

THE SUCCESSION OF STATES AND THE PROBLEM OF STATE DEBTS

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I. INTRODUCTION

The concept of debt has two aspects — benefit and obligation. The party benefiting from the obligation has a claim and the party performing the obligation has a duty. A debt creates “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.”¹

It is proverbial that the value of a debt is linked with the fate and action of the debtor; it is a concept which “falls within the category of personal obligations.”² In other words, it is a relative obligation, restricted to the relationship between the debtor and the creditor. Therefore, discharge of the debt primarily depends on the solvency of the debtor; his property is subject to the liability.

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¹ Ninth Report on Succession of States in Respect of Matters Other Than Treaties, *reprinted in* [1981] 2 Y.B. INT'L L. COMM'N, para. 2, U.N. Doc. A/CN.4/301/1981/Add.1 of 13.

² *Id.* at para. 3.

In municipal law, a writ of debt has existed since time immemorial. A writ of debt could be brought upon an obligation, a debt acknowledged by the deed under seal. In such cases the establishment of the authenticity of the deed was conclusive. Where there was no deed under seal, debt could still be used to recover a loan, to collect the rent due upon a lease, and later on to enforce various statutory penalties. The action of debt, therefore, was fairly comprehensive.

In Anglo-Saxon common law, a debt was a contractual right which could not be assigned so as to entitle the assignee its recovery in his own name. The Courts of Equity, however, took a different view.³ An equitable assignment conferred upon the assignee the right to invoke the aid of equity.⁴

The assignment of a debt, which operates as an effective transfer without the consent of the debtor, is distinguished from a novation. In a novation the debtor must be a party. Novation requires the consent of all the parties concerned and the new obligation is concluded in place of the old one.⁵

To what extent does this municipal law principle apply in international law? In the succession of states, it is necessary to examine when a triangular relationship is created and dissolved among a third state as creditor, a predecessor state as first debtor, and a successor state that agrees to assume the debt. Due to rapidly growing interdependence of states in international investment, the importance of this relationship cannot be overemphasized. The International Law Commission (hereinafter cited as the Commission), in its on-going work on the codification and progressive development of international law, seized this subject matter. After several years of continuous and consistent research and discussion, the Commission prepared a text of draft articles which was submitted to a United Nations Conference of plenipotentiaries held in Vienna in 1983. With minor changes, the Conference adopted these articles that have now become a part of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter cited as the Vienna Convention).⁶

This article is based upon the articles of the Vienna Convention. It examines how the articles define and consolidate the various types of state debts, and how they can be applied to different methods of state succession.

II. STATE DEBT: SCOPE AND NATURE

Debt, a generic term, occurs in a variety of forms. Depending upon a debt's characteristic features, legal literature designates debts in different categories.⁷ In this article, it is necessary to examine only those forms of debt which are closely connected with state debts; specifically, public debts, local debts, localized debts, debts of public enter-

³ "They admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset and treating the necessity of an action at law to get it in as a mere incident." *Fitzroy v. Cave* [1905] 2 K.B. 364, 372, *per* Cozens-Hardy, L.J.

⁴ "Equity considers that as done which ought to be done, and since the parties have agreed that the common law right under the contract is the property of the assignee, the assignor must allow an action at law to be brought in his own name so as to make the transaction effectual." CHESHIRE, FIFOOT AND FURMSTON, *THE LAW OF CONTRACT* (8th ed. 1972).

⁵ "The new contract may be between the original parties, e.g., where a written agreement is later incorporated in a deed; or between different parties, e.g., where a new person is substituted for the original debtor or creditor." *Id.* at 504.

⁶ Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, concluded 8 April 1983, Text Pub. U.N. Doc. A/Conf. 117/14.

⁷ See Ninth Report, *supra* note 1, at para. 6.

prises, and odious debts. Additionally, Article 33 of the Vienna Convention attempts to create its own definition of state debt, which has been viewed critically.

