances registered ... in the name of the French Republic" to Senegal. However, article 2 specifies: "Nevertheless, State appurtenances shall remain under the ownership of the French Republic and be registered in its name if they are certified to be needed for the operation of its services ... and are included in the list" given in an annex. This provision concerns, not the use of State property for the needs of the French services, but the ownership of such property.

expressly retroceded parts of them either in ownership or in usufruct.<sup>181/</sup> In some cases the newly independent State agreed to a division of property between itself and the former metropolitan State, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and of the presence of the former metropolitan State.<sup>182/</sup> Lastly, there have been cases where a treaty discarded the distinctions between public and private domains of the territory or of the metropolitan State, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements:

"The Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by a global settlement based on equity and satisfying their respective needs." <sup>183/</sup>

(11) However, it should be pointed out that these instruments have usually been of a temporary character. The more balanced development of the political relations between the predecessor State and the newly independent successor State has in many cases enabled the successor State, sooner or later, to regain the immovable State property situated in its territory which had been the subject of agreements with the former metropolitan State.

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<sup>181/</sup> A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26 October 1963), in: France, Journal officiel de la République française, Lois et décrets (Paris), 95th year, No. 256 (31 October 1963), pp. 9707-9708. Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

<sup>182/</sup> Cf. Decree No. 63-268 of 15 March 1963 publishing the Protocol to the property agreement between France and the Gabonese Republic of 6 June 1961, in: France, Journal officiel de la République française, Lois et décrets (Paris) 95th year, No. 69 (21 March 1963), pp. 2718-2719.

<sup>183/</sup> Article 31 of the Franco-Malagasy agreement of 27 June 1960 concerning economic and financial co-operation, approved by a Malagasy Act of 5 July 1960 and by a French Act of 18 July 1960 (France, Journal officiel de la République française, Lois et décrets (Paris), 92nd year, No. 167 (20 July 1960), p. 6615) [translation by the Secretariat]. A Franco-Malagasy Protocol on property was signed later, on 18 October 1961 (Decree No. 63-269 of 15 March 1963 publishing this Protocol, in: France, Journal officiel de la République française, Lois et décrets (Paris), 95th year, No. 69 (21 March 1963), pp. 2719-2720). This confirms the situation created by another economic co-operation agreement of 27 June 1960 and acknowledges - but in this context - Madagascar's ownership of the remaining State appurtenances, although France retains the ownership of military premises and constructions.

(12) Paragraph 1 (b) and (e) of article 14 deals with a problem unique to newly independent States. It concerns the cases of immovable and movable property which, prior to the period of dependence, belonged to the territory to which the succession of States relates. During the period of its dependence, some or all of such property may well have passed to the predecessor State administering the territory. This might be immovable property such as embassies and administrative buildings or movable property of cultural or historical significance. The subparagraphs set forth a rule of restitution of such property to the former owner. The text of subparagraph (b) refers to "immovable property" and that of subparagraph (e) to "movable property", and both state that such property shall pass to the successor State. In the provisional draft, immovable property had been excluded from paragraph 1 in the present case since it was thought that the provision now embodied in paragraph 1 (a) covered "all immovable State property of the predecessor State situated in the territory" including immovable property which had belonged to the territory before it became independent. In second reading, however, the Commission, in order to avoid problems of interpretation, deemed it appropriate to make specific provision in paragraph 1 for this case as regards immovable property as well.

(13) The situation covered by paragraph 1, subparagraphs (b) and (e) needs to be provided for expressly, even though it might be considered to be a particular aspect of the larger question relating to the "biens propres" of the dependent territory. The provisions of article 14 are not intended to apply to property belonging to the non-self-governing territory, as that property is not affected by the succession of States. Generally speaking, colonies enjoyed a special régime under what was termed a legislative and conventional speciality. They possessed a certain international personality so that they could own property inside and outside their territory. Consequently, there is no reason why succession should cause colonies to lose their own property. In the absence of express regulations for the situations covered by paragraphs 1 (b) and (e), the question might be raised whether, in the case of a State having become a dependent territory, property which, having belonged to that State, passed to the administering Power, was still to be regarded as property of the dependent territory or not.

(14) It should be noted that, unlike the other subparagraphs of paragraph 1, subparagraphs (b) and (e) do not mention "State property" but merely "property" at the beginning of the sentence. This is intended to widen the scope of the provision in order to include the property which, prior to the period of dependence, belonged to the territory of the successor newly independent State, whether that territory, during the pre-dependence period, was an independent State or an autonomous entity of other form, such as a tribal group or a local government.

(15) Paragraph 1 (c) of article 14 relates to the apportionment between the predecessor State and the successor State of immovable State property of the predecessor State, other than that mentioned in subparagraph (b) and situated outside the territory to which the succession of States relates, to the creation of which the dependent territory has contributed. Like in the case of subparagraph (b), this provision has been included in paragraph 1 during the second reading, in order to make it as complete as possible so as to avoid problems of interpretation that might arise from a lacuna on the point. Subparagraph (c) corresponds to the provision of subparagraph (f) which relates to the apportionment between the predecessor State and the successor State of movable State property of the predecessor State other than the property falling under subparagraphs (d) and (e), to the creation of which the dependent territory contributed. Like subparagraph (e), subparagraph (f) deals with such movable property regardless of whether it is situated in the territory of the predecessor State, of the successor State or of a third State. In this connection, the question may be asked, for example, whether successor States can claim any part of the subscriptions made by the administering States to the shares of the capital stock of international or regional financial institutions such as the World Bank. Although there seems to be no precedent regarding the apportionment of such assets between the predecessor State and the successor State, the question may well arise in view of the fact that participation in various intergovernmental bodies of a technical nature is open to dependent territories as such. Such property may well be considered property which belonged as of right to the dependent territory in the proportion determined by the territory's contribution. The Commission believes that the rule set forth in subparagraph (f), as well as the similar rule provided for in subparagraph (e) will make it possible to solve more easily and equitably many of the problems arising in this respect.

(16) Paragraph 1 (d) concerns the movable State property "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates", and states the common rule adopted with respect to the transfer of part of the territory of a State, the separation of part or parts of the territory of a State, and the dissolution of a State. Reference may be made in this connection to paragraphs (8) to (11) of the introductory commentary to section 2, which are relevant to this subparagraph. It should be noted that movable State property which may be located in the dependent territory only temporarily or fortuitously, like the gold of the Banque de France which was evacuated to West Africa during the Second World War, is to be excluded from the application of



the rule, since it is not actually connected with the activity of the State "in respect of the territory to which the succession of States relates".

(17) State practice relating to the rule enunciated in paragraph 1 can be discussed with reference to two main categories of movable State property, namely, currency and State funds.

(18) The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State, since it is a regalian right and an attribute of public authority. In this sense, as far as the privilege of issue is concerned, there is no question of succession of States involved; the predecessor State loses its privilege of issue in the dependent territory and the newly independent State exercises its own privilege, which it derives from its own sovereignty, upon achieving independence. Nor does the question of monetary tokens issued in the dependent territory by its own institution of issue relate directly to succession of States.

(19) Among the examples that may be given is that of the various Latin American colonies which became independent at the beginning of the nineteenth century, from which the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscription of the new State for the image and name of His Most Catholic Majesty on the coins in circulation, or to giving some other name to the Spanish peso, without changing its value or the structure of the currency.

(20) In the case of India, that country succeeded to the sterling assets of the Reserve Bank of India, estimated at £1,160 million.<sup>184/</sup> However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder - i.e., the greater part of the assets - was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.<sup>185/</sup>

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<sup>184/</sup> United Kingdom, Financial Agreement between the Government of the United Kingdom and the Government of India, Cmd. 7195 (London, H.M. Stationery Office, 14 August 1947).

<sup>185/</sup> For details, see I. Paenson, Les Conséquences financières de la succession des Etats (1932-1953) (Paris, Domat-Monchrestien, 1954), passim and in particular pp. 65-66 and 80.

(21) The French Government withdrew its monetary tokens from the French Establishments in India, but agreed to pay compensation. Article 23 of the Franco-Indian Agreement of 21 October 1954<sup>186/</sup> stated:

"The Government of France shall reimburse to the Government of India within a period of one year from the date of the de facto transfer the equivalent value at par in £ sterling or in Indian rupees of the currency withdrawn from circulation from the Establishments after the de facto transfer."

(22) State practice not being uniform, it is not possible to establish a rule applicable to all situations regarding succession in respect of currency. It is necessary to examine the concrete situation obtaining on the date of the succession of States. If the currency is issued by an institution of issue belonging to the territory itself, independence will not change the situation. However, if the currency issued for the territory by and under the responsibility of a "metropolitan" institution of issue is to be kept in circulation, it must be backed by gold and reserves, for reasons already explained in the commentary to article 13.

(23) With regard to State funds, some examples may be given. On termination of the French Mandate, Syria and Lebanon succeeded jointly to the "common interests" assets, including "common interests" treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of the Banque de Syrie et du Liban, although most of these assets were blocked and were released only progressively over a period extending to 1958.<sup>187/</sup> In the case of the advances which the United Kingdom had made in the past towards Burma's budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of 20 years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the costs it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.<sup>188/</sup>

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<sup>186/</sup> India, Foreign Policy of India: Texts of Documents, 1947-64 (New Delhi, Lok Sabha (Secretariat), 1966), p. 212.

<sup>187/</sup> For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (France, Journal officiel de la République française, Lois et décrets (Paris), 82nd year, No. 60 (10 March 1950), pp. 2697-2700); for Lebanon, see the Franco-Lebanese monetary and financial agreement of 24 January 1948 (ibid., 81st year, No. 64 (14 and 15 March 1949), pp. 2651-2654; also in United Nations, Treaty Series, vol. 173, p. 99).

<sup>188/</sup> The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign, and for certain costs relating to demobilization.

(24) Paragraph 2 concerns the cases of newly independent States formed from two or more dependent territories. It states that the general rules set out in paragraph 1 of article 14 apply to such cases. As examples of such newly independent States, mention may be made of Nigeria, which was created out of four former territories, namely, the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons; Ghana, which was formed from the former colony of the Gold Coast, Ashanti, the Northern Territories Protectorate and the Trust Territory of Togoland; and the Federation of Malaya, which emerged in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. The Commission finds no reason to depart from the formula contained in article 30, paragraph 1, of the 1978 Vienna Convention, which deals with the case of newly independent States formed from two or more territories in the same way as the case of newly independent States which emerge from one dependent territory, for the purpose of applying the general rules concerning succession in respect of treaties.

(25) Paragraph 3 involves a dependent territory which becomes part of the territory of an existing State other than the administering State of the dependent territory. As explained above,<sup>189/</sup> the Commission considered it more appropriate to deal with this case together with that of newly independent States, unlike the 1978 Vienna Convention, which included this case under "succession in respect of part of territory" together with the case of simple transfer of part of a territory. Association or integration with an independent State is a mode of implementing the right of self-determination of peoples, exactly like the establishment of a sovereign and independent State, as is clearly stated 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. It is therefore more logical to include this paragraph in an article dealing with newly independent States. In view of the basic similarity of the questions involved in succession in respect of State property when the successor State is a newly independent State and when it is a State with which a dependent territory has been integrated or associated, the present paragraph calls for the application to both cases of the same general rules provided for in paragraph 1 of the article.

(26) Paragraph 4 is a provision which confirms that the principle of the permanent sovereignty of every people over its wealth and natural resources takes precedence over agreements concluded between the predecessor State and the newly independent

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<sup>189/</sup> See para. 75 above.

State to determine succession to State property otherwise than by the application of the principles stated in article 14. The principle of the permanent sovereignty of every people over its wealth and natural resources has been forcefully affirmed in a number of General Assembly resolutions and in other United Nations instruments.<sup>190/</sup> (27) The formulation of the Charter of Economic Rights and Duties of States under the auspices of the United Nations Conference on Trade and Development looms large among recent developments within the United Nations system concerning permanent sovereignty over natural resources. This Charter, which was adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, should, according to the resolution, "constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries". The 15 fundamental principles which, according to this Charter (chapter I), should govern economic as well as political relations among States, include:

"Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development".\*

State property is certainly one of those necessary "natural means". Article 2 of this Charter (para. 1) states that:

"Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."

Expanding the passage from the resolution quoted above, article 16 states, in paragraph 1, that:

"It is the right and duty of all States; individually and collectively, to eliminate colonialism ... neo-colonialism ... and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution\* and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them."

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<sup>190/</sup> See, for example, General Assembly resolutions 626 (VII) of 21 December 1952; 1803 (XVII) of 14 December 1962; 2158 (XXI) of 25 November 1966; 2386 (XXIII) of 19 November 1968; 2692 (XXV) of 11 December 1970. See also Economic and Social Council resolutions 1737 (LIV) of 4 May 1973, and 1956 (LIX) of 25 July 1975. See, further, article 1, para. 2, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, annex).

(28) The General Assembly, meeting in special session for the first time in the history of the United Nations to discuss economic problems following the "energy crisis", gave due prominence to the "full permanent sovereignty of every State over its natural resources and all economic activities" in its Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI), of 1 May 1974). In section VIII of its Programme of Action on the Establishment of a New International Economic Order (resolution 3202 (S-VI) of 1 May 1974), the Assembly stated that:

"All efforts should be made:

"(a) To defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources."

(29) Just as individuals are equal before the law in a national society, so all States are said to be equal in the international sphere. But in spite of this theoretical equality, flagrant inequalities remain among States so long as sovereignty - a system of reference - is not accompanied by economic independence. When the elementary bases of national economic independence do not exist, it is idle to speak of the principle of sovereign equality of States. If it is really desired to free the principle of the sovereign equality of States from its large element of illusion, the formulation of the principle should be adapted to modern conditions in such a way as to restore to the State the elementary bases of its national economic independence. To this end, the principle of economic independence, invested with a new and vital legal function and elevated accordingly to the status of a principle of contemporary international law, must be reflected, in particular, in the right of peoples to dispose of their natural resources and in the prohibition of all forms of unwarranted intervention in the economic affairs of States, together with the outlawing of the use of force and of any form of coercion in economic and commercial relations. General Assembly resolution 1514 (XV) of 14 December 1960, which did not neglect the right of peoples to dispose of their natural resources, and, more particularly, resolution 1803 (XVII) and other subsequent resolutions which affirmed the principle of the permanent sovereignty of States over their natural resources,<sup>191/</sup> demonstrate the efforts of the General Assembly to make a legal reality of the fundamental matter of the principle of economic independence, and to remedy the disturbing fact that the gap between developed and developing States is constantly widening.

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<sup>191/</sup> See foot-note 190 above.

(30) It is by reference to these principles that an appraisal should be made of the validity of the so-called "co-operation" or "devolution" agreements and of all bilateral instruments which, under the pretext of establishing "special" or "preferential" ties between the new States and the former colonial Powers, impose on the former excessive conditions which are ruinous to their economies. The validity of treaty relations of this kind should be measured by the degree to which they respect the principles of political self-determination and economic independence. Some members of the Commission expressed the view that any agreements which violate these principles should be void ab initio, without even any need to wait until the new State is in a position formally to denounce their unfair character. Their invalidity should derive intrinsically from contemporary international law and not simply from their subsequent denunciation.

(31) Devolution agreements must therefore be judged according to their content. Such agreements do not, or only rarely, observe the rules of succession of States. In fact, they impose new conditions for the independence of States. For example, the newly independent State can remain independent only if it agrees not to claim certain property, or to assume certain debts, extend certain laws or respect certain treaties of the administering Power. Therein lies the basic difference from the other categories of succession, where the independence of the will of the contracting parties must be recognized. In the case of devolution agreements, freedom to conclude an agreement results in conditions being imposed on the very independence of the State itself. Through their restrictive content such agreements institute a "probation" system, the conditional independence, of the newly independent State. It is for this reason that the question of their validity must be raised with respect to their content.

(32) In the light of the foregoing considerations, the Commission, while being aware that the principle of permanent sovereignty over wealth and natural resources applies in the case of every people and not only of peoples of newly independent States, nevertheless thought it particularly relevant and necessary to stress that principle in the context of succession of States relating to newly independent States.

#### Article 15

#### Uniting of States

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

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

#### Commentary

(1) In the present draft, the Commission uses the term "uniting of States" in the same sense as it did in the 1974 draft articles on the succession of States in respect of treaties, namely, the "uniting in one State of two or more States, which had separate international personalities at the date of the succession".<sup>192/</sup> Article 15 covers the case where one State merges with another State, even if the international personality of the latter continues after they have united. It should thus be distinguished from the case of the emergence of a newly independent State out of two or more dependent territories, or from the case of a dependent territory which becomes integrated or associated with a pre-existing State, which have been dealt with in article 14.

(2) As the Commission wrote in 1974, the succession of States envisaged in the present article does not take account of the particular form of the internal constitutional organization adopted by the successor State:

"The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions ...

"Being concerned only with the uniting of two or more States in one State, associations of States having the character of intergovernmental organizations such as, for example, the United Nations, the specialized agencies, OAS, the Council of Europe, CMEA, etc., fall completely outside the scope ...; as do some hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new State and do not therefore constitute a succession of States." <sup>193/</sup>

(3) The formulation in article 15 of the international legal rule governing succession to State property in cases of the uniting of States, is limited to setting forth a general rule for the passing of State property from the

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<sup>192/</sup> Yearbook ... 1974, vol. II (Part One), p. 253, document A/9610/Rev.1, chap. II, sect. D, para. (1) of the commentary to articles 30 and 31. See the 1978 Vienna Convention, article 31.

<sup>193/</sup> Ibid., paras. (2) and (3) of the commentary.

predecessor States to the successor State, while making a provision of renvoi to the internal law of the successor State as far as the internal allocation of the property which passes is concerned. Thus, paragraph 1 states that when two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State, and paragraph 2 provides that the allocation of the property so passed as belonging to the successor State itself or to its component parts, shall be governed by the internal law of the successor State. Paragraph 2 is, however, qualified by the words "Without prejudice to the provision of paragraph 1", in order to stress the provision of paragraph 1 as the basic international legal rule of the article.

(4) "Internal law" as referred to in paragraph 2 includes, in particular, the constitution of the State and any other kind of internal legal rules, written or unwritten, including those which effect the incorporation into internal law of international agreements.<sup>194/</sup>

#### Article 16

##### Separation of part or parts of the territory of a State

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

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

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

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

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

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<sup>194/</sup> Examples of such internal law are: the Constitution of the United States of America [1787] (article IV, section 3), in: A.P. Blaustein and G.H. Flanz, eds., Constitutions of the Countries of the World: Unites States of America (Dobbs Ferry, N.Y., Oceana, 1975); the Swiss Constitutions of 1848 (article 33) and of 1874 (article 22), in: C. Hilty, Les Constitutions fédérales de la Suisse (Neuchâtel, Attinger, 1891), pp. 451 and 443; the Malaysia Act of 1963 (section 75), in: United Nations, Materials on Succession of States (op. cit.), pp. 92-93.



3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation as between the predecessor State and the successor State that may arise as a result of a succession of States.

### Article 17

#### Dissolution of a State

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

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

(b) immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions;

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

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

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

#### Commentary to articles 16 and 17

(1) Articles 16 and 17 both deal with cases where part or parts of the territory of a State separate from that State and form one or more individual States.

However, article 16 concerns the case of secession of States where the predecessor State continues its existence, while article 17 relates to the case of dissolution of States where the predecessor ceases to exist after the separation of parts of its territory.

(2) It may be recalled that, in its 1972 provisional draft articles on succession of States in respect of treaties, the Commission made a clear distinction between the separation of part of a State, or secession, and the dissolution of a State.<sup>195/</sup> However, that approach having been disputed by a number of States in

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<sup>195/</sup> Yearbook ... 1972, vol. II, pp. 292 and 295, document A/8710/Rev.1, chap. II, sect. C, articles 27 and 28.

their comments on the draft<sup>196/</sup> and also by certain representatives in the Sixth Committee at the twenty-eighth session of the General Assembly, the Commission subsequently, in its 1974 draft articles, somewhat modified the treatment of those two cases. While maintaining the theoretical distinction between the dissolution of a State and the separation of parts of a State, it dealt with both cases together in one article from the standpoint of the successor States (article 33), and at the same time made provision for the case of separation of parts of a State from the standpoint of the predecessor State which continues to exist (article 34).<sup>197/</sup>

(3) With regard to the question of succession in respect of State property, the Commission believes that the distinction between secession and dissolution should be maintained in view of the special characteristics of succession in that sphere. It considers that if the distinction was deemed to be valid for succession in respect of treaties, it is the more so for the purposes of succession in respect of State property. If the predecessor State survives, it cannot be deprived of all its State property; and if it disappears, its State property cannot be left uninherited.

(4) Paragraph 1 (a) of articles 16 and 17 lays down a common rule relating to the passing of immovable State property, according to which unless it is otherwise agreed by the predecessor State and the successor State, or when the predecessor State ceases to exist, by the successor States concerned, immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated. This last wording, which is the one used in article 17, has been modified in article 16 to read: "immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State", which is the formula used in paragraph 1 (a) of article 14. As has been explained, the basic rule, with slight variations, has been given for all the categories of succession of States provided for in section 2 of part II of the draft.<sup>198/</sup>

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<sup>196/</sup> Yearbook ... 1974, vol. II (Part One), pp. 68-69, document A/CN.4/278 and Add.I-6, paras. 390-391.

<sup>197/</sup> Ibid., pp. 260-266, document A/9610/Rev.1, chap. II, sect. D, articles 33 and 34. See 1978 Vienna Convention, articles 34 and 35.

<sup>198/</sup> See para. (7) of the introductory commentary to sect. 2, above.

(5) Some examples of relevant State practice can be cited in the present context. With regard to the separation of a part or parts of a State under article 16, it should first be noted that before the establishment of the United Nations most examples of secession were to be found among cases of the "secession of colonies", because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State, since according to contemporary international law what we are concerned with is newly independent States resulting from decolonization under the Charter of the United Nations. Since the establishment of the United Nations, there have been at least three cases of secession which were not cases of decolonization: the separation of Pakistan from India, the withdrawal of Singapore from Malaysia, and the secession of Bangladesh. In the case of Pakistan, according to one author, an Expert Committee was appointed on 18 June 1947 to consider the problem of apportionment of the property of British India, and the presumption guiding its deliberations was that "India would remain a constant international person, and Pakistan would constitute a successor State".<sup>199/</sup> Thus, Pakistan was regarded as a successor State by a pure fiction. On 1 December 1947, an agreement was concluded between India and Pakistan under which each of the Dominions would become the owner of the immovable property situated in its territory.<sup>200/</sup>

(6) An old example of State practice is to be found in the Treaty of 19 April 1839 concerning the Netherlands and Belgium, article XV of which provided as follows:

"Public or private utilities, such as canals, roads or others of a similar nature constructed, in whole or in part, at the expense of the Kingdom of the Netherlands, shall belong, with the benefits and charges attaching thereto, to the country in which they are situated."<sup>201/</sup>

The same rule was applied in the case of the Federation of Rhodesia and Nyasaland in 1963, after which "freehold property of the Federation situated in a Territory would vest in the Crown in right of the Territory".<sup>202/</sup>

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<sup>199/</sup> D.P. O'Connell, State Succession in Municipal Law and International Law (Cambridge, University Press, 1967), vol. I: Internal Relations, p. 220.

<sup>200/</sup> Ibid.

<sup>201/</sup> British and Foreign State Papers, 1838-1839, vol. XXVII (London, Harrison, 1856), pp. 997-998.

<sup>202/</sup> O'Connell, op. cit., p. 230.

(7) As far as doctrine is concerned, this aspect of State succession, namely, succession through secession or dissolution, has not been given much attention in legal literature. The writings of A. Sánchez de Bustamante Sirvén may, however, be cited. On the question of secession, he stated that:

"In the sphere of principles, there is no difficulty about the general principle of the passing of public property, except where the devolution of a particular item is agreed on for special reasons." 203/

He also refers to the draft code of international law by E. Pessoa, article 10 of which provided that "If a State is formed through the emancipation of a province or region, property in the public and private domain situated in the detached territory passes to it". 204/ The same author writes on the cases of dissolution of States as follows:

"In cases where a State is divided into two or more States and none of the new States retains or perpetuates the personality of the State which has ceased to exist, the doctrines with which we are already familiar [the principle that property passes to the successor State] must be applied to public and private property which is within the boundaries of each of the new States." 205/

(8) As for immovable State property of the predecessor State situated outside its territory, no specific provision is made in article 16, in conformity with the general principle of the passing of State property applied in most of the articles of section 2 of part II of the draft, which requires the geographical location of that State property in the territory to which the succession of States relates. The common rule stated in paragraph 1 (a) is, however, tempered in the case of both articles by the provisions of paragraph 3 of article 16 and paragraph 2 of article 17, which reserve any question of equitable compensation that may arise as a result of a succession of States. However, in the case of dissolution of the predecessor State, immovable State property should naturally pass to the successor States. That passing, under article 17, paragraph 1 (b) is to be made in "equitable proportions".

(9) The foregoing rule conforms to the opinions of publicists, who generally take the view that the predecessor State, having completely ceased to exist, no longer has the legal capacity to own property and that its immovable property abroad

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203/ A. Sánchez de Bustamante y Sirvén, Droit international public, French trans. P. Goulé (Paris, Sirey, 1936), vol. III, p. 310.

204/ Ibid., pp. 281-282.

205/ Ibid., p. 335.

should therefore pass to the successor State or States. It is the successor State which has the better title to such property, having, after all, formed part of the State that has ceased to exist. The question is not that on the extinction of the predecessor State the successor receives the State property of the predecessor because otherwise the property would become abandoned and ownerless.<sup>206/</sup> Abandonment of the property, if that is the case, is not the cause for the occurrence of a right of succession; at the most, it is the occasion for it. In any event, in practice, such property is normally apportioned under special agreements between the successor States. Thus, in the Agreement of 23 March 1906 concerning the settlement of economic questions arising in connection with the dissolution of the union between Sweden and Norway, the following provisions are found in article 7:

"The right of occupation of the consular premises in London, which was acquired on behalf of the 'Joint Fund for Consulates' in 1877 to have effect until 1945, and which is at present enjoyed by the Swedish Consul-General in London, shall be sold by the Swedish Consulate-General ... The proceeds of the sale shall be apportioned equally between Sweden and Norway". 206/

(10) In connection with a more recent case, it has been reported that, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, agreements were concluded for the devolution of property situated outside the territory of the union under which Southern Rhodesia was given Rhodesia House in London and Zambia the Rhodesian High Commissioner's house. 207/

(11) Article 16, paragraph 1 (b) and article 17, paragraph 1 (c) set forth the basic rule relating to movable State property, which is applied consistently throughout section 2 of part II of the draft. It stipulates that movable State property of the predecessor State connected with the activity of that State in respect of the territory (territories) to which the succession relates shall pass to the successor State. 208/

(12) When Pakistan was separated from India under an agreement signed on 1 December 1947, a great deal of equipment, especially arms, was attributed to India, which undertook to pay Pakistan a certain sum to contribute towards the construction of munitions factories. 209/ Upon the dissolution of the Federation of Rhodesia and Nyasaland, the assets of the joint institution of issue, and gold and foreign

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206/ Baron Descamps and L. Renault, Recueil international des traités du XX<sup>e</sup> siècle, 1906 (Paris, Rousseau), pp. 861-862.

207/ O'Connell, op. cit. p. 231.

208/ See para. (11) of the introductory commentary to sect. 2, above.

209/ O'Connell, op. cit., pp. 220-221.

exchange reserves, were apportioned in proportion to the volume of currency circulating or held in each territory of the predecessor State which became a successor State.<sup>210/</sup>

(13) Article 16, paragraph 1 (c) and article 17, paragraph 1 (d) enunciate a common rule according to which movable State property of the predecessor State, other than that connected with the activity of that State in respect of the territory (territories) to which the succession of States relates, shall pass to the successor State or States in equitable proportions. The reference to equity, a key element in the material content of the provisions regarding the distribution of property which thus has the character of a rule of positive international law, has already been explained.<sup>211/</sup>

(14) The agreement concerning the settlement of economic questions arising in connection with the dissolution of the union between Sweden and Norway contains the following provisions:

"Article 6. (a) Sweden shall repurchase from Norway its ... half-share in movable property at legations abroad which was purchased on joint account.\* An expert appraisal of such property shall be made and submitted for approval to the Swedish and Norwegian Ministries of Foreign Affairs.

"(b) Movable property at consulates which was purchased on joint account shall be apportioned between Sweden and Norway, without prior appraisal, as follows:

"There shall be attributed to Sweden the movable property of the consulates-general in ...

"There shall be attributed to Norway the movable property of the consulates-general in ..." <sup>212/</sup>

(15) The practice followed by Poland when it was reconstituted as a State upon recovering territories from Austria-Hungary, Germany and Russia was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories it regained or to the acquisition of which those territories had contributed. Poland claimed its share of such property in proportion to the contribution of the territories which it recovered. However, this rule apparently has not always been followed in diplomatic practice. Upon the fall of the Hapsburg dynasty, Czechoslovakia sought the restitution of a number of

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<sup>210/</sup> Ibid., p. 196.

<sup>211/</sup> See paras. 76-85 above.

<sup>212/</sup> Descamps and Renault, op. cit., pp. 860-861.

vessels and tugs for navigation on the Danube. An arbitral award was made.<sup>213/</sup> In the course of the proceedings, Czechoslovakia submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subsidy from them, on the ground that these interests had been bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that those countries had contributed thereto in proportion to the taxes paid by them, and were therefore to the same proportionate extent the owners of the property.<sup>214/</sup> The position of Austria and Hungary was that, in the first place, the property was not public property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "the Treaties themselves do not give Czecho-Slovakia the right to State property except to such property situated in Czecho-Slovakia".<sup>215/</sup> The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of the passing of public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

(16) Article 16, paragraph 2 states that the rules enunciated in paragraph 1 of the same article apply when part of the territory of a State separates from that State and unites with another State. Reference to this provision has already been made in the commentary to article 13,<sup>216/</sup> where the case concerned is distinguished from that covered by the provisions of article 13, namely, the transfer of part of the territory of a State. In the 1974 draft on succession in respect of treaties, the situations covered by paragraph 2 of article 16 and by article 13 were dealt with in a single provision,<sup>217/</sup> since the question there was the applicability to both cases

<sup>213/</sup> Case of the cession of vessels and tugs for navigation on the Danube, Allied Powers (Greece, Romania, Serb-Croat-Slovene Kingdom, Czechoslovakia) v. Germany, Austria, Hungary and Bulgaria (Decision: Paris; 2 August 1921, Arbitrator; Walter D. Hines (USA)). See United Nations, Reports of International Arbitral Awards, vol. 1 (United Nations publication, Sales No. 1948, V.2), pp. 97-212.

<sup>214/</sup> Ibid., p. 120.

<sup>215/</sup> Ibid., pp. 120-121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (British and Foreign State Papers, 1919, vol. 112 (op. cit.)), pp. 412-414, and article 191 of the Treaty of Trianon (ibid., 1922, vol. 113 (op. cit.)), pp. 564-565).

<sup>216/</sup> See paras. (5), (9) and (10) of the commentary to article 13, above.

<sup>217/</sup> Article 14, which corresponds to article 15 of the 1978 Vienna Convention.

of the same principle of treaty law, that of moving treaty-frontiers. In the context of succession of States in respect of State property, archives and debts, however, there are differences between the two situations which call for regulation by means of separate legal provisions. These differences are connected principally with whether or not it is necessary to consult the population of the territory to which the succession of States relates, depending on the size of the territory and of its population and, in consequence, its political, economic and strategic importance, and also with the fact of the usually politically charged circumstances that surround the succession of States in the case to which paragraph 2 of article 16 relates. As was explained above,<sup>218/</sup> the differences which ensue in the legal sphere are of two kinds: first, in the case covered by article 16, paragraph 2, where part of the territory of a State separates from that State and unites with another State, the agreement between the predecessor State and the successor State is not given the pre-eminent role it has under article 13, which is concerned with the transfer of part of the territory of a State to another State. Secondly, by contrast with article 13, article 16 provides for the passing to the successor State of a third category of movable State property, namely, movable State property of the predecessor State other than that connected with the activity of that State in respect of the territory to which the succession of States relates.

(17) Lastly, article 16, paragraph 3 and article 17, paragraph 2 lay down the common rule that the general rules contained in these articles are without prejudice to any question of equitable compensation that may arise as a result of a succession of States. There is a further example, in section 2, of a rule of positive international law incorporating the concept of equity, to which reference has already been made.<sup>219/</sup> It is intended to ensure a fair compensation for any successor State, as well as any predecessor State which would be deprived of its legitimate share as a result of the exclusive attribution of certain property either to the predecessor State or to the successor State or States. For example, there may be cases where all or nearly all the immovable property belonging to the predecessor State is situated in that part of its territory which later separates to form a new State, although such property was acquired by the predecessor State with common funds. If, under paragraph 1 (a) of articles 16 and 17, such property were to pass to the successor State in the territory of which it is situated, the predecessor might be left with little or no resources permitting it to survive as a viable entity. In such a case, the rule contained in article 16, paragraph 3, and article 17, paragraph 2, should be applied in order to avoid this inequitable result.

<sup>218/</sup> See paras. (9) and (10) of the commentary to article 13, above.

<sup>219/</sup> See paras. 76 to 85 above.



### PART III

#### STATE ARCHIVES

##### General commentary

(1) The Commission considers that, even if State archives may be treated as a type of State property, they constitute a very special case in the context of succession of States. The principle of the transfer of State property taken in abstracto applies to all property, whether movable or immovable, and is readily applicable to concrete situations involving the transfer of such property as administrative premises or buildings of the State, barracks, arsenals, dams, military installations, all kinds of research centres, factories, manufacturing facilities, railway equipment, including both rolling stock and fixed installations, airfields, including their movable and immovable equipment and installations, claims outstanding, funds, currency, etc. By virtue of their nature, all these forms of State property are susceptible of appropriation and, hence, of assignment to the successor State, as appropriate, in accordance with the rules on succession of States. Such is not necessarily the case with archives, which, by virtue of their physical nature, their contents, and the function which they perform, may seem to be of interest at one and the same time, both to the predecessor State and to the successor State. A State building situated in the territory to which the succession of States relates can only pass to the successor State or, where there is more than one successor State, to the successor States in equitable proportions. Similarly, monetary reserves, such as gold, for example, can be transferred physically to the successor State, or apportioned between the predecessor State and the successor State, or among several successors, if one or the other solution is agreed upon by the parties. There is nothing in the physical nature of State property of this kind that would stand in the way of any solution that is agreed upon by the States concerned.

(2) Archives, by contrast, may prove to be indispensable both to the successor State and to the predecessor State, and owing to their nature they cannot be divided or split up. However, State archives are objects which have the peculiarity of being reproducible, which is not true of the other immovable and movable property involved in the succession of States. Of all State property, archives alone are capable of being duplicated, which means that both the right of the successor State to recover the archives and the interest of the predecessor State in their use can be satisfied.

(3) This point should be stressed even more in the contemporary setting where the technological revolution has made it possible to reproduce documents of almost any kind with extreme speed and convenience.

(4) Archives, jealously preserved, are the essential instrument for the administration of a community. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the "ins and outs" of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. According to a group of experts convened by UNESCO in March 1976,

"Archives are an essential part of the heritage of any national community. Not only do they provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights." 220/

(5) The destructive effects of wars have seriously impaired the integrity of archival collections. In some cases, the importance of documents is such that the victor hastens to transfer these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the spoliation of its records. All, or almost all, annexation treaties in Europe since the Middle Ages have required the conquered to restore the archives belonging to or concerning the ceded territory. Without being under any delusion as to the draconian practice of the victors who carried off archives and recklessly disrupted established collections, legal doctrine considered clauses calling for the handing over of archives to the annexing State as implicit in the few treaties from which they had been omitted. 221/ These practices have been followed in all periods and in all countries. The fact is that archives handed over to the successor State - forcibly, if necessary - served primarily as evidence and as "title deeds" to the annexed territory; they were used as instruments for the administration of the territory, and are so used even more today.

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220/ UNESCO, "Final report of consultation group to prepare a report on the possibility of transferring documents from archives constituted within the territory of other countries" (CC - 76/WS/9), p.2. The meeting was held in co-operation with the International Council on Archives.

221/ L. Jacob, La clause de livraison des archives publiques dans les traités d'annexion (Paris, Giard et Brière, 1915) [thesis], passim, and in particular pp.40 and 49.

(6) Reflecting the importance of archives in domestic affairs as well as in international relations, disputes have never ceased to occur regarding State archives and numerous agreements have been concluded for their settlement.<sup>222/</sup>

(7) From an analysis of State practice, as reflected in such agreements, a number of conclusions can be drawn, as one writer has done,<sup>223/</sup> which can be summarized as follows:

(a) Archival clauses are very common in treaties on the cession of territories concluded between European Powers and are almost always absent in cases of decolonization.

(b) The removal of archives is a universal and timeless phenomenon. In almost all cases, they are returned sooner or later to their rightful owners, except, it seems, in cases of decolonization. But time has not yet run its full course or produced its effect in this field.

(c) Archives of an administrative or technical nature concerning the territory affected by the succession of States pass to the successor State in all categories of State succession and, generally, without much difficulty.

(d) Archives of an historical nature pass to the successor State, depending to some extent on the circumstances; archivists cannot always explain their transfer to the successor State nor, in the converse case, can jurists explain why they are kept by the predecessor State.

(8) With regard to the first conclusion, practically all treaties on the transfer of territory concluded in Europe since the Middle Ages contain special, and often very precise, clauses concerning the treatment of the archives of the territories to which the succession of States relates.<sup>224/</sup> The categories of State succession

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<sup>222/</sup> For a non-exhaustive table of treaties and conventions containing provisions relating to the passing of archives in cases of succession of States since 1600, see A/CN.4/322 and Corr.1 and Add.1 and 2, sect.D (to appear in Yearbook ... 1979, vol.II (Part One)).

<sup>223/</sup> See C. Kecskeméti, "Les contentieux archivistiques: étude préliminaire sur les principes et les critères à retenir lors des négociations", UNESCO document PGI - 77/WS/1, reproduced in: Dix-Septième Conférence internationale de la Table ronde des archives, "Constitution et reconstitution des patrimoines archivistiques nationaux", 1977, document 2. This study eventually constituted the substance of the UNESCO document entitled "Report of the Director-General on the study of problems involved in the transfer of documents from archives in the territory of certain countries to the country of their origin" (document 20 C/102, of 24 August 1978).

<sup>224/</sup> Jacob, op.cit.

dealt with in such treaties are, by and large, according to the categorization of succession established by the Commission, the transfer of part of the territory of one State to another State, and the separation of one or more parts of the territory of a State.

(9) In modern cases of decolonization, on the other hand, very few treaty provisions exist regarding the treatment of archives, despite the large number of newly independent States. The absence of archival clauses from agreements relating to the independence of colonial territories seems the more surprising as these agreements, of which there are many, govern succession not only to immovable but also to movable property, i.e. property of the same type as the archives themselves. 225/

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225/ There are very many treaties relating to the transfer of judicial archives in cases of decolonization. However, such cases involve the transfer of judicial records of litigation still under adjudication in courts of appeal or cassation situated in the territory of the former administering Power and involving nationals of the newly independent State. The predecessor State cannot continue to adjudicate cases henceforward falling under the judicial sovereignty of the successor State. Many agreements on this subject could be cited. See, for example, as regards France and the newly independent territories: Agreement concerning the transitional provisions in respect of justice between France and the Central African Republic of 12 July 1960 (Journal officiel de la République française, Lois et décrets (Paris), 30 July 1960, 92nd year, No.176, p.7043, and Materials on Succession of States in respect of Matters other than Treaties (United Nations publication, Sales No.E/F.77.V.9), p.150); Agreement between France and Chad of the same date (Journal officiel de la République française (op.cit.), p.7044, and Materials ... (op.cit.), p.157); Agreement between France and the Congo of the same date (Journal officiel ... (op.cit.), p.7043, and Materials ... (op.cit.), p.163); Agreement between France and Gabon of 15 July 1960 (Journal officiel ... (op.cit.), p.7048, and Materials ... (op.cit.), p.182); Agreement between France and Madagascar of 2 April 1960 (Journal officiel ... (op.cit.), 2 July 1960, 92nd year, No.153, p.5968, and Materials ... (op.cit.), p.290); Agreement between France and the Federation of Mali of 4 April 1960 (Journal officiel ... (op.cit.), p.5969, and Materials ... (op.cit.), p.315); exchange of letters between France and Upper Volta of 24 April 1961 relating to the transfer of records pertaining to cases pending in the Conseil d'Etat and the Court of Cassation (Journal officiel ... (op.cit.), 5-6 February 1962, 94th year, No.30, p.1315, and Materials ... (op.cit.), p.439); exchange of letters between France and Dahomey of 24 April 1961 (Journal officiel ... (op.cit.), p.1285, and Materials ... (op.cit.), p.128); exchange of letters between France and Mauritania of 19 June 1961 (Journal officiel ... (op.cit.), p.1335, and Materials ... (op.cit.), p.343); exchange of letters between France and Niger of 24 April 1961 (Journal officiel ... (op.cit.), p.1306, and Materials ... (op.cit.), p.372); exchange of letters between France and the Ivory Coast of 24 April 1961 (Journal officiel ... (op.cit.), p.1269, and Materials ... (op.cit.), p.231); and others.

(10) There may be many reasons for this. For example, decolonization cannot be total and instantaneous ab initio; rather, at least to begin with, it is purely nominal and only gradually acquires more substance and reality, so that the question of archives seldom receives priority treatment during the early, almost inevitably superficial, stage of decolonization. Newly independent States are plunged straight away into day-to-day problems, and have to cope with economic or other priorities which absorb all their attention and prevent them from perceiving immediately the importance of archives for their own development. Moreover, the under-development inherited in all fields by newly independent States is also reflected precisely in an apparent lack of interest in the exercise of any right to the recovery of archives. Lastly, the power relationship existing between the former administering Power and the newly independent State most often enables the former to evade the question of the passing of archives and to impose unilateral solutions in this matter.

(11) In view of the above-mentioned historical background, the Commission wishes to emphasize the importance of close co-operation among States for settling archival disputes, taking into account especially the relevant recommendations of international organizations such as UNESCO, which reflect the contemporary demands of States concerning their right to archives and their cultural heritage.<sup>226/</sup> The predecessor and successor States should be under a duty to negotiate in good faith and with unimpeachable determination to reach a satisfactory settlement of such disputes. As the Director-General of UNESCO has said:

"Because the patrimonial character of archives as State property derives from the basic sovereignty of the State itself, problems involved in the ownership and transfer of State archives are fundamentally legal in character. Such problems should therefore be resolved primarily through bilateral or multilateral negotiations and agreements between the States involved." <sup>227/</sup>

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<sup>226/</sup> Further on this point, see paras.(27) et seq. of the commentary to article 26, below.

<sup>227/</sup> UNESCO, document 20 C/102 (loc.cit.), para.19.

## Section 1. Introduction

### Article 18

#### 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.

#### Commentary

The present article corresponds to article 7 of Part II on State property and reproduces its wording, with the necessary replacement of the word "property" by the word "archives". Its purpose is to make clear that Part III of the draft deals specifically with State archives, as defined in the following article. As it has already been indicated,<sup>228/</sup> although State archives may be regarded as State property, they constitute a very special case in the context of succession of States. State archives have their own intrinsic characteristics which, in turn, impart a specific nature to the disputes they give rise to and call for special rules. In order to give better assistance in resolving such disputes between States, appropriate rules have been drafted in the present part which are more closely adapted to the specific case envisaged.

### Article 19

#### State archives

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

#### Commentary

(1) Article 19 defines the term "State archives" as used in the present articles. It means "all documents of whatever kind" which fulfil two conditions. First, the documents must have "belonged to the predecessor State according to its internal law", and second, they must have "been kept by [the predecessor State] as archives". The first condition thus follows the formula of renvoi to internal law adopted for article 8, defining the term "State property". The second condition, however, 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

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<sup>228/</sup> See para. (1) of the general commentary to this part, above.

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 "archives". It should be pointed out that in a number of countries such "living archives" are not classified as "archives" until a certain time, for example 20 or 30 years, has elapsed.

(2) Although in archival science "archives" are generally taken to mean "(a) the documentary material amassed by institutions or natural or legal persons in the course of their activities and deliberately preserved; (b) the institution which looks after this documentary material; (c) the premises which house it",<sup>229/</sup> the present articles deal with "all documents of whatever kind", corresponding to only (a) of those three categories. The other categories, namely the custodial institutions and the premises, are considered as immovable property and thus fall into part II of the present draft.

(3) The word "documents" (of whatever kind) should be understood in its widest sense. An archival document is anything which contains "authentic data which may serve scientific, official and practical purposes", according to the reply of Yugoslavia to the questionnaire drawn up by the International Round Table Conference on Archives.<sup>230/</sup> Such documents may be in written form or unwritten, or may be in a variety of material, such as paper, parchment, fabric, stone, wood, glass, film, etc.

(4) Of course, the preservation of written sources remains the very basis for the constitution of State archives, but the criterion of the physical appearance of the object, and even that of its origin, play a part in the definition of archival documents. Engravings, drawings and plans which include no "writing" may be archival items. Numismatic pieces are sometimes an integral part of archives. Quite apart from historic paper money, or samples or dies or specimens of bank notes or stamps, there are even coins in national archives or national libraries. This is the case in Romania, Italy, Portugal, England (where the Public Records Office owns a collection of stamps and counterfeit coins) and France (where the Bibliothèque nationale, in Paris, houses a large numismatic collection from the Cabinet des médailles). Iconographic documents, which are normally kept in

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<sup>229/</sup> France, Direction des archives de France, Actes de la Septième Conférence internationale de la Table ronde des archives, Le concept d'archives et les frontières de l'archivistique (Paris, Imprimerie nationale, 1963), p.9.

<sup>230/</sup> Ibid., p.10.

museums, are sometimes kept in national archival institutions, most frequently because they belong to archives. Iconographic documents which have to do with important persons or political events are filed and cared for as part of the national archives. This is the case in England, where the Public Records Office has a large number of iconographic documents as well as a large series of technical drawings from the Patent Office; in Italy, where the Archivio central dello Stato keeps photographs of all political, scientific and ecclesiastical notables; and in Argentina, where the Archivo gráfico fulfils the same function. Photographic prints are part of the archives themselves in certain countries. Thus, in Poland, the national archives receive prints from State photographic agencies. Some sound documents and cinematographic films are considered to be "archives" under the law of many countries (for example, France, Sweden, Czechoslovakia) and are therefore allocated under certain conditions either to the State archival administration, or to libraries or museums, or to other institutions. In cases where they are allocated to the State archival administration, sound documents must be considered an integral part of the archives and must be treated in the same way as the latter in the case of succession of States. In the United States, commercial films are subject to copyright and are registered with the Library of Congress, whereas cinematographic productions by the army and certain American public institutions are placed in the State archives. In Finland, a committee chaired by the director of the national archives is responsible for the establishment and preservation of cinematographic archives.<sup>231/</sup>

(5) The term "documents of whatever kind" is intended to cover documents of whatever subject-matter - diplomatic, political, administrative, military, civil, ecclesiastical, historical, geographical, legislative, judicial, financial, fiscal, cadastral, etc.; of whatever nature - handwritten or printed documents, drawings, photographs, their originals or copies, etc.; of whatever material - paper, parchment, stone, wood, ivory, film, wax, etc.; and of whatever ownership, whether forming part of a collection or not.

(6) The term "documents of whatever kind", however, excludes objets d'art, as such and not as archival pieces, which may also have cultural and historical value. The passing of such objects is covered either by the provisions relating to State property or dealt with as the question of their return or restitution, rather than as a problem of State succession.

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<sup>231/</sup> Ibid., pp.30-31, for other examples.



(7) Various wordings have been used in diplomatic instruments to refer to archives falling under the present article. Examples are "archives, registers, plans, title deeds and documents of every kind";<sup>232/</sup> "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories";<sup>233/</sup> "all title deeds, plans, cadastral and other registers and papers",<sup>234/</sup> "any governmental archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded";<sup>235/</sup> "all documents exclusively referring to the sovereignty relinquished or ceded ..., the official archives and records, executive as well as judicial",<sup>236/</sup> "documents, deeds and archives ..., registers of births, marriages and deaths, land registers, cadastral papers ...",<sup>237/</sup> and so forth.

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<sup>232/</sup> This expression appears in several clauses of the Treaty of Versailles of 28 June 1919: part III, sect.I, art.38, concerning Germany and Belgium; sect.V, art.52, concerning Germany and France in respect of Alsace-Lorraine; sect.VIII, art.158, concerning Germany and Japan in respect of Shantung (British and Foreign State Papers (London, H.M. Stationery Office, 1922), vol.112, pp.29-30, 42 and 81); as well as in the Treaty of Saint-Germain-en-Laye of 10 September 1919: art.93, concerning Austria (ibid., p.361); and in the Treaty of Trianon of 4 June 1920: art.77, concerning Hungary (ibid., vol.113, p.518).

<sup>233/</sup> Article 3 of the Treaty of Peace between the German Empire and France signed at Frankfurt on 10 May 1871 (de Martens, ed., Nouveau recueil général de traités (Göttingen, Dietrich, 1874), vol.XIX, p.689).

<sup>234/</sup> Article 8 of the Additional Agreement of the Treaty of Peace signed at Frankfurt on 11 December 1871 (ibid., 1875), vol.XX, p.854.

<sup>235/</sup> Article 1, para.3, of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (Supplement to the American Journal of International Law (New York, Oxford University Press, 1917), vol.II (1917), p.55).

<sup>236/</sup> Article VIII of the Treaty of Peace between Spain and the United States of America, signed at Paris on 10 December 1898 (text in Malloy, op.cit., p.1693).

<sup>237/</sup> Article 8 of the frontier treaty between the Netherlands and the Federal Republic of Germany signed at The Hague on 8 April 1960 (United Nations, Treaty Series, vol.508, p.154).

(8) A most detailed definition of "archives" is to be found in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia,<sup>238/</sup> concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses documents relating to all the public services, to the various parts of the population, and to categories of property, situations or private juridical relations. Article 2 reads as follows:

"The expression 'archives and documents of an administrative character' shall be construed as covering the documents of the central administration and those of the local public administrative authorities.

"The following [in particular shall be covered] ...:

"Documents ... such as cadastral registers, maps and plans; blueprints, drawings, drafts, statistical and other similar documents of technical administration, concerning, inter alia, the public works, railways, mines, public waterways, seaports and naval dockyards;

"Documents of interest either to the population as a whole or to part of the population, such as those dealing with births, marriages and deaths, statistics, registers or other documentary evidence of diplomas or certificates testifying to ability to practise certain professions;

"Documents concerning certain categories of property, situations or private juridical relations, such as authenticated deeds, judicial files, including court deposits in money or other securities ...;

"The expression 'historical archives and documents' shall be construed as covering not only the material from archives of historical interest properly speaking but also documents, acts, plans and drafts concerning monuments of historical and cultural interest."

(9) It should be noted that no absolute distinction exists between "archives" and "libraries". While archives are generally thought of as documents forming part of an organic whole and libraries as composed of works which are considered to be isolated or individual units, it is nevertheless true that archival documents are frequently received in libraries and conversely library items are sometimes taken into the archives. The inclusion of library documents in archives is not confined to rare or out-of-print books which may be said to be "isolated units", or to manuscripts, which, by their nature, are "isolated units". Conversely,

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<sup>238/</sup> Agreement signed at Rome on 23 December 1950 between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (ibid., vol.171, p.291).

libraries acquire or receive as gifts or legacies the archives of important persons or statesmen. There are therefore certain areas in which archives and libraries overlap, and these are extended by the system of the statutory deposit of copies of printed works (including the Press) in certain countries, and by the fact that the archival administration sometimes acts as the author or publisher of official publications.

(10) Similarly, "archives" and "museums" cannot be placed in completely separate categories; some archives are housed in museums and various museum pieces are found in archives. According to Y. Pérotin:

"... in England, it is considered normal that archival documents connected with museographical collections should follow the latter and conversely that certain objects (such as chests) should be treated in the same way as papers; ... local museums own archival documents that have been bought or received as gifts, or come from learned societies ... In the Netherlands, historical atlases are cited as an example of documents legitimately kept in museums, while dies of seals are kept in the archives. In the Land of Westphalia, reference is made to chests and other objects which by their nature belong to the archives ... .. in the USSR, collections of manuscript documents provisionally kept in the national museums are supervised by the Archives Administration; the major autonomous 'archive museums', established by special decision (Gorky, Mendeleev, etc.) are not exempt.

"... in Portugal, the Viseu regional museum keeps some of the parchments from the cathedral chapter of the See, and the remainder are in the district archives or in Lisbon in the Torre do Tombo ... In Turkey, ... the archives of the palace of the former sultans are kept in the Topkapi-Sarayi museum with part of the records of the religious courts, whereas the provincial counterparts of those records are, in exactly nineteen cases, kept in museums." 239/

#### Article 20

##### Effects of the passing of State archives

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.

#### Article 21

##### 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.

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239/ France, Le concept d'archives ... (op.cit.), pp.45-46.

## Article 22

### 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 from the predecessor State to the successor State shall take place without compensation.

## Article 23

### Absence of effect of a succession of States on the archives of a third State

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.

### Commentary to articles 20, 21, 22 and 23

(1) Having decided to devote a separate part to State archives, the Commission found it appropriate to include in section 1 a few introductory articles by way of general provisions, in keeping with the example followed in the parts relating to State property and State debts, in order to accentuate the specificity of the subject of State archives in relation to that of State property. With a view to avoiding the creation of too great a difference between the two sets of general rules the provisions concerning archives in section 1 of part III have been drafted in identical terms to those used in the corresponding articles of section 1 of part II on State property, except that the word "property" has been replaced by the word "archives". In this manner, a perfect correspondence has been achieved between the two sets of articles, as follows: articles 18 and 7 (as already explained in the commentary to article 18); articles 20 and 9; articles 21 and 10; articles 22 and 11; and articles 23 and 12.

(2) Article 20 calls for no special comments. As regards article 21 it may, at first sight, appear ill-advised to provide that State archives shall pass on the date of the succession of States. 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. 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. Article 93 (concerning Austria) of the Treaty of Saint-Germain-en-Laye, of

10 September 1919,<sup>240/</sup> article 77 (concerning Hungary) of the Treaty of Trianon, of 4 June 1920,<sup>241/</sup> and articles 38 and 52 (concerning Belgium and France) of the Treaty of Versailles, of 28 June 1919,<sup>242/</sup> provided that the archives in question should be transferred "without delay". Provision was also made for the "immediate" transfer of archives in article 1, paragraph (2) (a), of General Assembly resolution 388 (V) of 15 December 1950, concerning the position of Libya as a successor State.

(3) 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.

(4) 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 21 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 3 months (as in article 158 of the Treaty of Versailles<sup>243/</sup>) and sometimes 18 months (as in article 37 of the Treaty of Peace with Italy, of 10 February 1947,<sup>244/</sup> which required Italy to return within that period the archives and cultural or artistic objects "belonging to Ethiopia or its nationals"). It has also been stipulated that the question of the

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<sup>240/</sup> G.F. de Martens; Nouveau recueil général de traités (Third series), vol.XI, p.715.

<sup>241/</sup> British and Foreign State Papers, London, vol.II3.

<sup>242/</sup> Ibid., vol.II2, p.1.

<sup>243/</sup> Ibid.

<sup>244/</sup> United Nations, Treaty Series, vol.49, p.142.

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" (article 8 of the Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany concerning various frontier areas).<sup>245/</sup> One of the most precise provisions concerning time-limits is article 11 of the Treaty of Peace with Hungary, of 10 February 1947:<sup>246/</sup> it sets out a veritable calendar for action within a period of 18 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.

(5) Article 22 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 must be understood broadly, 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. Article 22 is justified by the fact that it reflects clearly established State practice. Furthermore, the principle of non-compensation is implicitly confirmed in the later articles of this part, which provide that the cost of making copies of archives shall be borne by the requesting State.

(6) The Commission, having decided to retain article 12 in the draft, found it only appropriate to include article 23 as its counterpart, in the part on State archives. As regards article 23, 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, e.g. 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

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<sup>245/</sup> Ibid., vol.508, p.154.

<sup>246/</sup> Ibid., vol.41, p.178.

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.

#### Article 24

##### Preservation of the unity of State archives

Nothing in the present Part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the unity of State archives.

#### Commentary

The Commission, in second reading, decided to include in a separate article the provision originally contained in paragraph 6 of article 29 as adopted on first reading, relating to the preservation of the unity of State archives. The reference to the preservation of the unity of State archives reflects the principle of indivisibility of archives which underlies the questions of succession to documents of whatever kind which constitute such State archives, irrespective of the specific category of succession of States involved. Article 24, therefore, provides for a safeguard in the application of the substantive rules stated in the articles constituting section 2 of the present part.

### Section 2. Provisions concerning specific categories of succession of States

#### Article 25

##### Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

#### Commentary

(1) The present article concerns the passing of State archives in the case of transfer of part of the territory of a State to another. The practice of States in this case of succession to State archives is somewhat suspect, inasmuch as it has relied on peace treaties that were generally concerned with providing political solutions that reflected relationships of strength between victors and vanquished rather than equitable solutions. It had long been the traditional custom that the victors took archives of the territories conquered by them and sometimes even removed the archives of the predecessor State.

(2) Without losing sight of the above stated fact, the existing State practice may, nevertheless, be used in support of the proposals for more equitable solutions that are embodied in the text of this article. That practice is referred to in the present commentary under the following six general headings: (a) transfer to the successor State of all archives relating to the transferred territory; (b) archives removed from or constituted outside the territory of the transferred territory; (c) the "archives-territory" link; (d) special obligations of the successor State; (e) time-limits for handing over the archives and (f) State libraries.

#### Transfer to the successor State of all archives relating to the transferred territory

(3) Under this heading, it is possible to show the treatment of the sources of archives, archives as evidence, archives as instruments of administration, and archives as historical fund or cultural heritage.

(4) The practice on sources of archives, about which there seems to be no doubt, originated a long time ago in the territorial changes carried out as early as the Middle Ages. It is illustrated by examples taken from the history of France and



Poland.<sup>247/</sup> In France, King Philippe-Auguste founded his "Repository of Charters" in 1194, which constituted a collection of the documents relating to his kingdom. When in 1271 King Philippe III inherited the lands of his uncle, Alphonse de Poitiers (almost the entire south of France), he immediately transferred the archives relating to these lands to the Repository: title deeds to land, chartularies, letter registers, surveys and administrative accounts. This practice continued over the centuries as the Crown acquired additional lands. The same happened in Poland from the fourteenth century onwards during the progressive unification of the kingdom through the absorption of the ducal provinces: the dukes' archives passed to the King along with the duchies. Thus, the transfer principle was being applied a very long time ago, even although, as will be seen, the reasons relied upon varied.

(5) Under the old treaties, archives were transferred to the successor State primarily as evidence and as titles of ownership. Under the feudal system, archives represented a legal title to a right. This is why the victorious side in a war made a point of removing the archives relating to their acquisitions, taking them from the vanquished enemy by force if necessary: their right to the lands was guaranteed only by the possession of the "terriers". An example of this is provided by the Swiss Confederates who, in 1415, manu militari removed the archives of the former Habsburg possessions from Baden Castle.<sup>248/</sup>

(6) As from the sixteenth century, it came to be realized that, while archives constituted an effective legal title, they also represented a means of administering the country. It then became the accepted view that, in a transfer of territory, it was essential to leave to the successor as viable a territory as possible in order to avoid any disruption of management and facilitate proper administration. Two possible cases may arise: first is the case of a single successor State. Under this case, all administrative instruments are transferred from the predecessor State to the successor State, the said instruments being understood in the broadest sense: fiscal documents of all kinds, cadastral and domanial registers, administrative documents, registers of births, marriages and

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<sup>247/</sup> See France, Direction des archives de France, Actes de la Sixième Conférence internationale de la Table ronde des archives, Les archives dans la vie internationale (Paris, Imprimerie nationale, 1963), pp.12 et seq.

<sup>248/</sup> As these archives concerned not only the Confederates' territories but also a large part of South-West Germany, the Habsburgs of Austria were able to recover the archives not concerned with Confederate territory in 1474.

deaths, land registers, judicial and prison archives, etc. Hence it became customary to leave in the territory all the written, pictorial and photographic material necessary for the continued smooth functioning of the administration. For example, in the case of the cession of the provinces of Jämtland, Härjedalen, Gotland and Oscl the Treaty of Brömsebro of 13 August 1645 between Sweden and Denmark provided that all judicial deeds, registers and cadastres (article 29), as well as all information concerning the fiscal situation of the ceded provinces must be delivered to the Queen of Sweden. Similar provisions were subsequently accepted by the two Powers in their peace treaties of Roskilde (26 February 1658, article 10) and Copenhagen (27 May 1660, article 14).<sup>249/</sup> Article 69 of the Treaty of Münster of 30 January 1648 between the Netherlands and Spain provided that "all registers, maps, letters, archives and papers, as well as judicial records, concerning any of the United Provinces, associated regions, towns ... which exist in courts, chancelleries, councils and chambers ... shall be delivered ...".<sup>250/</sup> Under the Treaty of Utrecht of 11 April 1713, Louis XIV ceded Luxembourg, Namur and Charleroi to the (Dutch) States General "with all papers, letters, documents and archives relating to the said Low Countries".<sup>251/</sup> In fact, almost all treaties concerning the transfer of part of a territory contain a clause relating to the transfer of archives, and for this reason it is impossible to list them all. Some treaties are even accompanied by a separate convention dealing solely with this matter. Thus, the Convention between Hungary and Romania signed at Bucharest on 16 April 1924,<sup>252/</sup> which was a sequel to the peace treaties marking the end of the First World War, dealt with the exchange of judicial records, land registers and registers of births, marriages and deaths, and specified how the exchange was to be carried out.

(7) The second case is one in which there is more than one successor State. The examples given below concern old and isolated cases and cannot be taken to indicate the existence of a custom, but it is useful to mention them because the approach adopted would today be rendered very straightforward through the use of modern

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<sup>249/</sup> See France, Les archives dans la vie internationale (op.cit.), p.16.

<sup>250/</sup> Ibid.

<sup>251/</sup> Ibid., p.17.

<sup>252/</sup> G.F. de Martens, ed., Nouveau recueil général de traités (Third series), Leipzig, Theodor Weicher Publishing House, vol.XXIV, p.788.

reproduction techniques. Article 18 of the Barrier Treaty of 15 November 1715 concluded between the Empire, England and Holland provides that the archives of the dismembered territory, namely Gelderland, would not be divided up among the successor States but that an inventory would be drawn up, one copy of which would be given to each State, and the archives would remain intact and at their disposal for consultation.<sup>253/</sup> Similarly, article VII of the Treaty concluded between Prussia and Saxony on 18 May 1815 refers to "deeds and papers which ... are of common interest to both parties".<sup>254/</sup> The solution adopted was that Saxony would keep the originals and provide Prussia with certified copies. Thus, regardless of the number of successors, the entire body of archives remains intact in pursuance of the principle of the conservation of archives for the sake of facilitating administrative continuity. However, this same principle and this same concern were to give rise to many disputes in modern times as a result of a distinction made between administrative archives and historical archives. According to some writers, administrative archives must be transferred to the successor State in their entirety, while so-called historical archives in conformity with the principle of the integrity of the archival collection, must remain part of the heritage of the predecessor State unless established in the territory being transferred through the normal functioning of its own institutions. This argument, although not without merit, is not altogether supported by practice: history has seen many cases of transfers of archives, historical documents included. For example, article 18 of the Treaty of Vienna of 30 October 1866 by which Austria ceded Venezia to Italy provides for the transfer to Italy of all title deeds, administrative and judicial documents and "political and historical documents of the former Republic of Venice", while each of the two parties undertakes to allow the others to copy "historical and political documents which may concern the territories remaining in the possession of the other Power and which, in the interests of science, cannot be separated from the archives to which they belong".<sup>255/</sup> Other examples of this are not difficult to find. Article 29, paragraph 1 of the Peace Treaty between Finland and Russia signed at Dorpat on

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<sup>253/</sup> See France, Les archives dans la vie internationale (op.cit.), p.17.

<sup>254/</sup> G.F. de Martens, ed., Nouveau recueil général de traités, Göttingen, Dietrich Publishing House, 1887, vol.II (1814-1815), p.276.

<sup>255/</sup> See France, Les archives dans la vie internationale (op.cit.), p.27.

14 October 1920<sup>256/</sup> provides that "the contracting parties undertake to return as soon as possible archives and documents which belong to public administrations and institutions, which are situated in their respective territories and which concern solely or largely the other contracting party or its history".

Archives removed from or constituted outside the transferred territory

(8) There would seem to be ample justification for accepting, as adequately reflecting the practice of States, the rule whereby the successor State is given all the archives, historical or other, relating to the transferred territory, even if these archives have been removed from or are situated outside this territory. The Treaties of Paris and Vienna of 1814 and 1815 provided for the return to their place of origin of the State archives that had been gathered together in Paris during the Napoleonic period.<sup>257/</sup> Under the Treaty of Tilsit of 7 July 1807, Prussia, having returned that part of Polish territory which it had conquered, was obliged to return to the new Grand Duchy of Warsaw not only the current local and regional archives relating to the restored territory but also the relevant State documents ("Berlin Archives").<sup>258/</sup> In the same way, Poland recovered the central archives of the former Polish State, transferred to Russia at the end of the eighteenth century, as well as those of the former autonomous Kingdom of Poland for the period 1815-1863 and the following period up to 1876. It also obtained the documents of the Office of the Secretary of State for the Kingdom of Poland that acted as the central Russian administration at St. Petersburg from 1815 to 1863, those of the Tsar's Chancellery for Polish Affairs, and lastly the archival collection of the Office of the Russian Ministry of the Interior responsible for agrarian reform in Poland.<sup>259/</sup> Reference can also be made to the case of the Schleswig archives. Under the Treaty of Vienna of 30 October 1864, Denmark had to cede the three duchies of Schleswig, Holstein and Lauenberg. Article 20 of the said Treaty provided as follows: "Title deeds, administrative documents and documents relating to civil justice that concern the ceded territories and are part of the archives of the Kingdom of Denmark" will be transferred, along with "all

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<sup>256/</sup> G.F. de Martens, ed., Nouveau recueil général de traités (Third series), vol. XII, p.47.

<sup>257/</sup> See France, Les archives dans la vie internationale (op.cit.), pp.19, 20.

<sup>258/</sup> Ibid., p.20.

<sup>259/</sup> Ibid., pp.35 and 36.

parts of the archives of Copenhagen that belonged to the ceded duchies and were taken from their archives".<sup>260/</sup> For a more detailed examination of this practice of States (although, in general, it would be wrong to attach too much importance to peace treaties, where solutions are based on a given "power relationship"), a distinction can be made between two cases, namely that of archives removed or taken from the territory in question and that of archives constituted outside that territory but relating directly to it.

(9) Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State. There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 provided as follows: "If any of these items [archives, documents, registers, etc.] have been removed, they will be restored by the French Government on the demand of the German Government".<sup>261/</sup> This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles, the only difference being that in that treaty it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.<sup>262/</sup> Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the treaties signed in Rapallo on 12 November 1920 and in Rome on 27 January 1924 which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like relating to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War.<sup>263/</sup> The

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<sup>260/</sup> Ibid., p.26.

<sup>261/</sup> Article 3 of the Peace Treaty between the German Empire and France, signed at Frankfurt on 10 May 1871. G.F. de Martens, ed., Nouveau recueil général de traités, vol.XIX, p.689.

<sup>262/</sup> Section V, article 52 of the Treaty of Versailles concerning Alsace-Lorraine, ibid. (Third series), vol.XI, pp.380 and 381.

<sup>263/</sup> Article 12 of the Treaty of Peace with Italy of 10 February 1947 (United Nations, Treaty Series, vol.49, p.134). For the Rapallo Treaty, see League of Nations, Treaty Series, vol.XVIII, p.387; for the Rome Treaty, see ibid., vol.XXIV, p.31.

agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the delivery to Yugoslavia of all archives "which are in the possession, or which will come into the possession of the Italian State, of local authorities, of public institutions and publicly-owned companies and associations" and adds that "should the material referred to not be in Italy, the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government".<sup>264/</sup> However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, F. Despagnet wrote: "The dismembered State retains ... archives relating to the ceded territory which are preserved in a repository situated outside that territory".<sup>265/</sup> P. Fauchille did not go so far as to support this contrary rule, but implied that distinction could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it: "Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or should it also hand over documents of a purely historical nature?"<sup>266/</sup> The fact is that these writers hesitated to support the generally accepted rule, and even went so far as to formulate a contrary rule, because they accorded excessive weight to a court decision which was not only an isolated instance but bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that "the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, was in no way divested of that right by the change of nationality imposed on a part of its territory".<sup>267/</sup> It should be noted that the main purpose in this case was not to

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<sup>264/</sup> United Nations, Treaty Series, vol.171, p.293.

<sup>265/</sup> F. Despagnet, Cours de droit international public, fourth edition, Paris, 1910, p.128, para.99.

<sup>266/</sup> P. Fauchille, Traité de droit international public, 8th ed. of Manual de droit international public, ed. H. Bonfils (Paris, Rousseau, 1922), vol.I (part I), p.360, para.219.

<sup>267/</sup> Judgement of the Court of Nancy of 16 May 1896, "Dufresne versus the State", Dalloz, Jurisprudence générale: Recueil périodique et critique de jurisprudence, de législation et de doctrine, 1896, Paris, Bureau de la Jurisprudence générale, part 2, p.412.

deny Germany (which was not a party to the proceedings) a right to the archives relating to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.<sup>268/</sup> Hence the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

(10) This isolated school of thought is being mentioned because it seemed to prevail at least for some time and in some cases, in French diplomatic practice. If credence is to be given to one interpretation of the texts at least, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new Government of Lombardy.<sup>269/</sup> If there is justification for interpreting in a very strict and narrow way the expressions used, which apparently refer only to items relating to current administration, it may be concluded that the historical part of the imperial archives at Vienna relating to the ceded territories was not affected.<sup>270/</sup> Article 2 of the Treaty of the same date between France and Sardinia<sup>271/</sup> refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded

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<sup>268/</sup> The decision concerned 16 cartons of archives which a private individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.

<sup>269/</sup> Article 15 of the Franco-Austrian Peace Treaty signed at Zurich on 10 November 1859. France, Archives diplomatiques, vol.1, 1861, p.10; and M. de Clercq, Recueil des traités de la France, Paris, A. Durand and Pedone-Lauriel, vol.VII, p.647.

<sup>270/</sup> For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870-1871", Revue générale de droit international public, vol.XVIII, 1911, p.35, and G. May, Le Traité de Francfort, Paris, Berger-Levrault et Cie., 1909, p.269, note 2.

<sup>271/</sup> Article 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, Archives diplomatiques (op.cit.), p.16; and M. de Clercq, op.cit., p.652).

between Austria, France and Sardinia also on the same date reproduces them word for word.<sup>272/</sup> Similarly, a Convention between France and Sardinia, signed on 23 August 1860 pursuant to the Treaty of Turin of 24 March 1860 confirming the cession of Savoy and the County of Nice to France by Sardinia, includes an article 10 which is cast in the same mould as the articles cited above when it states: "Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government".<sup>273/</sup>

(11) It is only with some hesitation that it may be concluded that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives, relating to the territory affected by the change of sovereignty which are situated outside that territory. Would it, after all, be very rash to interpret the words "titles to property" in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership, were claimed by the successor. If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that those treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family

<sup>272/</sup> Article 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, Archives diplomatiques (op.cit.), p.29; and M. de Clercq, op.cit., pp.661-662).

<sup>273/</sup> M. de Clercq, op.cit., vol.VIII, p.83; G.F. de Martens, ed., Nouveau recueil général de traités, vol.XVII, part II, p.25.



momentos, and so forth, are excluded from the transfer.<sup>274/</sup> What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some 90 years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government "all archives historical and administrative, prior to 1860, which concern the territory ceded" to France under the Treaty of 24 March 1860, and the Convention of 23 August 1860.<sup>275/</sup> Consequently, there seems to be ample justification for accepting as a rule which adequately reflects State practice the fact that the successor State should receive all the archives, historical or other, relating exclusively or principally to the territory to which the succession of States relates, even if those archives have been removed or are situated outside that territory.

(12) There are also examples of the treatment of items and documents that relate to the territory involved in the succession of States but that have been established and have always been kept outside this territory. Many treaties include this category among the archives that must pass to the successor State. As mentioned above,<sup>276/</sup> under the Treaty of Peace with Italy of 10 February 1947, France was able to obtain archives relating to Savoy and Nice established by the city of Turin. Under the peace treaty of 1947 with Hungary, Yugoslavia obtained all eighteenth century archives concerning Illyria that had been kept by Hungary.<sup>277/</sup> Under the Craiova agreement of 7 September 1940 between Bulgaria and

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<sup>274/</sup> Article 10 of the Convention of 23 August 1860 between France and Sardinia (*ibid.*) provided that France was to return to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".

<sup>275/</sup> United Nations, Treaty Series, vol.49, p.132.

<sup>276/</sup> See para.(11) above.

<sup>277/</sup> See article 11 of the Peace Treaty with Hungary. United Nations, Treaty Series, vol.41, p.178.

Romania concerning the cession by Romania to Bulgaria of the Southern Dobruja, Bulgaria obtained, in addition to the archives in the ceded territory, certified copies of the documents being kept in Bucharest and relating to the region newly acquired by Bulgaria.

(13) What happens if the archives relating to the territory affected by the change in sovereignty are situated neither within the frontiers of this territory nor in the predecessor State? Article 1 of the agreement between Italy and Yugoslavia signed at Rome on 23 December 1950 provides that, "should the material referred to not be in Italy, the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government."<sup>278/</sup> In other words, to use terms dear to French civil law experts, what is involved here is not so much an "obligation of result" as an "obligation of means".<sup>279/</sup>

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<sup>278/</sup> United Nations, Treaty Series, vol.171, p.292.

<sup>279/</sup> There are other cases in history of the transfer to the successor State of archives constituted outside the territory involved in the succession of States. These examples do not fall into any of the categories provided for in the system used here for the succession of States, since they concern changes in colonial overlords. These outdated examples are mentioned here solely for information purposes. (In old works, they were regarded as transfers of part of a territory from one State to another or from one colonial empire to another.)

The protocol concerning the return by Sweden to France of the Island of St. Barthélémy in the West Indies states that "papers and documents of all kinds concerning the acts [of the Swedish Crown] that may be in the hands of the Swedish administration ... will be delivered to the French Government" (article 3, paragraph 2, of the protocol of Paris of 31 October 1877 to the treaty between France and Sweden signed at Paris on 10 August 1877). G.F. de Martens, ed., Nouveau recueil général de traités (Second series), vol.IV, p.368.

In section VIII of the Treaty of Versailles concerning Shantung, article 158 obliges Germany to return to Japan the archives and documents relating to the Kiaochow territory, "wherever they might be". Ibid. (Third series), vol.XI, p.443.

Article 1 of the convention between the United States of America and Denmark of 4 August 1916 concerning the cession of the Danish West Indies awards to the United States any archives in Denmark concerning these islands (Supplement to the American Journal of International Law (New York, Oxford University Press), vol.II (1917), p.53; Revue générale de droit international public, vol.XXIV, 1917, p.454), just as article VIII of the Peace Treaty between Spain and the United States of America of 10 December 1898 had already given the United States the same right with regard to archives in the Iberian peninsula relating to Cuba, Puerto Rico, the Philippines and the island of Guam (Malloy, op.cit., p.1695).

(14) The rule concerning the transfer to the successor State of archives relating to a part of another State's territory is taken to be so obvious that there is no risk of its being jeopardized by the lack of references to it in agreements. This is the view of one writer, who states: "Since the delivery of public archives relating to the ceded territories is a necessary consequence of annexation, it is hardly surprising that in many treaties of annexation there is no clause concerning this obligation. It is implied, for it follows from the renunciation by the ceding State of all its rights and titles in the ceded territory".<sup>280/</sup> The terminology used has aged, and annexation itself is obsolete. However, the idea on which the rule is based is still valid, the object being, according to the same author,<sup>281/</sup> to "provide [the successor State] with whatever is necessary or useful for the administration of the territory".

The "archives-territory" link

(15) As has been mentioned above, State practice shows that the link between archives and the territory to which the succession of States relates is taken very broadly into account. But the nature of this link should be made quite clear. Expert archivists generally uphold two principles, that of "territorial origin" and that of "territorial or functional connection", each of which is subject to various and even different interpretations, leaving room for uncertainties. What seems to be obvious is that the successor State cannot claim any archives whatsoever; it can claim only those that relate exclusively or principally to the territory. In order to determine which are those archives it should be taken into account that there are archives which were acquired before the succession of States either by or on behalf of the territory, against payment or free of cost, and with funds of the territory or otherwise.<sup>282/</sup> From this standpoint, such archives must follow the destiny of the territory on the succession of States. Furthermore, the organic link between the territory and the archives relating to it must be taken into .

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<sup>280/</sup> Jacob, op.cit., p.17.

<sup>281/</sup> Ibid.

<sup>282/</sup> Article 11 of the Treaty of Peace with Hungary of 10 February 1947 (United Nations, Treaty Series, vol.41, p.168) rightly states, in paragraph 2, that the successor States, Yugoslavia and Czechoslovakia, shall have no right to archives or objects "acquired by purchase, gift or legacy" or to "original works of Hungarians".

account.<sup>283/</sup> However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as a whole, and only incidentally" to the ceded territory, they "remain the property of the predecessor State. But it is generally agreed that copies of them must be furnished to the annexing State at its request".<sup>284/</sup> The "archives-territory" link was specifically taken into account in the aforementioned Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.<sup>285/</sup>

(16) Attention is drawn at this point to the decision of the Franco-Italian Conciliation Commission, in which the Commission held that archives and historical documents, even if they belong to a municipality whose territory is divided by the new frontier drawn in the Treaty of Peace with Italy, must be assigned in their entirety to France, the successor State, whenever they relate to the ceded territory.<sup>286/</sup> As was mentioned in an earlier context after the Franco-German war of 1870, the archives of Alsace-Lorraine were handed over to the German successor State. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this

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<sup>283/</sup> By the Treaty of Peace of 10 February 1947 (art.11, para.1, *ibid.*) Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage [and] which originated in those territories ...".

<sup>284/</sup> C. Rousseau, Droit international public, vol.III (Paris, Sirey, 1977), p.384. See also O'Connell, op.cit., pp.232 and 233.

<sup>285/</sup> Article 6 of the Agreement provides that archives which are indivisible or of common interest to both parties "shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, according to the extent of the territory or the number of persons, institutions or companies to which these documents relate. In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original". United Nations, Treaty Series, vol.171, p.297.

<sup>286/</sup> Decision No.163 rendered on 9 October 1953 (United Nations, Reports of International Arbitral Awards, vol.XIII, pp.503-549). This decision includes the following passage: "Communal property which shall be so apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include, all relevant archives and documents of an administrative character or historical value; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred (annex XIV, para.1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 18 or to apportionment under paragraph 18, but remain the property of the Italian municipality. What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory" (pp.516-517).

case, however, the criterion of the "archives-territory" link was applied only in the case of documents considered to be "of secondary interest to the German Government".<sup>287/</sup>

#### Special obligations of the successor State

(17) The practice of States shows that many treaties impose upon the successor State an essential obligation which constitutes the normal counterpart of the predecessor State's duty to transfer archives to the successor State. Territorial changes are often accompanied by population movements (new frontier lines which divide the inhabitants on the basis of a right of option, for instance). Obviously, this population cannot be governed without at least administrative archives. Consequently, in cases where archives pass to the successor State by agreement, it cannot refuse to deliver to the predecessor State, upon the latter's request, any copies it may need. Any expense involved must, of course, be defrayed by the requesting State. It is understood that the handing over of these papers must not jeopardize the security or sovereignty of the successor State. For example, if the predecessor State claims the purely technical file of a military base it has constructed in the territory or the judicial record of one of its nationals who has left the ceded territory, the successor State can refuse to hand over copies of either. Such cases involve elements of discretion and expediency of which the successor State, like any other State, may not be deprived. The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future. The aforementioned Convention of 4 August 1916 between the United States and Denmark providing for the cession of the Danish West Indies stipulates in the third paragraph of article 1 that "archives and records shall be carefully preserved and authenticated copies thereof, as may be required shall be at all times given to the ... Danish Government, ... or to such properly authorized persons as may apply for them".<sup>288/</sup>

#### Time-limits for handing over the archives

(18) These time-limits vary from one agreement to another. The finest examples of the speed with which the operation can be carried out is undoubtedly to be found

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<sup>287/</sup> Convention of 26 April 1872, signed at Strasbourg. G.F. de Martens, ed., Nouveau recueil général de traités, vol.XX, p.875.

<sup>288/</sup> Supplement to American Journal of International Law (New York, Oxford University Press), vol.II (1917), p.54.

in the Treaty of 26 June 1816 between the Netherlands and Prussia, article XLI of which provides that "archives, maps and records ... shall be handed over to the new authorities at the same time as the territories themselves".<sup>289/</sup>

### State libraries

(19) In earlier discussion on this topic,<sup>290/</sup> it was explained how difficult it has been to find information about the transfer of libraries. Three peace treaties signed after the First World War nevertheless expressly mentioned that libraries must be restored at the same time as archives. The instruments in question are the Treaty of Riga between Russia and Latvia of 11 August 1920, article XI;<sup>291/</sup> the Treaty of Moscow between Russia and Lithuania of 12 July 1920, article 9;<sup>292/</sup> and the Treaty of Riga between Poland, Russia and the Ukraine of 18 March 1921, article 11, paragraph 1.<sup>293/</sup> In those treaties the following formula is used: "The Russian Government shall restore to ... at its own expense and hand over ... the libraries, archives, museums, works of art (teaching material, documents and other property of educational and scientific establishments), government property (religious, communal and that of corporative institutions), in so far as those objects were removed from the territory of ... during the world war 1914-1917 and are or will in fact be in the possession of the Government of public authorities of Russia".

(20) The conclusions and solutions to which a review of State practice gives rise would not appear to provide very promising material on which to base a proposal for an acceptable draft article on the problem of succession to State archives in the event of the transfer of part of a State's territory to another State. There are many reasons why the solutions adopted in treaties cannot be taken as an absolute and literal model for dealing with this problem in a draft article:

- (i) First, it is clear that peace treaties are almost inevitably an occasion for the victor to impose on the vanquished solutions which are most advantageous for the former. Germany, the victor in the Franco-German

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<sup>289/</sup> G.F. de Martens, ed., Nouveau recueil général de traités, vol.III (1808-1818), p.41.

<sup>290/</sup> Yearbook ... 1970, vol.II, p.161, document A/CN.4/226, paras.(47) et seq. of the commentary to article 7.

<sup>291/</sup> G.F. de Martens, ed., Nouveau recueil général de traités (Third series), vol.XI, p.895.

<sup>292/</sup> Ibid., p.883.

<sup>293/</sup> Ibid., vol.XIII, p.152.

war of 1870, dictated its own law as regards the transfer of archives relating to Alsace-Lorraine right until 1919 when France, in turn, was able to dictate its own law for the return of those same archives, as well as others, relating to the same territory. History records a great many instances of such reversals, involving first the break-up and later the reconstitution of archives, or, at best, global and massive transfers one day in one direction and the next day in the other.

- (ii) The solutions offered by practice are not very subtle nor always equitable. In practice, decisions concerning the transfer to the successor State or archives of every kind - whether as documentary evidence, instruments of administration, historical material or cultural heritage - are made without sufficient allowance for certain pertinent factors. It is true, that in many cases of the transfer of archives, including central archives and archives of an historical character relating to the ceded territory, the predecessor State was given an opportunity to take copies of these archives.
- (iii) As regards this type of succession, the general provisions of the article already adopted should be borne in mind, lest the solutions chosen conflict, without good reason, with those general provisions.

(21) In this connection, reference is made to the corresponding provision in part II on State property (article 13), paragraph 1 of which places the emphasis on the agreement between the predecessor State and the successor State, and paragraph 2 (b) of which states that, in the absence of such an agreement, "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State".

(22) It should not be forgotten that, in the view of the Commission, the type of succession referred to here concerns the transfer of a small portion of territory. The problem of State archives where part of a territory is transferred may be stated in the following terms: State archives of every kind which have a direct and necessary link with the management and administration of the part of the territory transferred, must unquestionably pass to the successor State. The basic principle is that the part of territory concerned must be transferred so as to leave to the successor State as viable a territory as possible in order to avoid any disruption of management and facilitate proper administration. In this connection, it may happen that in consequence of the transfer of a part of one State's territory to another State some - or many - of the inhabitants, preferring

to retain their nationality, leave that territory and settle in the other part of the territory which remains under the sovereignty of the predecessor State. Parts of the State archives that pass, such as taxation records or records of births, marriages and deaths, concern these transplanted inhabitants. It will then be for the predecessor State to ask the successor State for all facilities, such as microfilming, in order to obtain the archives necessary for administrative operations relating to its evacuated nationals. But in no case, inasmuch as it is a minority of the inhabitants which emigrates, may the successor State be deprived of the archives necessary for administrative operations relating to the majority of the population which stays in the transferred territory. The foregoing remarks concern the case of State archives which, whether or not situated in the part of territory transferred, have a direct and necessary link with its administration. This means, by and large, State archives of an administrative character. There remains, the case of State archives of an historical or cultural character. If these historical archives relate exclusively or principally to the part of territory transferred, there is a strong presumption that they are distinctive and individualized and constitute a homogeneous and autonomous collection of archives directly connected with and forming an integral part of the historic and cultural heritage of the part of territory transferred. In logic and equity this property should pass to the successor State. It follows from the comments in the preceding paragraphs that where the archives are not State archives at all, but are local administrative, historical or cultural archives, owned in its own right by the part of territory transferred, they are not affected by these draft articles, for these articles are concerned with State archives. Local archives which are proper to the territory transferred remain the property of that territory, and the predecessor State has no right to remove them on the eve of its withdrawal from the territory or to claim them later from the successor State.

(23) These various points may be summed up as follows: Where a part of a State's territory is transferred by that State to another State:

- (i) State archives of every kind having a direct and necessary link with the administration of the transferred territory pass to the successor State.
- (ii) State archives which relate exclusively or principally to the part of territory transferred pass to the successor State.
- (iii) Whatever their nature or contents, local archives proper to the part of territory transferred are not affected by the succession of States.
- (iv) Because of the administrative needs of the successor State, which is responsible for administering the part of territory transferred, and of



the predecessor State, which has a duty to protect its interests as well as those of its nationals who have left the part of territory transferred; and secondly, because of the problems of the indivisibility of certain archives that constitute an administrative, historical or cultural heritage, the only desirable solution that can be visualized is that the parties should settle an intricate and complex issue by agreement. Accordingly, in the settlement of these problems, priority should be given, over all the solutions put forward, to agreement between the predecessor State and the successor State. This agreement should be based on principles of equity and take account of all the special circumstances, particularly of the fact that the part of territory transferred has contributed, financially or otherwise, to the formation and preservation of archive collections. The principles of equity relied upon should make it possible to take account of various factors, including the requirements of viability of the transferred territory and apportionment according to the shares contributed by the predecessor State and by the territory separated from that State.

(24) The Commission, in the light of the foregoing considerations, prepared the present text for article 25 which concerns the case of succession of States corresponding to that covered by article 13, namely, transfer of part of the territory of a State. The cases of transfer of territory envisaged have been explained in the commentary to article 13 (paragraph (6)). Paragraph 1 of article 25 repeats, for the case of State archives, the rule contained in paragraph 1 of article 13 which establishes the primacy of agreement.

(25) In the absence of an agreement between the predecessor and successor States, the provisions of paragraph 2 of article 25 apply. Subparagraph (a) of paragraph 2 deals with what is sometimes called "administrative" archives providing that they shall pass to the successor State. To avoid using such an expression, which is not legally precise, the Commission referred to that category of archives as "the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred", terminology which is largely followed in the corresponding provision of article 26 (paragraph 1 (b)). The Commission preferred to use the phrase "should be at the disposal of the State to which the territory in question is transferred" instead of that found in paragraph 1 (b) of article 26 "should be in that territory" as being more appropriate to take account of the specific characteristics of the case of

succession of States covered by article 25. Subparagraph (b) of paragraph 2 embodies the rule according to which the part of the State archives of the predecessor State other than the part referred to in subparagraph (a) shall pass to the successor State if it relates exclusively or principally to the territory to which the succession of States relates. The words "exclusively or principally" were likewise regarded as being the most appropriate to delimit the rule, bearing in mind the basic characteristic of the case of succession of States dealt with in the article, namely, the transfer of small areas of territory.

(26) Paragraph 3 provides, for the case of a succession of States arising from the transfer of part of the territory of a State, the rule embodied in paragraph 3 of article 26. The relevant paragraphs of the commentary to that provision (paragraphs (20) to (24)) are also applicable to paragraph 3 of the present article.

(27) Paragraphs 4 and 5 establish the duty for the State to which State archives pass or with which they remain to make available to the other State, at the request and at the expense of that other State, appropriate reproductions of its State archives. Paragraph 4 deals with the situation where the requesting State is the successor State, in which case the documents of State archives to be reproduced are those connected with the interests of the transferred territory, a qualification which is also made in paragraph 2 of article 26. Paragraph 5 covers the situation where the requesting State is the predecessor State. In such a case, the documents of State archives to be reproduced are those which have passed to the successor State in accordance with the provisions of paragraph 1 or 2 of article 25.

#### Article 26

##### Newly independent State

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

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

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

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

3. The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence.

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

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

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

#### Commentary

(1) The present article principally envisages, like articles 14 and 36, the case where a newly independent State appears on the international scene as a result of decolonization. In such a case, the problem of succession in respect of archives is particularly acute.

(2) The Commission has clarified the notion of a "newly independent State" several times within the framework of the categorization used in the present draft. Reference should be made in particular to the definition in article 2, paragraph 1 (e) and the commentary to that paragraph,<sup>294/</sup> as well as to articles 14 and 36.<sup>295/</sup>

(3) The present article is closely modelled on article 14, though certain new elements have been added in view of the uniqueness of State archives as a category of matters which pass at a succession of States.

(4) Paragraph 1 (a) deals with "archives" - not necessarily "State archives" - which had belonged to the territory to which the succession of States relates before it became dependent and which became State archives of the predecessor

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<sup>294/</sup> See para.(6) of the commentary to article 2, above.

<sup>295/</sup> See paras.(1)-(3) of the commentary to article 14 above and paras.(1)-(2) of the commentary to article 36, below.

State during its dependency. Since no reason can be found for deviating from the rule enunciated in article 14, paragraph 1 (c), concerning movable property satisfying the same conditions, paragraph 1 (a) of the present article uses the same wording, except the word "archives", as that adopted for the former provision.

(5) By the use of the word "archives" rather than "State archives" at the beginning of paragraph 1 (a), it is intended to cover archives which belonged to the territory in question, whatever the political status it had enjoyed or under whatever ownership the archives had been kept in the pre-colonial period - whether by the central Government, local governments or tribes, religious missions, private enterprises or individuals.

(6) Such historical archives of the pre-colonial period are not the archives of the predecessor State, but the archives of the territory itself, which has constituted them in the course of its history or has acquired them with its own funds or in some other manner. They must consequently revert to the newly independent State, quite apart from any question of succession of States, if they are still within its territory at the time of its accession to independence, or can be claimed by it if they have been removed from the territory by the colonial Power.

(7) Examples of the passing of historical archives may be found in some treaties. Italy was obliged to return the archives it had removed from Ethiopia during its annexation when, after the Second World War, its colonization was terminated. Article 37 of the Treaty of Peace with Italy of 10 February 1947 provides that:

"... Italy shall restore all ... archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935." 296/

In the case of Viet Nam, a Franco-Vietnamese agreement in the matter of archives, signed on 15 June 1950, provided in its article 7 that the archives constituted by the Imperial Government and its Kinh Luoc<sup>297/</sup> and preserved at the Central Archives before the French occupation were to revert to the Government of Viet Nam.

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296/ United Nations, Treaty Series, vol.49, p.142. On the basis of that article (and article 75) of the Treaty of Peace, Ethiopia and Italy concluded an Agreement concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, signed at Addis Ababa on 5 March 1956, which had three annexes, A, B and C, listing the archives and objects of historical value that had been or were to be returned to Ethiopia by Italy (ibid., vol.267, pp.204-216).

297/ The "Kinh Luoc" were governors or prefects of the Emperor of Indo-China before the French occupation of the Indo-Chinese peninsula.

(8) In the case of Algeria, the archives relating to its pre-colonial history had been carefully catalogued, added to and preserved in Algiers by the French administering authority until immediately before independence, when they were taken to France (Nantes, Paris, and, more particularly, a special archives depot at Aix-en-Provence). These archives consisted of what is commonly known as the "Arabic collection", the "Turkish collection" and the "Spanish collection". As a result of negotiations between the two Governments, some registers of the pay of Janissaries, forming part of the documents in the "Turkish collection", and microfilms of part of the "Spanish collection" were returned in 1966. By a Franco-Algerian exchange of letters of 23 December 1966, the Algerian Government obtained the restitution of "450 original registers in the Turkish and Arabic languages relating to the administration of Algeria before 1830", i.e. before the French colonial occupation. Under the terms of this exchange of letters, the National Library of Algiers was to receive before July 1967, free of charge, microfilms of documents in Spanish, which had been moved from Algeria to Aix-en-Provence immediately before independence and which constituted the "Spanish collection" of Algeria relating to the Spanish occupation of Algerian coastal regions. The same exchange of letters provided that questions concerning archives not settled by that instrument would form the subject of subsequent consultations. Thus Algeria raised the problem of its historical archives again in 1974. In April 1975, on the occasion of the visit to Algeria of the President of the French Republic, 153 boxes of Algerian historical archives forming part of the "Arabic collection" were returned by the French Government.<sup>298/</sup>

(9) The historical documents of the Netherlands relating to Indonesia were the subject of negotiations between the former administering Power and the newly independent State within the framework of co-operation in the field of cultural and historical property. The relevant agreement concluded between the two countries in 1976 provides, inter alia:

"That it is desirable to make cultural objects such as ethnographical and archival material available for exhibitions and study in the other country in order to fill the gaps in the already existing collections of cultural objects in both countries, with a view to promoting mutual understanding and appreciation of each other's cultural heritage and history:

"That in general principle, archives ought to be kept by the administration that originated them."<sup>299/</sup>

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<sup>298/</sup> See A/CN.4/322 and Add.1 and 2, paras.168, 169 and 171 (to appear in Yearbook ... 1979, vol.II (Part One)).

<sup>299/</sup> A/32/203, pp.5-6.

(10) The rule enunciated in paragraph 1 (a) was stressed in the proceedings of an international round table conference on archives, which state that :

"It appears undeniable that the metropolitan country should return to States that achieve independence, in the first place, the archives which antedate the colonial régime, which are without question the property of the territory ... It is regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered indispensable." 300/

(11) Paragraph 1 (b) deals with what is sometimes called "administrative" archives and provides that they shall also pass to the newly independent State. The Commission, avoiding the use of that expression, which is not sufficiently precise to be used as a legal term, decided to refer to such category of archives as "the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory".

(12) In the case of the decolonization of Libya, General Assembly resolution 388 A (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", expressed the wish of the United Nations that the newly independent State should possess at least the administrative archives most indispensable to current administration. Accordingly, article I, paragraph 2 (a), of the resolution provided for the immediate transfer to Libya of "the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution". 301/

(13) The international conference of archivists mentioned above stated in this connection:

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300/ France, Les archives dans la vie internationale (op.cit.), pp.43-44.

301/ In the case of Eritrea, however, the General Assembly of the United Nations adopted certain provisions of which some are not wholly in accord with those that the Organization had one year earlier adopted with regard to Libya. Article II, paragraph 2, of resolution 530 (VI) of 29 January 1952, entitled "Economic and financial provisions relating to Eritrea", permitted Italy to hand over at its convenience to the provisional administering Power either the originals or copies of documents and archives.

"It seems undeniable that [the former administering Powers] have ... the duty to hand over all documents which facilitate the continuity of the administrative work and the preservation of the interests of the local population ... Consequently, titles of ownership of the State and of semi-public institutions, documents concerning public buildings, railways, roads and bridges, etc., land survey documents, census records, records of births, marriages and deaths, etc., will normally be handed over with the territory itself. This assumes the regular transfer of local administrative archives to the new authorities. It is sometimes regrettable that the conditions under which the transfer of powers from one authority to the other occurred have not always been such as to ensure the regularity of this transfer of archives, which may be regarded as indispensable." 302/

(14) Paragraph 2 of article 26 concerns those parts of State archives which, though not falling under paragraph 1 are "of interest" to the territory to which the succession of States relates. The paragraph provides that the passing of such archives, or their appropriate reproduction, shall be determined by agreement between the predecessor State and the newly independent State. Such agreement, however, is subject to the condition that each of the parties must "benefit as widely and equitably as possible" from the archives in question.

(15) One of the categories of State archives covered by paragraph 2 are those accumulated by the administering Power during the colonial period, relating to the imperium or dominium of that Power and to its colonial policy generally in the territory concerned. The former metropolitan country is usually careful to remove all such archives before the independence of the territory, and many considerations of policy and expediency prevent it from transferring them to the newly independent State.

(16) The same international conference of archivists stated:

"There are apparently legal grounds for distinguishing in the matter of archives between sovereignty collections and administrative collections: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country, whose history they directly concern." 303/

An author expresses the same opinion:

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302/ France, Les archives dans la vie internationale (op. cit.), pp. 43-44.

303/ Ibid., p. 44.

"Emancipation raises a new problem. The right of new States to possess the archives essential to the defence of their rights, to the fulfilment of their obligations, to the continuity of the administration of the populations, remains unquestionable. But there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States." 304/

(17) Nevertheless, it is undeniable that some of the archives connected with the imperium or dominium of the former administering Power are "of interest" also (and sometimes even primarily) to the newly independent State. They are, for instance, the archives relating to the conclusion of treaties applicable to the territory concerned, or to the diplomatic relations between the administering Power and third States with respect to the territory concerned. While it would be unrealistic for the newly independent State to expect the immediate and complete transfer of archives connected with the imperium or dominium of the predecessor State, it would be quite inequitable for the former State to be deprived of access to at least those of such archives in which it shares interest.

(18) No simple rule of passing or non-passing, therefore, would be satisfactory in the case of such State archives. The Commission considers that the best solution would be for the States concerned to settle the matter by an agreement based on the principle of mutual benefit and equity. In negotiating such an agreement due account should be taken of the need to preserve the unity of archives and of the modern technology which had made rapid reproduction of documents possible through microfilming or photocopying. It should also be borne in mind that almost all countries have laws under which all public political documents, including the most secret ones, become accessible to the public after a certain time. If any person is legally entitled to consult documents relating to sovereign activities after the lapse of a period of 15, 20 or 30 years, there cannot be any reason why the newly independent State directly interested in documents relating to its territory should not be given the right to obtain them in microfilm or photocopies, if need be at its own expense.

(19) It was in conformity with such a rule that the French-Algerian negotiations were conducted on the questions of political as well as historical archives in 1974-1975. The two States exchanged diplomatic correspondence on 22 April and

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304/ C. Laroche, "Les archives françaises d'outre-mer", Comptes rendus mensuels des séances de l'Académie des sciences d'outre-mer. Séances dès 4 et 18 mars 1966 (Paris), t. XXVI, vol. III (March 1966), p. 130).



20 May 1975, which shows that the French Government regarded it as "entirely in conformity with current practice of co-operation among historians to envisage the microfilming" of France's archives of sovereignty concerning the colonization of Algeria.<sup>305/</sup>

(20) Paragraph 3 stipulates that the predecessor State must provide the newly independent State with the "best available evidence" from its State archives, including both that "which bears upon title to the territory of the newly independent State or its boundaries", and that "which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article".

(21) The "best available evidence" means either the originals or reproductions of them. Which of the two is the "best evidence" depends upon circumstances.<sup>306/</sup>

(22) The first type of evidence covered by paragraph 3 is often intermingled with other relating to the imperium or dominium of the administering Power over the territory concerned. The evidence from the archives which bears upon title to such territory or its boundaries is, however, of vital importance to the very identity of the newly independent State. The need for such evidence is especially crucial when the latter State is in dispute or litigation with a third State concerning the title to part of its territory or its boundaries. The Commission considers, therefore, that the predecessor State has a duty to transmit to the newly independent State the "best evidence" available to it.<sup>307/</sup>

(23) As to the second type of evidence, the words "documents ... which pass ... pursuant to other provisions of the present article" are intended to cover all types of document which pass to the successor State by the direct application of paragraphs 1 and 2 and the first part of paragraph 3, as well as indirectly by the application of paragraphs 5 and 6.

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<sup>305/</sup> Letter dated 20 May 1975 addressed by Mr. Sauvagnargues, French Minister of Foreign Affairs, to Mr. Bedjaoui, Ambassador of Algeria to France, in reply to his letter of 22 April 1975. See A/CN.4/322 and Add.1 and 2, para. 156 (to appear in Yearbook ... 1979, vol. II (Part One)).

<sup>306/</sup> See J.B. Saunders, Words and Phrases Legally Defined, 2nd ed. (London, Butterworth, 1969), vol. 2, p. 192.

<sup>307/</sup> It may be noted that the Cartographic Seminar of African countries and France adopted a recommendation in which it welcomed the statement by the Director of the National Geographic Institute on the recognition of State sovereignty over all cartographic archives and proposed that such archives should be transferred to States on request and that documents relating to frontiers should be handed over simultaneously to the States concerned (Cartographic Seminar of African Countries and France, Paris, 21 May-3 June 1975, General Report, recommendation No. 2, "Basic Cartography").

(24) One example of this type of document may be found in documents relating to the interpretation of treaties applicable to the territory concerned concluded by the administering Power. It should be noted that the hesitation of newly independent States in notifying their succession to certain treaties is sometimes due to their uncertainty about the application of those treaties to their territory - or even about their contents.

(25) Paragraph 4 establishes a duty of co-operation between the predecessor State and the newly independent successor State for the purpose of recovering those archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence, a common occurrence. This paragraph is a corollary and should be read in the light of paragraph 1 (a) of this article.

(26) Paragraphs 5 and 6 reflect the decision which the Commission adopted in regard to article 14, to assimilate to the case of a newly independent State falling under paragraphs 1 to 3 of article 26 situations in which a newly independent State is formed from two or more dependent territories, or a dependent territory becomes part of the territory of an already independent State other than the State which was responsible for its international relations.

(27) Paragraph 7 refers to certain inalienable rights of the peoples of the predecessor State and the newly independent State, providing that agreements concluded between those States in regard to State archives of the former State "shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage". The paragraph is thus intended to lay down three major rights which must be respected by such States when they negotiate the settlement of any question regarding State archives of the predecessor State.

(28) These rights have been stressed in various international forums, in particular in the recent proceedings of UNESCO.

(29) At its eighteenth session, held in Paris in October-November 1974, the General Conference of UNESCO adopted the following resolution:

"The General Conference,

"Bearing in mind that a great number of Member States of UNESCO have been in the past for longer or shorter duration under foreign domination, administration and occupation,

"Considering that archives constituted within the territory of these States have, as a result, been removed from that territory,

"Mindful of the fact that the archives in question are of great importance for the general, cultural, political and economic history of the countries which were under foreign occupation, administration and domination,

"Recalling recommendation 13 of the Intergovernmental Conference on the Planning of National Documentation, Library and Archives Infrastructure, held in September 1974, and desirous of extending its scope,

"1. Invites the Member States of UNESCO to give favourable consideration to the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements; ..." 308/

(30) UNESCO's concern with problems of archives as such has been combined with an equal concern for archives considered as important parts of the cultural heritage of nations. UNESCO and its committees and groups of experts have at all times considered archives as "an essential part of the heritage of any national community" - a heritage which they are helping to reconstitute and whose restitution or return to the country of origin they are seeking to promote. In their view, historical documents, including manuscripts, are "cultural property" forming part of the cultural heritage of peoples. 309/

(31) In 1977, pursuant to a resolution adopted by the General Conference of UNESCO at its nineteenth session, 310/ the Director-General made a plea for the return of an irreplaceable cultural heritage to those who created it, as follows:

"The vicissitudes of history have ... robbed many peoples of a priceless portion of this inheritance in which their enduring identity finds its embodiment.

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308/ UNESCO, Records of the General Conference, Eighteenth Session, Resolutions (Paris, 1974), pp. 68-69, resolution 4.212.

309/ See documents of the nineteenth session of the General Conference of UNESCO (Nairobi, October-November 1976), in particular, "Report by the Director-General on the Study on the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements" (document 19 C/94 of 6 August 1976); the report by the Director-General at the following session of the General Conference (document 20 C/102 (loc. cit.)); report of the Committee of Experts on the setting up of an intergovernmental committee to promote the restitution or return of cultural property (Dakar, 20-23 March 1978) (document CC-78/CONF.609/3); and Statutes of the Intergovernmental Committee for the promotion of the return of cultural property to its country of origin or its restitution in the case of illegal appropriation (UNESCO, Records of the General Conference, Twentieth Session, Resolutions (Paris, 1978), pp. 92-93, resolution 4/7.6/5, annex).

310/ Ibid., Nineteenth Session, Resolutions (Paris, 1976), p. 48, resolution 4.128.

...

"The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better.

...

"These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish.

"This is a legitimate claim ...

...

"I solemnly call upon the Governments of the Organization's member States to conclude bilateral agreements for the return of cultural property to the countries from which it has been taken, to promote long-term loans, deposits, sales and donations between institutions concerned in order to encourage a fairer international exchange of cultural property ...

...

"I call on universities, libraries ... that possess the most important collections, to share generously the objects in their keeping with the countries which created them and which sometimes no longer possess a single example.

"I also call on institutions possessing several similar objects or records to part with at least one and return it to its country of origin, so that the young will not grow up without ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors.

...

"The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations." 311/

(32) The protection and restoration of cultural and historical archives and works of art, with a view to the preservation and future development of cultural values have received a great deal of attention in the United Nations, as evidenced in

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311/ The UNESCO Courier (Paris), 31st year, July 1978, pp. 4-5.

General Assembly resolutions 3206 A (XXVII) of 18 December 1972, 3148 (XXVIII) of 14 December 1973, 3187 (XXVIII) of 18 December 1973, 3391 (XXX) of 19 November 1975, 31/40 of 30 November 1976, 32/18 of 11 November 1977, 33/50 of 14 December 1978, 34/64 of 29 November 1979 and 35/128 of 11 December 1980. The last-mentioned resolution contains the following passages:

"The General Assembly,

...

"Aware of the importance attached by the countries of origin to the return of cultural property which is of fundamental spiritual and cultural value to them, so that they may constitute comprehensive or single collections representative of their cultural heritage,

"Reaffirming that the return or restitution to a country of its objets d'art, monuments, museum pieces, manuscripts, documents and any other cultural or artistic treasures constitutes a step forward in the strengthening of international co-operation and the preservation and further development of cultural values,

...

"Supporting the solemn appeal launched on 7 June 1978 by the Director-General of the United Nations Educational, Scientific and Cultural Organization for the return to those who created it of an irreplaceable cultural heritage,

...

"2. Requests the United Nations Educational, Scientific and Cultural Organization to intensify its efforts to help the countries concerned to find suitable solutions to the problems relating to the return or restitution of cultural property and urges Member States to co-operate with that organization in this area;

"3. Invites Member States, in co-operation with the United Nations Educational, Scientific and Cultural Organization, to draw up systematic inventories of cultural property existing in their territories and of cultural property abroad; ..."

(33) The Fourth Conference of Heads of State or Government of the Non-Aligned Countries, held at Algiers from 5 to 9 September 1973, adopted a Declaration on the Preservation and Development of National Cultures which stresses "the need to reassert indigenous cultural identity and eliminate the harmful consequences of the colonial era and call for the preservation of their national culture and traditions".<sup>312/</sup>

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<sup>312/</sup> Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, "Economic Declaration", sect. XIV (A/9330, pp. 73-74).

(34) At the following Conference, which took place at Colombo from 16 to 19 August 1976, two resolutions on the subject were adopted by the Heads of State or Government of the Non-Aligned Countries.<sup>313/</sup> Resolution No. 17, on the "Restitution of Art Treasures and Ancient Manuscripts to the Countries from which they have been looted", contains the following passages:

"The fifth Conference ...

...

"2. Reaffirms the terms of United Nations General Assembly resolution 3187 (XXVIII) and General Assembly resolution 3391 (XXX) concerning the restitution of works of art and manuscripts to the countries from which they have been looted.

"3. Requests urgently all States in possession of works of art and manuscripts to restore them promptly to their countries of origin.

"4. requests the Panel of Experts appointed by UNESCO which is entrusted with the task of restoring those works of art and manuscripts to their original owners to take the necessary measures to that effect."

(35) Lastly, the seventeenth International Round Table Conference on Archives, held in October 1977 at Cagliari, adopted a resolution reaffirming the right of peoples to their cultural heritage and to information about their history which reads, in part:

" ... The Round Table reaffirms the right of each State to recover archives which are part of its heritage of archives which are currently kept outside its territory, as well as the right of each national group to access, under specified conditions, to the sources wheresoever preserved, concerning its history, and to the copying of these sources.

"Considering the large number of archival disputes and, in particular, those resulting from decolonization,

...

"Considering that this settlement should be effected by means of bilateral or plurilateral negotiations,

"The Round Table recommends that:

"(a) The opening of negotiations should be encouraged between all parties concerned, first, regarding the problems relating to the ownership of the archives and, secondly, regarding the right of access and the right to copies,

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<sup>313/</sup> Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries, annex IV, resolutions Nos. 17 and 24 (A/31/197, pp. 136 and 148).

...

"The Round Table recognizes the legitimate right of the public authorities and of the citizens of the countries which formed part of larger political units or which were administered by foreign Powers to be informed of their own history. The legitimate right to information exists per se, independently of the right of ownership in the archives. ..." 314/

#### Article 27

#### Uniting of States

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

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

#### Commentary

(1) The present article deals with succession to State archives in the case of uniting of States. The agreement of the parties has a decisive place in the matter of State succession in respect of State property, archives and debts. But nowhere is it more decisive than in the case of a uniting of States. Union consists, essentially and basically, of a voluntary act. In other words, it is the agreement of the parties which settles the problems arising from the Union. And even where the States did not, before uniting, reach agreement on a solution in a given field, for example, archives, such omission or silence may be interpreted without any risk of mistake, as the common will to rely on the future provisions of internal law to be enacted instead by the successor State for the purpose, after the uniting of States has become a reality. Thus, if the agreement fails to determine what is to become of the predecessor State's archives, internal law prevails.

(2) It is the law in force in each component part at the time of the uniting of States that initially prevails. However, pending the uniting, such law can only give expression to the component part's sovereignty over its own archives. Consequently, in the absence of an agreed term in the agreements concerning the union, the archives of each component part do not pass automatically to the

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314/ International Council on Archives, Bulletin, No. 9 (December 1977), p. 7.

successor State, because the internal law of the component part has not been repealed. Only if the successor State adopts new legislation repealing the component parts' law in the matter of archives are those archives transferred to the successor State.

(3) The solution depends on the constitutional nature of the uniting of States. If the union results in the creation of a federation of States, it is difficult to see why the archives of each component part which survives (although with reduced international competence) should pass to the successor State. If, on the other hand, the uniting of States results in the establishment of a unitary State, the predecessor States cease to exist completely, in international law at least, and their State archives can only pass to the successor State.

(4) The solution depends also on the nature of the archives. If they are historical in character, the archives of the predecessor State are of interest to it alone and of relatively little concern to the union, unless it is decided by treaty, for reasons of prestige or other reasons, to transfer them to the seat of the union or to declare them to be its property. Any change of status or application, particularly a transfer to the benefit of the successor State of other categories of archives needed for the direction administration of each constituent State, would be not only unnecessary for the union but highly prejudicial for the administration of the States forming the union.

(5) Referring to the case of a uniting of States leading to a federation, P. Fauchille has said: "The State which ceases to exist does so not as a State but only as a unitary State. It should therefore retain its own patrimony, for the existence of this patrimony is in no way incompatible with the new régime to which the State is subject. Although its original independence is lost its legal personality remains and there is no reason why its property should become the property of the federation or union".<sup>315/</sup> E. Castren shares that opinion: "Since the members of the union of States retain their statehood, their public property continues as a matter of course to belong to them".<sup>316/</sup> Thus, both international treaty instruments and instruments of internal law, such as constitutions or basic laws, effect and define the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the devolution of State archives must be determined.

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<sup>315/</sup> Fauchille, op. cit., p. 382.

<sup>316/</sup> E. Castren, "Aspects récent de la succession d'Etats", Recueil des cours de l'Académie de droit international, vol. 78, 1951-I, p. 451.



(6) Once States agree to constitute a union among themselves, it must be presumed that they intend to provide it with the means necessary for its functioning and administration. Thus, State property, particularly State archives, are normally transferred to the successor State only if they are found to be necessary for the exercise of the power devolving upon that State under the constituent act of the union. The transfer of the archives of the predecessor States does not, however, seem to be necessary to the union, which will in time establish its own archives. The archives of the component parts will continue to be more useful to those parts than to the union itself, for the reasons given in paragraph (4) above.

(7) In this connection, an old but significant example may be recalled, that of the unification of Spain during the fifteenth and sixteenth centuries. That union was effected in such a way that the individual kingdoms received varying degrees of autonomy, embodied in appropriate organs. Consequently, there was no centralization of archives. The present organization of Spanish archives is still profoundly influenced by that system.

(8) The text of article 27 repeats that of the corresponding article in part II, namely, article 15 also entitled "Uniting of States", except for the substitution of the word "archives" for the word "property" in both paragraphs of the article. The parallel between article 27 and 15 is obvious and the Commission, therefore, refers to the commentary to the latter article as being equally applicable to the present text.

#### Article 28

##### Separation of part or parts of the territory of a State

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

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

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

4. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of their State archives connected with the interests of their respective territories.

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

## Article 29

### Dissolution of a State

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

(a) the part of the State archives of the predecessor State, which should be in the territory of a successor State for normal administration of its territory, shall pass to that successor State;

(b) the part of the State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates directly to the territory of a successor State, shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1, shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

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

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, appropriate reproductions of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

Commentary to articles 28 and 29

(1) Articles 28 and 29 concern, respectively, succession to State archives in the cases of separation of part or parts of the territory of a State and of dissolution of a State. These cases are dealt with in separate draft articles, with respect both to State property and State debts in parts II and IV of the draft but the commentaries on the two pairs of articles are combined. A similar presentation is followed in the present commentary. Separation and dissolution both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. The case of separation, however, is associated with that of secession, in which the predecessor State continues to exist, whereas in the case of dissolution the predecessor State ceases to exist altogether.

(2) An important and multiple dispute concerning archives arose among Scandinavian countries, particularly at the time of the dissolution of the Union between Norway and Sweden in 1905 and of the Union between Denmark and Iceland in 1944. In the first case, it seems, first, that both countries, Norway and Sweden, retained their respective archives, which the personal Union had not merged, and secondly, that it was eventually possible to apportion the central archives between the two countries, but not without great difficulty. In general, the principle of functional connection was combined with that of territorial origin in an attempt to reach a satisfactory result. The convention of 27 April 1906 concluded between Sweden and Norway one year after the dissolution of the Union, settled the allocation of common archives held abroad. That convention, which settled the problem of the archives of consulates that were the common property of both States, provided that:

"... documents relating exclusively to Norwegian affairs, and compilations of Norwegian laws and other Norwegian publications, shall be handed over to the Norwegian diplomatic agent accredited to the country concerned ...". 317/

Later, pursuant to a protocol of agreement between the two countries dated 25 April 1952, Norway arranged for Sweden to transfer certain central archives which had been common archives.

(3) A general arbitration convention concluded on 15 October 1927 between Denmark and Iceland resulted in a reciprocal handing over of archives. When the Union between Denmark and Iceland was dissolved, the archives were apportioned haphazardly. There was, however, one problem which was to hold the attention of both countries, to

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317/ Descamps and Renault, op. cit., p. 1050.

the extent that public opinion in Iceland and Denmark was aroused, something rarely observed in disputes relating to archives. What was at stake was an important collection of parchments and manuscripts of great historical and cultural value containing, inter alia, old Icelandic legends and the "Flatey Book", a two-volume manuscript written in the fourteenth century by two monks of the island of Flatey and tracing the history of the kingdom of Norway. The parchments and manuscripts were not really State archives since they had been collected in Denmark by an Icelander, Arne Magnussens, who was Professor of History at the University of Copenhagen. He had saved them from destruction in Iceland where they were said to have been used on occasion to block up holes in the doors and windows in the houses of Icelandic fishermen.

(4) These parchments, whose value had been estimated at 600 million Swiss francs, had been duly bequeathed in perpetuity by their owner to a university foundation in Copenhagen. Of Arne Magnussen's 2,855 manuscript and parchments, 500 had been restored to Iceland after the death of their owner and the rest were kept by the foundation with bears his name. Despite the fact that they were private property, duly bequeathed to an educational establishment, these archives were finally handed over, in 1971, to the Icelandic Government which had been claiming them since the end of the Union between Denmark and Iceland, as the local governments which preceded them had been doing since the beginning of the century. This definitive restitution occurred pursuant to Danish judicial decisions. The Arne Magnussens university foundation of Copenhagen, to which the archives had been bequeathed by their owner, had challenged the Danish Governments decision to hand over the documents to Iceland instituting proceedings against the Danish Minister of National Education in the Court of Copenhagen. The court rules in favour of the restitution of the archives by an order of 17 November 1966.<sup>318/</sup> The foundation having appealed against this ruling, the Danish Supreme Court upheld the ruling by its decision of 18 March 1971.<sup>319/</sup> Both Governments had agreed on the restitution of the originals to Iceland,<sup>320/</sup> which was to house them in a foundation similar to and having the

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<sup>318/</sup> Revue générale de droit international public, vol. LXXXI, 1967, pp. 401 and 402.

<sup>319/</sup> See Danish text, Hojesteretsdomme, 18 marts 1971, i sag 68/1970, Arne Magnussens Legat (Den arnamagnaeanske Stiftelse) mod Undervisningsministeriet, (Supreme Court decision, 18 March 1971, Case No. 68/1970, Arne Magnussens Bequest, "Arna-Magnae" Foundation, versus Ministry of National Education) in Hojesteretsdomme (March 1971), Ugeskrift for Retsvaesen, 1971, pp. 299-305.

<sup>320/</sup> See also J.H.W. Verzijl, International law in historical perspective, Leiden, A.W. Sijthoff, 1974, vol. VII, p. 153, which mentions the case of the Icelandic parchments.

same objects as those set forth in the statute of the Copenhagen Arne Magnussens Foundation. They also agreed on the conditions governing the loan, reproduction and consultation of these archives in the interest of scholarly research and cultural development. The agreement reached ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection, which is of the greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next 25 years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute.<sup>321/</sup>

(5) In the event of dissolution of a State, each of the successor States receives the archives relating to its territory. The central archives of the dissolved State are apportioned between the successor States if they are divisible, or placed in the charge of the successor State they concern most directly if they are indivisible. Copies are generally made for any other successor State concerned.

(6) The disappearance of the Austro-Hungarian monarchy after the First World War gave rise to a very vast and complicated dispute concerning archives which has not yet been completely settled. The territories which were detached from the Austro-Hungarian Empire to form new States, such as Czechoslovakia after the First World War, arranged for the archives concerning them to be handed over to them.<sup>322/</sup> The treaty concluded between Czechoslovakia, Italy, Poland, Romania and the Serb-Croat-Slovene State at Sèvres<sup>323/</sup> on 10 August 1920, provides as follows in article 1:

"Allied States to which territory of the former Austro-Hungarian monarchy has been or will be transferred, or which were established as a result of the dismemberment of that monarchy, undertake to restore to each other any of the following objects which may be in their respective territories:

1. Archives, registers, plans, title-deeds and documents of every kind of the civil, military, financial, judicial or other administrations of the transferred territories ..."

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<sup>321/</sup> A.E. Pederson: "Scandinavian sagas sail back to Iceland", International Herald Tribune, 23 April 1971, p. 16.

<sup>322/</sup> Article 93 of the Treaty of Saint-Germain-en-Laye. G.F. de Martens, ed., Nouveau Recueil général de traités (third series), vol. XI, p. 715.

<sup>323/</sup> Ibid., vol. XIX, p. 628.

(7) The earlier Treaty of Saint-Germain-en-Laye of 10 September 1919 concluded between the Allied Powers and Austria contained many provisions obliging Austria to hand over archives to various new (or pre-constituted) States.<sup>324/</sup> A convention dated 6 April 1922 concluded between Austria and various States attempted to settle the difficulties which had arisen as a result of the implementation of the provision of the Treaty of Saint-Germain-en-Laye in the matter of archives.<sup>325/</sup> It provided, inter alia, for exchanges of copies of documents, for the allocation to successor States of various archives relating to industrial property, and for the establishment of a list of reciprocal claims. An agreement of 14 October 1922 concluded at Vienna between Czechoslovakia and Romania provided for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy by each of the two States and concerning the other State. On 26 June 1923, the convention concluded between Austria and the Kingdom of the Serbs, Croats and Slovenes, pursuant to the pertinent provisions of the Treaty of Saint-Germain-en-Laye of 1919, provided for the handing over by Austria, to the Kingdom of archives concerning the Kingdom. A start was made with the implementation of this convention. On 23 November 1923, it was Romania's turn to conclude a convention, which was signed at Belgrade, with the Kingdom of the Serbs, Croats and Slovenes for the reciprocal handing-over of archives. Similarly, the Convention of Bucharest of 16 April 1924 concluded between Hungary and Romania with a view to the reciprocal handing-over of archives settled, so far as the two signatory countries were concerned, the dispute concerning archives which had resulted from the dissolution of the Austro-Hungarian monarchy. In the same year, the same two countries, Hungary and Romania, signed another convention also in Bucharest providing for exchanges of administrative archives.<sup>326/</sup> A treaty of arbitration and conciliation, dated 23 April 1925, was concluded between Czechoslovakia and Poland for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy.

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<sup>324/</sup> See articles 93, 97, 192, 193, 194, 196, 249 and 250 of the Treaty of Saint-Germain-en-Laye of 10 September 1919. Ibid., vol. XI, p. 215 et seq.

<sup>325/</sup> See articles 1, 2, 3, 4, 5 and 6 of the Convention of 6 April 1922 concluded between Austria, Czechoslovakia, Hungary, Italy, Poland, Romania and the Kingdom of the Serbs, Croats and Slovenes.

<sup>326/</sup> See the Convention of Bucharest of 3 December 1924, articles 1 (paragraph 5) and 18, which provide for an exchange of registers of births, marriages and deaths, court documents and land and cadastral title deeds.

(8) Yugoslavia and Czechoslovakia subsequently obtained from Hungary, after the Second World War, by the Treaty of Peace of 1947, all historical archives which had been constituted by the Austro-Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.<sup>327/</sup>

Article 11, paragraph 1, of the same Treaty specifically states that the detached territory which had formed a State, such as Czechoslovakia, was entitled to the objects "constituting [its] cultural heritage ... which originated in those territories"; thus, the article was based on the link existing between the archives and the territory. In the same case, moreover, paragraph 2 of the same article rightly stipulates that Czechoslovakia would not be entitled to archives or objects "acquired by purchase, gift or legacy and original works of Hungarians"; by a contrario reasoning it follows, presumably, that objects acquired by the Czechoslovak territory should revert to it. In fact, these objects have been returned to Czechoslovakia.<sup>328/</sup>

(9) The aforementioned article 11 of the Treaty of Peace with Hungary is one of the most specific with regard to time-limits for the handing over of archives it establishes a veritable time-table within a maximum time-limit of 18 months.

(10) This simple enumeration of only some of the many agreements reached on the subject of archives upon the dismemberment of the Austro-Hungarian monarchy gives some idea of the complexity of the problem to be solved in the matter of the archives of the Austro-Hungarian monarchy. Certain archival disputes that arose in this connection concern the succession of States by "transfer of part of the territory of a State to another State", as has been indicated in the commentary to article 25.

(11) Other disputes, also resulting from the dissolution of the Austro-Hungarian monarchy, concerned the "separation of one or more parts of the territory of a State" to form a new State, and the dissolution of a State resulting in two or

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<sup>327/</sup> Article 11 of the Treaty of Peace with Hungary of 10 February 1947 (United Nations, Treaty Series, vol. 41, p. 173).

<sup>328/</sup> The same provisions were reproduced, for the case of Yugoslavia, in article 12 of the Treaty of 10 February 1947, ibid.

more new States. But the archival dispute caused by the disappearance of the Hapsburg monarchy has given rise to intricate, even inextricable, situations and cross-claims in which each type of succession of States cannot always easily be separated.<sup>329/</sup>

(12) The Convention of Baden, concluded on 25 May 1926 between the two States, Austria and Hungary, which had given its name to the Austro-Hungarian monarchy, had partly settled the Austro-Hungarian archival dispute. Austria handed over the "Registraturen", documents of a historical nature concerning Hungary. The archives of common interest, however, formed the subject of special provisions, pursuant to which a permanent mission of Hungarian archivists is working in Austrian State archives, has free access to the shelves and participates in the sorting of the common heritage. (The most difficult question concerning local archives related to the devolution of the archives of the two countries of Sopron (Ödemburg) and Vas which, having been transferred to Austria, formed the Burgenland, while their chief towns remained Hungarian. It was decided to leave their archives, which had remained in the chief towns, to Hungary, except for the archives of Eisenstadt and various villages, which were handed over to Austria. This solution was later supplemented by a convention permitting annual exchanges of microfilms in order not to disappoint any party).<sup>330/</sup>

(13) The case of the break-up of the Ottoman Empire after the First World War is similar to that of a separation of several parts of a State's territory, although the Turkish Government upheld the theory of the dissolution of a State when, during negotiation of the Treaty of Lausanne of 1923, it considered the new Turkish State as a successor State on the same footing as the other States which had succeeded to the Ottoman Empire. This controversy adds a justification for the joint commentaries on the cases of separation and dissolution. The following provision appears in the Treaty of Lausanne:

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<sup>329/</sup> See, in addition to the agreements mentioned in the preceding paragraph, the Convention of Nettuno (articles 1 to 15) of 20 July 1925 between Italy and the Kingdom of the Serbs, Croats and Slovenes; the Convention of 26 October 1927 concluded between Czechoslovakia and Poland for the handing over of archives inherited from the Austro-Hungarian monarchy and concerning each of the two contracting States; the Convention of Rome (articles 1 to 9) of 23 May 1931 concluded between Czechoslovakia and Italy for the apportionment and reproduction of archives of the former Austro-Hungarian army; the Agreement of Vienna of 26 October 1932 which enabled Poland to obtain various archives from Austria; the Convention of Belgrade signed on 30 January 1933, between Romania and Yugoslavia; etc.

<sup>330/</sup> See the statements by Mr. Szedö at the sixth International Conference of the Archives Round Table, France, Les archives dans la vie internationale (op cit.), p. 137.



"Article 19. Archives, registers, plans, title-deeds and other documents of every kind relating to the civil, judicial or financial administration, or the administration of Wakfs, which are at present in Turkey and are only of interest to the Government of a territory detached from the Ottoman Empire, and reciprocally those in a territory detached from the Ottoman Empire which are only of interest to the Turkish Government shall reciprocally be restored.

Archives, registers, plans, title-deeds and other documents mentioned above which are considered by the Government in whose possession they are as being also of interest to itself, may be retained by that Government, subject to its furnishing on request photographs or certified copies to the Government concerned.

Archives, registers, plans, title-deeds and other documents which have been taken away either from Turkey or from detached territories shall reciprocally be restored in original, in so far as they concern exclusively the territories from which they have been taken.

The expense entailed by these operations shall be paid by the Government applying therefor." 331/

(14) Without expressing an opinion on the exact juridical nature of the operation of the dissolution of the Third German Reich and the creation of the two German States, a brief reference will here be made to the controversies that arose concerning the Prussian Library. Difficulties having arisen with regard to the allocation of this large library which contains 1,700,000 volumes and various Prussian archives, an Act of the Federal Republic of Germany dated 25 July 1957 placed it in the charge of a special body, the "Foundation for the Ownership of Prussian Cultural Property". This legislative decision is at present being contested by the German Democratic Republic.

(15) In adopting the present text for articles 28 and 29 the Commission has basically maintained the approach followed as regards the articles dealing with similar cases of succession of States, that is, separation of part or parts of the territory of a State and dissolution of a State, in the contexts of State property (articles 16 and 17) and of State debts (articles 38 and 39). Paragraphs 1 to 4 of article 28 and paragraphs 1 and 3 to 5 of article 29 embody the rules concerning succession to State archives that are common to both cases of succession of States. Those rules find inspiration in the text of article 26, which concerns succession to

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331/ Treaty of Peace between the British Empire, France, Italy, Japan, Greece, the Serbo-Croat-Slovene State of the one part, and Turkey of the other part, signed at Lausanne on 24 July 1923, League of Nations, Treaty Series, vol. XXVIII, pp. 12 et seq.

State archives in the case of newly independent States. In reflecting in articles 28 and 29, as appropriate, the applicable rules contained in article 26, the Commission has attempted to preserve as much as possible the terminological consistency while taking due account of the characteristics that distinguish the case of succession of States covered in the latter articles from those dealt with in articles 28 and 29.

(16) Paragraph 1 of articles 28 and 29 reaffirms the primacy of the agreement between the States concerned by the succession of States, whether predecessor and successor States or successor States among themselves, in governing succession to State archives. In the absence of agreement, paragraph 1 (a) of those two articles embodies the rule contained in paragraph 1 (b) of article 26 providing for the passing to the successor State of the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in the territory of the successor State. The use of the expression "normal administration of ... territory", also found in paragraph 2 (a) of article 25, has been explained in paragraphs (25) and (11) of the commentaries to articles 25 and 26 respectively. In addition, under paragraph 1 (b) of articles 28 and 29, the part of State archives of the predecessor State, other than the part mentioned in subparagraph 1 (a), that relates directly to the territory of the successor State or to a successor State, also passes to that successor State. A similar rule is contained in paragraph 2 (b) of article 25, the commentary to which (paragraph (25)) explains the use, in that article, of the words "exclusively or principally", instead of the word "directly" employed in articles 28 and 29.

(17) Paragraph 2 of article 28 and paragraph 3 of article 29 embody the rule, also incorporated in paragraph 3 of articles 25 and 26, according to which the successor State or States shall be provided, in the case of article 28 by the predecessor State and in the case of article 29 by each successor State,

with the best available evidence from State archives of the predecessor State which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the article concerned. The Commission refers, in this connection, to the paragraphs of the commentary to article 26 relating to the foregoing provision (paragraphs (20) and (24)).

(18) Paragraphs 3 of article 28 and 4 of article 29 include the safeguard clause found in paragraph 7 of article 26 regarding the rights of the peoples of the States concerned in each of the cases of succession of States envisaged in those articles, to development, to information about their history and to their cultural heritage. Reference is made in this regard to the relevant paragraphs of the commentary to article 26 (paragraphs (27) and (35)).

(19) Paragraphs 4 of article 28 and 5 of article 29 embody, with the adaptations required by each case of succession of States covered, the rule relating to the provision, at the request and at the expense of any of the States concerned, of appropriate reproductions of State archives connected with the interests of the territory of the requesting State.

(20) Paragraph 5 of article 28 reproduces the provision of paragraph 2 of articles 16 and 38. Paragraph (16) of the commentary to articles 16 and 17 is also of relevance in the context of article 28.

(21) According to paragraph 2 of article 29, the State archives of the predecessor State other than those mentioned in paragraph 1 of that article shall pass to the successor State in an equitable manner, taking into account all relevant circumstances. The wording of this provision finds inspiration in the text of the corresponding articles in parts II and IV (articles 17 and 29, respectively) and has been adapted to suit the specific characteristics of succession to State archives in the case of the dissolution of a State.

PART IV

STATE DEBTS

Section 1. Introduction

Article 30

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 debts.

Commentary

As already noted, 332/ the Commission, with a view to maintaining as close a parallelism as possible between the provisions concerning succession in respect of State debts in the present part and those relating to succession in respect of State property and State archives in parts II and III decided to include at the beginning of part IV a provision on the scope of the articles contained therein. Article 30 therefore, provides that the articles in part IV apply to the effects of a succession of States in respect of State debts. It corresponds to article 7 of the draft and reproduces its wording, with the required replacement of the word "property" by the word "debts". The article is intended to make it clear that part IV of the draft deals with only one category of public debts, namely, State debts, as defined in the following article.

Article 31 333/

State debt

For the purposes of the articles in the present Part, "State debt" means any financial obligation of a State towards another State, an international organization or any other subject of international law.

Commentary

(1) Article 31, which corresponds to articles 8 and 19 contains a definition of the term "State debt" for the purposes of the articles in part IV of the draft. In order to determine the precise limits of this definition, it is necessary at the

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332/ See para. 71 above.

333/ A subparagraph reading "(b) any other financial obligation chargeable to a State" was rejected by the Commission by a roll-call vote of 8 in favour (Messrs. Aldrich, Calle y Calle, Francis, Quentin-Baxter, Reuter, Riphagen, Sahović and Verosta) to 8 against (Messrs. Barboza, Bedjaoui, Díaz-González, Njenga, Tabibi, Thiam, Ushakov and Yankov) with no abstentions. One member (Mr. Dadzie) did not participate in the voting.

outset to ascertain what a "debt" is, what legal relationships it creates, between what subjects it creates such relationships, and in what circumstances such relationships may be susceptible to novation through the intervention of another subject. Also it is necessary to specify which "State" is meant.

The concept of debt and the relationships which it establishes

(2) The concept of "debt" is one which writers do not usually define because they consider the definition self-evident. Another reason is probably that the concept of "debt" involves a two-way or two-sided problem, which can be viewed from the standpoint either of the party benefiting from the obligation (in which case there is a "debt-claim") or of the party performing the obligation (in which case there is a "debt"). This latter point suggests one element of a definition, in that a debt may be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something, to effect a certain performance for the benefit of a certain party, called the creditor. Thus, the relationship created by such an obligation involves three elements: the party against whom the right lies (the debtor), the party to whom the right belongs (the creditor) and the subject-matter of the right (the performance to be effected).

(3) It should further be noted that the concept of debt falls within the category of personal obligations. The scope of the obligation is restricted entirely to the relationship between the debtor and the creditor. It is thus a "relative" obligation, in that the beneficiary (the creditor) cannot assert his right in the matter erga omnes, as it were. In private law, only the estate of the debtor, as composed at the time when the creditor initiates action to obtain performance of the obligation due to him, is liable for the debt.

(4) In short, the relationship between debtor and creditor is personal, at least in private law. Creditor-debtor relationships unquestionably involve personal considerations which play an essential role, both in the formation of the contractual link and in the performance of the obligation. There is a "personal equation" between the debtor and the creditor.

"Consideration of the person of the debtor, says one writer, is essential, not only in viewing the obligation as a legal bond, but also in viewing it as an asset; the debt-claim is worth what the debtor is worth." 334/

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334/ H., L. and J. Mazeaud, Leçons de droit civil, 4th ed. (Paris, Montchrestien, 1969), vol. II, p. 1093.

Discharge of the debt depends not only on the solvency of the debtor but also on various considerations connected with his good faith. It is therefore understandable that the creditor will be averse to any change in the person of his debtor. National laws do not normally allow the transfer of a debt without the consent of the creditor.

(5) For the purposes of the present part, the question arises whether the foregoing also applies in international law. Especially where succession of States is concerned, the main question is whether and in what circumstances a triangular relationship is created and dissolved between a third State as creditor, 335/ a predecessor State as first debtor and a successor State which agrees to assume the debt.

#### Exclusion of debts of a State other than the predecessor State

(6) When reference is made to State debts, it is necessary to specify which State is meant. Only three States could possibly be concerned: a third State, the successor State and the predecessor State; but in fact, only the debts of one of them are legally "involved" as a result of the phenomenon of State succession: those of the predecessor State.

(7) A third State might assume financial obligations towards another third State, towards the successor State or towards the predecessor State. In the first case, the financial relationship - like any other relationship of whatever kind between two States both of which are third parties as regards the State succession - obviously cannot be affected in any way by the phenomenon of territorial change that has occurred, or by its consequences with respect to State succession. The same can be said of any financial relationship which may exist between a third State and the successor State. There is no reason why, and no way in which, debts owed by the third State to the successor State (or to a potential successor State) should come to be treated differently simply because of the succession of States. This succession does not alter the international personality of the successor State in cases where it existed as a State before the occurrence of the succession. The fact that the succession may have the effect of modifying, by enlargement, the territorial composition of the successor State does not affect, and should not in

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335/ Although in the following paragraphs of the commentary to the present articles reference will be made, for purposes of convenience only, to "a third State" as creditor, it should be understood that the relevant considerations are applicable also to international organizations or other subjects of international law as creditors.

future affect, debts owed to it by a third State. If the successor State had no international personality as a State at the time the debt of the third State arose (e.g. in the case of a commercial debt between a third State and a territory having the potential to become independent or to detach itself from the territory of a State in order to form another State), it is perfectly clear that the acquisition of statehood would not cause the successor State to forfeit its rights vis-à-vis the third State.

(8) As to debts owed by a third State to the predecessor State, they are debt-claims of the predecessor State against the third State. Such debt-claims are State property and are considered in the context of succession of States in respect of State property. They are, therefore, not covered in the present part.

(9) The successor State might assume financial obligations to either a third State or the predecessor State. In the case of a debt to a third State, no difficulty arises. In this instance, the debt came into existence at the time when the succession of States occurred - in other words, precisely when the successor State acquired the status of successor. To speak of a debt of the successor State to a third State, that debt must have been assumed by the successor State on its own account, and in this case it is clearly unconnected with the succession of States which has occurred. The category of debt of the successor State to a third State which must be excluded from this part is precisely that kind of debt which, in the strict legal sense, is a debt of the successor State actually assumed by that State with respect to the third State and coming into existence in a context completely unconnected with the succession of States. In cases where this kind of debt was incurred after the succession of States, it is a fortiori excluded from the present part. On the other hand, any debt for which the successor State could be held liable vis-à-vis a third State because of the very fact of the succession of States would, strictly speaking, be not a debt assumed directly by the former with respect to the latter but rather a debt transmitted indirectly to the successor State as a result of the succession of States.

(10) The debt of the successor State to the predecessor State can have three possible origins. First, it may be completely unconnected with the relationship between the predecessor State and the successor State created and governed by the succession of States, in which case it should clearly remain outside the area of concern of the draft. Second, it can have its origin in the phenomenon of State succession, which may make the successor State responsible for a debt of the predecessor State. Legally speaking, however, this is not a debt of the successor State, but a debt of the predecessor State transmitted to the successor State,

as a result of the succession of States. This case will be discussed in connection with the debt of the predecessor State. 336/ It concerns a debt which came into existence as part of the liabilities of the predecessor State prior to the succession of States, and the subject-matter of State succession is, precisely, to determine what happens to such debt. Strictly speaking, however, this case is no longer one of a debt to the predecessor State assumed previously by the successor State.

(11) Lastly, the debt may be owed by the successor State to the predecessor State as a result of the succession of States. In other words, there may be liabilities which would have to be assumed by the successor State during, and as a result of, the process of State succession. For example, the successor State might be required to pay certain sums in compensation to the predecessor State as a financial settlement between the two States. This no longer involves debts which originated previously, and the subject-matter of State succession is what ultimately happens to the latter type of debt. Here, the problem has already been solved by the succession of States. This is not to say that such debts do not relate to State succession, but simply that they no longer relate to it.

(12) The predecessor State may have assumed debts with respect to either the potential successor State or a third State. In both cases, these are debts directly related to the succession of States, the difference being that, in the case of a debt of the predecessor State to the successor State, the only possibility to be envisaged is non-transmission of the debt, since deciding to transmit it to the successor State, which is the creditor, would mean cancellation or extinction of the debt. In other words, in this case, transmitting the debt would in fact mean not transmitting it, or extinguishing it. In any event, the basic subject-matter of State succession to debts is what becomes of debts assumed by the predecessor State, and by it alone; for it is the territorial change affecting the predecessor State, and it alone, that triggers the phenomenon of State succession. The change which has occurred in the extent of the territorial jurisdiction of the predecessor State raises the problem of the identity, continuity, diminution or disappearance of the predecessor State and thus causes a change in the territorial jurisdiction of the debtor State. The whole problem of succession of States in respect of debts is whether this change has any effects, and if so what effects, on debts contracted by the State in question.

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336/ See para. (12) of this commentary, below.



Exclusion of debts of a non-State organ

(13) Debts occur in a variety of forms, the exact features of which should be ascertained in the interests of a sounder approach to the concept of State debt. The following brief review of different categories of debts may help to clarify that concept. In State practice, in judicial decisions and in legal literature, a distinction is made in general between:

- (a) State debts and debts of local authorities;
- (b) General debts and special or localized debts;
- (c) State debts and debts of public establishments, public enterprises and other quasi-State bodies;
- (d) Public debts and private debts;
- (e) Financial debts and administrative debts;
- (f) Political debts and commercial debts;
- (g) External debt and internal debt;
- (h) Contractual debts and delictual or quasi-delictual debts;
- (i) Secured debts and unsecured debts;
- (j) Guaranteed debts and non-guaranteed debts;
- (k) State debts and other State debts termed "odious" debts, war debts or subjugation debts and, by extension, régime debts.

(14) A distinction should first of all be made between State debts and debts of local authorities. The latter are contracted not by an authority or department responsible to the central Government but by a public body which usually is not of the same political nature as the State and which is in any event inferior to the State. Such a local authority has a territorial jurisdiction which is limited and is in any case less extensive than that of the State. It may be a federal unit, a province, a Land, a département, a region, a county, a district, an arrondissement, a cercle, a canton, a city or municipality, and so on. The local authority may also have a degree of financial autonomy in order to be able to borrow in its own name. It nevertheless remains subordinate to the State, not being a part of the sovereign structure which is recognized as a subject of public international law. That is why the defining of "local authority" is normally a matter of internal public law, and no definition of it exists in international law.

(15) Despite this, writers on international law have at times concerned themselves with the question of defining an authority such as "the commune". The occasion for this arose in particular when article 56 of the Regulations annexed to the Convention respecting the laws and customs of war on land, signed at The Hague

on 18 October 1907; 337/ and following the example of the 1899 Hague Convention, attempted to make provision for a system to protect public property, including property owned by municipalities (communes), in case of war. The term "commune" then attracted the attention of writers. 338/ In any event, a local authority is a public-law territorial body other than the State. Whatever debts it may contract by virtue of its financial autonomy are not legally debts of the State and do not bind the latter, precisely because of that financial autonomy.

(16) Strictly speaking, State succession should not be concerned with what happens to "local" debts because, prior to succession, such debts were, and after succession will be, the responsibility of the detached territory. Having never been assumed by the predecessor State, they cannot be assumed by the successor State. The territorially diminished State cannot transfer to the enlarged State a burden which it did not itself bear and had never borne. In this case, there is no subject-matter of State succession, which consists in the substitution of one State for another. Unfortunately, legal theory is not as clear on this point as would be desirable. There is in legal literature almost unanimous agreement on the rule that "local" debts should pass to the successor State. This may not be incorrect in substance, but at least it is badly expressed. If it is established absolutely that the debts in question are local debts, duly distinguished from other debts, then they will be debts proper to the detached territory. They will not of course be the responsibility of the diminished predecessor State, and from that standpoint the writers concerned are justified in their view. But it does not follow that they will become the responsibility of the successor State, as these writers claim. They were, and will continue to be, debts to be borne solely by the territory now detached. However, in the case of one type of State succession, namely, that of newly independent States, debts proper to the territory, which are called "local" (in relation to the metropolitan territory of the colonial Power), would be assumed by the successor State, since in this case the detached territory and the successor State are one and the same.

(17) However, a careful distinction must be drawn between local debts, meaning those contracted by a territorial authority inferior to the State, for which the detached territory was responsible before the succession of States and for which

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337/ J.B. Scott, The Proceedings of The Hague Peace Conferences, vol. I (New York, Oxford University Press, 1920), p.623.

338/ O. Debbasch, L'occupation militaire - Pouvoirs reconnus aux forces armées hors de leur territoire national (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 29-30 and foot-notes 34-35.

it alone will be responsible afterwards, and debts which may be the responsibility of the State itself and for which the State is liable, incurred either for the general good of the national community or solely for the benefit of the territory now detached. Here there is subject-matter for the theory of State succession, the question being what happens to these two categories of debt on the occurrence of a succession of States. The comparison of general debts and special or "localized" debts which follows is intended to make the distinction clear.

(18) In the past, a distinction was made between "general debt", which is regarded as State debt, and regional or local debts contracted, as was noted above, by an inferior territorial authority, which is solely responsible for this category of debts. It is possible nowadays to envisage a further category, comprising what are called "special" or "relative" debts incurred by the predecessor State solely to serve the needs of the territory concerned. A clear distinction should therefore be drawn between a local debt (which is not a State debt) and a localized debt (which may be a State debt). The criterion for making this distinction is whether or not the State itself contracted the loan earmarked for local use. It has been accepted to some extent in international practice that local debts remain entirely the responsibility of the part of territory which is detached, without the predecessor State's having to bear any portion of them. This is simply an application of the adage res transit cum suo onere.

(19) Writers differentiate between several categories of "local" debts, but do not always draw a clear dividing line between those debts and "localized" debts. This should be gone into with more precision. "Local" debt is a concept that may sometimes appear to be relative. Before a part of a State's territory detaches itself, debts are considered local because they have various links to that part of the territory. At the same time, however, there may also be an obvious linkage to the territorially diminished State. The question is whether the local character of the debt outweighs its linkage to the predecessor State. It is mainly a problem of determination of degree.

(20) The following criteria may be tentatively suggested for distinguishing between localized State debt and local debt:

(a) Who the debtor is: a local authority or a colony or, for and on behalf of either of those, a central Government;

(b) Whether the part of territory which is detached has financial autonomy, and to what degree;

(c) To what purpose the debt is to be put: for use in the part of territory which is detached;

(d) Whether there is a particular security situated in that part of territory. Although these criteria are not absolutely sure guides, each of them can provide part of the answer to whether the debt should be considered more a local debt or more a localized State debt. The criteria show why legal theory on the question fluctuates. It is not always easy to ascertain whether a territorial authority other than the State really has financial autonomy and what the extent of its autonomy is in relation to the State. Moreover, even when the State's liability (in other words, the fact that the debt assumed is a State debt) is clear, it is not always possible to establish with certainty what the intended purpose of each individual loan is at the time when it is assumed, where the corresponding expenditure is to be effected, and whether the expenditure actually serves the interests of the detached territory.

(21) The personality of the debtor is still the least uncertain of the criteria. If a local territorial authority has itself assumed a debt, there exists a strong presumption that it is a local debt. The State is not involved, nor will it be any more involved simply because it becomes a predecessor State. Hence, the successor State will also not be involved. There will be no subject-matter for State succession here. If the debt is assumed by a central Government, but expressly on behalf of the detached local authority, it is legally a State debt. It could be called a localized State debt because the State intends the funds borrowed to be used for a specific part of the territory. If the debt was contracted by a central Government on behalf of a colony, the same situation should in theory prevail.

(22) The financial autonomy of the detached part of territory is another useful criterion, although in practice it may prove difficult to draw absolutely certain conclusions from it. A debt cannot be considered local unless the part of territory to which it relates has a "degree" of financial autonomy. But does this mean that the province or colony must be financially independent? Or is it sufficient that its budget is separate from the general budget of the predecessor State? Again, is it sufficient that the debt is distinguishable or, in other words, identifiable by the fact that it is included in the detached territory's own budget? What, for example, of certain "sovereignty expenditures" covered by a loan, which a central Government requires to be included in the budget of a colony and the purpose of which is to install settlers from the metropolitan country or to suppress an independence movement? 339/ Inclusion of the loan in the local budget of the territory because of its financial autonomy does not suffice to conceal the fact that debts assumed for the purpose of making such expenditures are State debts.

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339/ There is here the problem of "odious" debts, régime debts, war debts or subjugation debts; see paras. (41)-(43) of this commentary, below.

(23) The third criterion, namely, the intended purpose and actual use of the debt contracted, in and of itself cannot provide the key for distinguishing between local (non-State) debts and localized (State) debts. A central Government acting in its own name, may decide, just as a province would always do, to devote the loan which it has assumed to a local use. It is a State debt earmarked for territorial use. The criterion of intended purpose must be combined with the others in determining whether the debt is or is not a State debt. In other words, implicit in both the concept of local debt and that of localized debt is a presumption that the loan will actually be used in the territory concerned. This may or may not be a strong presumption. It is therefore necessary to determine the degree of linkage needed to justify a presumption that the loan will be used in the territory concerned. In the case of local debts, contracted by an inferior territorial authority, the presumption is naturally very strong: a commune or city generally borrows for itself and not in order to allocate the proceeds of its loan to another city. In the case of localized debts, contracted by the central Government with the intention of using them specifically for a part of territory, the presumption is obviously less strong.

(24) To refine the argument still further, it may be considered that, from this third point of view, there are three successive stages in the case of a localized State debt. First, the State must have intended the corresponding expenditures to be effected for the territory concerned (the principle of earmarking or intended use). Second, the State must actually have used the proceeds of the loan in the territory concerned (the criterion of actual use). Third, the expenditure must have been effected for the benefit and in the actual interest of the territory in question (the criterion of the interest or benefit of the territory). On these terms, abuses by a central Government could be avoided and problems such as those of régime debts or subjugation debts could be solved in a just and satisfactory manner.

(25) An additional item of evidence is the possible existence of securities or pledges for the debt. This is the last criterion. A debt may be secured, for instance, by real property or fiscal resources, and the property may be situated or the taxes levied either throughout the territory of the predecessor State or only in the part of the territory detached from that State. This may provide additional indications as to whether the debt is or is not a State debt. But the criterion should be cautiously applied for this purpose, since both the central Government and the Province may offer securities of this nature for their respective debts.

(26) When it has been ascertained with sufficient certainty that the debt is a State debt, it remains to be determined - and this is the subject-matter of State

succession to debts - what finally happens to the debt. The successor State is not necessarily liable for it. For example, in the case of a State debt secured by property belonging to the detached territory, it is by no means certain that the loan was contracted for the benefit of the detached territory. Perhaps the predecessor State had no other property which could be used as security. It would therefore be unfair to place the burden of such a debt on the successor State, simply because the territory which has become joined to it had the misfortune to be the only part capable of providing the security. In any case, such a debt is a State debt (not a local debt) for which the predecessor State was liable. In the case of debts secured by local fiscal resources, the presumption is stronger. As this form of security is possible in any part of the territory of the predecessor State (unless special revenue is involved), the linkage with the part of the territory which has been detached is specific in this case. However, as in the case of debts secured by real property, the debt may be either a State debt or a local debt since the State and the province can both secure their respective debts with local fiscal resources.

(27) The International Law Association, for its part, subdivides public debts into three categories:

(a) National debt: "The national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any particular assets";

(b) Local debt: "Local debts, that is, debts either raised by the central government for the purposes of expenditure in particular territories, or raised by the particular territories themselves";

(c) Localized debt: "Localized debts, that is, debts raised by a central government or by particular territorial governments with respect to expenditure on particular projects in particular territories". 340/

(28) In conclusion, a local debt can be said to be a debt: (a) which is contracted by a territorial authority inferior to the State; (b) to be used by that authority in its own territory; (c) which territory has a degree of financial autonomy; (d) with the result that the debt is identifiable. In addition, a "localized debt" is a State debt which is used specifically by the State in a clearly defined portion of territory. Because State debts are not generally "localized", it is considered

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340/ International Law Association, Report of the fifty-fourth Conference, held at The Hague, 23-29 August 1970, (London, 1971), p.108.

that they should be described as such if that is in fact what they are. This is superfluous in the case of local debts, all of which are "localized", in that they are situated and used in the territory. The reason to specify that a debt is "localized" is that it is a State debt which happens to be, by way of exception, geographically "situated". In short, while all local debts are by definition "localized", State debts usually are not; when they are, this must be expressly indicated so that it will be known that such is the case.

(29) The present part is limited to State debts, excluding from this term any debts which might be contracted by public enterprises or public establishments. It is sometimes difficult, under the domestic law of certain countries, to distinguish the State from its public enterprises. And when it does prove possible to do so, it is even more difficult not to consider debts contracted by a public establishment in which the State itself has a financial participation to be State debts. There arises, first of all, a problem in defining a public establishment or public enterprise. 341/ These are entities distinct from the State which have their own

341/ These two terms will be used interchangeably, even though the legal régime for the bodies in question may be different under the internal law of certain countries. In French and German administrative law, the "établissement public" or "öffentliche Anstalt" are distinguished from the "entreprise publique" or "öffentliche Unternehmung". English law and related systems hardly seem to make any distinction between a "public corporation", an "enterprise" an "undertaking" and a "public undertaking" or "public utility undertaking". Spain has "institutos publicos", Latin America has "autarquias", Portugal has "estabelecimentos publicos" or "fiscalias" and Italy has "enti pubblici", "imprese pubbliche", "aziende autonome", and so on. See W. Friedmann, The Public Corporation: A Comparative Symposium, University of Toronto School of Law, Comparative Law Series, vol. 1 (London, Stevens, 1954).

See also Yearbook ... 1973, vol. II, pp. 59-61 and 63, document A/CN.4/267, part four, articles 32-34.

International judicial bodies had to consider the definition of public establishments, in particular:

(a) In an arbitral award by Beichmann (Case of German reparations: Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles (arbitrator F.W.N. Beichmann), publication of the Reparation Commission, annex 2145a (Paris, 1924) and United Nations, Report of Arbitral Awards, vol. I (op.cit.) pp. 453 et seq.);

(b) In a decision of the United Nations Tribunal in Libya (Case of the institutions, companies and associations mentioned in article 5 of the agreement concluded on 28 June 1951 between the United Kingdom and Italian Governments concerning the disposal of certain Italian property in Libya: decision of 27 June 1955 (United Nations, Reports of Arbitral Awards, vol. XIII (op.cit.) pp. 390 et seq.); and

(c) A decision of the P.C.I.J. in a case relating to a Hungarian public university establishment of 15 December 1933 (Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (op.cit.), pp. 236 et seq.).

personality and usually a degree of financial autonomy, are subject to a sui generis juridical régime under public law, engage in an economic activity or provide a public service and have a public or public-utility character. The Special Rapporteur on State responsibility described them as "public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions". 342/ In the Certain Norwegian Loans case, considered by the International Court of Justice, the agent of the French Government stated:

"... in internal law ... a public establishment is brought into existence in response to a need for decentralization; it may be necessary to allow a degree of independence to certain establishments or bodies, either for budgetary reasons or because of the purpose they serve - for example, an assistance function or a cultural purpose. This independence is achieved through the granting of legal personality under internal law." 343/

(30) In its draft on State responsibility, the Commission has settled the question whether, in respect of international responsibility of the State, the debt of a public establishment can be considered a State debt. In respect of State succession, however, the answer to the question whether the debt of such a body is a State debt can obviously only be in the negative. The category of debts of public establishments will therefore be excluded from the scope of the present part of the draft in the same way as that of debts of inferior territorial authorities, despite the fact that both are of a public character. This public character does not suffice to make the debt a State debt, as will be seen below in the case of another category of debts.

(31) The preceding paragraphs show that the public character of a debt is absolutely necessary, but by no means sufficient, to identify it as a State debt. A "public debt" is an obligation binding on a public authority, as opposed to a private body or an individual. But the fact that a debt is called "public" does not make it possible to identify more completely the public authority which contracted it, so that it may be the State, a territorial authority inferior to it, or a public institution or establishment distinct from the State. The term "public debt" (as opposed to private debt) is therefore not very helpful in identifying a State

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342/ Yearbook ... 1971, vol. II (Part One), p. 254, document A/CN.4/246 and Add.1-3, para. 163.

343/ I.C.J. Pleadings, Certain Norwegian Loans (1955), vol. II, p. 72. [Translation by the secretariat].



debt. This term is too broad and covers not only State debts, which are the subject of the present part, but also the debt of other public entities, whether or not of a territorial character.

(32) Financial debts are associated with the concept of credits. Administrative debts, on the other hand, result automatically from the activities of the public services, without involving any financing or investment. The International Law Association cites several examples: 344/ certain expenses of former State services; debt-claims resulting from decisions of public authorities; debt-claims against public establishments of the State or companies belonging to the State; building subsidies payable by the State; salaries and remuneration of civil servants. 345/ While financial debts may be either public or private, administrative debts can only be public.

(33) Regarding political debts and commercial debts, while commercial debts may be State debts, debts of local authorities or public establishments or private debts, political debts are always State debts. The term "political debts", as described by one writer, should be taken to refer to:

"... those debts for which a State has been declared liable or has acknowledged its liability to another State as a result of political events. The most frequent case is that of a debt imposed on a defeated State by a peace treaty (war reparations, etc.). Similarly, a war loan made by one State to another State gives rise to a political debt." 346/

The same writer adds that "a political debt is one which exists only between Governments between one State and another. The creditor is a State, and the debtor is a State. It is of little consequence whether the debt arises from a loan or from war reparations". 347/ He contrasts political debts, which establish between the creditor and the debtor a relationship between States, with commercial debts, which "are those arising from a loan contracted by a State with private parties, whether bankers or individuals". 348/

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344/ International Law Association, op.cit., pp. 118-121.

345/ See Materials on Succession of States (op.cit.), pp. 114-115 (Poldermans v. State of the Netherlands: judgement of 8 December 1955).

346/ G. Jèze, "Les défaillances d'Etat", Recueil des cours ..., 1935-III (Paris, Sirey, 1936), vol. 53, p. 383.

347/ Ibid., pp. 383-384.

348/ Ibid., p. 383.

(34) The International Law Association makes distinctions between debts according to their form, their purpose and the status of the creditors:

"The loans may be made by:

"(a) Private individual lenders by means of individual contracts with the Government;

"(b) Private investors who purchase 'domestic' bonds, that is, bonds which are not initially intended for purchase by foreign investors...;

"(c) Private investors who purchase 'international' bonds, that is, bonds issued in respect of loans floated on the international loan market and intended to attract funds from foreign countries;

(d) Foreign Governments for general purposes and taking the form of a specific contract of credit;

"(e) Foreign Governments for fixed purposes and taking the form of a specific contract of loan;

"(f) Loans made by international organizations." 349/

(35) The distinction between external debt and internal debt is normally applied only to State debts, although it could conceivably be applied to other public debts or even to private debts. An internal debt is one for which the creditors are nationals of the debtor State, 350/ while external debt includes all debts contracted by the State with other States or with foreign bodies corporate or individuals.

(36) Delictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession of States, the solution of which is governed primarily by the principles relating to international responsibility of States. 351/

(37) Although all debts, whether they are private, public or State debts, may or may not be secured in some manner, this part deals exclusively with State debts.

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349/ International Law Association, op.cit., p. 106.

350/ See D. Bardonnet, La succession d'Etats à Madagascar - Succession au droit conventionnel et aux droits patrimoniaux (Paris, Libraire générale de droit et de jurisprudence, 1970), pp. 271 and 276.

351/ Ibid., p. 305. The author refers (p. 270) to A.B. Keith, The Theory of State Succession - with Special Reference to English and Colonial Law (London, Waterlow, 1907), pp. 58 et seq., with regard to succession of States in respect of delictual or quasi-delictual debts. See also International Law Association, op.cit., p. 122 (appendix C, "Debts of the Belgian Congo", Brussels Court of Appeal, Bougnet et Hoc v. Belgium, judgement of 4 December 1963).

In that connection, the notion of secured debt is an extremely important one. A distinction must be made between two categories of debt. First, there are State debts which are specially secured by certain tax funds, it having been decided or agreed that the revenue from certain taxes would be used to secure the service of the State debt. Second, there may be cases in which State debts are specially secured by specific property, the borrowing State having in a sense mortgaged certain national assets.

(38) A State's liability can arise not only from a loan contracted by that State itself, but also from a guarantee which it gives in respect of the debt of another party, which may be a State, an inferior territorial authority, a public establishment or an individual. The World Bank, when granting a loan to a dependent territory, often requires a guarantee from the administering Power. Thus, when the territory in question attains independence, two States are legally liable for payment of the debt. <sup>352/</sup> However, a study of the actual record of loans contracted with IBRD shows that a succession of States does not alter the previously existing situation. The dependent territory which attains independence remains the principal debtor, and the former administering Power remains the guarantor. The only difference, which has no real effect on what happens to the debt, is that the dependent territory has changed its legal status and become an independent State.

(39) The distinction to be made here serves not only to separate two complementary concepts but also to distinguish among a whole set of terms which are used at various levels. For the sake of strict accuracy, a contrast might be attempted between State debts and régime debts since the latter, as the term indicates, are debts contracted by a political régime or a Government having a particular political form. However, the question here is not whether the Government concerned has been replaced in the same territory by another Government with a different political orientation, since that would involve a mere succession of Governments in which régime debts may be repudiated. On the contrary, what is here involved is a succession of States, or, in other words, the question whether the régime debts of a predecessor State pass to the successor State. For the purposes of this part, régime debts must be regarded as State debts. The law of State succession does not concern itself with

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<sup>352/</sup> G.R. Delaume, Legal Aspects of International Lending and Economic Development Financing (Dobbs Ferry, N.Y., Oceana, 1967), p. 321; K. Zemanek, "State succession after decolonization", Recueil des cours ... 1965-III (Leyden, Sijthoff, 1965), vol. 116, pp. 259-260.

Governments or any other organs of the State, but with the State itself. Just as internationally wrongful acts committed by a Government give rise to State responsibility, so also régime debts, i.e. debts contracted by a Government, are State debts.

(40) In the opinion of one writer, what is meant by régime debts is:

"debts contracted by the dismembered State in the temporary interest of a particular political form, and the term can include, in peacetime, subjugation debts specifically contracted for the purpose of colonizing or absorbing a particular territory and, in wartime, war debts." 353/

This is one application of the broader theory of "odious" debts, to which reference will be made in the ensuing paragraphs.

The question of "odious debts"

(41) In his ninth report, 354/ the Special Rapporteur included a chapter entitled "Non-transferability of 'odious' debts". That chapter dealt, first, with the definition of "odious debts". The Special Rapporteur recalled inter alia, the writings of jurists who referred to "war debts" or "subjugation debts" 355/ and those who referred to "régime debts". 356/ For the definition of odious debts, he proposed an article C, which read as follows:

"Article C. Definition of odious debts"

"For the purposes of the present articles, 'odious debts' means:

"(a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

"(b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations."

(42) Second, the chapter dealt with the determination of the fate of odious debts. The Special Rapporteur reviewed State practice concerning "war debts", including

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353/ C. Rousseau, Droit international public (Paris, Sirey, 1977), vol.III, p.458.

354/ Yearbook ... 1977, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1

355/ For example, Sanches de Bustamante y Sirvén, op.cit., pp. 293-294 and Fauchille, op.cit., p. 352.

356/ For example, G. Jéze, Cours de science des finances et de législation financière française, 6th ed. (Paris, Giard, 1922), vol.I (part I), pp. 302-305, 327.

a number of cases of the non-passing of such debts to a successor State, 357/ as well as cases of the passing of such debts. 358/ He further cited cases of State practice concerning the passing or non-passing to a successor State of "subjugation debts. 359/ He proposed the following article D, concerning the non-transferability of odious debts:

"Article D. Non-transferability of odious debts

"[Except in the case of the uniting of States,] odious debts contracted by the predecessor State are not transferable to the successor State."

(43) The Commission, having discussed articles C and D, recognized the importance of the issues raised in connection with the question of "odious" debts, but was of the opinion initially that the rules formulated for each type of succession of States might well settle the issues raised by the question and might dispose of the need to draft general provisions on it. In completing the second reading of the draft, the Commission confirmed that initial view.

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357/ The report mentions, inter alia, the following examples: article 24 of the Treaty of Tilsit between France and Prussia (see E.H. Feilchenfeld, Public Debts and State Succession (New York, Macmillan, 1931), p. 91); the annexation of the Transvaal ("South African Republic") by the United Kingdom (ibid., pp. 380-396, cf. J. de Louter, Le droit international public positif (Oxford, University Press, 1920), vol. I, p.229); peace treaties following the end of the First and Second World Wars, in particular article 254 of the Treaty of Versailles (British and Foreign State Papers, 1919, vol. CXII (London, H.M. Stationery Office, 1922) pp. 124-125); article 203 of the Treaty of Saint-Germain-en-Laye (ibid., pp.405-407); article 141 of the Treaty of Neuilly-sur-Seine (ibid., p.821); article 186 of the Treaty of Trianon (ibid., vol. CXIII, pp. 556-568); article 50 of the Treaty of Lausanne (League of Nations, Treaty Series, vol. XXVIII, pp. 41 and 43); and annexes X and XIV of the Treaty of Peace with Italy (United Nations, Treaty Series, vol. 49, pp. 209, 225).

358/ For example, the 1720 treaty between Sweden and Prussia (see E. Feilchenfeld, op.cit., p.75, foot-note 6); the unification of Italy (ibid., p.269); and the assumption by Czechoslovakia, for a short period of time, of certain debts of Austria-Hungary (see O'Connell, op.cit., pp. 420-421).

359/ The Special Rapporteur made reference to the 1847 treaty between Spain and Bolivia (see below, para. (11) of the commentary to article 36); the question of Spanish debts with regard to Cuba in the context of the 1898 Treaty of Paris between Spain and the United States (see Feilchenfeld, op.cit., pp.337-342, cf. Rousseau, op.cit., p. 459); article 255 of the Treaty of Versailles (for reference, see foot-note 357 above) and the Reply of the Allied and Associated Powers concerning the German colonization of Poland (British and Foreign State Papers, 1919, vol. CXII (London, H.M. Stationery Office, 1922), p. 290); the question of Netherlands debts with regard to Indonesia in the context of the 1949 Round Table Conference and of the subsequent 1956 denunciation by Indonesia (see below, paras. (16)-(19) of the commentary to article 36); and the question of French debts in Algeria (see below, para. (36) of the commentary to article 36).

## Definition of a State debt

(44) Having in mind the foregoing considerations, the Commission adopted the text of article 31, which contains the definition of State debt for the purposes of the articles in part IV of the draft. The reference in the text of the article to the "articles in the present Part" conforms to usage throughout the draft and in particular to the language of the corresponding provisions in parts II and III namely, articles 8 and 19. The text of article 31 refers to a "financial obligation" in order to make it clear that the debt in question involves a monetary aspect. It further specifies that it is any financial obligation of a State "towards another State, an international organization or any other subject of international law" which may be characterized as an international financial obligation.

(45) As it is indicated in foot-note 333 above, the inclusion of an additional provision extending the definition of State debt to cover "any other financial obligation chargeable to a State" was rejected by the Commission in second reading, by a tied vote. That second category of financial obligation was intended to cover State debts whose creditors are not subjects of international law. During the debate on this article in the Commission, it was generally agreed that the debts owed by a State to private creditors, whether natural or juridical persons were legally protected and were not prejudiced by a succession of States. This position is reflected in the new article 6 adopted at the present session as a safeguard clause and included among the "General provisions" of part I of the draft.

(46) In the opinion of those members of the Commission who opposed the inclusion in article 31 of a subparagraph (b), the definition of State debt should be limited to financial obligations arising at the international level, that is to say, between subjects of international law. Debts owed by a State to private creditors, in their view, fell outside the scope of the present draft. Although protected, such debts were not the subject of the law of succession of States. Furthermore, in the view of some of those members, the proposed subparagraph (b) should not extend to "any other financial obligation chargeable to a State" when the creditor was an individual who was a national of the debtor predecessor State, whether a natural or juridical person. On the other hand, the members who favoured subparagraph (b), stressed the volume and importance of the credit currently extended to States from foreign private sources. It was considered that the deletion of subparagraph (b) would lead to a limitation of the sources of credit available to States and international organizations, which would be detrimental to the interests of the international community as a whole and, in particular, to those of the developing countries that

were in dire need of external financing for their development programmes and whose early access to private capital markets was one of the objectives of the "North-South dialogue" on economic matters. <sup>360/</sup> It was also indicated by some of those members that the deletion of subparagraph (b) would create an inconsistency between the definition of State debt and that of State property in article 8 which extended to the property, rights and interests that were owned by the predecessor State, in accordance with its internal law, at the date of the succession of States, without distinguishing whether debtors were subjects of international law or not.

### Article 32

#### Effects of the passing of State debts

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

#### Commentary

(1) Articles 9 and 20 lay down a rule confirming the dual juridical effect of a succession of States upon the respective rights of the predecessor State and the successor State as regards, respectively, State property and State archives passing from the former to the latter, consisting in the extinction of the rights of the predecessor State to the property or archives in question and the simultaneous arising of the rights of the successor State to that property or those archives. Article 32 embodies a parallel rule regarding the obligations of the predecessor and successor States in respect of State debts which pass to the successor State in accordance with the provisions of the articles in part IV.

(2) It should be stressed that this rule applies only to the State debts which actually pass to the successor State "in accordance with the provisions of the articles in the present Part". Particularly important among such provisions is article 34 which, as a complement to article 32, guarantees the rights of creditors.

### Article 33

#### 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.

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<sup>360/</sup> Originally, the "Conference on International Economic Co-operation", which opened in Paris in December 1975.

### Commentary

- (1) At the present session the Commission decided to include in the final draft the present article, which corresponds to articles 10 and 21 concerning, respectively, the date of the passing of State property and of State archives. Article 33 has its own justification and fills what had been a gap in the past on State debts.
- (2) 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.
- (3) 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.
- (4) The principal purpose of article 33 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 34

### Effects of the passing of State debts with regard to creditors

1. A succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State, an international organization or any other subject of international law asserting a claim unless:

(a) the consequences of that agreement are in accordance with the provisions of the present Part; or

(b) the agreement has been accepted by that third State, international organization or other subject of international law.

### Commentary

(1) In part II (State property) of the present draft articles, the Commission has adopted a rule, i.e., article 12, for the protection of the property of a third State from any "disturbance" as a result of territorial change through a succession of States. If article 12 were to be given a narrow interpretation, it could be said to relate only to tangible property such as land, buildings, consulates and possibly bank deposits, whose location in the territory of the predecessor State in accordance with article 12 could, by their nature, be determined. However, no restriction was placed on the expression "property, rights and interests" of the third State that would enable third State debt-claims which constitute intangible property whose location it might prove difficult to determine, to be excluded from it. If, therefore, article 12 is taken to refer also to third State debt-claims, this would mean that the debts of the predecessor State corresponding to those debt-claims of the third State should in no way be affected by the succession of States. In other words, it would be pointless to study the general problems of succession of States in respect of debts, since the debts of the predecessor State (which are nothing more than the debt-claims of the third State) must remain in a strict status quo, which cannot be changed by the succession of States.

(2) What article 12 really means is that the debt-claims of the third State must not cease to exist or suffer as a result of the territorial change. Prior to the succession of States, the debtor State and the creditor State were linked by a specific, legal debtor/creditor relationship. The problem which then arises

is whether the succession of States is, in this case, intended not only to create and establish a legal relationship between the debtor predecessor State and the successor State, enabling the former to shift on to the latter all or part of its obligation to the creditor third State, but also to create and establish a new "successor State/third State" legal relationship to replace the "predecessor State/third State" relationship in the proportion indicated by the "predecessor State/successor State" relationship with respect to assumption of the obligation. The answer must be that succession of States in respect of State debts can create a relationship between the predecessor State and the successor State with regard to debts which linked the former to a third State, but that it cannot, in itself, establish any direct legal relationship between the creditor third State and the successor State, should the latter "assume" the debt of its predecessor. From this point of view, the problem of succession of States in respect of debts is much more akin to that of succession of States in respect of treaties than to that of succession in respect of property.

(3) Considering here only the question of the transfer of obligations and not that of the transfer of rights, there are certainly grounds for stating that a "succession of States", in the strict sense, takes place only when by reason of a territorial change, certain international obligations of the predecessor State to third parties pass to the successor State solely by virtue of a norm of international law providing for such passing, independently of any manifestation of will on the part of the predecessor State or the successor State. But the effect, in itself, of the succession of States should stop there. A new legal relationship is established between the predecessor State and the successor State with regard to the obligation in question. However, the existence of this relationship does not have the effect either of automatically extinguishing the former "predecessor State/third State" relationship (except where the predecessor State entirely ceases to exist) or of replacing it with a new "successor State/third State" relationship in respect of the obligation in question.

(4) If, then, it is concluded that there is a passing of the debt to the successor State (in a manner which it is precisely the main purpose of the succession of States to determine), it cannot be argued that it must automatically have effects in relation to the creditor third State in addition to the normal effects it will have vis-à-vis the predecessor State. As in the case of succession of States in respect of treaties, there is a personal equation involved in the matter of succession in respect of State debts. The legal relationship which existed between

the creditor third State and the predecessor State cannot undergo a twofold novation, in a triangular relationship, which would have the effect of establishing a direct relationship between the successor State and the third State.

(5) The problem is not a theoretical one, and its implications are important. In the first place, if the successor State is to assume part of the debts of the predecessor State, in practice this often means that it will pay its share to the predecessor State, which will be responsible for discharging the debt to the creditor third State. The predecessor State thus retains its debtor status and full responsibility for the old debt. This has frequently occurred, if only for practical reasons, the debt of the predecessor State having led to the issue of bonds signed by that State. For the successor State to be able to honour those bonds directly, it would have to guarantee them; until that operation, which constitutes the novation in legal relations, has taken place, the predecessor State remains liable to the creditors for the whole of its debts. Nor is this true only in cases where the territorial loss is minimal and where the predecessor State is bound to continue servicing the whole of the old debt. Moreover, if the successor State defaults, the predecessor State remains responsible to the creditor third State for the entire debt until an express novation has taken place to link the successor State specifically and directly to the third State.

(6) The above position has been supported by an author, who wrote:

"If the annexation is not total, if there is partial dismemberment, there can be no doubt on the question: after the annexation, as before it, the bondholders have only one creditor, namely the State which floated the loan ... Apportionment of the debt between the successor State and the dismembered State does not have the immediate effect of automatically making the successor State the direct debtor vis-à-vis the holders of bonds issued by the dismembered State. To use legal terms, the right of the creditors to institute proceedings remains as it was before the dismemberment; only the contribution of the successor State and of the dismembered State is affected; it is a legal relationship between States.

...

"Annexation or dismemberment does not automatically result in novation through a change of debtor.

"In practice, it is desirable, for all the interests involved, that the creditors should have as the direct debtor the real and principal debtor. Treaties concerning cession, annexation or dismemberment should therefore settle this question. In fact, that is what usually occurs.

...

"In case of partial dismemberment, and when the portion of the debt assumed by the annexing State is small, the principal and real debtor is

the dismembered State. It is therefore preferable not to alter the debt, but to leave the dismembered State as the sole debtor to the holders of the bonds representing the debt. The annexing State will pay its contribution to the dismembered State and the latter alone will be responsible for servicing the debt (interest and amortization), just as before the dismemberment.