A. Public Debts

A public debt is "an obligation binding on a public authority as opposed to a private body or an individual."⁸ The term "public authority" has a broad definition which covers inferior territorial authorities as well as the State. The term may also include other public entities, such as public institutions or establishments, whether or not they are of a territorial character.⁹ Moreover, "a public debt is the individual legal situation of the State's administrative patrimony: it is the legal obligation of the administrative patrimony to pay a certain sum of money to a given creditor."¹⁰

The International Law Association's report, the *Succession of New States*, subdivides public debt into three distinct categories: the national debt, local debts, and localized debts.¹¹

The national debt is defined as "the debt shown in the general revenue accounts of the central government, which is unrelated to any particular territory or any particular assets."¹² This definition given by the International Law Association identifies the national state debt, but it does not include what is known as a localized state debt.¹³ The Special Rapporteur to the Commission, Mohammed Bedjaoui, suggests that the better definition of state debt is "a debt that is chargeable solely to the treasury of the central government."¹⁴ The main criterion used in defining "state debt" is the correlation between the party that is legally bound and the party that is financially responsible for the debt.¹⁵ On this basis the Special Rapporteur proposes that the term state debt be defined as:

- (a)[a debt] contracted by the central government of the state and therefore legally binding on the state itself, and
- (b)[a debt] chargeable to the central treasury of the state.¹⁶

B. Local Debts and Localized Debts

A local debt is different from a localized debt.¹⁷ A local debt may be defined as a debt: "(a) that is contracted by a territorial authority inferior to the State; (b) to be used

⁸ *Id.* at para. 33.

⁹ *Id.*

¹⁰ G. JEZE, *COURS DE SCIENCE DES FINANCES ET DE LEGISLATION FINANCIERE FRANCAISE* 215.

¹¹ International Law Association, *Report of the Fifty-Fourth Conference held at the Hague, 23rd-29th August, 1970* 108 (1971).

¹² *Id.*

¹³ According to the Special Rapporteur of the commission, Mohammed Bedjaoui, a localized debt is "a form of State debt that is contracted by the organs of the central government and charged to the general treasury of the State but that has been used, by decision of the State, to meet the exclusive needs of a particular territory." See Ninth Report, *supra* note 1, at para. 62.

¹⁴ *Id.*

¹⁵ *Id.* at para. 63.

¹⁶ *Id.*

¹⁷ To distinguish between localized state debts and local debts, the following criteria are suggested:

(a) Who the debtor is: a local authority or a colony or, for and on behalf of either of these, a central government;

by that authority in its own territory; (c) such territory has a degree of financial autonomy; (d) with the result that the debt is identifiable.”¹⁸ If this principle is accepted, local debts would remain under the exclusive responsibility of the contracting territory and would not be considered a state debt. Thus, a predecessor state would not bear responsibility for that portion of the debt by application of the doctrine *res transit cum suo onere* (the thing passes with its burden).¹⁹

A localized debt is “a State debt that is used specifically by the State in a clearly defined portion of a territory.”²⁰ For a localized debt to be a state debt, it must satisfy three discernible criteria: (1) intended use in the territory; (2) actual use in the territory; and (3) use for the interest or benefit of the territory.²¹ Other pertinent factors considered are the personality of the debtor, the financial autonomy of the territory, and the existence of securities or pledges for the debt.²² If these criteria are met, a localized debt would be a state debt for which the predecessor state would be liable. However, a successor state may not be liable for the debt.²³ For example, “in the case of a State debt secured by property belonging to the territory, it is by no means certain that the loan was contracted for the benefit of the territory in question.”²⁴

The principle of making a clear distinction between local and localized debts has been subject to criticism. According to one Commission member:

A local debt incurred by a municipality or an organized section of the community with local autonomy would, if backed by a guarantee from the central Government, be only one step removed from a State debt . . . [A] localized debt, which meant one incurred by the central Government for a particular part of the country, was very similar to a debt of a local community or entity guaranteed by the State . . . Consequently, the difference between a local debt and a localized debt, when such debts were guaranteed by the central Government, tended to be blurred.²⁵

Thus, determining whether a debt is local or localized is a difficult process. The difficulty arises when determining whether the debt is incurred by the local community

(b) Whether the part of territory that 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 that is detached;

(d) Whether there is a particular security situated in the part of the territory.

Id. at para. 16.

¹⁸ *Id.* at para. 29.

¹⁹ *Id.* at para. 14.

²⁰ *Id.* at para. 29.

²¹ In accordance with the first criterion, the state must have intended the corresponding expenditures to be effected for the territory concerned; by the second criterion, the State must actually have used the proceeds of the loan in the territory concerned; and by the last criterion the expenditure must have been effected for the benefit and in the actual interest of the territory in question. *Id.* at para. 22.

²² *Id.* at paras. 18, 19, 23.

²³ *Id.* at para. 24.