"The contribution of the annexing State will be paid by the latter in the form either of a periodic payment ... or of a one-time capital payment." 361/

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361/ G. Jèze, "L'emprunt dans les rapports internationaux - La répartition des dettes publiques entre Etats au cas de démembrement du territoire", Revue de science et de législation financières (Paris), vol. XIX, No. 1 (Jan.-March 1921) pp.67-69. Jèze also quotes A. de Lapradelle and N. Politis, Recueil des arbitrages internationaux (Paris, Pedone, 1905), vol. I, p.287.

A contrary position was taken, however, by A.N. Sack, who formulated such rules as the following:

"No part of an indebted territory is bound to assume or pay a larger share than that for which it is responsible. If the Government of one of the territories refuses to assume, or does not actually pay, the part of the old debt for which it is responsible, there is no obligation on the other cessionary and successor States or on the diminished former State to pay the share for which that territory is responsible.

"This rule leaves no doubt concerning cessionaries and successors which are sovereign and independent States; they cannot be required to guarantee jointly the payments for which each of them and the diminished former State (if it exists) are responsible, or to assume any part of the debt which one of them refuses to assume.

"However, the following question then arises: is the former State, if it still exists and if only part of its territory has been detached, also released from such an obligation?

"...

"The argument that the diminished 'former' State remains the principal debtor vis-à-vis the creditors and, as such, has a right of recourse against the cessionary and successor States is based on [an erroneous] conception [according to which] the principle of succession to debts is based on the relations of States between themselves ...

"...

"Thus, in principle, the diminished former State has the right to consider itself responsible only for that part of the old debt for which it is responsible in proportion to its contributive capacity.

"...

"The creditors have no right of recourse (or right to take legal action) either against the diminished former State as regards those parts of the old debt for which the ... successors are responsible or against one of the ... successors as regards those parts of the old debt for which another ... successor or the diminished former State is responsible.

"... The debtor States have the right to apportion among all the indebted territories what was formerly their common debt. This right belongs to them

(7) For the sake of the argument, reference may be made to the case of a State debt which has come into existence as a result of an agreement between two States. In this case, the creditor third State and the debtor predecessor State may set out their relationship in a treaty. The fate of that treaty, and thus of the debt to which it gave rise, may have been decided in a "devolution agreement" concluded between the predecessor State and the successor State. But the creditor third State may prefer to remain linked to the predecessor State, even though it is diminished, if it considers it more solvent than the successor State. In consequence of its debt-claim, the third State possessed a right which the predecessor State and the successor State cannot dispose of at their discretion in their agreement. The general rules of international law concerning treaties and third States (in other words, articles 34 to 36 of the 1969 Vienna Convention) quite naturally apply in this case. It must, of course, be recognized that the agreement between the predecessor State and the successor State concerning the passing of a State debt from one to the other is not in principle designed to be detrimental to the creditor third State, but rather to ensure the continuance of the debt incurred to that State.

(8) However, as the Commission observed with respect to devolution agreements, in the case of succession of States in respect of treaties:

"The language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State." 362/

And the Commission further stated:

"A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory. It is, however, extremely doubtful whether such a purported assignment by itself changes the legal position of any of the interested States. The [1969] Vienna Convention contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution

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independently of the consent of the creditors. They are therefore bound to pay to the creditors only that part of the old debt for which each of them is responsible." (A.N. Sack, "La succession aux dettes publiques d'Etat", Recueil des cours ... 1928 - III (Paris, Hachette 1929), vol.23, pp.303-304, 306 and 320).

362/ Yearbook ... 1974, vol. II (Part One), p.184, document A/9610/Rev.I, chap. II, sect. D, para. (5) of the commentary to art. 8,

of 'assignment' found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, as a treaty, can be binding only as between the predecessor and the successor States and the direct legal effects of which are necessarily confined to them.

...

"That devolution agreements, if valid, do constitute at any rate a general expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question is whether a devolution agreement constitutes something more, namely an offer to continue the predecessor State's treaties, which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties." 363/

(9) A similar situation exists as to the effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes the debts of the predecessor State, however consented to by the latter. Does a unilateral declaration by the successor State that it assumes all or part of the debts of the predecessor State following a territorial change mean, ipso facto, a novation in the legal relationship previously established by treaty between the creditor third State and the debtor predecessor State? Such a declaration is unquestionably to the advantage of the predecessor State, and it would be surprising and unexpected if that State were to find some objection to it since it has the practical effect of easing its debt burden. It is, at least in principle, also to the advantage of the creditor third State, which might have feared that all or part of its debt-claim would be jeopardized by the territorial change. However, the creditor third State might have a political or material interest in refusing to agree to substitution of the debtor or to assignment of the debt. Moreover, under most national systems of law, the assignment of debts is, of course, generally impossible. The creditor State has a subjective right, which involves a large measure of intuitus personae. It may, in addition, have a major reason for refusing to agree to assignment of the debts - for example, if it considers that the successor State, by its unilateral declaration, has taken over too large (or

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363/ Ibid., paras. (6) and (11) of the commentary.

too small) a share of the debts of the predecessor State, with the result that the declaration may jeopardize its interests in view of either the degree of solvency of one of the two States (the predecessor or the successor) or the nature of the relations which the third State has with each of them, or for any other reason. More simply still, the third State cannot feel itself automatically bound by the unilateral declaration of the successor State, since that declaration might be challenged by the predecessor State with regard to the amount of the debts which the successor State has unilaterally decided to assume.

(10) Having in mind the foregoing considerations relating to creditor third States, which are equally valid in cases where the creditors are not States, the Commission has adopted article 34 on the effects of the passing of State debts with regard to creditors. Paragraph 1 of the article enunciates the basic principle that a succession of States does not, by that phenomenon alone, affect the rights and obligations of creditors. Under this paragraph, while a succession of States may have the effect of permitting the debt of the predecessor State to be apportioned between that State and the successor State or to be assumed in its entirety by either of them, it does not, of itself, have the effect of binding the creditor. Furthermore, a succession of States does not, of and by itself, have the effect of giving the creditor an established claim equal to the amount of the State debt which may pass to the successor State; in other words, the creditor does not, in consequence only of the succession of States, have a right of recourse or a right to take legal action against the State which succeeds to the debt. The word "creditors" covers such owners of debt-claims as fall within the scope of the articles in part IV and 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. Although this paragraph will in practice apply mostly to the "rights" of creditors, it refers as well to "obligations" in order not to leave a possible lacuna in the rule nor allow it to be interpreted as meaning that a succession as such could affect that aspect of the debt relationship involving the creditor's obligations arising out of the State debt.

(11) Paragraph 2 envisages the situation where the predecessor and the successor States or, as the case may be, the successor States themselves, conclude an

agreement specifically for the passing of State debts. It is evident that such an agreement has by itself no effect on the rights of creditors. To have such an effect, the consequences of such an agreement must be in accordance with the provisions of the present part. This is the rule contained in subparagraph (a). It should be stressed that subparagraph (a) deals only with the consequences of the agreement and not with the agreement itself, whose effect would be subject to the general rules of international law concerning treaties and third States: articles 34 and 36 of the 1969 Vienna Convention. The effects of such an agreement can also be recognized if the creditor third State or international organization has accepted the agreement on the passing of debts from the predecessor to the successor States. In other words, succession of States does not, of itself, have the effect of automatically releasing the predecessor State from the State debt (or a fraction of it) assumed by the successor State or States unless the consent, express or tacit, of the creditor has been given. This is provided for in subparagraph (b). There may be cases where the creditors feel more secured by an agreement between a predecessor State and a successor State or between successor States concerning the passing of State debts because, for example, of the greater solvency of the successor State or States as compared with the predecessor State. It would therefore be to the advantage of creditors to be given the possibility, provided for in subparagraph (b), of accepting such an agreement.

(12) Since the rule embodied in article 34 concerns the effects of the passing of State debts with regard to creditors, paragraph 2 is drafted in such a way as to preclude the invoking of the agreement in question against creditors unless one or another of the conditions set out in subparagraphs (a) and (b) is fulfilled. At the present session the Commission completed the introductory sentence of paragraph 2 so that it not only refers to "a third State or an international organization" but also to other subjects of international law, since the rule applies equally to such subjects.



Section 2. Provisions concerning specific categories  
of succession of States

Commentary

In parts II (State property) and III (State archives) of the draft articles the Commission decided to draft the provisions relating to each type of succession of States following the broad categories of succession which it had adopted for the draft articles on succession of States in respect of treaties, yet introducing certain modifications to those categories in order to accommodate the characteristics and requirements proper to the topic of succession of States in respect of matters other than treaties. The Commission, therefore, established a typology consisting of the following five types of succession: (a) transfer of part of the territory of a State; (b) newly independent States; (c) uniting of States; (d) separation of part or parts of the territory of a State; and (e) dissolution of a State. In the present part also, the Commission has attempted to follow, in so far as appropriate, the typology of succession of States adopted in parts II and III. Thus the titles of section 2 and of the draft articles therein correspond to those of section 2 of parts II and III and of the draft articles contained therein.

Article 35

Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, inter alia, the property, rights and interests which pass to the successor State in relation to that State debt.

Commentary

(1) The category of succession of States which article 35 deals with corresponds to that covered by articles 13 and 25. There is divergency in State practice and in legal literature on the legal principle to be applied concerning the passing (or non-passing) of the State debt of the predecessor State to the successor State for the type of succession envisaged in article 35. In the following paragraphs, reference will be made to doctrinal views and to examples of State practice and judicial decisions concerning the fate of the general debt of a State as well as that of localized State debts.

(2) Commenting on the uncertainties of the doctrine regarding the general public debt contracted for the general needs of a dismembered State, one writer summed up the situation as follows:

"... What conclusion is to be drawn with regard to the general public debt of the dismembered State? Opinions on this differ widely. There are several schools of thought. According to the first, the cession by a State of a fraction of its territory should have no effect on its public debt; the debt remains wholly its responsibility, for the dismembered State continues to exist and retains its individuality; it must therefore continue to be held responsible vis-à-vis its creditors. Moreover, the annexing State, being only an assignee in its private capacity, should not be held responsible for personal obligations contracted by its principal ... The second holds that the public debt of the dismembered State must be divided between that State and the territory which is annexed; the annexing State should not bear any portion of it ... According to the third school of thought, the annexing State must take over part of the public debt of the dismembered State. There are two main grounds for this view, which is the most widely held. Firstly, since the public debt was contracted in the interest of the entire territory of the State and the portion which is now detached benefited just as did the rest, it is only fair that it should continue to bear the burden to some extent. Secondly, since the annexing State receives the profits from the ceded part, it is only fair that it should bear its costs. The State, whose entire resources are assigned to payment of its debt, must be relieved of a corresponding portion of that debt when it loses a portion of its territory and thus a part of its resources." 364/

(3) The arguments in favour of the passing of part of the general debt can be divided into four groups. The first is the theory of the patrimonial State and of the territory encumbered in its entirety with debts. One author, for example, advocating the passing of a part of the general debt of the predecessor State to the successor State in proportion to the contributing capacity of the transferred territory, argued as follows:

"Whatever territorial changes a State may undergo, State debts continue to be guaranteed by the entire public patrimony of the territory encumbered with the debt. [365/] The legal basis for public credit lies precisely in the fact that public debts encumber the territory of the debtor State ...

...

"Seen from that standpoint, the principle of indivisibility [366/] proclaimed in the French constitutions of the great Revolution is very

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364/ Fauchille, op. cit., p. 351

365/ It is clear from the context that the author meant the entirety of the territory of the predecessor State prior to its amputation.

366/ The author is referring here to the indivisibility of the Republic and of its territory.

enlightening; it has also been proclaimed in a good number of other constitutions ... Government actions and their consequences, as well as other events, may adversely affect the finances and the capacity to pay of the debtor State.

"All these are risks which must be borne by creditors, who cannot and could not restrict the Government's ... right freely to dispose of [its] property and of the State's finances ...

...

"Nevertheless, creditors do have a legal guarantee in that their claims encumber the territory of the debtor State.

...

"The debt which encumbers the territory of a State is binding on any Government, old or new, that has jurisdiction over that territory. In case of a territorial change in the State, the debt is binding on all Governments of all parts of that territory ...

"The justification for such a principle is self-evident. When taking possession of assets, one cannot repudiate liabilities: ubi emolumentum, ibi onus esse debet, res transit cum suo onere ... Therefore, with regard to State debts, the emolumentum consists of the public patrimony within the limits of the encumbered territory." 367/

(4) In the foregoing passage, two arguments are intermingled. The first is debatable so far as the principle is concerned. Since all parts of the territory of the State "guarantee", as it were, the debt that is contracted, the part which is detached will continue to do so, even if it is placed under another sovereignty; as a result of this, the successor State is responsible for a corresponding part of the general debt of the predecessor State. Such an argument is as valid as the theories of the patrimonial State may be valid. In addition, another argument casts an awkward shadow over the first; it is the reference to the benefit which the transferred territory may have derived from the loan, or to the justification for taking over liabilities because of the acquisition of assets. This argument may fully apply in the case of "local" or "localized" debts, where it is necessary to take into consideration the benefit derived from these debts by the transferred territory or to compare the assets with the liabilities. It has no relevance in the case in point, which involves a general State debt contracted for a nation's

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367/ Sack, loc. cit., pp. 274-277.

general needs, since these needs may be such that the transferred territory will not benefit - or will not benefit as much as other territories - from that general debt.

(5) A second argument is the theory of the profit derived from the loan by the transferred territory. One author, for instance, wrote:

"The State which profits from the annexation must be responsible for the contributory share of the annexed territory in the public debt of the ceding State. It is only fair that the cessionary State should share in the debts from which the territory it is acquiring profited in various ways, directly or indirectly." 368/

Another author wrote that "the State which contracts a debt, either through a loan or in any other way, does so for the general good of the nation; all parts of the territory profit as a result".369/ And he drew the same conclusion. Again, it has been said that "these debts were contracted in the general interest and were used to effect improvements from which the annexed areas benefited in the past and will perhaps benefit again in the future ... It is therefore fair ... that the State should be reimbursed for the part of the debt relating to the transferred province." 370/ 371/

(6) In practice, this theory leads to an impasse; for in fact, since this is a general debt of the State contracted for the general needs of the entire territory, with no precise prior assignment to or location in any particular territory, the statement that such a loan profited a particular transferred territory leads to vagueness and uncertainty. It does not give an automatic and reliable criterion for the assumption by the successor State of a fair and easily calculated share of the general debt of the predecessor State. In actual fact, this theory is an extension of the principle of succession to local debts, which, not being State debts, are outside the scope of the present draft, and to localized State debts,

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368/ H. Bonfils, Manuel de droit international public (droit des gens), 5th ed. (Paris, Rousseau, 1908), p. 117.

369/ N. Politis, Les emprunts d'Etat en droit international public (Paris, 1891), p. 111 [thesis].

370/ R. Selosse, Traité de l'annexion au territoire français et de son démembrement (Paris, Larose, 1880), p. 168.

371/ For all these and other authors, see the details given by Sack, loc. cit., pp. 295 et seq.

which will be considered below.<sup>372/</sup> In addition, it may prove unfair in certain cases of territorial transfer, and this would destroy its own basis of equity and justice.

(7) A third argument purports to explain why part of the general debt is transferable, but in fact it explains only how this operation should be effected. For example, certain theories make the successor State responsible for part of the general debt of the predecessor State by referring flatly to the "contributory capacity" of the transferred territory. Such positions are diametrically opposed to the theory of benefit, so that they and it cancel each other out. The "contributory strength" of a transferred territory, calculated for example by reference to the fiscal resources and economic potential which it previously provided for the predecessor State, is a criterion which is at variance with the theory of the profit derived from the loan by the transferred territory. A territory already richly endowed by nature, which was attached to another State, may not have profited much from the loan but may, on the other hand, have contributed greatly by its fiscal resources to the servicing of the general State debt, within the framework of the former national solidarity. If, when the territory becomes attached to another State, that successor State is asked to assume a share of the predecessor State's national public debt, computed according to the financial resources which the territory provided up to that time, such a request would not be justified by the theory of profit. The criterion of the territory's financial capacity takes no account of the extent to which that territory may have profited from the loan.

(8) A fourth argument is the one based on considerations of justice and equity towards the predecessor State and of security for creditors. It has been argued that the transfer of a territory, particularly of a rich territory, results in a loss of resources for the diminished State. The predecessor State - and indeed the creditors - relied on those resources. It is claimed that it is only fair and equitable, as a consequence, to make the successor State assume part of the general debt of the predecessor State. But the problem is how this share should be computed; some authors refer to "contributory capacity", which is logical, given their premises (referring to the resources previously provided by the territory), while others consider the benefit which the territory has derived from the loan.

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<sup>372/</sup> See paras. (22) et seq. of the present commentary, below.

Thus the same overlapping considerations, always entangled and interlocked, are found in the works of various authors. It is particularly surprising to find the argument of justice and equity in the works of authors of the nineteenth or early twentieth century, who were living at a time when provinces were annexed by conquest and by war. It is thus difficult to imagine how the annexing State (which did not shrink from the territorial amputation of its adversary or even the forced imposition on the adversary of reparations or a war tribute) could in any way be moved by considerations of justice and equity to assume part of the general debt of the State which it had geographically diminished. There is a certain lack of realism in this theoretical construction.

(9) The arguments which deny that there is any legal basis for the passing of the general State debt from the predecessor to the successor State in the case of transfer of part of the territory have been advanced on two different bases. The first is based on the sovereign nature of the State. The sovereignty which the successor State exercises over the detached territory is not a sovereignty transferred by the predecessor State; the successor State exercises its own sovereignty there. Where State succession is concerned, there is no transfer of sovereignty, but a substitution of one sovereignty for another. In other words, the successor State which is enlarged by a portion of territory exercises its own sovereign rights there and does not come into possession of those of the predecessor State; it therefore does not assume the obligations or part of the debts of the predecessor State.

(10) The second argument is derived from the nature of the State debt. The authors who deny that a portion of the national public debt (i.e. of a general State debt) passes to the successor State consider that this is a personal debt of the State which contracted it. Thus, in their view, on the occasion of the territorial change this personal debt remains the responsibility of the territorially diminished State, since that State retains its political personality despite the territorial loss suffered. For example, one author wrote:

"... The dismembered or annexed State personally contracted the debt. (We are considering here only national debts, and not local debts ...). It gave a solemn undertaking to service the debt, come what might. It is true that it was counting on the tax revenue to be derived from the whole of the territory. In case of partial annexation, the dismemberment reduces the

resources with which it is expected to be able to pay its debt. Legally, however, the obligation of the debtor State cannot be affected by variations in the size of its resources." 373/

And he added a foot-note stating:

"In the case of partial annexation, most English and American authors consider this principle to be absolute, so that they even declare that the annexing State is not legally bound to assume any part of the debt of the dismembered State." 374/

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373/ Jèze, "L'emprunt dans les rapports internationaux ..." (loc. cit.), p. 65. However, the same author writes in the same article:

"The annexing State did not personally contract the debt of the annexed or dismembered State. It is logical and equitable that, as a result of the annexation, it should at most be obligated only propter rem, because of the annexation ... What exactly is involved in the obligation propter rem? It is the burden corresponding to the contributory strength of the inhabitants of the annexed territory." (Ibid., p. 62)

Jèze thus favours in this passage a contribution by the successor State with regard to the general debt of the predecessor State. But see also ibid., p. 70, where he states:

"Present and future taxpayers in each portion of the territory of the dismembered State must continue to bear the total burden of the debt regardless of the political events which occur, even if the annexing State does not agree to assume part of the debt ... A change in the size of the territory cannot cause the disappearance of the legal obligation regularly contracted by the competent public authorities. The taxpayers of the dismembered State, despite the reduction in its territorial size and in resources, remain bound by the original obligation."

Jèze must ultimately be classified among the authors who favour conditional transferability of part of the national public debt of the predecessor State, for he concludes with the following words:

"To sum up, in principle: (1) the annexing State must assume part of the debt of the annexed State; (2) this share must be calculated on the basis of the contributory strength of the annexed territory; (3) by way of exception, if it is demonstrated in a certain and bona fide manner that the annexed territory's resources for the present and for the near future are not sufficient to service the portion of the debt thus computed and chargeable to the annexing State, the latter State may suspend or reduce the debt to the extent strictly necessary to obtain the desirable financial stability." (Ibid., p. 72)

374/ Ibid., p. 65, foot-note 2.

For example, one such author wrote:

"The general debt of a State is a personal obligation ... With the rights which have been contracted by the State as personal rights and obligations, the new State has nothing to do. The old State is not extinct." 375/

(11) The practice of States on the question of the passing of general State debts with a transfer of part of the territory of a predecessor State is equally divided. Several cases can be cited where the successor State assumed such debts.

(12) Under article 1 of the Franco-Sardinian Convention of 23 August 1860, France, which had gained Nice and Savoy from the Kingdom of Sardinia, did assume responsibility for a small part of the Sardinian debt. In 1866, Italy accepted a part of the Pontifical debt proportionate to the population of the Papal States (Romagna, the Marches, Umbria and Benevento) which the Kingdom of Italy had annexed in 1860. In 1881, Greece, having incorporated in its territory Thessaly, which until then had belonged to Turkey, accepted a part of the Ottoman public debt corresponding to the contributory capacity of the population of the annexed province (article 10 of the Treaty of 24 May 1881).

(13) The many territorial upheavals in Europe following the First World War raised the problem of succession of States to public debts on a large scale, and attempts to settle it were made in the Treaties of Versailles, Saint-Germain-en-Laye and Trianon. In those treaties, writes one author,

"... political and economic considerations came ... into play. The Allied Powers, who drafted the peace treaties practically on their own, had no intention of entirely destroying the economic structure of the vanquished countries and reducing them to a state of complete insolvency. This explains why the vanquished States were not left to shoulder their debts alone, for they would have been incapable of discharging them without the help of the successor States. But other factors were also taken into consideration, including the need to ensure preferential treatment for the allied creditors and the difficulty of arranging regular debt-service owing to the heavy burden of reparations.

...

"Finally, it should be pointed out that the traditional differences in legal theory as to whether or not the transfer of public debts is obligatory caused a cleavage between the States concerned, entailing a radical opposition between the domestic judicial decisions of the dismembered States and those of the annexing States." 376/

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375/ W.E. Hall, A Treatise on International Law, 7th ed. (Oxford, Clarendon, 1917), pp. 93 and 95.

376/ Rousseau, Droit international public (op. cit.), p. 442.



A general principle of succession to German public debts was accordingly affirmed in article 254 of the Treaty of Versailles of 28 June 1919. According to this provision, the Powers to which German territory was ceded were to undertake to pay a portion - to be determined - of the debt of the German Empire and of the debt of the German State to which the ceded territory belonged, as they had stood on 1 August 1914.<sup>377/</sup> However, article 255 of the Treaty provided a number of exceptions to this principle. For example, in view of Germany's earlier refusal to assume, in consideration of the annexation of Alsace-Lorraine in 1871, part of France's general public debt, the Allied Powers decided, as demanded by France, to exempt France in return from any participation in the German public debt for the retrocession of Alsace-Lorraine.

(14) One author cites a case of participation of the successor State in part of the general debt of its predecessor. However, that case is not consistent with contemporary international law, since the transfer of part of the territory was effected by force. The Third Reich, in its agreement of 4 October 1941 with Czechoslovakia, did assume an obligation of 10 billion Czechoslovak korunas as a participation in that country's general debt (and also in the localized debt for the conquered Länder of Bohemia-Moravia and Silesia). Part of the 10 billion covered the consolidated internal debt of the State, the State's short-term debt, its floating debt and the debts of government funds, such as the central social security fund, the electricity, water and pension funds (and all the debts of the former Czechoslovak armed forces, as of 15 March 1939, which were State debts and which the said author incorrectly included among the debts of the territories conquered by the Reich).<sup>378/</sup>

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<sup>377/</sup> War debts were thus excluded. Article 254 of the Treaty of Versailles (for reference, see foot-note 357 above) read as follows:

"The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay:

"(1) A portion of the debt of the German Empire as it stood on August 1, 1914 ...

"(2) A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged ...".

<sup>378/</sup> Paenson, op. cit., pp. 112-113.

The author refers to an irregular annexation and, moreover, considers the Czechoslovak case as falling within the category of "cession of part of the territory"; in fact, the case was more complex, involving disintegration of the State, not only through the joining of territories to Hungary and to the Reich, but also through the creation of States: the so-called "Protectorate of Bohemia-Moravia" and Slovakia.

(15) On the other hand, there have often been cases where the successor State was exonerated from any portion of the general State debt of the predecessor State. Thus, in the "Peace Preliminaries between Austria, Prussia and Denmark", signed at Vienna on 1 August 1864, article 3 provided that:

"Debts contracted specifically on behalf either of the Kingdom of Denmark or of one of the Duchies of Schleswig, Holstein and Lauenburg shall remain the responsibility of each of those countries." 379/

(16) At a time when annexation by conquest was the general practice, Russia rejected any succession to part of the Turkish public debt for territories it had taken from the Ottoman Empire. Its plenipotentiaries drew a distinction between the transfer of part of territory by agreement, donation or exchange (which could perhaps give rise to the assumption of part of the general debt) and territorial transfer effected by conquest - as was acceptable at the time - which in no way created any right to relief from the debt burden of the predecessor State. Thus, at the meeting of the Congress of Berlin on 10 July 1878, the Turkish plenipotentiary, Karatheodori Pasha, proposed the following resolution: "Russia shall assume the part of the Ottoman public debt pertaining to the territories annexed to Russian territory in Asia." It is said in the record of that meeting that:

"Count Shuvalov replied that he believed he was justified in considering it generally recognized that, whereas debts in respect of territories that were detached by agreement, donation or exchange would be apportioned, that was not so in the case of conquest. Russia was the victor in Europe and in Asia. It did not have to pay anything for the territories and could in no way be held jointly responsible for the Turkish debt. Prince Gorchakov categorically rejected Karatheodori Pasha's request and said that, in fact, he was astonished by it."

The President said that, in view of the opposition of the Russian plenipotentiaries, he could see no possibility of acceding to the Ottoman proposal. 380/

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379/ de Martens, ed., Nouveau Recueil ... (Göttingen, Dieterich, 1869), vol. XVII, pp. 470 et seq.

380/ Protocol No. 17 of the Congress of Berlin for the Settlement of Affairs in the East, British and Foreign State Papers 1877-1878 (London, Ridgway, 1885), vol. LXIX, p. 862 and pp. 1052 et seq. This was exactly the policy followed by the other European Powers in the case of conquest.

(17) The Treaty of Frankfurt of 10 May 1871 between France and Prussia, whereby Alsace-Lorraine passed to Germany, was deliberately silent on the assumption by the successor State of part of the French general debt. Prince von Bismarck, who in addition had imposed on France, after its defeat at Sedan, the payment of war indemnities amounting to 5 billion francs, had categorically refused to assume a share of the French national public debt proportionate to the size of the territories detached from France.<sup>381/</sup> The cession of Alsace-Lorraine to Germany in 1871, free and clear of any contributory share in France's public debt, had, as has been seen,<sup>382/</sup> a mirror effect in the subsequent retrocession to France of the same provinces, also free and clear of all public debts, under articles 55 and 255 of the Treaty of Versailles.

(18) When, under the Treaty of Ancón of 20 October 1883, Chile annexed the province of Tarapacá from Peru, it refused to assume responsibility for any part whatever of Peru's national public debt. However, after disputes had arisen between the two countries concerning the implementation of the Treaty, another treaty, signed by them at Lima on 3 June 1929, confirmed Chile's exemption from any part of Peru's general debt.<sup>383/</sup>

(19) In 1905, no part of Russia's public debt was transferred to Japan with the southern part of the island of Sakhalin.

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<sup>381/</sup> One must not be led astray by the fact that Prince von Bismarck affected to reduce the cost of war indemnities by first fixing them at 6 billion francs, since it did not correspond to an assumption of part of the general debt of France. This apparent concession by Prince von Bismarck was later used by d'Arnim at the Brussels Conference, on 26 April 1871, as a pretext for ruling out any participation by Germany in France's general public debt.

<sup>382/</sup> See para. (13) of the present commentary, above.

<sup>383/</sup> However, deposits of guano situated in the province transferred to Chile had apparently served to guarantee Peru's public debt to foreign States such as France, Italy, the United Kingdom or the United States. Claims having been lodged against the successor State for continuance of the security and assumption of part of the general debt of Peru secured by that resource of the transferred territory, a Franco-Chilean arbitral tribunal found that the creditor States had acquired no guarantee, security or mortgage, since their rights resulted from private contracts concluded between Peru and certain nationals of those creditor States (arbitral award of Rapperswil, of 5 July 1901). See Feilchenfeld, *op. cit.*, pp. 321-329 and D.P. O'Connell, *The Law of State Succession* (Cambridge University Press, 1956), pp. 167-170. In any event, the Treaty of Lima, referred to above, confirmed the exoneration of Chile as the successor State.

(20) Following the Second World War, the trend of State practice broke with the solutions adopted at the end of the First World War. Unlike the treaties of 1919, those concluded after 1945 generally excluded the successor States from any responsibility for a portion of the national public debt of the predecessor State. Thus the Treaty of Peace with Italy of 10 February 1947 ruled out any passing of the debts of the predecessor State, for instance in the case of Trieste,<sup>384/</sup> except with regard to the holders of bonds for those debts issued in the ceded territory.

(21) With regard to judicial precedent, the arbitral award most frequently cited is that rendered by E. Borel on 18 April 1925 in the case of the Ottoman public debt. Even though this involved a type of succession of States other than the transfer of part of the territory of one State to another - since the case related to the apportionment of the Ottoman public debt among States and territories detached from the Ottoman Empire (separation of one or more parts of territory of a State with or without the constitution of new States) - it is relevant here because of the general nature of the terms advisedly used by the arbitrator from Geneva. He took the view that there was no legal obligation for the transfer of part of the general debt of the predecessor State unless a treaty provision existed to that effect. In his award, he said:

"In the view of the arbitrator, despite the existing precedents, one cannot say that the Power to which a territory is ceded is automatically responsible for a corresponding part of the public debt of the State to which the territory formerly belonged." <sup>385/</sup>

He went on to state even more clearly:

"One cannot consider that the principle that a State acquiring part of the territory of another State must at the same time take over a corresponding portion of the latter's public debts is established in positive international law. Such an obligation can derive only from a treaty in which it is assumed by the State in question, and exists only on the terms and to the extent stipulated therein." <sup>386/</sup>

(22) Consideration has so far been focused on the general State debts of the predecessor State. What then is the situation as regards localized State

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<sup>384/</sup> For reference, see foot-note 357 above.

<sup>385/</sup> United Nations, Reports of International Arbitral Awards, vol. I (op. cit.), p. 573.

<sup>386/</sup> Ibid. 571.

debts, i.e. State debts contracted by the central Government on behalf of the entire State but intended particularly to meet the specific needs of a locality, so that the proceeds of the loan may have been used for a project in the transferred territory? At the outset it should be pointed out that, although localized State debts are often dealt with separately from general State debts, identifying such debts can prove to be difficult in practice. As has been stated:

"... it is not always possible to establish precisely: (a) the intended purpose of each particular loan at the time when it is concluded; (b) how it is actually used; (c) the place to which the related expenditure should be attributed ...; (d) whether a particular expenditure did in fact benefit the territory in question." 387/

(23) Among the views of publicists, the most commonly - and perhaps most easily - accepted theory appears to be that a special State debt of benefit only to the ceded territory should be attributed to the transferred territory for whose benefit it was contracted. It would then pass with the transferred territory "by virtue of a kind of right of continuance (droit de suite)."388/ However, a sufficiently clear distinction is not made between State debts contracted for the special benefit of a portion of territory and local debts proper, which are not contracted by the State. Yet the assertion that they follow the fate of the territory by virtue of a right of continuance, and that they remain charged to the transferred territory, implies that they were already charged to it before the territory was transferred, which is not the case for localized State debts, these being normally charged to the central State budget.

(24) Writers on the subject appear, generally speaking, to agree that the successor State should assume special debts of the predecessor State, as particularized and identified by some project carried out in the transferred territory. The debt will, of course, be attributable to the successor State and not to the transferred territory, which had never assumed it directly under the former legal order and to which there is no reason to attribute it under the new legal order. Moreover, it can be argued that if the transferred territory was previously responsible for the debt it could not be regarded with certainty as a State debt specially contracted by the central Government for the benefit or the needs of the territory concerned. Rather would it be a local debt contracted and assumed by the

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387/ Sack, loc. cit., p. 292

388/ F. Despagnet, Cours de droit international public, 3rd ed. (Paris, Larose et Tenin, 1905), p. 109.

territorial district itself. That is a completely different case, which does not involve the question of a State debt and hence falls outside the scope of the present draft articles.

(25) The practice of States shows that, in general, the attribution of localized State debts to the successor State has nearly always been accepted. Thus, in 1735, the Emperor Charles VI borrowed the sum of one million crowns from some London financiers and merchants, securing the loan with the revenue of the Duchy of Silesia. Upon his death in 1740, Frederick II of Prussia obtained the Duchy from Maria Theresa under the Treaties of Breslau and Berlin. Under the latter treaty, signed on 28 July 1742, Frederick II undertook to assume the sovereign debt (or State debt, as it would be called today) with which the province was encumbered as a result of the security arrangement.

(26) Two articles of the Treaty of Peace between the Emperor of Austria and France, signed at Campo Formio on 17 October 1797, presumably settled the question of the State debts contracted in the interests of the Belgian provinces or secured on them at the time when Austria ceded those territories to France:

"Article IV. All debts which were secured, prior to the war, on the territory of the countries specified in the preceding articles, and which were contracted in accordance with the customary formalities, shall be assumed by the French Republic.

"Article X. Debts secured on the territory of countries ceded, acquired or exchanged under this Treaty shall pass to the parties into whose possession the said countries come." 389/

These two articles, like similar articles in other treaties, referred without further specification to "debts secured on the territory" of a province. This security arrangement may have been made either by the central authority in respect of State debts or by the provincial authority in respect of local debts. However, the context suggests that it was in fact a question of State debts, since the debts were challenged for the very reason that the provinces in question had not consented to them. France refused on that ground to assume the so-called "Austro-Belgian" State debt dating from the period of Austrian rule. 390/

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389/ de Clercq, op. cit., vol. I (1713-1802), pp. 336-337; de Martens, Recueil ... (Göttingen, Dieterich, 1829), vol. VI, pp. 422-423. [Translation by the Secretariat.]

390/ See sack, loc. cit., pp. 268-269.

(27) As a result of this, France, Germany and Austria included in the Treaty of Lunéville, of 9 February 1801, an article VIII reading as follows:

"As in articles IV and X of the Treaty of Campo Formio, it is agreed that, in all countries ceded, acquired or exchanged under this Treaty, those into whose possession they come shall assume debts secured on the territory of the said countries; in view, however, of the difficulties which have arisen in this connexion with regard to the interpretation of the said articles of the Treaty of Campo Formio, it is expressly agreed that the French Republic shall assume only debts resulting from loans formally authorized by the States of the ceded countries or from expenditure undertaken for the actual administration of the said countries." 391/ [The word "States" here refers not to a State entity, but to provincial bodies.]

(28) The Treaty of Peace between France and Prussia signed at Tilsit on 9 July 1807, made the successor State liable for debts contracted by the former sovereign for or in the ceded territories. Article 24 of the Treaty reads as follows:

"Such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Prussia may have entered into or contracted ... as owner of countries, territories, domains, property and revenue ceded or renounced by His Majesty under this Treaty shall be assumed by the new owners ..." 392/

(29) Article 9 of the Treaty of 26 December 1805 between Austria and France provided that His Majesty the Emperor of Germany and Austria:

"... shall remain free of any obligation in relation to any debts whatsoever which the House of Austria has contracted by reason of possession, and has secured on the territory of the countries renounced by it under this Treaty." 393/

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391/ de Clercq, op. cit., vol. I, pp. 426-427; de Martens, ed. Recueil ... (Göttingen, Dieterich 1831), vol. VII, p. 299; Baron Descamps and L. Renault, Recueil international des traités du XIXe siècle (Paris, Rousseau), vol. I (1801-1825). p. 3. [Translation by the Secretariat.]

392/ de Clercq, op. cit. (1880), vol. II, (1803-1815), p. 221; de Martens, Recueil ... (1835), vol. VIII, p. 666; Descamps and Renault, Recueil ... XIXe siècle (op. cit.), vol. I, p. 184 [Translation by the Secretariat.]

393/ de Clercq, op. cit., vol. II, pp. 147-148; de Martens, ed., Recueil ... vol. VIII (op. cit.), p. 391; Descamps and Renault, Recueil ... XIXe siècle (op. cit.), vol. I, p. 153. [Translation by the Secretariat.]

Similarly, article 8 of the Treaty of 11 November 1807 between France and Holland provided that:

"Such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Holland may have entered into or contracted as owner of the ceded cities and territories shall be assumed by France ..." 394/

Article XIV of the Treaty of 28 April 1811 between Westphalia and Prussia is identical with the article just cited. 395/

(30) Article VIII of the Treaty of Lunéville of 9 February 1801 served as a model for article 5 of the Treaty of Paris between France and Württemberg of 20 May 1807, which stated:

"Article VIII of the Treaty of Lunéville, concerning debts secured on the territory of the countries on the left bank of the Rhine shall serve as a basis and rule in respect of the debts with which the possessions and countries included in the cession under article II of the present Treaty are encumbered." 396/

The Treaty of 14 November 1802 between the Batavian Republic and Prussia contains a similarly worded article IV. 397/ Again, article XI of the Treaty of 22 September 1815 between the King of Prussia and the Grand Duke of Saxe-Weimar-Eisenach provided that "His Royal Highness shall assume [any debts] ... specially secured on the ceded districts". 398/

(31) Article IV of the Treaty of 4 June 1815 between Denmark and Prussia provided as follows:

"H.M. the King of Denmark undertakes to assume the obligations which H.M. the King of Prussia has contracted in respect of the Duchy of Lauenburg under articles IV, V and IX of the Treaty of 29 May 1815 between Prussia and His Britannic Majesty, King of Hanover ..." 399/

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394/ de Clercq, op. cit., vol. II, p. 241; de Martens, ed., Recueil ... vol. VIII (op. cit.), p. 720. [Translation by the Secretariat.]

395/ de Martens, ed., Nouveau Recueil ... (Göttingen, Dieterich, 1817), vol. I, p. 367.

396/ de Clercq, op. cit., vol. I, p. 582; de Martens, ed., Recueil ... (op. cit.), vol. VII, p. 430. [Translation by the Secretariat.]

397/ de Martens, ed., Recueil ... vol. VII (op. cit.), pp. 427-428.

398/ de Martens, ed., Nouveau Recueil de traités (Göttingen, Dieterich, 1831), vol. III, p. 330; Descamps and Renault, Recueil ... XIXe siècle (op. cit.), p. 513.

399/ de Martens, ed., Nouveau Recueil ..., vol. II (op. cit.), p. 350; Descamps and Renault, Recueil ... XIXe siècle (op. cit.), vol. I, p. 426.



The Franco-Austrian agreement of 20 November 1815, whose 26 articles dealt exclusively with debt questions, required the successor State to assume debts which "formed part of the French public debt" (State debts), but "originated as debts specially secured on countries which have ceased to belong to France or were contracted for purposes of the internal administration of the said countries" (article VI).<sup>400/</sup>

(32) Even though an irregular forced annexation of territory was involved, mention may be made of the assumption by the Third Reich, under the Agreement of 4 October 1941, of debts contracted by Czechoslovakia for the purpose of private railways in the Länder seized from it by the Reich.<sup>401/</sup> Debts of this kind seem to be governmental in origin and local in purpose.

(33) After the Second World War, France, which had regained Tenda and Briga from Italy, agreed to assume part of the Italian debt only subject to the following four conditions: (a) that the debt was attributable to public works or civilian administrative services in the transferred territories; (b) that the debt was contracted before Italy's entry into the war and was not intended for military purposes; (c) that the transferred territories had benefited from the debt; and (d) that the creditors resided in the transferred territories.

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<sup>400/</sup> de Martens, ed., Nouveau Recueil ... vol. II (op. cit.), p. 723; Descamps and Renault, Recueil ... XIXe siècle (op. cit.), vol. I, p. 531; British and Foreign State Papers, 1815-1816, vol. III (London, Ridgeway, 1838), pp. 326-327. See also article 5 of the Treaty of 14 October 1809 between France and Austria, concerning debts secured on the territories ceded to France by Austria (Upper Austria, Carniol, Carinthia, Istria) (de Clercq, op. cit., vol. II, p. 295; de Martens, ed., Nouveau Recueil ... vol. I (op. cit.), p. 213), article VII of the Treaty of 3 June 1814 between Austria and Bavaria (de Martens, ed., Nouveau Recueil ... vol. II (op. cit.), p. 21); article IX of the Treaty of 18 May 1815 between Prussia and Saxony (de Clercq, op. cit., vol. II, pp. 520-521; de Martens, ed., Nouveau Recueil ... vol. II (op. cit.), pp. 277-278); article XIX of the Treaty of Cession of 16 March 1816 under which the Kingdom of Sardinia ceded to Switzerland various territories in Savoy which were incorporated into the Canton of Geneva (de Martens, ed., Nouveau Recueil ... (Göttingen, Dieterich, 1880, vol. IV, p. 223; Descamps and Renault, Recueil ... XIXe siècle (op. cit.), vol. I, p. 555).

<sup>401/</sup> Paenson, op. cit., p. 113.

(34) Succession to special State debts which were used to meet the needs of a particular territory is more likely if the debts in question are backed by a special security arrangement. The predecessor State may have secured its special debt on tax revenue derived from the territory which it is losing or on property situated in the territory in question, such as forests, mines or railways. In both cases, succession to such debts is usually accepted.

(35) On rare occasions, however, the passing of localized debts has been refused. One such example is article 255 of the Treaty of Versailles, which provided a number of exceptions to the general principle, laid down in article 254, of the passing of public debts of the predecessor State.<sup>402/</sup> Thus, in the case of all ceded territories other than Alsace-Lorraine, that portion of the debt of the German Empire or the German States which represented expenditure by them on property and possessions belonging to them and situated in the ceded territories was not assumed by the successor States. Obviously, political considerations played a role in this particular case.

(36) From the foregoing observations, it may be concluded that, while there appears to exist a fairly well established practice requiring the successor State to assume a localized State debt, no such consensus can be found with regard to general State debts. Although the refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice, political considerations or considerations of expediency have admittedly played some part in such refusals. At the same time, those considerations appear to have weighed even more heavily in cases where the successor State ultimately assumed a portion of the general debt of the predecessor State, as occurred in the peace treaties ending the First World War. In any event, it must also be acknowledged that the bulk of the treaty precedents available consists largely of treaties terminating a state of war; and there is a strong presumption that that is not a context in which States express their free consent or are inclined to yield to the demands of justice, of equity or even of law.

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<sup>402/</sup> See para. (13) of this commentary, above.

(37) Whatever the case, the refusal of the successor State to assume part of the national public debt of the predecessor State appears to have logic on its side, as one author remarks, although he agrees that this approach is hard for the ceding State, which is deprived of part of its property without being relieved of its debt, whereas the cessionary State is enriched or enlarged without a corresponding increase in its debt burden.<sup>403/</sup> It is useless, however, to seek for the existence of an incontestable rule of international law to avoid this situation. Under the circumstances, the Commission proposes, in the absence of an agreement between the parties concerned, the introduction of the concept of equity as the key to the solution of problems relating to the passing of State debts. That concept has already been adopted by the Commission in parts II and III of the draft and therefore does not require detailed commentary here.<sup>404/</sup>

(38) The rules enunciated in article 35 keep certain parallelisms with those of articles 13 and 25, relating to the passing of State property and of State archives respectively. Paragraph 1 thus provides for, and thereby attempts to encourage, settlement by agreement between the predecessor and successor States. Although it reads "the passing ... is to be settled ...", the paragraphs should not be interpreted as presuming that there is always such a passing. Paragraph 2 provides for the situation where no such agreement can be reached. It stipulates that "an equitable proportion" of the State debt of the predecessor State shall pass to the successor State. In order to determine what constitutes "an equitable proportion", all the relevant factors should be taken into account in each particular case. Such factors must include, among others, "the property, rights and interests" which pass to the successor State in relation to the State debt in question.

(39) Article 35 is drafted in such a way as to cover all types of State debts, whether general or localized. It may readily be seen that under paragraph 2 localized State debts would pass to the successor State in an equitable proportion, taking into account, inter alia, the "property, rights and interests" which pass to the successor State in relation to such localized State debts.

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<sup>403/</sup> L. Cavaré, Le droit international public positif, 3rd ed. (Paris Pedone, 1967), vol. I, p. 380.

<sup>404/</sup> See paras. 76-85 above.

## Article 36

### Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

### Commentary

(1) Article 36 concerns succession of States in respect of State debts when the successor State is a newly independent State. This is an article parallel to article 14, relating to succession of States in respect of State property in the case of a newly independent State and to article 26 concerning succession to State archives in the same case.

(2) The Commission has on several occasions affirmed the necessity and utility of including "newly independent State" as a distinct type of succession of States. It did so in its draft articles on succession of States in respect of treaties<sup>405/</sup> and again in the present set of draft articles in connection with succession in respect of State property and State archives. It might be argued by some that decolonization is a thing of the past, belonging almost entirely to the history of international relations, and that consequently there is no need to include "newly independent State" in a typology of succession of States. In fact, decolonization is not yet fully completed. Important parts of the world are still dependent, even though some cover only a small area. And decolonization is far from complete from yet another point of view. If decolonization is taken to mean the end of a relationship based on political domination, it has reached a very advanced stage. But economic relations are vital, and are much less easily rid of the effects of colonization than political relations. Political independence may not be genuine independence and, in reality, the economy of newly independent States may long remain particularly dependent on the former metropolitan country and firmly bound

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<sup>405/</sup> Yearbook ... 1974, vol. II (Part One), pp. 167-169, document A/9610/Rev.1, paras. 45 and 57-60.

to it, even allowing for the fact that the economies of nearly all countries are interdependent. Hence it cannot be denied that draft articles on succession of States in respect of State debts may be useful, not only with respect to territories which are still dependent but also with respect to countries which have recently attained political independence, and even to countries which attained political independence much earlier. In fact, the debt problem, including the servicing of the debt, the progressive amortization of the principal and the payment of interest, all spread over several years, if not decades, is the most typical example of matters covered by succession which long survive political independence. Thus the effects of problems connected with succession of States in respect of State debts continue to be felt for many decades and would appear more lasting than the effects of succession in respect of treaties, State property or State archives, in each of which cases the Commission nevertheless devoted one or more articles to decolonization.

(3) Before reviewing State practice and the views of jurists on the fate of State debts in the process of decolonization, it may be of historical interest to note the extent to which colonial Powers were willing, in cases of colonization which occurred during the last century and the early 1900s, to assume the debts of the territories colonized. State practice seems contradictory in this respect. In the cases of the annexation of Tahiti in 1880 (by internal law), Hawaii in 1898 (by internal law), and Korea in 1910 (by treaty), the States which annexed those territories assumed wholly or in part the debts of the territory concerned.<sup>406/</sup> In an opinion relating to the Joint Resolution of the United States Congress providing for the annexation of Hawaii, the United States Attorney-General stated that:

"... the general doctrine of international law, founded upon obvious principles of justice, is that, in the case of annexation of a State or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed State or territory - it takes the burdens with the benefits."<sup>407/</sup>

In the case of the annexation of the Fiji Islands in 1874, it appears that the United Kingdom, after annexation, agreed voluntarily to undertake payment of certain debts contracted by the territory before annexation, as an "act of grace".<sup>408/</sup>

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<sup>406/</sup> Feilchenfeld, op. cit., pp. 369, 377 and 378, respectively.

<sup>407/</sup> O'Connell, State Succession ... (op. cit.), p. 377.

<sup>408/</sup> Feilchenfeld, op. cit., p. 292.

The metropolitan Power did not recognize a legal duty to discharge the debts concerned. A similar position appears to have been taken on the annexation of Burma by the United Kingdom in 1886.<sup>409/</sup>

(4) In other cases, the colonial Powers refused to honour the debts of the territory concerned. In the 1895 treaty establishing the (second) French protectorate over Madagascar, article 6 stated that, inter alia,

"The Government of the French Republic assumes no responsibility with respect to undertakings, debts or concessions contracted by the Government of Her Majesty the Queen of Madagascar before the signing of the present Treaty." <sup>410/</sup>

Shortly after the signing of that treaty, the French Minister for Foreign Affairs declared in the Chamber of Deputies that, as regards the debts contracted abroad by the Madagascar Government,

"the French Government will, without having to guarantee them for our own account, follow strictly the rules of international law governing cases in which sovereignty over a territory is transferred as a result of military action." <sup>411/</sup>

According to one writer, while that declaration recognized the existence of rules of international law governing the treatment of debts of States that had lost their sovereignty, it also made clear that, according to the opinion of the French Government, there was no rule of international law which compelled an annexing State to guarantee or assume the debts of annexed States.<sup>412/</sup> The Annexation Act of 1896 by which Madagascar was declared a French colony was silent on the issue of succession to Malagasy debts. Colonial Powers also refused to honour debts of colonized territories on the grounds that the previously independent State retained a measure of legal personality. Such appears to have been the case with the protectorates established at the end of the nineteenth century in Tunisia, Annam, Tonkin and Cambodia.<sup>413/</sup> A further example may be mentioned, that of the

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<sup>409/</sup> Ibid., p. 379. It appears that the British Government did not consider Upper Burma to be a "civilized country", and that therefore rules more favourable to the "succeeding Government" could be applied than in the case of the incorporation of a "civilized" State. O'Connell, State Succession ... (op. cit.), pp. 358-360.

<sup>410/</sup> See Feilchenfeld, op. cit., p. 372, foot-note 20.

<sup>411/</sup> Ibid., p. 373, foot-note 22.

<sup>412/</sup> Ibid., p. 373.

<sup>413/</sup> Ibid., pp. 369-371.

annexation of the Congo by Belgium.<sup>414/</sup> In the 1907 treaty of cession, article 3 provided for the succession of Belgium in respect of all the liabilities and all the financial obligations of the "Congo Free State", as set forth in annex C. However, in article 1 of the Colonial Charter of 1908 it was stated that the Belgian Congo was an entity distinct from the metropolitan country, having separate laws, assets and liabilities, and that, consequently, the servicing of the Congolese debt was to remain the exclusive responsibility of the colony, unless otherwise provided by law.

#### Early decolonization

(5) In the case of the independence of 13 British colonies in North America, the successor State, the United States, did not succeed to any of the debts of the British Government. Neither the Treaty of Paris of 1783, by which Great Britain recognized the independence of those colonies, nor the constituent instruments of the United States (the Articles of Confederation of 1776 and 1777 and the Constitution of 1787) mention any payment of debts owed by the former metropolitan Power.<sup>415/</sup> This precedent was alluded to in the 1898 peace negotiations between Spain and the United States following the Spanish-American War. The Spanish delegation asserted that there were publicists who maintained that the 13 colonies which had become independent had paid 15 million pounds to Great Britain for the extinguishment of colonial debts. The American delegation however, viewed the assertion as entirely erroneous, pointing out that the preliminary (1782) and definitive (1783) treaties of peace between the United States and Great Britain contained no stipulation of the kind referred to.<sup>416/</sup>

(6) A similar resolution of the fate of the State debts of the predecessor State occurred in South America upon the independence of Brazil from Portugal in the 1820s. During the negotiations in London in 1822, the Portuguese Government claimed that part of its national debt should be assumed by the new State. In a dispatch of 2 August 1824, the Brazilian plenipotentiaries informed their Government of the way in which they had opposed that claim, which they deemed inconsistent with the examples furnished by diplomatic history. The dispatch states:

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<sup>414/</sup> Ibid., pp. 375-376.

<sup>415/</sup> Ibid., pp. 53-54.

<sup>416/</sup> Ibid., p. 54, foot-note 95.

"Neither Holland nor Portugal itself, when they separated from the Spanish Crown, paid anything to the Court of Madrid in exchange for the recognition of their independence; recently the United States likewise paid no monetary compensation to Great Britain for similar recognition." 417/

The Treaty between Brazil and Portugal of 29 August 1825 which resulted from the negotiations in fact made no express reference to the transfer of part of the Portuguese State debt to Brazil. However, since there were reciprocal claims involving the two States, a separate instrument - an additional agreement of the same date - made Brazil responsible for the payment of 2 million pounds sterling as part of an arrangement designed to liquidate those reciprocal claims.

(7) With regard to the independence of the Spanish colonies in America, 418/ article VII of the Treaty of Peace and Friendship, signed at Madrid on 28 December 1836 between Spain and newly independent Mexico, reads as follows:

"Considering that the Mexican Republic, by a Law passed on the 28th of June, 1824, in its General Congress, has voluntarily and spontaneously recognized as its own and as national, all debt contracted upon its Treasury \* by the Spanish Government of the Mother Country and by its Authorities, during the time they ruled the now independent Mexican Nation \*, until in 1821, they entirely ceased to govern it ... Her Catholic Majesty ... and the Mexican Republic, by common accord, desist from all claim or pretension which might arise upon these points, and declare that the 2 High Contracting Parties remain free and quit from henceforward for ever from all responsibility on this head." 419/

It thus seems clear that, in accordance with its unilateral statement independent Mexico had taken over only those debts of the Spanish State which had been contracted for and on behalf of Mexico and had already been charged to the Mexican Treasury.

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417/ Dispatch of 2 August 1824, in Arquivo diplomático da independência, vol. II, p. 95, cited by H. Accioly in Traité de droit international public, trans. P. Goulé (Paris, Sirey, 1940), vol. I, pp. 198-199. It would appear that the matter at issue was less a question of Brazil's taking over part of the Portuguese State public debt than of the payment of "compensation" in exchange for the "recognition of independence".

418/ See J.B. Moore, A Digest of International Law (Washington, D.C., US Government Printing Office, 1906), vol. I, pp. 342-343. See also Feilchenfeld, op. cit., pp. 251-257, and Jèze, "L'emprunt dans les rapports internationaux ..." (loc. cit.), p. 76. The case of Cuba is dealt with in para. (12) of this commentary, below.

419/ British and Foreign State Papers, 1835-1836 (London, Ridgway, 1853), vol. 24, pp. 868-869.



(8) Article V of the Treaty of Peace and Friendship and Recognition, signed at Madrid on 16 February 1840 between Spain and Ecuador, in turn provided that

"The Republic of Ecuador ... recognizes voluntarily and spontaneously every debt contracted upon the credit of its Treasury, whether by direct orders of the Spanish Government or by its authorities established in the Territory \* of Ecuador, provided that such debts are always registered in the account books belonging to the treasuries of the ancient kingdom and presidency of Quito, or provided that it is shown through some other legal and equivalent means that they have been contracted within the said Territory by the said Spanish Government and its authorities while they administered the now independent Ecuadorian Republic, until they ceased governing it in the year 1822 ..." 420/

(9) A provision more or less similar to the one in the treaties mentioned above may be found in article V of the Treaty of 30 March 1845 between Spain and Venezuela, in which Venezuela recognized

"as a national debt ... the sum to which the debt owing by the Treasury of the Spanish Government amounts and which will be found entered in the ledgers and accounts books of the former Captaincy-General of Venezuela, or which may arise from other fair and legitimate claims." 421/

Similar wording may be found in a number of treaties concluded between Spain and the former colonies. 422/

(10) The cases of decolonization of the former Spanish dependencies in America would seem to represent a departure from the earlier precedents set by the United States and Brazil. However, it may be noted that the departure was a limited one, not involving a succession to the national debt of the predecessor State, but rather to two types of debts: those contracted by the predecessor State for and on behalf of the dependent territory, and those contracted by an organ of the colony. As has been noted, 423/ the latter category of debts,

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420/ Ibid., 1840-1841 (1857), vol. 29, pp. 1316-1317.

421/ Ibid., 1846-1847 (Harrison, 1860), vol. 35, p. 302.

422/ For example, article IV of the Treaty between Spain and Argentina of 9 July 1859 (ibid., 1859-1860 (Ridgway, 1867), vol. 50, p. 1161); article 11 of the Treaty between Spain and Uruguay of 9 October 1841 (ibid., 1841-1842 (1858), vol. 30, p. 1360); article V of the Treaty between Spain and Costa Rica of 10 May 1850 (ibid., 1849-1850 (Harrison, 1863), vol. 39, p. 1341); article V of the Treaty between Spain and Nicaragua of 25 July 1850 (ibid., p. 1340); article IV of the Treaty between Spain and Guatemala of 29 May 1863 (ibid., 1868-1869 (Ridgway, 1874), vol. 59, p. 120); article IV of the Treaty between Spain and El Salvador of 25 June 1865 (ibid., 1867-1868 (1873), vol. 58, pp. 1251-1252).

423/ See paras. (14) et seq. of the commentary to article 31, above.

considered as proper to the territory itself, are in any event excluded from the subject-matter of the present draft articles as they do not properly fall within the scope and definition of State debts of the predecessor State. In spite of the fact that overseas possessions were considered, under the colonial law of the time, a territorial extension of the metropolitan country, with which they formed a single territory, it did not occur to writers that any part of the national public debt of the metropolitan country should be imposed on those possessions.<sup>424/</sup> That was a natural solution, according to one author, because "the creditors [of the metropolitan country] could never reasonably assume that their debts would be paid out of the resources to be derived from such a financially autonomous territory".<sup>425/</sup> What was involved was not a participation of the former Spanish American colonies in the national debt of the metropolitan territory of Spain, but a take-over by those colonies of State debts, admittedly of Spain, but contracted by the metropolitan country on behalf and for the benefit of its overseas possessions.<sup>426/</sup> It must also be pointed out that in the case of certain treaties there was a desire to achieve a "package deal" involving various reciprocal compensations rather than any real participation in the debts contracted by the predecessor State for and on behalf of the colony. Finally, it may be noted that, in most of the cases involving Spain and her former colonies, the debts assumed by the successor States were assumed by means of internal legislation, even before the conclusion of treaties with Spain, which often merely took note of the provisions of those internal laws. None of the treaties, however, speak of rules or principles of international law governing succession to State debts. Indeed, many of the treaty provisions indicate that what was involved was a "coluntary and spontaneous" decision on the part of the newly independent State.

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<sup>424/</sup> Cases of unlimited colonial exploitation whereby a metropolitan Power, during the time of the old colonial empires, was able to cover part of its national debt by appropriating all of the resources or raw materials of the colonies, have been disregarded as being archaic or rare. See foot-note 471 below.

<sup>425/</sup> Jèze, "L'emprunt dans les rapports internationaux ..." (loc. cit.) p. 74.

<sup>426/</sup> It seems clear, however, that the South American republics which attained independence did not seek to determine whether the metropolitan country had been fully justified in including the debt among the liabilities of their respective treasuries. The inclusion of that debt in the accounts of the treasury of the colony by the metropolitan country was based on an assumption that the debt had been concluded on behalf and for the benefit of the colony. Such an assumption was vigorously challenged in later cases of succession. See para. (12) of this commentary, below.

(11) Mention should, however, be made of one Latin American case which appears to be at variance with the general practice of decolonization in that region as outlined in the preceding paragraph. This relates to the independence of Bolivia. A Treaty of Recognition, Peace and Friendship, signed between Spain and Bolivia, on 21 July 1847, provides in article 5 that:

"The Republic of Bolivia ... has already spontaneously recognized, by the law of 11 November 1844, the debt contracted against its treasury, either by direct orders of the Spanish Government \*, or by orders emanating from the established authorities of that Government in the Territory of Upper Peru, now the Republic of Bolivia; and [recognizes] as consolidated debt of the Republic, in the same category as the most highly privileged debt, all the credits, of whatever description, for pensions, salaries, supplies, advances, freights, forced loans, deposits, contracts and every other debt, either arising from the war or prior thereto \*, which are a charge upon the aforesaid treasury, provided always that such credits proceed from the direct orders of the Spanish Government \* or of their established authorities in the provinces which now form the Republic of Bolivia ..." 427/

(12) The Anglo-American precedent of 1783 and the Portuguese-Brazilian precedent of 1825 were followed by the Peace Treaty of Paris of 10 December 1898, concluded at the end of the war between the United States and Spain. The charging of Spanish State debts to the budget of Cuba by Spain was contested. The assumption that charging a debt to the accounts of the Cuban Treasury meant that it was a debt contracted on behalf and for the benefit of the island was successfully challenged by the United States plenipotentiaries. The Treaty of 10 December 1898 freed Spain only from liability for debts proper to Cuba, that is, debts contracted after 24 February 1895 and the mortgage debts of the municipality of Havana. It did not allow succession to any portion of the Spanish State debt which Spain had charged to Cuba. 428/

#### Decolonization since the Second World War

(13) An examination of cases of decolonization since the Second World War indicates little conformity in the practice of newly independent States. There are precedents in favour of the passing of State debts and precedents against, as well as cases of repudiation of such debts after they had been accepted. It is not the intention of the Commission to overburden this commentary by including a complete

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427/ British and Foreign State Papers, 1868-1869 (op. cit.), vol. LIX, p. 423.

428/ Feilchenfeld, op. cit., pp. 329-343; Moore, op. cit., pp. 351 et seq., and Jèze, "L'emprunt dans les rapports internationaux ..." (loc. cit.), p. 84.

catalogue of all cases of decolonization since the Second World War. The cases mentioned below are not intended to represent an exhaustive survey of practice in the field, but are rather provided as illustrative examples.

(14) The independence of the Philippines was authorized by the Philippines Independence Act (otherwise known as the "Tydings-McDuffie Act") of the United States Congress, approved on 24 March 1934.<sup>429/</sup> By that Act, a distinction was made between the bonds issued before 1934 by the Philippines with the authorization of the United States Congress and other public debts. It provided that the United States declined all responsibility for those post-1934 debts of the archipelago. The inference has accordingly been drawn that the United States intended to maintain pre-1934 congressionally authorized debts.<sup>430/</sup> As regards these pre-1934 debts, by a law of 7 August 1939, the proceeds of Philippine export taxes were allocated to the United States Treasury for the establishment of a special fund for the amortization of the pre-1934 debts contracted by the Philippines with United States authorization. Under the 1934 and 1939 Acts, it was provided that the archipelago could not repudiate loans authorized by the predecessor State and that if, on the date of independence, the special fund should be insufficient for service of that authorized debt, the Philippines would make a payment to balance the account. Under both its Constitution (article 17) and the Treaty of 4 July 1946 with the United States, the Philippines assumed all the debts and liabilities of the islands.

(15) The case of the independence of India and Pakistan is another example where the successor State accepted the debts of the predecessor State. It would be more correct to speak of successor States, and in fact this seems a two-stage succession as a result of partition, Pakistan succeeding to India, which succeeded to the United Kingdom. It has been explained that:

"There was no direct repartition of the debts between the two Dominions. All financial obligations, including loans and guarantees, of the central Government of British India remained the responsibility of India ... While India continued to be the sole debtor of the central debt, Pakistan's share of this debt, proportionate to the assets it received, became a debt to India." <sup>431/</sup>

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<sup>429/</sup> O'Connell, State Succession ... (op. cit.), p. 433; G. Fischer, Un cas de décolonisation - Les Etats-Unies et les Philippines (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 264; and M. Whiteman, Digest of International Law (Washington, D.C., U.S. Government Printing Office, 1963), vol. 2, pp.211-213, 854.

<sup>430/</sup> Fischer, op. cit., p. 264.

<sup>431/</sup> O'Connell, State Succession ... (op. cit.), p. 404.

It does not seem that many distinctions were made regarding the different categories of debt. Only one appears to have been made by the Committee of Experts set up to recommend the apportionment of assets and liabilities. This was the public debt, composed of permanent loans, treasury bills and special loans, as against the unfunded debt, which comprised savings bank deposits and bank deposits. These various obligations were assigned to India, but it is not indicated whether they were debts proper to the dependent territory, which would have devolved upon it in any event, or debts of the predecessor State, which would thus have been transferred to the successor State. The problem to which the Committee of Experts devoted most attention appears to have been that of establishing the modalities for apportioning the debt between India and Pakistan. An agreement of 1 December 1947 between the two States was to embody the practical consequences of this and determine the respective contributions. That division, however, has not been implemented, owing to differences between the two States as to the sums involved.

(16) The problems arising from the succession of Indonesia to the Kingdom of the Netherlands were, as far as debts are concerned, reflected essentially in two instruments: the Round-Table Conference Agreement, signed at The Hague on 2 November 1949,<sup>432/</sup> and the Indonesian Decree of 15 February 1956, which repudiated the debt, Indonesia having denounced the 1949 agreements on 13 February 1956.<sup>433/</sup> The Financial and Economic Agreement (which is only one of the Conference agreements) specifies the debts which Indonesia agreed to assume.<sup>434/</sup> Article 25 distinguishes four series of debts: (a) a series of six consolidated loans; (b) debts to third countries; (c) debts to the Kingdom of the Netherlands; (d) Indonesia's internal debts.

(17) The last two categories of debts need not be taken into consideration here. Indonesia's debts to the Kingdom of the Netherlands were in fact debt-claims of the predecessor State, and thus do not come within the scope of the present commentary. The internal debt of Indonesia at the date of the transfer of sovereignty are also excluded by definition. However, it should be noted that

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<sup>432/</sup> United Nations, Treaty Series, vol. 69, p. 3. See also O'Connell, State Succession ... (op. cit.), pp. 437-438, and Paenson, op. cit., pp. 77-78.

<sup>433/</sup> Rousseau, Droit international public (op. cit.), pp. 451-452.

<sup>434/</sup> United Nations, Treaty Series, vol. 69, pp. 252-258, draft Financial and Economic Agreement, articles 25-27.

this category was not precisely defined. The predecessor State later interpreted that provision as including debts which the successor State considered as "war debts" or "odious debts". It would appear that this was a factor in the denunciation and repudiation of the debt in 1956.<sup>435/</sup>

(18) The other two categories of debts to which the newly independent State succeeded involved: (a) consolidated debts of the Government of the Netherlands-Indies <sup>436/</sup> and the portion attributed to it in the consolidated national debt of the Netherlands consisting of a series of loans issued before the Second World War; (b) certain specific debts to third States.<sup>437/</sup>

(19) During the Round-Table Conference, Indonesia brought up issues relating to the degree of autonomy which its organs had possessed by comparison with those of the metropolitan country at the time when the loans were contracted. The Indonesian plenipotentiaries also, and in particular, referred to the problem of their assignment, and the utilization of and benefit derived from those loans by the territory. As in the other cases, it appears that the results of the negotiations at The Hague should be viewed as a whole and in the context of an over-all arrangement. The negotiations had led to the creation of a "Netherlands-Indonesian Union", which was dissolved in 1954. Shortly afterwards, in 1956, Indonesia repudiated all of its colonial debts.

(20) On the accession of Libya to independence, the General Assembly of the United Nations resolved the problem of the succession of States, including the succession to debts, in resolution 388 (V) of 15 December 1950 entitled "Economic and financial provisions relating to Libya", article IV of which stated that "Libya shall be exempt from the payment of any portion of the Italian public debt".

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<sup>435/</sup> See "L'Indonésie répudie sa dette envers les Pays-Bas", in Libre Belgique of 12 August 1956, quoted in: France, Présidence du Conseil et Ministère des affaires étrangères, La documentation française - Problèmes économiques (Paris, 28 August 1956), No. 452, pp. 17-18.

<sup>436/</sup> It has been maintained that these debts were contracted by the dependent territory on its own behalf and for its own account (Rousseau, Droit international public (op. cit.) p. 451; O'Connell, State Succession ... (op. cit.) p. 437). It appears, however, that the loans were contracted under Netherlands legislation; thus the argument could be made that the debts were contracted by the metropolitan Power for the account of the dependent territory.

<sup>437/</sup> This involved debts contracted under the Marshall Plan and to the United States in 1947, to Canada in 1945 and to Australia in 1949.

(21) Guinea attained its independence in 1958, following its negative vote in the constitutional referendum of 28 September of the same year establishing the Fifth Republic of the French Community. One writer stated: "Rarely in the history of international relations has a succession of States begun so abruptly".<sup>438/</sup> The implementation of a monetary reform in Guinea led to that country's leaving the franc area. To that was added the fact that diplomatic relations between the former colonial Power and the newly independent State were severed for a long period. This situation was not conducive to the promotion of a swift solution of the problems of succession of States which arose some 20 years ago. However, it seems that a trend towards a settlement has emerged since the resumption of diplomatic relations between the two States in 1975. But apparently the problem of debts has not assumed a significant dimension in the relations between the two States; it seems to be reduced essentially to questions regarding civil and military pensions.

(22) Among other newly independent States which had formerly been French dependencies in Africa, the case of Madagascar<sup>439/</sup> may be noted. Madagascar, like all former French overseas territories in general, had legal personality, implying a degree of financial autonomy. The island was thus able to subscribe loans and exercised that right on the occasion of five public loans in 1897, 1900, 1905, 1931 and 1942. The decision in principle to issue a loan was made in Madagascar by the Governor-General, after hearing the views of various administrative organs and economic and financial delegations. If the process had stopped there and it had been possible for the public actually to subscribe to the loan, the debt would simply have been contracted within the framework of the financial autonomy of the dependent territory. The loan would then have had to be termed a "debt proper to the territory" and could not have been attributed to the predecessor State; consequently, it would not have been considered within the

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<sup>438/</sup> Gonidec, quoted by G. Tixier in "La succession à la régie des chemins de fer de l'A.O.F.", Annuaire français de droit international, 1965 (Paris, 1966), vol. XI, p. 921.

<sup>439/</sup> See Bardonnnet, op. cit.

scope of the present commentary.<sup>440/</sup> But it appears that a further decision had to be taken by the administering Power. The decision-making process, begun in Madagascar, was completed within the framework of the laws and regulations of the central Government of the administering Power. Approval could have been given either by a decree adopted in the Conseil d'Etat or by statute. In actual fact, all the Malagasy loans were the subject of legislative authorization by the metropolitan country.<sup>441/</sup> This authorization might be said to have constituted a substantial condition of the loan, a sine qua non, without which the issue of the loan would have been impossible. The power to enter into a genuine commitment in this regard lay only, it would seem, with the administering Power, and by so doing, it assumed an obligation which might be compared with the guarantees required by IBRD, which confer on the predecessor State the status of "primary obligor" and not of "surety merely".<sup>442/</sup>

(23) These debts were assumed by the Malagasy Republic, which, it appears, did not dispute them at the time. The negotiators of the Franco-Malagasy Agreement of 27 June 1960 on co-operation in monetary, economic and financial matters thus did not work out any special provisions for this succession. Later, following a change of régime, the Government of Madagascar, denounced the 1960 Agreement on 25 January 1973.<sup>443/</sup>

(24) The former Belgian Congo acceded to independence on 30 June 1960, in accordance with article 259 of the Belgian Act of 19 May 1960. Civil war erupted, and diplomatic relations between the two States were severed from 1960 to 1962.

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<sup>440/</sup> For a different reason, the first Malagasy loan of 1897 must be disregarded in the present commentary. It was subscribed for a term of 60 years, and redemption was completed in 1957, prior to the date of independence. Whether it is defined as a debt exclusive to the territory or a debt of the metropolitan country, this loan clearly does not concern the succession of States. It remains an exclusively colonial affair. The other loans do concern the succession of States because their financial consequences continued to have an effect in the context of decolonization.

<sup>441/</sup> See Act of 5 April 1897; Act of 14 April 1900; Act of 19 March 1905; Act of 22 February 1931; Act of 16 April 1942. For further details, see the table of Malagasy public loans in Bardonnat, op. cit., p. 650.

<sup>442/</sup> See paras. 54 to 57 of this commentary below.

<sup>443/</sup> See Rousseau, Droit international public (op. cit.), p. 454.



The problems of succession of States were not resolved until five years later, in two conventions dated 6 February 1965. The first relates to "the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony".<sup>444/</sup> The second concerns the statutes of the "Belgo-Congolese Amortization and Administration Fund".<sup>445/</sup>

(25) The classification of debts was made in article 2 of the Convention for the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony, which distinguished three categories of debt: (1) "Debt expressed in Congolese francs and the debt expressed in foreign currencies held by public agencies of the Congo as at 30 June 1960 ..."; (2) "Debt expressed in foreign currencies and guaranteed by Belgium ..."; (3) "Debt expressed in foreign currencies and not guaranteed by Belgium (except the securities of such debt held by public agencies of the Congo) ...". This classification thus led ultimately to a distinction between the internal debt and the external debt.

(26) The internal debt should not engage our attention for long, not because it was "internal" but because it was held by public agencies of the Congo,<sup>446/</sup> or as one writer specifies, "three quarters" of it was.<sup>447/</sup> It was thus intermingled with the debts of local public authorities and hence cannot be regarded as a State debt of the predecessor State.

(27) The external debt was subdivided into guaranteed external debt and non-guaranteed external debt. The external debt guaranteed or assigned by Belgium extended to two categories of debt, which are set out in schedule 3 annexed to the above convention.<sup>448/</sup> The first concerns the Congolese debt in respect of which Belgium intervened only as guarantor. It was a debt denominated in foreign currencies (United States dollars, Swiss francs and other currencies). In this category, mention may be made of the loan agreements concluded between the Belgian Congo and the World Bank, which are referred to in article 4 of the Belgo-Congolese Agreement. The guarantee and liability of Belgium could

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<sup>444/</sup> United Nations, Treaty Series, vol. 540, p. 227.

<sup>445/</sup> Ibid., p. 275.

<sup>446/</sup> A list of these agencies and funds is annexed to the Convention: ibid., p. 253.

<sup>447/</sup> C. Lejeune, "Le contentieux financier belgo-congolais", Revue belge de droit international (Brussels), 1969-2, p. 546.

<sup>448/</sup> United Nations, Treaty Series, vol. 540, p. 255.

naturally not extend, with regard to the IBRD loans, beyond "the amounts withdrawn by the Belgian Congo ... before 30 June 1960", i.e. before independence. When it gave its guarantee, it seemed that Belgium intended to act "as primary obligor and not as surety merely". According to the actual provisions of the agreements with IBRD, the character of State debt of the predecessor State emerges even more clearly for the second category of debt guaranteed by Belgium.

(28) The second type of external debt was called "assigned" debt; it relates to "loans subscribed by Belgium, the proceeds of which were assigned to the Belgian Congo".<sup>449/</sup> This is a particularly striking illustration of a State debt of the predecessor State. Belgium was no longer a mere guarantor. The obligation fell directly on Belgium, and it was that country which was the debtor.

(29) The two types of debt, guaranteed and assigned, were to become the responsibility of Belgium. That is what is provided by article 4 of the Convention for the settlement of questions relating to the public debt, in the following terms:

"1. Belgium shall assume sole liability in every respect for the part of the public debt listed in schedule 3, which is annexed to this Convention and which forms an integral part thereof. [The preceding paragraphs describe the contents of schedule 3].

...

"2. With regard to the Loan Agreements concluded between the Belgian Congo and the International Bank for Reconstruction and Development, the part of the public debt referred to in paragraph 1 of this article shall comprise only the amounts withdrawn by the Belgian Congo, under those Agreements, before 30 June 1960." <sup>450/</sup>

(30) The external debt not guaranteed by Belgium, which was expressed in foreign currency in the case of the "Dillon loan" issued in the United States and in Belgian currency in the case of other loans, was owed, as one writer says, to "people who have been referred to as 'the holders of colonial bonds', 95 per cent of whom were Belgians".<sup>451/</sup> What would seem to have been involved was a kind of "colonial debt", which would be outside the scope of consideration of the present commentary. It might be relevant, however, according to another author's view, "that the financial autonomy of the Belgian Congo was purely formal in nature and that the administration of the colony was completely in the hands of the Belgian

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<sup>449/</sup> *Ibid.*, p. 257.

<sup>450/</sup> *Ibid.*, p. 231.

<sup>451/</sup> Lejeune, *loc. cit.*, p. 546.

authorities".<sup>452/</sup> However, neither Belgium nor the Congo agreed to have that debt devolve upon it, and the two countries avoided the difficulty by setting up a special international agency to handle the debt. That is the significance of articles 5 to 7 of the Convention for the settlement of questions relating to the public debt, which established a Fund.<sup>453/</sup>

(31) The establishment of the Fund, an "autonomous international public agency", and the arrangement for joint contributions to it implied two things:

(a) Neither State in any sense accepted the status of debtor. That is made clear by article 14 of the Convention:

"The settlement of the public debt of the Belgian Congo, which is the subject of the foregoing provisions, constitutes a solution in which each of the High Contracting Parties reserves its legal position with regard to recognition of the public debt of the Belgian Congo."

(b) The two States nevertheless regarded the matter as having been finally settled. That is stated in the first paragraph of article 18 of the Convention:

"The foregoing provisions being intended to constitute a final settlement of the problems to which they relate, the High Contracting Parties undertake to refrain in the future from any discussion and from any action or recourse whatsoever in connexion either with the public debt or with the portfolio of the Belgian Congo. Each Party shall hold the other harmless, fully and irrevocably, for any administrative or other act performed by the latter Party in connexion with the public debt and portfolio of the Belgian Congo before the date of the entry into force of this Convention."

(32) In the case of the independence of Algeria, article 18 of the "Declaration of Principles concerning Economic and Financial Co-operation", contained in the Evian Agreements,<sup>454/</sup> provided for the succession of the Algerian State to

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<sup>452/</sup> Rousseau, Droit international public (op. cit.), p. 453.

<sup>453/</sup> See article 5, para. 1, of the Convention:

"Belgium and the Congo jointly establish, by this Convention, an autonomous international public agency to be known as 'the Belgo-Congolese Amortization and Administration Fund', hereinafter referred to as 'the Fund'. The Statutes of the Fund shall be established by a separate Convention."

The Fund was to receive an annual contribution in Belgian francs from the two States, two-fifths of which was to come from Belgium and three-fifths from the Congo (article 11 of the Convention).

<sup>454/</sup> Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement between France and Algeria: United Nations, Treaty Series, vol. 507, p. 25.

France's rights and obligations in Algeria. However, neither this declaration of principles nor the other declarations contained in the Evian Agreements referred specifically to public debts, much less to the various categories of such debts, so that authors have taken the view that the Agreements were silent on the matter.<sup>455/</sup>

(33) Negotiations on public debts were conducted by the two countries from 1963 until the end of 1966. They resulted in a number of agreements, the most important of which was the agreement of 23 December 1966, which settled the financial differences between the two countries through the payment by Algeria to France of a lump sum of 400 million francs (40 billion old francs). Algeria does not seem to have succeeded to the "State debts of the predecessor State" by making the payment since, if it had so succeeded, it would have paid the money not to the predecessor State (which would by definition have been the debtor), but to any third parties to which France owed money in connection with its previous activities in Algeria. What was involved was, rather, debts which might be termed "miscellaneous" debts, resulting from the takeover of all public services by the newly independent State, assumed by it as compensation for that take-over or in respect of the repurchase of certain property. Also included were ex post facto debts covering what the successor State had to pay to the predecessor State as a final settlement of the succession of States. Algeria was not assuming France's State debts (to third States) connected with its activities in Algeria.

(34) In the negotiations, Algeria argued that it had agreed to succeed to France's "obligations" only in return for certain French commitments to independent Algeria. Under the aforementioned "Declaration of principles", a French contribution to the economic and social development of Algeria and "Marketing facilities on French territory for Algerian surplus production" (wine)<sup>456/</sup> were to be the quid pro quo for the obligations assumed by Algeria under article 18 of the Declaration. The Algerian negotiators maintained that that "contractual" undertaking between Algeria and France could only be regarded as valid if two conditions were met: (a) that the respective obligations were properly balanced, and (b) that the financial situation inherited by Algeria was a sound one.

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<sup>455/</sup> Rousseau, Droit international public (op. cit.), p. 454, and O'Connell, State Succession ... (op. cit.), pp. 444-446.

<sup>456/</sup> United Nations, Treaty Series, vol. 507, pp. 57 and 59.

(35) Algeria also refused to assume debts representing loans which France had contracted during the war of independence for the purpose of carrying out economic projects in Algeria. The Algerian delegation argued that the projects had been undertaken in a particular political and military context in order to advance the interests of the French settlers and of the French presence in general and that they fell within the over-all framework of France's economic strategy, since nearly all of France's investment in Algeria had been complementary in nature. The Algerians also argued that the departure of the French population during the months preceding independence had resulted in massive disinvestment and that Algeria could not pay for investments at a time when the necessary income had dried up and, in addition, a process of disinvestment had developed.

(36) The Algerian negotiators stated that a substantial part of the economic programme in Algeria had had the effect of incurring debts for that country while it still had dependent status. They argued that, during the seven-and-a-half years of war, the administering Power had for political reasons been over-generous in pledging Algeria's backing for numerous loans, thus seriously compromising the Algerian treasury. Finally, the Algerian negotiators refused to assume certain debts they considered to be "odious debts" or "war debts", which France had charged to Algeria.

(37) This brief account, which shows the extent of the controversy surrounding even the question how to refer to the debts (French State debts or debts proper to the dependent territory), gives an indication of the complexity of the Algerian-French financial dispute, which the negotiators finally settled at the end of 1966.<sup>457/</sup>

(38) As to the independence of British dependencies, it would appear that borrowings of British colonies were made by the colonial authorities and were charges on colonial revenues alone.<sup>458/</sup> The general practice appears to have been that, upon attaining independence, former British colonies succeeded to four categories of loans: loans under the Colonial Stock Acts; loans from IBRD; colonial welfare and development loans; and other raisings in the London and

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<sup>457/</sup> One writer has stated that the 1966 agreement constituted "a compromise" (Rousseau, Droit international public (op. cit.), p.454.

<sup>458/</sup> O'Connell, State Succession ... (op. cit.), p. 423.

local stock market.<sup>459/</sup> It would therefore seem that such debts were considered to be debts proper to the dependent territory and hence might be outside the scope of the draft articles, in view of the definition of State debts as those of the predecessor State.

#### Financial situation of newly independent States

(39) International law cannot be codified or progressively developed in isolation from the political and economic context in which the world is living at present. The Commission believes that it must reflect the concerns and needs of the international community in the rules which it proposes to that community. For that reason, it is impossible to evolve a set of rules concerning State debts for which newly independent States are liable, without to some extent taking into account the situation in which a number of these States are placed.

(40) Unfortunately, statistical data are not available to show exactly how much of the extensive debt problem of these countries is due to the fact of their having attained independence and assumed certain debts in connection with the succession of States, and how much to the loans which they have had to contract as sovereign States in an attempt to overcome their under-development.<sup>460/</sup> Similarly, the relevant statistics covering all the developing countries cannot easily be broken down in order to individualize and illustrate the specific situation of the newly independent States since the Second World War. The figures given below relate to the external debt of the developing countries; they include the Latin American countries - i.e., countries decolonized long ago. Here the aim is not so much to calculate precisely the financial burden resulting from the assumption by the newly independent States of the debts of the predecessor States as to highlight a dramatic and widespread debt problem affecting the majority of the developing countries. This context and this situation impart particular and specific overtones to succession of States involving newly independent States that do not generally arise in connection with other types of succession.

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<sup>459/</sup> Ibid., p. 424.

<sup>460/</sup> The statistics published or made available by international economic or financial organizations are not sufficiently detailed to enable a distinction to be drawn between debts which predate and debts which postdate independence. OECD has published various studies and numerous tables giving a breakdown of debts by debtor country, type of creditor and type of debt, but with no indication of whether the debts are "colonial debts". See OECD, Total external liabilities of developing countries (Paris, 1974).

(41) The increasingly burdensome debt problem of these countries has become a structural phenomenon whose profound effects were apparent long before the present international economic crisis. In 1960, the developing countries' external public debt already amounted to several billion dollars. During the 1960s, the total indebtedness of the 80 developing countries studied by UNCTAD increased at an annual rate of 14 per cent, so that at the end of 1969 the external public debt of these 80 countries amounted to \$59 billion.<sup>461/</sup> It was estimated that at the same date the total sums disbursed by those countries simply for servicing the public debt and repatriation of profits was \$11 billion.<sup>462/</sup> At that time already, in certain developing countries the servicing of the public debt alone consumed over 20 per cent of their total export earnings. In its annual report for 1980,<sup>463/</sup> the World Bank estimated that by the end of 1979, the outstanding medium-term and long-term dispersed debt from public and private sources of developing countries would reach \$376 billion. Service payments on that debt were estimated to amount to \$69 million.

(42) This considerable increase in the external debt placed an unbearable burden on certain countries, particularly a number of developing countries which faced an alarming situation:

"During the past years, a growing number of developing countries have experienced debt crises which warranted debt relief operations. Multilateral debt renegotiations were undertaken, often repeatedly, for Argentina, Bangladesh, Brazil, Chile, Ghana, India, Indonesia, Pakistan, Peru and Turkey. In addition, around a dozen developing countries were the subject of bilateral debt renegotiations. Debt crises have disruptive effects on the economies of developing countries and a disturbing influence on creditor/debtor relationships. Resource providers and recipients should therefore ensure that the international resource transfer is effected in such a way that it avoids debt difficulties of developing countries." <sup>464/</sup>

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<sup>462/</sup> See Proceedings of the United Nations Conference on Trade and Development, Third Session, vol. III, Financing and invisibles (United Nations publication, Sales No. E.73.II.D.6) p. 71, document TD/118/Supp.5, para. 4.

<sup>463/</sup> World Bank, Annual Report, 1980 (Washington, D.C.), pp. 20-21.

<sup>464/</sup> OECD, Debt problems of developing countries (Paris, 1974), p. 2.

(43) The considerable increase in inflation in the industrialized economies that began in 1973 was to have serious consequences for the developing countries, which depend heavily on those economies for their imports, and thus aggravated their external debt.

(44) The current deficit of these non-oil-exporting countries increased from \$9.1 billion in 1973 to \$27.5 billion in 1974 and \$35 billion in 1976.<sup>465/</sup> These deficits resulted in a huge increase in the outstanding external debt of the developing countries and in the service payments on that debt in 1974 and 1975. A recent study by IMF reveals that the total outstanding guaranteed public debt of these countries increased from about \$62 billion in 1973 to an estimated \$95.6 billion in 1975 - an increase of over 50 per cent.<sup>466/</sup>

(45) In addition, while the developing countries' indebtedness was increasing, the relative value of official development assistance was declining, the volume of such transfers having remained far below the minimum of 1 per cent of GNP called for by the International Development Strategy. In addition to and simultaneously with this trend, there was a considerable increase in reverse transfers of resources in the form of repatriation of profits made by investors from developed countries in developing countries. The increase in the absolute value of resources transferred to the developing countries in fact conceals a worsening of the debt situation of those countries. It has been estimated that the total percentage of export earnings used for debt service was 29 per cent in 1977, compared with 9 per cent for 1965.

(46) Concern about the debt problem has been reflected in the proceedings of many international meetings, of which those mentioned in this and the following paragraphs may serve as illustrations. Arrangements agreeable to both developing countries and industrialized creditor States to remedy this dramatic

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<sup>465/</sup> IMF, "World economic outlook: Developments and prospects in the non-oil primary producing countries", p. 4, table 1.

<sup>466/</sup> Ibid., table 8.



situation have not been easy to reach. The debtor countries have indicated that, in their view, their indebtedness is such that, if it is not readjusted, it may cancel out any development effort.<sup>467/</sup>

(47) The issue of cancellation of the debts of the former colonized countries has been raised by certain newly independent States.<sup>468/</sup> The General Assembly, by

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<sup>467/</sup> At the Fourth Conference of Heads of State or Government of Non-Aligned Countries held at Algiers from 5-9 September 1973, the problem was stated as follows:

"The adverse consequences for the current and future development of developing countries arising from the burden of external debt contracted on hard terms should be neutralized by appropriate international action ...

"Appropriate measures should be taken to alleviate the heavy burden of debt-servicing, including the method of rescheduling." (Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries. "Action programme for economic co-operation", section entitled "International monetary and financial systems", paras. 6-7 (A/9330, p. 92).

<sup>468/</sup> Speaking at the sixth special session of the United Nations General Assembly, in his capacity as Chairman of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, the Head of State of Algeria declared:

"In this regard it would be highly desirable to examine the problem of the present indebtedness of the developing countries. In this examination, we should consider the cancellation of the debt in a great number of cases and, in other cases, refinancing on better terms as regards maturity dates, deferrals and rates of interest." (Official Records of the General Assembly, Sixth Special Session, Plenary Meetings, 2208th meeting, para. 136).

At the second session of the United Nations Conference on Trade and Development, held at New Delhi, Mr. L. Nègre, Minister of Finance of Mali, said at the 58th plenary meeting:

"Many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign Powers ... the developing countries asked their creditors to show a greater spirit of equity and suggested that, during the present Conference, they might decree ... the cancellation of all debts contracted during the colonial period ...". (Proceedings of the United Nations Conference on Trade and Development, Second Session, vol. I (and Corr.1 and 3 and Add.1-2), Report and annexes (United Nations publication, Sales No. E.68.II.D.14), annex V, p. 140).

During an official visit to French-speaking Africa, the President of the French Republic, Mr. G. Pompidou, decided to cancel a debt of about 1 billion francs owed by 14 African countries. That gesture, which was well received, does not fall within the scope of this draft, which is not concerned with the debt-claims of the predecessor State (constituting State property of that State). See Journal officiel de la République française: Lois et décrets (Paris, 20 July 1974), 106th year, No. 170, p. 7577.

resolution 3202 (S-VI) of 1 May 1974, adopted the "Programme of Action on the Establishment of a New International Economic Order", which provided in section II.2 that all efforts should be made to take, inter alia, the following measures:

"(f) Appropriate urgent measures, including international action, should be taken to mitigate adverse consequences for the current and future development of developing countries arising from the burden of external debt contracted on hard terms;

"(g) Debt renegotiation on a case-by-case basis with a view to concluding agreements on debt cancellation, moratorium, rescheduling or interest subsidization."

(48) Resolution 31/158, adopted by the General Assembly of the United Nations on 21 December 1976, concerning "debt problems of developing countries" states:

"The General Assembly,

...

"Convinced that the situation facing the developing countries can be mitigated by decisive and urgent relief measures in respect of ... their official ... debts ...,

"Acknowledging that, in the present circumstances, there are sufficient common elements in the debt-servicing difficulties faced by various developing countries to warrant the adoption of general measures relating to their existing debt,

"Recognizing the especially difficult circumstances and debt burden of the most seriously affected, least developed, land-locked and island developing countries,

"1. Considers that it is integral to the establishment of the new international economic order to give a new orientation to procedures of reorganization of debt owed to developed countries away from the past experience of a primarily commercial framework towards a developmental approach;

"2. Affirms the urgency of reaching a general and effective solution to the debt problems of developing countries;

"3. Agrees that future debt negotiations should be considered within the context of internationally agreed development targets, national development objectives and international financial co-operation, and debt reorganization of interested developing countries carried out in accordance with the objectives, procedures and institutions evolved for that purpose;

"4. Stresses that all these measures should be considered and implemented in a manner not prejudicial to the credit-worthiness of any developing country;

"5. Urges the International Conference on Economic Co-operation to reach an early agreement on the question of immediate and generalized debt relief of the official debts of the developing countries, in particular of the most seriously affected, least developed, land-locked and island developing countries, and on the reorganization of the entire system of debt renegotiations to give it a developmental rather than a commercial orientation."

(49) The Conference on International Economic Co-operation (sometimes referred to as the "North-South Conference") did not reach final agreement on the issue of debt relief or reorganization. The General Assembly, on 19 December 1977, adopted resolution 32/187 entitled "Debt problems of developing countries" which reads, inter alia:

"The General Assembly,

...

"Concerned that many developing countries are experiencing extreme difficulties in servicing their external debts and are unable to pursue or initiate important development projects, that the growth performance of the most seriously affected, least developed, land-locked and island developing countries during the first half of this decade has been extremely unsatisfactory and that their per capita incomes have hardly increased,

"Considering that substantial debt-relief measures in favour of developing countries are essential and would result in a significant infusion of untied resources urgently required by many developing countries,

...

"Noting that the Special Action Programme of \$1 billion offered by the developed donor countries at the Conference on International Economic Co-operation will cover less than one third of the annual debt-service payments of the most seriously affected and the least developed countries, and that substantive action has yet to be taken by them to implement the Programme,

...

2. Calls upon the Trade and Development Board at its ministerial session to reach satisfactory decisions on:

(a) Generalized debt relief by the developed countries on the official debt of developing countries, in particular of the most seriously affected, least developed, land-locked and island developing countries, in the context of the call for a substantial increase in net official development assistance flows to developing countries;

(b) Reorganization of the entire system of debt renegotiation to give it a developmental orientation so as to result in adequate, equitable and consistent debt reorganizations;

(c) The problems created by the inadequate access of the majority of developing countries to international capital markets, in particular the danger of the bunching of repayments caused by the short maturities of such loans;

"3. Welcomes the steps taken by some developed countries to cancel official debts owed to them by certain developing countries and the decision to extend future official development assistance in favour of the most seriously affected and the least developed of the developing countries in the form of grants, and urges that this be followed by similar decisions by other developed countries;

"4. Recommends that additional financial resources should be committed by multilateral development finance institutions to the developing countries experiencing debt-servicing difficulties."

(50) In response to resolution 32/187, at the third (ministerial) part of its ninth special session, the Trade and Development Board adopted resolution 165 (S-IX) on "Debt and development problems of developing countries". That resolution states, inter alia:

"The Trade and Development Board,

...

"Noting the pledge given by developed countries to respond promptly and constructively, in a multilateral framework, to individual requests from developing countries with debt-servicing difficulties, in particular the least developed and most seriously affected among these countries,

"Recognizing the importance of features which could provide guidance in future operations relating to debt problems as a basis for dealing flexibly with individual cases,

"Recalling further the commitments made internationally by developed donor countries to increase the volume and improve the quality of their official development assistance,

"Aware that means to resolve these problems are one of the urgent tasks before the international community,

"Agrees to the following decisions:

A

"1. Members of the Board considered a number of proposals made by developing countries and by developed market-economy countries.

"2. The Board recognized that many poorer developing countries, particularly the least developed among them, face serious development problems and in some instances serious debt-service difficulties.

"3. The Board notes with interest the suggestions made by the Secretary-General of UNCTAD with respect to an adjustment of terms of past bilateral official development assistance in order to bring them into line with the currently prevailing softer terms.

"4. Developed donor countries will seek to adopt measures for such an adjustment of terms of past bilateral official development assistance, or other equivalent measures, as a means of improving the net flows of official development assistance in order to enhance the development efforts of those developing countries in the light of internationally agreed objectives and conclusions on aid.

"5. Upon undertaking such measures, each developed donor country will determine the distribution and the net flows involved within the context of its own aid policy.

"6. In such a way, the net flows of official development assistance in appropriate forms and on highly concessional terms should be improved for the recipients.

...

B

"8. In accordance with Conference resolution 94 (IV), the Board reviewed the intensive work carried on within UNCTAD and other international forums on the identification of those features of past situations which could provide guidance for future operations relating to debt problems of interested developing countries.

"9. The Board notes with appreciation the contributions made by the Group of 77 and by some members of Group B.

"10. Common to the varying approaches in this work are certain basic concepts which include, inter alia:

"(a) International consideration of the debt problem of a developing country would be initiated only at the specific request of the debtor country concerned;

"(b) Such consideration would take place in an appropriate multilateral framework consisting of the interested parties, and with the help as appropriate of relevant international institutions to ensure timely action, taking into account the nature of the problem, which may vary from acute balance-of-payments difficulties requiring immediate action to longer term situations relating to structural, financial and transfer-of-resources problems requiring appropriate longer term measures;

"(c) International action, once agreed by the interested parties, would take due account of the country's economic and financial situation and performance, and of its development prospects and capabilities and of external factors, bearing in mind internationally agreed objectives for the development of developing countries;

"(d) Debt reorganization would protect the interests of both debtors and creditors equitably in the context of international economic co-operation.

..." 469/

(51) On 5 December 1980, the General Assembly by resolution 35/56 adopted the "International Development Strategy for the Third United Nations Development Decade". Included among the "Policy measures" regarding "Financial resources for development" is the following:

"111. Negotiations regarding internationally agreed features for future operations related to debt problems of interested developing countries should be brought to an early conclusion in the light of the general principles adopted by the Trade and Development Board in section B of its resolution 165 (S-IX) of 11 March 1978.

"112. Governments should seek to adopt the following debt-relief actions or equivalent measures:

"(a) Commitments undertaken in pursuant of section A of Trade and Development Board resolution 165 (S-IX) should be fully implemented as quickly as possible;

"(b) Retroactive adjustment of terms should be continued in accordance with Trade and Development Board resolution 165 (S-IX), so that the improvement in current terms can be applied to outstanding official development assistance debt, and the United Nations Conference on Trade and Development should review the progress made in that regard."

Rule reflected in article 36

(52) It may, at this juncture, be helpful to recall the scope of Part IV of the draft articles and the provisions of article 31 defining "State debt". As has been noted, 470/ debts proper to the territory to which a succession of States relates and contracted by one of its territorial authorities are excluded from the scope of "State debt" in this draft, as they may not properly be considered to be the debts of the predecessor State. In adopting such an approach in the context of decolonization, the Commission is aware that not all problems relating to succession in respect of debts are settled for newly independent States by article 36. In fact, the bulk of the liabilities involved in the succession may

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469/ Official Records of the General Assembly, Thirty-third session, Supplement No. 15 (A/33/15), vol. I, pp. 43-45, Part Two, Annex I.

470/ See paras. (14) et seq. of the commentary to article 31 above.

not, in the case of decolonization, consist of State debts of the predecessor State. They may be debts said to be "proper to the dependent territory", contracted under a very formal financial autonomy by the organs of colonization in the territory, which may constitute a considerable volume of liabilities. As has been seen, disputes have frequently arisen concerning the real nature of debts of this kind, which are at times considered by the newly independent State as "State debts" of the predecessor State, which must remain the responsibility of the latter. The category of debts directly covered by article 36 is therefore those debts contracted by the Government of the administering Power on behalf and for the account of the dependent territory. These are, properly speaking, the State debts of the predecessor State, the fate of which upon the emergence of a newly independent State is the subject matter of the article.

(53) Also excluded are certain debts assumed by a successor State within the context of an agreement or arrangement providing for the independence of the formerly dependent territory. They include "miscellaneous debts" resulting from the takeover by the newly independent State of, for example, all public services. They do not appear to be debts of the predecessor State at the date of the succession of States, but rather correspond to what the successor State pays for the final settlement of the succession of States. Indeed, such debts may be said to represent "debt-claims" of the predecessor State against the successor State for the settlement of a dispute arising on the occasion of the succession of States.<sup>471/</sup> Finally, as explained above,<sup>472/</sup> the Commission has left aside the question of drafting general provisions relating to "odious debts".

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<sup>471/</sup> Another category of debts should be excluded: that of the "national" debt of the predecessor State. Such debts would be those contracted by the predecessor State for its own account and for its own national metropolitan use, but part of which it was decided should be borne by its various dependent territories. This category relates to the archaic practices of certain States during the time of colonial empires several centuries ago, which are irrelevant in the contemporary world. It also covers certain rare cases occurring in modern times when the administering Power, in the face of national or international danger (such as the First and Second World Wars) may have contracted loans to sustain its war effort and associated its dependent territories in such efforts by requesting them to contribute. (This does not, of course, relate to military efforts directed against the dependent territory itself.) As this category of debts is exceptionally rare, it was decided to leave it aside in the present context.

<sup>472/</sup> See paras. (41)-(43) of the commentary to article 31.

(54) Further in regard to the scope of the present article, State practice concerning the emergence of newly independent States has shown the existence of another category of debts: those contracted by a dependent territory, but with the guarantee of the administering Power. This category includes, in particular, most loans contracted between dependent territories and IBRD. The latter required a particularly sound guarantee from the administering Power. In most, if not all, guarantee agreements<sup>473/</sup> concluded between IBRD and an administering Power for a dependent territory, there are two important articles, articles II and III:

#### Article II

"Paragraph 2.01. Without limitation or restriction upon any of the other covenants on its part in this Guarantee Agreement contained, the guarantor hereby unconditionally guarantees, as primary obligor and not as surety merely,\* the due and punctual payment of the principal of, and the interest and other charges on the loan ...

"Paragraph 2.02. Whenever there is reasonable cause to believe that the borrower will not have sufficient funds to execute or to arrange the execution of the project in conformity with the Loan Agreement, the guarantor, in consultation with the Bank and the borrower, will take the measures necessary to help the borrower to obtain the additional funds required.

#### Article III

"Paragraph 3.01. It is the mutual understanding of the guarantor and the Bank that, except as otherwise herein provided, the guarantor will not grant in favour of any external debt, any preference or priority over the loan ..."

(55) In the case of a guaranteed debt, the guarantee furnished by the administering Power legally creates a specific obligation for which it is liable, and a correlative subjective right of the creditor. If the succession of States had the effect of extinguishing the guarantee altogether and thus relieving the predecessor State of one of its obligations, a right of the creditor would unjustifiably disappear. The problem is not, therefore, to determine what happens to the debt proper to the dependent territory - which, it appears, is in fact normally assumed by the newly independent State - but rather to ascertain what becomes of the element

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<sup>473/</sup> See, for example, Guarantee Agreement (Northern Rhodesia-Rhodesia Railways Project) between the United Kingdom and IBRD, signed at Washington on 11 March 1953 (United Nations, Treaty Series, vol. 172, p. 115).



by which the debt is supported, furnished in the form of a guarantee by the administering Power. In other words, what is at issue is not succession to the debt proper to the dependent territory, but succession to the obligation of the predecessor State in respect of the territory's debt.

(56) The practice followed by IBRD in this regard seems clear. The Bank turns first to the newly independent State, for it considers that the loan agreements signed by the dependent territory are not affected by a succession of States as long as the debtor remains identifiable. For the purposes of these loan agreements, IBRD seems to consider, as it were, that the succession of States has not changed the identity of the entity which existed before independence. However, the World Bank considers - and the predecessor State which has guaranteed the loan does not in any way deny - that the legal effects of the contract of guarantee continue to operate after the territory has become independent, so that the Bank can at any time turn to the predecessor State if the successor State defaults. The practice of the World Bank shows that the predecessor State cannot be relieved of its guarantee obligation as the principal debtor unless a new contract is concluded to this effect between IBRD, the successor State and the predecessor State, or between the first two for the purpose of relieving the predecessor State of all charges and obligations which it assumed by virtue of the guarantee given by it earlier.

(57) Bearing these considerations in mind, the Commission considers it sufficient to note that a succession of States does not as such affect a guarantee given by a predecessor State for a debt assumed by one of its formerly dependent territories.

(58) In the search for a general solution to the question of the fate of State debts of the predecessor State upon the emergence of a newly independent State, some writers have stressed the criterion of the utility or actual benefit which the loan afforded to the formerly dependent territory.<sup>474/</sup> While such a criterion may appear useful at first glance, it is clear that if established as the basic rule governing the matter at issue, it would be extremely difficult to apply in practice. During a regional symposium held at Accra by UNITAR in 1971, the question was raised in the following terms:

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<sup>474/</sup> Sánchez de Bustamante y Sirvén, op. cit., pp. 296-297.

"To justify the transfer of debts to a newly independent State, it was argued ... that, since in a majority of cases the metropolitan Power made separate fiscal arrangements for the colony, it would be possible to determine the nature and extent of such debts. One speaker argued that any debt contracted on behalf of a given colony was not necessarily used for the benefit of that colony. He suggested that perhaps the determining factor should be whether the particular debt was used for the benefit of the colony. Although this point was generally acceptable to several delegates, doubt was raised as regards how the utility theory would in practice be applied, i.e., who was to determine and in what manner the amount of the debt which had actually been used on behalf of the colony." 475/

(59) In the case of loans granted to the administering Power for the development of the dependent territory (criterion of intended use and allocation), the colonial context in which the development of the territory may have taken place as a result of these loans must be kept in mind. It is by no means certain that the investment in question did not primarily benefit a foreign colonial settlement or the metropolitan economy of the administering Power.<sup>476/</sup> Even if the successor State retained some "trace" of the investment, in the form, for example, of public works infrastructures, such infrastructures might be obsolete or unusable in the context of decolonization, with the new orientation of the economy or the new planning priorities decided upon by the newly independent State.

(60) Another factor to be taken into account in the drafting of a general rule concerning the subject-matter of this article is the capacity of the newly independent State to pay the relevant debts of the predecessor State. This factor has arisen in State practice in connection with cases other than that of newly independent States. The Permanent Court of Arbitration, in the Russian Indemnity case<sup>477/</sup> of 1912, recognized that:

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<sup>475/</sup> Report of the United Nations Regional Symposium on International Law for Africa, 14-28 January 1971, Accra, Ghana, organized by UNITAR at the invitation of the Ghanaian Government, p. 9.

<sup>476/</sup> Mention may be made of article 255, section 2, of the Treaty of Versailles, which provided that:

"In the case of Poland that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland shall be excluded from the apportionment to be made under Article 254", British Foreign and State Papers, 1919, (op. cit.), p.125.

<sup>477/</sup> United Nations, Reports of International Arbitral Awards, vol. XI (United Nations publication, Sales No. 61.V.4), p.421.

"The defence of force majeure ... may be pleaded in public as well as in private international law: international law must adapt itself to political necessities." 478/

The treaties of peace concluded at the end of the First World War seem to indicate that, in the apportionment of predecessor State debts between various successor States, the financial capacity of the latter States, in the sense of future paying capacity (or contributing capacity), was in some cases taken into account.<sup>479/</sup> One author quotes an example of State practice in 1932, in which the creditor State (the United States) declared in a note to the debtor State (the United Kingdom) that the principle of capacity to pay did not require that the foreign debtor should pay to the full limit of its present or future capacity, as no settlement which was oppressive and which delayed the recovery and progress of the foreign debtor was in accordance with the true interest of the creditor.<sup>480/</sup> (61) Transposed to the context of succession to debts in the case of newly independent States, these considerations relating to the financial capacity of the debtor are of great importance in the search for a basic rule governing such succession. The Commission is not unaware of the fact that cases of "State default" involve debts already recognized by and assigned to the debtor whereas, in the cases with which this article is concerned, the debt is not yet "assigned" to the successor State and the whole problem is first to decide whether the newly independent State must be made legally responsible for such a debt before deciding whether it can assume it financially. Nevertheless, the two questions must be linked if practical and just solutions are to be found for situations in which prevention is better than cure. It may be asked what purpose is served by affirming in a rule that certain debts are transferable to a newly independent State if its economic and financial difficulties are already known in advance to constitute a substantial impediment to the payment of such debts.<sup>481/</sup> Admittedly,

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<sup>478/</sup> Ibid., p. 443. [Translation by the Secretariat]

<sup>479/</sup> See Rousseau, Droit international public (op. cit.), pp. 442-447, 464-466, and Feilchenfeld, op. cit., pp. 458-461, 852-856.

<sup>480/</sup> G. Jèze, "Les défeillances d'Etat", Recueil des cours ... 1935-III (Paris, Sirey, 1936), vol. 53, p. 392.

<sup>481/</sup> "Reconstruction of their economies by several new States has raised questions of the continuity of financial and economic arrangements made by the former colonial Powers or by their territorial administrations." (International Law Association, op. cit. p. 102).

taking into account explicitly in a draft article the "financial capacity" of a State would involve a somewhat vague phrase and might leave the way open for abuses. On the other hand, it is neither possible nor realistic to ignore the reasonable limits beyond which the assumption of debts would be destructive for the debtor and without result for the creditor.

(62) The above general considerations concerning the capacity to pay must be viewed in relation to the developments occurring in contemporary international relations concerning the principle of the permanent sovereignty of every people over its wealth and natural resources, which constitutes a fundamental element in the right of peoples to self-determination.<sup>482/</sup> This principle, as it emerges from United Nations practice, is of substantial significance in the context of the financial capacity of newly independent States to succeed to State debts of the predecessor State which may have been linked to such resources (which may for example have been pledged as security for a debt). Thus the traditional issue of "capacity to pay" must be seen in its contemporary framework, taking into account the present financial situation of newly independent States as well as the implications of the paramount right of self-determination of the peoples and the principle of the permanent sovereignty of every people over its wealth and natural resources.

(63) In attempting to draft a basic rule applicable to succession to State debts of the predecessor State by newly independent States, the Commission has approached its task by drawing inspiration from Article 55 of the United Nations Charter:

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health and related problems; and international cultural and educational co-operation;"

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<sup>482/</sup> See paras. (26) to (29) of the commentary to article 14 above.

Stability and orderly relations between States, which are necessary for peaceful and friendly relations cannot be divorced from the principles of equal rights and self-determination of peoples or from the over-all efforts of the present-day international community to promote conditions of economic and social progress and to provide solutions of international economic problems. State practice and the writings of jurists do not provide clear and consistent answers to the question of the fate of State debts of the former metropolitan Power. Thus, the Commission is aware that, in drawing up rules governing the subject-matter, it is inevitable that a measure of progressive development of the law should be involved. State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles, and serious divergences of views, which continue to manifest themselves many years after the purported settlement of a succession of States. It is true, nevertheless, that in many cases the State debts of the predecessor metropolitan State have not passed to the newly independent State. The Commission cannot but recognize certain realities of present-day international life, in particular the severe burden of debt reflected in the financial situation of a number of newly independent States, nor can it ignore, in the drafting of legal rules governing succession to State debts in the context of decolonization, the legal implications of the fundamental right of self-determination of peoples and of the principle of the permanent sovereignty of every people over its wealth and natural resources. The Commission considered the possibility of drafting a basic rule which would provide for the passing of such debts if the dependent territory actually benefited therefrom. But as indicated above,<sup>483/</sup> that criterion taken alone seems difficult to apply in practice, and does not provide for stable and friendly solution of the problems. It should not be forgotten that the subject-matter at issue - the succession to State debts of a metropolitan Power by a newly independent State - takes place wholly within the context of decolonization, which imports special and unique considerations not found in other types of succession of States. The latter consideration also implies the necessity to avoid such general language as "equitable proportion", which has proved appropriate in other types of succession but which would raise serious questions of interpretation and possible abuse in the context of decolonization.

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<sup>483/</sup> See paras. (58) and (59) of this commentary.

(64) The Commission, in the light of all the above considerations, decided to adopt as a basic rule the rule of the non-passing of the State debt of the predecessor State to the successor State. This rule is found in the first part of paragraph 1 of article 36, which states: "no State debt of the predecessor State shall pass to the newly independent State ...". Having thus provided for the basic rule of non-passing, however, the Commission did not wish to foreclose the important possibility of an agreement on succession in respect of State debts being validly and freely concluded between the predecessor and successor States. The Commission was fully aware that newly independent States often need capital investment and that it should avoid formulating rules which might discourage States or financial international organizations from providing the necessary assistance. Thus, the second part of paragraph 1 of article 36 is intended to follow the spirit of other provisions of the draft which encourage the predecessor and successor States to settle the question of the passing of State debts by agreement between themselves. Of course, it must be emphasized that such agreements must be validly concluded pursuant to the will freely expressed by both parties. To bring that consideration more sharply into focus, the second part of paragraph 1 has been drafted so as to spell out the necessary conditions under which such an agreement should be concluded. Thus, first, the State debt of the predecessor State must be "connected with its activity in the territory to which the succession of States relates." The language generally follows that found in other articles of the draft already adopted concerning succession in respect of State property (see, in particular, articles 13, 14, 16 and 17). Its purpose is clearly to exclude from consideration debts of the predecessor State having nothing to do with its activities as metropolitan Power in the dependent territory concerned. Secondly, the State debt of the predecessor State, connected with its activity in the territory concerned must be linked with "the property, rights and interests which pass to the newly independent State". If the successor State succeeds to certain property, rights and interests of the predecessor State, as provided for in article 14, it is only natural that an agreement on succession regarding State debts should take into account the corresponding obligations which may accompany such property, rights and interests. Thus articles 14 and 36 are closely connected in that respect. While the use of the criterion of "actual benefit" has generally been avoided, it can be seen that certain elements of that criterion have been usefully reflected here: the passing of debts may be settled by agreement in view of the passing of benefits (property, rights and interests) to which those debts are linked

(65) While the parties to the agreement envisaged in paragraph 1 may freely agree on the provisions to be included therein, the Commission thought it necessary to provide a safeguard clause to ensure that such provisions do not ignore the financial capacity of the newly independent State to succeed to such debts or infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. Such a safeguard, which is included in paragraph 2, is particularly necessary in the case of an agreement such as is mentioned in paragraph 1, that is, one concluded between a former metropolitan Power and one of its former dependencies. By paragraph 2, it is intended to underline once again that the agreement must be concluded by the two parties on an equal footing. Thus agreements purporting to establish "special" or "preferential" ties between the predecessor and successor States (often termed "devolution agreements"), which in fact impose on the newly independent States terms that are ruinous to their economies, cannot be considered as the type of agreement envisaged in paragraph 1. The article presupposes - and paragraph 2 is intended to reinforce that supposition - that the agreements are to be negotiated in full respect for the principles of political self-determination and economic independence. Hence the express reference to the principle of the permanent sovereignty of every people over its wealth and natural resources and to the fundamental economic equilibria<sup>484/</sup> of the newly independent State. The latter expression "fundamental economic equilibria" must be interpreted in a broad sense, covering all kinds of economic, financial (including indebtedness) and other factors which assure the fundamental equilibria of a newly independent State.

(66) The Commission would further recall certain decisions relating to other articles of the draft which bear upon article 36. The term "newly independent State" has already been defined in article 2, paragraph 1 (e) of the draft. Like article 14, article 36 is intended to apply to cases in which the newly independent State is formed from two or more dependent territories. Likewise, the article applies to cases in which a dependent territory becomes part of the territory of a State other than the State which was responsible for its international

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<sup>484/</sup> In this connection, attention may be drawn to the fact that the word "dis-equilibria" is found in article 60 of the Treaty instituting the European Coal and Steel Community (United Nations, Treaty Series, vol. 261, p. 191) and in article 3 (c) of the Treaty establishing the European Economic Community (ibid., vol. 298, p. 16).

relations.<sup>485/</sup> The Commission has not thought it necessary to deal with the self-evident case of debts of the predecessor State owed to the dependent territory, which continue to be payable, after the date of the succession of States to the newly independent State.

(67) Certain members of the Commission at the time of the adoption of article 36 on first reading were unable to support the text and expressed reservations and doubts thereon. When it was provisionally adopted by the Commission at its twenty-ninth session in 1977, one member expressed reservations on certain paragraphs of the commentary to the article as well.<sup>486/</sup> That member also proposed at that time an alternative text for the article,<sup>487/</sup> which received a measure of support from some members. Concerning the question of permanent sovereignty over natural resources, that member expressed preference for the terminology found in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>488/</sup>

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<sup>485/</sup> See para. 75 above.

<sup>486/</sup> The member concerned objected to the inclusion of paragraphs (39) to (50) of the 1977 commentary (see paragraphs (39) to (48) of the present commentary), particularly on the grounds that, in his view, they contained economic exposition and analysis which were not within the Commission's sphere of competence and that some aspects of that exposition and analysis were debatable. That Member also considered it important to note that a number of States had dissented from elements of the Charter of Economic Rights and Duties of States and the Declaration on the establishment of a new International Economic Order quoted in paragraphs (27) and (28) of the commentary to article 14, to which reference is made in connection with article 36, in footnote 482.

<sup>487/</sup> That text (A/CN.4/L.257) reads as follows:

"Article 22. Newly Independent States

"1. No debt contracted by the predecessor State on behalf or for the account of a territory which has become a newly independent State shall pass to the newly independent State unless the debt related to property, rights and interests of which the newly independent State is beneficiary and unless that passage of debt is in equitable proportion to the benefits that the newly independent State has derived or derives from the property, rights and interests in question.

"2. Any agreement concluded between the predecessor and the newly independent State for the implementation of the principles contained in the preceding paragraph shall pay due regard to the newly independent State's permanent sovereignty over its natural wealth and resources in accordance with international law."

<sup>488/</sup> Resolution 2200A (XXI) of the General Assembly, annex.



## Article 37

### Uniting of States

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

#### Commentary

- (1) Article 37, on the passing of the State debt in the case of uniting of States, corresponds to article 15 in part II relating to succession in respect of State property and to article 27 in part III on succession in respect of State archives. It is not necessary, therefore to specify again the exact scope of the type of succession in question.<sup>489/</sup>
- (2) When two or more States unite and so form one successor State, it seems logical for the latter to succeed to the debt of the former just as it succeeds to their property. Res transit cum suo onere, the basic rule, is laid down in the single paragraph constituting the article. This rule is generally accepted in legal theory. According to one writer, for instance, "when States merge to form a new State, their debts become the responsibility of that State."<sup>490/</sup>
- (3) In the practice of States, there seem to be only a few cases where the passing of the State debt upon a uniting of States was settled at the international level; questions relating to State debts have usually been regulated by the internal law of States. One example of an international arrangement is the union of Belgium and the Netherlands by the Act of 21 July 1814.<sup>491/</sup> Article 1 of the Act provided:

"This union shall be intimate and complete so that the two countries form but one single State, governed by the Constitution already established in Holland, which will be modified by agreement in accordance with the new circumstances."

In view of the "intimate and complete" nature of the union thus achieved, article VI of the Act quite naturally concluded that:

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<sup>489/</sup> See paras. (1) and (2) of the commentary to article 15, above.

<sup>490/</sup> Fauchille, op. cit., p. 380.

<sup>491/</sup> Act signed by the Secretary of State of H.R.H. the Prince of the Netherlands, in acceptance of the sovereignty of the Belgian provinces on the agreed bases. The Hague, 21 July 1814 (de Martens, ed., Nouveau Recueil ... (op. cit.)), vol. II, p. 38).

"Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces on the one hand and by the Belgian provinces on the other, shall be borne by the General Treasury of the Netherlands."

The Act of 21 July 1814 was later annexed to the General Act of the Congress of Vienna,<sup>492/</sup> and the article VI cited was invoked on a number of occasions to provide guidance for the apportionment of the debts between Holland and Belgium.

(4) A second example that may be cited is the unification of Italy - a somewhat ambiguous example, however, because learned opinion differs in describing the manner in which unity was achieved. As one writer sums it up:

"Some have regarded the Kingdom of Italy as an enlargement of the Kingdom of Sardinia, arguing that it was formed by means of successive annexations to the Kingdom of Sardinia; others have regarded it as a new subject of law created by the merger of all the former Italian States, including the Kingdom of Sardinia, which thus ceased to exist."<sup>493/</sup>

In a general way, the Kingdom of Italy acknowledged the debts of the formerly separate States and continued the practice that had already been instituted by the King of Sardinia. Thus the Treaty of Vienna of 3 October 1866,<sup>494/</sup> under which "His Majesty the Emperor of Austria [agreed] to the union of the Lombardo-Venetian Kingdom with the Kingdom of Italy" (article III), included an article VI which provided as follows:

"The Italian Government shall assume responsibility for: (1) that part of Monte Lombardo Veneto which was retained by Austria under the agreement concluded at Milan in 1860 in application of article 7 of the Treaty of Zurich; <sup>495/</sup> (2) the additional debts contracted by Monte Lombardo Veneto between 4 June 1859 and the date of conclusion of this Treaty; (3) a sum of 35 million Austrian florins in cash, representing the portion of the 1854 loan attributable to Venetia in respect of the cost of non-transportable war materials ..."

(5) Certain treaties relating to the uniting of Central American States may also be mentioned. The Treaty of 15 June 1897 concluded by Costa Rica, El Salvador,

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<sup>492/</sup> Ibid., p. 379. See also Feilchenfeld, *op. cit.*, pp. 123-124.

<sup>493/</sup> D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), p. 171.

<sup>494/</sup> G.F. Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1873), vol. XVIII, pp. 405-406.

<sup>495/</sup> The Treaty of Zurich of 10 November 1859, concluded between Austria and France, ceded Lombardy to France. The "new Government of Lombardy", under article 7 of the Treaty, was to assume three-fifths of the debt of Monte Lombardo Veneto (*ibid.*, 1860), vol. XVI, part II, p. 518.

Guatemala, Honduras and Nicaragua<sup>496/</sup> to form the Republic of Central America, as well as the Covenant of Union of Central America of 19 January 1921<sup>497/</sup> concluded by Costa Rica, El Salvador, Guatemala and Honduras after the dissolution of the Republic of Central America, contained some provisions relating to the treatment of debts. Although those treaties were more directly concerned with the allocation of debts among the component parts of the united State, there is no doubt that in its international relations the new State as a whole assumed the debts that had been owed by the various predecessor States. The Treaty of 1897, according to which the union had "for its one object the maintenance in its international relations of a single entity" (article III), provided that

"The pecuniary or other obligations contracted, or which may be contracted in the future, by any of the States, are matters of individual responsibility (article XXXVII)."

The 1921 Covenant stipulated that the Federal Government should administer the national finances, which should be distinct from those of the component States, and that the component States should "continue the administration of their present internal and external debts" (article V, para. (n)). It then went on to provide that

"The Federal Government shall be under an obligation to see that the said administration is faithfully carried out, and that the revenues pledged thereto are earmarked for that purpose."

(6) As indicated above, it is usually through the internal laws of States that questions relating to State debts have been regulated. Such laws often provide for the internal allocation of the State debt and thus are not directly relevant to the present article. Some examples, however, may be mentioned, because they assume that the State debt of the predecessor State passes to the successor State; otherwise no question of its allocation among component parts would arise.

(7) The union of Austria and Hungary was based essentially on two instruments: the "[Austrian] Act concerning matters of common interest to all the countries of the Austrian Monarchy and the manner of dealing with them" of 21 December 1867, and the "Hungarian Act [No. 12] relating to matters of common interest to the

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<sup>496/</sup> Ibid., (Leipzig, Dieterich, 1905), 2nd series, vol. XXXII, p. 279.

<sup>497/</sup> League of Nations, Treaty Series, vol. V, p.9.

countries of the Hungarian Crown and the other countries subject to the sovereignty of His Majesty and the manner of dealing with them", of 12 June 1867.<sup>498/</sup> The Austrian Act provided, in article 4, that

"The contribution to the costs of the pre-existing public debt shall be determined by agreement between the two halves of the Empire."

The Hungarian Act No. 12 of 1867 contained the following:

"Article 53. As regards public debts, Hungary, by virtue of its constitutional status, cannot, in strict law, be obliged to assume debts contracted without the legally expressed consent of the country.

"Article 54. However, the present Diet has already declared "that, if a genuine constitutional régime is really applied as soon as possible in our country and also in His Majesty's other countries, it is prepared, for considerations of equity and on political grounds, to go beyond its legitimate obligations and to do whatever shall be compatible with the independence and the constitutional rights of the country to the end that His Majesty's other countries, and Hungary with them, may not be ruined by the weight of the expenses accumulated under the régime of absolute power and that the untoward consequences of the tragic period which has just elapsed may be averted".

"Article 55. For this reason, and for this reason alone, Hungary is prepared to assume a portion of the public debts and to conclude an agreement to that effect, after prior negotiations, with His Majesty's other countries, as a free people with a free people."

(8) The Constitution of the Federation of Malaya (1957)<sup>499/</sup> contained a long article 167 entitled "Rights, liabilities and obligations", including the following provisions:

"(1) ... all rights, liabilities and obligations of

"(a) Her Majesty in respect of the Government of the Federation, and

"(b) the Government of the Federation or any public officer on behalf of the Government of the Federation,

shall on and after Merdeka Day [the date of uniting] be the rights, liabilities and obligations of the Federation.

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<sup>498/</sup> F.-R. Dareste and P. Dareste. Les Constitutions modernes, 3rd ed. (Paris, Challamel, 1910), vol. I, pp. 394 et seq. (for the Austrian Act) and pp. 403 et seq. (for the Hungarian Act).

<sup>499/</sup> Malayan Constitutional Documents (Kuala Lumpur, the Government Printer, 1959), p. 27.

"(2) ... all rights, liabilities and obligations of

"(a) Her Majesty in respect of the government of Malacca or the government of Penang.

"(b) His Highness the Ruler in respect of the government of any State, and

"(c) the government of any State,

shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States."

These provisions thus appear to indicate that each State entity was concerned only with the assets and liabilities of its particular sphere. "Rights, liabilities and obligations" were apportioned according to the division of spheres of competence established between the Federation and the member States. Debts contracted were thus the responsibility of the States in respect of matters which, as from the date of uniting, fell within their respective spheres of competence. Article 167 continued:

"(3) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Federation Government but which on that date becomes the responsibility of the Government of a State, shall on that day devolve upon that State.

"(4) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Government of a State but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation."

(9) The Federation of Malaya was succeeded by Malaysia in 1963. The Malaysia Bill, which was annexed to the Agreement relating to Malaysia and came into force on 16 September 1963, contained in its part IV, relating to transitional and temporary provisions, a section 76 entitled "Succession to rights, liabilities and obligations", which read, inter alia:

"(1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State.

"(2) This section does not apply to any rights, liabilities or obligations in relation to which section 75 has effect, nor does it have effect to transfer any person from service under the State to service

under the Federation or otherwise affect any rights, liabilities or obligations arising from such service or from any contract of employment; but, subject to that, in this section rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise.

...

"(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day." 500/

Similar provisions may be noted in the individual Constitutions of the member States of the Federation. For example, article 50 of the Constitution of the State of Sabah (Rights, liabilities and obligations) stated:

"(1) All rights, liabilities and obligations of Her Majesty in respect of the government of the colony of North Borneo shall on the commencement of this Constitution become rights, liabilities and obligations of the State." 501/

(10) The Provisional Constitution of the United Arab Republic, of 5 March 1958, 502/ although not very explicit as regards succession to debts of the two predecessor States, Egypt and Syria, provided in article 29 that:

"The Government may not contract any loans, or undertake any project which would be a burden on the State Treasury over one or more future years, except with the consent of the National Assembly."

This provision may be interpreted as giving the legislative authority of the United Arab Republic, to the exclusion of Syria and Egypt, sole power to contract loans. Furthermore, since article 70 provided for a single budget for the two regions, there may be grounds for agreeing with an eminent authority that "the United Arab Republic would seem to have been the only entity competent to service the debts of the two regions". 503/ 504/

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500/ United Nations, Treaty Series, vol. 750, p.60.

501/ Ibid., p. 110. See also p. 134 (Constitution of the State of Sarawak, article 48), and p. 176 (Constitution of the State of Singapore, article 104).

502/ Text in E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", International and Comparative Law Quarterly, London, vol. 8, part 2 (April 1959), pp. 374-387.

503/ O'Connell, State Succession ... (op. cit.), p. 386.

504/ It may be noted that the arrears of contributions due to UNESCO from Egypt and Syria before their union came into being were treated as a liability of the United Arab Republic (Materials on Succession of States in respect of Matters other than Treaties (op. cit.), p. 545.

## Article 38

### Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account all relevant circumstances.
2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

## Article 39

### Dissolution of a State

When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account all relevant circumstances.

### Commentary to articles 38 and 39

- (1) The topics of succession of States covered by articles 38 and 39 correspond to those dealt with in articles 16 and 17 and 28 and 29, respectively in parts II and III; hence the use of similar introductory phrases in the corresponding articles to define their scope. Articles 38 and 39 both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. They differ, however, in that, while under article 38 the predecessor State continues its existence, under article 39 it ceases to exist after the separation of parts of its territory. The latter case is referred to as "dissolution of a State" in articles 17, 29 and 39.<sup>505/</sup>
- (2) In establishing the rule for articles 38 and 39 the Commission believes that, unless there is a compelling reason to the contrary, the passing of the State debt in the two types of succession covered by these articles should be governed by a common basic rule, as are articles 16 and 17, relating to State property and articles 28 and 29 on State archives. It is on the basis of this assumption that State practice and legal doctrine will be examined in the following paragraphs.

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<sup>505/</sup> See para. (1) of the commentary to articles 16 and 17 above.

(3) The practice of States offers few examples of separation of part or parts of the territory. Some cases may nevertheless be mentioned, one of them being the establishment of the Irish Free State. By a Treaty of 1921, Ireland obtained from the United Kingdom the status of a Dominion and became the Irish Free State. The Treaty apportioned debts between the predecessor State and the successor State on the following terms:

"The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire." 506/

(4) Another example is the separation of Singapore which, after joining the Federation of Malaya in 1963, withdrew from it and achieved independence in 1965. Article VIII of the Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State, signed at Kuala Lumpur on 7 August 1965, provides:

"With regard to any agreement entered into between the Government of Singapore and any other country or corporate body which has been guaranteed by the Government of Malaysia, the Government of Singapore hereby undertakes to negotiate with such country or corporate body to enter into a fresh agreement releasing the Government of Malaysia of its liabilities and obligations under the said guarantee, and the Government of Singapore hereby undertakes to indemnify the Government of Malaysia fully for any liabilities, obligations or damage which it may suffer as a result of the said guarantee." 507/

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506/ Article V of the Treaty of 6 December 1921 between Great Britain and Ireland (League of Nations. Treaty Series, vol. XXVI, p. 10).

507/ United Nations, Treaty Series, vol. 563, p. 94. The Constitution of Malaysia (Singapore Amendment) Act, 1965, also contains some provisions relating to "succession to liabilities and obligations", including the following paragraph:

"9. All property, movable and immovable, and rights, liabilities and obligations which before Malaysia Day belonged to or were the responsibility of the Government of Singapore and which on that day or after became the property of or the responsibility of the Government of Malaysia shall on Singapore Day revert to and vest in or devolve upon and become once again the property of or the responsibility of Singapore." (ibid., p. 100).



(5) The two above-mentioned examples relate to cases where separation took place by agreement between the predecessor and successor States. However, it is far from certain that separation is always achieved by agreement. For example, the apportionment of State debts between Bangladesh and Pakistan does not seem to have been settled since the failure of the negotiations held at Dacca from 27 to 29 June 1974.<sup>508/</sup> This is one of the points that clearly distinguish cases of separation, covered by article 38, from cases of transfer of a part of a State's territory, dealt with in article 35. The latter article, it should be recalled, concerns the transfer of relatively small or unimportant territories, effected by theoretically peaceful procedures and, in principle, by agreement between the ceding and beneficiary States.

(6) With regard to dissolution of a State, covered by article 39, the following historical precedents may be cited: the dissolution of Great Colombia (1829-1831), the dissolution of the Union of Norway and Sweden (1905), the disappearance of the Austro-Hungarian Empire (1919); the disappearance of the Federation of Mali (1960), the dissolution of the United Arab Republic (1961), and the dissolution of the Federation of Rhodesia-Nyasaland (1963). Some of these cases are considered below, with a view to establishing how the parties concerned attempted to settle the passing of State debts.

(7) Great Colombia, which was formed in 1821 by the union of New Granada, Venezuela and Ecuador, was not to be long-lived. Within about 10 years, internal disputes had put an end to the union, whose dissolution was fully consummated in 1831.<sup>509/</sup> The successor States agreed to assume responsibility for the debts of the Union. New Granada and Ecuador first established the principle in the Treaty of Peace and Friendship concluded at Pasto on 8 December 1832. Article VII of the Treaty provided:

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<sup>508/</sup> Rousseau, Droit international public (op. cit.), p. 454. According to the same author, "Bangladesh claimed 56 per cent of all common property, while at the same time remaining very reticent regarding the apportionment of existing debts - a problem that it apparently did not wish to tackle until after settlement of the apportionment of assets, an approach that Pakistan is said to have refused". (ibid.)

<sup>509/</sup> See V.-L. Tapié. Histoire de l'Amérique latine au XIX<sup>e</sup> siècle (Paris, Montaigne, 1945). See in particular the discussion of the breakup of Great Colombia, pp. 57-60.

It has been agreed, and is hereby agreed, in the most solemn manner, and under the Regulations of the Laws of both States, that New Granada and Ecuador shall pay such share of the Debts, Domestic and Foreign, as may proportionably belong to them as integral parts which they formed, of the Republic of Colombia, which Republic recognized the said debts in solidum. Moreover, each State agrees to answer for the amount of which it may have disposed belonging to the said Republic." 510/

Reference may also be made to the Convention of Bogota of 23 December 1834, concluded between New Granada and Venezuela, to which Ecuador subsequently acceded on 17 April 1857. 511/ These two instruments indicate that the successor States were to apportion the debts of Great Colombia among themselves in the following proportions: New Granada, 50 per cent; Venezuela, 28.5 per cent; Ecuador, 21.5 per cent. 512/

(8) The "Belgian-Dutch question" of 1830 had necessitated the intervention of the five Powers of the Holy Alliance, in the form of a conference that opened in London in 1830 and that culminated only in 1839, in the Treaty of London of 19 April of that year. 513/ During the nine years of negotiations, a number of documents had to be prepared before the claims regarding the debts of the Kingdom of the Netherlands could be settled.

(9) One such document, the Twelfth Protocol of the London Conference, dated 27 January 1831, prepared by the five Powers, was the first to propose a fairly specific mode of settlement of the debts, which was to be included among the general principles to be applied in the draft treaty of London. The five Powers first sought to justify their intervention by asserting that "experience ... had only too often demonstrated to them the complete impossibility of the Parties directly concerned agreeing on such matters, if the benevolent solicitude of the five Courts did not facilitate agreement". 514/ They cited the existence of

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510/ de Martens, ed., Nouveau Recueil ... (op. cit., 1838), vol. XIII, p. 63 [quoted in English].

511/ Convention for the acknowledgement and division of the active and passive credits of Colombia (British and Foreign State Papers, 1834-1835) vol. XXIII (London, Ridgway, 1852), p. 1342, See also Feilchenfeld, op. cit., pp. 296-298 (especially, p. 296, where the pertinent articles of the Convention are quoted.

512/ Sanchez de Bustamante y Sirvén, op. cit., p. 337; Accioly, op. cit., p. 199; O'Connell, State Succession ... (op. cit.), p. 308.

513/ See de Martens, ed. Nouveau Recueil ... (op. cit., 1842), vol. XVI, part II, p. 773. The five Powers of the Holy Alliance were Austria, France, Great Britain, Prussia and Russia.

514/ Ibid. (1836), vol. X, p. 164.

relevant precedents that they had helped to establish and that had "in the past led to decisions based on principles which, far from being new, were those that have always governed the reciprocal relations of States and that have been cited and confirmed in special agreements concluded between the five Courts; those agreements cannot therefore be changed in any case without the participation of the Contracting Powers".<sup>515/</sup> One of the leading precedents relied upon by these five monarchies was apparently the above-mentioned Act of 21 July 1814<sup>516/</sup> by which Belgium and the Netherlands were united. Article VI of that Act provided that:

"Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces of the one hand and by the Belgian provinces on the other shall be borne by the General Treasury of the Netherlands."

From that provision the five Powers drew the conclusion of principle that, "upon the termination of the union, the community in question likewise should probably come to an end, and, as a further corollary of the principle, the debts which, under the system of the union, had been merged, might under the system of separation, be redivided".<sup>517/</sup> Applying that principle in the case of the Netherlands, the five Powers concluded that "each country should first reassume exclusively responsibility for the debts it owed before the union", and that Belgium should in addition assume "in fair proportion, the debts contracted since the date of the said union and during the period of the union by the General Treasury of the Kingdom of the Netherlands, as they are shown in the budget of that Kingdom".<sup>518/</sup> That conclusion was incorporated in the "Bases for establishing the separation of Belgium and Holland" annexed to the Twelfth Protocol. Articles X and XI of those "bases" read as follows:

"Article X. The debts of the Kingdom of the Netherlands for which the Royal Treasury is at present liable, namely (1) the outstanding debt on which interest is payable; (2) the deferred debt; (3) the various bonds of the Amortization Syndicate; and (4) the reimbursable annuity funds secured on State lands by special mortgages, shall be apportioned between Holland and Belgium in proportion to the average share of the direct, indirect and excise taxes of the Kingdom paid by each of the two countries during the years 1827, 1828 and 1829.

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<sup>515/</sup> Ibid., p. 165.

<sup>516/</sup> See para. (3) of the commentary to article 37, above.

<sup>517/</sup> de Martens, ed., Nouveau Recueil ... (op. cit., 1836), vol. X, p. 165.

<sup>518/</sup> Ibid., pp. 165-166.

"Article XI. Inasmuch as the average share in question makes Holland liable for 15/31 and Belgium liable for 16/31 of the aforesaid debts, it is understood that Belgium will continue to be liable for the payment of appropriate interest." 519/

These provisions were objected to by France, which considered that "His Majesty's Government had not found their bases equitable enough to be acceptable". 520/

The four courts to which the French communication was addressed replied that:

"The principle established in Protocol No. 12, with regard to the debt, was as follows: When the Kingdom of the Netherlands was formed by the union of Holland with Belgium, the then existing debts of those two countries were merged by the Treaty of 1815 into a single whole and declared to be the national debt of the United Kingdom. It is therefore necessary and just that, when Holland and Belgium separate, each should resume responsibility for the debt for which it was responsible before their union and that these debts, which were united at the same time as the two countries, should likewise be separated.

"Subsequent to the union, the United Kingdom has an additional debt which, upon the separation of the United Kingdom, must be fairly apportioned between the two States; the Protocol does not, however, specify what exactly the fair proportion should be and leaves this question to be settled later." 521/

(10) The Netherlands proved particularly satisfied and its plenipotentiaries were authorized to indicate their full and complete acceptance of all the basic articles designed to establish the separation of Belgium and Holland, which basic provisions derived from the London protocols of 20 and 27 January 1831. 522/  
The Belgian point of view was reflected in a report dated 15 March 1831 to the Regent by the Belgian Minister for Foreign Affairs, which stated:

"Protocols Nos. 12 and 13 dated 27 January ... have shown in the most obvious manner the partiality, no doubt involuntary, of some of the plenipotentiaries in the Conference. These Protocols, dealing with the fixing of the boundaries, the armistice and, above all, the apportionment of the debts, arrangements which would consummate the ruin of Belgium, were restored ... by a note of 22 February, the last act of the Diplomatic Committee." 523/

519/ Ibid., p. 172.

520/ Twentieth Protocol of the London Conference, dated 17 March 1831 (annex A). Communication to the Conference by the plenipotentiary of France, Paris, 1 March 1831 (ibid., p. 228).

521/ Idem (annex B). The plenipotentiaries of the four Courts to the plenipotentiary of France (ibid., p. 233).

522/ Eleventh Protocol of the London Conference, dated 20 January 1831, determining the boundaries of Holland (ibid., p. 150), and Eighteenth Protocol, dated 18 February 1831 (ibid., p. 196).

523/ Ibid., p. 222.

Belgium thus rejected the provisions of the "Bases designed to establish the separation of Belgium and Holland". More precisely, it made its acceptance dependent on the facilities to be accorded it by the Powers in the acquisition, against payment, of the Grand Duchy of Luxembourg.

(11) The Twenty-fourth Protocol of the London Conference, dated 21 May 1831, clearly showed that "acceptance by the Belgian Congress of the bases for the separation of Belgium from Holland would be very largely facilitated if the five Courts consented to support Belgium in its wish to obtain against payment, the Grand Duchy of Luxembourg".<sup>524/</sup> As its wish could not be satisfied, Belgium refused to agree to the debt apportionment proposals that had been made to it. The Powers thereupon took it upon themselves to devise another formula for the apportionment of the debts; that was the object of the Twenty-fifth Protocol, dated 26 June 1831, of the London Conference. The new protocol contained a draft treaty consisting of 18 articles, article XII of which stated:

"The debts shall be apportioned in such a way that each of the two countries shall be liable for all the debts which originally, before the union, encumbered the territories composing them, and in such a way that debts which were jointly contracted shall be divided up in a just proportion." <sup>525/</sup>

That was in fact only a reaffirmation, not specified in figures, of the principle of the apportionment of debts contained in the Twelfth Protocol, of 27 January 1831. Unlike the latter, however, the new protocol did not specify the debts for which the parties were liable. This time it was the Kingdom of the Netherlands that rejected the proposals of the Conference,<sup>526/</sup> and Belgium that agreed to them.<sup>527/</sup>

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<sup>524/</sup> Ibid., p. 269.

<sup>525/</sup> Ibid., p. 290.

<sup>526/</sup> See Twenty-eighth Protocol of the London Conference, dated 25 July 1831 (annex A). "The Government of the Netherlands to the Conference", The Hague, 12 July 1831 (ibid., 1837, vol. XI, pp. 212-222, and particularly p. 221).

<sup>527/</sup> See Twenty-seventh Protocol of the London Conference, dated 12 July 1831 (annex), "The Belgian Government to the Conference", Brussels, 9 July 1831 (ibid., p. 210).

(12) Before the Conference adjourned on 1 October 1832, it made several unsuccessful proposals and counter-proposals.<sup>528/</sup> Not until seven years later did the Belgian-Netherlands Treaty of 9 April 1839 devise a solution to the problem of the succession to debts arising out of the separation of Belgium and Holland.

<sup>528/</sup> These proposals and counter-proposals included those made in two protocols and a treaty:

(a) The Forty-fourth Protocol of the London Conference, dated 26 September 1831 (annex A), Proposals by the London Conference, item 3 of which comprised 12 articles (articles VII-XVIII), of which the first three provided:

"VII. Belgium, including the Grand Duchy of Luxembourg, shall be liable for the debts which it had lawfully contracted before the establishment of the Kingdom of the Netherlands.

"Debts lawfully contracted from the time of the establishment of the Kingdom until 1 October 1830 shall be equally apportioned.

"VIII. Expenditures by the Treasury of the Netherlands for special items which remain the property of one of the two Contracting Parties shall be charged to it, and the amount shall be deducted from the debt allocated to the other Party.

"IX. The expenditures referred to in the preceding article include the amortization of the debt, both outstanding and deferred, in the proportion of the original debts, in accordance with article VII." (*ibid.*, p. 291).

These proposals which were the subject of strong criticism by both the States concerned, were not adopted.

(b) The Forty-ninth Protocol of the London Conference, dated 14 October 1831 (annex A), Articles concerning the separation of Belgium from Holland, of which the first two paragraphs of a long article XIII read as follows:

"1. As from 1 January 1832, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 8,400,000 Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

"2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 8,400,000 Netherlands florins of annuity bonds, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow either now or in future, any distinction to be made between this portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt." (*ibid.*, pp. 328-329).

Belgium agreed to this provision (*ibid.*, pp. 350-351).

(c) The treaty for the final separation of Belgium from Holland, signed at London by the five Courts and by Belgium on 15 November 1831 (*ibid.*, p. 390), used the wording of provisions of the Forty-ninth Protocol reproduced above. This time too, however, it was not accepted by Holland (see Fifty-third Protocol of the London Conference, dated 4 January 1832, annex A (*ibid.*), vol. XII, pp. 285 et seq.).

(13) The Belgian-Dutch dispute concerning succession to the State debts of the Netherlands was finally settled by the Treaty of 19 April 1839, article 13 of the annex to which contained the following provisions:

"1. As from 1 January 1839, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 5 million Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

"2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 5 million Netherlands florins in annuity payments, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow, either now or in future, any distinction to be made between the portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt.

...

"4. By the creation of the said sum of 5 million florins of annuities, Belgium shall be discharged vis-à-vis Holland of any obligation resulting from the apportionment of the public debts of the Kingdom of the Netherlands." 529/

The five Powers of the Holy Alliance, under whose auspices the 1839 Treaty was signed, guaranteed its provisions in two conventions of the same date signed by them and by Belgium and Holland. It was stated in those instruments that the articles of the Belgian-Dutch Treaty "are deemed to have the same force and value as they would have if they had been included textually in the present instrument, and are consequently placed under the guarantee of Their Majesties". 530/

(14) The dissolution of the Union of Norway and Sweden was effected by several conventions signed at Stockholm on 26 October 1905. 531/ The treatment of debts was decided by the Agreement of 23 March 1906 relating to the settlement of economic

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529/ Ibid. (1842), vol. XVI, part II, pp. 782-783.

530/ Article 2 of the London Treaty of 19 April 1839, signed by the five Courts and the Netherlands (ibid., p. 773), and article 1 of the London Treaty of 19 April 1839, signed by the five Courts and Belgium (ibid., p. 790).

531/ See L. Jordan, La séparation de la Suède et de la Norvège (Paris, Pedone, 1906) [thesis]; Fauchille, op. cit., p. 234.

questions arising in connection with the dissolution of the union between Norway and Sweden,<sup>532/</sup> which is commonly interpreted to mean that each State continued to be liable for its debts.<sup>533/</sup> The Agreement provided:

"Article 1. Norway shall pay to Sweden the share applicable to the first half of 1905 of the appropriations voted by Norway out of the common budget for the foreign relations of Sweden and Norway in respect of that year, into the Cabinet Fund, and also, out of the appropriations voted by Norway for contingent and unforeseen expenditures of the Cabinet Fund for the same year, the share attributable to Norway of the cost-of-living allowances paid to the agents and officials of the Ministry of Foreign Relations for the first half of 1905.

"Article 2. Norway shall pay to Sweden the share applicable to the period 1 January-31 October 1905 of the appropriations voted by Norway out of the common budget for that year, into the Consulates Fund, and also the share attributable to Norway of the following expenditures incurred in 1904 and not accounted for in the appropriations for that year.

(a) the actual service expenditures of the consulates for the whole of 1904; and

(b) the office expenses actually attributed to the remunerated consulates, subject to production of documentary evidence, for the second half of 1904." <sup>534/</sup>

These provisions, the purpose of which was to make Norway assume its share of common budget expenditures, become clearer if it is remembered that, by a duplication of functions, the King of Sweden was also the King of Norway, and that the Swedish institutions were exclusively responsible for the diplomatic and consular representation of the Union. In this connection, it should be noted that the cause of the break between the two States was Norway's wish to have its own consular service.<sup>525/</sup> From the foregoing considerations, it may be inferred

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<sup>532/</sup> Descamps and Renault, Recueil ... XVe siècle, 1906 (op. cit.), pp.858-862.

<sup>533/</sup> Thus Fauchille (op. cit., p. 389) writes:

"After Sweden and Norway had dissolved their real union in 1905, a convention between the two countries, dated 23 March 1906, left each of them responsible for its personal debts."

<sup>534/</sup> Descamps and Renault, Recueil ... XVe siècle, 1906 (op. cit.), pp. 858-859.

<sup>535/</sup> Académie diplomatique internationale, Dictionnaire diplomatique, ed. A.-F. Frangulis (Paris, Lang Blanchong, 1933), vol. II, p. 233.



that the consequences of the dissolution of the Swedish-Norwegian Union were, first, the continued liability of each of the two States for its own debts and, secondly, an apportionment of the common debts between the two successor States. (15) The Federation of which Northern Rhodesia, Southern Rhodesia and Nyasaland had been members since 1953 was dissolved in 1963 by an Order in Council of the United Kingdom Government. The Order also apportioned the federal debt among the three territories in the following proportions: Southern Rhodesia, 52 per cent; Northern Rhodesia, 37 per cent; Nyasaland, 11 per cent. The apportionment was made on the basis of the share of the federal income allocated to each territory.<sup>536/</sup> This apportionment of the debts, as made by the United Kingdom Government's Order in Council, was challenged both as to its principle and as to its procedure. It was first pointed out that, "since the dissolution was an exercise of Britain's sovereign power, Britain should assume responsibility."<sup>537/</sup> This observation was all the more pertinent as the debts thus apportioned among the successor States by a British act of authority included debts contracted, under the administering Power's guarantee, with IBRD. This explains the statement by Northern Rhodesia that "it had at no time agreed to the allocation laid down in the Order, and had only reluctantly acquiesced in the settlement."<sup>538/</sup> Zambia, formerly Northern Rhodesia, later dropped its claim, because of the aid granted to it by the United Kingdom Government.<sup>539/</sup>

(16) One of the cases considered above, the dissolution of Great Colombia, gave rise to two arbitral awards almost 50 years after the apportionment among the successor States of the debts of the predecessor State. These were the Sarah Campbell and W. Ackers-Cage cases,<sup>540/</sup> taken up by the Mixed Commission of Caracas set up between Great Britain and Venezuela under an agreement of 21 September 1863, in which two claimants - Alexander Campbell (later, his widow Sarah Campbell) and W. Ackers-Cage - sought to obtain from Venezuela payment of

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<sup>536/</sup> O'Connell, State Succession ... (op. cit.), p. 393.

<sup>537/</sup> Ibid., p. 394.

<sup>538/</sup> Ibid., p. 393.

<sup>539/</sup> Ibid., foot-note 6.

<sup>540/</sup> A. de Lapradelle and N. Politis, Recueil des arbitrages internationaux (Paris, Pedone, 1923), vol. II, pp. 552-556.

a debt owing to them by Great Colombia, Sturup, the umpire, in his award of 1 October 1869, held that "the two claims should be paid by the Republic. However, since they both form part of the country's external debt, it would be unjust to require that they be paid in full."<sup>541/</sup>

(17) Two authors who commented on this award considered that "the responsibility of Venezuela for the debts of the former Republic of Colombia, from which it had originated, was not and could not be contested" because, in their opinion (citing Bonfils and Fauchille), it could be regarded as a rule of international law that "where a State ceases to exist by breaking up or dividing into several new States, the new States should each bear, in an equitable proportion, a share of the debts of the original State as a whole."<sup>542/</sup> Another author took the same view, adding pertinently that "the umpire Sturup, simply took account of the resources of the successor State in imposing an equitable reduction of the amount of the claims."<sup>543/</sup>

(18) In connection with the dissolution of a State in general, the following rule has been suggested:

"If a State ceases to exist by breaking up and dividing into several new States, each of the latter shall in equitable proportion assume responsibility for a share of the debts of the original State as a whole, and each of them shall also assume exclusive responsibility for the debts contracted in the exclusive interest of its territory."<sup>544/</sup>

(19) A comparable formula is offered by an authority on the subject, article 49 of whose codification of international law provides that:

"If a State should divide into two or more new States, none of which is to be considered as the continuation of the former State, that former State is deemed to have ceased to exist and the new States replace it with the status of new persons."<sup>545/</sup>

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<sup>541/</sup> Ibid., pp. 554-555.

<sup>542/</sup> Ibid., p. 555.

<sup>543/</sup> Rousseau, Droit international public (op. cit.), p. 431.

<sup>544/</sup> Fauchille, op. cit., p. 380.

<sup>545/</sup> J.-G. Bluntschli, Das moderne Völkerrecht, 3rd ed. (Nördlingen, Beck, 1878), pp. 81 and 82.

He, too, recommends the equitable apportionment of the debts of the extinct predecessor State, citing as an example "the division of the Netherlands into two kingdoms: Holland and Belgium", although he considers that "the former Netherlands was in a way continued by Holland particularly as regards the colonies".<sup>546/</sup>

(20) From the foregoing survey, two conclusions may be drawn that are worth noting in the context of articles 38 and 39. The first relates to the classification of the category of State succession exemplified by the precedents cited. In choosing historical examples of the practice of States with a view to their classification as cases of separation-secession and dissolution respectively, the Commission has mainly taken into account the fact that, in a case of the first category, the predecessor State survives the transfer of territory, whereas in a case of the second category it ceases to exist. In the first case, the problem of the apportionment of debts arises between a predecessor State and one or more successor States, whereas in the second it affects successor States inter se. Yet even this apparently very dependable criterion of the State's disappearance or survival cannot ultimately provide sure guidance, for it raises, in particular, the thorny problems of the State's continuity and identity.

(21) In the case of the disappearance of the Kingdom of the Netherlands in 1830, which the Commission has considered, not without some hesitation, as one of the examples of dissolution of a State, the predecessor State - the Belgian-Dutch monarchical entity - seems genuinely to have disappeared and to have been replaced by two new successor States, Belgium and Holland, each of which assumed responsibility for one half of the debts of the predecessor State. It might be said that it was actually the mode of settlement of the apportionment of the debts that confirmed the nature of the event that had occurred in the Dutch monarchy and made it possible to describe it as "dissolution of a State". It is also possible, on the other hand, to regard the Netherlands example as a case of secession, and to hold, like one of the authors cited above, that "from a legal point of view, the independence of Belgium was nothing more than a secession of a province".<sup>547/</sup> That approach might have proved seriously prejudicial

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<sup>546/</sup> Ibid.

<sup>547/</sup> Feilchenfeld, op. cit., p. 208.

to Holland's interests had it been acted upon, precisely in so far as it was not apparently demonstrated that the secessionist province was legally bound to participate - let alone in equal proportion - in servicing the debt of the dismembered State. But that approach was not, in fact, adopted by the London Conference, or even by the parties themselves, least of all by Belgium. Both States regarded their separation as the dissolution of a union, and each claimed for itself the title of successor State to a predecessor State that had ceased to exist. That was the treatment adopted in the above-mentioned Treaty of London of 19 April 1839, concluded between the five Powers and the Netherlands, article 3 of which provided that:

"The Union\* which existed between Holland and Belgium under the Treaty of Vienna of 31 May 1815 is recognized by His Majesty the King of the Netherlands, Grand Duke of Luxembourg, as being dissolved\*." 548/

- (22) There are other cases concerning which opinions differ as to whether they should be regarded as falling under article 38 or under article 39. In any event, it is clear that there is a relationship between the two types of succession, and that the solutions adopted in the two cases should at least be analogous.
- (23) The second conclusion concerns the nature of the problems arising in connection with succession of States in respect of debts. In cases of separation of a part of the territory of a State as well as of dissolution of a State, the problems posed by the devolution of the State debt involve, in the final analysis, an endeavour to adjust the interests of the States concerned. Such interests are often substantial and almost always conflicting, and their reconciliation will in many cases call for difficult negotiations between the States directly affected by the succession. Only these States really know what are their own interests, and are often the best qualified to defend them, and in any event they alone know how far they can go in making concessions. These considerations are most strikingly illustrated in the already quoted case of 1830/1839, where the Netherlands and Belgium refused to submit to the many settlement proposals made by third States, which happened to be the major Powers at that time. The solution was worked out by the States concerned themselves, although a certain kinship is discernible between the various types of settlement proposed to them and the solutions they ultimately adopted. While it is undeniably more than desirable - and indeed necessary - to leave the parties concerned the widest latitude in seeking

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548/ de Martens, ed., Nouveau Recueil ... (op. cit.), vol. XVI, p. 770.

an agreement acceptable to each of them, nevertheless this "face-to-face" confrontation might in some situation prove prejudicial to the interests of the weaker party.

(24) In the light of the foregoing remarks, the best solution in the two types of succession envisaged under articles 38 and 39 would be to adopt a common residual rule to be applied in cases where the States concerned cannot reach agreement on the devolution of the debt of the predecessor State. Furthermore, the historical precedents analysed above, together with the theoretical considerations amply developed throughout the present draft articles, lead the Commission to conclude that such a rule should be based on equity.

(25) Paragraph 1 of article 38 as well as article 39, thus state that, unless the States concerned otherwise agree "the State debt of the predecessor State" shall pass to the successor State or States, "in [an] equitable proportion[s], taking into account all relevant circumstances". The States concerned are "the predecessor State and the successor State" in the case of article 38, and "the successor States" in the case of article 39, where the predecessor State disappears. It should be noted that in article 39 the Commission has omitted the word "concerned", which appears after the words "the successor States" in article 17, because of the different situation covered by article 39, which involves the passing of a debt rather than of property. Such debt cannot be imposed on one of the successor States by agreement between the other successor States alone.

(26) Regarding the phrase "unless ... otherwise agree", the Commission wishes to point out that it is by no means intended to imply that the parties may agree on a solution that is not equitable. As demonstrated by State practice, an equitable or "just" apportionment of debts should always be the guiding principle for negotiations.

(27) With regard to the expression "taking into account all relevant circumstances", used in articles 38 and 39, the Commission adopted that formula despite the fact that it did not conform to the one already used in article 35, paragraph 2, namely, "taking into account, inter alia, the property, rights and interests which pass to the successor State in relation to that State debt". Although the latter phrase could theoretically be considered as including "all relevant circumstances", the Commission preferred the new expression for articles 38 and 39 in order to avoid a division of opinion among its members as to whether those articles should expressly mention, as one of the factors to be taken into account,

the "tax-paying capacity" or "debt-servicing capacity", which would best convey the meaning of the French term "capacité contributive". Some members considered such capacity as one of the most important factors in dealing with the passing of State debts. Others took the view that it should nowhere be mentioned because, if that factor were to be singled out, there might be a danger of excluding others that could be equally important. In addition, the term "capacité contributive" was thought to be too vague to be uniformly interpreted. The expression "taking into account all relevant circumstances" should therefore be understood to embrace all the factors relevant to a given situation, including "capacité contributive", both actual and potential, and the "property, rights and interests" passing to the successor State in relation to the State debt in question. Other factors, too, might deserve particular consideration in certain cases, their relative importance varying according to the specific situation.

(28) Paragraph 2 of article 38 is identical with paragraph 2 of article 16, the purpose of which is to assimilate cases of separation of a part of the territory of a State that unites with another independent State, to those in which a part of the territory of a State separates and forms a new State. The rationale for such assimilation is given in the commentary to article 16 in the context of succession in respect of State property.<sup>549/</sup> The Commission finds no reason to deal with such cases differently in the context of succession to State debts.

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<sup>549/</sup> See para. (16) of the commentary to articles 16 and 17 above.

## CHAPTER III

### QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

#### A. Introduction

##### 1. Historical review of the work of the Commission

88. During the preparation of the draft articles on the law of treaties from 1950 to 1966, the International Law Commission considered on several occasions the question whether the draft articles should apply not only to treaties between States but also to treaties concluded by other entities, and in particular by international organizations.<sup>550/</sup> The course finally adopted was to confine the study undertaken by the Commission to treaties between States. The Commission accordingly included in the final draft articles<sup>551/</sup> an article 1 which read: "The present articles relate to treaties concluded between States". The draft articles were subsequently transmitted<sup>552/</sup> as the basic proposal to the United Nations Conference on the Law of Treaties, which, having met at Vienna in 1968 and 1969, adopted on 22 May 1969, the Vienna Convention on the Law of Treaties.<sup>553/</sup> Article 1 of the Commission's draft became article 1 of the Convention, reading as follows: "The present Convention applies to treaties between States." However, in addition to the provision of article 1, the Conference adopted the following resolution:

#### Resolution relating to article 1 of the Vienna Convention on the Law of Treaties

"The United Nations Conference on the Law of Treaties,

"Recalling that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session.

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<sup>550/</sup> See the first report of the Special Rapporteur (Yearbook ... 1972, vol. II, p. 171, document A/CN.4/258), and the historical survey in the working paper published by the Secretariat (A/CN.4/L.161 and Add.1 and 2).

<sup>551/</sup> Yearbook ... 1966, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II.

<sup>552/</sup> The draft articles were transmitted to the Conference by the Secretary-General under paragraph 7 of General Assembly resolution 2166 (XXI) of 5 December 1966.

<sup>553/</sup> Referred to hereafter as the "Vienna Convention". For all references to the text of the Convention, see 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. 289. The Vienna Convention entered into force on 27 January 1980.

"Taking note that the Commission's draft articles deal only with treaties concluded between States,

"Recognizing the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,

"Cognizant of the varied practices of international organizations in this respect, and

"Desirous of ensuring that the extensive experience of international organizations in this field be utilized to the best advantage,

"Recommends to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations." 554/

89. The General Assembly, having discussed that resolution, dealt with it in paragraph 5 of its resolution 2501 (XXIV) of 12 November 1969, in which the Assembly

"Recommends that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question."

90. In 1970, at its twenty-second session, the Commission decided to include the question referred to in resolution 2501 (XXIV), paragraph 5, in its general programme of work, and it set up a Sub-Committee composed of thirteen members to make a preliminary study.<sup>555/</sup> The Sub-Committee submitted two reports, the first in the course of the Commission's twenty-second session<sup>556/</sup> and the second during its twenty-third session.<sup>557/</sup> In 1971, on the basis of the second report, the Commission appointed Mr. Paul Reuter Special Rapporteur for the question of treaties concluded between States and international organizations or between two or more international organizations.<sup>558/</sup> In addition, it confirmed a decision taken in 1970

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554/ Ibid., p. 285.

555/ See Yearbook ... 1970, vol. II, p. 310, document A/8010/Rev.1, para. 89.

556/ Ibid.

557/ See Yearbook ... 1971, vol. II (Part One), p. 348, document A/8410/Rev.1, chap. IV, annex.

558/ Ibid., para. 118.



requesting the Secretary-General to prepare a number of documents, including an account of the relevant practice of the United Nations and the principal international organizations, "it being understood that the Secretary-General will, in consultation with the Special Rapporteur, phase and select the studies required for the preparation of that documentation".<sup>559/</sup>

91. To facilitate the task of carrying out that decision, the Special Rapporteur addressed a questionnaire to the principal international organizations, through the Secretary-General, with a view to obtaining information on their practice in the matter.<sup>560/</sup> The Secretariat, in its turn, prepared the following studies and documents between 1970 and 1974:

(a) A document containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations Treaty Series;<sup>561/</sup>

(b) A selected bibliography on the question (A/CN.4/277);<sup>562/</sup>

(c) A study of the possibilities of participation by the United Nations in international agreements on behalf of a territory (A/CN.4/281).<sup>563/</sup>

92. Meanwhile the General Assembly, by its resolutions 2634 (XXV) of 12 November 1970 and 2780 (XXVI) of 3 December 1971 recommended that the Commission should continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations. This recommendation was later renewed by the General Assembly in its resolutions 2926 (XXVII) of 28 November 1972 and 3071 (XXVIII) of 30 November 1973.

93. In 1972 the Special Rapporteur, submitted his first report<sup>564/</sup> on the topic referred to him. This report reviewed the discussions which the Commission and after it the Conference, while examining the law of treaties, had held on the question of the treaties of international organizations. In the light of that review, the report made a preliminary examination of several essential problems

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<sup>559/</sup> Ibid.

<sup>560/</sup> Yearbook ... 1973, vol. II, document A/CN.4/271, annex.

<sup>561/</sup> A/CN.4/I.161 and Add.1 and 2.

<sup>562/</sup> Yearbook ... 1974, vol. II (Part Two), p. 3, document A/CN.4/277.

<sup>563/</sup> Ibid., p. 8, document A/CN.4/281.

<sup>564/</sup> Yearbook ... 1972, vol. II, p. 171, document A/CN.4/258.

such as the form in which international organizations express their consent to be bound by a treaty, their capacity to conclude treaties, the question of representation, the effect of treaties concluded by international organizations and the precise meaning of the reservation concerning "any relevant rules of the organization" which appears in article 5 of the Vienna Convention.

94. In 1973 the Special Rapporteur submitted to the Commission for its twenty-fifth session, a second report<sup>565/</sup> supplementing the first in the light of, inter alia, the substantial information since communicated by international organizations in reply to the questionnaire which had been addressed to them.<sup>566/</sup>

95. Mr. Reuter's first two reports were discussed by the Commission at its twenty-fifth session (1973). The opinions expressed by the members concerning those reports are reflected in the Commission's report on the work of that session.<sup>567/</sup>

96. From 1974 to 1980,<sup>568/</sup> the Special Rapporteur presented his third to ninth reports containing proposed draft articles. Those reports were considered by the Commission at its twenty-sixth, twenty-seventh and twenty-ninth to thirty-second sessions. On the basis of that consideration and on reports of the Drafting Committee, the Commission at its thirty-second session completed the adoption in first reading of a set of draft articles on treaties concluded between States and international organizations or between international organizations.<sup>569/</sup>

97. During that period, the General Assembly recommended that the International Law Commission should: proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations (resolution 3315 (XXIX) of 14 December 1974 and 3495 (XXX) of 15 December 1975); proceed on a priority basis, with that preparation (resolutions 31/97 of 15 December 1976 and 32/151 of 19 December 1977); proceed

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<sup>565/</sup> Yearbook ... 1973, vol. II, document A/CN.4/271.

<sup>566/</sup> Ibid., annex.

<sup>567/</sup> Yearbook ... 1973, vol. II, document A/9010/Rev.1, paras. 127-133.

<sup>568/</sup> Yearbook ... 1974, vol. II (Part One), p. 135, document A/CN.4/279 (third report); Yearbook ... 1975, vol. II, p. 25, document A/CN.4/285 (fourth report); Yearbook ... 1976, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1 (fifth report); Yearbook ... 1977, vol. II (Part One), p. 119, document A/CN.4/298 (sixth report); Yearbook ... 1978, vol. II (Part One), p. 247, document A/CN.4/312 (seventh report); A/CN.4/319 (to appear in Yearbook ... 1979, vol. II (Part One) (eighth report)); and A/CN.4/327 (to appear in Yearbook ... 1980, vol. II (Part One) (ninth report)).

<sup>569/</sup> For the text of these articles, see Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10 (A/35/10); p. 181, chapter IV. B.1.

with that preparation with the aim of completing, as soon as possible, the first reading of these draft articles (resolution 33/139 of 19 December 1978); and proceed with that preparation with the aim of completing, at its thirty-second session, the first reading of these draft articles (resolution 34/141 of 17 December 1979).

98. In 1979, at its thirty-first session the Commission reached the conclusion that the articles on the topic which had thus far been considered (articles 1 to 4, 6 to 19, 19 bis, 19 ter, 20, 20 bis, 21 to 23, 23 bis, 24, 24 bis, 25, 25 bis, 26 to 36 bis and 37 to 60) should be submitted for observations and comments before the draft as a whole was adopted in first reading. That procedure was seen as making it possible for the Commission to undertake the second reading without too much delay. In accordance with articles 16 and 21 of its Statute, those draft articles were then transmitted to Governments for their comments and observations. Furthermore, since the General Assembly recommended, in paragraph 5 of resolution 2501 (XXIV) of 12 November 1969, that the Commission should study the present topic "in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice", the Commission also decided to transmit those draft articles to such organizations for their comments and observations.<sup>570/</sup> It was indicated at that time that following completion of the first reading of the draft, the Commission would request comments and observations of Member States and of the said international organizations on the remaining draft articles adopted and, in so doing, would set a date by which comments and observations should be received.

99. In the light of the above, the Commission, at its thirty-second (1980) session, decided to request the Secretary-General again to invite Governments and the international organizations concerned to submit their comments and observations on the draft articles on treaties concluded between States and international organizations or between international organizations transmitted earlier and to request that such comments and observations be submitted to the Secretary-General by 1 February 1981.

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<sup>570/</sup> In the light of Commission practice regarding its work on the topic, the organizations in question are the United Nations and the intergovernmental organizations invited to send observers to United Nations codification conferences.

100. Furthermore, and in accordance with articles 16 and 21 of its Statute, the Commission decided to transmit through the Secretary-General, to Governments and the international organizations concerned, articles 61 to 80 and the Annex adopted by the Commission in first reading at that session for their comments and observations and to request that such comments and observations be submitted to the Secretary-General by 1 February 1982.

101. The procedure outlined above would, it was anticipated, allow Governments and organizations sufficient time for the preparation of their comments and observations on all the draft articles and would also allow the Commission to begin its second reading of the draft articles on the topic without too much delay, on the basis of reports to be prepared by the Special Rapporteur and in the light of comments and observations received from Governments and international organizations.

102. By its resolution 35/163 of 15 December 1980, the General Assembly recommended that, taking into account the relevant written comments received and views expressed in the debates in the General Assembly, the International Law Commission should, at its thirty-third session, commence the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations.

103. At its present session, the Commission commenced its second reading of the draft articles in question on the basis of the tenth report (A/CN.4/341 and Add.1 and Add.1/Corr.1/(English only)) submitted by the Special Rapporteur. That report included general observations and a review of articles 1 to 41 of the draft articles as adopted in first reading, in the light of the written comments and observations received pursuant to the request noted on paragraphs 98 and 99 above, as well as of views expressed in the debates in the General Assembly.<sup>571/</sup> The

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<sup>571/</sup> See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its thirty-fifth session (1980) prepared by the Secretariat (A/CN.4/L.326); the topical summary of the discussion held in the Sixth Committee of the General Assembly during its thirty-fourth session (1979), prepared by the Secretariat (A/CN.4/L.311); Official Records of the General Assembly, Thirty-fourth Session, Annexes, agenda item 108, report of the Sixth Committee (1979), document A/34/785; ibid., Thirty-third Session, Annexes, agenda item 114, report of the Sixth Committee (1978), document A/33/419; ibid., Thirty-second Session, Annexes, agenda item 112, report of the Sixth Committee (1977), document A/32/433; ibid., Thirty-first Session, Annexes, agenda item 106, report of the Sixth Committee (1976), document A/31/370; ibid., Thirtieth Session, Annexes, agenda item 108, report of the Sixth Committee (1975), document A/10393; and ibid., Twenty-ninth Session, Annexes, agenda item 87, report of the Sixth Committee (1974), document A/9897.

Commission in addition had before it the text of the written comments and observations submitted by Governments and principal international organizations (A/CN.4/339 and Add.1-8).<sup>572/</sup> Finally, the Commission had before it a Note submitted by a member listing some of the relevant provisions of the Draft Convention on the Law of the Sea (Informal Text) (A/CONF.62/WP.10/Rev.3) and the Common Fund Agreement (TD/IPC/CF/CONF/24).

104. The Commission considered the tenth report of the Special Rapporteur at its 1644th to 1652nd and 1673rd to 1679th meetings and referred to the Drafting Committee articles 1 to 41. At its 1681st and 1692nd meetings, the Commission on the report of the Drafting Committee adopted the text of articles 1, 2 (paragraph 1 (a), (b), (b bis), (b ter), (c), (c bis), (d), (e), (f), (g), (i) and (j) and paragraph 2) and 3 to 26.<sup>573/</sup>

105. The text of articles 1 to 26 of the draft articles on treaties concluded between States and international organizations or between international organizations and commentaries thereto, as finally approved at the present session are reproduced below in section B for the information of the General Assembly. After the completion of the second reading of the set of draft articles, the Commission reserves the possibility of making minor drafting adjustments to those articles if in the interests of clarity and consistency it is so required.

106. In order to facilitate the completion of the second reading of the draft articles in question at the earliest possible time, the Commission at its present session decided to remind, through the Secretary-General, Governments and principal international organizations<sup>574/</sup> of its previous invitation for the submission to the Secretary-General, by 1 February 1982, of their comments and observations on articles 61 to 80 and Annex of the draft articles on treaties concluded between States and international organizations or between international organizations as adopted in first reading by the Commission in 1980.

107. In that connection, it may be noted that at its next session the Commission hopes to examine the remaining articles (articles 41 to 80) and Annex adopted in first reading which were not considered during the present session.<sup>575/</sup> After

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<sup>572/</sup> See Annex II to the present report.

<sup>573/</sup> See paragraph 12 above.

<sup>574/</sup> See paragraph 100 above.

<sup>575/</sup> See also paragraph 12 above.

those remaining articles have been examined in the light of comments and observations received, the Commission will have completed its second reading of the draft articles in question and will at that time consider the formulation of any appropriate recommendations to the General Assembly.

2. General remarks concerning the draft articles

(a) Form of the draft

108. As in the other work undertaken by the Commission in the past, the form adopted for the present codification is that of a set of draft articles capable of constituting the substance of a convention at the appropriate time. This approach to the topic does not prejudice the decision which will be taken later when the second reading of the draft articles will have been completed; the Commission will then, in accordance with its Statute, recommend whatever procedure it considers most appropriate. However, a set of draft articles, because of the strict requirements it imposes upon the preparation and drafting of the text, has been deemed to be the most suitable form in which to deal with questions concerning treaties concluded between States and international organizations or between international organizations.

(b) Relationship to the Vienna Convention

109. By comparison with others, the present codification possesses some distinctive characteristics owing to the extremely close relationship between the draft articles and the Vienna Convention.

110. Historically speaking, the provisions which constitute the draft articles now under consideration would have found a place in the Vienna Convention had the Conference not decided that it would confine its attention to treaties between States. Consequently the further stage in the codification of the law of treaties represented by the preparation of draft articles on treaties concluded between States and international organizations or between international organizations cannot be divorced from the basic text on the subject, namely the Vienna Convention.

111. That Convention has provided the general framework for the present draft articles. This means, firstly, that the draft articles deal with the same questions as formed the substance of the Vienna Convention. The Commission has had no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties concluded between States and international organizations or between international organizations.

112. This task, as the Commission envisaged it, called for a very flexible approach. On considering what changes should be made in an article of the Vienna Convention in order to give it the form of an article applicable to treaties concluded between States and international organizations, the Commission has been presented with the possibility of drafting a provision containing additions to or refinements on the Vienna Convention that might also be applicable to treaties between States, for example in connection with a definition of treaties concluded in written form or the consequences of the relationship between a treaty and other treaties or agreements. Where such a possibility has occurred, the Commission has in principle refrained from pursuing it and from proceeding with any formulation which would give the draft articles, on certain points, a structure different from that of the Vienna Convention. The position is different where, because of the subject-matter under consideration, namely treaties between States and international organizations or between international organizations, new and original provisions are required to deal with problems or situations unknown to treaties between States.

113. Unfortunately these considerations do not dispose of all the difficulties raised by the relationship between the draft articles and the Vienna Convention. The preparation of a set of draft articles that may become a convention presents, as regards the future relationship between the articles and the Vienna Convention, awkward problems of law and drafting (see paragraph 120 below).

114. Treaties are based essentially on the equality of the contracting parties and this premise leads naturally to the assimilation, wherever possible, of the treaty situation of international organizations to that of States. The Commission has largely followed this principle in deciding generally to follow as far as possible the articles of the Vienna Convention referring to treaties concluded between States for treaties concluded between States and international organizations, and for treaties concluded between international organizations. The increasing number of treaties in which international organizations participate is evidence of the value of treaties to international organizations as well as to States.

115. However, even when limited to the field of the law of treaties, the comparison involved in the assimilation of international organizations to States is quickly seen to be far from exact. While all States are equal before international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization. As a composite structure, an international organization remains bound by close ties to the States which are its members; admittedly

analysis will reveal its separate personality and show that it is "detached" from them, but it still remains closely tied to its component States. Being endowed with a competence more limited than that of a State and often (especially in the matter of external relations), somewhat ill-defined, for an international organization to become party to a treaty occasionally requires an adaptation of some of the rules laid down for treaties between States.

116. The source of many of the substantive problems encountered in dealing with this subject lies in the contradictions which may arise as between consensus based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties. The rule stated in article 6, which reflects this basic truth, clearly shows the difference between international organizations and States. Moreover, although the number and variety of international agreements to which one or more international organizations are parties have continued to increase, international practice concerning certain basic questions, such as the participation of international organizations in open multilateral treaties and the formulation of reservations by international organizations, is still limited.

117. This does not mean, at least in the opinion of the great majority of the Commission, that a consistently negative position should be adopted on the status of international organizations under the law of treaties or that the problems involved should be overlooked. On the contrary, the Commission has sought to take a balanced view denying organizations some of the facilities granted to States by the Vienna Convention and applying to organizations certain rules whose flexibility had been considered appropriate for States alone. However, it has maintained for international organizations the benefit of the general rules of consensus wherever that presented no difficulties and seemed to be consistent with certain trends emerging in the modern world.

118. In the course of this necessary process of balancing, divergent opinions have frequently been expressed and two contradictory trends of opinion became apparent. According to one, international organizations should be treated like States as far as treaties are concerned, unless there is an obvious need to do otherwise, while



the other side considers that the differences are fundamental and should be emphasized at every opportunity, even from a purely formal point of view. Both approaches found supporters among the members of the Commission when the draft articles were being prepared; many draft articles represent an attempt to reach a compromise solution. The general principle of consensualism which constitutes the basis of any treaty commitment necessarily entails the legal equality of the parties, and this principle plays an important role in the draft articles. On the other hand, account has been taken of the essential differences between States and international organizations, not only in certain substantive rules but even in matters of vocabulary.<sup>576/</sup>

(c) Methodological approach

119. As soon as the Commission resolved, as indicated above, to prepare a text which could become a convention it was confronted with a choice: it could prepare a draft which in form was entirely independent of the Vienna Convention, or a draft which was more or less closely linked to that Convention from the standpoint of form. The Commission opted for the former course, that is a draft that is formally independent of the Vienna Convention. The draft articles as they appear today are in form entirely independent of the Vienna Convention, meaning that they are independent in two respects, which must be carefully distinguished.

120. First, the draft articles are independent of the Vienna Convention in the sense that the text as a whole represents a complete entity that can be given a form which would enable it to produce legal effects irrespective of the legal effects of the Vienna Convention. If the set of draft articles becomes a convention, the latter will bind parties other than those to the Vienna Convention and will have legal effects whatever befalls the Vienna Convention. The draft articles have been so formulated that, as worded at present, they are fated to remain completely independent of the Vienna Convention. If they became a convention, there would be States which would be parties to both conventions at once. That being so, there may be some problems to be solved, as the Commission indicated briefly in its report on the work of its twenty-sixth session:

"The draft articles must be so worded and assembled as to form an entity independent of the Vienna Convention: if the text later becomes a convention in its turn, it may enter into force for parties which are not parties to the

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<sup>576/</sup> Thus, for legal acts having the same nature, the same effect and the same purpose, the Commission used a different vocabulary according to whether those acts were performed by States or international organizations, for example "full powers" and "powers" (article 7) or "ratification" and "act of formal confirmation" (article 14).

Vienna Convention possibly including, it must be remembered, all international organizations. Even so, the terminology and wording of the draft articles could conceivably have been brought into line with the Vienna Convention in advance, so as to form a homogeneous whole with that Convention. The Commission has not rejected that approach outright and has not ruled out the possibility of the draft articles as a whole being revised later with a view to providing for States which are parties both to the Vienna Convention and to such convention as may emerge from the draft articles, a body of law as homogeneous as possible, particularly in terminology."577/

121. Second, the draft articles are independent in the sense that they state the rules they put forward in full, without referring back to the articles of the Vienna Convention, even when the rules are formulated in terms identical with those of the Vienna Convention.

122. It has been suggested that it would be a good idea to streamline as much as possible a set of draft articles which appeared to be a belated annex to the Vienna Convention and whose main point was to establish the very simple idea that the principles embodied in the Convention are equally valid for treaties to which international organizations are parties. A review of the methodological approach hitherto adopted was urged and it was suggested that the draft articles be combined with the relevant provisions of the Vienna Convention so as to simplify the proposed text, one method being to use "renvoi" to the articles of the Vienna Convention. If the Commission had adopted that latter method, it would have been possible to apply it to a considerable number of draft articles which differ from the Vienna Convention only in their references to the international organizations which are parties to the treaties covered by the draft articles. Although such an approach would simplify the drafting process, the International Law Commission has not followed it for several reasons. To begin with, the preparation of a complete text with no "renvoi" to the Vienna Convention would undoubtedly be advantageous from the standpoint of clarity and would make it possible to measure the extent of the parallelism with the Vienna Convention. Furthermore, the International Law Commission has until now avoided all formulas involving "renvoi"; one need only compare the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character to realize that, although

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577/ Yearbook ... 1974, vol. II (Part One), p. 293, document A/9610/Rev.1, para. 141.

there was ample opportunity to refer from one text to another, there is not a single example of a "renvoi". Moreover, such "renvoi" is likely to cause certain legal difficulties: since every convention may have a different circle of States parties would States not parties to the convention to which the "renvoi" referred be bound by the interpretation given by States which were parties to the convention in question? Should "renvoi" to a convention be understood to apply to the text as it stands at the time of the "renvoi" or to the text as it might conceivably be amended as well?

123. It may also be useful to consider another possible methodological approach which, while not having been suggested thus far, merits attention. That approach is based on the desire to strengthen the formal links between the draft articles and the Vienna Convention and entails considering the draft articles as constituting, from the technical standpoint, a proposal to amend the Vienna Convention on the Law of Treaties. Such a position cannot be accepted by the Commission for a number of reasons. The simplest is that, since the Vienna Convention does not contain any specific provisions governing its amendment, the rules of article 40 of the Convention would apply and amendments would be decided upon both as to principle and substance by the contracting States alone. Of course, any contracting State can take the initiative to have the treaty amended on any ground it deems appropriate, but the International Law Commission is foreign to such a procedure and cannot direct its work to that end. Moreover, returning to the initial point, it must be borne in mind that the draft articles should be structured in such a way as to accord with whatever solution the General Assembly may ultimately adopt. The International Law Commission cannot at the present stage and on its own authority adopt an approach which would foreclose all but one very specific option, namely, amendment of the Vienna Convention. It should be added, moreover, that incorporating the draft articles into the Vienna Convention by means of an amendment would create difficulties with regard to the role of international organizations in the preparation of the text and the procedure in accordance with which they would agree to be bound by the provisions relating to them. In addition, incorporating the substance of the draft articles into the Vienna Convention would entail a number of drafting problems, on which there is no need to dwell here.

124. The Commission has prepared a comprehensive set of draft articles that will remain legally separate from the Vienna Convention. The draft articles will be given legal force by incorporation in a convention or another instrument depending

upon the decision of the General Assembly. However much the streamlining of the text of the draft articles may be desirable, it can be achieved, at least to some extent, by means other than the inclusion of references to the Vienna Convention. 125. As the Commission's work has progressed, views have been expressed to the effect that the wording of the draft articles is too cumbersome and too complex. Almost all such criticisms levelled against the draft articles stem from the dual position of principle that is responsible for the nature of some articles:

- On the one hand, it is held that there are sufficient differences between States and international organizations to rule out in some cases the application of a single rule to both;
- On the other hand, it is held that a distinction must be made between treaties between States and international organizations and treaties between two or more international organizations and that different provisions should govern each.

There is no doubt that these two principles are responsible for the drafting complexities which are so apparent in the draft articles as adopted in first reading.

126. In commencing the second reading of the draft articles at the present session, the Commission considered whether in concrete instances it was possible to consolidate certain articles which dealt with the same subject-matter, as well as the text within individual articles, as had been suggested in some of the written comments received and as had been proposed by the Special Rapporteur in his tenth report. Whenever it was deemed justified by the characteristics of the types of treaty involved, the Commission decided to maintain the textual distinctions which had been made in the articles adopted in first reading, with a view to achieving clarity and precision and consequently to facilitate the application and interpretation of the rules contained in the articles concerned. On the other hand, when it was concluded that repetition or distinctions were not so justified, the Commission proceeded to simplify the text to the extent possible by combining two paragraphs into a single one applicable to all the treaties which are the subject-matter of the present draft (this was done in the case of articles 13, 15 and 18). It also proceeded in certain cases to combine two articles into a more simplified single one (articles 19 and 19 bis, 20 and 20 bis, 23 and 23 bis, 24 and 24 bis and 25 and 25 bis). In one case, article 19 ter, an article adopted in first reading was deleted from the draft upon review during second reading.

127. It can be concluded, in general, that the Commission will continue to pay close attention to the quality of the wording and will seek to simplify it as far as possible without introducing any ambiguities or altering any substantive position which the Commission may intend to confirm.

128. Finally, in conformity with the general conception of the relationship which the draft articles should naturally bear to the Vienna Convention, it was decided to keep the order of that Convention so far as possible, so as to permit continuous comparison between the draft articles and the corresponding articles of the Convention. Accordingly, for the time being at least, the draft articles bear the same numbers as those of the Vienna Convention. Any provision of the present draft which does not correspond to a provision found in the Vienna Convention is numbered bis, ter and so forth in order to preserve the parallel between the Vienna Convention and the draft articles.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

129. The text of, and the commentaries to, articles 1, 2 (paragraphs 1(a), (b), (b bis), (b ter), (c), (c bis), (d), (e), (f), (g), (i) and (j) and paragraph 2) and 3 to 26 of the draft articles on treaties concluded between States and international organizations or between international organizations, as finally approved by the International Law Commission at its thirty-third session, as reproduced below.

PART I

INTRODUCTION

Article 1

Scope of the present articles

The present articles apply to:

(a) treaties concluded between one or more States and one or more international organizations, and

(b) treaties concluded between international organizations.

Commentary

The title of the draft articles is a slightly simplified version of the title of the topic as it appears in several General Assembly resolutions and in the resolution relating to article 1 of the Convention adopted by the United Nations Conference on the Law of Treaties. The titles of part I and article 1 are in the same form as those in the Vienna Convention. The scope of the draft articles is described in the body of article 1 in more precise terms than in the title in order

to avoid any ambiguity. Furthermore the two categories of treaties concerned have been presented in two separate subparagraphs because this distinction will sometimes have to be made in the treaty régime to which the draft articles apply. The separation into two subparagraphs, (a) and (b), does not affect the fact that many of the draft articles are formulated in general terms, referring to "a treaty", without distinguishing between the two types of treaties.

## Article 2

### Use of terms

1. For the purposes of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations, or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty or for accomplishing any other act with respect to a treaty;

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for negotiating, adopting or authenticating the text of a treaty, for communicating the consent of the organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving, or acceding to a

treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State
- (ii) an international organization

which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

- (i) a State
- (ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

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(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or in the rules of any international organization.

#### Commentary

(1) Paragraph 1 (a) defining the term "treaty", follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. No further details have been added to the Vienna Convention text.

(2) The definition of the term "treaty" contains a fundamental element by specifying that what is involved is an agreement "governed by international law". It has been suggested that a further distinction should be introduced into the article according to whether or not a State linked by an agreement to an

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578/ See paragraph 12 above.

international organization is a member of that organization. The Commission fully recognizes that special problems arise, particularly as regards matters such as reservations or the effects of treaties on third States or organizations, when an organization and some or all of its member States are parties to the same treaty, but the draft articles cannot be designed to cater exhaustively for all difficulties. Furthermore, while the distinction may be relevant in the case of regional organizations, it is less important in the case of universal organizations. For those reasons, the Commission has, not without regret, left it aside.

(3) The suggestion noted above is also of interest in so far as it raises the possibility of investigating whether some agreements are of an "internal" nature as far as the international organization is concerned, that is, whether they are governed by rules peculiar to the organization in question. The Special Rapporteur addressed enquiries on this point to various international organizations without receiving any conclusive replies.<sup>579/</sup> However, the draft articles, in referring to agreements "governed by international law", have established a simple and clear criterion. It is not the purpose of the draft articles to state whether agreements concluded between organizations, between States and international organizations, or even between organs of the same international organization may be governed by some system other than general international law, whether the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law. Granting that, within certain limits, such a possibility exists in some cases, the draft articles do not purport to provide criteria for determining whether an agreement between international organizations or between States and international organizations is not governed by general international law. Indeed, that is a question which, within the limits of the competence of each State and each organization, depends essentially on the will of the parties and must be decided on a case-by-case basis.

(4) What is certain is that the number of agreements dealing with administrative and financial questions has increased substantially in relations between States and organizations or between organizations, that such agreements are often concluded in accordance with streamlined procedures and that the practice is sometimes uncertain as to which legal system governs such agreements. If an agreement is concluded by organizations with recognized capacity to enter into agreements under international law and if it is not by virtue of its purpose and

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<sup>579/</sup> See the second report of the Special Rapporteur, Yearbook ... 1973, vol. II, document A/CN.4/271, paras. 83-87.



terms of implementation placed under a specific legal system (that of a given State or organization), it may be assumed that the parties to the agreement intended it to be governed by general international law.<sup>580/</sup> Such cases should be settled in the light of practice; the draft articles are not intended to prescribe the solution.

(5) The texts of paragraphs 1 (b), and (b ter), reproduce the same meanings attributed to the terms in question as are given in article 2, paragraph 1 (b), of the Vienna Convention with regard to the establishment by a State of its consent to be bound by a treaty. Paragraph (b ter) also applies the definition of the Vienna Convention concerning "acceptance", "approval" and "accession" to the establishment by an international organization of its consent to be bound by a treaty.

(6) The use of the term "ratification" to designate a means of establishing the consent of an international organization to be bound by a treaty, however, gave rise to considerable discussion within the Commission in the context of the consideration of article 11 on means of expressing consent to be bound by a treaty (see below).

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<sup>580/</sup> Attention may be drawn to agreements referred to as "interagency" agreements, about whose legal nature there may sometimes be doubt. What seems certain is that some important agreements concluded between international organizations are not subject either to the national law of any State or to the rules of one of the organizations that is a party to the agreement and hence fall within the purview of general public international law. A case in point is that of the United Nations Joint Staff Pension Fund, which was established by General Assembly resolution 248 (III) of 7 December 1948 (subsequently amended on several occasions). The principal organ of the Fund is the Joint Staff Pension Board (art. 4 of the Regulations, JSPB/G.4/Rev.10). Article 13 of the Regulations provides that:

"The Board may, subject to the concurrence of the General Assembly, approve agreements with member Governments of a member organization and with intergovernmental organizations with a view to securing continuity of pension rights between such Governments or organizations and the Fund".

Agreements have been concluded in pursuance of that article with four States (Canada, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the USSR) and seven intergovernmental organizations (the European Communities, the European Space Agency, the European Free Trade Association, IBRD, IMF, OECD and the European Centre for Medium-range Weather Forecasts). For the text of some of these agreements, see Official Records of the General Assembly Thirty-fifth Session, Supplement No. 9 (A/35/9 and Add.1). An agreement has legal effect only when the General Assembly "concurs" (for an example see resolution 35/215 A IV, of 17 December 1980).

(7) To put the elements of the problem in clearer perspective, it should be remembered that there is no question of the meaning which may be given to the terms in question in the internal law of a State or in the rules of an international organization (article 2, paragraph 2). It is therefore irrelevant to ascertain whether an international organization employs the term "ratification" to designate a particular means of establishing its consent to be bound by a treaty. In point of fact, international organizations use the term only in exceptional cases, which appear to be anomalous.<sup>581/</sup> It is obvious, however, that the draft articles do not set out to prohibit an international organization from using a particular vocabulary within its own legal order.

(8) At the same time, the draft articles, like the Vienna Convention on the Law of Treaties, make use of a terminology accepted "on the international plane" (article 2, paragraph 1 (b) of the Vienna Convention). The Commission considered in this connection that the term "ratification" should be reserved for States, since in accordance with a long historical tradition it always denotes an act emanating from the highest organs of the State, generally the Head of State, and there are no corresponding organs in international organizations.

(9) Looking not at the organs from which the ratification proceeds, however, but at the technical mechanism of ratification, we find that ratification amounts to the definitive confirmation of a willingness to be bound which has, in the first instance, been manifested without commitment. Such a mechanism may sometimes be necessary in the case of international organizations, and there is no reason for denying it a place among the means of establishing their consent to be bound by a treaty. At present, however, there is no generally accepted international designation of such a mechanism in relation to an international organization. In the absence of an accepted term, the Commission has confined itself to describing this mechanism by the words "act of formal confirmation", as indicated in paragraph 1 (b bis). When necessary, international organizations, using a different terminology, can thus establish on an international plane their consent to be bound by a treaty by means of a procedure which is symmetrical with that which applies to States.

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<sup>581/</sup> See Yearbook ... 1975, vol. II, p. 33, document A/CN.4/285, para. 4 of the commentary to article 11 and note 31.

(10) In paragraph 1 (c), the term "full powers" is confined to documents produced by representatives of States and in paragraph 1 (c bis) the term "powers" to those produced by representatives of international organizations. The Commission is aware of how much the terminology varies in practice (a situation exemplified by articles 12 and 44 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character<sup>582/</sup>), but it considers that the terminology which it proposes makes a necessary distinction. It seemed inappropriate to use the term "full powers" for an organization, for the capacity of such a body to bind itself internationally is never unlimited.

(11) The Commission also believed that to apply the verb "express" in this context ("expressing the consent ... to be bound by ... a treaty") to the representative of an international organization might give rise to some doubt; particularly in view of the rather frequent gaps and ambiguities in constituent instruments, the term might be understood in some cases as giving the representative of an international organization the right to determine by himself, as representative, whether or not the organization should be bound by a treaty. A means of avoiding that doubt in such cases seemed the use of the verb "communicate" instead of the verb "express", since the former indicates more clearly that the consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization.

(12) Apart from the modifications made necessary by the incorporation of international organizations in the text,<sup>583/</sup> paragraph 1 (d), dealing with the term "reservation", follows the corresponding provision of the Vienna Convention and does not call for any special comment.

(13) It will be recalled that the definition of the term "reservation" in paragraph 1 (d) which appeared in the text adopted in first reading was adopted by the Commission in 1975 prior to its examination of articles 11 and 19. The Commission instead of waiting at that time, decided to provisionally adopt the wording found in the first reading draft which included the phrase "made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty". In so doing, the Commission saw the

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<sup>582/</sup> For the text of the Convention, see Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, vol. II, Documents of the Conference (United Nations publication, Sales No. E.75.V.12), document A/CONF.67/16.

<sup>583/</sup> As well as consequential slight drafting changes in the French text only.

advantage of a text simpler than the corresponding text of the Vienna Convention and of leaving in abeyance the question whether the terms "ratification", "acceptance", "approval" and "accession" could also be used in connection with acts whereby an organization expresses its consent to be bound by a treaty. Nevertheless, the Commission stressed that the wording so adopted was provisional and put the expression "by any agreed means" in brackets to indicate its intention to review the adequacy of such an expression at a later stage.

(14) Having adopted article 11 and subparagraph (b bis) of paragraph 1 of article 2, which establish an "act of formal confirmation" for international organizations as equivalent to ratification for States, the Commission at its present session saw no reason which would justify the maintenance of the first reading text as opposed to returning to a text which could now more closely follow that of the corresponding definition given in the Vienna Convention.

(15) Paragraph 1 (e) defines the terms "negotiating State" and "negotiating organization". It follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. Since the term "treaty" refers here to a category of conventional acts different from that covered by the same term in the Vienna Convention, the wording need not allow for the fact that international organizations sometimes play a special role in the negotiation of treaties between States by participating through their organs in the preparation, and in some cases even the establishment, of the text of certain treaties.

(16) Paragraph 1 (f), also follows the corresponding provision of the Vienna Convention, taking into account article 1 of the present draft.

(17) Except for the addition of the words "or an international organization", the definition given in paragraph 1 (g) follows exactly the wording of the Vienna Convention. It therefore leaves aside certain problems peculiar to international organizations. But in this case the words "to be bound by the treaty" must be understood in their strictest sense - that is to say, as meaning to be bound by the treaty itself as a legal instrument and not merely "to be bound by the rules of the treaty". For it can happen that an organization will be bound by legal rules contained in a treaty without being a party to the treaty, either because the rules have a customary character in relation to the organization, or because the organization has committed itself by way of a unilateral declaration (assuming that to be possible), or because the organization has concluded with the parties to treaty X a collateral treaty whereby it undertakes to comply with the rules contained in treaty X without, however, becoming a party to that treaty.

Furthermore, it should be understood that the relatively simple definition given above cannot be used in the case of international organizations which, at the time of the drawing-up of a treaty, lend their technical assistance in the preparation of the text of the treaty, but are never intended to become parties to it.

(18) Paragraph 1 (i) gives the term "international organization" a definition identical with that in the Vienna Convention. This definition should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of States and in exceptional cases one or two international organizations<sup>584/</sup> and in some cases having associate members which are not yet States or which may be other international organizations; some special situations have been mentioned in this connection, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.<sup>585/</sup>

(19) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(20) In the present draft, this very elastic definition is not meant to prejudice the régime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise no attempt has been made to prejudice the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is that the main purpose of the present draft is to regulate, not the status of international organizations, but the régime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.

(21) Attention should be drawn to a further very important consequence of the definition proposed. The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are

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<sup>584/</sup> This line of analysis may be compared with that adopted in paragraph 2 of article 9 below, regarding the adoption of the text of a treaty at international conferences.

<sup>585/</sup> In connection with situations in which an organization is called upon to act specifically on behalf of a territory, see the Secretariat study on "Possibilities of participation by the United Nations in international agreements on behalf of a territory" Yearbook ... 1974, vol. II (Part Two), p. 8, document A/CN.4/281.

universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

(22) Yet the Commission has wondered whether the concept of international organization should not be defined by something other than the "intergovernmental" nature of the organization. In connection with the second reading of the article, several governments also suggested that this should be the case.<sup>586/</sup> After having further discussed this question, the Commission has decided to keep its earlier definition because it is adequate for the purposes of the draft articles; either an international organization has the capacity to conclude at least one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.

(23) Paragraph 1 (j) is a new provision by comparison with the Vienna Convention. In the light of a number of references which appear in the present draft articles to the rules of an international organization, it was thought useful to provide a definition for the term "rules of the organization". Reference was made in particular to the definition that had recently been given in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (article 1, para. 1(34)).<sup>587/</sup> The Commission accordingly adopted the present draft subparagraph, which reproduces verbatim the definition given in that Convention.

(24) But a question which occupied the Commission for some considerable time was that of the terms referring to the organization's own law, or that body of law which is known as "the internal law" of a State and which the Commission has called "the rules" of an international organization. The Commission has, finally, left its definition unchanged. There would have been problems in referring to the "internal law" of an organization, for, while it has an internal aspect, this law also has in other respects an international aspect. The definition itself would have been incomplete without a reference to "the constituent instruments ... of the organization"; it also had to mention the precepts established by the organization itself, but the terminology used to denote such precepts varies from organization

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<sup>586/</sup> See A/CN.4/L.311, para. 171 and A/CN.4/339/Add.7, section IV, para. 1.

<sup>587/</sup> See footnote 582 above.

to organization. Hence, while the precepts might have been designated by a general formula through the use of some abstract theoretical expression, the Commission, opting for a descriptive approach, has employed the words "decisions" and "resolutions"; the adverbial phrase "in particular" shows that the adoption of a "decision" or of a "resolution" is only one example of the kind of formal act that can give rise to "rules of the organization". The effect of the adjective "relevant" is to underline the fact that it is not all "decisions" or "resolutions" which give rise to rules, but only those which are of relevance in that respect. Lastly, reference is made to "established practice". This point once again evoked comment from Governments and international organizations.<sup>588/</sup> It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules.<sup>589/</sup> However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect. Similarly, by referring to "established" practice, the Commission seeks only to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization's history. Organizations stressed this point at the Vienna Conference on the Law of Treaties (1969) and the Vienna Conference on the Representation of States in Their Relations with International Organizations (1975).<sup>590/</sup>

(25) Article 2, paragraph 2 extends to international organizations the provisions of article 2, paragraph 2, of the Vienna Convention, adjusted in the light of the adoption of the term "rules of the organization" as explained above.

### Article 3

#### International agreements not within the scope of the present articles

The fact that the present articles do not apply:

- (i) to international agreements to which one or more international organizations and one or more subjects of international law other than States or international organizations are parties; or

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<sup>588/</sup> See, for example, document A/CN.4/339/Add.7.

<sup>589/</sup> This was the view taken by the International Court of Justice with regard to the effect of abstentions by permanent members of the Security Council in voting in that body, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion, I.C.J. Reports 1971, p. 22, para. 22.

<sup>590/</sup> Yearbook ... 1972, vol. II, pp. 106 and 107, document A/CN.4/258, para. 51; see also Annex II to this report.

- (ii) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or international organizations are parties; or
- (iii) to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations;

shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;
- (c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

#### Commentary

(1) It is pretty well beyond dispute that the situation under international law of certain international agreements not within the scope of the present articles needs to be safeguarded by a provision on the lines of article 3 of the Vienna Convention. Suffice it to point out that it is not unusual for an international agreement to be concluded between an international organization and an entity other than a State or than an international organization. Reference might be made here (if the Vatican City were not recognized as possessing the characteristics of a State) to agreements concluded between the Holy See and international organizations. Similarly there can be little doubt that agreements concluded between the International Committee of the Red Cross and an international organization (such as those concluded with EEC under the World Food Programme) are indeed governed by international law. The development of world humanitarian law and its extension for the benefit of entities which have not yet been constituted as States will provide further examples of this kind, and there will even be agreements concluded between one or more international organizations, one or more States and one or more entities which are neither States nor international organizations.

(2) On the other hand there is no need to labour the frequency and importance of agreements not in written form concluded between one or more States and one or more international organizations. There may indeed be some doubt as to whether



agreements resulting from an offer made by a State and accepted by an international organization at a meeting of which only a summary record is to be kept are written agreements; it must also be borne in mind that many agreements between organizations are set down, for example, in the verbatim records of conferences or co-ordination committees. Lastly, the development of telecommunications necessarily leads to a proliferation of unwritten international agreements on a variety of matters ranging from peace-keeping to intervention on economic markets - so much so that voices have been raised against what has sometimes been considered the abuse of such agreements. However, even if such comment may in some cases be deemed justified, they do not affect the need for concluding such agreements. It is for each organization, under the rule laid down in article 6 of the draft, so to organize the régime of agreements not concluded in written form that no organ goes beyond the limits of the competence conferred on it by the relevant rules of the organization.

(3) It therefore seemed to the Commission that some agreements should have the benefit of provisions similar to those of article 3, subparagraphs (a), (b) and (c), of the Vienna Convention. The text of those subparagraphs of the Convention has been adopted for draft article 3, subject, in the case of subparagraph (c) to the changes obviously necessitated by the difference in scope between the Vienna Convention and the draft articles.

(4) On the other hand a problem might arise in defining the agreements to which the rules laid down in subparagraphs (a), (b) and (c) apply. The Commission considered that for the sake of clarity it should enumerate those agreements, and it discarded global formulae which, though simpler in form, were less precise; it has accordingly enumerated the agreements in question in separate categories in subparagraphs (i), (ii) and (iii) of draft article 3; categories (i) and (ii), as is implicit in the general meaning of the term "agreement", include both agreements in written form and agreements not in written form.

(5) On considering the three categories referred to in subparagraphs (i), (ii) and (iii), it will be seen that the Commission has excluded agreements between States, whether or not concluded in written form, and agreements between entities other than States or than international organizations, whether or not concluded in written form. It took the view that after the Vienna Convention there was no need to reiterate that agreements between States, whatever their form, were subject to international law. Agreements concluded between entities other than States or than international organizations seem too heterogeneous a group to constitute

a general category, and the relevant body of international practice is as yet too exiguous for the characteristics of such a general category to be inferred from it. (6) At its thirty-third session, the Commission, after having considered shorter versions of this article, decided that the present wording, although cumbersome, should be maintained for the sake of clarity. It decided to replace the expression "one or more entities other than States or international organizations" by the phrase "one or more subjects of international law other than States or international organizations". The term "subject of international law" is used in the Vienna Convention on the Law of Treaties, where it applies to international organizations in particular. The Commission avoided this term in first reading in order to preclude discussion of the question whether there are currently subjects of international law other than States and international organizations. It became apparent in second reading, however, that the term "entity" is too vague and could cover any subject of private law, including associations or societies, and that such an extension of the scope of the article could give rise to all kinds of problems. The reference to subjects of international law is, as things stand, far narrower in scope and the area of discussion which it opens up is very limited.

#### Article 4

##### Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties concluded after the entry into force of the present articles with regard to those States and those organizations.

##### Commentary

This provision repeats the text of article 4 of the Vienna Convention, subject only to the adjustments necessitated by draft article 1. The expression "entry into force" is to be regarded as provisional. The Commission has no wish for the moment to take a stand on the final form of the draft articles. The expression "entry into force" refers essentially to treaties and would have to be amended if the draft articles are not embodied in a convention. The Commission will have to state its feelings concerning the final form to be given to the draft once it has completed the second reading; the final decision on the matter will, however, lie with the General Assembly and the question therefore remains open. Furthermore, taken literally, the expression might be construed as implying that, in order to be enforceable against international organizations, the present draft articles would have to be embodied in a convention to which those international organizations were parties. However, the Commission did not intend, by the mere use of the words

"entry into force", to address itself at this stage to the question whether international organizations should be parties to a convention incorporating the proposed articles.

#### Article 5

#### Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

#### Commentary

(1) In its first reading of the draft articles, the Commission subscribed to the Special Rapporteur's view that there was no need for a provision paralleling article 5 of the Vienna Convention.

(2) On reviewing the question, the Commission came to the conclusion that, even though its substance would relate to what are still rather exceptional circumstances, such a provision was perhaps not without value; it has therefore adopted a draft article 5 which follows exactly the text of article 5 of the Vienna Convention. The differences resulting from the attribution to the term "treaty" of a distinct meaning in each of those texts must now be spelt out and evaluated.

(3) First, draft article 5 evokes the possibility of the application of the draft articles to the constituent instrument of one organization to which another organization is also a party. While - with the exception of the special status which one organization may enjoy within another as an associate member thereof<sup>591/</sup> - such cases are at present rare, not to say unknown, there is no reason to consider that they may not occur in the future. However, the Commission did not feel it necessary to draw from this the consequence that the definition of the expression "international organization" should be amended to take account of such cases, for they will never involve more than the admission by an essentially intergovernmental organization of one or two other international organizations

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<sup>591/</sup> See paragraph (18) of the commentary to article 2, above.

as members.<sup>592/</sup> The Commission did not consider the hypothesis that an international organization might have nothing but international organizations as members.

(4) Second, draft article 5 extends the scope of the draft to treaties adopted within international organizations. Such a situation arises principally when a treaty is adopted within an international organization of which another such organization is a member. But it is also conceivable that an international organization all of whose members are States might adopt a treaty designed for conclusion by international organizations or by one or more international organizations and one or more States. In referring to "the adoption of a treaty", article 5 seems to mean the adoption of the text of a treaty, and it is, for example, conceivable that the text of a treaty might be adopted within the United Nations General Assembly, even though certain organizations might subsequently be invited to become parties to the instrument.<sup>593/</sup>

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<sup>592/</sup> The situation is comparable to that contemplated by article 9 with respect to "international conferences of States".

<sup>593/</sup> It might also be possible to resolve various other questions following the definitive adoption of draft article 5, including the question of the insertion in draft article 20 of a provision mirroring paragraph 3 of article 20 of the Vienna Convention, an addition which the Commission refrained from making in first reading. See paragraph (3) of the commentary to article 20 below.

PART II  
CONCLUSION AND ENTRY INTO FORCE OF TREATIES

Section 1. Conclusion of treaties

Article 6

Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

Commentary

- (1) When the question of an article dealing with the capacity of international organizations to conclude treaties was first discussed in the Commission, members were divided on the matter; varied and finely differentiated views were expressed on this subject. With some slight simplification, these may be reduced to two general points of view. According to the first, such an article would be of doubtful utility or should at least be limited to stating that an organization's capacity to conclude treaties depends only on the organization's rules. According to the second point of view, the article should at least mention that international law lays down the principle of such capacity; from this it follows, at least in the opinion of some members of the Commission, that in the matter of treaties the capacity of international organizations is the ordinary law rule, which can be modified only by express restrictive provisions of the constituent instruments.
- (2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations in international law; that question remains open, and the proposed wording is compatible both with the concept of general international law as the basis of international organizations' capacity and with the opposite concept. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the regime of treaties to which international organizations are parties, by what rules the capacity to conclude treaties should be assessed.
- (3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the

fundamental notion of "rules of any international organization" already laid down in article 2, paragraph 2, of the present draft. The addition, in article 6, of the adjective "relevant" to the expression "rules of that organization" is due simply to the fact that, while article 2, paragraph 2, relates to the "rules of any organization" as a whole, article 6 concerns only some of those rules, namely those which are relevant in settling the question of the organization's capacity.

(4) A question naturally arises as to the nature and characteristics of the "relevant rules" in the matter of an organization's capacity, and it might be tempting to answer this question in general terms, particularly with regard to the part played by practice. That would obviously be a mistake which the text of draft article 6 seeks to avert by specifying that "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization".

(5) It should be clearly understood that the question how far practice can play a creative part, particularly in the matter of international organizations' capacity to conclude treaties, cannot be answered uniformly for all international organizations. This question, too, depends on the "rules of the organization"; indeed, it depends on the highest category of those rules - those which form, in some degree, the constitutional law of the organization and which govern in particular the sources of the organization's rules. It is theoretically conceivable that, by adopting a rigid legal framework, an organization might exclude practice as a source of its rules. Even without going as far as that, it must be admitted that international organizations differ greatly from one another as regards the part played by practice and the form which it takes, inter alia in the matter of their capacity to conclude international agreements. There is nothing surprising in this; the part which practice has played in this matter in an organization like the United Nations, faced in every field with problems fundamental to the future of all mankind, cannot be likened to the part played by practice in a technical organization engaged in humble operational activities in a circumscribed sector. For these reasons, practice was not mentioned in article 6; practice finds its place in the development of each organization in and through the "rules of the organization", as defined in article 2, paragraph 1 (j), and that place varies from one organization to another.

(6) These considerations should make it possible to clear up another point which has been of keen concern to international organizations in other contexts<sup>594/</sup> but

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<sup>594/</sup> See Yearbook ... 1972, vol. II, pp. 186-187, document A/CN.4/258, para. 51.

which is open to no misunderstanding so far as the present draft articles are concerned. In matters, such as the capacity to conclude treaties, which are governed by the rules of each organization, there can be no question of fixing those rules as they stand at the time when the codification undertaken becomes enforceable against each organization. In reserving the practice of each organization in so far as it is recognized by the organization itself, what is reserved is not the practice established at the time of entry into force of the codification but the very faculty of modifying or supplementing the organization's rules by practice to the extent permitted by those rules. Thus, without imposing on the organizations the constraint of a uniform rule which is ill-suited to them, article 6 recognizes the right of each of them to have its own legal image.

(7) Lastly, it would strictly speaking have been possible for article 6 to restate in an initial paragraph the rule laid down in article 6 of the Vienna Convention: "Every State possesses capacity to conclude treaties". But it was felt that such a reminder was unnecessary and that the whole weight of article 6 could be concentrated on the case of international organizations.

#### Article 7

##### Full powers and powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) heads of State, heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference of States in which international organizations participate, for the purpose of adopting the text of a treaty between States and international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty within that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing ad referendum, a treaty between the accrediting States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purpose without having to produce powers.

#### Commentary

(1) The first two paragraphs of this draft article deal with representatives of States and the last two paragraphs with representatives of international organizations. The former provisions concern only treaties between one or more States and one or more international organizations; the latter relate to treaties within the meaning of draft article 2, paragraph 1 (a), namely both to treaties between one or more States and one or more international organizations and to treaties between international organizations.

(2) In the case of representatives of States, the draft broadly follows article 7 of the 1969 Vienna Convention: as a general rule, these representatives are required to produce "appropriate full powers" for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty. There are nevertheless exceptions to this rule.



First of all, as in the Vienna Convention on the Law of Treaties, practice or other circumstances might result in a person being considered as representing a State despite the fact that full powers are not produced.

(3) Secondly, as in the Vienna Convention on the Law of Treaties, certain persons are considered as representing a State in virtue of their functions. The enumeration of these persons which is given in the Vienna Convention on the Law of Treaties has had to be altered to some extent. In the case of Heads of State and Ministers for Foreign Affairs (paragraph 2 (a)) there is no change, but some amendments have been made as regards other representatives. First, article 7, paragraph 2 (b), of the 1969 Vienna Convention, which refers to "heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited", was not required since it is inapplicable to the present draft article. In addition, account had to be taken not only of certain advances over the Vienna Convention represented by the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975<sup>595/</sup> but also of the limitations which affect certain representatives of States by virtue of their functions.

(4) Paragraph 2 (b) of the present draft article is therefore symmetrical with article 7, paragraph 2 (c), of the Vienna Convention in its treatment of international conferences, but it replaces the latter paragraph's expression "representatives accredited by States to an international conference" by the more precise wording "heads of delegations of States to an international conference", which is based on article 44 of the Convention on the Representation of States. Drawing inspiration from article 9, further precision is introduced by describing that conference as one "of States in which international organizations participate".

(5) Paragraph 2 (c) deals with the case of heads of delegations of States to an organ of an international organization and restricts their competence to adopt the text of a treaty without producing full powers to the single case of a treaty between one or more States and the organization to the organ of which they are delegated. This is because their functions do not extend beyond the framework of the organization in question.

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<sup>595/</sup> See footnote 582 above. The Convention will hereafter be referred to in this Chapter as "the Convention on the Representation of States".

(6) Lastly, with regard to missions to international organizations, the wording "representatives accredited by States ... to an international organization" used in the Vienna Convention has been dropped in favour of the term "head of mission" employed in the Convention on the Representation of States: paragraphs 2 (d) and (e) of the present draft article are based on paragraphs 1 and 2 of article 12 of the latter instrument, which contain the most recent rule drafted by representatives of States in the matter. Heads of permanent missions to an international organization are competent by the very fact of their functions to adopt the text of a treaty between accrediting States and that organization. They may also be competent, but only by virtue of practice or other circumstances, to sign, or to sign ad referendum, the text of a treaty between accrediting States and the organization concerned.

(7) The matter of representatives of international organizations raises new questions and, first, one of principle. Should the rule be established that the representative of an organization is required, like the representative of a State, to prove by an appropriate document that he is competent to represent a particular organization for the purpose of performing certain acts relating to the conclusion of a treaty (the adoption and authentication of the text, consent to be bound by the treaty, etc.)? The Commission answered that question in the affirmative since no reason exists for international organizations not to be subject to a rule which is already firmly and universally established with regard to treaties between States. It is perfectly true that in the practice of international organizations formal documents are not normally used for this purpose. The treaties at present being concluded by international organizations are in large measure bilateral treaties or are restricted to very few parties; they are preceded by exchanges of correspondence which generally determine beyond all doubt the identity of the individuals who will perform on behalf of the organization certain acts relating to the procedure for the conclusion (in the broadest sense) of the treaty. In other cases, the highest ranking official of the organization ("the chief administrative officer of the Organization" within the meaning of article 85, paragraph 3 of the Convention on the Representation of States), with his immediate deputies, is usually considered in practice as representing the organization without further documentary evidence.

(8) These considerations should not, however, obscure the fact that in the case of organizations with a more complex institutional structure formal documents are necessary for the above purposes. Moreover, the present draft articles provide

for the possibility, with the consent of the States concerned, of participation by international organizations in treaties drawn up at an international conference composed mainly of States (article 9), and it seems perfectly proper that in such cases organizations should be subject to the same rules as States. It is nevertheless necessary that the general obligation thus imposed on international organizations should be made as flexible as possible and that authority should exist for a practice which is accepted by all concerned, namely that of making whatever arrangements are desirable; these ends are achieved by paragraphs 3 (b) and 4 (b) which apply the rule accepted for representatives of States to the case of representatives of international organizations. The Commission did not, however, think it possible to draw up a list of cases in which a person would be absolved by reason of his functions in an international organization from the need to furnish documentary proof of his competence to represent an organization in the performance of an act relating to the conclusion (in the broadest sense) of a treaty. If impossible complications are to be avoided, the present draft articles, unlike the Convention on the Representation of States, must apply to all organizations; and international organizations, taken as a whole, exhibit structural differences which rule out the possibility of making them the subject of general rules.

(9) There are other considerations which support this view. As has been mentioned, no organization has the same treaty-making capacity as a State; the capacity of every organization is restricted, under the terms of draft article 6. These differences are asserted through appropriate terminology, and the limited competence of representatives of international organizations by comparison with what applies to States spelt out. Thus, as indicated in the commentary to article 2 above, paragraph 1 (c) of that article confines the term "full powers" to documents produced by representatives of States and paragraph 1 (c bis) confines the term "powers" to documents produced by representatives of international organizations.

(10) Moreover, in the case of representatives of international organizations, the Commission felt it necessary to distinguish between the adoption and authentication of the text of a treaty, on the one hand, and consent to be bound by a treaty, on the other; the two cases are dealt with in paragraphs 3 and 4 of the present draft article respectively. With regard to the adoption or authentication of the text of a treaty, the formulation proposed corresponds to that of paragraph 1 (a) relating to representatives of States. With regard to consent to be bound by a

treaty, however, the Vienna Convention and paragraph 1 of the present draft article provide for a case in which "a person is considered as representing a State ... for the purpose of expressing the consent of the State to be bound by such a treaty". As explained in paragraph (11) of the commentary to article 2 above, the Commission felt it advisable, in first reading, to use the verb "communicate" in the case of a representative of an international organization.

(11) At its thirty-third session, the Commission decided that the drafting of article 7, though cumbersome, should be retained. The written comments noted a difference in wording as between the case of representatives of States, who express the consent of the latter to be bound by a treaty, and the case of representatives of organizations, who communicate the consent of the latter to be bound.<sup>596/</sup> The Commission wished to draw attention thereby to a nuance that must nevertheless not be exaggerated. It often happens in the case of international organizations that the intent to bind the organization originates from an organ other than the official who makes that intent known to the other party or the depositary; in such a case, the official "communicates" the intent. But allowance must be made for the possibility that, in some cases, the official who "communicates" the intent may also be competent to decide, without consulting another organ, on the content of such an intent to be bound;<sup>597/</sup> that is why the word "express" has also been used with respect to the representatives of organizations when there is no reason for not so employing it (article 11 et seq.).

(12) However, although the suggestion that it should do so was made in some comments,<sup>598/</sup> the Commission did not feel it possible to provide that the executive head of an organization should have a general right, such as heads of State, heads of Government and Ministers for Foreign Affairs have for States, to represent an organization for the purposes of concluding a treaty. It is quite true that one cannot confer "powers" on oneself and that there is in fact a person responsible in the organizations for providing others with "powers" without giving any to himself.<sup>599/</sup> But it is necessary to uphold firmly the principle that each

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<sup>596/</sup> See documents A/10393, para. 178, and A/CN.4/339/Add.5, para. 4.

<sup>597/</sup> On this point, see the written comments of the United Nations, document A/CN.4/339/Add.5, p. 4, para. 4.

<sup>598/</sup> A/CN.4/339, p. 12.

<sup>599/</sup> A/CN.4/339/Add.5, p. 3, para. 2.

organization has its own highly individualized structure, and that it decides, according to its own rules, on the capacity, status and title of the person responsible for representing it without powers and, when necessary, for conferring powers on others.

#### Article 8

##### Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

#### Commentary

This article reproduces the corresponding text of the Vienna Convention except for the changes necessitated by the subject-matter of the present draft articles.

#### Article 9

##### Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the international organizations or, as the case may be, all the States and organizations participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty between States and international organizations at an international conference of States in which organizations participate takes place by the vote of two-thirds of the States and organizations present and voting, unless by the same majority they shall decide to apply a different rule.

#### Commentary

- (1) The corresponding article of the Vienna Convention establishes a rule, namely that the adoption of the text of a treaty shall take place by the consent of all the States participating in its drawing up, together with an exception concerning the adoption of the text of the treaty at an "international conference", but it does not define an "international conference". The general view, however, has always been that this term relates to a relatively open and general conference in which States participate without the final consent of one or more of them to be bound by the treaty being regarded by the other States as a condition for the entry into force of the treaty.
- (2) The present draft article exhibits a number of particular aspects which derive from the specific characteristics of international organizations. In the first place, article 9, paragraph 1, of the Vienna Convention refers, as regards a treaty, to "all the States participating in its drawing-up"; no definition is given for

this expression, the meaning of which is sufficiently clear when only States are involved. Where organizations are concerned, it is only possible to regard as "organizations" participating in the drawing up of the text those organizations which participate in the drawing up on the same footing as States, and that excludes the case of an organization which merely plays a preparatory or advisory role in the drawing up of the text.

(3) In examining the possible place of international organizations in the development of the international community, the Commission has had to decide whether a conference consisting only of international organizations is conceivable. The hypothesis, although exceptional, cannot be excluded; it is possible, for example, that international organizations might seek through an international conference to resolve certain problems or at least to bring uniformity into certain arrangements relating to the international civil service. It was felt, however, that even in an eventuality of that kind each organization would possess such specific characteristics by comparison with the other organizations that there would be little point in bringing such a "conference" within the scope of the rule in article 9, paragraph 2. In the draft article proposed above, a "conference" consisting only of international organizations would fall under paragraph 1 in regard to the adoption of the text of a treaty: the text would have to be adopted by all the participants unless a rule other than unanimous consent were established.

(4) The only specific hypothesis calling for the application of a rule symmetrical with the rule in article 9, paragraph 2, of the Vienna Convention would be that of a "conference" between States within the meaning of that Convention in which one or more international organizations also participated with a view to the adoption of the text of a treaty between those States and the international organization or organizations concerned. In such a case, it would be proper that the rule of the two-thirds majority laid down in the text of the Vienna Convention should apply, with the two-thirds majority meaning two thirds of all the participants, both States and international organizations. This is the aim of paragraph 2 of the present draft article. In the absence of such a provision, if States participating in the conference decided to invite one or two international organizations to participate in the conference on the same footing as States themselves, the rule in article 9, paragraph 2 of the Vienna Convention would be inapplicable; that would leave no alternative but to follow a rule of unanimous consent, possibly for the adoption of the text of a treaty and in any case for the adoption of the rule

according to which the text of the treaty is to be adopted. It was not the intention of the Commission, in proposing paragraph 2 of draft article 9, to recommend the participation of one or more international organizations in the drawing up of a treaty at an international conference; this is a question which must be examined case by case and is a matter for States to decide. The Commission merely wished to make provision for that possibility. At least in some cases, customs and economic unions may be called on to participate as such in the drawing up of conventions at international conferences. Nor was it the intention of the Commission that the provisions of paragraph 2 should be interpreted as impairing the autonomy of international conferences in the adoption of their own rules of procedure, which might prescribe a different rule for the adoption of the text of a treaty, or in filling any gaps in their rules of procedure on this subject.

(5) In second reading, the Commission modified the wording of article 9, while leaving all substantive provisions intact, in order to make it more explicit: it will be noted that paragraph 1 speaks of "The adoption of the text of a treaty" (as does article 9 of the Vienna Convention). In addition, the capacity of the "participants" in the drawing up of the text of a treaty has been clarified by distinguishing between the two categories of treaty that are the subject of the draft articles:

"The adoption of the text of a treaty takes place by the consent of all the international organizations or, as the case may be, all the States and organizations participating in its drawing up ...".

#### Article 10

##### Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States and those organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those organizations of the text of a treaty or of the final act of a conference incorporating the text.

#### Commentary

This draft article reproduces the corresponding text (article 10) of the Vienna Convention, except for differences of presentation reflecting the two particular kinds of treaty with which it is concerned. The brief allusion at the end of paragraph 2 to a conference consisting only of international organizations should be regarded as providing for an exceptional case, as explained in connection with article 9 (see paragraph (3) of the commentary to that article above).

#### Article 11

##### Means of expressing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.
2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

#### Commentary

- (1) Paragraph 1 of this draft article reproduces, in respect of the consent of States to be bound by a treaty concluded between one or more States and one or more international organizations, the enumeration of the different means of expressing consent given in article 11 of the Vienna Convention as regards treaties between States.
- (2) It is more difficult to enumerate the different means of establishing the consent of an international organization to be bound by a treaty to which it intends to become a party. There is no difficulty, as regards international organizations, in allowing signature, exchange of instruments constituting a treaty, acceptance, approval or accession. The Commission considers that the same principle could be accepted for international organizations as for States, namely, the addition to this list of the expression "any other means if so agreed". This formulation, adopted by the United Nations Conference on the Law of Treaties, is of considerable significance, since it introduces great flexibility in the means of expressing consent to be bound by a treaty; the freedom thus given to States, which it is proposed to extend to international organizations, bears on the



terminology as well, since the Vienna Convention enumerates, but does not define, the means of expressing consent to be bound by a treaty. Practice has shown, however, that the considerable expansion of treaty commitments makes this flexibility necessary and there is no reason to deny the benefit of it to international organizations.

(3) Article 11 reflects the decision explained above, in the commentary to article 2, to reserve for States the expression "ratification" as a means of expressing consent to be bound by a treaty and to utilize a new term, "act of formal confirmation", as the analogous means for an international organization to express consent to be bound by a treaty (see paragraphs 1 (b) and 1 (b bis) of article 2 above).

(4) During the second reading of this article, at its thirty-third session, the Commission concluded that there were no convincing reasons to maintain the distinction which had been made in the text adopted in first reading between the consent of a State to be bound by a treaty being "expressed" and that of an international organization being "established". The terminology as adopted in second reading is now uniform in that regard. This change has also been reflected in the articles which follow.

## Article 12

### Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the organization to give that effect to the signature appears from the powers of its representative or was expressed during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations so agreed;

(b) the signature ad referendum of a treaty by the representative of a State or an organization, if confirmed by his State or organization, constitutes a full signature.

#### Commentary

(1) Article 12 corresponds to article 12 of the Vienna Convention and basically provides for the same régime for both States and international organizations. It was deemed advisable to maintain separate paragraphs for States and organizations because of the important distinction between "full powers" (paragraph 1 (c)) and "powers" (paragraph 2 (c)).

(2) The other distinction, which was made at the first reading stage, involved the denial to international organizations of the faculty accorded to States under paragraph 1 (b). The Commission concluded that there was no sound reason why the consent of an international organization to be bound by a treaty could not be expressed by signature when, in the absence of a relevant provision in the treaty, it was established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that signature should have that effect. In that connection, it may be stressed that the use of the term "negotiating organization" must be read in the light of the fact that the consent of an organization to be bound by signature can only be given in conformity with the relevant rules of the organization.

(3) Finally, the Commission decided in second reading to replace the ambiguous expression "participants in the negotiation" by a more precise formula inspired by the text of the corresponding article of the Vienna Convention: "the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations".

#### Article 13

##### Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of international organizations or, as the case may be, of States and international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those organizations or, as the case may be, those States and those organizations were agreed that the exchange of instruments should have that effect.

#### Commentary

(1) This draft article reproduces article 13 of the Vienna Convention except for the changes necessitated by the subject matter of the draft articles. The wording of this draft article reflects the fact, although cases of the kind are now rare, that a treaty may also be constituted by an exchange of instruments when there are more than two contracting parties.

(2) The text adopted in first reading consisted of two paragraphs, one dealing with treaties between one or more States and one or more international organizations and the other dealing with treaties between international organizations. In second reading, it was decided to simplify the article by merging the two paragraphs into a single one applicable to both kinds of treaties.

#### Article 14

##### Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(a) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(b) it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was expressed during the negotiation.

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification or, as the case may be, to an act of formal confirmation.

#### Commentary

(1) This draft article deals separately, in paragraph 1 with the consent of the State in the case of treaties implicitly between one or more States and one or more international organizations and in paragraph 2 with the consent of an international organization in the case of a treaty as defined in article 2, paragraph 1 (a) - that is to say, a treaty between one or more States and one or more international organizations and a treaty between a number of international organizations. It does not call for any comment as regards the question of the use, for the case of international organizations, of the term "act of formal confirmation", which has already been discussed.<sup>600/</sup> It will merely be noted that the wording of the title of this article, at least in the French version, makes it clear that the expression used there ("un acte de confirmation formelle") is a verbal expression describing an operation which has not so far had any generally accepted term bestowed on it in international practice.

(2) At its 1981 session, the Commission basically maintained the text as adopted in first reading, except for a few drafting adjustments already explained<sup>601/</sup> in connection with other articles.

#### Article 15

##### Consent to be bound by a treaty expressed by accession

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State or that organization by means of accession;

(b) it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that such consent may be expressed by that State or that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State or that organization by means of accession.

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<sup>600/</sup> See paras. (8) and (9) of the commentary to article 2, above.

<sup>601/</sup> See para. (4) of the commentary to article 11 and para. (3) of the commentary to article 12, above.

### Commentary

Draft article 15 corresponds to the provisions of article 15 of the Vienna Convention and, in its present form, is the result of an attempt to simplify the text adopted in first reading by the merger into one paragraph of the two paragraphs which appeared in the earlier text dealing with the two types of treaties covered by the present draft articles. As a result, there is no description of the two types of treaty involved, since the same rule applies to both. One member of the Commission abstained in the adoption of the consolidated text since, in his view, it was not possible to contemplate, in the case of a treaty concluded solely between international organizations, later accession to that treaty by States. It was also felt that such a situation should not be dealt with in the present draft, since the corresponding situation of treaties concluded solely between States being acceded to by international organizations had not been covered by the Vienna Convention. The text of article 15 as adopted in second reading shows changes similar to those previously made in other articles.<sup>602/</sup>

### Article 16

#### Exchange or deposit of instruments of ratification, act of formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, act of formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:
  - (a) their exchange between the contracting States and the contracting organizations;
  - (b) their deposit with the depositary; or
  - (c) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.
  
2. Unless the treaty otherwise provides, instruments of act of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:
  - (a) their exchange between the contracting organizations;
  - (b) their deposit with the depositary; or
  - (c) their notification to the contracting organizations or to the depositary, if so agreed.

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<sup>602/</sup> Ibid.

### Commentary

The draft article follows the provisions of article 16 of the Vienna Convention, but has two paragraphs dealing separately with the two different kinds of treaties which are the subject of this set of draft articles. In the case of an act of formal confirmation, the instrument establishing its existence has been described as an "instrument of act of formal confirmation"; the use of this term is in harmony with the expression "an act of formal confirmation" in draft article 2, paragraph 1 (b bis), and in draft articles 11 and 14, since these terms help to avoid any confusion with the confirmation referred to in draft article 8 and, as has already been explained,<sup>603/</sup> they do not denominate, but rather describe the operation referred to.

### Article 17

#### Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and the contracting organizations or, as the case may be, the other contracting organizations and the contracting States so agree.
2. Without prejudice to articles 19 to 23, the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting organizations so agree.
3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.
4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

### Commentary

This draft article deals with the two separate questions which are the subject of article 17 of the Vienna Convention. It deals with these questions in four paragraphs, giving separate consideration to the two kinds of treaties which are the subject of the present set of draft articles.

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<sup>603/</sup> See para. (9) of the commentary to article 2, above.

## Article 18

### Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

#### Commentary

The draft article follows the principle set forth in article 18 of the Vienna Convention. Again, as in articles 13 and 15 and for similar reasons of simplification, the text of article 18 as it has emerged from second reading at the present session is the result of the merger into one paragraph of what was originally two. Consequently, the reference is to "a treaty", without any description of the type of treaty involved.

### Section 2. Reservations

#### Commentary

(1) Even in the case of treaties between States the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention on the Law of Treaties may not have eliminated all these difficulties.<sup>604/</sup> Difficulties attended the Commission's discussions with regard to treaties to which international organizations are parties;<sup>605/</sup> the compromise

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<sup>604/</sup> P.H. Imbert, Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis donné par la Cour internationale de Justice le 28 mai 1951 (Paris, Pédone, 1979); see also the same author's "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume Uni de Grande-Bretagne et d'Irlande du Nord", Annuaire français de droit international, 1978, p. 29.

<sup>605/</sup> Yearbook ... 1975, vol. I, 1348th to 1350th meetings, pp. 237-249; Yearbook ... 1977, vol. I, 1429th to 1435th meetings, pp. 70-103.

text finally adopted did not receive unanimous support within the Commission.<sup>606/</sup> In the Sixth Committee the question was discussed extensively, and widely diverging points of view emerged in 1977.<sup>607/</sup> The question was also touched upon in 1978 and 1979.<sup>608/</sup> It is brought up in the written observations submitted by a number of Governments and international organizations.<sup>609/</sup>

(2) Before examining the considerations which led to the conclusions reached by the Commission in second reading, it should be considered whether it would not in fact be possible to find some information concerning practice, despite the prevailing view that practice is lacking in this regard. In fact this view is not entirely justified; there are a certain number of cases in which such questions have arisen. Admittedly the value of these cases is open to question: do the examples to be adduced involve genuine reservations, genuine objections or even genuine international organizations? It would seem difficult to claim that the problem of reservations has never arisen in practice, although the issue is a debatable one.

(3) An interesting legal opinion<sup>610/</sup> has been given in the form of an aide-mémoire addressed to the Permanent Representative of a Member State from the Secretary-General of the United Nations concerning the "Juridical standing of the specialized agencies with regard to reservations to the Convention on the Privileges and Immunities of the Specialized Agencies", which was approved by the General Assembly of the United Nations on 21 November 1947.<sup>611/</sup> In becoming parties to this Convention, States have sometimes entered reservations, and

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<sup>606/</sup> One member of the Commission did not associate himself with the compromise solution adopted; see A/CN.4/L.253.

<sup>607/</sup> Report of the Sixth Committee (1977), document A/32/433, paras. 169-178. While some representatives supported the compromise submitted by the Commission (para. 170), some sought a stricter system on the lines envisaged in the previous foot-note (para. 171), while others asked for a more liberal system (para. 172).

<sup>608/</sup> Report of the Sixth Committee (1978), document A/33/419, para. 228 and Topical summary ... (1979), document A/CN.4/L.311, paras. 175 and 176.

<sup>609/</sup> See Annex II to the present report.

<sup>610/</sup> United Nations Juridical Yearbook, 1964, p. 266.

<sup>611/</sup> United Nations, Treaty Series, vol. 33, p. 261.



several specialized agencies have "objected to the reservation"; after various representations, four States which had formulated reservations withdrew them. It is at the level of objections to reservations that such precedents can be invoked. According to the Secretary-General's legal opinion:

"Practice ... has established ... the right ... to require that a reservation conflicting with the purposes of the Convention and which can result in unilaterally modifying that agency's own privileges and immunities, be not made effective unless and until it consents thereto." 612/

As an example of an objection by an international organization to a reservation formulated by a State this case is open to dispute, in that the specialized agencies are not usually considered as "parties" to the 1947 Convention. 613/ However, even if they are denied this status, there is obviously a link under the terms of the Convention between each specialized agency and each State party to the Convention, and it is on the basis of this link that the objection is made. 614/

(4) A second case which arose a little later involved reservations not only to the 1947 Convention but also to the Convention on the Privileges and Immunities of the United Nations, which was approved by the General Assembly on 13 February 1946. 615/ In a letter addressed to the Permanent Representative of a Member State, 616/ the Secretary-General of the United Nations referred still more specifically to the position of a State which has indicated its intention of acceding to the Convention with certain reservations. Without using the term "objection", the Secretary-General indicated that certain reservations were incompatible with the Charter and strongly urged that the reservation should be withdrawn, emphasizing that he would be obliged to bring the matter to the attention of the General Assembly if, despite his objection, the reservation was retained, and that a supplementary agreement might have to be drawn up "adjusting" the provisions of the Convention in conformity with section 36 of the Convention.

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612/ United Nations Juridical Yearbook, 1964, p. 266, para. 6.

613/ The legal opinion states that: "each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether or not each agency may be described as a 'party' to the Convention in the strict legal sense". (ibid., para. 5). See also "Depositary practice in relation to reservations: report of the Secretary-General", Yearbook ... 1965, vol. II, p. 102, document A/5687, paras. 23-25.

614/ See the view expressed by the Special Rapporteur in his first report, Yearbook ... 1972, vol. II, p. 194, document A/CN.4/258, foot-note 181.

615/ United Nations, Treaty Series, vol. 1, p. 15.

616/ United Nations Juridical Yearbook, 1965, p. 234.

This precedent is of additional interest in that the Convention contains no provision concerning reservations and objections to reservations and also in that the States parties have made a considerable number of reservations.<sup>617/</sup>

(5) A number of precedents concern the European Economic Community, and at least one of them is of particular interest. The European Economic Community is a party to several multilateral conventions, usually on clearly specified conditions. Some of these conventions prohibit reservations or give a restrictive definition of the reservations authorized; in other cases there are no indications.<sup>618/</sup>

The European Economic Community has already entered reservations authorized under such conventions.<sup>619/</sup> One case which merits some attention is the Customs Convention on the International Transport of Goods under Cover of TIR carnets (TIR Convention) with annexes, concluded at Geneva on 14 November 1975.<sup>620/</sup> This Convention has established that customs or economic unions may become parties to the Convention, either at the same time as all the member States do so or subsequently; the only article to which reservations are authorized is the article relating to the compulsory settlement of disputes. Both Bulgaria and the German Democratic Republic have made declarations to the effect that:

"... the possibility envisaged in article 52, paragraph 3, for customs or economic unions to become Contracting Parties to the Convention, does not bind Bulgaria [the German Democratic Republic] with any obligations whatsoever with respect to these unions".<sup>621/</sup>

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<sup>617/</sup> Multilateral treaties in respect of which the Secretary-General performs depositary functions (ST/LEG/SER.D/13), p. 35.

<sup>618/</sup> Examples of prohibition have already been cited in the report of the Commission on the work of its twenty-ninth session, Yearbook ... 1977, vol. II (Part Two), document A/32/10, foot-notes 458-462. Mention can also be made of the Convention on the Conservation of Migratory Species of Wild Animals of 23 June 1979, signed at Bonn, International Legal Materials, vol. XIX, No. 1, p. 15, which recognizes "any regional economic integration organization" as a party; article XIV restricts the right to enter reservations, but states that the reservations permitted are open to "any State or any regional economic integration organization". At least one State (the USSR) objected to the mention of such organizations and has not become a party to the Convention.

<sup>619/</sup> The International Convention on the Simplification and Harmonization of Customs Procedures, concluded at Kyoto on 18 March 1973, authorizes certain reservations; the European Economic Community, which is a party to the Convention, has on several occasions accepted "annexes" while availing itself of the power to formulate reservations. (Official Journal of the European Communities, Legislation, vol. 18 (1975), No. L 100, p.1; ibid., vol. 21 (1978), No. L 160, p. 13; ibid., vol. 23 (1980), No. L 100 p. 27.

<sup>620/</sup> Multilateral treaties ... (op. cit.), p. 335.

<sup>621/</sup> Ibid., p. 335.

The nine (at that time) member States of the Community and the European Economic Community jointly formulated an objection in the following terms:

"The Statement made by Bulgaria [the German Democratic Republic] concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention. The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void." 622/

There is no need to discuss or even to consider the legal problems created by this precedent. It merely indicates that international organizations (or at least organizations sharing certain common features with international organizations) may be called upon to take cognizance of questions relating to reservations at a time when it would not perhaps be universally recognized, even in the context of inter-State relations, that the rules of the Vienna Convention on the Law of Treaties have become customary rules of international law. All that can be said is that these precedents, especially that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies and the 1946 Convention on the Privileges and Immunities of the United Nations, show that it is not unknown in current practice for international organizations to formulate what may be considered reservations or objections.

(6) At its thirty-third session, the Commission made a general review of the articles which it had adopted on reservations in first reading. It was encouraged to pay particular attention to this issue by the difficulty of the subject on the one hand, and by the differences of opinion that had become apparent among its members in first reading and the oral and written comments of governments on the other.

(7) Apart from tackling the difficult drafting problems involved, the Commission devoted a long discussion to the substantive problem of the formulation of reservations (article 19 of the Vienna Convention). It was left in no doubt that this was the question that gave rise to the greatest difficulties and that its solution required both a statement of principle and the admission of exceptions to that principle.

(8) With regard to the principle, the options are either to extend to organizations the freedom to formulate reservations conferred upon States by article 19 of the Vienna Convention or, on the contrary, to state by way of a general rule that organizations are prohibited from making reservations. In either case, the consequences of the choice can be alleviated by appropriate exceptions.

622/ Ibid., p. 335.

(9) In first reading, the Commission tried to establish a compromise between two approaches that became apparent during its discussions, the one favouring the principle of freedom and the other principle of prohibition. As a result, it provided that the principle of freedom would apply with respect to treaties between international organizations and to reservations formulated by States, but that the possibility of reservations by international organizations to a treaty between States and international organizations would depend on the circumstances of the case.

(10) Not all members of the Commission subscribed to this choice, and one of them proposed a consistent series of articles based on the principle of prohibition.<sup>623/</sup>

(11) Numerous comments were made concerning the articles adopted in first reading. In particular, it was said that the distinctions made by the Commission lacked logical justification and employed imprecise criteria. Furthermore, as an extension of the compromise solution that it had adopted concerning the formulation of reservations in articles 19 and 19 bis, the Commission had devoted an article 19 ter, having no equivalent in the Vienna Convention, to the formulation of objections to reservations, and it was claimed that the rules laid down in that article were pointless, complicated and ambiguous.

(12) Finally, the Commission had proposed in articles 19, 19 bis and 19 ter a description of the treaties in question which implied that the articles and, in consequence, the formulation of reservations applied only to multilateral treaties. While it is certain that reservations take on their full significance only in relation to multilateral treaties, it was pointed out that there had been examples in practice of reservation to bilateral treaties, that the question was the subject of dispute, and that the Vienna Convention on the Law of Treaties was cautiously worded and took no stand on the matter.

(13) After a thorough review of the problem, a consensus was reached within the Commission, which, choosing a simpler solution than the one it had adopted in first reading, assimilated international organizations to States for the purposes of the formulation of reservations.

(14) Hence, the rules laid down in article 19 of the Vienna Convention on the Law of Treaties now extend, in the cases of treaties concluded between States and international organizations and treaties concluded between international organizations, both to reservations formulated by States and to reservations

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<sup>623/</sup> A/CN.4/L.253

formulated by international organizations. The principle of the freedom to formulate reservations that had been established for States is also valid for international organizations; this is in accordance with the wishes of such organizations and, it would seem, with a number of pointers from the realm of practice. The limits to that freedom which subparagraphs (a), (b) and (c) of article 19 of the Vienna Convention lay down for States have been applied without change to international organizations.

(15) This substantive change from the solutions chosen by the Commission in first reading makes for far simpler drafting. There is no longer any need to make a fundamental distinction between treaties between States and international organizations and treaties between international organizations; in some instances, it is even possible to forgo distinguishing between the case of States and that of international organizations. Articles 19 and 19 bis as adopted in first reading have been reduced to a single provision, the new article 19; article 19 ter as adopted in first reading, which varied the régime for the formulation of objections to reservations according to whether the objection came from an organization or a State and whether the treaty was between international organizations or between one or more States and one or more international organizations, has been deleted as having lost its raison d'être. The Commission has also been able, either as a direct consequence of the change in the rules it proposes concerning the formulation of reservations, or merely by the use of simpler wording, substantially to refine the text of the other articles concerning reservations and, in particular, to reduce each of the combinations of articles 20 and 20 bis and 23 and 23 bis to a single article.

#### Article 19

##### Formulation of reservations

1. A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

#### Commentary

Article 19 replaces articles 19 and 19 bis as adopted in first reading. It is only for the sake of clarity that the article retains separate paragraphs for States and international organizations; the rules it lays down are substantially the same in each case. Paragraph 1, concerning States, differs from article 19 of the Vienna Convention only in that it mentions both "negotiating States and negotiating organizations"; paragraph 2, concerning international organizations, speaks of "formally confirming" rather than "ratifying" and distinguishes, in subparagraph (a) between the case of treaties between international organizations and that of treaties between States and international organizations.

#### Article 20

##### Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting organizations or, as the case may be, by the contracting organizations and contracting States unless the treaty so provides.

2. When it appears from the object and the purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the author of the reservation and for the State or organization which has accepted it;

(b) an objection by a contracting organization or by a contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act of a State or of an international organization expressing the consent of a State or of an organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or one contracting organization or, as the case may be, one other contracting organization or one contracting State has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

#### Commentary

(1) As stated above, article 20 results from the merger of articles 20 and 20 bis as adopted in first reading. Like the corresponding provision in the Vienna Convention, the article moves directly to the problem of acceptance of and objection to reservations without the question of the "formulation" of objections having been tackled in any way in the earlier articles; this was not the case with the articles adopted in first reading, since they included article 19 ter (now eliminated) which was devoted to that question.

(2) Comparison of the present article 20 and article 20 of the Vienna Convention reveals two substantive differences<sup>624/</sup> which merit comment and a number of drafting changes which it is sufficient simply to point out. The latter concern

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<sup>624/</sup> There is a further substantive difference which was approved in first reading and to which the Commission considered it unnecessary to revert, namely the omission from paragraph 2 of the present text of all reference to the "limited number of negotiating States". Such a reference could hardly be transposed either to the field of treaties between organizations or to that of treaties between States and international organizations. The object of article 20, paragraph 2, of the Vienna Convention is to place treaties under a special régime in cases where "the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty". That text gives two criteria for the nature of such consent: the limited number of negotiating States and the object and purpose of the treaty. The second criterion is perfectly valid for treaties between international organizations or between States and international organizations, but the first is not and has therefore been discarded. The limited degree of participation in a negotiation cannot, indeed, be measured in the same way for treaties between States as for treaties between international organizations or between States and international organizations, since the membership of international organizations already represents a multiplicity of States.

subparagraphs 3(a) and 3(b), where mention of an international organization appears alongside that of a State, and paragraph 1 and subparagraph 3(c), where a distinction is made between the case of treaties between international organizations and that of treaties between States and international organizations.

(3) With regard to the substantive differences, the first comment to be made is that draft article 20 contains no counterpart to article 20, paragraph 3, of the Vienna Convention.<sup>625/</sup> This kind of provision had already been omitted from articles 20 and 20 bis as adopted in first reading. However, the omission was justified in those cases<sup>626/</sup> by the fact that the Commission had decided against dealing with the possible case of an international organization having at least one other international organization among its members. Now the Commission is, as previously indicated, proposing for the first time a draft article 5 paralleling article 5 of the Vienna Convention; by so doing, it brings within the scope of the provisions of the present draft the constituent instruments of organizations of which at least one member is another international organization. Logically, therefore, article 20 should comprise a paragraph 3 paralleling article 20, paragraph 3, of the Vienna Convention. However, the Commission has adopted draft article 5 without excluding returning at its next session to that provision and, if necessary, to article 20 in the light of comments evoked by its new initiative.

(4) The second comment on the substance concerns article 20, paragraph 4, which deals with the effects of silence during a specified period (12 months) with regard to a reservation formulated by a contracting State. With the exception of the numbers of the two paragraphs to which it refers, the text of this provision as proposed in second reading is identical to that of article 20, paragraph 5, of the Vienna Convention; it provides that:

"... a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later".

The rule therefore applies to reservations whether they are formulated by international organizations or by States; however, this new paragraph 4 does not state any rule concerning the acceptance of a reservation by an international

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<sup>625/</sup> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organization of that organization."

<sup>626/</sup> Yearbook ... 1977, Vol. II (Part 2), p. 112, document A/32/10.



organization in the event that the organization does not react to the reservation within a specified period. In this respect, paragraph 4 as adopted in first reading assimilated the situation of international organizations to that of States.

(5) The majority of the members of the Commission accepted this change only after protracted discussion. Several protests had been raised, in oral and written comments, against the assimilation of international organizations to States in this respect. It had been asserted that the paragraph in effect established "tacit acceptance" of reservations and that:

"... any actions by an international organization relating to a treaty to which it is a party must be clearly and unequivocally reflected in the actions of its competent body". 627/

It was also remarked that 12 months was too short a period to serve as the basis for a rule of tacit acceptance, since, in the case of some international organizations, the bodies competent to accept reservations did not hold annual sessions. It was suggested in that connection that the 12 months' time-limit might have been extended in the case of international organizations. In contrast to this, it was said that the expiry of the 12 months' time-limit had less the effect of tacit acceptance than of the prescription of a right and that organizations could not be given the privilege of prolonging uncertainty concerning the substance of treaty obligations. It was further stated that constitutional considerations specific to an organization could not in any case be taken into consideration when that organization expressed its consent to be bound by a treaty after the formulation of a reservation by one of its partners. That was because the competent organs of the organization would have been aware of the reservation when they took the decision to bind the organization and their silence would therefore have been voluntary.

(6) Finally, the Commission, without thereby rejecting the principle that, even where treaties are concerned, obligations can arise for an organization from its conduct, 628/ has refrained from saying anything in article 4, paragraph 20, concerning the problems raised by the protracted absence of any objection by an international organization to a reservation formulated by one of its partners.

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627/ A/CN.4/339, p.16.

628/ This question will have to be studied again in connection with draft article 45.

It was the Commission's view in this respect that practice would have no great difficulty in producing remedies for the prolongation of a situation whose drawbacks should not be exaggerated.<sup>629/</sup>

## Article 21

### Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization to the extent of the reservation.

## Article 22

### Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or a contracting organization or, as the case may be, another contracting organization or a contracting State only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

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<sup>629/</sup> Prolongation of uncertainties concerning the acceptance of reservation has drawbacks principally in the case referred to in article 20, paragraph 2, since it then delays the entry into force of the treaty.

## Article 23

### Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and organizations entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by a treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

### Commentary to articles 21, 22 and 23

By comparison with the texts adopted in first reading, these three articles exhibit only drafting changes, all of which have been made in order to lighten the text: article 22 now has only three paragraphs instead of four, and the new version of article 23 is a product of the merger of articles 23 and 23 bis as adopted in first reading. The result is that the new texts are very close to the corresponding provisions of the Vienna Convention, from which they differ only by their mention of international organizations in addition to States (article 21, subparas. 1(a) and (b) and para. 3; article 22, para. 1 and subpara. 3(b); article 23, paras. 1 and 2) or by the fact that they distinguish between treaties between international organizations and treaties between States and international organizations (article 22, subpara. 3(a)).

### Section 3. Entry into force and provisional application of treaties

## Article 24

### Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating organizations or, as the case may be, all the negotiating States and negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

#### Article 25

##### Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or that organization notifies the other States and the organizations or, as the case may be, the other organizations and the States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

##### Commentary to articles 24 and 25

No substantive changes were made to these two articles after their second reading. Their wording is, however, considerably lighter than that of the corresponding provisions as adopted in first reading, articles 24 and 24 bis and articles 25 and 25 bis respectively having been merged to form single articles. Articles 24 and 25 as now drafted differ from the corresponding articles of the Vienna Convention only in so far as is necessary to cater for the distinction between treaties between international organizations and treaties between States and international organizations (article 24, paras. 1, 2 and 3; article 25, subpara. 1(b) and para. 2).

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

Section 1. Observance of treaties

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Commentary

This text reproduces the corresponding provision of the Vienna Convention. It calls for no comment other than that it may be said to constitute a definition of the very essence of treaties, thus recognizing that international organizations are genuine parties to legal instruments which are genuine treaties, even if some differences exist between their participation and that of States.

## CHAPTER IV

### STATE RESPONSIBILITY

#### A. Introduction: Completion of the first reading of Part 1 of the draft articles

##### (The origin of international responsibility)

130. At its thirty-second session, in 1980, the Commission completed its first reading of Part 1 of the draft articles on the topic,<sup>630/</sup> as recommended by the General Assembly in its resolution 34/141 of 17 December 1979.

131. The general structure of the draft was described at length in the Commission's report on the work of its twenty-seventh session.<sup>631/</sup> Under the general plan adopted by the Commission, the origin of international responsibility forms the subject of Part 1 of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility.

132. In 1978, in conformity with the pertinent provisions of its Statute, the Commission requested the Governments of Member States to transmit their observations and comments on the provisions of chapters I, II and III of Part 1 of the draft articles on State responsibility for internationally wrongful acts. The General Assembly, in section I, paragraph 8, of resolution 33/139 of 19 December 1978, endorsed this decision of the Commission. The observations and comments received in response to that request have been reproduced in document A/CN.4/328 and Add. 1 to 4. Having completed the first reading of the whole of Part 1 of the draft, the Commission decided at the thirty-second session to renew its request to Governments to transmit their observations and comments on the provisions of chapters I, II and III, and to ask them to do so before 1 March 1981. At the same time the Commission decided, in conformity with articles 16 and 21 of its Statute, to communicate the provisions of chapters IV and V to the Governments of Member States, through the Secretary-General, and to request them to transmit their observations and comments on those provisions by 1 March 1982. The observations and comments of Governments on the provisions

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<sup>630/</sup> See Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), pp. 49-132.

<sup>631/</sup> Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

appearing in the various chapters of Part 1 of the draft will, when the time comes, enable the Commission to embark on the second reading of that part of the draft without undue delay. As of 24 July 1981, comments and observations from five Governments had been received.<sup>632/</sup>

B. Commencement of consideration of Part 2 of the draft articles (Content, forms and degrees of international responsibility)

133. Part 2 of the draft articles deals with the content, forms and degrees of international responsibility, that is to say, with determining the consequences which an internationally wrongful act of a State may have under international law in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may perhaps decide to add to the draft a Part 3 concerning the "implementation" ("mise en oeuvre") of international responsibility and the settlement of disputes. The Commission considered that it would be better to postpone a decision on the question whether the draft articles on State responsibility for internationally wrongful acts should begin with an article giving definitions or an article enumerating the matters excluded from the draft. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure of the draft. It is always advisable to avoid definitions or initial formulations which may prejudge solutions that are to be adopted later.

134. In order to pursue its consideration of "State responsibility", in view of the former Special Rapporteur's election as a Judge of the International Court of Justice, the Commission appointed Mr. Willem Riphagen as Special Rapporteur for the topic at its thirty-first session in 1979. At the thirty-second session the Special Rapporteur submitted a preliminary report (A/CN.4/330) on the basis of which the Commission reviewed a broad range of general and preliminary questions raised by the study of Part 2 of the draft, dealing with the content, forms and degrees of international responsibility. The views expressed in this connection by the members of the Commission are reproduced in the summary records of its 1597th to 1601st meetings.<sup>633/</sup>

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<sup>632/</sup> See comments and observations of Sweden (A/CN.4/342), Bulgaria (A/CN.4/342/Add.1), Mongolia (A/CN.4/342/Add.2), the Federal Republic of Germany (A/CN.4/342/Add.3) and Czechoslovakia (A/CN.4/342/Add.4).

<sup>633/</sup> See Yearbook ... 1980, vol. I, pp. 73-98

135. The preliminary report analysed in general the various possible new legal relationships (i.e. new rights and corresponding obligations arising from an internationally wrongful act of a State as determined by Part 1 of the draft articles on State responsibility).

136. Having noted at the outset a number of circumstances which are, in principle, irrelevant for the application of Part 1<sup>634/</sup> but relevant for Part 2, the report set out three parameters for the possible new legal relationship arising from an internationally wrongful act of a State. The first parameter was the new obligations of the State whose act is internationally wrongful, the second being the new right of the "injured" State, and the third one being the position of the "third" State in respect of the situation created by the internationally wrongful act.

137. In thus drawing up a catalogue of possible new legal relationships established by a State's "wrongfulness", the report discussed the duty to make "reparation" in its various forms falling within the first parameter, the principle of non-recognition, exceptio non adimpleti contractus, and other "counter-measures" covered under the second parameter, and the right, possibly even duty, of "third" States to take a non-neutral position as envisaged under the third parameter.

138. The report then turned to the problem of "proportionality" between the wrongful act and the "response" thereto, and in this connection discussed limitations of

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<sup>634/</sup> The report noted at the outset that a number of circumstances which are, in principle, irrelevant for the application of Part 1 - such as the conventional or other origin of the obligation breached, the content of that obligation, and the seriousness of the actual breach of that obligation - may, however, have relevance for the determination of the new legal relationships in Part 2. It also recalled that some draft articles in Part 1 - notably article 11, para. 2; article 12, para. 2; article 14, para. 2 - may give rise to the question whether or not the content, forms and degrees of State responsibility are the same for this "contributory" conduct as for other internationally wrongful conduct, and that similar questions arise in respect of the cases of implication of a State in the internationally wrongful act of another State (articles 27 and 28). Furthermore, the report recalled that the Commission, in drafting the articles of chapter V of Part 1, entitled "Circumstances precluding wrongfulness", deliberately left open the possibility that an act of a State, committed under such circumstances, might nevertheless entail some new legal relationships similar to those entailed by an internationally wrongful act. The report recommended such new legal relationships to be dealt with in Part 2 of the draft articles rather than within the context of the topic "International liability for injurious consequences arising out of acts not prohibited by international law". See Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), p. 133, para. 36.



allowable responses by virtue of the particular protection, given by a rule of international law, to the object of the response; by virtue of linkage, under a rule of international law, between the object of the breach and the object of the response; and by virtue of the existence of a form of international organization lato sensu.<sup>635/</sup>

139. Finally, the report addressed the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act, and suggested that this matter be dealt with rather within the framework of Part 3 of the draft articles on State responsibility (the implementation of State responsibility).<sup>636/</sup>

140. The discussion of the topic in the Commission was of a preliminary character, calling for the need to draw up a concrete plan of work for the topic. It was generally recognized that in drafting the articles of Part 2 the Commission should proceed on the basis of the articles of Part 1 - already provisionally adopted by the Commission in first reading, though, of course, in the second reading some revisions, rearrangements and mutual adaptations should not be excluded.<sup>637/</sup>

141. It was also noted that, while liability for injurious consequences arising out of acts not prohibited by international law might include the obligation of a State to give compensation, any possible degree of "overlap" with the treatment, in Part 2 of the articles on State responsibility, of the obligation of reparation, resulting from a wrongful act, or even from an act, the wrongfulness of which was precluded in the circumstances described in chapter V of Part 1, would do no harm.<sup>638/</sup>

142. Some members expressed doubts as to the advisability of dealing extensively with "counter-measures", international law being based not so much on the concept of sanction and punishment as on the concept of remedying wrongs that had been committed. Other members, however, considered the second and third parameters to be of the essence of Part 2.<sup>639/</sup>

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<sup>635/</sup> Ibid., para. 37.

<sup>636/</sup> Ibid., p. 134, para. 39.

<sup>637/</sup> Ibid., para. 41.

<sup>638/</sup> Ibid., para. 42.

<sup>639/</sup> Ibid., para. 43.

143. It was generally recognized that the principle of proportionality was at the basis of the whole topic of the content, forms and degrees of responsibility, though some members contested its character as a rule of international law, or were inclined to regard it as being a primary rather than a secondary rule.<sup>640/</sup>

144. Several members stressed the need to avoid the enunciation of primary rules within the context of Part 2. There was the feeling, however, that some "categorization" according to their content, of the primary obligations with which an act of a State was not in conformity, was inevitable when determining the new legal relationships arising from the breach of those obligations.<sup>641/</sup>

C. Consideration of the topic at the present session

145. At the present session, the Commission had before it the second report (A/CN.4/344 and Corrs. 1 (English only) and 2) submitted for its consideration by the Special Rapporteur. In part II of the report, the Special Rapporteur proposed five draft articles on content, forms and degrees of State responsibility. The first three articles constituted chapter I entitled "General principles".<sup>642/</sup> The

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<sup>640/</sup> Ibid., para. 44.

<sup>641/</sup> Ibid., p. 135, para. 45.

<sup>642/</sup> Those three articles read as follows:

"Article 1

"A breach of an international obligation by a State does not, as such and for that State, affect (the force of) that obligation.

"Article 2

"A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

"Article 3

"A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law."

last two articles constituted chapter II entitled "Obligations of the State which has committed an internationally wrongful act".<sup>643/</sup>

146. After a brief review of the first (preliminary) report, the comments in the Commission on that report, and the comments in the Sixth Committee on the topic, the second report dealt primarily with the first parameter, i.e. the new obligations of the State which is held to have committed an internationally wrongful act entailing its international responsibility (the "author" State). The report,

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643/ Those two articles read as follows:

"Article 4

"Without prejudice to the provisions of article 5:

"1. A State, which has committed an internationally wrongful act, shall:

- (a) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and
- (b) subject to article 22 of Part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and
- (c) re-establish the situation as it existed before the breach.

"2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

"3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.

"Article 5

"1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State (within its jurisdiction) to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation, mentioned in article 4, paragraph 1, under (c), or to act in accordance with article 4, paragraph 2.

"2. However, if, in the case mentioned in paragraph 1 of the present article,

- (a) the wrongful act was committed with the intent to cause direct damage to the injured State, or
- (b) the remedies, referred to in article 4, paragraph 1, under (b), are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply."

however, also suggested the advisability of starting the draft articles of Part 2 with three "preliminary" rules (draft articles 1 to 3),<sup>644/</sup> providing a frame for all the following chapters of Part 2, which deal separately with each of the three parameters outlined in the preliminary report.

147. By way of introduction of those preliminary rules, the report noted the fundamental structural difference between international law and any system of internal law, and the interrelationship between - and essential unity of purpose of - the rules relating to the methodologically separated items of "primary rules", "rules relating to the origin of State responsibility", "rules relating to the content, forms and degrees of State responsibility" and "rules relating to the implementation of State responsibility". The report also noted that the "rule of proportionality" underlying the responses of international law to a breach of its primary rules, should be understood as to be rather of a negative kind, excluding particular responses to particular breaches.

148. The report then stated the reasons for including the three preliminary rules, articles 1 and 3 of which deal with the continuing force, notwithstanding the breach, of the primary obligations and rights of the States concerned, while article 2 refers to possible special, self-contained, régimes of legal consequences attached to the non-performance of obligations in a specific field.

149. The report then turned to the first parameter and analysed the three steps associated with that parameter: the obligation to stop the breach, the obligations of "reparation", and the obligations of restitutio in integrum stricto sensu and "satisfaction" in the form of an apology and guarantee against repetition of the breach.

150. This analysis is then confronted with State practice, judicial and arbitral decisions and doctrine, leading up to the proposed articles 4 and 5.<sup>645/</sup>

151. Article 4, paragraph 1, refers to the new obligations tending towards a belated performance of the original primary obligation (stop the breach stricto sensu; stop the breach lato sensu, and restrictio in integrum stricto sensu).

Paragraphs 2 and 3 of article 4 refer to the new obligations tending towards a substitute performance (reparation ex nunc, reparation ex tunc and reparation ex ante).

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<sup>644/</sup> See foot-note 642 above.

<sup>645/</sup> See foot-note 643 above.

152. Article 5, paragraph 1, provides for a deviation from the general rules contained in article 4, in the case of a breach of obligations in a particular field (treatment of aliens), and leaves in such a case to the author to state the choice between re-establishment of the situation as it existed before the breach, and reparation in pecuniary terms. If the latter course of action is chosen, the author State, under paragraph 2 of article 5 still has the additional duty to provide satisfaction in cases where the wrongful act is aggravated by one of the two circumstances, described in subparagraphs (a) and (b).

153. The second report by the Special Rapporteur was considered by the Commission at its 1666th to 1670th and 1682nd to 1684th meetings. The Commission decided to discuss first articles 1 to 3 together.

154. It was suggested, and found generally acceptable, to start Part 2 of the draft articles with an article providing for a link between the draft articles in Part 1 and those to be drafted in Part 2, in the form of a statement that "an internationally wrongful act of a State gives rise to obligations of that State and to rights of other States in accordance with the following articles".

155. There was considerable discussion and divergence of opinions within the Commission, on the advisability of including articles 1 to 3 in an introductory chapter of Part 2. While most members felt that the ideas underlying articles 1 to 3 should be expressed at the outset as a frame for the provisions in the other chapters of Part 2, other members expressed doubts as regards the advisability of including articles of this kind in a first chapter.

156. It was suggested that articles 1 and 3 ought to be combined in one article dealing with both the obligations and the rights of the author State, the injured State and other States, and providing that those rights and obligations could be affected by a breach only to the extent stipulated in the other articles of Part 2. In this way one could also avoid the impression, created by the wording of articles 1 and 3 as proposed, that those articles tended towards protection of the wrongdoing State.

157. As regards article 2, it was generally recognized that a specific rule, or set of rules, of international law establishing an international obligation could at the same time deal with the legal consequences of a breach of that obligation in a way at variance with the general rules to be embodied in the draft articles of Part 2. The question was put, however, whether this should be stated at the outset or rather at some other place in the draft articles.

158. During the discussion on articles 4 and 5 several members expressed a preference for dealing with the new obligations of the author State, arising from its internationally wrongful act, rather in terms of new rights of the injured State, and possibly other States, to demand a certain conduct of the author State after the breach occurred. While in Part 1, relating to the origin of State responsibility, it was generally irrelevant, towards which State or States the primary obligation existed, this question was essential in dealing with the legal consequences of a breach of such primary obligation. Obviously, such an approach would still make it necessary to spell out which conduct of the author State could be demanded by the injured State, and, possibly, other States. Furthermore, such an approach could leave open the question whether or not the injured State (or, as the case may be, other States) should first demand the specified conduct of the author State before taking any other measure in response to the breach. In this respect one member expressed the opinion that any legitimate countermeasure could always be taken in advance of any request for restitutio in integrum or for reparation.

159. Doubts were also expressed in respect of article 5 as proposed. While some members did not consider that the breach of an obligation concerning the treatment to be accorded by a State to aliens entailed, within the framework of the first parameter, other legal consequences than a breach of any other international obligation, other members wondered whether the special régime of article 5 should not also apply in cases of breach of other international obligations than those mentioned in paragraph 1 of that article.

160. The view was also expressed that article 4, paragraph 1 (b) and article 5, paragraph 2 (b) created the impression that the state of the internal law of a State influenced the extent of its obligations under international law. In this connection it was recalled that article 22 of Part 1 of the draft articles (exhaustion of local remedies) dealt with the (non-) existence of a breach of an international obligation of result and only where that result or an equivalent result may be achieved by subsequent conduct of the State.

161. At the conclusion of the debate the Commission decided to send articles 1, 2, 3, 4 and 5 to the Drafting Committee. <sup>646/</sup>

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<sup>646/</sup> See para. 12 above.

## CHAPTER V

### INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

#### A. Introduction

162. It may be recalled that the International Law Commission began its consideration of the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" at its thirtieth session, in 1978, pursuant to General Assembly resolution 32/151 of 19 December 1977. At that session, the Commission established a Working Group to consider the question of future work on the topic; it also appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic. The General Assembly requested the Commission, by paragraph 5 of resolution 34/141 of 17 December 1979, to continue its work on the remaining topics on its current programme, among them being the present topic.<sup>647/</sup>

163. At its thirty-second session, in 1980, the Commission had before it a preliminary report (A/CN.4/334 and Add.1, Add.1/Corr.1 and Add.2) submitted by the Special Rapporteur. The preliminary report was considered by the Commission at its 1630th to 1633rd meetings. It engaged in a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole. A summary of that debate was set out in a section of the report of the Commission on the work of its thirty-second session.<sup>648/</sup>

164. The General Assembly, by paragraph 4 (d) of resolution 35/163 of 15 December 1980, recommended that the International Law Commission should continue its work on the topic, taking into account the views expressed in debates in the General Assembly.

#### B. Consideration of the topic at the present session

165. The Commission at the present session had before it the second report submitted by the Special Rapporteur (A/CN.4/346 and Add.1-2), containing four chapters and the text of a draft article: "Scope of these articles" (article 1). Chapter I considered the relationship of this topic with the régime of State responsibility, referring in part to the difficulty caused by the use of the concept of "strict liability" and other similar terms which had appeared in the literature relevant to

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<sup>647/</sup> For the historical review of the work of the Commission on the topic up to 1980, see Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), paras. 123-130, pp. 361-362.

<sup>648/</sup> Ibid., paras. 131-144, pp. 362-368.

the question. Chapter II discussed the intersection of harm and wrong, taking a fresh look at the Trail Smelter case. Chapter III stressed the importance of striking a balance of interests in regulating a transboundary harm. Chapter IV reviewed the nature and scope of the topic on the basis of the discussions in the preceding chapters, from which the text of a draft article on the scope of the topic was elaborated.<sup>649/</sup>

The general character of the second report

166. The second report submitted by the Special Rapporteur was considered by the Commission at its 1685th to 1687th and 1690th meetings. In speaking of the report, the Special Rapporteur noted that he had continued to develop themes outlined in the preliminary report. In doing so, he had borne in mind the prevailing view within the Commission that basic principles should be explored generally, even though at present little State practice could be found outside the areas relating to the use and management of the physical environment. It was open to argument whether the rapid growth of treaty practice in those areas was non-principled, or whether it was a response to more general rules existing in customary international law: therefore the present report had been directed, not to an examination of treaty practice, but to other aspects of legal development.

167. The Special Rapporteur indicated that there was already a wide measure of agreement about policy aims. The old concept of invasion of sovereignty was no longer a sufficient means of regulating the impact of activities within one State's territory or control upon other States. Many kinds of legitimate activity, carried on within the borders of a State or by its nationals in areas beyond the limits of national sovereignty, were capable of causing loss or injury to other States and their nationals. The principle that States were free to conduct their own affairs in ways which did not harm others was of central importance, but could not be applied rigidly: the true freedom of each national community depended on preserving a balance between over-restriction of beneficial activities which might have harmful transboundary consequences, and over-exposure to such consequences when produced within other States or by their nationals. Legal policy therefore aimed to avoid both extremes, making as little use as possible of outright prohibitions, while seeking to minimize harmful consequences, and when they occurred, to provide reparation.

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<sup>649/</sup> For the text of the draft article proposed by the Special Rapporteur, see foot-note 654 below.



168. It was noted by the Special Rapporteur that States, in fact, often settled by agreement the conditions under which a potentially dangerous activity could be conducted. By making the agreement and adhering to its terms, they avoided in their mutual relations the possibility of wrongfulness, substituting instead obligations relating to injurious consequences arising out of acts not prohibited by international law. When loss or injury was sustained in situations not governed by a conventional régime, the questions which the régime might have determined were left open. One question, not within the scope of the present topic, was whether the injurious consequences had arisen out of a wrongful act. Sometimes, however, compensation was asked and paid - though usually without admission of liability - simply on the basis that the cause of the loss or injury was an activity within the territory or control of the paying State.

169. He also noted that usually in such cases the claim might also have been formulated in terms of reparation for a wrongful act; but that sometimes that alternative had been ruled out, either because there were circumstances precluding wrongfulness, or because the damage that had occurred could not be attributed to the State. These, then, were the test cases; and it had commonly been argued that liability in such cases must depend upon a principle that was independent of the classical rules of State responsibility for wrongfulness. Because this principle of "strict" or "absolute" or "no-fault liability", or "liability for risk" was seen to cut across traditional doctrine, there was a natural anxiety to find another principle which would limit its field of application. The criteria often suggested were those of "ultra-hazard" and "abnormal user"; but there had been little success in defining such criteria acceptably. As had been stressed in the preliminary report, "harm" was itself a relative concept, clear enough in some situations, but varying with the knowledge and skills and resources and priorities of national and international communities of interest.

#### Preliminary issues

170. To make sure that the development of the present topic did not cut across the classical principles of international law, the Special Rapporteur had continued to use two guidelines, each of which had been generally supported during the Commission's discussion of the preliminary report. The first was the distinction between "primary" and "secondary" rules, developed and used by the Commission in the elaboration of the draft articles on State responsibility, Part I. According to this distinction, "secondary" rules are those engaged by the occurrence of a wrongful act: therefore an act which is not prohibited can give rise to

responsibility (or liability) only when a "primary" rule of obligation so provides. The value of maintaining this technical distinction was simply that it kept a correct relationship between the present topic and that of State responsibility. The two topics are not on the same plane; and rules developed under the present topic may not purport to derogate from the universal rules of State responsibility.

171. There was some discussion within the Commission of the value and limitations of the distinction between "primary" and "secondary" rules. Like all abstractions, it could distort, as well as illuminate. Several members were not satisfied that it had been possible to adhere to the distinction completely, even in the case of the draft articles on State responsibility, Part 1. One member observed that it made no difference to the quality or value of a rule, whether it was classified as "primary" or "secondary". There was, however, no disagreement with the view that rules developed under the present topic could not be allowed to derogate from the rules of State responsibility. It was also noted that rules developed under the present topic would be auxiliary rules of a mainly procedural character. To that extent they could be regarded as having, in a broad and non-technical sense, the quality of secondary rules.

172. The Special Rapporteur's second guideline was to apply, in every situation to which the present topic might relate, the test of the duty of care or due diligence. There was, after all, a significant, though imperfect, parallel between a State's responsibility for the treatment of aliens in its territory and its responsibility for harm generated within its territory or control, and suffered beyond its borders by other States and their nationals. The second class of case was in principle even more serious than the first, because those who suffered loss or injury had not chosen to place themselves within the territory or control of the State in which the harm was caused. In both cases, however, the traditional rules of State responsibility required more than proof of causality; it must also be shown that the State in whose territory or control the harm was generated had the possibility of averting that harm.

173. The Special Rapporteur was of the view that whenever a State within whose territory or control substantial transboundary harm is generated has knowledge of the harm, or means of knowledge, and opportunity to act, the rule enunciated by the International Court of Justice in the Corfu Channel case<sup>650/</sup> establishes that

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<sup>650/</sup> Corfu Channel, Merits, Judgement, I.C.J. Reports 1949, p.4.

the test of attribution has been satisfied. It is, of course, not necessary to describe this rule, which has an objective character, as a reflection of the duty of care; and one Commission member was concerned to insist that a reference in any context to the duty of care imports considerations which have moral, but not legal, value. Nevertheless, it is not easy, even in this limited context, to avoid a reference to the duty of care; for writers of widely different persuasions agree - and their view finds support in multilateral State practice - that the standard of care or vigilance required of a State rises in proportion to the degree of danger known to be associated with the conduct of a particular activity. This point also was made by several Commission members.

174. In any case, as some Commission members noted, the main purpose of the Special Rapporteur's emphasis on the duty of care was to strengthen the linkage between the present topic and the classical rules of international law, so that the issue of "strict" liability could be conservatively assessed. It was abundantly clear that, when transboundary harm was chronic or continually threatening, or had given rise to communications between governments, any failure to take action incumbent upon the State within whose territory or control that harm had been caused could readily be attributed to that State. Two important classes of case - those of unforeseeable accident and of circumstances precluding wrongfulness - did not fall within this category and must be reserved for further consideration. First, however, it was necessary to shift the main focus of attention from questions of attribution, which had tended to dominate doctrinal discussion, to the objective element in the relevant rules of obligation.

#### Rules entailing a balance of interest test

175. In the Corfu Channel case, the International Court of Justice had referred to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".<sup>651/</sup> The principle was already well established in the Alabama arbitral awards<sup>652/</sup> and in other cases; but only in the Trail Smelter case did a substantial question of balance of interest arise. In the latter case, although the tribunal appeared to state absolutely the duty that "a State owes at all times ... to protect other States against injurious acts by

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<sup>651/</sup> Ibid., p.22.

<sup>652/</sup> J.B. Moore, History and Digest of the International Arbitrations to which the United States Has Been a Party (Washington, D.C., Government Printing Office, 1898), vol. I, Chapter XIV ("The Geneva Arbitration"), pp. 495-682.

individuals from within its jurisdiction",<sup>653/</sup> it in fact applied a balance of interest test to establish the point at which a neglect of that duty would entail wrongfulness. It then imposed upon Canada a further duty to compensate for any transboundary loss or injury caused by the operation of the smelter, even when that loss or injury was not caused by a wrongful act.

176. In the submission of the Special Rapporteur, the Trail Smelter situation offered an elementary working model of principles that were fundamental to the present topic. There was a broad obligation not to allow activities within the territory or control of a State to cause substantial, physical transboundary harm to other States and their nationals; and there was a supporting obligation to do whatever might be necessary to make the first obligation effective. It was the supporting obligation which concerned the present topic. It could not come into operation unless there were already a primary rule of obligation of such generality that its application in a particular case required a test of proportionality or balance of interest. In such a case duties to disclose information, to receive representations, and to negotiate in good faith, were very well established.

177. It was furthermore submitted that the régime constructed by the Trail Smelter tribunal also illustrated principles that could be discerned in many multilateral instruments regulating the conduct of activities capable of causing substantial transboundary harm. Every effort had been made to reconcile the continuance of the activity with adequate protection for those likely to be harmed. A right of compensation had not been allowed to take the place of the right to be protected against loss or injury; but levels of prevention had been determined with regard to the technological and economic possibilities of the industry, as well as to the need to minimize harm. The principle of "strict" liability had been admitted to fill the gap between the possibility of harm and the measures taken to prevent harm; but this had not entailed any departure from classic principles of responsibility. Rather it was in fulfilment of a duty of care or protection that a régime had been constructed, composed of obligations of prevention, and obligations to compensate when prevention proved insufficient.

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<sup>653/</sup> United Nations, Reports of International Arbitral Awards, vol. III, p.1963.

178. The themes which have been very briefly summarized in the three preceding paragraphs evoked two main lines of comment from Commission members. Some were doubtful about the validity of the structure which the Special Rapporteur had begun to outline. A larger number, though willing to accept the validity of the structure at least on a provisional basis, had considerable doubts about the possibility of crystallizing rules of general application to put within that structure. There was full agreement that doubts of the latter kind could only begin to be resolved on the basis of a further report, which would explore multilateral treaty practice and other forms of international co-operation relating to the conduct of activities causing transboundary harm. It is therefore convenient to reserve comments on that point for the final section of this chapter, and to return now to the question of structure.

179. The development of this topic proceeds upon the view that States, which exercise exclusive authority within their territory and over their ships and nationals beyond territorial limits, owe other States a correlative duty of protection against harm generated within their territory or control. Although several Commission members expressed reservations as to the present status of such a principle in customary law - and in one case denied that it had any such status - there was a clear general opinion that the Commission should follow the indications in the Stockholm Declaration and in other international instruments calling for progressive development in this area of the law. Some members placed especially strong emphasis upon the duty of care, regarding it as the minimum standard of acceptable behaviour in the age of interdependence.

180. Several members were, however, doubtful about the "gray area" or "twilight zone" which they felt to be represented by the present topic, believing that it had only a transient existence while new norms of right and wrong were crystallizing out. It was generally agreed that, when a particular activity had been regulated in a treaty régime or series of régimes, precise and detailed rules would in many cases replace the need to balance interests in each individual situation; but in some contexts margins of appreciation were likely to remain. Several members pointed out that both tendencies were evident in the evolving draft treaty text of the Third United Nations Conference on the Law of the Sea, and in the legislation promoted under the auspices of the Intergovernmental Maritime Consultative Organization and other international bodies. As to the capacity of rules developed under the present topic to act as a catalyst in the promotion of treaty régimes and other solutions of conflicts of interest, there were varying speculative estimates, but agreement that more definite answers must await consideration of the content of the topic.

181. The general acknowledgement that the time had come to turn from questions of outer structure to those of inner content was indicative of ground gained. The topic had been described in terms which did not place it in opposition to the classical rules of international law. On the contrary, it had been shown - some thought convincingly - that the present topic was an essential counterpart to the law of State responsibility. Primary rules of obligation involving a balance of interest test could be implemented only if States were able to believe that a true balance of interest was obtainable. In most situations this could not be achieved merely by deciding how much harm was wrongful: the point of wrongfulness had to be fixed in conjunction with other measures prescribing the conditions under which a beneficial, but potentially harmful, activity could continue. One member observed that the present course of development was mirrored in the early development of the common law, when rules of prohibition were supplemented by other, more flexible rules, which began with the fact of loss or injury sustained, and considered whether that loss or injury was attributable to negligence - that is, to lack of care, on the part of another subject of law.

#### Unforeseen accidents

182. Commission members appeared to accept - for the most part, tacitly - the Special Rapporteur's view that the question of responsibility (or liability) for loss or injury caused by unforeseen accidents, or in circumstances in which wrongfulness was precluded, was a separate and subordinate question, on which the opinion of governments could be taken when other, major issues had been clarified. The Special Rapporteur had suggested that, even in this limiting class of case, it was possible to find parallels with classical principles of State responsibility. For example, the case in which, despite the greatest care, a space object failed to respond to its controls, and caused transboundary damage, might well have been considered - apart from treaty - a case in which wrongfulness was precluded. Yet it was foreseeable that, sooner or later, space activity would give rise to such an unforeseen accident, and States had established by treaty a duty to compensate for losses caused by such accidents.

183. It would seem, therefore, that the moral objection to leaving an innocent victim to bear his loss has, in most cases, some support of a more specifically legal nature. If, in relation to any activity, it is foreseeable that transboundary harm may sooner or later occur despite all care taken by the State, the actual occurrence of that harm may not be predictable or in itself wrongful; but a failure to make reparation for the loss or injury caused by the harm may

still be wrongful. The distinctions here made are characteristic of the present topic. The topic is concerned, not with a breach of the duty of care - which goes to wrongfulness - but with care as a function of a primary rule of obligation. Under the present topic, the ambit of the duty of care may be a little more far-seeing than in other contexts: it may encompass a duty of reparation at least when it is foreseeable that preventive measures cannot eliminate danger. That, after all, is the standard which States often seek to implement, when they negotiate régimes for the conduct of enterprises that may cause transboundary harm.

#### Scope and content

184. As already noted, the Commission as a whole believes that, in the early stages of this project, scope and content must go together. There was therefore no question of seeking to adopt at this session the draft article 1 proposed by the Special Rapporteur.<sup>654/</sup> Moreover, members found the draft article to be condensed and cryptic, saying more than ought to be said in a scope article, but less than needed to be said to give a complete outline of the considerations traversed in the Special Rapporteur's preliminary and second report. Nevertheless, draft article 1 served as a useful focus of debate; and points made in criticism or elucidation of the draft article should be placed on record.

185. At the outset of the debate, a Commission member noted that the two subparagraphs of the draft article brought into conjunction a physical situation and a legal situation. Pursuing that approach, the elements of the physical situation indicated in subparagraph (a) could be enumerated in the following way. First, there must be a human "activity" - not merely a natural event, which gives rise to harm. Secondly, that activity must occur within the "territory or jurisdiction" of a State (which would therefore be accountable for its own acts or omissions in relation to the conduct of the activity). The Special Rapporteur

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<sup>654/</sup> The text of the draft article proposed by the Special Rapporteur read as follows:

#### "Article 1. Scope of these articles

"These articles apply when:

(a) activities undertaken within the territory or jurisdiction of a State give rise, beyond the territory of that State, to actual or potential loss or injury to another State or its nationals; and

(b) independently of these articles, the State within whose territory or jurisdiction the activities are undertaken has, in relation to those activities, obligations which correspond to legally protected interests of that other State."

explained that he had in mind two situations when he used the term "jurisdiction": one was the case of a State's exclusive jurisdiction over its ships and nationals beyond territorial limits; and the other was the possible case of State acts that could not be said to have a geographical location. It was felt by some members that "control" was a more suitable term than "jurisdiction"; and the word "control" has been used in the present report.

186. Continuing with subparagraph (a), the third element was to exclude from the scope of the draft articles questions relating to the treatment of aliens. In principle, in situations with which this topic deals, the loss or injury is always sustained "beyond the territory" of the State in which the harm was generated; but the Special Rapporteur noted that this concept needed refinement to cover - for example - the case of innocent passage, and perhaps other situations in which a territorial boundary does not represent the real division of control between the State in whose territory or control the harm is generated and the victim State. A fourth element, provided by the reference to "another State or its nationals", is to exclude situations which involve only a single State and its own nationals. Several Commission members made the point that this reference needs to be expanded to take separate account of loss or injury to areas which are the common heritage of mankind.

187. There remains in subparagraph (a) the most fundamental element of all - the fact of "loss or injury". As to "actual" loss or injury, no question arose; but, as to "potential" loss, a number of Commission members had serious misgivings; and further study of this point is clearly necessary. The Special Rapporteur had in mind the fact that in some cases - say, the case of a dam that impends over the watershed of a neighbouring State, affecting land use within that State - the reasonable apprehension of injury might itself amount to injury. Probably, however, it was unnecessary to refer to "potential" injury in such a context.

188. More fundamentally, there was the question of the point in time at which the draft articles would speak. Provisions relating to reparation would, of course, become operative only in relation to an actual loss or injury; but the duty to establish a régime of prevention and reparation would arise when the need for such a régime could be foreseen. Several Commission members had underlined the fact that mere compensation for harm suffered was not an acceptable substitute for measures to minimize harm. The key to this problem may lie in the observation of one Commission member that the reference to "potential" loss was wrongly placed among the physical factors, but that the idea contained in that reference could perhaps be introduced in the second subparagraph, dealing with legal factors.



189. In subparagraph (b), the dominant consideration is the auxiliary nature of rules developed under the present topic. Unless there were a relevant primary rule of obligation - a rule which asserted, for example, the Stockholm Declaration principle that "States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"<sup>655/</sup> - rules developed pursuant to the present topic would not be engaged. But if the application of such a customary rule is hindered only by its generality and the implicit need to reconcile conflicting interests, rules developed under this topic should have catalytic value. In particular, the rules should make it easier for interested States to agree upon the point of intersection of harm and wrong, taking into account the conditions subject to which the activity in question could be continued without risk of a breach of obligation.

190. Accordingly, the reference to "legally protected interests" in subparagraph (b) of the article proposed by the Special Rapporteur was intended to complete the equation described in the preceding paragraph. As the Lake Lanoux tribunal pointed out, "legally protected interests" are, indeed, rights;<sup>656/</sup> but they are not the same rights guaranteed by the principle rule of obligation. The principal rule prohibits an activity that is wrongful: the subsidiary rule allows the activity to continue while it complies with conditions that avoid wrongfulness. As one Commission member noted, the reference to "legally protected interests" showed that the draft was related to the concept of classical responsibility for wrongful acts.

191. In the course of debate, one Commission member, expressing agreement with the view that the topic was mainly of a procedural character, said that he believed the articles would be far more effective if they contained provision for the settlement of disputes. In that connection, he drew attention to the Draft Convention on the Law of the Sea (Informal Text),<sup>657/</sup> developed by the Third United Nations Conference on the Law of the Sea, specifying six draft articles that contained relevant material.

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<sup>655/</sup> Report of the United Nations Conference on the Human Environment, document A/CONF.48/14/Rev.1 and Corr.1 (English only) (United Nations publication, Sales No. E.73.II.A.14), Principle 21, p.5.

<sup>656/</sup> United Nations, Reports of International Arbitral Awards, vol.XII, p.315. See also International Law Reports, 1957, p.138.

<sup>657/</sup> A/CONF.62/WP.10/Rev.3 and Corrs. 1, 2 (Spanish only), 3, 4 (Chinese only), 5 (Arabic only), 6 (French and Russian only), 7 (French only) and 8 (French only).

192. Another Commission member, recalling that the materials on which the Special Rapporteur had relied were drawn from the area of the use and management of the physical environment, emphasized the need to ensure that the rules would not appear to apply in areas to which they were quite unsuited. The Special Rapporteur, however, suggested that there were criteria which should meet this need. First, these auxiliary rules would apply only when there was already an existing norm to which they could attach. Secondly, they would apply only when the existing norms incorporated a balance of interest test. In other words, there was an inherent limitation to cases in which an activity was not in itself undesirable. In such cases, rules developed under the present topic would seek to accommodate the activity upon terms that took into account the real interests of other States likely to be harmfully affected.

193. Yet another Commission member thought that the only major fields likely to attract rules made under the present topic were those of the use and management of the physical environment, and economic and monetary activities, which in practice often caused loss or injury beyond the territory of the State in which they were undertaken. If the latter activities were meant to be covered by the topic, their predominantly quantitative aspects would give rise to enormous difficulties in determining the exact nature of the rules. Again, the Special Rapporteur stressed that the question depended, in the first instance, upon the existence of a rule setting limits to freedom of action in the area concerned. Rules made under this topic could not be applied simply to situations in which there was a free play of market forces, or any other form of open, unregulated competition. The duty of care was owed in respect of "legally protected interests".

194. On the other hand, the Special Rapporteur also stressed that there was no intrinsic reason why economic factors should not enter into a balance of interest equation: they did so frequently in relation to questions affecting the management and use of the physical environment - for example, in the factors adduced by the International Court of Justice in the Anglo-Norwegian Fisheries case<sup>658/</sup> relating to the dependence of the land upon the water. Similarly, in

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<sup>658/</sup> Fisheries, Judgement, I.C.J. Reports 1951, p.116.

the regulation of an industry such as that concerning the sea carriage of oil, the economic viability of the industry was as much a major factor as the economic losses that oil pollution might cause to coastal and fishing States. At the present stage of enquiry, perhaps it could only be said that, when there was a recognized need to regulate competing interests, rules of conditional authorization might sometimes offer a better way of doing so than mere rules of prohibition.

#### Programme of future work

195. For reasons touched upon in paragraphs 178 and 184, the immediate priorities for future work on this topic are clear. Attention must turn from the survey of boundaries, and of relationships with State responsibility, to the inner content of the topic. The third report must also provide a review of conventional régimes, as a counterpart to the doctrinal and other considerations treated in the second report. The main field of study must be that in which States have shown a sense of obligation towards each other in relation to the manner and conditions of conduct of activities which are carried on within their territory or control, and which may or do produce effects that harm other States or their nationals.

196. It is not necessary to decide in advance whether the whole or a part of that area is aptly described in terms of "ultra-hazard" or of some other specific criterion. The approach must, as some members suggested, be pragmatic and empirical - and broad enough to take into account objectives that individual Commission members had described in differing terms. The enquiry should, for example, be able to indicate the kinds of situation in which States have found it useful to try to reach agreements, as well as the methods they have tended to employ and the factors they have considered pertinent. One aim must be to identify the rules of greatest generality.

197. In approaching that task, the Special Rapporteur must bear in mind the efforts that individual Commission members have already made to look into the future of the topic. The highest common factor of agreement is that the search for general principles should be pursued, with a willingness to venture cautiously into the realm of progressive development, but also with a consciousness that different kinds of situation may be found to require different treatment. One member, for example, envisaged the possibility of a very small body of very general rules, and a larger body of rules relating specifically to questions affecting the physical environment. He thought that the Commission should be prepared - if that was the way in which matters evolved - to consider the production of guidelines rather than firm rules, using "should" instead of "shall".

198. Several members also pointed out that, even within a comparatively narrow subject area, it was extremely difficult to enumerate the factors entitled to consideration in a way that would direct the conduct of States. One member referred in that context to efforts made to enumerate in international agreements the hierarchy of permissible uses of international watercourses. Another member dwelt upon the difficulties of providing objective guidance about methods of determining whether a use was beneficial, to what limitations an activity could reasonably be subjected, and the relationships between competing priorities. He felt that, in such matters, municipal laws were the best guide. Minimal objectives were to ensure that a balance of interest was achieved at the level of municipal law, that the rules established at that level applied equally in internal and transnational situations, and that the universal principles of the law of co-operation were followed.

199. In short, paths would divide; but most Commission members felt that the topic was valid and that although the study should be aimed initially at the identification of general rules, it should be based upon a pragmatic and empirical examination of the sources. In modern conditions, useful activities that could produce harmful transboundary effects had to be regulated with minimal recourse to rules of prohibition. The Special Rapporteur noted that not enough attention had yet been paid to the important question of thresholds. The amount of harm considered substantial in any transboundary situation of course depended on the perspectives of the States concerned; and there was always a legacy of history to be taken into account, when these perspectives changed. Similar considerations underlay principle 23 of the Stockholm Declaration of the United Nations Conference on the Human Environment,<sup>659/</sup> relating to the circumstances of developing countries.

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<sup>659/</sup> Report of the United Nations Conference on the Human Environment ...  
op. cit., p.5.

## CHAPTER VI

### JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

#### A. Introduction

##### 1. Historical review of the work of the Commission

200. The topic entitled "Jurisdictional immunities of States and their property" was included in the current programme of work of the International Law Commission by decision of the Commission at its thirtieth session in 1978,<sup>660/</sup> on the recommendation of the Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.<sup>661/</sup>

201. At its thirty-first session, in 1979, the Commission had before it a preliminary report (A/CN.4/323) on the topic submitted by the Special Rapporteur, Mr. Sompong Sucharitkul. During the discussion of the report,<sup>662/</sup> it was pointed out that relevant materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible. It was also emphasized that another potential source of materials could be found in the treaty practice of States, which indicated consent to some limitations in specific circumstances.

202. In that connection, the Commission, at its thirty-first session, decided to seek further information from Governments of Member States of the United Nations in the form of replies to a questionnaire. It was noted that States know best their own practice, wants and needs as to immunities in respect of their activities and that the views and comments of Governments could provide appropriate indication of the direction in which the codification and progressive development of the international law of State immunity should proceed.

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<sup>660/</sup> See Yearbook ... 1978, vol. II (Part Two) P.153, document A/33/10, para.188. The topic was one of the 14 included on a provisional list of topics selected for codification by the International Commission in 1949. See Yearbook ... 1949 p.281, doc. A/925, para.16, and subsequent mentioning of the topic in Yearbook ... 1973, vol. II, pp.230-231, document A/9010/Rev.1, paras.173-174, and Yearbook ... 1977, vol. II, (Part Two), p.130, document A/32/10, para.110.

<sup>661/</sup> See Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), pp.316-317, paras.99-103.

<sup>662/</sup> Ibid., pp.317-319, paras.106-109.

203. Pursuant to that decision, the Legal Counsel of the United Nations addressed a circular letter dated 2 October 1979 to the Governments of Member States, inviting them to submit replies, if possible by 16 April 1980, to a questionnaire on the topic formulated by the Special Rapporteur.<sup>663/</sup>

204. At its thirty-second session, in 1980, the Commission had before it the second report on the topic submitted by the Special Rapporteur (A/CN.4/331 and Add.1) containing the text of the following six proposed draft articles: "Scope of the present articles" (article 1); "Use of terms" (article 2); "Interpretative provisions" (article 3); "Jurisdictional immunities not within the scope of the present articles" (article 4); "Non-retroactivity of the present articles" (article 5); and "The principle of State immunity" (article 6). The first five articles constituted part I entitled "Introduction" while the sixth article was placed in part II entitled "General principles".

205. During the discussion on the second report,<sup>664/</sup> the Special Rapporteur indicated that the provisional adoption by the Commission of draft articles 1 and 6 could provide a useful working basis for the continuation of the work on the topic. He suggested that the Commission might, therefore, wish to concentrate on the proposed draft articles 1 and 6, since draft articles 2, 3, 4 and <sup>665/</sup> had been submitted for the preliminary reaction of members of the Commission and their consideration and could be deferred. Thus only draft articles 1 and 6 were referred to the Drafting Committee by the Commission.

206. As explained in the report of its thirty-second session<sup>666/</sup> the Commission after a considerable debate,<sup>667/</sup> on the basis of the second report submitted by the Special Rapporteur, adopted provisionally article 1 entitled "Scope of the present articles"<sup>668/</sup> and article 6 entitled: "State immunity".<sup>669/</sup> As indicated above, in the second report submitted by the Special Rapporteur four other

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<sup>663/</sup> The information, materials and replies submitted by Governments are described in para.209 below.

<sup>664/</sup> Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), pp.319-320, paras.112-113.

<sup>665/</sup> See foot-notes 670, 671, 672 and 673, below.

<sup>666/</sup> See Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10).

<sup>667/</sup> Ibid., pp.319-326, paras.112-122.

<sup>668/</sup> See section B of the present chapter, below.

<sup>669/</sup> Ibid.

articles were also tentatively proposed, namely article 2 entitled "Use of terms",<sup>670/</sup>

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670/ Draft article 2 read as follows:

"Article 2. Use of terms

"1. For the purposes of the present articles:

(a) 'immunity' means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

(b) 'jurisdictional immunities' means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

(c) 'territorial State' means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

(d) 'foreign State' means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

(e) 'State property' means property, rights and interests which are owned by a State according to its internal law;

(f) 'trading or commercial activity' means

(i) a regular course of commercial conduct, or

(ii) a particular commercial transaction or act;

(g) 'jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

"2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization."

article 3 entitled "Interpretative provisions", <sup>671/</sup> article 4 entitled "Jurisdictional

671/ Draft article 3 read as follows:

"Article 3. Interpretative provisions

"1. In the context of the present articles, unless otherwise provided,

(a) The expression 'foreign State', as defined in article 2, paragraph 1 (d) above, includes

- (i) the sovereign or head of State,
- (ii) the central government and its various organs or departments,
- (iii) Political subdivisions of a foreign State in the exercise of its sovereign authority, and
- (iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government.

(b) The expression 'jurisdiction', as defined in article 2, paragraph 1 (g) above, includes

- (i) the power to adjudicate,
- (ii) the power to determine questions of law and of fact,
- (iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and
- (iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

"2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1 (f) above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose."



immunities not within the scope of these articles", <sup>672/</sup> and article 5 entitled

672/ Draft article read as follows:

"Article 4. Jurisdictional immunities not within the scope of the present articles

"The fact that the present articles do not apply to jurisdictional immunities accorded or extended to

- (i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,
- (ii) consular missions under the Vienna Convention on Consular Relations of 1963,
- (iii) special missions under the Convention on Special Missions of 1969,
- (iv) the representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,
- (v) permanent missions or delegations of States to international organizations in general,

shall not affect

(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles."

"Non-retroactivity of the present articles".<sup>673/</sup> These four draft articles, forming part of the "Introduction" (part I) were submitted by the Special Rapporteur in his second report on a purely tentative basis as an indication to the Commission of a framework for the topic, including possible definitional problems relating to it. The Commission decided to suspend substantive consideration of these four articles until such time as and when the Commission approaches the final stages of its work on the draft articles on the topic.

207. By paragraph 4 of its resolution 35/163 of 15 December 1980, the General Assembly recommended that the International Law Commission should, inter alia:

"(e) Proceed with the preparation of draft articles on ... jurisdictional immunities of States and their property, taking into account the replies to the questionnaires addressed to Governments as well as information furnished by them;"

2. Consideration of the topic at the present session

208. At the present session, the Commission had before it the third report on the topic submitted by the Special Rapporteur (A/CN.4/340 and Corr. 1 and Add.1 and Add.1/Corr.1), containing the text of the following five proposed draft articles: "Rules of competence and jurisdictional immunity" (article 7). "Consent of State" (article 8); "Voluntary submission" (article 9); "Counter-claims" (article 10); and "Waiver" (article 11). Together with the text of draft article 6 on "State immunity" adopted provisionally by the Commission at its 1980 session, the five articles contained in the third report were placed in part II entitled "General principles".

209. The Commission had also before it documents containing replies and relevant materials submitted by Governments pursuant to the questionnaire mentioned in paragraph 203 above. The materials were organized as follows: Part I consisted of Government replies to the questionnaire in a systematic order (document A/CN.4/343 and Add. 3-4). Part II contained relevant materials that

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673/ Draft article 5 read as follows:

"Article 5. Non-retroactivity of the present articles

"Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby."

Governments had submitted together with their replies to the questionnaire (document A/CN.4/343/Add.1). Part III contained materials submitted by Governments which had not replied to the questionnaire (A/CN.4/343/Add.2) 210. The third report by the Special Rapporteur was considered during the thirty-third session of the Commission at its 1653rd to 1657th and 1663rd to 1665th meetings.

211. Following the presentation by the Special Rapporteur and the discussion by the Commission, draft article 7<sup>674/</sup> was referred to the Drafting Committee.

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674/ Draft article 7 read as follows:

"Article 7. Rules of competence and jurisdictional immunity

"1. A State shall give effect to State immunity under article 6 by refraining from submitting another State to its jurisdiction, notwithstanding its authority under its rules of competence to conduct the proceedings in a given case.

"Alternative A

"2. A legal proceeding is considered to be one against another State, whether or not named as a party, so long as the proceeding in fact impleads that other State.

"Alternative B

"2. In particular, a State shall not allow a legal action to proceed against another State, or against any of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions, or permit a proceeding which seeks to deprive another State of its property or of the use of property in its possession or control."

Similarly, draft article 8,<sup>675/</sup> and draft article 9,<sup>676/</sup> were referred to the

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675/ Draft article 8 read as follows:

"Article 8. Consent of State

"1. A State shall not exercise jurisdiction against another State without the consent of that other State in accordance with the provisions of the present articles.

"2. Jurisdiction may be exercised against a State which consents to its exercise.

"3. A state may give consent to the exercise of jurisdiction by the court of another State under paragraph 2,

(a) in writing, expressly for a specific case after a dispute has arisen, or

(b) in advance, by an express provision in a treaty or an international agreement or in a written contract in respect of one or more types of cases, or

(c) by the State itself through its authorized representative appearing before the Court in a proceeding to contest a claim on the merit without raising a plea of State immunity."

676/ Draft article 9 read as follows:

"Article 9. Voluntary submission

"1. Jurisdiction may be exercised against a State which has voluntarily submitted to the jurisdiction of a court of another State,

(a) by itself instituting or intervening in proceedings before that court; or

(b) by appearing before that court of its own volition or taking a step in connection with proceedings before that court without raising a claim of State immunity; or

(c) by otherwise expressly indicating its volition to submit to the jurisdiction and to have the outcome of a dispute or question determined by that court.

"2. The mere fact that a State fails to appear in proceedings before a court of another State shall not be construed as voluntary submission.

"3. Appearance or intervention by or on behalf of a State in proceedings before a court of another State with a contention of lack of jurisdiction on the ground of State immunity, or an assertion of an interest in a property in question shall not constitute voluntary submission for the purpose of paragraph 1."

677/ Draft article 10 read as follows:

"Article 10. Counter-claims

"1. In any legal proceedings instituted by a State, or in which a State intervenes, in a court of another State, jurisdiction may be exercised against the State in respect of any counter-claim,

(a) for which in accordance with the provisions of the present articles jurisdiction could be exercised had separate proceedings been instituted before that court; or

(b) arising out of the same legal relationship or facts as the principal claim; and

(c) to the extent that the counter-claim does not seek relief exceeding in amount or differing in kind from that sought by the State in the principal claim.

"2. Any counter-claim beyond the extent referred to in paragraph 1(c) shall operate as a set-off only.

"3. Notwithstanding voluntary submission by a State under article 9, jurisdiction may not be exercised against it in respect of any counter-claim exceeding the amount of differing in kind from the relief sought by the State in the principal claim.

"4. A State which makes a counter-claim in proceedings before a court of another State voluntarily submits to the jurisdiction of the courts of that other State with respect not only to the counter-claim but also to the principal claim."

678/ Draft article 11 read as follows:

"Article 11. Waiver

"1. Jurisdictional immunity may be waived by a State at any time before commencement or during any stage of the proceedings before a court of another State.

"2. Waiver may be effected by a State or its authorized representative,

(a) expressly in facie curiae, or

(b) by an express undertaking to submit to the jurisdiction of a court of that other State as contained in a treaty or an international agreement or a contract in writing, or in any specific case after a dispute between the parties has arisen.

"3. A State cannot claim immunity from the jurisdiction of a court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim to immunity can be based until after it has taken such a step, in which event it can claim immunity based on those facts if it does so at the earliest possible moment.

"4. A foreign State is not deemed to have waived immunity if it appears before a court of another State in order specifically to assert immunity or its rights to property."

212. In introducing the report, the Special Rapporteur explained that the five new draft articles mentioned above flowed from the position set out in draft article 6 which established the rule on State immunity. Thus, article 7 on the rules of competence and jurisdictional immunity was, in fact, a corollary to the right to State immunity laid down in article 6. This was so because article 7 imposed a duty on the part of one State to refrain from exercising jurisdiction over another State, or in proceedings involving the interests of another State, regardless of its competence.

213. In attempting, in draft article 7, to define the concept of proceedings against a State, whether or not named as defendant, the Special Rapporteur pointed out that State practice appeared to indicate that there was in normal circumstances an assumption in favour of the absence of consent. In other words, in proceedings involving the interests of a foreign State, it would be correct to assume, in the absence of any indication to the contrary, that the foreign State did not consent to submit to the jurisdiction of the territorial State. There was thus a possibility of the principle of State immunity coming into play. However, it followed as a corollary that, if there was an indication of consent, there could be no question of State immunity.

214. The Special Rapporteur further explained that the existence of consent could be viewed as an exception to the principle of State immunity and that it had been so viewed in certain national legislation and regional conventions. But, for the purposes of the draft articles, he preferred to consider consent as a constituent element of State immunity: immunity came into play when there was no consent, subject, of course to other limitations and exceptions (which remained to be set forth in part III). Accordingly, draft articles 8, 9, 10 and 11 all constituted different ways in which consent could be expressed, and could thus be viewed as qualifications of the principle of State immunity. He left open the possibility of combining the ideas expressed in these four articles into three articles only. Thus "Consent of State" (article 8) would remain a separate article, "Voluntary submission" (article 9) and "Waiver" (article 11) could be combined in one article as various expressions of consent, while "Counter-claims" (article 10) would also be a separate article.

215. In presenting these five new draft articles the Special Rapporteur emphasized that, in the preceding draft article 6 on "State immunity", the rule of State immunity had been formulated from the standpoint of the State receiving or benefiting from State immunity. A State is said to be "immune from the jurisdiction

of another State". This formulation restated jurisdictional immunity as a general rule or general principle, rather than an exception to a more basic norm or fundamental principle of territorial sovereignty or territoriality. It was to be recalled that the discussion within the Commission and the Sixth Committee had revealed the existence of several theories and differing views regarding the concept of State immunity. Adherence to a more fundamental and original concept of sovereignty was not uncommon among developing States and socialist States hinging on a more absolute notion of sovereignty and hence of State immunity. Sharing a similar notion of absolute sovereignty, one view regarded State immunity as an inevitable exception to the territorial sovereignty of a State exercising its normal competence, while another view considered jurisdictional immunity to be a direct application of the very principle of absolute sovereignty of the State claiming to be immune. Par in parem imperium non habet. The two views were not necessarily irreconcilable. The Commission in fact adopted an objective concept or a more orthodox formulation of article 6 restating a general rule of State immunity, as confirmed in the practice of States, following in a sense an inductive method of approach to the question of jurisdictional immunity.

216. In the view of the Special Rapporteur, it would seem pointless, for all practical purposes, to have to make reference back to a more basic principle of sovereignty each time a new study is made of any topic of international law. The same could likewise be said of perfunctory reference to a more fundamental norm such as "pacta sunt servanda" or indeed "the principle of consent of States" to which practically all subsidiary rules of international law may be traceable. Such retrospective investigation appeared to be neither salutary nor helpful. It might on analysis even prove to be less than accurate if not altogether misleading. The question was where to begin and where to stop in the process of retrogression.

217. During the discussion, it was pointed out that the approach adopted by the Commission in treating the general principles before proceeding to examine the various possible exceptions to or limitations upon the general principles had received general approbation in the Sixth Committee of the General Assembly. However, the manner in which the first general principle was stated in article 6 ("A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles"\*) met with some reluctance and even dissent within the Commission.

218. One member maintained that the phrase "in accordance with the provisions of the present articles" made article 6 dependent upon other provisions of the draft articles and thus disqualified it from being an independent legal proposition or statement of a basic rule of international law. This dissent with regard to the way in which the first general rule of State immunity was stated in article 6 persisted in the view of that member in so far as draft article 7 was concerned, since article 7 was a natural consequence and necessary corollary of article 6 which the Commission had, however, adopted provisionally in order to enable its work on this topic to proceed.

219. While most members of the Commission confirmed their approval of the approach provisionally adopted with regard to article 6, some of them doubted the approach as reflected in the proposed article 7 that followed. Other members were, however, of the opinion that article 7 viewed the rule on State immunity from a different standpoint by placing emphasis on the obligation incumbent upon a State to refrain from exercising jurisdiction in a proceeding against another State. Accordingly, article 7 served to reinforce the effect to be given to the right to State immunity contained in article 6. It was further noted that article 7 dealt also with the problem of defining the nature and scope of legal actions which constitute legal proceedings against another State for the purpose of jurisdictional immunities.

220. In further support of the two articles, some members stated that article 6 clearly constituted a general statement of legal principle of the right to State immunity and that it provided a flexible, step-by-step approach to the complex topic. There was, thus, the view that the general approach of both articles 6 and 7 offered a satisfactory compromise: a doorway wide and tall enough for everyone to pass through with relative ease.

221. There was a generally shared view that draft article 8 dealing with the question of consent should be recast in order to preclude its first paragraph phrase ("A State shall not exercise jurisdiction against another State without the consent of that other State") from creating the impression that the article sought to establish absolute or unqualified immunity. It was also pointed out that following article 7, the full phrase "jurisdiction in proceedings against another State" should be used in order to avoid the implication that jurisdiction is exercised against rather than with respect to another State.



222. While also rejecting the idea of absolute immunity, but propounding the notion of full immunity, one member of the Commission however dissented from the view reflected in the "trend" of restricting cases in which a State may claim immunity before foreign courts. He did not therefore accept the approach followed in the existing draft articles which he considered to be stressing that jurisdictional immunity existed only to the extent the draft articles said it existed. He preferred instead the approach reflected in article 15 of the 1972 European Convention on State Immunity<sup>679/</sup> which lays down the principle that a State is entitled to immunity from the jurisdiction, except in a number of cases mentioned in articles 1 to 14 of that Convention. This member also found unacceptable the term "voluntary submission" used in draft article 9.

223. But it was pointed out that the concept of voluntary submission, as expressed in article 9, was simply one aspect of the concept of consent and that certain distinctions could be drawn in articles 10 and 11. While it was generally accepted that article 11 on waiver dealt with an aspect of method of expressing consent, it was doubted whether article 10 dealing with counter-claims could also be treated as means of expressing consent.

224. It was however observed that the underlying theme of articles 8 to 11 was the consent of a State to the exercise of jurisdiction, where the State was entitled to immunity under international law. That being so, there was inevitably some overlapping of the articles, since they were all, in a sense, expressions of different ways of signifying consent to the exercise of jurisdiction in legal proceedings involving interests of a foreign State. Some members, however, wished to see further draft articles before lending a seal of approval to the approach reflected in these articles. One member especially doubted wherever it was fair for the articles to be based only on the presumption of absence of consent on the part of the State conducting activities within the territory of another State.

225. While an ideal situation would be to have before the Commission all provisions of the draft articles including at least part III, which is intended to deal with the exceptions to or limitations upon the general principles of State immunity, it is crystal clear that an inductive approach as recommended and adopted by the Commission envisages a step-by-step examination of each and every possible

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<sup>679/</sup> Explanatory Reports on the European Convention on State Immunity (Council of Europe, Strasbourg, 1972). See also International Legal Materials, vol. XI (1972), pp.470-489.

legal principle and its ramifications. Like all other topics hitherto considered by the Commission, a yearly report could do no more than present a piece-meal and necessarily incomplete picture of the whole subject. The topic "Jurisdictional immunities of States and their property" has been studied in a similar light. Meticulous care has been taken to examine every aspect of each rule of law as evidenced by the practice of States. A report is produced each year in that direction and within that scope, as outlined and approved by the General Assembly. 226. In the light of the discussion in the Commission,<sup>680/</sup> the Special Rapporteur prepared and submitted for the consideration of the Drafting Committee, a revised version (A/CN.4/L.337) of his original five draft articles,<sup>681/</sup> which he reduced to four articles as follows: "Obligation to give effect to State immunity" (article 7);<sup>682/</sup>

680/ See paras.217-225 above.

681/ See foot-notes 674-678 above.

682/ Draft article 7 as revised read:

"Article 7. Obligation to give effect to State immunity"

"Paragraph 1 - Alternative A"

"1. A State shall give effect to State immunity under, [as stipulated in] article 6 by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State.

"Paragraph 1 - Alternative B"

"1. A State shall give effect to State immunity under article 6 by refraining from subjecting another State to its jurisdiction [and] or from allowing legal proceedings to be conducted against another State, notwithstanding the existing competence of the authority before which the proceedings are pending.

"2. For the purpose of paragraph 1, a legal proceeding is considered [deemed] to be one against another State, whether or not named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, interests, properties or activities of the State.

"3. In particular, a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives, of [if] it is designed to deprive another State of its public property or the use of such property in its possession or control.

"NOTE: Paragraph 3 would constitute an alternative to the text of draft article 3, subparagraph 1(a)" [See foot-note 671 above.]

683/ Draft article 8 as revised read:

"Article 8. Consent of State

"1. [Subject to Part III of the draft articles] Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any legal proceeding against another State [as defined in article 7] without the consent of that other State.

"2. Jurisdiction may be exercised in a legal proceeding against a State which consents to its exercise."

684/ Draft article 9 as revised read:

"Article 9. Expression of consent

"1. A State may give its consent to the exercise of jurisdiction by the court of another State under article 8, paragraph 2, either expressly or by necessary implication from its own conduct in relation to the proceeding in progress.

"2. Such consent may be given in advance by an express provision in a treaty or an international agreement or a written contract, expressly undertaking to submit to the jurisdiction or to waive State immunity in respect of one or more types of activities.

3. Such consent may also be given after a dispute has arisen by actual submission to the jurisdiction of the court or by an express waiver of immunity, [in writing, or otherwise] for a specific case before the court.

"4. A State is deemed to have given consent to the exercise of jurisdiction by the court of another State by voluntary submission if it has instituted a legal proceeding or taken part or a step in the proceeding relating to the merit, without raising a plea of immunity.

"5. A State is not deemed to have given such consent by voluntary submission or waiver if it appears before the court of another State in order specifically to assert immunity or its rights to property and the circumstances are such that the State would have been entitled to immunity, had the proceeding been brought against it.

"6. Failure on the part of a State to enter appearance in a proceeding before the court of another State does not imply consent to the exercise of jurisdiction by that court. Nor is waiver of State immunity to be implied from such non-appearance or any conduct other than an express indication of consent as provided in paragraphs 2 and 3.

"7. A State may claim or waive immunity at any time before or during any stage of the proceedings. However, a State cannot claim immunity from the jurisdiction of the court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim of immunity can be based, in which event it can claim immunity based on those facts if it does so at the earliest possible moment."

and "Counter-claims" (article 10).<sup>685/</sup> (Neither the Commission nor its Drafting Committee has considered these texts.<sup>686/</sup>)

227. In its consideration of the rest of the draft articles in part II dealing with general principles of State immunity, the Drafting Committee will therefore also have before it these revised versions of the draft articles as submitted by the Special Rapporteur.

B. Draft articles on jurisdictional immunities of States and their property <sup>687/</sup>

PART I

INTRODUCTION

Article 1

Scope of the present articles

The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State.

...

PART II

GENERAL PRINCIPLES

Article 6

State Immunity

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

2. Effect shall be given to State Immunity in accordance with the provisions of the present articles.

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<sup>685/</sup> Draft article 10 as revised read:

"Article 10. Counter-claims

"1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles jurisdiction could be exercised, had separate proceedings been instituted before that court.

"2. A State makes a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship or facts [as the counter-claim]."

<sup>686/</sup> See para.12 above.

<sup>687/</sup> For the commentary to the articles, see Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10) pp. 326-360, chapter VI.B.

## CHAPTER VII

### STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

#### A. Introduction

228. It may be recalled that at its thirty-first session, in 1979,<sup>688/</sup> the International Law Commission appointed Mr. Alexander Yankov Special Rapporteur for the topic of the "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". At its thirty-second session, in 1980, the Commission had before it a preliminary report (A/CN.4/335) submitted by the Special Rapporteur, and also a working paper (A/CN.4/WP.5) prepared by the Secretariat. The preliminary report was considered by the Commission at its 1634th, 1636th and 1637th meetings. It engaged in a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole. A summary of that debate was set out in a section of the report of the Commission on the work of its thirty-second session.<sup>689/</sup>

229. The General Assembly, by paragraph 4 (f) of resolution 35/163 of 15 December 1980, recommended that the International Law Commission, taking into account the written comments of Governments and views expressed in debates in the General Assembly, should continue its work on the topic with a view to the possible elaboration of an appropriate legal instrument.

#### B. Consideration of the topic at the present session

230. The Commission at the present session had before it the second report submitted by the Special Rapporteur (A/CN.4/347 and Corrs. 1 (English only) and 2 and Add. 1-2), containing the text of six proposed draft articles which constituted part I entitled "General provisions": "Scope of the present articles" (article 1); "Couriers and bags not within the scope of the present articles" (article 2); "Use of terms" (article 3); "Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" (article 4); "Duty to respect international law and the laws and regulations of the receiving and the transit State" (article 5); and "Non-discrimination and reciprocity" (article 6).

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<sup>688/</sup> For the historical review of the work of the Commission on the topic up to 1980, see Yearbook ... 1979, vol. II (Part Two), document A/34/10, paras. 149-155 and Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), pp. 369-376, paras. 145-176.

<sup>689/</sup> Ibid., pp. 373-376, paras. 162-176.

231. The second report, considering first the scope of the draft articles, projected a comprehensive approach to the question by undertaking a close examination of the relevant multilateral conventions<sup>690/</sup> as the legal basis for a uniform regime governing the status of the courier and the bag. It then discussed the definition of the terms "diplomatic courier" and "diplomatic bag" as well as other terms to be used for the draft articles on the basis of the travaux préparatoires of the relevant provisions of those conventions. Finally, the report considered the general principles underlying those conventions which should also be incorporated in the present draft articles.

232. The second report submitted by the Special Rapporteur was considered by the Commission at its 1691st, 1693rd and 1694th meetings. In introducing the report, the Special Rapporteur indicated that the provisional adoption by the Commission of draft articles 1 to 6 could provide a useful working basis for the continuation of the work on other articles constituting part II relating to the status of the courier and part III relating to the status of the bag.

1. Scope of the draft articles

233. With regard to the scope of the topic, the Special Rapporteur proposed, as mentioned in paragraph 230 above, two draft articles, namely, "Scope of the present articles" (article 1) and "Couriers and bags not within the scope of the present articles" (article 2).<sup>691/</sup>

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<sup>690/</sup> The relevant multilateral conventions referred to in the report were: the 1961 Vienna Convention on Diplomatic Relations; the 1963 Vienna Convention on Consular Relations; the 1969 Convention on Special Missions; the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

<sup>691/</sup> Draft articles 1 and 2 proposed by the Special Rapporteur read as follows:

"Article 1. Scope of the present articles

"1. The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, or with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags.

"2. The present articles shall apply also to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, and with other States or international organizations and also to official communications of

234. Introducing draft article 1, the Special Rapporteur stated that paragraph 1, which was designed to guarantee the implementation of the principle of freedom of communication through the diplomatic courier and diplomatic bag, provided for a broad network of means of official communication. Article 1, paragraph 2, was an explicit and descriptive assimilation provision which made the rules relating to the diplomatic courier and diplomatic bag applicable to couriers and bags used by consular posts and other missions and delegations. Although that provision could have been drafted in more concise terms, he said it had been submitted in a more elaborate form in order to make his intentions clear at the current initial stage of the consideration of the topic.

235. While many members of the Commission generally agreed with the proposal of the Special Rapporteur, some expressed doubt as to the desirability of referring to "communications with other States or international organizations"; they considered that the scope of the draft articles should be limited to communications of the State with its missions and agencies abroad. One member of the Commission thought that the scope contemplated in these articles was too broad as it included all kinds of communications by States.

236. The Special Rapporteur noted that draft article 2, paragraph 1, made it clear that the articles would not apply to couriers and bags used for all official purposes by international organizations, while paragraph 2 contained a safeguard clause. Several members of the Commission, however, expressed reservations concerning the exclusion of couriers and bags used for official purposes by international organizations from the scope of the topic. While they realized that the inclusion of international organizations within the scope of the draft articles might present some difficulties, they were of the view that the extent of those difficulties should

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these missions and delegations with the sending State or with each other by employing consular couriers and bags, and couriers and bags of the special missions, or other missions or delegations."

"Article 2. Couriers and bags not within the scope of  
the present articles

"1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

"2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations, shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles."

be ascertained before any firm decision was taken. It was stated that, unless justifiable reasons were given, the couriers and bags of international organizations which play an active role in the present-day world should not be excluded. One member of the Commission expressed the view, however, that since any communication by the international organizations should not be considered secret or confidential, it might not be possible to treat them in the same way as States.

237. It was stated by several members in this connection that the article should also refer to "other subjects of international law" so that the interests of such entities as the Palestine Liberation Organization and the Council for Namibia could be safeguarded in addition to international organizations.

## 2. Use of terms

238. Concerning the definition of the term "diplomatic courier", and "diplomatic bag" and other terms, the Special Rapporteur proposed a draft article on "Use of terms" (article 3).<sup>692/</sup>

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692/ Draft article 3 proposed by the Special Rapporteur read as follows:

### "Article 3. Use of terms

"1. For the purposes of the present articles:

(1) 'diplomatic courier' means a person duly authorized by the competent authorities of the sending State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the diplomatic mission, consular post, special mission or other missions or delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State facilities, privileges, and immunities in the performance of his official functions;

(2) 'diplomatic courier ad hoc' means an official of the sending State entrusted with the function of diplomatic courier for special occasion only, who shall cease to enjoy the facilities, privileges and immunities accorded by the receiving or the transit State to a diplomatic courier, when he has delivered to the consignee the diplomatic bag in his charge;

(3) 'diplomatic bag' means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions or other missions or delegations, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function;



239. Some members of the Commission expressed the view that it was doubtful to include substantive rules in a provision on definitions, and they referred specifically to subparagraphs (1), (2), (3) and (7) of article 3, paragraph 1. One member suggested the use of the terms "government courier" and "government bag" while another member favoured the terms "official courier" and "official bag". Still another member did not consider it necessary to invent new terms since the terms "diplomatic courier" and "diplomatic bag" had already been well established.

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692/ (cont.)

(4) 'sending State' means a State dispatching diplomatic bag, with or without a courier, to its diplomatic mission, consular post, special mission or other missions or delegations, wherever situated, or to other States or international organizations;

(5) 'receiving State' means a State on whose territory:

(a) a diplomatic mission, consular post, special mission or permanent mission are situated, or

(b) a meeting of an organ or of a conference is held;

(6) 'host State' means a State on whose territory:

(a) an organization has its seat or an office, or

(b) a meeting of an organ or a conference is held;

(7) 'transit State' means a State through whose territory and with whose consent the diplomatic courier and/or the diplomatic bag passes en route to the receiving State;

(8) 'third State' means any State other than the sending State, the receiving State and the transit State;

(9) 'diplomatic mission' means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(10) 'consular post' means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(11) 'special mission' means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a special task;

(12) 'mission' means, as the case may be, the permanent mission or the permanent observer mission;

(13) 'permanent mission' means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

(14) 'permanent observer mission' means a mission of permanent character, representing a State, sent to an international organization by a State not a member of that organization;

Referring to subparagraph (7), a few speakers expressed reservation to the requirement of "consent" of the transit State which might impose undue restriction upon the sending State. Finally, it was said that some of the terms listed in the subparagraphs might profitably be omitted.

240. It was pointed out, however, that the notions "diplomatic courier" and "diplomatic bag" have been well established in State practice and have acquired general acceptance and legal certainty. Therefore it was suggested to adopt them as the basic terms regarding the courier and the bag and through an assimilation

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692/ (cont.)

(15) 'delegation' means, as the case may be, the delegation to an organ or the delegation to a conference;

(16) 'delegation to an organ' means the delegation sent by a State to participate on its behalf in the proceedings of the organ;

(17) 'observer delegation' means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

(18) 'observer delegation to an organ' means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the organ;

(19) 'delegation to a conference' means the delegation sent by a State to participate on its behalf in the proceedings of the conference;

(20) 'observer delegation to a conference' means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the conference;

(21) 'international organization' means an intergovernment organization;

(22) 'organ' means:

(a) any principal or subsidiary organ of an international organization, or

(b) any commission, committee or sub-group of any such organ, in which States are members;

(23) 'conference' means a conference of States.

"2. The provisions of paragraph 1 (1, 2, 3) on the terms 'diplomatic courier', 'diplomatic courier ad hoc' and 'diplomatic bag' may apply also to consular courier and consular courier ad hoc, to couriers and ad hoc couriers of special missions and other missions or delegations, as well as to consular bag and the bags of special missions and other missions and delegations of the sending State.

"3. The provisions of paragraphs 1 and 2 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State."

formula, as contained in article 1, paragraph 2, to apply the régime governing the diplomatic courier and the diplomatic bag to all other kinds of couriers and bags used by States in communicating with their missions abroad.

241. Regarding the drafting of the proposed draft articles and the definition of other terms, the Special Rapporteur noted that upon further reflection, a number of improvements could be made. He suggested that article 1, paragraph 1, could be improved by confining the network of communications to those between the sending State and its missions and between those missions, wherever situated, while paragraph 2 could be abbreviated. On article 3, the Special Rapporteur pointed out that the list of terms could be more concise and certain terms like "transit State", "third State", etc. should be well determined.

### 3. General principles

242. With respect to the general principles of the draft articles, the Special Rapporteur proposed three draft articles, namely, "Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" (article 4),<sup>693/</sup> "Duty to respect international law and the laws and

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693/ Draft article 4 proposed by the Special Rapporteur read as follows:

"Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags

"1. The receiving State shall permit and protect free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts and other missions or delegations as well as between those missions, consular posts and delegations, wherever situated or with other States or international organizations, as provided for in article 1.

"2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article."

regulations of the receiving and the transit State" (article 5)<sup>694/</sup> and "Non-discrimination and reciprocity" (article 6).<sup>695/</sup>

243. While many speakers generally felt that the principles stipulated in these articles formed the sound basis for the entire codification on this topic, some members of the Commission expressed the view that an article prescribing the duties of the sending State should also be inserted in order to secure a proper balance between the rights and obligations of sending States and receiving States. In this context it was observed that abuses of the courier and the bag sometimes occurred and that there might be room for strengthening the safeguards to be provided for in the draft articles.

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694/ Draft article 5 proposed by the Special Rapporteur read as follows:

"Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State"

- "1. Without prejudice to his privileges and immunities, it is the duty of the diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.
- "2. The diplomatic courier also has a duty not to interfere in the internal affairs of the receiving and the transit State.
- "3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations or by other rules of general international law or by any special agreements in force between the sending State and the receiving or the transit State".

695/ Draft article 6 proposed by the Special Rapporteur read as follows:

"Article 6. Non-discrimination and reciprocity"

- "1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags:
- "2. However, discrimination shall not be regarded as taking place:
  - (a) where the receiving State applies any of the provisions of the present draft articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State;
  - (b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States."

244. Reference was made in this connection to the provision of article 35, paragraph 3 of the 1963 Vienna Convention on Consular Relations under which the bags could be opened in certain circumstances. The Special Rapporteur indicated, however, that, having studied some 110 bilateral treaties, he found 92 of them contained provisions similar to article 27, paragraph 3 of the 1961 Vienna Convention on Diplomatic Relations which stipulated unconditional inviolability, while only 18 had provisions deviating from it in one way or another, but certainly no more restrictive than the conditions laid down in the 1963 Vienna Convention. Given the objective picture of the situation, he concluded that, though reference to possible abuses was quite legitimate, it should not be unduly exaggerated.

4. Other remarks concerning the study of the topic

245. Many members of the Commission considered that the method applied by the Special Rapporteur was good and sound for the preparation of the draft articles on this topic. It was stated for instance that the Special Rapporteur had successfully demonstrated that the comprehensive and uniform treatment of the problem was possible. Another member said that the Special Rapporteur's presentation had done much to alleviate his uncertainty as to why the General Assembly and the Commission had considered the topic of such importance, given the body of law which already existed.

246. However, a few members of the Commission observed that, while there were advantages in establishing one set of rules to cover all official communications, such rules might also detract from the protection accorded to such communications by current law. One speaker wondered if there was a need to elaborate such a detailed set of draft articles as proposed by the Special Rapporteur since most of the problems were already quite clear under the existing conventions. They stressed that the topic was one which called for close examination and that the Commission should exercise great caution in its consideration.

247. One member of the Commission also expressed the view that the approach proposed by the Special Rapporteur was neither inductive nor deductive, but was an analytical method. To take four articles from four different conventions and to attempt to amalgamate certain of their provisions into a single article to apply to all situations would inevitably lead to confusion. He stressed the importance of an empirical examination based on the functional approach.

248. Finally, upon the suggestion of the Special Rapporteur, the Commission requested the Secretariat:

(a) to bring up-to-date the compilation of the relevant provisions of multilateral and bilateral treaties in the field of diplomatic and consular law, prepared earlier for the Special Rapporteur;

(b) to solicit from States information on national laws, regulations, procedures and practices as well as information on judicial decisions, arbitral awards and diplomatic correspondence regarding the treatment of the diplomatic courier and the diplomatic bag.

249. At the conclusion of the debate, the Commission decided to refer articles 1 to 6 to the Drafting Committee.<sup>696/</sup>

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<sup>696/</sup> See para. 12 above.

## CHAPTER VIII

### OTHER DECISIONS AND CONCLUSIONS

#### A. Relations between States and international organizations (second part of the topic)

250. The Special Rapporteur for the topic "Relations between States and international organizations (second part of the topic)" continued his study of the question and received certain materials from the Secretariat relevant to the topic. To assist him in his further work, the Special Rapporteur requested the Secretariat to continue its research and studies in the field.

#### B. Programme and methods of work of the Commission

251. At its 1650th meeting, held on 13 May 1981, the Commission decided to establish a Planning Group of the Enlarged Bureau for the present session. The Group was composed of Mr. Robert Q. Quentin-Baxter (Chairman); Mr. Julio Barboza; Mr. Mohammed Bedjaoui; Mr. Laurel B. Francis; Mr. Frank X.J.C. Njenga; Mr. Christopher W. Pinto; Mr. Willem Riphagen; Mr. Milan Sahovic; Mr. Abdul Hakim Tabibi; Mr. Nikolai A. Ushakov; and Sir Francis Vallat. The Group was entrusted with the task, inter alia, of considering the programme and methods of work of the Commission and of reporting thereon to the Enlarged Bureau. The Planning Group met on 15 May and 17 July 1981. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

252. On the recommendation of the Planning Group, the Enlarged Bureau recommended to the Commission, for inclusion in its report to the General Assembly on the work done at the present session, paragraphs 253 to 261 below. At its 1696th meeting held on 22 July 1981, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of these recommendations, adopted the following paragraphs.

253. In considering the question of its programme of work for its thirty-fourth session in 1982, the Commission took into account that its present session is its last within the present term of office of the members of the Commission. As a permanent body, and without wishing to prejudice the freedom of action of its membership as newly constituted in 1982, the Commission has reached the conclusions indicated below to ensure the continuity of work on the topics on its current programme of work. In addition, the Commission reaffirmed its decision recorded in earlier reports<sup>697/</sup> that a Special Rapporteur who is re-elected by the

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<sup>697/</sup> See, for example, Yearbook ... 1971, vol. II (Part One), p. 352, document A/8410/Rev.1, para. 132; Yearbook ... 1966, vol. II, p. 277, document A/6309/Rev.1, part II, para. 73; and Yearbook ... 1953, vol. II, p. 231, document A/2456, para. 172.

General Assembly as a member of the Commission should continue his work on his topic unless and until the Commission as newly constituted should decide otherwise at its thirty-fourth session.

254. Also in considering the question of its programme of work for its thirty-fourth session, the Commission took into account the general objectives and priorities which the Commission, with the approval of the General Assembly, had established at previous sessions and the recommendations contained in General Assembly resolution 35/163 of 15 December 1980, as well as the progress achieved at the present session in the study of the topics under current consideration. In that connection, as recommended by the General Assembly in resolution 35/163, the Commission at its present session completed the second reading of the draft articles on the topic "Succession of States in respect of matters other than treaties" adopted in first reading at its thirty-first and thirty-second sessions, taking into account the written comments of Governments and views expressed in debates in the General Assembly. Those draft articles are entitled "Draft articles on succession of States in respect of State property, archives and debts". The Commission has thus completed its work on this topic within the term of office of the present membership, as envisaged by the Commission in 1977.

255. Concerning the topic "Question of treaties concluded between States and international organizations or between two or more international organizations", the Commission, as recommended by General Assembly resolution 35/163, commenced at the present session the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations, in the light of the written comments of Governments received and views expressed in debates in the General Assembly, as well as of the written comments received from principal international organizations. The Commission completed at the present session the second reading of articles 1 to 26 of the relevant draft articles and intends to devote primary attention to this topic at its 1982 session with the aim of completing the second reading of the remaining articles of the draft and Annex, on the basis of a further report to be submitted by the Special Rapporteur and in the light of comments and observations of Governments and international organizations concerned. This will complete the work of the Commission on this topic. As indicated above in paragraph 106 the Commission decided at its present session to address a reminder to Governments and principal international organizations for the submission of written comments and observations on articles 61 to 80 and Annex of the above-mentioned draft articles.



256. While, as indicated above, the Commission in conformity with General Assembly resolution 35/163 will devote primary attention at its 1982 session to the topic "Question of treaties concluded between States and international organizations or between two or more international organizations", it also intends to continue the study of other topics on its current programme of work as follows:

(a) At the present session, the Commission continued its work on the topic "State responsibility", on the basis of the second report submitted by the Special Rapporteur containing proposed draft articles, with the aim of beginning the preparation of draft articles concerning Part 2 of the draft on the responsibility of States for internationally wrongful acts (content, forms and degrees of international responsibility), as recommended by resolution 35/163 of the General Assembly. In so doing, it has borne in mind, as further recommended by the General Assembly, the need for a second reading of the draft articles constituting Part 1 of the draft (the origin of international responsibility), the first reading of which the Commission had completed at its thirty-second session. In the report on the work of its thirty-second session,<sup>698/</sup> the Commission had expressed the hope to proceed, in the light of written comments and observations of Governments as well as views expressed in the General Assembly, to a second reading of the draft articles constituting Part 1 of the draft at its thirty-fourth session. Nevertheless,, considering the limited number of written comments and observations of States thus far received on those articles and the desirability of advancing the work on Part 2 of the draft, the Commission believes that the Special Rapporteur should, for the time being, continue to focus his main attention on the development of Part 2 of the draft. At its thirty-fourth session, the Commission intends, on the basis of a further report to be submitted by the Special Rapporteur, to pursue its work on this topic.

(b) The Commission continued at the present session its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" on the basis of the second report submitted by the Special Rapporteur. The Commission at its next session will continue the study of the topic on the basis of a further report to be prepared by the Special Rapporteur with a view to the elaboration of draft articles on the topic.

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698/ Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10 (A/35/10), para. 182.

(c) Due to the resignation from the Commission of the Special Rapporteur on the topic "The law of the non-navigational uses of international watercourses" upon his election to the International Court of Justice, the Commission was not in a position to take up the study of the topic during its present session. At future sessions the Commission intends to proceed with the elaboration of draft articles on the topic which had begun at its thirty-second session on the basis of a report to be submitted by a new Special Rapporteur to be appointed.<sup>699/</sup>

(d) Concerning the topic "Jurisdictional immunities of States and their property" the Commission at its present session continued its study of the topic, on the basis of the third report submitted by the Special Rapporteur. It intends to continue that study at its thirty-fourth session on the basis of reports prepared by the Special Rapporteur with a view to proceeding with the preparation of draft articles on the topic, which had begun at the Commission's thirty-second session.

(e) The Commission continued its work at the present session on the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", on the basis of the second report presented by the Special Rapporteur. It is anticipated that at its thirty-fourth session the Commission will continue its study of the topic, with a view to the elaboration of draft articles on the topic.

(f) The Special Rapporteur for the second part of the topic "Relations between States and international organizations" will continue his study of the subject and may, should that study so require, submit a preliminary report to the Commission.

257. As to the allocation of time at its thirty-fourth session for the topics mentioned in paragraphs 255 and 256 above, the Commission will take the appropriate decisions at the beginning of that session when arranging for the organization of its work. The Commission is, however, aware that in the time available, it may not be possible to take up all the topics mentioned in paragraph 256 above. The Commission believes, moreover, that it can do better work and in the longer run achieve greater results by concentrating its attention on a smaller number of topics at any one session.

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<sup>699/</sup> A third report on this topic was submitted by the former Special Rapporteur who had begun the preparation of that report prior to his resignation from the Commission upon his election to the International Court of Justice. That report will be circulated as document A/CN.4/348.

258. As to the long-term programme of work of the Commission, it may be anticipated that at its thirty-fourth session, the first within the term of office of Commission members elected by the General Assembly at its thirty-sixth session, the Commission will consider establishing general objectives and priorities which would guide its study of the topics on its current programme of work for the coming sessions, taking into account relevant General Assembly recommendations. It may be recalled that in 1975, the Commission considered a set of proposals for completing either first or second readings of draft articles in the fields of State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause, and the question of treaties concluded between States and international organizations or between two or more international organizations by the conclusion of the Commission's five-year term of office ending in 1981.<sup>700/</sup> As that term of office is now ending, it may be noted that those objectives established in 1975 and reaffirmed in 1977, have been largely realized.<sup>701/</sup> The establishment, in conformity with relevant General Assembly resolutions, of general objectives and priorities guiding the programme of work to be undertaken by the Commission during a term of its membership, or for a longer period if appropriate, appears to be an efficient and practical method for the planning and timely carrying out of the work programme of the Commission.

259. Under General Assembly resolution E4/142 of 17 December 1979 entitled "Co-ordination in the field of international trade law", the Secretary of the United Nations Commission on International Trade Law (UNCITRAL) addressed a letter to the Secretary of the Commission requesting information relating to the recent or current activities of the International Law Commission in the field of international trade law. As a result of the discussion held on the matter in the Enlarged Bureau of the Commission and its Planning Group, the Secretary of the Commission was authorized to transmit certain materials to the Secretary of UNCITRAL

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<sup>700/</sup> Yearbook ... 1975, vol.II, p.184, document A/10010/Rev.1, paras. 141-145.

<sup>701/</sup> Those objectives were realized as follows: at its thirty-second session in 1980 the Commission completed the first reading of the articles constituting Part 1 of the draft articles on State responsibility; at its present session it completed the second reading of the draft articles on succession of States in respect of State property, archives and debts; in 1978, at its thirtieth session, the Commission completed the second reading of the draft articles on most-favoured-nations clauses; and in 1980, at its thirty-second session, it completed the first reading of the draft articles on treaties concluded between States and international organization or between international organizations.

concerning recent and current activities of the International Law Commission which may bear upon questions related to the field of international trade law. The materials furnished were subsequently reproduced as a document of UNCITRAL (A/CN.9/202/Add.3 and Corr.1 (English only)). The Commission welcomes the opportunity to co-operate, as invited by the General Assembly in its resolution 34/142, with the United Nations Commission on International Trade Law by providing it with relevant information on activities of the International Law Commission and by consulting with it.

260. In connection with the methods of work of the Commission, the Commission takes note of paragraph 8 of resolution 35/163 of 15 December 1980 by which the Assembly welcomed the considerations and recommendations contained in the report of the Commission on the work of its thirty-second session on questions having a bearing on the nature, programme and methods of work of the Commission and the organization of its sessions with a view to the timely and effective fulfilment of the tasks entrusted to it.<sup>702/</sup> The Commission wishes to reaffirm that it will continue to keep under review the possibility of improving further its present procedures and methods with the flexibility which the study of particular topics may require, with a view to the timely and effective fulfilment of the tasks entrusted to it by the General Assembly.

261. In connection with the International Law Seminar which is so closely associated with the annual sessions of the Commission, it may be that the Commission, as newly constituted, will wish to take an early opportunity to consider whether there are any practical steps that can be taken to make the Seminar even more valuable.

C. Relations with the International Court of Justice

262. On behalf of the International Court of Justice, Judge Abdullah El-Erian paid a visit to the International Law Commission and addressed it at the 1683rd meeting. In his remarks, Judge El-Erian conveyed to the Chairman and members of the International Law Commission the best wishes of the International Court of Justice and of its President, Sir Humphrey Waldock, who was unfortunately unable to convey those wishes personally to the Commission. Judge El-Erian referred to a letter

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<sup>702/</sup> Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10 (A/35/10); paras. 186-193.

which had been addressed to the Chairman of the Commission by the President of the Court in which the President stressed the significance of the codification work of the International Law Commission for the judicial activity of the Court. The President reaffirmed that the Court valued and wished to maintain its strong links with the Commission. Judge El-Erian pointed out that in its latest judgements and advisory opinions, the Court had had the task of applying and interpreting a number of conventions concluded on the basis of draft articles prepared by the Commission. In one judgement concerning diplomatic and consular immunities the Court based itself on the rules as they had been clearly formulated in the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. The Court also examined with great care and appreciation the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973. He recalled that in an advisory opinion, the Court had made use of the Vienna Convention on the Law of Treaties of 1969. It was also noteworthy he said, that the work of the Commission had its utility for the Court even before it had resulted in the conclusion of an international convention. Article 56 of the Commission's draft articles on treaties concluded between States and international organizations or between international organizations had been relied upon by the Court as illustrative of customary law and a guiding indication of a residual rule.

263. The Commission also received a visit from another Judge of the International Court of Justice, Judge Roberto Ago, who made a statement at the 1666th meeting of the Commission. He reaffirmed the significance of the co-operation between the Commission and the Court and related how the work of the Commission on various topics had been reflected in the judgements of the Court and in its hearings. He also stressed that there were additional contemporary reasons why co-operation between the Court and the Commission should become even more intense and active; it was essential that the Court and the Commission should co-operate in actually defending the law in the field of international relations. It was by no means unheard of, in current circumstances, for superficial observers to advocate making a kind of distinction between "classical" international law, allegedly old if not indeed obsolete, and a "new" international law covering new areas and more closely attuned to the recent aspirations and needs of the international community. Those views were unacceptable, he said, to anyone with a substantial knowledge of the realities of the life of the international community and its law. International legal rules should certainly be gradually extended to new areas with which the law had not so far been concerned or had been involved to a limited extent only. Those

rules should, however, be carefully thought out and should genuinely meet the acknowledged needs of the whole community. Judge Ago considered it to be essential, in particular, that new rules thus developed should be grafted on to the solid trunk of existing international law. He believed that the Commission had had the merit of demonstrating that the codification and progressive development of international law, which it was its object to promote, were not tasks to be pursued separately but tasks to be carried on together in the definition of all the topics under consideration. Whatever the matter proposed, codification should be both the reaffirmation of the still topical rules of existing law and the affirmation, in the form of gradual development, of the modifications necessitated by the changes in the international community and its way of life. In that approach, there could be no codification without gradual development. He said it would, in particular, be very dangerous to lose sight of the fact that, following the profound changes that had occurred in the composition of the community of States, it had become both essential and urgent to define anew and with the participation of all concerned, the old customary law, to redefine it, to supplement it, and to invest it with the clarity characteristic of written, conventional law. On the basis of the fulfilment of that primordial task, it would then be possible to turn attention to the consideration of new matters and to add an organic supplement to the rules inherited from past centuries. He was thus convinced that the Court and the Commission were called upon to co-operate even more closely, not limiting themselves to mere reciprocal borrowing of each other's work, to safeguard international law and the essential function it fulfilled in the life of the international community.

#### D. Co-operation with other bodies

264. The Commission wishes to reaffirm the great importance it attaches to co-operation with bodies engaged in the progressive development of international law and its codification at the regional level. In accordance with article 26 of its Statute, the Commission has thus maintained co-operation with the Arab Commission for International Law, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. As the aspirations of the States of the regions concerned in regard to the development of international law are also reflected in the respective agendas of those bodies, the Commission intends to pay due attention to topics on such agendas when considering, in the future, its own programme of work. It also intends to examine further ways by which existing ties of co-operation between the Commission and those bodies may be enhanced and strengthened.

1. European Committee on Legal Co-operation

265. The European Committee on Legal Co-operation was represented at the thirty-third session of the Commission by Mr. Erik Harremoës, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1687th meeting, held on 9 July 1981.

266. Mr. Harremoës first dealt with the recent law-making activities of the Council of Europe and primarily with the Conventions which had been concluded in the last year. The European Agreement on Transfer of Responsibility for Refugees was opened for signature by member States of the Council of Europe on 16 October 1980 and had already entered into force. Its main purpose was to facilitate the application of article 28 of the 1951 Geneva Convention relating to the Status of Refugees<sup>703/</sup> which has been ratified by all member States of the Council of Europe. The European Agreement aims at regulating in a uniform manner the question of transfer of responsibility for refugees between Council of Europe member States and is designed, in a liberal and humanitarian spirit, to specify the condition in which responsibility for issuing a travel document is transferred when a refugee moves residence from one State to another. The other legal instrument to which Mr. Harremoës referred was the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data which opened for signature on 28 January 1981. The Convention contains three categories of rules. First, it confirms as rules of international law binding upon the contracting States those national principles dealing with private and public data banks which had been recommended in 1973 and 1974 by the Council's Committee of Ministers for voluntary adoption by its member States. Second, it contains a solution to the international data protection applicable to transboundary data flows. Third, it helps data subjects in one country defend their rights with regard to the information about them which is being automatically processed in another country. Mr. Harremoës also brought to the Commission's attention new developments in the relations between the European Economic Community and the Council of Europe and reviewed the legal activities of the Council to be undertaken in the period 1981 to 1986, including the preparation of draft conventions on the following subjects: protection of art objects against theft, transfer of prisoners from one State to another, compensation to victims of crimes, protection of underwater cultural heritage, retention of ownership clauses in commercial contracts and the protection of animals.

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<sup>703/</sup> United Nations, Treaty Series, vol. 189, p.137.

267. The Commission, having a standing invitation to send an observer to the session of the European Committee on Legal Co-operation, requested its Chairman, Mr. Doudou Thiam, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

## 2. Inter-American Juridical Committee

268. Mr. Christopher W. Pinto, Chairman of the Commission at its thirty-second session, attended, as an observer for the Commission, the session of the Inter-American Juridical Committee held in January-February 1981 at Rio de Janeiro, and made a statement to the Committee.

269. The Inter-American Juridical Committee was represented at the thirty-third session of the Commission by one of its members, Mr. Jorge Aja Espil, who addressed the Commission at its 1689th meeting, held on 13 July 1981.

270. Mr. Aja Espil reviewed the work of the Inter-American Juridical Committee during the past 10 years which had aimed at enforcing the effectiveness of the Organization of American States and reflecting the realities and present aspirations of the Inter-American Community. In the 1970s, the Committee had concentrated on, inter alia, a draft convention on international terrorism and the revision of the Convention on the Protection of Industrial Property. At its recent session, the Committee had devoted its attention to a draft convention on torture and on a report on the legal aspects of the transfer of technology. Thus, the Committee continued to maintain its concern, as the legal organ of the Inter-American system, to protect fundamental human rights, as well as to tackle the international problems affecting the development of States. As to the draft convention on torture, Mr. Aja Espil drew attention to a 1978 resolution adopted by the General Assembly of the OAS calling for the preparation of such a draft convention defining torture as an international crime and reviewed the issues considered by the Committee in its work on the draft. The greatest force of the draft, he explained, lay in a new element: the international control of obligations of States whereby each individual is protected against the international crime of torture, even vis-à-vis his own State. By establishing, in the draft convention, mechanisms for recourse by an individual to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, the individual may be said to have become a subject of international law. In reviewing the work of the Committee on the legal aspects of the transfer of technology, Mr. Aja Espil stressed that, as in other fora, the formulation of legal rules cannot be isolated from the pressing social and economic problems facing the world community. For those supporting the establishment of a new international economic order, one of the most important problems in the legal



ordering of international economic relations is that of the transfer of technology to developing countries. He noted that in its work on this topic, the Committee examined the system of international protection of industrial property and the work of WIPO concerning its revision, as well as the draft international code of conduct on the transfer of technology being considered within the United Nations. The approach taken by the Committee was one of innovation and harmonization, attempting to frame a legal order which would submit international economic relations to rules corresponding to greater distributive justice. Finally, Mr. Aja Espil recounted the activities of the Committee in the field of private international law relating to international co-operation in judicial proceedings and acceptance of evidence abroad.

271. The Commission, having a standing invitation to send an observer to the sessions of the Inter-American Juridical Committee, requested its Chairman, Mr. Doudou Thiam, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

### 3. Asian-African Legal Consultative Committee

272. Mr. Christopher W. Pinto, Chairman of the Commission at its thirty-second session, was appointed by the Chairman at the present session to attend, as the observer for the Commission, the twenty-second session of the Asian-African Legal Consultative Committee held at Colombo from 24 to 30 May 1981, and made a statement before the Committee.

273. At the present session of the Commission, the Committee was unable to be represented. The Commission, which has a standing invitation to send an observer to the Committee's sessions, requested its Chairman, Mr. Doudou Thiam, to attend the next session of the Committee or, if he was unable to do so, to appoint another member of the Commission for that purpose.

### 4. Arab Commission for International Law

274. The Arab Commission for International Law was represented at the thirty-third session by Mr. Hadi Treki, who addressed the Commission at its 1697th meeting, held on 24 July 1981.

275. Mr. Treki said that the participation of the Arab Commission for International Law in the present session of the International Law Commission would strengthen relations between the two bodies, help to shed light on the difficulties of the newly independent countries, including such matters as the legal foundation of the new international economic order, ecological problems and the question of international peace and security, and at the same time open the way for greater contacts between the Arab Commission and such institutions as the Asian-African

Legal Consultative Committee. He expressed the hope that the work of the International Law Commission would help to establish equality among the members of the international community, with due regard for the rights of peoples struggling for self-determination and for the harmony of the rules of justice, and that the Commission would be able to achieve its goal of serving the interests of mankind.

E. Date and place of the thirty-fourth session

276. The Commission decided to hold its next session at the United Nations Office at Geneva from 3 May 1982 to 23 July 1982.

F. Representation at the thirty-sixth session of the General Assembly

277. The Commission decided that it should be represented at the thirty-sixth session of the General Assembly by its Chairman, Mr. Doudou Thiam.

G. International Law Seminar

278. Pursuant to paragraph 12 of General Assembly resolution 35/163 of 15 December 1980, the Office of Legal Affairs organized, in conjunction with the United Nations Office at Geneva, the seventeenth session of the International Law Seminar during the thirty-third session of the International Law Commission. The Seminar is intended for advanced students of this subject and junior government officials who normally deal with questions of international law in the course of their work. A selection committee met under the chairmanship of Mr. Erik Suy, Under-Secretary-General, the Legal Counsel. It comprised two other members: Mr. G. Badr, Deputy Director of the Codification Division, and Mr. H. Geiser, Chief of Administration of the Geneva Office of UNITAR. Twenty-one participants, all of different nationalities and the great majority from developing countries, were selected from among the candidates; one was unable to attend. Additionally, three fellowship holders under the United Nations/Unitar programme participated in the session.

279. Participants had access to the facilities of the United Nations Library and were able to attend a film show given by the United Nations Information Service. They were given copies of the basic documents necessary for following the discussions of the Commission and the lectures at the Seminar and were also able to obtain, or to purchase at reduced cost, United Nations documents which are unavailable or difficult to find in their countries of origin. At the end of the session, participants received an attendance certificate, signed by the Chairman of the Commission and the Director-General of the United Nations Office at Geneva. Between 1 and 19 June the Seminar held 12 meetings, at which lectures were given, followed by discussions.

280. The following seven members of the Commission delivered lectures and took part in discussions at the Seminar: Mr. G.H. Aldrich (Some problems of the law of the sea); Mr. J. Barboza (The law of the non-navigational uses of international watercourses); Mr. R.Q. Quentin-Baxter (International liability for injurious consequences arising out of acts not prohibited by international law); Mr. P. Reuter (Treaties to which international organizations are parties); Mr. W. Riphagen (State responsibility); Mr. S. Sucharitkul (Jurisdictional immunities of States) and Mr. S. Verosta (Regional alliances and arrangements in international law). In addition, the text of a lecture to have been delivered by Mr. S. Tsuruoka on "Some reflections on the International Law Commission in the 1980s" was circulated. Furthermore, judge Roberto Ago delivered a lecture entitled "Is international law a law of recent formation and is it a reflection of European thought?". Mr. C. Swinarski of the Legal Office of the International Committee of the Red Cross delivered a lecture on "International humanitarian law as part of public international law: sources and scope". Mr. V. Romanov, Director of the Codification Division, delivered a lecture on "United Nations institutional arrangements for the progressive development and condification of international law". Mr. G.M. Badr, Deputy Director of the Codification Division, delivered concluding remarks on "Law in a changing community of nations". The introductory lecture on the International Law Commission and its work was given by Mr. E. Valencia-Ospina, Deputy Secretary of the Commission.

281. This year a visit to the Headquarters of the International Committee of the Red Cross was added to the programme of the Seminar. The participants were received by Mr. Alexandre Hay, President of the International Committee, and, after a luncheon offered by the Committee, listened to a talk by Mr. J. Moreillon, Director of the Department of Principles and Law of the International Committee of the Red Cross, on the legal aspects of the work of his organization touching upon points of humanitarian law.

282. As in the past, none of the costs of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants. The Governments of Austria, Denmark, Finland, the Netherlands and Norway made funds available this year that enabled the granting of some fellowships to participants from developing countries. Funds were also made available for fellowships by the Dana Fund for International and Comparative Legal Studies (of Toledo, Ohio, United States of America). With the award of fellowships it is possible to achieve adequate geographical distribution of participants and to bring from distant

countries deserving candidates who would otherwise be prevented from participating, solely by lack of funds. This year fellowships were awarded to 16 participants. 283. Of the 380 participants; representing 108 nationalities, accepted since the beginning of the Seminar in 1965, fellowships have been awarded to 168, not including Unitar fellowship holders. It is to be hoped that donor Governments will continue their efforts and that other Governments will be able to contribute to this movement of solidarity with nationals of developing countries.

284. The Commission wishes to express its thanks to Mr. E. Valencia-Ospina for having made arrangements for, and Mr. G. Badr for having conducted proceedings of, the Seminar this year. It notes with appreciation the arrangements made this year to ensure the continuance of the International Law Seminar, for whose success Mr. Pierre Raton, Senior Legal Officer, who has retired after more than 30 years of devoted service, took a large share of responsibility in previous years. At its 1680th meeting, held on 29 June 1981, the Commission paid tribute to Mr. Raton.

ANNEX I

COMMENTS OF GOVERNMENTS ON THE DRAFT ARTICLES ON SUCCESSION  
OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES ADOPTED  
BY THE INTERNATIONAL LAW COMMISSION AT ITS THIRTY-FIRST AND  
THIRTY-SECOND SESSIONS \*/

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NOTE

For the text of the draft articles on succession of States in respect of matters other than treaties provisionally adopted by the Commission at its thirty-first and thirty-second sessions, see Yearbook ... 1979, vol. II (Part Two), pp. 15 et seq., document A/34/10, chap. II, sect. B and Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), pp. 17 et seq., chap. II, sect. B.2. For the correspondence between those draft articles and the draft articles on succession of States in respect of State property, archives and debts as finally approved by the Commission at its thirty-third session, see Annex III to the present report.

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\*/ The comments reproduced in this annex were originally circulated in documents A/CN.4/338 and Add.1-4.

[Original: English]

[16 April 1981]

1. The Commission observes a/ itself that the present title of the draft articles and, in conjunction with it, the wording of article 1 are no longer appropriate since important "matters other than treaties", affected by a succession of States, as, e.g. the issues of acquired rights (with the exception of those of third States, which are the subject of article 9) or of nationality are not dealt with by the draft. It would thus seem advisable to revise both the title and article 1 accordingly. Of the suggestions offered by the Commission with a view to remedying this unsatisfactory situation, "succession of States in respect of State property, State debts and State archives" (in case the latter provisions are retained in the draft) would seem more appropriate than "succession of States in respect of certain matters other than treaties" because the vagueness of the latter wording is hardly felicitous for the title of an international instrument. Moreover, it would again beg the question as to which "matters" were actually dealt with by the draft.

2. What is stated above, namely, the fact that it is necessary to bring the title and the wording of article 1 in line with the present scope of the draft articles raises, however, the basic question of whether a draft dealing only with three aspects of State succession - and leaving aside a number of aspects of great importance - justifies the amount of thought, energy and time which the Commission and its Special Rapporteur have devoted to the subject over so many years. Although the Commission's decision to limit the scope of the draft would seem understandable in view of the controversies surrounding some other "matters" affected by a succession of States, the mere fact that it was found necessary to restrict the scope of the draft would suggest that subjects considered for codification should undergo an ever stricter screening as regards their suitability for codification before work commences on them. The establishment of working groups or sub-committees for the preliminary examination of new subjects, a procedure which the Commission has used effectively in recent years, should therefore become standing practice. Those working groups or sub-committees should not only determine the scope of a future draft and the main points which the draft would have to encompass but should also establish guidelines for the Special Rapporteur with a view to ensuring that his reports remain within the mainstream of thought of the Commission. This would surely allow for a more rapid progress of work.

3. Another aspect of the draft articles would seem to point in a similar direction. Many articles use language like "unless otherwise agreed" [arts. 7, 8, 13 (1), 14 (1), 22 (1), 23, E (1), F (1)], or "settled by agreement" [arts. 10 (1), 11 (4), 19 (1), C (1)], or "determined by agreement" [art. b (2)]. 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 is indeed throwing doubt on 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. If, however, that reference has been inserted to satisfy the

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a/ Report of the International Law Commission on the work of its thirty-first session (Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 10 (A/34/10)), para. 49.

condition set by article 41 (1 a) of the Vienna Convention on the Law of Treaties, it would rather seem preferable to omit such a blank check in an instrument of codification and have the States concerned comply with the limit established by subparagraph b (ii) of article 41 (1) of the Vienna Convention, if indeed States wish to deviate by agreement from the draft articles.

Moreover, even where the draft articles are apparently stating residual rules, they are in some cases referring, in fact, back to an agreement between the States concerned. Thus, some articles provide that State property shall, in the absence of specific agreement between the States concerned, pass to one of them who shall equitably compensate the other [arts. 13 (3), 14 (1 b) and (2)] or, in other cases, that it shall pass to the successor States in equitable proportion [art. 14 (1 d)]. Similar provision is made in some articles relating to the State debt [arts. 19 (2), 22 (1), 23]. Given the reluctance of States to submit disputes between them to third-party settlement, and in the absence of a provision in the draft as to who shall determine what is equitable and what procedure ought to be followed in such cases, the implementation of the articles quoted would require an agreement between the States concerned even in the absence of an "agreement".

4. The draft articles incorporate in part I (introduction) only some of the general provisions of the Vienna Convention on Succession of States in Respect of Treaties. While the reason for such omission is obvious in respect of articles 3, 4 and 5 of the Vienna Convention, no reason is offered nor can any reason be logically deduced for not including article 7 (temporal application). It would rather appear that the reasons invoked by the Commission for the reception of article 6 of the Vienna Convention into the draft articles as article 3 (those reasons are set forth in paragraph 4 of the commentary to article 3) argue in favour of including also article 7 of the Vienna Convention, especially if article 20 of the draft articles is retained in its present form.

#### Specific articles

##### 5. Article 6

The present wording of article 6 may easily give rise to misunderstandings. Title to State property is held by a State under its internal law and not under international law; international law only authorizes the State to claim it under its internal law. Thus, a succession of States - which is an operation under international law - entails the extinction of the predecessor's claim and the arising of the corresponding claim of the successor State but does not cause the transfer of the right itself which is held under international law: an act of the successor State under its internal law is necessary to that effect. That the Commission recognizes this legal situation is evident from paragraph 4 of the commentary to article 6 where the Commission states that "the effect of the succession of State is essentially to change the entitlement (emphasis supplied) to the right to the State property". The Commission has failed, however, to make this clear in the wording of the article which should, therefore, be revised accordingly.

##### 6. Article 16

Although the commentary to article 16 contains a lengthy dissertation on different categories of the State debt (paras. 13-40), nothing of this is reflected

in the wording of the article. Further, no explanation is given by the Commission in the commentary to that article (cf. paras. 44 and 45 stating the legislative history of the text).

This is all the more regrettable as the failure to distinguish between different categories of the State debt, such as national debt, local debt and localized debt, leads to the otherwise quite unnecessary introduction into some articles of the concept of equity, which has no generally accepted meaning in international law.

#### 7. Article 20

The fact that no distinction is made between different categories of the State debt is apparently also the reason why a rule is being proposed in article 20 which goes beyond a reasonable protection of the interests of a newly independent State and, furthermore, is not at all confirmed by the practice of States over the last 20 years. To make the passing of a localized debt to a newly independent State dependent on an agreement between predecessor and successor State and thus on a voluntary act of the newly independent State, is at variance with the principle res transit cum suo onere, quoted by the Commission in paragraph 18 of its commentary to article 16. None of the lengthy considerations set forth in paragraphs 2 to 58 of the commentary to article 20 are convincing, particularly not the reference to the weak "financial capacity" of newly independent States (para. 58). Such considerations which amount to a mandatory transfer of debt pertain, and rightly so, to the realm of economic aid or of the new international economic order; in the context of the legal régime of State succession and as a principle for determining the passing on of obligations to the successor State, they seem rather out of place. If a weak "financial capacity" were to prevent the passing on of a State debt, why should that benefit be limited to "newly independent States"? Contrary to the present wording of article 20, and in accordance with the principle of unjust enrichment, local or localized debts should in principle, pass on to the newly independent State and deviations from that principle, for whatever reason, should be left to arrangements between the predecessor and the successor State. For this reason, preference is given to paragraph 1 of the alternative text proposed by one member of the Commission and reproduced in paragraph 64, note 345, of the commentary to article 20.

#### 8. Addendum: articles A to F

The residual nature which characterizes the draft as a whole becomes particularly obvious in respect of draft articles A to F relating to State archives, constituting the addendum. In fact, with the exception of paragraph 1 of article B relating to the case of a newly independent State, no provision in the addendum does envisage rules from which deviation by agreement between the States concerned would not be admissible. This approach which, in view of the complexity of the problems involved, seems indeed to be the only practical solution must, on the other hand, automatically raise the question whether it is necessary at all to include provisions on State archives in the present draft articles. It would seem that - with the possible exception of newly independent States - the inclusion of the articles contained in the addendum does not add much to the draft as a whole. Those articles should therefore simply be deleted.

If, however, the Commission were to deem it absolutely essential to retain provisions on State archives, the contents and language of the provisions ought to be carefully reviewed. The definition of the term "State archives" contained in



article A, while in principle acceptable for the purpose of the subsequent article B, seems inadequate for the suggested remaining articles. A thorough review of this definition establishing, after all, the scope of the following provisions, would in that case be necessary. The language used in articles C, E and F for basically identical situations varies for no apparent reason and should be brought in line.

The solution adopted by the Commission for dealing in the draft with what the commentary calls the "archives-territory link", seems arbitrary and somewhat at variance with the established treaty practice in this field. In particular, thought must be given to the possibility of incorporating, in an appropriate way, both of the two main principles relating to the problem of the "archives-territory link" (see paragraph 15 of the commentary to article C). The option made by the Commission to the effect to incorporate only the principle of "territorial or functional connection" without giving regard to the principle of "territorial origin" is indeed unsatisfactory.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]

[28 January 1981]

The formulation by the International Law Commission of the draft articles on succession of States in respect of matters other than treaties is one of the most important areas of work in the field of the codification and progressive development of international law.

An analysis of the three parts of the draft on succession of States in respect of matters other than treaties prepared by the International Law Commission ("Introduction", "State property", "State debts") shows that the existing text is, on the whole, satisfactory and may be used as a basis for the drafting of an international convention to supplement the Vienna Convention on Succession of States in Respect of Treaties.

At the same time, some provisions in the draft articles require further elaboration, particularly the provisions of article 16 (b). This paragraph deals with "any other financial obligation chargeable to a State", which is totally unacceptable since such obligations are governed not by international law but by the relevant provisions of municipal law. Paragraph (b) should accordingly be deleted from article 16.

The work of the International Law Commission in formulating articles on succession to State archives seems important and necessary, since archives are a constituent part of State property and, because of their nature, contents and functions, are of great interest both to the predecessor State and to the successor State. In this connection, the question of defining the actual concept of "State archives" and all aspects of the problem which have a bearing on the possibility of transferring State archives in various cases of succession of States should be given particular attention.

Since the draft articles on succession of States in respect of matters other than treaties are not complete, the observations set forth above are of a preliminary nature. The Byelorussian SSR reserves the right to submit additional comments as work on the draft articles as a whole progresses.

Although the Government of Chile has not focused its attention on detailed analysis of this matter, there being other questions which are currently of greater concern from the codification standpoint, it has noted with interest the work done by the International Law Commission in this area. It considers it acceptable that the wording of the draft articles should be in line with that of the Vienna Convention on Succession of States in Respect of Treaties, subject to the appropriate adjustments, and that, in dealing with the draft articles, account has been taken of resolution 4.212, adopted by the UNESCO General Conference at its eighteenth session in Paris in 1974, on the transfer of documents from archives.

As to substance, Chile has expressed its agreement with the approach taken by the International Law Commission in the draft articles. However, their title is of questionable legal clarity, since the draft articles deal solely with succession of States in respect of property, debts and archives, which can be summed up as the assets and liabilities of a State; the title of the draft convention, therefore, is not felicitous, since it bears no relation to the rules instituted. Furthermore, the phrase "matters other than treaties" is ineffective in the light of the principle that special provisions take precedence over general provisions: it is obvious that this draft convention deals with succession of States in respect of matters other than treaties, bearing in mind the Vienna Convention on Succession of States in Respect of Treaties, adopted in 1978.

In this context, the provisions of draft article 1 seem repetitious and redundant in a modern set of legal rules. These provisions should be related to article 1 of the Vienna Convention on Succession of States in Respect of Treaties, which is more specific than article 1 of the draft under consideration and which performs a definite function in that it provides that that Convention applies to the effects of a succession of States in respect of treaties "between States"; this gives it some dispositive force. On the other hand, article 1 of the draft under consideration merely reproduces its infelicitous title.

Furthermore, the definition of "State debt" given in draft article 16 seems insufficiently clear, State debt being defined as a financial obligation of a State towards another State. Such an approach limits the scope of the concept of debt. In general, debt can be taken to mean contracted obligations arising from a legal connection between creditor and debtor with the effect that the latter performs the commitment based on the corresponding right. This concept does not lose its validity if applied by analogy to international law; in the light of the above, it is appropriate to suggest that the definition proposed in draft article 16 should be reconsidered, with a view to extending it to cover all commitments vis-à-vis another party which possesses the corresponding right, not limiting it to the performance of a financial obligation, or an obligation in kind, along with the obligations of giving, doing or not doing a particular thing, within the category of obligations.

Lastly, on the basis of an over-all examination of the draft articles, some comments may be made on article A in the addendum which defines, for the relevant purposes, the concept of "State archives". This is unduly broad and hence insufficiently specific for a legal definition. The way in which the concept is

dealt with can be criticized, since the succinct reference to the "collection of documents of all kinds" does not give a definite idea of the nature of the documents that comprise an archive and make it deserving of special treatment different from that accorded to other items of State property. On this point, it would be desirable for the definition in article A to take account of the concept embodied in resolution 4.212 adopted at the eighteenth session of the UNESCO General Conference in 1974, in which the General Conference declared itself mindful of the fact that archives are of great importance for the general, cultural, political and economic history of the countries concerned. It would therefore be preferable to state, for the purposes of the draft articles, that the term "State archives" means the collection of public or private documents which, by their selection and nature, constitute the general historical, political, economic and cultural record of the countries concerned.

These are the general, preliminary comments of the Government of Chile on the draft articles proposed by the International Law Commission on succession of States in respect of matters other than treaties. The Government of Chile is interested in continuing to co-operate in the important and valuable codification work undertaken by the International Law Commission.

#### CZECHOSLOVAKIA

[Original: French]

[8 April 1981]

1. The Government of the Czechoslovak Socialist Republic pays a tribute to the excellent work done by the International Law Commission in the preparation of the articles on succession of States in respect of matters other than treaties and to the outstanding contribution of Mr. Bedjaoui, its Special Rapporteur.

The priority given by the Commission to the economic aspects of succession of States, i.e., to State property and State debts and questions relating to State archives, in the study of questions relating to succession of States in respect of matters other than treaties has proved useful. The articles prepared constitute a relatively complete and independent body of problems which can be codified without its being necessary to open up other questions of succession of States in respect of matters other than treaties which are not affected by the present draft articles. In view of the great diversity existing in international practice, it would be difficult to prepare a draft set of general rules governing those other problems.

Succession of States in respect of matters other than treaties constitutes a very important but also very complex body of topics of international law. The international practice applied so far does not always permit the assumption of the existence of a generally valid rule, and, consequently, we see in the set of draft articles on succession of States in respect of matters other than treaties prepared by the Commission an inextricable interweaving of the progressive development and codification of international law. The approach adopted by the Commission, which has applied itself to finding a just and balanced solution to thorny problems, unquestionably merits approval.

2. We must commend the effort made by the Commission to ensure that the draft articles on succession of States in respect of matters other than treaties, as a part of the general codification of the law of succession of States, is harmonized

with the 1978 Vienna Convention on Succession of States in Respect of Treaties. For that reason, the new structure of the draft, which brings the draft articles closer to the 1978 Vienna Convention on Succession of States in Respect of Treaties, is grounds for satisfaction.

It seems necessary, however, for the Commission to elucidate yet more closely the relationship between the Vienna Convention on Succession of States in Respect of Treaties and the draft articles on State debts arising from international treaties.

3. With regard to the form which the draft articles should take in the final stage, as in the case of the codification of the law of succession of States in respect of treaties, the most appropriate form would be an international convention.

4. With regard to the title of the draft articles, Czechoslovakia recalls in this regard its position in the Sixth Committee of the United Nations General Assembly, where it declared itself in favour of changing it so as better to express the content of the draft articles, namely, "succession of States in respect of State property, State debts and State archives".

5. As well as the title, article 1 should also be changed. Its scope seems too broad in view of the actual content of the draft articles, which regulate only questions of succession of States in respect of State property, State debts and State archives. At the same time, articles 4 and 15 should be deleted, since they will become superfluous after article 1 is changed.

There is, however, another aspect which the Commission should study more closely if it should decide to replace in article 1 the expression "in respect of matters other than treaties" by the expression "in respect of State property, State debts and State archives". In the Sixth Committee of the General Assembly, several delegations expressed the wish that the draft articles on succession of States in respect of matters other than treaties should be harmonized with the 1978 Vienna Convention on Succession of States in Respect of Treaties. The purpose of this request is not merely to have an analogous structure in the external form. The sphere of application of the articles on succession of States in respect of matters other than treaties should also be parallel to the sphere of application of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

Article 1 of the above-mentioned Convention limits the scope of the Convention to treaties between States. In the case of article 1, 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 with the Vienna Convention on Succession of States in Respect of Treaties disappears.

6. The Commission's intention of unifying as far as possible the terminology used in the 1978 Vienna Convention on Succession of States in Respect of Treaties is commendable. We can thus approve the conception of article 2. Article 2 should, however, be completed by the definition of the terms "State property", "State debts" and "State archives", which are at present scattered throughout the various parts of the draft and to which we shall revert subsequently.

Similarly, the meaning of the term "third State", as defined in article 2, paragraph 1 (f), is not entirely clear, and we shall refer to this below in connection with article 18.

7. The inclusion of article 3 in the draft articles is motivated not only by the fact that similar provisions are incorporated in the 1978 Vienna Convention on Succession of States in Respect of Treaties, but also by the fact that the consequences of territorial changes made in contradiction with international law relate essentially to the topic of State responsibility. Czechoslovakia therefore approves the Commission's idea of not including these questions in the present codification.

Harmony must, however, be established between the provisions of article 3 and the commentary to certain other articles. In the commentary to article 19, the Commission mentions the case of the participation of the Third Reich in the general debt of the Czechoslovak State after 1939. Although it is stated that there was no question in that case of a succession of States occurring in accordance with international law, the commentary cites this case in support of the provisions of draft article 19. The Czechoslovak Government considers that there is a contradiction in the Commission's mode of procedure. Inasmuch as, according to article 3, the provisions of the draft articles apply only to cases of a succession of States occurring in conformity with international law, the mode of procedure of a State which violated international law cannot, in any event, serve as an argument in support of the proposed legal rules. Czechoslovakia considers that this passage should be deleted in the Commission's commentary to article 19.

8. We can support the approach adopted by the Commission for the settlement of individual cases of succession of States in Part II, Section 2, Part III, Section 2, and articles B to F. The distinction drawn between cases of the transfer of part of the territory of a State, the birth of a newly independent State, the uniting of States, the separation of part or parts of the territory of a State and the dissolution of a State is fully justified. The reasons for which the Commission, when proceeding to the classification of particular types of succession of States does not follow the model of the 1978 Vienna Convention on Succession of States in Respect of Treaties are convincing.

The thorough analysis of international practice made by the Commission in order to elucidate the principles valid for each of the types of succession of States should be appreciated. The importance accorded by the draft articles to agreements between the predecessor State and the successor State or successor States, as the case may be, is fully justified.

9. With regard to article 5, which defines the concept of "State property", attention should be given to the criterion adopted in the definition of that concept, namely, the internal law of the predecessor State. Logical as this criterion may appear, 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.

The same problems arise with regard to the application of the internal law of the predecessor State in accordance with article 9; this article is, moreover, somewhat 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 the

property of nationals other than those of the predecessor State or 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.

10. With regard to article 6, the question arises whether the terms "extinction" and "arising" of rights adequately express the fact that the rights "pass" from the predecessor State to the successor State. The element of the continuity of the legal relationship, in spite of the change occurring in one of its subjects, is extremely important, particularly in view of the interests of third subjects and questions of transitional periods. It would therefore be appropriate if the Commission replaced these expressions by terms better corresponding to the idea of the continuity of the legal relationship.

11. In Part II, Section 2, the International Law Commission has rightly devoted particular attention to cases involving the birth of a newly independent State. The Government of Czechoslovakia favours a codification of the provisions on the succession of States relating to newly independent States in such a way that it would take account of the need to create conditions which would enhance their independent political and economic advancement and would be based on the consistent application of the principle of the permanent sovereignty of every people over its wealth and natural resources. It therefore notes with satisfaction that this principle has been clearly enunciated in article 11, paragraph 4, as being one of the principles to which any agreement between the predecessor State and the newly independent State relating to the succession of the newly independent State to State property must be subordinated.

12. In the case of article 11, paragraph 1 (c) and article 13, paragraph 1 (c), the International Law Commission has employed two different criteria for the determination of the proportion of the movable property of the predecessor State, other than the movable property specified in the preceding subparagraphs of the two articles, which should pass to the successor State, although the situations in both cases are quite similar. It would therefore be advisable to harmonize the wording of the two provisions; the wording of article 11, paragraph 1 (c) would be preferable.

13. Article 16, which defines the meaning of State debt for purposes of the draft articles, presents a difficult problem. In view of the basic difference of view on the question of the meaning of State debt, the International Law Commission should give further consideration to the question.

The scope of the current definition of State debt is much too broad. It exceeds the system of legal relationships regulated by general principles of international law.

General international law can regulate the succession of States only in respect of State debts which represent obligations of the State under international law. The legal basis of such international obligations may rest on an international agreement or on customary international law. Regulation of the succession of States in respect of debts which obligate the State under domestic law does not form part of international law. General international law certainly does not regulate legal succession in respect of debts of the predecessor State to individuals who, at the time of succession, were nationals of the predecessor State, nor to debts of the predecessor State in respect of its own legal entities because, at the time of the succession of States, there was no international obligation of the predecessor State on the subject. Nor does general international

law regulate the succession of the successor State in respect of debts of the predecessor State owing to nationals, respectively legal entities of the successor State, because such legal relationships are an internal matter falling within the purview of the sovereign power of the successor. In that connection, only a special agreement can impose obligations of an international character on the successor.

Likewise, State debts to individuals and legal entities of third States do not represent international financial obligations. Such State debts cannot therefore of themselves be the object of State succession under international law. The legal succession of States in respect of such debts is only possible if, on the date of the succession of States, there existed an international obligation of the predecessor State in respect of the third State concerning payment. Such cases, to the extent that they affect the problem of State responsibility, do not fall within the scope of the present draft articles.

14. Article 18 needs further elucidation by the International Law Commission. Since it is hardly possible to consider all the rules contained in the draft articles as established norms of general international law, the question arises as to whether the agreements specified in article 18, paragraph 2 can be enforced against third States or international organizations - even when the effects of such agreements are consistent with other applicable rules of the present draft articles as stipulated in article 18, paragraph 2 (a) - to the extent that they are not bound by a future convention concluded pursuant to the present draft articles. The definition of third State contained in article 2, paragraph 1 (f) is inadequate because it is possible in that connection to distinguish between two categories of third States - States which will be third States in respect of the agreement between the predecessor State and the successor State, respectively between successor States, but will be bound by a future convention on succession of States in respect of matters other than treaties, and those States which will be third States both with respect to the agreement between the predecessor State and the successor State, respectively between the successor States, and with respect to the Convention on the succession of States in respect of matters other than treaties.

In view of the provisions of article 34 of the Vienna Convention on the Law of Treaties, 1969, the provisions of article 18, paragraph 2 (a) can apply only in respect of matters pertaining to the first category of third States.

15. The Government of Czechoslovakia supports draft article 20, according to which no State debt of the predecessor State shall pass automatically to the newly independent State. It fully supports the provisions of article 20, paragraph 2, according to which the agreement between the successor and the predecessor State should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should its implementation endanger the fundamental economic equilibria of the newly independent State.

16. In articles 22 and 23, the International Law Commission draws a distinction between the separation of part or parts of the territory of a State and the dissolution of a State.

In the first case - separation of part or parts of the territory of a State - the predecessor State as an entity will continue to exist after the succession; in the second case, it ceases to exist as an entity at the time of dissolution. According to draft articles 21 and 22, the consequences in respect of State debts in each of the two cases are the same. In the two cases, the International Law

Commission stipulates the rule that an equitable proportion of the State debt of the predecessor State shall pass to the successor State, unless the predecessor and the successor otherwise agree (art. 22), or to the successor States (art. 23). The proportion must take all relevant circumstances into account.

There is a difference between the two cases, if the problems in connection with articles 22 and 23 are approached from the point of view of the creditor. While, in the case of article 23, the only method open to the creditor is to claim his debt from the successor, it might be possible in the case of secession, to contemplate a solution whereby the creditor could claim the total debt from the original debtor while compensation between the original debtor (namely the predecessor State) and the successor would be subject to mutual agreement. The creditor would receive an equitable proportion of the original debt directly from the successor only if the predecessor and the successor had reached agreement on the issue and the creditor had accepted such agreement. Such is the principle of cumulative subrogation as known in domestic legal systems. The International Law Commission has nevertheless proposed a solution which would contemplate in such cases - as in cases of the dissolution of States - the automatic division of the debt and the passing of an equitable proportion thereof to the successor. The question of the amount of such equitable share could, in the absence of agreement, lead to litigation between the parties. In such a situation, the position of the creditor is made more difficult even in relation to the original debtor, because his claim against the latter has become a matter of litigation in respect of the amount.

The wording of article 22, paragraph 1 and article 23, moreover, is 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 arises as to whether such an agreement should apply in respect of a creditor.

17. On the question of State archives, while such archives undoubtedly represent one of the categories of State property, they nevertheless constitute a sufficiently specific category for the draft articles to devote an autonomous chapter, or at least an autonomous part, to them. In some respects the rules applicable to the succession of States to State archives can be quite similar to those which apply in cases of the succession of States in respect of movable State property although in other respects they may be different. The draft rules concerning State archives prepared by the International Law Commission also go beyond the strict context of legal succession. The insertion into the text of the draft articles of the right of peoples to development and to information concerning their history and cultural heritage, places State archives in a different category from that of other material property which may be subject to succession.

The expression "documents of all kinds" employed in article A is too vague and requires more precise definition if only because, in view of the diversity of rules contained in Chapter II and in the Addendum, it is necessary to draw a clear distinction between State archives and other categories of State property.

It will also be necessary during the second reading to draw a clearer distinction between two categories of documents which, together, constitute State archives in the broadest meaning of the term: namely, between documents of an administrative character - which are essential for the administration of the territory involved in the succession of States - and documents which are predominantly of cultural or historical value. In the case of the former category,



it is possible to benefit substantially from modern reproduction techniques, which might influence the thrust of the pertinent rules, but such a possibility does not exist for the second category. So far as concerns documents of an administrative character, it will therefore be possible to extend to other articles the principle of the indivisibility of State archives which the International Law Commission has stipulated in article F, paragraph 6.

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

[30 October 1980]

1. The German Democratic Republic welcomes the draft articles on succession of States in respect of matters other than treaties as submitted by the International Law Commission (ILC) in 1979, and believes the text to be a solid base for the second reading of the draft articles by ILC.

The intentional reproduction of definitions, terms and denominations of the types of succession from the Convention on Succession of States in Respect of Treaties is suited to preclude misunderstandings in the application and interpretation of basic notions.

2. In the present draft articles on succession of States in respect of matters other than treaties, ILC confined itself on regulating State property, State archives and State debts, and treated all three categories from international legal aspects as relatively independent matters. This approach is fundamentally important since it respects, as in the case of succession of States in respect of treaties, the principle of sovereign equality of States and does not unduly encroach upon the domestic authority of States involved in succession. By the way, different definitions of the legal status of these matters in national jurisdictions set insurmountable limits to a universal regulation under international law. In this context it is to be appreciated that ILC defined State property only as a general category and did not try to regulate from an international legal aspect the status as defined by domestic jurisdiction of local, provincial or communal entities in connection with State property, State archives and State debts.

Generally, the submitted draft represents a largely acceptable compromise, although a number of improvements and specifications will be required to be included in its second reading.

3. The German Democratic Republic supports what has been stated in part I (arts. 1-3) and welcomes the decision of the International Law Commission to find at the second reading a more precise formulation of the field of application of article 1 and, hence, for the future convention's title. It would seem possible to make explicit reference to the matters which are the subject of the draft, i.e. State property, State archives and State debts.

4. The German Democratic Republic generally agrees to the definition of State property in part II, section 1 (arts. 4-9) and to the rules to govern succession. It is particularly State property which constitutes a vital material base for establishing a State and ensuring its sovereignty. From this point of view it is to be welcomed that article 5 gives an all-embracing term to describe State property which 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). Similarly important is the provision that by a succession the predecessor State's titles to State property become extinct and the successor State acquires original rights thereto, and that State property shall pass to the successor State without indemnification or compensation. Finally, the German Democratic Republic supports the provision of article 9 that State succession shall in no way affect property owned by a third State.

With regard to the regulations to be applied to the various types of succession (arts. 10-14), it is to be welcomed that priority orientation is towards an agreement between the States concerned. Equally commendable is the differentiation between movable and immovable State property and the differentiated passing of such property.

5. The German Democratic Republic appreciated the comprehensive regulation concerning the passing of State archives in the case of State succession. The definition of State archives seems to be well considered so as to cover the large variety of archives, and is a fair compromise to permit equitable succession in respect of archives. In its respective provisions the draft takes account of the peculiar nature of State archives in so far as they are both indispensable part of State property and cultural asset. Because of that dual nature, State archives should form an independent part III to be inserted after article 14. This new part III would then be followed by the regulations with regard to State debts forming part IV.

6. With regard to part III, the German Democratic Republic feels urged to reaffirm the reservations which have been voiced by its representative in the Legal Committee, particularly at the thirty-fourth session of the United Nations General Assembly, against the definition of State debts in article 16. Since succession into State debts is still a very controversial matter and the draft establishes, except for newly independent States, the obligation of succession which would imply a progressive development of international law, the draft formula needs to be studied very thoroughly.

With that in view, it is to be welcomed that article 16 (a) confines itself to defining as State debts only financial obligations of States towards other subjects of international law.

On the other hand, it is highly objectionable that, despite the dissenting votes of several members, the majority of ILC in article 16 (b) should have abandoned its otherwise consistent orientation with regard to that question, and that it should have completely deviated from the provisional draft submitted in 1977. Article 16 (b) would result in an obligation for the successor State to continue without changes its predecessor's relations under private law towards foreign natural and juridical persons. The same would apply with all consequences also to its own citizens. Factually, article 16 (b) would obligate a new State to the domestic jurisdiction of its predecessor. This would constitute unacceptable interference in the successor State's sovereignty and, therefore, is irreconcilable with the principles of sovereign equality of States and non-interference in other States' internal affairs. A successor State must have the inalienable right to establish its own constitutional and legal order, including the independent conduct of its relations under civil law with natural and juridical persons. When a State believes that, for instance, nationalizations or general expropriations affect in a way contrary to international law the interests of its citizens with regard to their property, this State may exercise protective rights on behalf of its citizens

through diplomatic channels. This is the internationally accepted way of protecting the interests of citizens in foreign countries. It cannot be accepted, however, that an international convention a priori would obligate a new State to the unqualified continuation of its predecessor's relations under private law. On account of this, the German Democratic Republic holds 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 is the case with regard to all other matters (treaties, State property, and State archives).

7. Another problem arises from the general obligation for the successor State (with certain exceptions in case this is a newly independent State) to succeed into the State debts of its predecessor, which is stipulated by article 17. Such a provision, though, can only be acceptable provided it is explicitly clarified that it applies only to State debts contracted in conformity with international law, so that debts contracted for a purpose not in conformity with international law would be excluded.

The German Democratic Republic deems it necessary to include in the convention a provision on non-transferable debts and, consequently, clearly to define the term of "odious debts".

It would be desirable, therefore, if in the second reading ILC would again consider the pertinent proposals which were submitted by the Special Rapporteur in 1977 (A/34/10, pp. 112-115). Article C could provide a good platform for the definition of such debts which are excluded from obligatory succession on grounds of their being inconsistent with international law.

8. In conclusion, the German Democratic Republic wishes to touch upon the problem of apportioning the State debts of a predecessor State to several obligated successor States. The provision for passing an equitable proportion of State debts in consideration of all relevant circumstances as set out in articles 19, 22 and 23 seems to be broad enough so as to cover all possible situations. In the final analysis, any passing of equitable proportions of the State debts that are subject to succession will always have to take account of the historical and national circumstances of each individual event of succession. Equitable apportionment will have to pay regard both to the capabilities of the successor State and the real gain which would result for the successor State from assuming the debts contracted by its predecessor.

[Original: English]

[12 March 1981]

1. The German Democratic Republic welcomes the four draft articles worked out by the International Law Commission on the succession into archives. They contribute no doubt towards completing the whole draft text concerning the succession of States in other matters than treaties. The German Democratic Republic holds the view that the wording of the individual articles constitutes a good basis for the further consideration of the subject of succession of States into archives.

2. In view of the distinct nature of State archives which, on the one hand, form part of State property in general and, on the other, may also be national cultural property, the German Democratic Republic deems it appropriate that the provisions on State archives be inserted after article 14 as part III. This part should then be followed by the regulations concerning State debts as part IV.

3. In connection with the final clarification of the placing of archives in the whole draft text, it should also be decided whether State archives should be mentioned in the title of the convention as a separate category in addition to State property and State debts.

4. As far as the definition of the term "State archives" is concerned (art. A) we would wish that ILC, in the second reading of the draft text, pay more regard to the fact that State archives can be both administrative and historical archives.

Administrative archives mostly contain information which is essential for an effective use of the entire property by the successor State, whereas historical archives are collections of sources of historical and cultural significance which are chiefly used for scholarly purposes.

It would add to the value of the present draft articles if this important differentiation would be made expressis verbis in the definition of the term "archives". That would also make it possible to establish 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.

5. The principle contained in articles C, E and F that the passing of archives should be settled by means of an agreement between the predecessor and the successor States is acceptable. In the view of the German Democratic Republic, such an approach is in harmony with the basic principles of international law, particularly the principle of the sovereign equality of States.

6. Pursuant to article F, paragraph 6, the provisions concerning succession into archives do in no way prejudice any question relating to the preservation of the unity of State archives.

The German Democratic Republic would deem it desirable if similar provisions were included also in articles C and E. This would take account of a legitimate concern of archival science and would, at the same time, confirm the principle discernible in the long-standing practice of States that historically grown archives should be preserved.

#### GREECE

[Original: English]

[11 February 1981]

The Greek Government considers as satisfactory on the whole the four articles contained in chapter II of the report of the International Law Commission (A/35/10) and has, therefore, no specific observation to submit.

#### ISRAEL

[Original: English]

[19 December 1980]

1. In general, attention is drawn to the statements made by the delegation of Israel, as this work progressed, in the 1404th (twenty-eighth session, 2 October 1973), 36th (thirty-second session, 2 November 1977),

41st (thirty-third session, 8 November 1978), 46th (thirty-fourth session, 21 November 1979) and 44th (thirty-fifth session, 11 November 1980) meetings of the Sixth Committee, on the different parts of the draft articles in question, presented in those years. It is noted with satisfaction that some of those observations have been taken into account by the Commission in the draft articles submitted in 1979. Apart from those observations, for the most part on matters of detail, two aspects call for some repetition and re-emphasis here.

2. The first relates to the implication of the factor "time" for the topic under examination, and the proper formulation of all the draft articles and their commentaries to encompass that element. In its work on State succession and the law of treaties, the Commission did make some references to that factor, notably in its report on the work of its twenty-fourth session (A/9710/Rev.1), and its report on the work of its twenty-sixth session (A/9610/Rev.1, para. 62). However, it is not considered that those comments deal adequately with the issue posed by the factor "time". To put it in its simplest form, the question that has to be answered is: "To what instances of State succession is it envisaged the draft articles will apply?" Unless that question is given a satisfactory answer, there is the risk that the work of the Commission will not meet any practical needs of the international community today.

3. The second relates to the addendum on State archives contained in the Commission's report on the work of its thirty-first and thirty-second sessions. The Commission is to be congratulated on this important pioneering work, and in that connection attention is again called to the statements of the representative of Israel on this aspect in the 46th (thirty-fourth session) and 44th (thirty-fifth session) meetings of the Sixth Committee on 21 November 1979 and 11 November 1980.

4. In articles B, paragraph 6, E, paragraph 4, and F, paragraph 4, references are made to the right of peoples of newly independent States - of which Israel is one - to information about their history and to their cultural heritage. In our view this is a major theme, only now in process of examination and stabilization in modern international law, and the Commission is to be encouraged to continue with its refining of this new aspect of the law - which, let it be added, may not be limited only to "Succession of States in matters other than treaties", even if that is a convenient place for the initial studies. In this connection, it is noted that article 149 of the Draft Convention on the Law of the Sea (Informal Text) of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.10/Rev.3) refers to the preferential rights inter alia of the State of cultural origin or the State of historical and archaeological origin of certain artifacts: and during the ninth session of that Conference article 303 was added, further clarifying and extending the application of that notion. The approach of the Commission thus complements similar activities being conducted in other branches of the law.

5. In that connection, the delegation of Israel expressed the view that all peoples have the right to the restoration of objects of their cultural heritage of which they have been despoiled and which, being of a particularist character, have little or no value whatsoever in the places in which they happen to be situated as a result of the vicissitudes through which they have passed. That statement was made with particular reference to particular documents of the Hebrew and other Jewish cultural heritage scattered around the world, which do not form part of the cultural heritage of the countries in which they happen to be found, and which for the most part are irrelevant to the cultural heritage of that country. The minimum obligation of those countries is to ensure adequate

protection of this material, much of which is delicate and deteriorating physically, as well as free access to it on the part of students and scholars: but that is a minimum obligation, and the real duty of those countries is to facilitate the restoration of those materials to the newly independent State which is the "State of cultural origin or the State of historical and archaeological origin". This would seem to be an obvious contribution to the age of decolonization.

#### ITALY

[Original: English]

[3 April 1981]

The issue of the succession of States is currently in a state of considerable flux owing mainly to the notable evolution of international practice regarding instances of succession arising from decolonization. One evidence of this is the International Law Commission's draft which deals with cases of succession resulting from decolonization separately, in ad hoc articles concerning newly independent countries.

Under the circumstances, it would appear difficult to define very general principles for such cases. It is possible that, once the decolonization process has been fully accomplished, practice may revert in part to the rules previously in force, so that excessively innovative general criteria would risk failing to serve the interests of the international community in the most useful way. On the other hand, it is important that any case of succession of States which may arise in the near future have access to normative schemes of reference.

With this in mind, the Italian Government favours the continuation and early conclusion of the International Law Commission's work on the succession of States in the matter of State property, State debts and State archives. In regard to the question of which form the rules contained in the draft should most appropriately assume - treaty or other international instrument, model rules, etc. - Italy will reserve its opinion until after ILC has finished its second reading of the draft.

It seems clear from what has just been stated, however, that it would not be useful to attribute too broad a scope to the articles proposed by the International Law Commission - that is, a scope so general as to allow them to be applied to every aspect of succession in matters other than treaties. Topics such as the outcome of administrative concessions in the event of succession, or the nationality of individuals residing in the interested territory itself, require ad hoc rulings, and it would be inaccurate to extend, by analogy, to cases like these, the rules outlined by ILC for other situations.

Since ILC has decided to limit its work to the three items cited above - i.e. State property, State debts and State archives (a decision supported by Italy) - we believe it would be desirable for the title of the draft to bear reference to the specific matters treated in it; consequently, the text of article 1 should be amended accordingly. In fact, the Italian Government considers that the part of the draft on State archives should, because of its special nature, be distinct from the other two parts, and should constitute the object of an autonomous body of rules. This would require that the draft articles on State property be clarified to exclude archives themselves from the general category of State property, for the purposes of the articles under discussion.

While duly acknowledging the problematic nature of the matter and the considerable controversy that continues to surround it, we cannot refrain from pointing out that on most points, the solutions proposed by ILC are rather vague. For example, reference is made frequently to the concept of "equitable proportion" (arts. 14, 19, 22, 23). A solution of this kind may be inevitable, but if so, it becomes all the more important - as the Italian delegation has stated in its interventions in the Sixth Committee of the General Assembly - to provide the terms for an appropriate and effective mechanism for the settlement of disputes that might arise in the area of State debts, in particular. This would become essential, should ILC recommend that such rules be incorporated into an international convention. A further general observation seems in order prior to a discussion of the merits of individual articles. While aware of the motives that may have induced ILC 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).

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Turning to the merit of the individual articles proposed by ILC, the Italian Government wishes to limit its observations to certain questions of major importance.

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On the subject of State property, the sense of article 11, paragraph 1, letter (a), referring to the attribution of movable goods of a predecessor State to a successor State when the latter is a newly independent country, does not appear at all clear; specifically, the meaning of the expression "movable property, having belonged to the territory to which the succession of States relates" is inexact.

In fact, it is not precise to speak of attribution of movable property to a territory; rather, such property should be referred to in terms of its attribution, on the basis of a given system of law, to this or that subject. Moreover, a movable property can have been attached to a territory at a given time for totally incidental reasons (as, for example, in the case of temporary location of a tangible property), while it may in fact have been created elsewhere, as in the case of a work of art. In relation to all this, and with particular regard to the fact that a movable property can have been legitimately acquired by the predecessor State following a legitimate purchase, and therefore would not necessarily have to be "returned", the ILC draft ruling seems ambiguous and likely to generate serious interpretive difficulties. For this reason, it would be advisable for the Commission to clarify this point in detail in an attempt to delineate all the possible cases that may emerge in reality, in order to adapt to such cases the rules to be drafted.

Again in article 11, the referent of the expression "contribution of dependent territory", named as a criterion for partition in letter (c), paragraph 1, is not at all clear to the Italian authorities. While in the English text this expression seems to refer, justly, to the contribution that the territory in question has made to the creation of the given property, its counterpart in the French text is structurally broader and vaguer.

With regard to article 14, which contemplates the possibility of the dissolution of a pre-existing State, the feasibility of the solution indicated in paragraph 1, letter (b), raises problems for the case of property located outside the territory of the predecessor State. One may ask, indeed, what should determine in such a case the attribution of property to one successor State rather than another.

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Concerning the articles on State debts, the basic question - on which opinion remains divided, even within ILC - is to determine whether the draft should cover only debts among subjects of international law (debts between States or to international organizations) or also those owed to private, foreign subjects. The presence, in the draft of letter (b), article 16, would suggest that the broadest possible approach was sought; but the logic of subsequent articles, especially 19 and 23, is that of inter-State relations.

In fact, the matter of succession of States also encompasses the question of the outcome of debts owed by the predecessor State to private foreign subjects, and it would be mistaken to claim that international laws do not already exist in this regard. The ample body of practice which has developed especially since the First World War shows the contrary.

However, the matter is highly controversial and does not lend itself readily to the formulation of a solution acceptable to the entire international community. Furthermore, the exploration of the subject in depth would run the risk of necessitating an extremely long and complex investigation as well as the revision of several clauses of the draft articles.

For all these reasons, which are of political import, the Italian Government wishes to reiterate the opinion previously expressed by its delegation to the Sixth Committee of the General Assembly in 1977, i.e. that it would be wise to limit the draft articles under discussion to the topic of debts between subjects of international law. But this should not be interpreted in any way as a negation of the international relevance of succession in the case of debts between States and private foreign subjects; to this end, we may stress the importance of paragraph 1, article 18, which, in Italy's opinion, should be clarified as a general safeguard clause. In conclusion, for these reasons, it seems appropriate to propose the deletion of letter (b), article 16, and the rewording of paragraph 1, article 18, in order to transform it into a separate article.

A final observation on the topic of State debts concerns article 21, which deals with the unification of States. The value of paragraph 2 is highly doubtful, as that paragraph seems to refer to a question of purely domestic (internal) law.

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Regarding the articles on State archives, aside from the observation already made at the beginning of these observations as well as any general comments contained herein which may apply to them, they do not seem to raise large-scale problems. Viewed as a whole these articles, pending further clarification, seem to offer very balanced solutions; in fact, they appear more suited than the others to be adopted as an international convention whose utility is most evident.



The Italian Government wishes merely to emphasize two factors in this connection: the first is that considerable attention should be taken to distinguish the problems of archives in the traditional sense (that is, collections of documents) from those of works of art. This distinction, clear enough in itself, may in certain actual cases become problematical as regards the kind of documentation that the history of a given civilization has produced.

The second conclusion is that, given the acceptance of the principle that justly favours the greatest possible dissemination of the information collected in archives (considerably enhanced by modern means of document reproduction), we should seek to avoid as much as possible the dismantling of collections of documents whose existence as a unit is very often an essential condition for their effective use by scholars. The motivating principle here should not be a pedantic quest to assign documents to a precisely-determined site, but rather the realization that historical documentation constitutes the common heritage of mankind. In respect of this principle, free access to such documentation should be promoted with all available means.

SWEDEN

[Original: English]

[9 February 1981]

As regards article D ("Uniting of States"), paragraph 1 provides that the State archives of the predecessor State shall pass to the successor State, whereas it appears from paragraph 2 that the internal law of the successor State shall determine whether the archives shall belong to the successor State or to its component parts. It is noted that article 12 of the draft articles is worded in a similar manner.

It is true that the commentary to these articles gives some guidance as to their interpretation. The text itself of the articles makes it difficult, however, to understand the relations between paragraph 1 and paragraph 2 which may even appear to be contradictory. It is therefore suggested that the International Law Commission should give some further consideration to the best way of drafting article D and article 12.

Articles E and F deal with the separation of part or parts of the territory of a State and with the dissolution of a State. The draft articles distinguish between these cases of State succession and the case of a newly independent State which is dealt with in article B. Nevertheless, articles E and F seem to be based on largely the same principles as article B. In particular, the provisions of paragraphs 2 and 6 of article B have been extended to the said other cases of State succession (by paras. 2 and 4 of art. E and paras. 2 and 4 of art. F). These provisions restrict the freedom of the predecessor State and 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 them regarding the passing (in arts. B and E also the reproduction) of archives which are of interest to the territory in question but do 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 paragraphs 4 of articles E and F provide 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".

This means 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 conforms to certain principles, which are all of a very general nature. To let such general principles take precedence over agreements concluded between independent States can hardly be justified and might lead to unnecessary disputes regarding the validity of the agreements concluded. In the case of a State succession which is 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. It is 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 paragraphs 2 of articles E and F as well as the whole paragraphs 4 of those two articles should be deleted.

As regards the articles previously adopted by the International Law Commission on the topic "Succession of States in respect of matters other than treaties", I wish to refer to the comments of the Swedish delegate in the Sixth Committee of the General Assembly of the United Nations on 19 November 1979. b/

#### UKRAINIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]

[8 April 1981]

The patterns of world development are causing the entire system of international law to become more complex. This is reflected in the increased volume of international legal norms as a whole, the expansion of their range and the growing complexity of their contents; in other words, in the improvement of traditional and the development of new means of regulation under international law. The United Nations International Law Commission took all this duly into account in preparing its draft articles on the succession of States in respect of matters other than treaties.

The articles on the succession of States in respect of State property, State debts and State archives contained in the draft prepared by the Commission appear to be an entirely satisfactory basis for the formulation of the corresponding international agreement. The adoption of such an international legal instrument would be a new stage in the codification of the right of succession of States, and would supplement the 1978 Vienna Convention on the Succession of States in Respect of Treaties.

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b/ For the summary of the statement by the Swedish delegation, see document A/C.6/34/SR.43, paras. 35-42. The views expressed by the Swedish delegation were also included, under appropriate headings, in the "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its thirty-fourth session, prepared by the Secretariat" (A/CN.4/L.311, paras. 15-136).

However, the advisability of retaining several provisions in the draft articles is doubtful. For instance, the draft mentions "any other financial obligation chargeable to a State" (art. 16 (b)), as distinct from a State's obligations towards the subjects of international law mentioned in paragraph (a) of that article. Essentially, this goes beyond the group of problems covered by the draft, and article 16 (b) should accordingly be deleted.

With regard to draft articles C, D, E and F on succession in respect of State archives, the Ukrainian SSR believes that they should be supplemented by provisions on succession in connection with the emergence of new, independent States upon the accession to independence of the peoples of colonial and dependent territories, especially since such cases are already mentioned in article 2, paragraph (e), of the draft.

UNION OF SOVIET SOCIALIST REPUBLICS

[Original: Russian]

[19 February 1981]

The draft articles prepared by the International Law Commission on succession of States in respect of matters other than treaties, and, specifically, the articles relating to State archives, can as a whole be used as an acceptable basis for drafting the corresponding international legal instrument.

At the same time, in the particular case of succession it would seem appropriate that the draft articles should reflect succession in connection with the emergence of newly independent States as a result of the achievement of independence by the peoples of colonial and dependent territories. It would be still more appropriate to include such a provision in the section on State archives in that such cases of succession are provided for in the articles which the Commission has already agreed upon, and specifically in article 2, which contains definitions of the terms used.

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ANNEX II

COMMENTS AND OBSERVATIONS OF GOVERNMENTS AND PRINCIPAL INTERNATIONAL ORGANIZATIONS ON ARTICLES 1 TO 60 OF THE DRAFT ARTICLES ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS TWENTY-SIXTH, TWENTY-SEVENTH, TWENTY-NINTH, THIRTIETH AND THIRTY-FIRST SESSIONS \*\*/

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\*\*/ The comments and observations reproduced in this annex were originally circulated in documents A/CN.4/339 and Add. 1-8.

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NOTE

For the text of articles 1 to 60 of the draft articles on treaties concluded between States and international organizations or between international organizations provisionally adopted by the Commission at its twenty-sixth, twenty-seventh, twenty-ninth, thirtieth and thirty-first sessions, see Yearbook ... 1974, vol. II (Part One), pp. 294 et seq., document A/9610/Rev.1, chap. V, sect. B.2; Yearbook ... 1975, vol. II, pp. 174 et seq., document A/10010/Rev.1, chap. V, sect. B.2; Yearbook ... 1977, vol. II (Part Two), pp. 105 et seq., document A/32/10, chap. IV, sect. B.2; Yearbook ... 1978, vol. II (Part Two), pp. 132 et seq., document A/33/10, chap. V, sect. B.2; and Yearbook ... 1979, vol. II (Part Two), pp. 148 et seq., document A/34/10, chap. IV, sect. B.2.

# I. COMMENTS AND OBSERVATIONS OF GOVERNMENTS

## BULGARIA

[Original: English]

[April 1981]

The Government of the People's Republic of Bulgaria is pleased to note the progress made on the question of treaties concluded between States and international organizations or between two or more international organizations. The fruitful work of the International Law Commission in this field has largely bridged the gap in international law of treaties and thus represents a major contribution to the codification and progressive development of contemporary international law.

The Bulgarian Government welcomes, as a whole, the texts of articles 1 to 60 adopted on first reading. Generally, these draft articles follow the customary law in this field and the general structure of the Vienna Convention on the Law of Treaties and reflect the established practice, as well as the specifics, of the international organizations whose legal capacity, including the legal capacity to conclude treaties, is confined within the limits of their functions under the relevant constitutive documents (Charter, Statute, etc.).

It is essential, nevertheless, to point out that not in all cases do the provisions adopted by the Commission on first reading reflect in a sufficient degree the differences between the international legal capacity of States, which stems from their sovereignty, and the legal capacity of international organizations which is always secondary to and derivative from the concerted will of the States parties to the constitutive instrument of a particular international organization.

On this score the view of the Bulgarian Government is that some draft articles adopted on first reading need further consideration.

For example, in addressing the problem of reservations (draft articles 19 to 23) one has to take due account of the fact the right of States to formulate objections when signing, ratifying, approving or acceding to international treaties, is founded on their sovereignty, therefore, it cannot be applied automatically to international organizations whose competence is, as a rule, limited. Not only do relative limits to the right of international organizations to formulate reservations correspond more fully to their specific nature as subjects of international law, but, moreover, they largely reduce the chances for contradictions in the interpretation of the particular provisions.

The Bulgarian Government is also of the opinion that the question of the validity of treaties to which an international organization is a party with respect to States members of that organization should be studied in more detail with a view to avoiding in a more assertive manner the possibility that such a treaty could be in any way constitutive of rights and obligations for the States members to an international organization without their express prior consent.

With respect to this it is the view of the Bulgarian Government that the present text of draft article 36 bis, para. (a) is completely at variance with the general rule of article 34, which provides that treaties between one or more States and one or more international organizations do not create either obligations or rights

for a third party State or a third organization without the consent of that State or that organization; therefore, in its present form, it would not be a generally acceptable and viable solution to the problem.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]

[6 February 1981]

Articles 1 to 60 of the draft articles formulated by the International Law Commission, concerning treaties concluded between States and international organizations or between international organizations are, in principle satisfactory. Basically they reflect current practice with regard to treaties involving the participation of international organizations and may be taken as a basis for the drafting of an international convention.

At the same time the draft articles contain some provisions which are unacceptable and need to be further elaborated and clarified.

In particular, doubts may be entertained about the wording of articles 20 and 20 bis, which permit the tacit acceptance by international organizations of reservations made by other parties to a treaty. The Byelorussian SSR believes that the draft should stipulate that the competent organ of an international organization which is party to a treaty has an obligation to take action to express its position on such reservations clearly and unequivocally.

Article 36 bis, which also regulates questions regarding treaties concluded by supranational organizations, conflicts with the provision in the draft to the effect that participation of an international organization in a treaty has legal implications only for the organization itself and not for States which are members of it. In order to eliminate this inconsistency article 36 bis should be deleted from the draft.

Part V of the draft should include a provision to the effect that an international organization may not conclude treaties which conflict with its basic instruments, such as its charter, and it would therefore seem advisable to amend the wording of articles 45 and 46 accordingly.

CANADA

[Original: English]

[25 April 1980]

Introduction

The Canadian authorities welcome the opportunity to offer some preliminary comments on the draft articles as they now stand.

International organizations - capacity to conclude treaties

The basic problem which ILC has encountered in these draft articles is that while all States are equal before international law, international organizations

vary in legal form, functions, powers and structure and in their competence to conclude treaties, and the extent to which all of these characteristics may be accepted by others.

Because of the great variety of international organizations, it is not sufficient to define an international organization as meaning simply an intergovernmental organization, as is done in subparagraph 1 (i) of draft article 2.

A definition of this kind begs the question since many intergovernmental organizations do not now, and probably never will, possess the power to enter into treaties with one or more States or with international organizations such as the United Nations. The question is not simply of academic interest since, at last count, some 170 intergovernmental organizations were listed with the Union des associations internationales in Brussels. Are all of these to be included within the scope of the proposed definition? In the Canadian view the draft articles should be concerned only with intergovernmental organizations possessing the capacity to assume rights and obligations under international law and thus to enter into treaties. The Commission should endeavour to find language which would clearly reflect the fact that an international organization within the meaning of the draft articles means an intergovernmental organization which has the capacity to assume rights and incur obligations on the plane of international law.

Article 6 provides that "The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization". Here it is important to note that "rules" have been defined in article 2 to include the constituent instruments, relevant decisions and resolutions, and established practice of the organization. For example, the treaty-making powers of the European Economic Community (EEC) are not confined to matters covered by express provisions of the Treaty of Rome, but embrace, in addition, the power to conclude treaties whenever the Community has laid down common rules to give effect to common policies. In fact it has been argued that it is not possible, once and for all, to make a list of the areas in which EEC has or does not have the capacity to conclude treaties with third States. There will also be situations where rights and obligations are to some extent divided between the Community and its member States, as in the case of treaties to which EEC is a party, together with its nine member States. In these cases the organization and its member States may be given different rights under the treaty but these rights may be exercised concurrently. Hence, one must look not only at the rules of the organization, but also at their evolution as reflected in actual practice; and certainty may not always be the rule in this matter.

On this latter point, it would be helpful if ILC, in its commentaries on the draft articles, could provide some concrete examples of the manner in which the capacity of international organizations to conclude treaties, in accordance with the relevant rules of the organization, has been exercised in practice. We are dealing here with an evolving body of international practice and details of that practice should be documented. It would also be useful to have available information on any problems which may have arisen as to the capacity of international organizations to discharge their international treaty obligations, since this question may have some relevance to their capacity to enter into treaties in the first place.



## Who represents an international organization?

ILC proposes in article 7 that the representative of an international organization must produce "appropriate powers" for the purpose of communicating the consent of that organization to be bound by a treaty, unless "it appears from practice or from other circumstances" that he or she is "considered as representing the organization for that purpose without having to produce powers". This wording is vague and leaves room for a considerable amount of doubt as to who may claim to represent an international organization. Clarification is needed, and for this purpose it might be helpful to specify that the executive head of an international organization, in virtue of his functions and without having to produce powers, is considered as representing that organization for the purpose of performing all acts relating to the conclusion of a treaty, on the analogy of article 7, paragraph 2 (a), of the Vienna Convention on the Law of Treaties.

## Reservations and objections by international organizations

Among the more complex and difficult questions with regard to treaties involving international organizations is the formulation of reservations (and objections to reservations) by such organizations, especially in the case of a multilateral treaty open to participation by all States and by one or more international organizations on a footing similar to that of States. The Commission appears to be on the right track in proposing a rather more restrictive rule for reservations and objections by international organizations in these cases. It is to be hoped, however, that the Commission will be able to formulate some alternative wording to express this approach, in order to avoid possible controversy where the participation of an international organization is not essential to the object and purpose of the treaty. (Articles 19 bis and ter.)

## Treaties creating rights or obligations for "third States" members of an international organization

Article 36 bis deals with the effects of a treaty to which an international organization is a party with respect to third States members of that organization. The question is, what duty is owed by States in relation to treaty obligations falling upon international organizations of which they are members? States members of international organizations, even though they are "third States" in relation to treaties between the organization and other States, must observe the obligations and may exercise rights which arise for them under those treaties. If the rules of the organization provide that member States are bound by treaties concluded by it, or if all the parties concerned acknowledge that the treaty in question necessarily entails such effects, then the obligations and rights thereunder will devolve on member States of the organization. This is the core of article 36 bis.

Both logic and practice, at first glance, seem to argue in favour of the approach set out in this article. The question, however, is not free of complexity or controversy and will require further examination. Here again, developing practice could be instructive.

## Termination and suspension of treaties - the position of international organizations

In the case of article 45, the question is whether an international organization can be bound by conduct. It is here and in article 46 that the structural difference between States and international organizations in respect to treaty-making becomes particularly apparent. The solution adopted by the

Commission is to provide that an international organization may not invoke a ground for terminating, withdrawing from or suspending the operation of a treaty if, after becoming aware of the facts, "it must by reason of its conduct be considered as having renounced the right to invoke that ground", (i.e. for terminating, withdrawing from or suspending the operation of a treaty).

In other words, rather than suggesting that conduct be considered (as in the case of a State) evidence of acquiescence in the validity of the treaty, the Commission proposes that conduct, in the case of an international organization, be considered as renunciation by the organization of the right to invoke a ground for terminating, withdrawing from or suspending the operation of a treaty. Without going into semantics, the result would appear to amount to much the same thing, placing international organizations on a footing similar to that of States in so far as conduct is concerned.

In the case of article 46, the International Law Commission has opted for the test of a "manifest" violation of the rules of the organization, dispensing with the condition laid down for States, namely, that of a violation of a rule of fundamental importance.

Here the difficulty is simply how one judges whether there has been a "manifest" departure from the rules of the organization regarding competence to conclude treaties since, in this regard, there is no "normal practice" for international organizations and the organs or agents responsible for their external relations differ from one organization to the other. Admitting these problems, the solution adopted by the Commission in article 46 would appear to be a reasonable one.

In pursuing its work on the draft articles on treaties involving international organizations the Commission might consider the utility of adopting simpler solutions to some of its drafting problems. As one example, it does not seem to be essential to distinguish, in each and every instance, between treaties to which both States and international organizations are parties and those to which only international organizations are parties. As another illustration, articles 47, 54 and 57 are examples of unnecessarily complicated drafting, in which a rather simple principle becomes buried in the obscurities of defining the cases to which it applies. Subparagraph (b) of both articles 54 and 57 could simply refer to "consultation with the other contracting States or organizations, as the case may be", rather than employing the present tedious wording.

The Canadian authorities may have further comments to offer in due course on these draft articles.

CZECHOSLOVAKIA

[Original: English]

[8 April 1981]

The Czechoslovak Socialist Republic welcomes the progress made by the International Law Commission in the preparation of draft articles on treaties concluded between States and international organizations or between international organizations. In its work the Commission proceeded from the provisions of the Vienna Convention on the Law of Treaties. The Czechoslovak Socialist Republic

agreed with this method of work on the condition that the Commission will pay regard to the different scope of the subjectivity of States and international organizations. After the examination of the first 60 draft articles, it can be stated that the above-mentioned difference in the subjectivity has not always been sufficiently reflected. In spite of the fact that in the last decades international organizations grew not only in number but also in importance, it is not possible to overlook the fact that a sovereign State is the sole original subject of the international public law. The Czechoslovak Socialist Republic is therefore of the opinion that the International Law Commission should - on the second reading of the draft articles - proceed from this fact more consistently than it has done so far.

According to the opinion of the Czechoslovak Socialist Republic, the Commission should reconsider from this point of view first of all the regulation of reservations to international treaties.

For the Czechoslovak Socialist Republic draft article 36 bis, which envisages the possibility of the rise of international law obligations for member States of the organization from treaties concluded by that organization without requiring their separate acceptance by the States concerned, continues to be unacceptable. The regulation determined in article 36 bis is in contradiction with the spirit of the whole draft in all cases when it deals with the relation of third States to treaties, particularly with its article 34. Article 36 bis also contradicts the concept of section 4 of part III (particularly arts. 34-37) of the Vienna Convention on the Law of Treaties of 1969, from which the Commission should have proceeded in its work.

Article 36 bis, moreover, unnecessarily introduces yet another category of "third States", i.e. of those which are members of the organization which is a party to a treaty. The draft articles thus become more complicated and unclear.

The overwhelming majority of international organizations is based on relations of co-ordination and co-operation between member States and the organization and between the member States themselves. The Czechoslovak Socialist Republic therefore regards as completely inappropriate to generalize, in the codification under preparation, the practice of a single organization which - as far as the conclusion of treaties of certain categories is concerned - has towards its members a position of a superior authority.

For the same reasons the Czechoslovak Socialist Republic also proposes to delete from the draft all references to article 36 bis contained in it so far. They are, in particular, the references in the introduction of the first paragraphs of articles 35 and 36. While article 36 bis by itself is aimed seemingly only at the member States of the organization, the references mentioned in articles 35 and 36 inadmissibly limit the contractual freedom even of those contracting States which are not members of the organization.

A situation might arise when a contracting State wants to be bound by a specific treaty only in relation to the organization and not in relation to one or to all of its member States. In the above-mentioned case it would be necessary to explicitly exclude such effects in the treaty itself, which would be very complicated. If, however, the contracting parties intend to also bind directly by the treaty the member States of the organization (which should be a rare case in practice), it is more natural and easier to use the general regulation under articles 35 and 36.

[Original: French]

[14 April 1981]

1. The French Government has examined with the greatest interest the report of the International Law Commission on the question of treaties concluded between States and international organizations or between two or more international organizations. It thinks that the report is certain to prove a valuable contribution to the progressive elaboration of a customary international law applicable to international organizations.
2. The French Government reserves the right to submit, at a later stage, detailed comments on the draft articles as a whole. It believes that it should, however, make the following general comments now.
3. The French Government endorses the approach taken by the International Law Commission in seeking to make the draft articles a complete and autonomous whole. It thinks that such a method is preferable in the interest of clarity and for the sake of broad agreement on the norms envisaged.
4. This Government would not object if the draft generally followed the structure of the Vienna Convention on the Law of Treaties of 23 May 1969. It wishes to point out, however, that the reservations and objections which certain provisions of that Convention prompt it to formulate, and which it voiced at the Vienna Conference, hold true in respect of treaties concluded by international organizations.
5. As far as the form is concerned, the French Government thinks that the International Law Commission could make a useful attempt to simplify the wording of the draft articles, so as to make them more easily understood by any future users.
6. Finally, with respect to the follow-up to the work of the International Law Commission in this area, the French Government believes that consideration could be given to the adoption by the United Nations General Assembly of the articles not in the form of an international convention, but as recommended norms of reference.

Such an approach would obviate the difficulties of organizing a diplomatic conference, with regard to, inter alia, the role which international organizations would have in such a conference, and would make the progressive development of customary law possible.

Should a majority be in favour of elaborating a treaty, the French Government would, however, take the view that such a task should be entrusted to a diplomatic conference.

[Original: English]

[26 May 1981]

1. The German Democratic Republic considers the draft articles submitted by the United Nations International Law Commission on "treaties concluded between States and international organizations or between two or more international organizations" in their wording of July 1980 a sound basis for the second reading by the Commission. In this connection, the German Democratic Republic also would like to commend the outstanding merits of the Special Rapporteur, Professor Paul Reuter. His work was essential in creating the prerequisites for the constructive results reached in this area.

2. It has proved helpful in the preparation of the draft articles, to use the Vienna Convention on the Law of Treaties of 23 May 1969 as the basis and general frame. At the same time it was necessary, at all stages of work, to take account of the actually existing substantial differences between States and international organizations: only States have sovereignty. States are original subjects of international law, while international organizations only derive that quality from them. According to the generally recognized principles of international law, the capacity of States to conclude treaties is of a comprehensive nature while that of international organizations is established and limited by their constituent instruments and other rules created on the basis of the constituent instruments.

It is to be noted that in the provisions of the present draft articles these differences between States and international organizations have largely been taken into account. However, some draft articles should be reviewed, in particular from that angle.

3. Draft article 2 (1) (j) defines the "rules of the organization". This definition draws, apart from the constituent instruments, relevant decisions and resolutions, also on the established practice of the organization.

The German Democratic Republic proposes to further qualify the notion of practice and to conceive of the "rules of the organization" as the constituent instruments, relevant decisions and resolutions, and the organization's practice established in accordance with the constituent instruments.

Moreover, the German Democratic Republic regards it as necessary to delete in draft article 2 (1) (j) the words "in particular" because, otherwise, there would be too much room for the interpretation of the term "rules of the organization".

4. As regards draft article 27 (2) the German Democratic Republic believes that in the interest of protecting the sovereignty of member States of an international organization it should be made quite clear and unambiguous that the rules of an organization have precedence over all treaties to which the international organization is a party. While this position is unambiguously taken in the commentary of the International Law Commission (paragraph 5), c/ it does not appear

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c/ Yearbook ... 1977, vol. II (Part Two), p. 119, document A/32/10.

in the text of the draft article. Its present wording, which formulates the above-mentioned principle as an exception, contradicts itself. The question arises what cases draft article 27 (2) is expected to cover if the rule is to be that an organization cannot invoke its rules if the performance of the treaty is outside the scope of its functions and powers.

5. As regards draft article 45 (2) the German Democratic Republic proposes to delete the reference made therein to draft article 46. This precludes an international organization from confirming, expressly or by its conduct, the validity of a treaty it has concluded in violation of its rules regarding the competence to conclude treaties.

6. In the interest of giving greater protection to the organization and its member States, the German Democratic Republic considers it necessary that article 46 (3) should provide that an organization may in any case invoke the violation of its rules as a ground for invalidating its consent to be bound by a treaty if the rules violated were of fundamental importance. Such rules are, in the opinion of the German Democratic Republic, the constituent instruments and other relevant instruments of that kind. As regards other rules, the "manifestness" of a violation could be maintained as the criterion for the possibility of invoking a violation.

7. The German Democratic Republic regards its observations on draft articles 2 (1) (j), 27 (2), 45 (2) and 46 (3) as a necessary conclusion from the fact that international organizations only derive the quality of subjects of international law from States and that their capacity to conclude treaties is established and limited by the rules their member States agree upon in terms of international law. Unlawful action by an organization should not be allowed to entail the establishment of valid norms of international law. The German Democratic Republic would like to see an exception to this principle to be confined to the case referred to in paragraph 6 concerning article 46 (3). The resultant effects on the law of international treaties to which international organizations are parties and on the relevant treaty practice corroborate, in the opinion of the German Democratic Republic, the view held in the International Law Commission that international organizations cannot be regarded as having a status equal to that of States and cannot, consequently, be considered equal participants in international relations.

8. With regard to draft article 3, the German Democratic Republic wishes to voice doubts about the phrase "international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties]". International agreements can only be concluded between subjects of international law. Therefore, the term "entities" should be replaced by the previously used term "subjects of international law".

9. The German Democratic Republic considers it appropriate that when finalizing the provisions on reservations the possibility of a tacit acceptance of reservations by international organizations be precluded.

10. The German Democratic Republic proposes to delete draft article 36 bis. It deviates from the general rule set forth in draft article 34 under which obligations or rights for a third State or a third organization cannot be established without the consent of that State or that organization.

[Original: English]

[10 March 1981]

During the recent deliberations in the Sixth Committee of the General Assembly, the Government of the Federal Republic of Germany welcomed the completion of the draft articles by the International Law Commission on first reading and herewith submits the following comments on articles 1 to 60 of the draft.

## I. General

### 1. General approach

The weight carried by international organizations has grown, which in turn has repercussions on treaty law.

The Government of the Federal Republic of Germany supports the efforts to amplify the codification of international treaty law and to add to the existing codification which was successfully initiated with the Vienna Convention of 1969 on the Law of Treaties (henceforth "Vienna Convention") a comprehensive set of rules on the increasingly important sphere of treaties concluded by international organizations. There are various ways and methods of approaching this undertaking but the work of the International Law Commission is now so far advanced that the merits of alternative solutions (e.g., an additional protocol to the Vienna Convention or an adjunct supplement limited to textual divergencies) will no longer be discussed here. The approach chosen by the Commission, i.e. the preparation of a companion instrument which is to enter into effect independently as a sequel to the Vienna Convention, should now be pursued further. Hence, in continuing its work, the Commission should adhere to its approach of not revising but adopting the rules of the Vienna Convention by merely adapting its provisions to the requirements of the subject-matter under consideration.

### 2. Equal treatment

International organizations correspond to the need for international co-operation. Their development signifies progress towards an "international law of co-operation". International organizations are composed of sovereign States; it follows from their composition that when they conclude treaties with other States, endowed by their member States with powers to do so, they should receive the same treatment as States as far as this is feasible. This principle - equality of all contracting parties - ought to form the basis of the draft articles.

According to its own explanations, the International Law Commission has endeavoured to set international organizations and States on an equal footing when they conclude treaties with one another in so far as this appeared expedient in view of existing differences de facto or de jure between States and international organizations. Essentially, the régime of the Vienna Convention has been applied, directly or mutatis mutandis to international organizations for conclusion, implementation and termination of treaties. Strict adherence to this underlying principle is to be welcomed; deviations from the Vienna Convention régime should only exceptionally be made, if necessary.

### 3. Scope of draft articles

A question of great concern is how to decide which international organizations will be covered by the draft articles. The International Law Commission has wisely avoided redefining the term "international organization" more precisely for the purpose of the application of the draft articles. Instead, the Commission has adopted the definition of the Vienna Convention in article 2 (1) (i) which supplemented by articles 2 (1) (j) and 6 of the present draft articles, must and does suffice since international organizations vary to a great extent in legal form, structure, functions and powers, ranging from scarcely institutionalized, loosely organized associations to close-knit supranational entities such as the European Communities. It is therefore entirely appropriate, with regard to the capacity of an international organization, to conclude treaties, to refer to the relevant rules of the organization (cf. article 6 together with article 2 (1) (j) of the present draft articles).

### 4. Identity of substance between the Vienna Convention and the draft articles

The codified substantive law of treaties should be uniform, regardless of whether treaties are concluded by States or by international organizations. The draft articles, therefore, rightly follow the provisions of the Vienna Convention which is already in force. Uniformity is so important that it must take priority even over partial improvements to the former convention that could be made. Deviations from the Vienna Convention are justified only where they are unavoidable and dictated by the particular structure and functions of international organizations. It seems doubtful, and worthy of reconsideration during the second reading, whether all the deviations from the Vienna Convention deemed desirable by the International Law Commission correspond to the aforementioned requirements and are in fact absolutely necessary.

### 5. Differences in drafting between the Vienna Convention and the draft articles

The International Law Commission has adhered quite closely to the wording of the Vienna Convention which it has repeated throughout, except for the changes that have been deemed necessary in view of the participation of international organizations. No other deviations from the wording of the Vienna Convention have been made in order to maintain uniformity in the application of law. This is to be welcomed. However, the ILC draft of a new parallel convention has certain shortcomings where the requisite adaptations are too cumbersome and perfectionistic in drafting. The intelligibility and transparency of numerous articles suffer as a result (cf. articles 1, 3, 10 to 25 bis, 47 (2), 54, 57). The Commission should examine whether the extensive subdivision of rules and terms relating to the peculiarities of international organizations could not be avoided. This could partly be done by comprehensive definitions given once and for all in article 2, with shorter designations for later use throughout the subsequent articles of the draft. For example: the cumbersome enumeration "treaty between States and one or more international organizations or between international organizations and one or more States" (cf. article 19 bis (2) (3)) could be replaced by the abbreviation "treaty with participation of international organizations" (or "treaty of international organizations").

The selective introduction of new terms relating to the peculiarities of international organizations does not seem completely satisfactory either, e.g., "powers" in articles 2 (1) (c bis) and 7, "act of formal confirmation" in articles 2 (1) (b bis), 11, 14 and 16; see also article 15 ("express" -



"establish"). This new terminology does not rely on practice. Since the conventional terms of treaty law can be applied to international organizations as well, the innovations do not seem justified.

#### 6. Different treatment of States and of international organizations

In a limited number of articles, it is certainly necessary to distinguish between the legal position of international organizations and that of States under international law, as the International Law Commission has done in article 6 (capacity to conclude treaties). It is also appropriate, and in some cases even necessary in view of the wide variety of international organizations to refer to their rules and established practice, as has been done at several points throughout the draft.

In some cases (cf. articles 7, 27 (2)), the International Law Commission has envisaged analogous legal treatment for international organizations and States in spite of de facto differences. This is to be welcomed; de facto divergencies in the practice of States and international organizations do not always have to result in different legal consequences.

Equal treatment of international organizations and States ought to be foreseen by the International Law Commission where there is need for complete equality, in particular where unequal treatment would amount to discrimination against international organizations.

#### 7. Unresolved questions

It seems wise that in the ILC draft a number of questions have not been dealt with, since the present attempt at codification can hardly embrace the whole subject-matter which still is in the process of evolution. The complex of questions that have not been dealt with or are still partially unresolved includes, in particular, the relationship between international organizations as parties to a treaty and member States which may not be, or even may be, party to the same treaty. It is true that problems arising in this field are situated rather in the internal structure of the international organization. It is also true that treaty law can in principle take no more account of the internal structure of international organizations than of the national (constitutional) law of States (cf. articles 27 and 46 of the Vienna Convention). Direct reference to the internal composition of international organizations is generally out of the question. However, the juxtaposition of States in their dual position as parties or non-parties to a treaty and, simultaneously, members of a contracting international organization does, with regard to conclusion and performance of treaties, bring about situations which go beyond the internal structure of international organizations. This type of situation has been addressed by the International Law Commission in section 4 of part III solely from the - restricted - viewpoint of the effects that treaties have with respect to third parties. Member States of international organizations can, however, not properly be considered as "third" States in relation to the organization. Adhering too closely to the Vienna Convention system could mean not paying sufficient attention to the specific relationship between international organizations and their member States. The peculiar situation resulting from the close interrelation between an international organization and its member States plays a role not only under the heading "obligations and rights of third States", but is of significance also for the subject-matter covered by the reservation provisions and by articles 18, 26, 29 and 60 to 62 of the draft. These problems

must be recognized and taken into consideration so that the provisions of the new convention are generally acceptable and do not inhibit or hamper further developments of international law.

The International Law Commission has left open the essential question, to be settled in the final clauses, as to how treaty-making international organizations will participate in the conclusion of the convention, if the present draft evolves into a full-fledged convention. If one starts from the principle of equality between States and international organizations under treaty law, there is no valid reason why international organizations should be accorded different treatment in this matter. A convention on treaty law in respect of international organizations will be a master convention of all conventions in which international organizations participate. Consequently, those international organizations should be entitled to take part in a plenipotentiary conference on the elaboration of the new convention parallel to the Vienna Convention on the basis of the ILC draft articles on a par with negotiating States as well as to sign and ratify the master convention.

## II. Comments on individual provisions of the draft

### Article 1

It does not appear necessary to subdivide treaties into categories (a) and (b) as this subdivision makes subsequent articles cumbersome (cf. articles 2 (1) (a), 10, 13, 17, 24).

### Article 2 (1)

The new definitions in (b bis), (b ter) and (c bis) seem to be superfluous (for reasons, see comments in section I.5 above on articles 11, 14 and 7).

### Article 7

The term "powers" to be used specifically in connection with international organizations (in German there is the same translation for "full powers" and "powers" alike) should be omitted since it does not appear necessary to introduce terminological innovations of this kind.

In paragraph 4, the verb "communicate" seems not to be quite apposite if a representative of an international organization signs a treaty with the effect that the organization is definitively bound by the treaty; he is thereby not communicating a declaration but making the declaration itself. It should be examined whether "communicating" could be replaced by "declaring".

Paragraphs 3 and 4 of this article could be combined.

### Article 9

Paragraph 2 can be supported on the understanding that it is not intended to limit unnecessarily the powers of international organizations, in particular their faculty to participate in international conferences.

## Article 11

Admittedly, the term "ratification" is not really suited to international organizations (cf. article 16 as well; "instrument of formal confirmation"); it is suggested to overcome this difficulty by inserting the term "act of formal confirmation" into the otherwise unchanged transposition of the Vienna Convention to read as follows:

"The consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations or between international organizations is established by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or any other act of formal confirmation, accession or by any other means if so agreed".

As it is, the peculiarities of international organizations are covered anyway by the phrase "by any other means, if so agreed".

## Articles on reservations

The International Law Commission has envisaged that in principle, the liberal reservations provisions of the Vienna Convention shall cover international organizations too, as contracting parties with equal rights. This rule is to be welcomed. However, the exceptions from this rule are important and far-reaching. The deviations from the Vienna Convention in articles 19 bis (2) and 19 ter (3) have been drafted in involved and rather vague terms that might lend themselves to difficulties of interpretation. In particular, the use of the term "object and purpose" in articles 19 bis (2) and 19 ter (3) (b) does not seem felicitous since this term is employed with not quite the same meaning elsewhere in the Vienna Convention and the draft (cf. articles 18 and 19 (c)) in order to describe the actual essence of a treaty. It is suggested, by the way, that the formula "object and purpose" in article 19 bis (3) (c) might in itself suffice to adequately cover the cases envisaged in article 19 bis (2).

Moreover, as a question of principle it seems open to doubt whether special provisions for international organizations limiting their options to enter reservations and to object to reservations, should be envisaged at all. In view of the almost complete lack of precedents, it is suggested that the adoption of the Vienna Convention provisions would produce equally adequate results, thereby drastically shortening the draft. The necessity for equal treatment between international organizations and States, as stressed throughout the present observations, points in this direction.

## Articles 24 and 24 bis (as well as 25 and 25 bis)

It does not seem necessary to divide the subject-matter into two articles (the same applies to article 25 and 25 bis); combining the articles would improve the draft.

## Article 27 (2):

Equal treatment of international organizations and States must mean that international organizations are in principle no more entitled than States to invoke their internal rules to justify the failure to perform a treaty. This is in keeping with the organizations' responsibility for their actions when concluding and implementing treaties (article 26).

The necessary exceptions regarding the competence to conclude treaties are dealt with satisfactorily in article 46 for international organizations as well.

Article 27 (2) contains another special exception for certain types of treaty: "unless performance of the treaty ... is subject to the exercise of the functions and powers of the organization"; this provision appears conceptually sound and should be retained.

#### Treaties and third States (section 4 of part III of the draft)

The provisions of this section must deal, inter alia, with the relationship between international organizations and their member States, which should not be called "third States" in this context but, as proposed by the Special Rapporteur, "non-parties". Some kind of provision, as envisaged in article 36 bis, is indispensable if the rules of advanced international organizations bind the organizations' member States by the provisions of the treaties concluded by the organizations (cf. article 228 of the EEC Treaty). The rule formulated in article 36 bis serves to safeguard the rights of third States who enter into treaty relations with an international organization whose member States are internally bound to contribute to the fulfilment of the treaty. The Government of the Federal Republic of Germany has on former occasions, both verbally and in written form, expressed the view that article 36 bis is indispensable. It endorses the written comments d/ of the European Economic Community of part III, section 4, of the draft articles and hopes that the International Law Commission will, during the second reading, definitively arrive at a solution which does justice to the requirements of third parties (in the true sense) to treaties concluded with advanced international organizations as well as to their member States.

HUNGARY

[Original: English]

[20 March 1981]

The Government of the Hungarian People's Republic has, on several occasions, expressed its appreciation to the United Nations and its International Law Commission for the highly important work of codification undertaken by them in pursuance of Article 13 of the United Nations Charter. A significant station in this undertaking is the initiative to work out draft articles on treaties concluded between States and international organizations or between international organizations. The regulation of this area combines the requirements of topicality, practicality and utility in view of the growing role which international organizations do and can play in the shaping and development of international relations.

The Hungarian Government has followed with interest the work done by the International Law Commission and has studied with attention the draft articles elaborated thus far. It agrees with the principles of codification applied and, on

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d/ See sect. III of the present annex, below.

the whole, endorses the methods followed in the elaboration of the draft articles, namely, it finds it appropriate and practicable for the Commission to have adopted the structure and principal solutions of the 1969 Vienna Convention on the Law of Treaties in its formulation of the draft articles.

This approach has of necessity raised the difficulties being encountered by the codification effort with respect partly to the difference existing between States and international organizations in their condition as subjects of international law and in their legal capacity, and partly to the relative paucity and oftentimes contradictory nature of practical experience available for legal generalization in the field of treaties concluded by international organizations. The International Law Commission has made great and successful efforts to overcome such difficulties, although the formulation of some of the draft articles, revealing as it does a high degree of complexity and compromise, points to the continuing existence of unresolved or not fully resolved problems and hence to the need for further improvement in wording.

In the view of the Hungarian Government, full application of the principle of the sovereignty of States requires that the International Law Commission be still more explicit and consequent in distinguishing between States and international organizations, with due regard for the fact that the condition of international organizations as subjects of international law, and hence their legal capacity, are of a limited scope and of a derivative nature.

Such distinction is necessary especially in the case of articles 19 to 23, which fail to give a clear definition of the different legal status of States and international organizations concerning reservations and objections thereto.

The provisions of draft articles 20 and 20 bis spell out the possibility for tacit acceptance of reservations by international organizations. The Hungarian Government believes it would be more logical and appropriate to make acceptance by international organizations of reservations subject exclusively to express declaration to that effect.

The Hungarian Government sees no ground for the solution adopted in paragraph 2 of article 45. Proceeding from the limited nature of the condition of international organizations as subjects of international law, the International Law Commission has, in articles 27 and 46, devised a suitable solution for the problem relating to the observance of treaties and to invalidity. However, the said limitative principle is broken by paragraph 2 of article 45, which allows subsequent recognition by international organizations of the validity of legal acts that entail invalidity under article 46. Therefore, the Hungarian Government suggests that the reference to article 46 should be omitted from paragraph 2 of article 45.

Finally, mention is deserved by draft article 36 bis, the provisions of which are known to have been objected to by representatives of several States, both in the International Law Commission and in the Sixth Committee of the General Assembly. In the judgement of the Hungarian Government, the provisions of this article are not consistent with the generally accepted rule of international law that a treaty cannot be constitutive of rights and obligations with respect to third States except with the consent thereof. This rule is otherwise stated in draft articles 34 and 35.

The Hungarian Government believes it ill-advised for the problems involved in the conclusion of treaties by such international organizations as are affected by article 36 bis to be regulated by the draft articles now in the process of elaboration.

#### MADAGASCAR

[Original: French]

[22 August 1980]

(1) The contents of the draft articles are the outcome of many years of study and of exchanges of views between States, and the statements made by the Malagasy delegation during the discussions held on the subject which have contributed in no small measure to their elaboration. The Malagasy delegation felt, in any case, that the text drawn up by the International Law Commission was, on the whole, clear and specific enough to serve as a valid basis for discussion and that the main points of the rules that should govern future treaties had been duly taken into account.

In short, conscientious work has been done on the draft articles by highly qualified international legal specialists and diplomats, on the lines contemplated in the Charter of the United Nations for the codification of international law.

(2) As regards the actual substance of the draft articles, it should be noted that while articles 45 and 46 on the invalidity of treaties gave rise to some disagreement, the principles accepted are identical whether the grounds for invalidity are invoked by States or by international organizations. Inclusion of the latter entities is in any case a new subject-matter since the conclusion of the Vienna Convention of 23 May 1961 which had covered only treaties between States. The term must itself be taken in a very broad sense, and it would be difficult in practice, if not impossible, to confine the scope of the future convention exclusively to a few international organizations, as proposed by some Governments.

As regards articles 52 and 53 dealing with coercion, the threat or use of force and the conclusion of treaties conflicting with a peremptory norm of general international law, and particularly the latter, the proposed wording could stand, particularly since an actual definition of "peremptory norms" has been included in the article dealing with them.

The thinking behind these articles is certainly in the jurisprudential tradition of the Vienna Convention.

#### ROMANIA

[Original: French]

[2 June 1981]

I. Romania's competent bodies have followed with great interest the process of codification of legal norms relating to treaties concluded between States and international organizations or between the latter. Following the codification - through the Vienna Convention of 14 March 1975 - of rules on the representation of

States in their relations with international organizations of a universal character, the draft articles which the International Law Commission has prepared in the field of treaties which reflect the ever increasing role of the international organizations in our day, constitutes a major new achievement, an outstanding result of the efforts made within the United Nations to develop norms designed to promote in the conduct of States observance of the lofty principles enshrined in the Charter and consequently to help, by making more effective the contribution of the international organizations, to translate into reality the Purposes of the United Nations inscribed in the Charter, in particular to maintain international peace and security and to develop friendly relations and fruitful co-operation among all nations.

II. To serve their legal and political purpose, rules designed to govern the future contractual relations between States and international organizations or between two or more international organizations must, in our opinion, meet the following requirements, which we consider essential for the codification of such rules:

1. The new set of norms must be in harmony with the principles forming the basis of the law of treaties, as reflected in the 1969 Vienna Convention on the Law of Treaties. There must be complete concordance between the norms to be codified and the fundamental principles of international law as well as between those norms and the principles peculiar to the field of international treaties (the principle of free consent, the principle of good faith, and the rule of pacta sunt servanda).

2. To ensure that the instrument in which the codified norms are to be incorporated can secure the widest possible acceptance by States and international organizations, the codification process as a whole must rely on existing international practice, seeking out the highest common denominator.

3. The norms which are to govern treaties concluded between States and international organizations must reflect as faithfully as possible the specific characteristics of the factors involved; in particular, they must take into account the essential de facto and de jure differences existing between States and international organizations as subjects of international law and international relations.

In this connection, Romania's competent authorities consider that it is essential, in preparing the new body of rules, for particular account to be taken (a) of the functional nature of the international organizations as compared to the full legal status of States, sovereign entities, which continue to be the fundamental elements of the international community; (b) of the great diversity of the international organizations; (c) of the decisive fact that it is the States which create international organizations by endowing them with certain rights and duties, which constitute their legal capacity, limited to their specific field of activity; (d) of the principle that the competences of the international organizations are laid down in their constitutive instruments, the interpretation of which is restrictive (principle of specificity); (e) of the fact that the international organizations, despite their position as entities distinct from the States that founded them, cannot be entirely dissociated from their member States; their interests are not different from or alien to the interests of the member States and their desires must be in accord with those of all their member States; (f) of the essential role of the international organizations - that of offering institutional frameworks for multilateral inter-State co-operation which, if it is to contribute

effectively to the achievement of the Purposes of the United Nations Charter, must promote, in the fields entrusted to them, the interests of all the member States and hence must be guided in their activities by the precepts of consensus.

III. An examination of the draft articles on treaties concluded between States and international organizations or between two or more international organizations shows clearly that the International Law Commission has very largely observed the imperatives of proper codification of the subject-matter. By using the procedure of adapting the rules codified by the 1969 Vienna Convention on the Law of Treaties to a related field, the ILC chose what is, in principle, a judicious method. Romania's competent bodies share the idea that the new rules should be embodied in an instrument independent of the above-mentioned Vienna Convention. In their opinion, the preparation of new rules cannot be reduced to the dimension of an "application" of the Vienna Convention. In that context, the Romanian side considers that the new codification instrument could take the form of an international convention provided that the ILC is able to formulate norms that could gain the widest acceptance by States.

IV. In the light of the above considerations and, while reserving the right to express their views at a later stage concerning the final version of the draft articles, the competent Romanian bodies wish at this juncture to make the following comments and observations on certain provisions of the draft.

1. Ad article 2, paragraph 1 (i), concerning the meaning of the term "international organization". The proposed wording reproduces exactly the corresponding provision of article 2, paragraph 1 (i), of the 1969 Vienna Convention on the Law of Treaties. In the opinion of Romania's competent bodies, such an abstract and general definition does not provide an adequate basis for determining the specific legal personality of international organizations, a cardinal question on whose solution will depend the development of other legal concepts and constructions of the system to be established by the new codifying instrument. The definition of international organization proposed during the work of the ILC on the question of the representation of States in their relations with the international organizations (see Yearbook of the International Law Commission, 1968, vol. II, page 124) would perhaps provide a more secure point of departure.

2. Ad article 2, paragraph 1 (j). In the opinion of the Romanian side, the definition of the term "rules of the organization" is too broad and goes beyond certain limits of the general practice in relations between States and the international organizations, which show that the internal rules of the organizations are established in their constitutions, decisions or resolutions accepted by all their member States. Furthermore, the words "established practice of the organization" are rather vague and can give rise to great difficulties. Lastly, in view of the frequent references in the draft to the "relevant rules of the organization", we consider that these concepts should be thoroughly examined. Romania's competent bodies believe that, for the purposes of the draft, the "rules of the organization" should designate those which are laid down in its constitutive instrument or in other instruments of a treaty or other nature accepted by all the member States.

3. Ad article 6. The capacity of international organizations to conclude treaties with States or with other international organizations would be governed, under draft article 6, to the "relevant rules" of the organizations concerned. In that connection, we would point out, first, that draft article 2 does not contain a definition of the term "relevant rules" of the organization. Secondly, if this



concept is interpreted in the light of the definition in article 2, paragraph 1 (j), which we have just commented on in paragraph 2 above, it is difficult to accept the conclusion reached, namely that the "relevant rules" in question in article 6 (and in other draft articles) could also be determined by the "established practice" of the organization.

In our opinion, the absence of elements, in article 2, paragraph 1 (i), determining the character of an international organization, its capacity to conclude international treaties should be that laid down in its constitutive instrument or by other instruments of a treaty or other nature that have been accepted by all its member States and that have established the competences of the organization in its specific field of activity.

4. Ad article 9, paragraph 2, concerning adoption of the text of a treaty. The proposed provision is derived from article 9, paragraph 2, of the Vienna Convention on the Law of Treaties. However, in the case of the adoption of the text of a treaty in an international conference with the participation of international organizations, the application of the two thirds majority rule might lead to situations in which one and the same State would find itself in contradictory positions: on the one hand, as a State participating nomine proprio, and, on the other, as a member State participating through the intermediary of the international organization. In the light of these considerations, it seems necessary to re-examine article 9, paragraph 2, so as always to ensure concordance between the position of the organization and that of its member States.

5. Ad article 19 bis, paragraph 2. One of the first questions that arise with regard to the above paragraph is: to what extent are its provisions based on existing practice? Secondly, the hypothesis mentioned in the draft ("When the participation of an international organization is essential to the object and purpose of a treaty") can give rise to very serious disputes. Thirdly, we would point out that situations of the kind envisaged in the paragraph constitute exceptions which are in the domain of special regulation by the treaty in question. It therefore seems that inasmuch as such procedures do not as yet appear to have been confirmed by practice, it would be preferable to abandon them.

6. Ad article 19 ter, paragraph 3. The observations made in the preceding paragraph are also valid for article 19 ter, paragraph 3. In addition, there is the question of how it will be determined that the participation of the organization in the treaty "is not essential to the object and purpose of the treaty".

We consider that, given existing practice, the aspects dealt with in the paragraph should also be reserved for special regulation by the treaty in question. We further believe that in the case mentioned in paragraph 3 (a), the possibility for an organization to object to a reservation made by a State should be expressly recognized by the treaty, since such a possibility cannot be derived, by way of interpretation, from "the tasks assigned to the international organization by the treaty".

7. Ad article 36 bis. This article raises a whole series of questions both from the standpoint of principle and from that of practice. Under the relevant principles, a State cannot be held to be bound by an international treaty unless it has freely manifested its consent (principle of free consent referred to in the preamble to the 1969 Vienna Convention on the Law of Treaties).

Under those principles, States members of an international organization can be bound by a treaty concluded by it only to the extent that the respective States had agreed to the conclusion of the treaty. The "relevant rules of the organization applicable at the moment of the conclusion of the treaty" (article 36 bis (a)) could produce effects only to the extent that those "rules" were not contrary to the wishes of the member States or of some of them.

It is not sufficiently clear whether the international practice alluded to during the work of codification has served to elucidate the complex problems that would result from the machinery envisaged in article 36 bis, not only as regards relations between the Organization and its foreign partners but also as regards all the relations between member States and non-member States. It therefore seems necessary to examine whether, at the current stage, we find international practice really sufficiently crystallized to make it possible to formulate rules of international law. As things stand at present, the special competences entrusted to an international organization by its member States in any case derive from constitutive instruments and as they are not general, they should not take the form of a general rule of international law.

V. Romania's competent bodies consider that the draft articles require further drafting improvements. It will be necessary, in particular, to avoid repetitions such as those which appear in article 7, paragraph 1, and articles 3, 11, 12, 13, and 14, paragraphs 1 and 2, etc., which only overburden the draft and make the wording less concise.

UKRAINIAN SOVIET SOCIALIST REPUBLIC .

[Original: Russian]

[25 February 1981]

In the contemporary situation increasing urgency attaches to the improvement of the existing means of regulation in the field of international law and the development of new ones. An important factor in this process is the new stage reached in the codification of the law of treaties, namely, the preparation of draft articles on treaties concluded between States and international organizations or between international organizations. In principle, therefore, the Ukrainian SSR takes a positive view of the work done by the International Law Commission in this area, and considers that draft articles 1 to 60, adopted by the Commission in preliminary form, provide an acceptable basis for the drafting of an international convention on the subject in that, in general, they properly reflect the practice which has developed with regard to contractual relations involving international organizations.

Some of the provisions of the draft articles, however, are open to objection and, in fact, require clarification, amendment or deletion.

This is especially the case with the wording of articles 20 and 20 bis, which permit the tacit acceptance by international organizations of reservations without their express acceptance of a particular reservation entered by another party to the treaty concerned. Since, unlike States, international organizations have limited status as subjects of international law, it would be wrong if the draft articles merely reiterated the relevant provisions of the Vienna Convention of 1969. Such an approach cannot be substantiated by reference to practice or still less, be justified by considerations of a theoretical nature.

The entering of a reservation on the acceptance of or objection to reservations by an international organization, obviously requires a decision by the competent body of that organization and clear and unequivocal action by that body.

The Ukrainian SSR considers that article 36 bis, which refers to treaties concluded between organizations of a supranational character, should be deleted from the draft articles under consideration. A treaty to which an international organization is a party creates rights and obligations only for the international organization as such, and does not have legal implications for the member States of that organization.

Since an international organization cannot conclude treaties which conflict with its basic instrument, that is, its statute, the wording of article 45 of the draft articles should be amended accordingly.

UNION OF SOVIET SOCIALIST REPUBLICS

[Original: Russian]

[5 February 1981]

The draft articles on treaties concluded between States and international organizations or between international organizations formulated by the International Law Commission on the whole accurately reflect established practice as regards contractual relations involving international organizations and could serve as a good basis for the drafting of an international convention on the subject. Articles 1 to 60 of the draft adopted on a preliminary basis by the Commission at its thirty-first session seem to be satisfactory in principle.

At the same time, a number of provisions in the draft give rise to objections and therefore need to be improved.

Generally speaking the draft is rightly based on the premise that the fact that an international organization is a party to a treaty creates rights and obligations, flowing from the treaty, for that international organization alone and does not create such rights and obligations for the States members of that organization. In the light of the foregoing, article 36 bis dealing with treaties concluded by supranational organizations, should be deleted from the draft since it goes beyond the scope of the questions covered by the draft.

The provisions contained in articles 20 and 20 bis give cause for misgivings. These provisions allow the tacit acceptance by international organizations of reservations without their clearly expressed consent to a particular reservation made by a party to a treaty to which the organization is a party. It would seem that any actions by an international organization relating to a treaty to which it is a party must be clearly and unequivocally reflected in the actions of its competent body.

The work on article 45 of the draft clearly needs to be continued since an international organization surely cannot conclude treaties which conflict with the relevant rules of that organization, for example, its constituent act.

[Original: English]

[July 1981]

1. The United Kingdom is particularly glad to be able to comment on articles 1-60 of the draft articles with the benefit of having had sight of the draft articles as a whole, as adopted by the Commission on first reading. The difficulties of commenting on draft articles piecemeal are well known, and the United Kingdom has drawn attention to them in debates in the Sixth Committee of the General Assembly. The value of having an overview of the entire draft is particularly great in a case, such as the present, in which questions of methodology remain to be settled. At an early stage of its consideration of the present topic, the Commission decided to proceed by way of careful examination, article by article, of the provisions of the Vienna Convention on the Law of Treaties (hereinafter referred to as "the Vienna Convention"). This seemed to the Commission at the time to be the most practical working method and has received the general approval of Member States participating in the discussions in the Sixth Committee. Moreover, the process of meticulous analysis of the provisions of the Vienna Convention in order to discover, in the context of specific draft provisions, how the solutions they embody could and should be applied to similar problems arising in the case of treaties concluded by international organizations has, at one and the same time, been a valuable intellectual exercise for the Commission and has proved most useful to the Member States in providing a clear picture of which provisions of the Vienna Convention can be applied to international organizations as they stand; which provisions, on the other hand, are applicable with only the necessary changes in nomenclature; and, finally, which provisions, in the view of the Commission, call for the application of a somewhat different rule to international organizations.

2. The United Kingdom is convinced that the Commission, having completed the first reading of the draft articles in this way, should not regard this working framework as immutable and should not accordingly limit itself on second reading to reviewing draft articles 1-60 within the existing framework. Even though the Commission will not have been in possession at its thirty-third session of comments and observations on draft articles 61 et seq, the United Kingdom nevertheless believes that it is incumbent on the Commission in the course of the second reading to review ab initio the organization and structure of its draft articles on this topic. In emphasizing this point, which is already implicit in the Commission's own "General Remarks" in the report for 1974, the United Kingdom has two principal points in mind.

Firstly, while not wishing to reopen the question of the exclusion from the scope of the Vienna Convention of treaties to which international organizations are parties, the United Kingdom nevertheless observes that the present topic is by way of being a supplement, in a relatively restricted area, to the rules codified in the Vienna Convention. This being so, it would clearly be unnecessary, as well as undesirable, for any instrument which might be adopted as the result of the present study to rival in size and complexity the Vienna Convention itself, still less to exceed the Vienna Convention both in size and in complexity.

Secondly, the United Kingdom would be strongly opposed to any proceeding in the present context which might damage the status or authority of the Vienna Convention itself or undermine the effectiveness of any of its

provisions; this would be doubly regrettable now that the Vienna Convention has recently entered into force and is steadily gaining in authority. The Commission has shown itself, in its reports, to be fully sensitive to the delicacy of the interrelationships between the Vienna Convention and any new legal instrument that might emerge from the present draft, and conscious of the dangers attendant on straying beyond the limits of such variations or modifications of the provisions contained in the Vienna Convention as may be strictly necessary to take account of the special features of international organizations. In principle, the United Kingdom approves the decision taken by the Commission at the outset of its drafting work in 1974 rigorously to eschew any thought of modifications or refinements that might also be applicable to treaties between States. But, in the opinion of the United Kingdom, a similar danger (although perhaps not so extensive) resides in the introduction of any variations in wording as between the two texts, however minor, and however laudable the reason might be for suggesting formulations slightly different from those contained in the Vienna Convention. In particular, the Commission should resist any temptation to revise or redraft articles adopted by the Vienna Conference even where the proposal in question emerged at the Conference itself and was not, accordingly, based in detail upon careful preparatory work by the Commission. Nevertheless, there remains a serious question as to whether the whole approach of reproducing the Vienna Convention, article by article, subject to modifications to take account of the particular subject matter, might not make it difficult, if not impossible, to avoid unintended side effects on the integrity of the Vienna Convention itself. The Commission will only be able to give a final answer to this question once it is in a position to look at the draft as a whole at the close of the second reading.

3. The points mentioned above may be illustrated briefly by examples from the present text (even though there is not necessarily any significant point of substance involved). The first danger is well illustrated by articles 19, 19 bis and 19 ter, and articles 20 and 20 bis, corresponding to articles 19 and 20 of the Vienna Convention. The concise terms of article 19 of the Vienna Convention receive their counterpart in the present text in two substantial articles in which the criteria appearing in article 19 are reproduced in three separate places. Similarly, article 20 of the Vienna Convention finds its reflection in three lengthy articles: in particular, the scheme followed requires article 20 bis (3) (b) to distinguish between no less than four different cases even in the process of applying an identical rule to all four. It must be said that, from the viewpoint of legal technique, such a result appears prima facie both inelegant and inefficient.

4. The United Kingdom is fully conscious of the reasons why the Commission has proceeded hitherto by way of placing into separate categories treaties concluded between States and one or more international organizations and treaties concluded between international organizations only. This distinction has clearly been valuable to the Commission as an analytical tool. That said, it remains doubtful whether the distinction should be elevated into a point of cardinal principle. On the one hand, it is clear that the maintenance of the fundamental distinction leads to a considerable overloading of the draft articles, despite the fact that there appear to be, amongst draft articles 1-60, relatively few cases in which the Commission has in fact felt it necessary to recommend a difference of treatment according to whether the treaty envisages both States and international organizations amongst its parties or not. On the other hand, the United Kingdom has noted, with some concern, the remarks made by the Special Rapporteur (and adopted by the Commission in its commentaries to certain draft articles) about

consensuality as the basis for treaty relations, inasmuch as these have been cast in a form which implies that true consensuality can only exist between parties of exactly equal status. Without wishing in any way to pronounce upon the question how the status in international law of international organizations differs from that of States, the United Kingdom wishes to point out that consensuality is the fundamental basis underlying the whole of the international law of treaties; it provides the basis for the fundamental norm pacta sunt servanda, and thus ultimately for all the principles and rules contained in the Vienna Convention. In this sense, consensuality must continue to be the essential foundation of any new instrument regulating treaties to which international organizations are parties. It would be unacceptable in principle, and carry far-reaching implications, for this basic principle of consensuality to be regarded as in some sense inoperative by virtue of the different character of some treaty parties as compared with others. The United Kingdom wishes to repeat in this context what it has already had occasion to point out in the Sixth Committee, namely that, whatever the difference between States and international organizations qua parties to treaties, these differences relate principally to the capacity to enter into treaty relations and the incidents associated therewith; once, however, two entities having international personality are validly in treaty relations with one another, the presumption must be that their rights as contracting partners are equal, and this presumption must stand unless there are clear reasons, in a particular set of circumstances, for drawing distinctions based upon the character or status of the parties.

5. In making the above general comments, the United Kingdom is conscious of the difficulties faced by the Commission in the present state of development of international relations. It might even be said that the present state of international practice as regards treaties concluded by international organizations does not easily admit of codification, given the great increase in the number of international organizations in recent years and the great variety between them, both as to the competence they exercise, as well as in their internal relations with member States and their external relations with third States. This is not, of course, an argument against the Commission's present endeavours, but it serves nevertheless as a further reminder that the element of progressive development involved in the Commission's studies must genuinely be progressive; no purpose would be served by the production of proposals which were ultimately rejected for fear that they might have the effect of stultifying developments which are currently taking place in international practice.

6. Against that background, the United Kingdom wishes to comment in greater detail on draft articles 2.1 (j), 19-23 bis, 27, 36 bis, 37 and 46.

#### Article 2.1 (j)

7. This provision serves to define the expression "rules of the organization". This expression is a key term in the draft, inasmuch as the operation of articles 6, 27 and 46 and of other significant provisions in the draft turns on it. The United Kingdom supports the intention of the Commission to provide a definition, and is content with the terms of the definition put forward by the Commission. Without a definition at all, considerable ambiguity might have been engendered as to what elements should be regarded as constituting part of the "rules" of the organization for the purposes of articles such as those referred to above. It is self-evident that in such crucial matters ambiguity should be avoided so far as possible. The particular definition put forward by the Commission follows precedent and is sufficiently supple to allow for the developing practice of international

organizations, while avoiding trespassing on the internal arrangements of particular international organizations, which must remain a matter for the member States and for the competent organs of the organization in question.

#### Articles 19-23 bis

8. This set of nine articles regulates the formulation of reservations, their acceptance, objections to reservations, their legal effect, and related questions of procedure. It would be unfortunate if the extensive treatment given to this topic gave the impression that it constitutes a major element in the present area of study. Whereas it was certainly true that, in the period leading up to the Vienna Conference, the legal régime of reservations to multilateral conventions was a topic of major controversy in international law, the same can hardly be said of reservations in the context of treaty-making by international organizations. Indeed, inasmuch as it is not clear that cases of difficulty have in fact arisen in this context, it would be unfortunate if the Commission and, subsequently, the international community as a whole, devoted disproportionate attention to this question, ultimately adopting new rules of such additional complexity as to lay the ground for greater difficulties in the future than there have been in the past.

9. As regards the right to formulate reservations, the United Kingdom well understands why the Commission approached this matter with caution. The Commission was necessarily conscious of the fact that the earlier controversy on the matter centred in part on an alleged right of States to formulate reservations at will, which was claimed to be an aspect of State sovereignty; inevitably, looked at in this perspective, the case of international organizations would appear significantly different from that of States. Nevertheless, the modern law on the question, as codified in articles 19 and 20 of the Vienna Convention, does not incorporate a generalized right to enter into treaty obligations subject to reservations of the State's choosing; on the contrary, the general tenor of the Vienna régime is strongly to encourage contracting parties to multilateral treaties to regulate the matter of reservations by express provision in the treaty. Moreover, in modern treaty practice an express regulation of the question of reservations is becoming increasingly common. It would be highly desirable to take account of this fact in any project which, like the Commission's draft articles, is designed for the future (cf. draft article 4). Accordingly, while the United Kingdom does not specifically object to the approach adopted in articles 19 and 19 bis, the United Kingdom remains to be persuaded that it is objectively necessary to apply separate rules to the rights of States, on the one hand, and international organizations on the other, to formulate reservations. In particular, the United Kingdom has doubts about the concept, enunciated in paragraph 2 of article 19 bis, that the participation of an international organization may be "essential to the object and purpose" of a treaty. The concept that a reservation may be "incompatible with the object and purpose" of the treaty is well known in international law, having been enunciated by the International Court of Justice in its Advisory Opinion on Reservations to the Genocide Convention; nevertheless it cannot be said that, in the absence of a generalized system for solving disputed questions connected with reservations to multilateral conventions, the international community has yet arrived at sufficiently well developed criteria for deciding the questions of compatibility with the object and purpose of the treaty. This being so, it would seem unwise to further burden treaty law by the introduction of a new, and subtly different concept of the sort put forward in the Commission's draft. It seems to the United Kingdom that, in the generality of the cases foreseen by the Commission in its commentary on article 19 bis, a reservation formulated by the international organization would in any event fail to satisfy the established

test of compatibility with the object and purpose of the treaty. Conversely, it is by no means difficult to think of circumstances in which the participation of an international organization might be essential to the efficacy of a treaty, but only in very much the same way as the participation of one or more contracting States might also be necessary for the treaty to have its intended effect. In such circumstances, the criterion of the participation of the organization as essential to the object and purpose of the treaty would be too ambiguous and uncertain in its operation. Moreover, some account has to be taken in this connection of the possibility that an international organization may, in terms of its constituent instrument and other rules, be exercising some of the competences of the member States which have been transferred to it. It is far from clear that, in such circumstances, the system proposed by the Commission would preserve the necessary balance as between the parties to the treaty.

10. The major concern of the United Kingdom relates, however, not to the right to formulate reservations, but to those of the Commission's draft articles dealing with the acceptance of, and objection to, reservations. In this context, draft articles 20 and 20 bis are broadly equivalent to article 20 of the Vienna Convention. Draft article 19 ter, entitled "Objection to reservations", is entirely new. The necessity for this new provision arises solely out of the structure which the Commission has decided to adopt for articles 19, 19 bis and 19 ter, and in particular follows from the differentiation between the position of States and international organizations, under a treaty to which both are parties, as exemplified by paragraph 3 of draft article 19 ter - a differentiation about which the United Kingdom has some fundamental doubts, as indicated below. Therefore, the United Kingdom must place a general reserve on article 19 ter, simply by virtue of the fact that it has no counterpart in the Vienna Convention itself. Without prejudice to that and before proceeding to consider paragraph 3 of article 19 ter in more detail, the United Kingdom would wish to draw attention to a discrepancy between the drafting of paragraphs 1 and 2, in that the latter contains a specific cross-reference to article 19 bis, paragraphs 1 and 3, whereas the former contains no equivalent cross-reference to article 19. The reason for this difference of terminology is not apparent from the Commission's commentary and (subject to any more fundamental considerations arising out of the comments below), the United Kingdom questions whether the maintenance of this difference would be desirable. It could lead to difficulties of interpretation, which might in the end only serve to cloud the meaning given to the specific legal concept of an "objection" both in the Vienna Convention itself and in the Commission's draft articles; That is to say, it may lead to a confusion between the right of one contracting party to exclude the opposability to itself of an entirely permissible reservation formulated by another contracting party, and the possibility that one or more contracting parties may contest in limine the very admissibility of a purported reservation in accordance with the criteria specified in article 19 of the Vienna Convention and reproduced in draft article 19 and draft article 19 bis, paragraphs 1 and 3, of the present articles (express or implied exclusion and incompatibility with the object and purpose).

11. The United Kingdom's difficulties with the substance of paragraph 3 of draft article 19 ter are of an altogether more fundamental character. The rationale behind the Commission's draft is that the right of a party to formulate reservations to a treaty finds its balance and counterpart in the extent to which that party has a right (or "possibility") of raising objections to reservations formulated by other parties. The United Kingdom does not believe this governing principle to be sound. It seems to the United Kingdom, in the light of the whole development of the institution of reservations to multilateral conventions, that the true



counterpart to the right of one party to formulate a reservation is in fact the inherent right of the other parties to object (in the technical sense used above) to that same reservation. Any other principle (i.e. any system under which the possibility of making a reservation was not balanced by the possibility of its being objected to) would destroy the crucial balance between contracting parties in respect of their mutual rights and obligations, inasmuch as it would allow one party to impose its reservation upon others and thus, in effect, to write its own treaty. Such a proposition was decisively rejected by the Vienna Conference itself. Nor is the principle in any way affected by the special provision made for a reservation expressly authorized by a treaty, since such a reservation has been specifically agreed to by the contracting States in advance.

12. Nevertheless, the Commission has, perhaps inadvertently, created in its draft articles a situation of precisely this kind. This has arisen as a result of the Commission's preference for regarding the right of an international organization to object to a reservation not as being inherent in the very possibility that a reservation may be formulated by another party, but as being a right which requires to be specifically conferred by the draft articles. The ultimate result could, in many cases, be diametrically opposed to the Commission's essential objective in postulating the category of treaties where the participation of an international organization is essential to the object and purpose. For, under the provisions of article 19 bis, paragraph 1, taken together with 19 ter, paragraph 3, it might be possible for a State party to such a treaty to impose its reservation upon the international organization, even though the latter might conclude that the application of the treaty, subject to the reservation, was not compatible with the public function which the international organization was called upon to perform under the treaty. Such a situation would be clearly undesirable in the public interest, and might furthermore lead to extraordinary legal results if other States, parties to the treaty, chose to exercise their right to object to the reservation (while not precluding the entry into force of the treaty as between them and the reserving State). The solution appears to the United Kingdom to be, not to regard a "right to object" as being in some sense a manifestation of State sovereignty; but rather, on the basis of the fundamental principle of the greatest possible equality between parties to a treaty, to regard the possibility of an objection as the inherent and automatic corollary of the formulation of the reservation itself. If, as is strongly urged, the Commission accepts the validity of this argument, it would be left with the choice either of maintaining the special category of treaties foreseen in article 19 bis, paragraph 2 - in which case the limitation on the right to make reservations would have to be applied equally to States parties and to international organizations parties; or to subject to critical examination the restrictive provisions laid down in paragraph 3 of draft article 19 ter. If, in the course of this examination, the Commission were to have second thoughts about the legal justification for paragraph 3, the question would arise whether draft article 19 ter (which, as explained above, is an addition to the scheme contained in the Vienna Convention itself) should be maintained at all. By reason of the view it takes of the essential nature of the right to object to a reservation, the United Kingdom would see considerable merit in the suppression of draft article 19 ter entirely.

#### Article 27

13. No comment is called for on paragraphs 1 and 3 of this draft article, but the United Kingdom is conscious of the difficulties with which the Commission had to grapple in producing, in paragraph 2, a counterpart to the rule laid down for States in article 27 of the Vienna Convention. The United Kingdom agrees with the Commission's conclusion that the rules of an international organization are not on

the same plane as the internal law of the State. The United Kingdom therefore agrees in principle that the Commission's draft articles should contain a provision along the lines of paragraph 2. A point of concern in this context is the same as that which troubles the Commission, namely, whether it is appropriate to give a greater status to the internal operations of the organization than to the internal law of a State, as in the proviso contained in the Commission's draft: "unless performance of the functions and powers of the organization". It is pertinent to observe in this context that arrangements of the sort foreseen in this proviso are also not unknown in treaties between States. For example, it is common form in treaties concluded by the United Kingdom providing for the expenditure of money (if the treaty enters into force on signature) for the treaty to be drafted in such a way that its operation is contingent on the voting of the necessary monies by Parliament. Nevertheless, neither the Commission nor the Vienna Conference felt it necessary to include a similar proviso in the Vienna Convention itself; the underlying reason was no doubt that the matter was ultimately felt to have been regulated as a question of the interpretation of the treaty, in accordance with its terms (a similar point having been made by certain members of the Commission in the discussion of draft article 27 itself). Conversely, if the operation of a duly authorized treaty concluded by an international organization became impossible as a result of the subsequent failure by the competent organs of the organization to take the necessary decisions for implementation of the treaty, the matter might become one to be dealt with under the draft article on supervening impossibility of performance, contained in the latter part of the Commission's draft articles, and questions of international responsibility might ultimately arise. All in all, therefore, the Commission should be encouraged to reconsider whether it is in fact necessary for draft article 27, paragraph 2, expressly to provide for the very rare case in which an argument may be raised as to the subordination of treaty obligations to the internal workings of an international organization party to it, where no specific provision has been included in the treaty to regulate the question. It must be borne in mind in this connection that the functions and powers of international organizations are normally entrusted to organs composed of representatives of sovereign States, the decisions of which may in practice be taken on grounds not limited to the organization's treaty obligations, including the situation in which there is controversy within the organ itself or as between member States as to the lawfulness of certain actions in terms of the organization's governing instrument. Reference may be made in this context to the International Court of Justice's Advisory Opinion of 20 December 1980 on "Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt".

#### Article 36 bis

14. The United Kingdom and various other member States have commented at length in favour of the inclusion of draft article 36 bis since it was first put forward by the Commission in its report for 1978. In particular, the United Kingdom wishes to refer to and endorse the comments on this question submitted on behalf of the European Economic Community, so far as that organization is concerned. Nevertheless, the question has a wider aspect, to which the United Kingdom wishes to draw attention in the present comment. In broad terms, draft articles 35 and 36 reproduce for present purposes the rules adopted in the Vienna Convention, subject only to particular considerations bearing on the assent of a third international organization to rights conferred upon it by a treaty stipulation to which it is not party (on which subject the United Kingdom does not propose to comment at the present time). In general, a translation of those rules from the area of treaties between States to that of treaties between States and international organizations is both necessary and

appropriate. However, when one begins to examine the matter more closely, it becomes apparent that a mere translation, without more, of the Vienna Convention articles to international organizations begs a number of crucial questions as to the identification of "third States" in these circumstances. It is evident from the origins of the rule pacta tertiis nec nocent nec prosunt, and from the discussions in the Commission on the proposals which eventually became articles 35 and 36 of the Vienna Convention, that a "third State" was regarded as being, by definition, a State that was outside the treaty-making process entirely and was therefore a stranger to the creation of the treaty right or obligation. While not expressed with quite this clarity in the definition of "third State" contained in article 2, this is nevertheless the essential thought behind the definition. Clearly, however, this simple model does not fit in every respect the case of the member States of an international organization which becomes party to a treaty. This is so for two reasons. The first reason is that, through their representatives on the competent organ or organs of the organization, the member States will have been associated with the conclusion of the treaty by the organization, especially so in the case where (as is becoming increasingly common) the international organization itself participates in the treaty negotiations and has received for this purpose a specific mandate from the competent organ. Indeed, if for any reason the international organization does not itself participate in the negotiations, but these are nonetheless conducted by the member States with a view to the ultimate participation of the organization of which they are members, then it may hardly be said that the member States are strangers to the negotiation.

15. The second reason is that, irrespective of the particular division of competences that may arise in a particular organization, it is very frequently the case that one or more member States will themselves become parties to the treaty along with the organization itself. It is hardly to be presumed that the complexities of this situation should produce a result quite as simple and straightforward as that embodied in articles 35 and 36 of the Vienna Convention; nor is it to be presumed that any of the participants in the negotiations could fail to be aware of this.

16. For the above reasons, it seems abundantly clear to the United Kingdom that the member States of an international organization cannot automatically be regarded as "third States", within the meaning of the rules laid down (as between States alone) in articles 2, 35 and 36 of the Vienna Convention, in relation to treaty rights and obligations assumed in due form by the organization. It follows from this both that the Commission was entirely right in attempting to formulate an additional provision to deal with this state of affairs, and that the purpose of such additional provision is not to create a new rule of international law but rather to correct the unwarranted inference that might otherwise arise from the simple translation of articles 35 and 36 of the Vienna Convention into the present draft articles. The United Kingdom has taken due note of the comment made, in the course of the debates in the Sixth Committee, that the Commission's draft article 36 bis conflicted with a generally accepted rule of international law that treaties could not create rights or obligations for any third State without its consent; the United Kingdom regards this objection however as being clearly without substance in the present circumstances. By definition, it is impossible to regard the member State which has subscribed to the rules of the organization in becoming a member as not consenting to the substance and effect of those rules. Indeed, the question may even be posed whether the rules of the organization do not, in effect, constitute a form of consent sufficient to satisfy the principle underlying the rule contained in article 34. The essential feature of that consent is, of course, that it is given in general terms in advance of the conclusion of the particular treaty, from which it follows

that it is simply the procedural aspects of the more detailed amplification, in articles 35 and 36, of the general rule laid down in article 34 which is at fault in failing to cater for this particular case. At the same time, the United Kingdom acknowledges the difficulty and delicacy of the Commission's task in attempting to formulate the necessary additional elements, but believes that the Commission deserves strong encouragement in its attempts further to refine the ideas contained in draft article 36 bis (together with the necessary consequential elements in draft article 37) which constitute an essential requirement for this portion of the draft articles.

#### Article 46

17. Paragraphs 1 and 2 of this draft article deal with the position of contracting States, and are identical in substance with the equivalent provisions in the Vienna Convention. Paragraphs 3 and 4, on the other hand, deal with the case of contracting international organizations, but show certain differences by comparison with paragraphs 1 and 2: in particular, paragraph 3 omits the additional qualification that the rule violated must be one of "fundamental importance", and paragraph 4 incorporates a totally different definition of when a violation is "manifest". The United Kingdom has studied the text closely in the light of the Commission's commentary, but remains unpersuaded of the need to distinguish between the circumstances in which a State and the circumstances in which an international organization may invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law (or of its rules, as the case may be). The Commission's commentary rightly points out that article 46 of the Vienna Convention was inspired by general principles of good faith and responsibility and that the present draft article has the same inspiration. Nevertheless, in the view of the United Kingdom, no case has been made out for translating the same general principle into different rules for States and for international organizations: if the basic rule is to be the same, then the qualifications should be, so far as is possible, identical, and there is a strong presumption accordingly that in the drafting the same wording should be used, so far as possible, in both cases. The commentary gives no indication that it was the Commission's intention to draft rules with substantively different effects, but the use of widely different formulae could give rise precisely to the misleading impression that there are more substantive distinctions between the two cases than is in fact intended. The United Kingdom therefore recommends that the Commission reverts to a simpler draft article based more closely on article 46 of the Vienna Convention. This would give the Commission the opportunity at the same time to harmonize the title of the present draft article more closely with the title of article 46: the present title lays unnecessary and misleading emphasis on the notion of "violation" of the internal rule, whereas the principal concern of the provision in question is of course the external effect on the treaty. The Commission might likewise resolve the discrepancy between paragraphs 2 and 4, in that the former is (wrongly) limited to the impression in the mind of a contracting State, whereas the latter deals (rightly) with both contracting States and contracting organizations.

18. There follow a number of comments of an essentially drafting character, on certain of the draft articles 1-60 which have not been dealt with above.

#### Article 2

19. Subparagraph 1 (d) contains, in square brackets, the phrase "by any agreed means" as qualification of the notion of consenting to be bound by a treaty. The foot-note to the 1974 report indicates that the Commission intends to review the

phrase in the light of usage elsewhere in the draft. One may now compare this subparagraph with article 11, in particular, and with the immediately following articles, from which it will be seen that in dealing generally and in particular with the various recognized means of establishing consent to be bound, the Commission, following the pattern of the Vienna Convention, supplements the listing by the addition of "or by any other means if so agreed", to cover less orthodox cases which are not readily foreseeable in advance. It follows that there is no need to deal with the point in the context of particular definitions in article 2. Accordingly, it is recommended that the phrase in square brackets should be deleted.

#### Article 4

20. The concluding phrase of this draft reveals some slight differences from the equivalent phrase in article 4 of the Vienna Convention. Whereas the latter refers to "treaties which are concluded by States after the entry into force of the present Convention with regard to such States", the present draft article refers to "such treaties after the [entry into force] of the said articles as regards those States and those international organizations". It may be that some of these variations arise simply out of the process of translation, and that conformity with the usage in the Vienna Convention can be restored as a purely editorial matter. To the extent that this is not so, the United Kingdom can nevertheless see no good reason for diverging from the Vienna Convention text. In particular, the United Kingdom draws attention to the omission of the word "concluded" which, in the Vienna Convention, serves to complete the temporal clause "after the entry into force"; it is clear to the United Kingdom that the omission of the concept of 'Conclusion' in that context in the present draft creates a substantial, and highly undesirable, area of ambiguity.

#### Article 6

21. This draft article refers to the capacity of an international organization to conclude treaties as being governed by the "relevant rules" of the organization. A similar usage appears in articles 35(3), 36(3) and 36 bis (a). The United Kingdom questions whether, from a drafting point of view, the qualification "relevant" is necessary. Article 2.1 (j) contains the definition of "rules of the organization", and this definition has been commented on with approval above. Whereas it is questionable whether the addition of the word "relevant" adds anything to the articles in question (since it embodies an idea which is self-evident); its very inclusion could nevertheless lead in practice to disputes as to whether formal distinctions ought to be made between certain rules of the organization and others, which the definition in article 2.1 (j) is precisely designed to avoid. The United Kingdom therefore suggests that the word "relevant" should be deleted.

#### Article 7

22. Subparagraph (b) of paragraphs 1, 3 and 4 again shows slight variations from the equivalent phrases in the Vienna Convention, inasmuch as the present draft omits the phrase referring to the intention of the parties. The effect is to take something which is dependent upon the will of the parties in the particular case and turn it into an apparently general and abstract concept; this creates, once again, a new area of ambiguity. The United Kingdom can see no real value in the change and recommends the reinstatement of the Vienna Convention text.

## Article 12

23. This article, together with various others, such as article 15, uses the phrase "the participants in the negotiation". While the broad intention behind this phrase is clear enough, the phrase does not correspond to the definitions included in article 2, paragraph 1 (e). To the extent that "participants" is a word which fails to make entirely clear whether it signifies the potential parties to the treaty themselves (whether States or international organizations) or merely their authorized delegates, it seems that the more precise phrases defined in article 2 are to be preferred. It may also be pointed out that the present drafting of article 12.3 (a) omits the phrase "of the treaty" and the present text of article 15.1 (b) omits the phrase "it is otherwise established that", for no apparent reason in either case. It is recommended, once again, that the exact terminology of the Vienna Convention be adhered to.

## Article 39

24. Paragraph 1 of this article diverges in two respects from the text of article 39 of the Vienna Convention, for reasons which are explained in the Commission's commentary. The United Kingdom reserves its judgement for the time being as to whether these variations are necessary.

## YUGOSLAVIA

[Original: French]

[1 April 1981]

In reply to the letter from Mr. E. Suy, Legal Counsel of the United Nations, No. LE 113(20-1) of 6 October 1980, the Permanent Mission of the Socialist Federal Republic of Yugoslavia to the United Nations has the honour to communicate the observations and comments of the Government of the Socialist Federal Republic of Yugoslavia concerning the draft articles on treaties concluded between States and international organizations or between international organizations. The Government of the Socialist Federal Republic of Yugoslavia has in mind in this regard the articles which the International Law Commission adopted at its sessions up to the thirty-first session and which it decided, in accordance with the decision in paragraph 84 of the report of the International Law Commission on the work of its thirty-first session (A/34/10) and in accordance with articles 16 and 21 of its Statute, to communicate to Governments for observations and comments through the Secretary-General. In this context, the Commission, at its thirty-second session (para. 55 of the report of the International Law Commission on the work of its thirty-second session (A/35/10)), requested States to communicate their observations and comments regarding this question by 1 February at the latest.

In this regard, the Yugoslav Government welcomes, first of all, the excellent work carried out by the Commission, and in particular by its Special Rapporteur, Mr. Paul Reuter. The Yugoslav Government also wishes to express its desire that the Commission should undertake without too much delay the second reading of the draft articles and successfully conclude its work on this important question.

In formulating its observations and comments on the draft articles, at a time when the study of this subject is nearing its end, the Yugoslav Government wishes to stress that it has supported from the outset the work of the Commission on this matter. It did so as early as the time when the draft articles on the law of

treaties had been in preparation. At that time, in its reply to the Secretary-General of the United Nations, the Yugoslav Government pointed out that it "considers it desirable that the future convention on the law of treaties should not be confined exclusively to treaties concluded between States, but should cover also agreements concluded by other subjects of international law, such as international organizations". e/ In accordance with this position, Yugoslavia included in article 2, paragraph 1, of its "Law on the Conclusion and Execution of International Treaties" (Official Journal of the Socialist Federal Republic of Yugoslavia, No. 55/1978) the following provision: "The expression 'international treaty' means any treaty concluded in writing by the Socialist Federal Republic of Yugoslavia with one or more States or with one or more international organizations and governed by international law."

Mindful that the task of preparing an international instrument capable of governing this field is currently before the international community, the Yugoslav Government, noting that the preparation of the draft articles is nearing its end, takes this opportunity to express its opinion. It wishes to state its observations and suggestions with a view to helping to clarify the provisions of the draft. The remarks presented below in no way prejudge the position which the Government of the Socialist Federal Republic of Yugoslavia may take at a later stage of the work. The purpose is to arrive without too much delay at the adoption of a convention on treaties concluded between States and international organizations or between international organizations.

First of all, the Government of the Socialist Federal Republic of Yugoslavia fully supports the approach taken and the work carried out by the Commission on this subject. As in the case of the other tasks undertaken over the past 10 years by the Commission, it welcomes the fact that the form used for the codification is that of draft articles, capable of constituting, at an opportune time, the substance of a convention.

In the opinion of the Yugoslav Government, despite opposing concepts, the Commission has, to the very end of its work, remained true to the provisions of the Vienna Convention on the Law of Treaties. This correct approach has enabled it to apply, wherever possible, solutions taken from the above-mentioned Convention, even though that procedure sometimes created difficulties because some provisions of the draft articles relate to treaties between international organizations, which, in a number of respects, represent specific subjects of international law entirely different from States. Proceeding from this fact, the Yugoslav Government wishes to emphasize that it is important to obtain comments on the draft articles from international organizations as well, in order to gain a better understanding of the main problems and to eliminate some of the weaknesses of the draft articles.

The best course the Commission could find was to study one by one the text of each of the articles of the Vienna Convention and determine what modification of wording or substance would be required for the drafting of a similar article dealing with the same problem in the case of treaties concluded between States and international organizations or between international organizations. Of course, the Commission also had to prepare new articles whenever that proved necessary. For that reason, it is understandable that in addition to difficulties of wording and to sometimes delicate adaptations of the text of the Vienna Convention, the work occasionally raises some novel and essential problems.

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e/ Yearbook of the International Law Commission, 1966, vol. II, p. 359, document A/6309/Rev.1 (part two), annex.

With regard to its specific objections to the draft articles, the Yugoslav Government considers part I and articles 6 to 18 of part II of the draft, as adopted by the Commission, to be acceptable in principle; it feels that their final adoption should give rise to no particular difficulties.

In the context of part II, section 2, of the draft articles, the Yugoslav Government attaches particular importance to articles 19 (Formulation of reservations in the case of treaties between several international organizations), 19 bis (Formulation of reservation by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States), and 19 ter (Objection to reservations), since the provisions in those articles deal with a matter of the highest importance to the draft articles as a whole. The wording of those articles is in the nature of a compromise and authorizes in a general way the formulation of reservations by States in every case (art. 19 bis, para. 1) and by international organizations in certain cases if the treaty has been concluded solely between international organizations (art. 19) or when the participation of an international organization is not essential to the object and purpose of a treaty between States and international organizations (art. 19 bis, para. 3). Where the participation of an international organization in the latter type of treaty is essential to the object and purpose of the treaty, the draft articles have adopted a more restrictive formulation, which permits the formulation of reservations only if the treaty itself expressly authorizes them or if it is otherwise agreed that the reservation is authorized (art. 19 bis, para. 2). The Commission has stipulated the same conditions in the case of the formulation of objections to reservations (art. 19 ter). The provisions cited above lead one to conclude that the Commission has decided to impose stricter conditions on international organizations than on States. It is true that there are differences between States and international organizations in respect of certain features that might justify the different treatment and the conditions imposed on the formulation of reservations. However, their unequal treatment, which derives from the solutions provided for, should, in the view of the Yugoslav Government, be reconsidered in detail, in order to avoid giving rise in practice to possible negative and confusing situations in the evaluation of the validity of international treaties owing to the differences in conditions imposed, as a result of the draft articles cited above, on States and on international organizations with regard to the formulation of reservations.

The Yugoslav Government is ready to accept the Commission's approach to the provisions of article 27 (Internal law of a State, rules of an international organization and observance of treaties), in particular its approach to the extension of the meaning of the expression "rules of the organization"; that expression should be given a broader conception than is envisaged in article 1, paragraph 1, subparagraph (34), of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, since in its present form the article represents an appropriate application of the rule pacta sunt servanda envisaged in draft article 26.

In the view of the Government of the Socialist Federal Republic of Yugoslavia, the Commission was quite right in making use, in the section on the interpretation of treaties (arts. 31 to 33), of the corresponding provisions of the Vienna Convention.

The text of article 36 bis (Effects of a treaty to which an international organization is party with respect to third States members of that organization) is based, in the view of the Yugoslav Government, on the provisions of treaties



governing the status of supranational international organizations; however, these rules cannot be applied in a general manner to other international organizations. The provisions of the above-mentioned article, especially those contained in subparagraph (a), run counter to the provisions of articles 35 and 36 and to the generally recognized rule of international law pacta tertiis nec nocent nec prosunt, and therefore they are not acceptable in their present wording. Furthermore, the provisions of the article do not make it possible to establish clearly the need to apply special treatment to States members of international organizations and to regard them as third States members in the treaties of international organizations to which those States belong. For that reason, the Yugoslav Government believes that it would be desirable to apply the rules contained in articles 35 and 36.

In the view of the Government of the Socialist Federal Republic of Yugoslavia, the Commission correctly drafted article 43 (Obligations imposed by international law independently of a treaty) in taking the view that "there can be no doubt that rules of international law can apply to an international organization independently of any treaty to which it may have been a party". f/ The many documents adopted in the United Nations, such as the Definition of Aggression, the Charter of Economic Rights and Duties of States, and others, only serve to support this proposition.

The Government of the Socialist Federal Republic of Yugoslavia supports the Commission's position with regard to article 46 (Violation of provisions regarding competence to conclude treaties) and believes that even the simplest provision of the statute of an international organization cannot be considered to be of fundamental importance, and therefore its violation cannot be considered a reason for invalidating the treaty.

With regard to article 52 (Coercion of a State or of an international organization by the threat or use of force), the Yugoslav Government believes that these provisions are fully applicable to international organizations as well. The question involves a general principle of international law which is sanctioned by the Vienna Convention and relates to treaties concluded between States but whose effect could be extended to cover the international treaties dealt with by the draft articles as well, in view of the very varied possibilities of recourse to the threat or use of force in international relations.

The Government of the Socialist Federal Republic of Yugoslavia particularly welcomes the introduction of the provisions of article 53 (Treaties conflicting with a peremptory norm of general international law (jus cogens)), taken from the Vienna Convention, because the rules of jus cogens are the basis of modern international law as a whole.

In the view of the Yugoslav Government, the formulation of article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach), which is also taken from the Vienna Convention, is completely satisfactory. It sets down basic rules dealing with the termination of a treaty or the suspension of its operation as a consequence of its breach that can be applied equally well

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f/ Yearbook ... 1979, vol. II (Part Two), document A/34/10, commentary to article 43.

to international organizations. The matter dealt with by the provisions of the above-mentioned article is one of the problems that remain pending, primarily because the arbitrary breach of a treaty endangers its stability and the stability of the international legal order. In this context, with regard to paragraph 5, it might be necessary to consider the question whether there are cases in which a treaty could not be terminated or its operations suspended as a consequence of its breach. The importance of this article is recognized not only by States and in writings on international law; it is also recognized by the International Court of Justice. In its advisory opinion entitled Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), g/ the Court referred expressly to the provisions of article 60 of the Vienna Convention, although that Convention had not yet entered into force. The importance of those provisions, in the view of the Yugoslav Government, lies not only in the introduction of rules governing the termination or suspension of the operation of a treaty as a consequence of its breach. Those provisions also establish the possibility for drawing up rules dealing with the responsibility of States for the breach of treaties between States and international organizations or between international organizations, which do not exist in the Vienna Convention but are the subject of a detailed study connected with the preparation of the draft articles on the responsibility of States which the International Law Commission is now preparing.

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g/ Advisory Opinion, I.C.J. Reports 1971, p. 16.

II. COMMENTS AND OBSERVATIONS OF  
THE UNITED NATIONS AND  
SPECIALIZED AGENCIES

UNITED NATIONS

[Original: English/French]

[1 May 1981]

... [At] the present time, the Secretariat of the United Nations has considered only draft articles 1 to 60 ... The formal comments by the United Nations could be submitted after the International Law Commission has completed its elaboration of the whole of the text.

The attached preliminary comments and observations undoubtedly reveal the nature and the gravity of the issues that the set of draft articles raises for the United Nations. ...

Preliminary comments and observations by the United Nations on  
draft articles 1 to 60

1. The United Nations wishes to express reservations concerning the Commission's general approach to the subject, namely to draft each article as a parallel to the corresponding article of the Vienna Convention on the Law of Treaties. Although this approach has permitted a detailed examination of the extent to which the provisions of the Vienna Convention are applicable to treaties to which one or more international organizations are parties, it also has demonstrated that most provisions of the Vienna Convention are applicable to such treaties.

2. The Commission has emphasized the fact that while States in international law are equal also with respect to their capacity to enter into treaties, the capacity of international organizations differ from organization to organization. In this connection the United Nations is an example of an international organization which has negotiated and concluded numerous treaties with States, and other international organizations. Agreements in the form of treaties also have been concluded between the United Nations and entities not referred to in the draft articles, such as foundations, private and public corporations, and governmental organs and agencies. The continuous expansion of the number and subject areas of treaties to which the United Nations has been or is a party, has occurred without an express provision in the constitutive instrument - the Charter of the United Nations - granting the Organization the capacity to enter into treaties for the general purpose of carrying out the tasks entrusted to it. Although Article 104 of the Charter provides that "the organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes", this Article contains no express reference to treaty-making capacity, nor does the Convention on the Privileges and Immunities of the United Nations, which is the principal international instrument - widely accepted - for the purpose of implementing Articles 104 and 105 of the Charter. h/ Although Article 4 (1) (a) of the

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h/ Some other Charter provisions, such as Articles 43, 57, 63 and 81, refer to particular types of agreements; however the provisions of Article 43, para. 3, concerning agreements between the Security Council and Member States or groups of Member States, have yet to be implemented.

Regulations to give effect to Article 102 of the Charter (General Assembly resolution 97 (I), as amended), foresees that the United Nations is to be a party to registerable treaties or agreements, and article 10 (a) similarly refers to instruments to be filed and recorded, the United Nations treaty practice may be said to find its legal basis principally in the intendment of the Charter as interpreted and accepted through practice. It follows that in the case of the United Nations the practice of the Organization is an essential source of the rules of international law governing the subject of treaties between the United Nations and States and/or international organizations.

3. The Commission's reports and its commentary to the draft articles extensively discuss whether the nature of treaties concluded solely among States differs from that of treaties between one of more States and one or more international organizations, and further whether such treaties differ in their nature from treaties among international organizations. Without necessarily intending to comment on the validity in theory of these distinctions, it seems clear that from the outset the method following in the United Nations practice has been to apply in principle the established international legal rules concerning treaties between States, and to modify these rules only so far as necessary in view of the special requirements of the United Nations.

#### Comments and observations on particular articles

##### Article 2 (1) (c) and (c bis); article 7

1. It is the general practice of the United Nations not to require the production of full powers by permanent representatives of Member States to the United Nations with respect to treaties dealing with the relationship between the State in question and the Organization. However, if the treaty concerns a subject which is not part of the bilateral relationship between the State and the Organization, or if the representative of the State is not accredited to the United Nations, the practice is to require the production of full powers for any expression of consent to be bound by the treaty, but not for the purpose of authenticating the text by signature, signature ad referendum, or initialling.

2. With respect to the representative of the United Nations no instrument of powers (or full powers) is issued when the Secretary-General himself signs a treaty on behalf of the United Nations. In practice treaties of the United Nations are very often signed by heads of departments, offices, divisions, etc., it being understood that such officials may sign a treaty or agreement binding the Organization provided they act within their area of competence with the express or implied authorization of the Secretary-General. The considerable increase in the number of international treaties entered into by the United Nations and the fact that such treaties in most instances are not signed by the Secretary-General explains that Governments sometimes have demanded that the representative of the United Nations present formal powers, and in such cases formal powers have been issued by the Secretary-General.

##### Article 2 (1) (c) and (c bis); article 7 (4); - article 11

3. The distinction between the terms "full powers" and "powers" is explained in the Commission's commentary on the basis of the different capacities possessed by certain representatives of States and representatives of international organizations, respectively. However, the actual instrument indicating a representative's authority need not - and in practice often does not - authorize the

representative to express the Organization's consent to be bound by treaties in general, but rather refers merely to a particular treaty or to a category of treaties, such as those referred to in article 7 (2) (b), (c) or (d). Since, moreover, the draft articles attribute the same function and effect to "full powers" and "powers", it appears that the same term could, in the interest of clarity and simplicity, be used for representatives of States as well as for representatives of international organizations.

4. In the definitions of terms in article 2 (1) (c) and (c bis) as well as in the draft articles referred to above, a distinction is drawn between the capacity of representatives of States to "express" the consent of a State and the capacity of representatives of international organizations to "communicate" the consent of an international organization. The theory underlying the distinction seems, according to the Commission's commentary, i/ to be that to employ the term "express consent" in connection with representatives of international organizations might give rise to a misunderstanding concerning the representatives' authority to determine whether or not the international organization should be bound by a treaty. The commentary further states that the use of the verb "communicate" more clearly indicates "that the consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization and that the action of its representatives should be to transmit that consent". While these distinctions are of analytical interest, it is necessary to consider whether the draft articles incorporating these distinctions accurately reflect United Nations practice.

5. In this connection it is well established that as far as treaties of the United Nations are concerned, in nearly every case it is the Secretariat that represents the Organization at all stages, including the negotiating stage and the establishment of the Organization's consent to be bound. In exceptional cases - such as the Headquarters Agreement with the United States, the bringing into force of which was authorized by the General Assembly in its resolution 169 (II) adopted on 31 October 1947 - formal approval has been expressed by an intergovernmental organ of the United Nations, but in nearly all other instances, including headquarters agreements subsequently concluded, no formal action was taken by any intergovernmental organ either before or after the text of the treaty had been established as authentic and definitive. In accordance with this practice the final clauses in United Nations treaties usually provide for entry into force immediately upon signature as far as the Organization is concerned.

6. In view of the characteristics of United Nations treaty practice outlined above, it is clear that the distinction between "expressing" and "communicating" consent has not found application except in highly exceptional cases. Consequently, it would seem advisable to suppress the distinction in the draft articles referred to here. It is noted that this solution has been adopted in the remaining draft articles.

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i/ Official Records of the General Assembly, Thirtieth Session, Supplement No. 10 (A/10010/Rev.1), Chapter V.B, commentary to article 7, para. (11).

Article 2 (1) (j); article 2 (2)

7. The definition of "rules of the organization" contained in article 2 (1) (j) is of paramount importance, for the legal position of international organizations under the draft articles.

8. In this connection reference is made to the comments and observations made above concerning the legal basis of the treaty-making capacity of the United Nations and concerning the role of practice as an essential source in the development of the rules of international law applicable to treaties of the United Nations. There can be little doubt that the applicable international law rules have been and are being continuously developed. In this context it seems doubtful that the word "established" should be retained as a qualification to "practice", because to do so might prevent the further development and adaptation to future needs of international organizations' treaty practice.

9. From the Commission's reports it is seen that article 2 (2) was approved at first reading before the definition contained in article 2 (1) (j) was introduced. Possibly because of this sequence, a semantic circle has been created through the references in both of these provisions to the rules of the organization.

10. That the "rules of the organization" necessarily must permit further development on the basis of practice appears to be recognized - at least by implication - in the Commission's commentary to articles 2 (2) and 6.

11. The identical definition of "rules of the organization" contained in article 2 (1) (j) is also found in article 1 (1) (34) of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Indeed, the drafting history of the present draft articles suggests that this definition was simply transposed without full consideration of all implications of such a move. Naturally, it is necessary to explain why the same definition should not be used in both the 1975 Vienna Convention and in the draft articles now under consideration. A logical and convincing reason for not using identical definitions, especially a definition circumscribing "practice" by the term "established", lies in the fact that the draft articles do not contain a provision similar to article 3 of the 1975 Convention. The latter provision states in its relevant part that "The provisions of the present Convention are without prejudice to any relevant rules of the Organization ...". On the basis of a provision of this nature the practice of an international organization with respect to the development of "rules of the organization" would not be affected by the application of the Convention.

Article 4

12. The commentary on this article raises the difficult question whether international organizations should be afforded the opportunity to become parties to any convention which may result from the draft articles. In view of the many unclarified questions raised by the draft articles, including whether the final instrument should be a multilateral treaty or a set of recommended norms adopted by the General Assembly, the United Nations is not in a position to offer comments on this point at the present time.

## Article 6

<sup>17</sup> Reference is made to the preceding comments and observations with respect to article 2 (1) (c) and (c bis) and articles 2 (1) (j) and 7.

## Article 14; article 2 (1) (bis)

14. As stated under the comments and observations regarding article 2 (1) (c) and (c bis); j/ it is not the practice in the United Nations to require the Secretary-General or his representatives to sign treaties subject to "an act of formal confirmation". In this connection it is pertinent to recall that no practices or procedures have been developed in the United Nations which would fit the definition contained in article 2 (1) (bis). Naturally, this observation is of a juridical nature and is not intended to de-emphasize the crucial importance in many cases of consultations between on the one hand the interested Member States, non-member States or interested intergovernmental organs as the case may be, and on the other hand the Secretary-General or his representatives.

## Section 2. Reservations

15. The draft articles in Section 2, in so far as they are not essentially particular applications of the principle of pacta sunt servanda and of the will of the parties, appear to be codification de lege ferenda as far as the United Nations is concerned. This observation is based on the fact that the United Nations has not developed any general, let alone established practices with respect to reservations, objections to reservations, and acceptance, opposition or withdrawal of reservations and opposition to reservations.

## Article 30 (6)

16. While the reservation in this provision regarding any possible overriding effect of Article 103 of the Charter seems justified with respect to the subject matter of article 30, the inclusion of paragraph 6 in article 30 gives rise to the question whether Article 103 of the Charter does not override all of the draft articles? This question seems to merit further study by the Commission, and attention is drawn, in particular, to the implication in this connection of draft articles 2 (1) (j) and 4 and to the comments and observations above concerning those draft articles.

## Articles 35, 36 and 36 bis

17. It would seem desirable for the Commission to clarify further the criteria distinguishing between treaties falling under articles 35 and 36 as compared to those governed by article 36 bis. In this connection consideration might be given to the possibility of merging these provisions in order to minimize the potential for conflicting interpretations. Until the relationship between articles 35 and 36, on the one hand, and article 36 bis on the other hand, has been further analysed and defined, it would not seem possible for the United Nations to comment on whether article 36 bis should be retained.

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j/ Paragraphs 2-6.

## Article 37 (6)

18. With respect to article 37 (6) it appears timely to comment briefly on one aspect. This provision contains the requirement that "the States members of the organization" must give their consent to any revocation or modification of a right or obligation which has arisen from article 36 bis (b). As examples of treaties considered to be governed by this provision the Commission's commentary k/ mentions headquarters agreements concluded between the United Nations and States that provide privileges and immunities for Member States. Therefore the question arises, whether it is at all necessary and practical to require the consent of all member States of an organization before any amendment revoking or modifying a right or an obligation of a Member State under a headquarters agreement may enter into effect, this would certainly be contrary to existing United Nations practice. Would the same rules apply also to a temporary agreement regarding arrangements for a conference held away from an established headquarters? It would appear preferable not to impose such a requirement of consent by all affected States, but to retain the freedom of action of the parties to the treaty in question.

### INTERNATIONAL LABOUR ORGANISATION

[Original: English]

[21 August 1980]

#### Scope and use of terms (articles 1 and 2)

The draft articles are to apply to any "international agreement governed by international law" concluded in written form between one or more "States" and one or more "international organizations" or between international organizations. In its comments, the International Law Commission recognizes that it would not always be easy to establish whether a conventional act was governed by international law or by some system of national law.

Both in the relations between States and international organizations, and in those between international organizations, the problem known, in inter-State relations, as that of interdepartmental agreements exists and is growing in importance. For instance, in relation to technical co-operation activities, it is not uncommon for a government department having the necessary funds and the necessary constitutional authority to agree with the secretariat of an international organization that the latter would execute certain projects for the benefit of the State in which the funds originate or of a third State.

As regards interdepartmental agreements in inter-State relations, the view is taken by a number of States that they are matters of private law, and full powers are not issued for their negotiation. It may well be that arrangements of

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k/ Official Records of the General Assembly, Thirty-third Session, Supplement No. 10 (A/33/10) Chapter V.B, commentary to article 36 bis.



the kind referred to, in relations between States and international organizations, should be similarly regarded. At the same time, and with a view to avoiding any increase in the legal uncertainties at present often attendant on such arrangements, it might be useful if some express reference to the issue were made at least in the commentary on the draft articles, with an indication whether the arrangements would or would not fall within the scope of the text.

#### Manner of making the articles applicable to international organizations (article 4)

Article 4 is concerned with the date on which the articles would become applicable. But in its commentary the International Law Commission refers to the underlying issue, namely, how the articles are to be made applicable to international organizations. Since the articles envisage, on the part of States, behaviour essentially corresponding to that laid down in the Vienna Convention on the Law of Treaties, it is their application to international organizations which is of key importance.

A preliminary question concerns the extent to which the articles innovate, or are merely declaratory of existing custom or practice. There would seem to be little doubt that - since conventional arrangements falling outside the internal law of organizations have had to draw on existing principles of international law - major rules of treaty law such as the principle of pacta sunt servanda, or the rules concerning interpretation of treaties, have long been applied by those concerned. <sup>1/</sup> The same may not be true of more procedural requirements set out in the articles, such as the rules regarding powers. Moreover, there are matters - such as the rules regarding reservations envisaged in the articles - with respect to which the law has not developed much because this has not proved necessary.

In these circumstances, what are the main methods for making the substance of the articles legally binding on, or otherwise applicable to international organizations?

(a) One approach would be to embody the articles in an international convention and to enable both States and international organizations to become parties thereto on the same footing. That approach would assume that, as suggested above, the main rules of treaty law are binding on the organizations irrespective of the terms of the convention. Conversely, such rules as may not yet be so binding - for instance, as regards reservations - would not apply to the acceptance of obligations under the convention. Such acceptance may, accordingly, be imperfect. It may also take a long time. It has taken 10 years for the Vienna Convention on the Law of Treaties to obtain the 35 ratifications necessary for entry into force. The number of intergovernmental organizations in the world is becoming comparable to that of States.

(b) Another approach is that of the various Conventions on Privileges and Immunities. These were "adopted" (United Nations, IAEA) or "accepted" (specialized agencies) by the representative organs of the organizations and then

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<sup>1/</sup> See, on this, sect. I of the resolution concerning the application of general international law regarding treaties to international agreements concluded by international organizations adopted by the Institute of International Law in 1973.

opened to ratification or accession by States. They speak, expressly, of being "in force" as between the organizations and ratifying or acceding States, and there is no doubt that the organizations consider themselves to be bound by their terms, without being "parties" thereto in the same sense as States. At the same time, the procedure followed in these cases is more difficult to envisage where the proposed convention would affect a substantially larger number of organizations.

(c) A variant of the foregoing would be the "third party" approach: a convention would be open to ratification and accession by States only but, since it would create both rights and obligations for international organizations, these would be invited to consent thereto. From a practical point of view, and again given the large number of States and organizations concerned, this variant might combine and compound some of the disadvantages of (a) and of (b).

(d) A quite different approach would be for the General Assembly of the United Nations to adopt the articles, not as an international convention destined to create legal obligations for the parties thereto, but as a standard of reference for action destined to harden into customary law. As regards the organizations of the United Nations system - i.e. the major universal organizations - such adoption could be accompanied by a formal recommendation which would be required, under the various relationship agreements, to be submitted to the competent organ of each organization (where agreement to use a standard of reference may be a less difficult issue than acceptance or consent for purposes of (a) to (c) above). As regards other organizations, it would be the responsibility of States members both of the United Nations and of those organizations to take the necessary steps so that due account is taken of the standard of reference. On the assumption of wide support for the articles in the General Assembly, it may well be that the effect, in practice if not in law, of such an approach would more than match that of more formal methods. At the same time, and without notably increasing the uncertainty of the rules (which, in any case, leave much to the internal law of organizations), this approach may permit an element of flexibility as regards such articles as have not yet been adequately tested in practice. And it may avoid some sterile controversy about the capacity of one organization or another to participate in more formal action.

Capacity of international organizations to conclude treaties (art. 6 and art. 2, para. 1 (j))

The draft articles leave the treaty-making capacity of international organizations to be governed by the relevant rules of each organization.

It is noted that, where the rules of the organization so permit, the term "relevant rules" is intended to embrace practice and that there is no intention of fixing these rules as they stand at the time the draft articles become effective.

It is assumed that any question or dispute regarding the treaty-making capacity of an organization will also fall to be decided exclusively by the methods applicable to the relevant rules of the organization.

Full powers and powers (art. 7 and art. 2, para. 1 (c bis))

In addition to the persons listed in paragraph 2 of article 7, ministers whose departments deal with the questions falling within the competence of the ILO are considered as representing their State both for the purpose of adopting

the text of a treaty and for the purpose of expressing the consent of the State thereto. Presumably, this practice is covered by paragraph 1 (b) of article 7, and the generality of that provision is not limited by the enumeration of paragraph 2.

As the commentary on article 7 indicates, "the chief administrative officer" of the organization is usually considered in practice as representing the organization without further documentary evidence. It is understood that paragraphs 3 (b) and 4 (b) of the article allow that practice to be continued. Furthermore, the chief administrative officer is usually considered in practice as representing the organization for the purpose of communicating the consent of the organization to be bound by a treaty, without express powers, even where one of the representative organs of the organization is competent to decide on the matter. It is understood that paragraph 4 (b) of article 7 as drafted allows that practice to be continued.

### Reservations (part II, sect. 2)

The draft articles apply the régime of the Vienna Convention to the position of States in their relations with international organizations and to the position of international organizations in their relations with each other, but vary it as regards the position of international organizations in relation to States. It is clear that there is not, as yet, any existing practice to support or invalidate the proposed system. The system can, accordingly, be discussed only on a theoretical basis. From that point of view, it would seem that any departure from the general régime must be justified by a demonstration of need for such departure. It is not certain that this has been done.

The commentary explains that, in certain treaties, a reservation formulated by an international organization may be incompatible with the object and purpose of the treaty. Even under the general régime, reservations are permissible only if they are not incompatible with the object and purpose of the treaty. It may be that this condition could, in certain cases, preclude reservations by an international organization regarding a range of provisions with respect to which it is open to States to make reservations. But it is equally possible that a treaty in which participation of an international organization is essential for its object and purpose may contain provisions which are not crucial to the object and purpose. It is not clear why it is necessary to preclude reservations to such provisions unless these reservations are specifically authorized. In a sense, of course, the proposed rules amount to the following: in relations between States and international organizations, pending solution of any dispute as to whether a particular reservation is compatible with the object and purpose of a treaty, States would not be bound by the provision to which they had made the reservation while organizations would be bound. At the same time, and from a practical point of view, the proposed rules could result in the organizations refusing to participate in the treaty at all until the reservation on the point at issue is authorized. This would be so, in particular, where organizations, whose freedom of action is circumscribed by the terms of their constitution, find that particular treaty provisions are not wholly consistent with those terms; it is not altogether fanciful to envisage such an occurrence.

The proposed provisions concerning objections to reservations parallel those regarding reservations: in cases in which the freedom of organizations to make reservations is limited, the possibility to object to reservations is also

limited; this is explained by reference to the different nature of States and organizations. Again, one may wonder whether the departure from the general régime is warranted. Particularly in cases in which the participation of an organization is essential to the object and purpose of a treaty, it may be necessary for the organization to be able to object to the terms to which a State, or other organization, subjects its own participation therein; not in all circumstances will such need be directly related to the tasks of the organizations under the treaty (which alone would justify objections under the draft articles). In so far as it is the intention that an organization should be bound by the terms of the treaty without possibility of exception, any reservation by another party - by virtue of its reciprocal effect under draft article 21 - to some extent affects that intention, and it should be possible at least to highlight this by public objection. At the same time, the fact of objecting does not in any way limit the participation in the treaty of the organization regarded as essential; it may, but will not necessarily, limit the participation of the State or organization free to make reservations.

### Rules of the organization and observance of treaties (art. 27)

On the theoretical plane, the subject raises, as the commentary shows, considerable difficulties. Thus there may be a problem of hierarchy of norms. Does Article 103 of the Charter of the United Nations create a special status for the internal law of the United Nations? Is there - as suggested in foot-note 499 to the commentary on article 27, m/ but as regards article 46 - a distinction between treaties concluded with Member States and treaties concluded with non-member States (and hence, in effect, between universal organizations and organizations with more limited membership)? Can changes in the rules of an organization subsequent to the conclusion of a treaty modify the obligations under the latter (and, given the mechanisms for making constitutional changes binding even on States which have not consented thereto, do so without the consent of all the parties thereto)?

On the practical plane, every effort is and should be made to avoid the occurrence of these problems, by including in the terms of the international commitment such safeguards as appear to be called for by the internal law. This is widely done in bilateral agreements. As regards multilateral treaties, the issue underlines the need for a possibility to make reservations. As foot-note 502 to the commentary to article 27 n/ implies, a valid commitment, which can be fully complied with, is preferable, even if it is more limited in scope, to one which is wider in appearance only.

### Interpretation of treaties (part III, sect. 3)

Practice supports the indication, in the commentary, that preparatory work plays a larger role in the interpretation of treaties with which international organizations are concerned than in inter-State relations.

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m/ Yearbook ... 1977, vol. II (Part Two), p. 119, document A/32/10.

n/ Ibid., p. 120.

## Treaties and third parties (part III, sect. 4)

Draft article 36 makes inapplicable to international organizations the principle according to which the assent of a third State to the acquisition of rights under a treaty is presumed as long as the contrary is not indicated; the assent of the organization to the acquisition of rights under a treaty to which it is not a party is required, in a form to be determined by its rules. This corresponds to certain rules regarding gifts presently applicable: thus, under the Financial Regulations of the ILO, gifts must be accepted by one of the representative organs (the Conference, where the gift may directly or indirectly involve an immediate or ultimate financial liability for the members of the Organization; the Governing Body, where no such liability is involved). Amongst the matters to which consideration has been given in that connection are the ability of the Organization to use the gift, in law or in fact, the ability of the Organization to respect conditions to which the gift may have been made subject, and, of course, the liabilities which may be attendant thereon. The proposed rule thus seems desirable, even if - as shown in paragraph 96 of the second report by the Special Rapporteur o/ - it has not always been followed hitherto. At the same time, it is assumed that, as suggested by the Special Rapporteur, assent may be implied if the rules of the organization permit this.

As regards the problem of the position of member States of the organization in relation to treaties to which the organization is a party (possible article 36 bis), a fundamental question is that discussed in the second report of the Special Rapporteur, namely, to what extent the treaty creates international rights and obligations directly between the other contracting parties and the member States of the organization. Where a liability is created for member States by virtue of their obligation, under the constitution of the organization, to meet the expenses of the organization, there are probably no such direct relations; in such case the problem is linked to that dealt with in draft articles 27 and 46 (and possibly 61 and 62) and not to that of part III, section 4. Even in the case of agreements concerning the privileges and immunities of organizations, it may be arguable that the rights and obligations arise exclusively in relation to the organization and not directly as between States; p/ if that is so, acceptance of the terms of the agreement by the organization in accordance with its rules may imply a certain liability - but to the organization - even for member States which dissented from the decision taken in the competent organ. For the rest, the ILO does not, at present, have experience which could throw any light on the needs which might call for provisions of the kind envisaged in possible article 36 bis.

## Miscellaneous provisions (art. 73)

Related, inter alia, to the questions considered above by reference to articles 27 and 46, is the question of the matters which have been reserved in

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o/ Yearbook ... 1973, vol. II, pp. 90-91, document A/CN.4/271.

p/ This argument is relevant, not only to the present issue, but also to that of the obligations, under one of the general Conventions, of a host State in respect of the representatives of another ratifying State which has made reservations regarding the treatment of such representatives. It might be recalled that, as regards the Specialized Agencies Convention, the organizations concerned do not accept accessions subject to substantive reservations.

pursuance of article 73. In this connection, the comments of the Commission on a number of articles suggest that the Commission envisaged wider reservations than the terms of article 73, strictly interpreted, might allow. The issue is of importance in that, as recognized in the Commission's comments, the interpretation of the rules laid down elsewhere in the draft articles will be affected by what is clearly understood not to be dealt with therein.

The comments on article 73 itself make clear that the examples given therein are not exhaustive; as drafted, however, the terms of the article do not bear out that view. It is recognized that it may be difficult to change that drafting if, as stated in the commentary, the parallel language of the Vienna Convention on the Law of Treaties is also not intended to be exhaustive. The issue may, nevertheless, merit further reflection.

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

[Original: English]

[17 February 1981]

General

Having examined articles 1 to 60 adopted by the International Law Commission, FAO is of the opinion that they would not give rise to difficulties in its relations with States and other international organizations. FAO would, however, wish to make the specific comments set out below.

Article 2 (1) (b ter): "'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;"

This provision refers to "acceptance", "approval" and "accession" but does not refer to "adherence". It is true that the terms "accession" and "adherence" have become largely synonymous and that the term "accession" tends to be used more frequently than "adherence". However, since a number of States and international organizations still employ both terms, it would seem desirable for this practice to be reflected in the draft articles.

Article 2 (1) (i): "'international organization' means an intergovernmental organization;"

While the commentary on this provision contains cogent arguments in favour of the proposed text, it might none the less prove desirable for this definition, when read in conjunction with the definition of "treaty" contained in article 2 (1) (a), to bring out more clearly the extent to which the articles would apply to agreements concluded between subsidiary organs of international organizations, both with States and other international organizations, since it is well known that certain subsidiary organs of international organizations, in particular the United Nations, enjoy a wide measure of autonomy and conclude a large number of agreements.

The question also arises whether the definition of an "international organization" would cover international organizations whose membership was made up both of sovereign States and other international organizations.

Article 36 bis (b)

As to the effects of a treaty to which an international organization is a party with respect to third States that are members of that organization, it is a fact that in a number of instances the treaties concluded by such an organization give rise, at least indirectly, to rights or obligations - or both - for third States. This can occur in a general manner in the case of treaties concluded with non-member States or other intergovernmental organizations, and more specifically in connection with topics such as privileges and immunities as mentioned in the commentary on article 36 bis (Yearbook of the International Law Commission, 1978, vol. II (Part Two), document A/33/10, p. 135)

In the experience of FAO, the question of the way in which a third State's acceptance of the rights and obligations deriving from such treaties should be expressed does not appear to have given rise to any problems.

It may be appropriate, however, to distinguish between treaties concluded by an international organization that have been formally approved by the competent intergovernmental organ of that organization and those concluded at the secretariat level in accordance with less formal procedures. In the former case, the "acknowledgement" of third States that the application of the treaty may entail obligations as well as rights for it can be assumed. On the other hand, in the case of the numerous treaties which are concluded by the secretariats of international organizations with States and other international organizations, the "acknowledgement" is less clear. However, in so far as these latter treaties are concluded in virtue of powers delegated to the secretariats, either expressly or implicitly, under the constituent instrument or rules of the international organization concerned, it could be maintained that the obligations flowing from these treaties apply automatically to members of the international organization as a consequence of their membership and without any need for them to "acknowledge" that the application of a particular treaty entails obligations for them.

### III. COMMENTS AND OBSERVATIONS OF OTHER INTERNATIONAL ORGANIZATIONS

#### COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE

[Original: Russian]

[4 October 1980]

... [T]he secretariat of the Council for Mutual Economic Assistance (CMEA) welcomes the considerable work done by the United Nations International Law Commission in connection with the preparation of the draft articles on treaties between States and international organizations or between international organizations.

Articles 1 to 60 of the draft articles submitted for our consideration appear on the whole to merit a favourable evaluation and could provide a good basis for the elaboration by the Commission of the final draft of the articles on this subject.

However, the draft contains certain provisions which, in the opinion of the CMEA secretariat, require clarification. In particular, the CMEA secretariat would think it advisable in the final wording of the provisions concerning reservations (draft arts. 19 to 23) to proceed from the assumption that international organizations are not able tacitly to accept reservations formulated by States or by other international organizations. In our view, the parallel with States is inappropriate in this instance.

The CMEA secretariat would also consider it advisable to eliminate from the text provisions which would place on States members of a particular international organization obligations under international treaties concluded by it, without the express agreement of those States members with regard to the treaty concluded by the organization.

#### EUROPEAN ECONOMIC COMMUNITY

[Original: English/French]

[11 February 1981]

1. The European Economic Community (EEC) recalls that its member States <sup>g/</sup> have transferred to the Community their competences within certain fields, in particular in respect of external trade policy, the common agricultural policy including management and conservation of fishery resources, and certain matters relating to the protection and preservation of the environment.

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<sup>g/</sup> The Community has since 1 January 1981 the following 10 member States: Belgium, Denmark, France, Germany, Federal Republic of, Greece, Ireland, Italy, Luxembourg, Netherlands and United Kingdom of Great Britain and Northern Ireland.



The draft articles under consideration are drawn up in parallel with the Vienna Convention on the Law of Treaties and complete this Convention in relation to the application of treaty law in respect of international organizations. The Community, having international legal personality and being capable under international law to conclude treaties with States and other entities, is therefore to be treated accordingly.

The Community's treaty-making powers are not restricted to the instances explicitly provided for in the Treaty establishing the European Economic Community. These powers may be extended in new fields under the conditions provided for in the Treaty.

## 2. General observations

The Community welcomes that the International Law Commission has adopted as a basic principle to keep the draft articles as close as possible to the text of the Vienna Convention of 1969 on the Law of Treaties. The deliberations that have taken place in the Commission show that it is not possible in all instances to transpose the provisions of the Vienna Convention. It is, however, important to maintain this basic principle in order not to create a new legal instrument which could have the effect of undermining the principles codified in the Vienna Convention.

The Community supports the recommendation made by several representatives in the Sixth Committee of the United Nations General Assembly that a simpler solution should be found in various instances to the draft articles. Reference is in particular made to articles 20 bis, 47, 54 and 57 as examples of unnecessarily complicated drafting, and in which a rather simple principle is buried in the obscurities of defining the cases to which it applies.

To avoid complicated and tedious drafting changes from the model of the Vienna Convention is a correct principle. International organizations vary to a large extent in legal form, functions, powers and structure and in their capacity to conclude treaties. The International Law Commission was itself conscious of this fact, as witness its adoption of a broad definition of international organizations, a definition which would clearly cover the European Economic Community; a similar recognition underlies the Commission's decision to solve various essential questions by reference to the constituent instruments, relevant decisions and resolutions, and established practice of the organization. Too zealous a pursuit of distinctions between States and international organizations in each and every instance could all too easily lead to a situation in which the draft articles would fail to correspond to established and developing international practice.

## 3. Comments on individual draft articles

The Community prefers to focus its comments on a limited number of the draft articles which it considers to be of particular concern to it. These comments should be read in close connection with the outline made above in section 1 on the international legal personality of the European Economic Community and with the general observations contained in section 2.

## Article 2, paragraph 1 (j). Use of terms

The definition in this subparagraph of the term "rules of the organization" is important. It is recalled that the International Law Commission inserted this definition when elaborating draft article 27 which deals with the internal law of a State, rules of an international organization and observance of treaties. The definition repeats article 1, paragraph 1 (34), in the Convention of 14 March 1975 on the Representation of States in their Relations with International Organizations of a Universal Character. It is a helpful clarification and it should be retained as a supplement to the preceding subparagraph of article 2 which contains the definition of an "international organization".

The definition given in article 2, paragraph 1 (j), seems also necessary in order to ensure an adequate interpretation of other provisions of the draft articles; in particular draft article 6 on the capacity of international organizations to conclude treaties. The reference simply to "relevant rules of the organization" would be acceptable to the Community if read in conjunction with the clarification given in draft article 2, paragraph 1 (j).

## Article 9. Adoption of the text of a treaty

Paragraph 1 of this article states the general rule that treaties are concluded by agreement between the contracting parties. This principle, which repeats the provisions of the Vienna Convention, represents no difficulties.

The present draft of paragraph 2 would not exclude international organizations from participating fully in an international conference convened for the purpose of adopting a treaty. It is, however, not adequate, as indicated in the commentary of the International Law Commission, to leave it to States in each case to decide whether such participation would be accepted.

## Part II. Section 2. Reservations

Most of the provisions contained in the section on reservations to treaties concluded between States and international organizations or between international organizations transpose the provisions on that subject matter in the Vienna Convention. The International Law Commission has, however, attempted to draw up distinctions in respect of the right for an international organization to formulate reservations on its own behalf or object to reservations made by another contracting party to a treaty concluded between one or more States and one or more international organizations. The ability of an international organization in these instances is, in draft article 19 bis, paragraph 2, and draft article 19 ter, paragraph 3, limited on the one hand either to cases where "the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized", or, on the other, if "the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty" or if the participation of such organization "in the treaty is not essential to the object and purpose of the treaty".

It is not clear why the International Law Commission has adopted the position that international organizations should not be able to avail themselves of commonly agreed principles concerning the right to formulate reservations and especially the right to object to reservations formulated by other contracting

parties to a treaty. The Community therefore recommends that the Commission should reconsider draft article 19 bis, paragraph 2 and draft article 19 ter, paragraph 3 with particular reference to the need not to introduce distinction between the parties to freely negotiated treaties, unless such distinction is essential.

Part III. Section 4. Treaties and third States or third international organizations

The provisions on this topic raise important issues relating to the status of international organizations in respect of the general rules of international law. Two points seem to be of particular interest:

(a) The position of an international organization vis-à-vis treaties between States intending to give powers to such organization - or organ thereof - in respect of the implementation of such treaties; and

(b) The legal position of member States of an international organization vis-à-vis treaties concluded by that organization.

The comments will be limited to the second point mentioned, namely, the legal position of member States of an international organization as dealt with in article 36 bis, a question which the International Law Commission has left open pending the comments of States and international organizations.

The need for dealing with this problem in the draft articles is inescapable. The legal fiction, that an international organization is as such separate and distinct from its member States cannot be carried to the extreme by stating that the member States as such have absolutely nothing to do with treaties, validly concluded by the organization to which they belong. Such attitude could actually be interpreted as a philosophical approach based upon the concept that an international organization constitutes an independent sovereign entity, possessing original powers just like the national States.

The actual situation for the Community is that it possesses personality under international law to conclude treaties which are binding on its institutions and on the member States. Reference is hereby made to article 228 of the EEC treaty. The provisions of that article do not purport to lay down a general rule. They do at least recognize, in so far as the States parties to that treaty are concerned, the legal significance, for those States, of treaties concluded by the international organization they have established. One might even argue that this provision of the EEC treaty is a treaty provision which intends to give guarantees to non-member States which those States assent to and accept by entering into a treaty with the organization. However that may be, and quite apart from the specific situation of the EEC, the problem is obviously a general one and arises in respect of any international organization which enters into treaty relations with a third State or with another international organization. It is rather the effects of that treaty, validly entered into by an international organization, which require attention. The primary effect of such a treaty is to create rights and obligations as between the entities which are the formal parties to the treaty.

The rule formulated in article 36 bis actually serves to protect the State or other entity which enters into a treaty with an international organization, just like the existing and never challenged rule of international law as contained in article 27 of the Vienna Convention that, where there is a treaty between States

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Draft article 36 bis is not addressed to the question of responsibility of an international organization for the conduct of its organs or of its member States, but rather deals with the "primary" rules of rights and obligations of those member States. Nevertheless, the underlying function of protection of the interests of the State party to a treaty it concludes in this case with an international organization, is the same. It is therefore surprising to see that objections to this article were brought forward in the International Law Commission on the basis that the article serves the purposes and interests of some particular existing international organizations and their member States.

The Community fully endorses the principles underlying draft article 36 bis. The text as it stands does, however, have certain shortcomings. It should be noted that draft article 36 bis does not expressly envisage the situation where an international organization, together with its member States, concludes a treaty with a third State or organization. At least for the Community, it is common practice that it becomes a contracting party to a treaty together with its member States if that treaty covers areas within which the competences are mixed. This situation of "mixed agreements" is, by way of example, the situation in respect of a number of international commodity agreements. 1/ The Community considers that it should be clear that article 36 bis also applies in the case of mixed agreements to those rights and obligations provided for in the agreement which fell within the competence of the international organization. As regards the rights and obligations resulting specifically from the treaty relations between member States of the organization and non-member States, it should be no less clear that they are governed by the rule set out in article 3 (c) of the Vienna Convention.

The Community's final observation is that, in the case of mixed agreements, the member States of the international organization would not necessarily be "third States"; the Community moreover draws attention to the awkwardness of describing Member States as "third States" in relation to an organization of which they are members.

The Community is ready to continue its work in order to bring about the clarifications or amendments, with regard to article 36 bis, which would enable interpretation of that article to be made clearer or better account to be taken of the rules according to which the Community and its Member States become parties to treaties.

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1/ The International Wheat Agreement 1971, the International Cocoa Agreement 1975, the International Tin Agreement 1975, the International Coffee Agreement 1976, (all with later amendments) and the International Natural Rubber Agreement 1979.

ANNEX III

CORRESPONDENCE BETWEEN THE DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS AS FINALLY APPROVED BY THE INTERNATIONAL LAW COMMISSION AT ITS THIRTY-THIRD SESSION AND THE DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES AS PROVISIONALLY ADOPTED BY THE COMMISSION AT PREVIOUS SESSIONS

<u>Designation of the article as finally approved at the 1981 session s/</u>	<u>Designation of the article as provisionally adopted in first reading at the 1979 or 1980 session t/</u>	<u>Designation of the article as provisionally adopted at previous sessions u/</u>
1	1	1
2	2	3
3	3	2
4	-	-
5	-	-
6	-	-
7	4	4
8	5	5
9	6	6
10	7	7
11	8	8
-	-	9
-	-	[11]
12	9	X

s/ See chap. II, sect. D above.

t/ Articles 1-23, A and B were adopted by the Commission at its thirty-first (1979) session (see Yearbook ... 1979, vol. II (Part Two), chap. II, sect. B) while articles C-F were adopted at its thirty-second (1980) session (see Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10), chap. II, sect. B.2).

u/ Articles 1, 2, 3(a)-(d) and 4-8 were adopted by the Commission at its twenty-fifth (1973) session (see Yearbook ... 1973, vol. II, document A/9010/Rev.1, chap. III, sect. B). Articles 3(e), 9, [11] and X were adopted at its twenty-seventh (1975) session (see Yearbook ... 1975, vol. II, document A/10010/Rev.1, chap. III, sect. B.2). Articles 3(f) and 12-16 were adopted at its twenty-eighth (1976) session (see Yearbook ... 1976, vol. II (Part Two), document A/31/10, chap. IV, sect. B.2). Articles 17-22 were adopted at its twenty-ninth (1977) session (see Yearbook ... 1977, vol. II (Part Two), document A/32/10, chap. III, sect. B.2). Articles 23-25 were adopted at its thirtieth (1978) session (see Yearbook ... 1978, vol. II (Part Two), document A/33/10, chap. IV, sect. B.2).

<u>Designation of the article as finally approved at the 1981 session</u>	<u>Designation of the article as provisionally adopted in first reading at the 1979 or 1980 session</u>	<u>Designation of the article as provisionally adopted at previous sessions</u>
13	10	12
14	11	13
15	12	14
16	13	15
17	14	16
18	-	-
19	A	-
20	-	-
21	-	-
22	-	-
23	-	-
24	-	-
25	C	-
26	B	-
27	D	-
28	E	-
29	F	-
30	15	17
31	16	18
32	17	19
33	-	-
34	18	20
35	19	21
36	20	22
37	21	23
38	22	24
39	23	25

NOTE

In the above table, where an article in one set has no corresponding article in another set, the relevant column is marked. "-".

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