²⁴ “Perhaps the predecessor State had no other property that could be used as security; it would be necessary to place the burden of such a debt on the successor State simply because the territory that has become joined to it had the misfortune to be the only part capable of providing the security.” *Id.*

²⁵ Summary Records of the 1416th Meeting, [1977] 1 Y.B. INT’L L. COMM’N, para. 40, U.N. Doc. A/CN.4/301/1977/Add.1.

or whether the source of the debt is incurred by the central government for the benefit of the territory.²⁶ This study leads to the conclusion that there are two categories of localized state debts: (1) localized state debts where the proceeds have been applied in a territory but which have benefited the entire state, such as a dam which supplied electricity to the entire territory of a state; and (2) localized state debts where the proceeds have been applied in a territory and have benefited that territory exclusively, such as the construction of a local railway.²⁷ The debt in the latter case is transferred to the successor state.

C. *Debts of Public Enterprises*

In recent years, increased government participation in once exclusively private spheres of economic and commercial activity has resulted in an increased number of public enterprises in many countries. While some public enterprises have independent corporate status, most others are state agencies and are integral units of the government. Furthermore, public enterprises have been described as "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."²⁸ Their international personality and responsibility is determined in accordance with the public function they undertake. The internal law of the state will determine whether the public enterprise performs a public function. If an enterprise does perform a public function, debts incurred in performing the public function have a public character.

An immediate concern with respect to state succession, is whether the debt of a public enterprise is a state debt. In his report to the Commission, the Special Rapporteur concluded that although the debts of public enterprises are of a public character, that character "does not suffice to make the debt a State debt."²⁹ This restrictive concept of state debt has been subject to criticism. An opposing view is that:

Under certain constitutional arrangements, public enterprises were sometimes completely autonomous, but more often a public enterprise was simply an arm of the central Government that had limited financial autonomy and was usually indirectly accountable to the central Government, which kept watch over its activities.³⁰

Thus, under this viewpoint, the debt of a public enterprise is actually the debt of the state, and should be assumed by the successor nation.

²⁶ Summary Records of the 1417th Meeting, *supra* note 25, at para. 16.

²⁷ Summary Records of the 1421st Meeting, *supra* note 25, at para. 14.

²⁸ Ago, in [1971] 2 Y.B. INT'L L. COMM'N 254, U.N. Doc. A/CN.4/246/1971/Add. 1-3 (Part One) para. 163.

²⁹ Ninth Report, *supra* note 1, at para. 32.

³⁰ Summary Records of the 1416th Meeting *supra* note 25, at para. 41. Another member, Robert Ago, was reluctant to subscribe to the restrictive approach said:

[S]upposing, for instance, that the Italian administration for the railways, which belonged to the State, contracted a loan to develop the Italian railway network. If Sicily subsequently separated from the Italian State the problem of succession to a part of that debt would arise in the same way as if Brittany were to separate from France, after a loan for similar purposes had been contracted by SNCF, which was a separate public establishment of the State. The fact that SNCF was not a direct branch of the State administration would not justify the application of a different rule.

Summary Records of the 1421st Meeting, *supra* note 25, at para. 19.

D. *Odious Debts*

Odious debts are contracted contrary to the interests of the inhabitants of the territory, such as war debts and subjugation debts. War debts "are those contracted by a State to sustain its war effort against another State."³¹ Subjugation debts "are those contracted by a State with a view to subjugating a people and colonizing its territory."³² Generally, for ethical and political reasons, odious debts are not assumed by the successor state because those debts seriously impair the successor nation's interests in the state.

Eighteenth and nineteenth century treaties, as well as treaties concluded after the First and Second World Wars, attest to the successor state's rejection of the predecessor state's war debts. The Treaty of Campo Formio of 1797 (between France and the Emperor of Austria),³³ the Treaty of Tilsit of 1807 (between France and Prussia),³⁴ and the Treaty of Vienna of 1864, (among Denmark, Prussia, and Austria),³⁵ exemplify the tendency to exclude war debts from state debts assumed by the successor nation.

The peace treaties concluded after the First World War broadened the concept of war debt by including all debts contracted during the war and debts incurred by victims of the war in both the warring and neutral states.³⁶ This broad concept of war debt was exemplified after the Second World War in the 1947 Peace Treaties of Paris. For example, the Italian Treaty³⁷ states:

The Government of the successor State (Free Territory) shall be exempt from the payment of the Italian public debt, but will assume the obligations of the Italian State towards holders who continue to reside in the ceded territory (Free Territory), or who, being judicial persons, retain their *siege social* or principal place of business there, in so far as these obligations correspond to that portion of this debt which has been issued prior to June 10, 1940, and is attributable to public works and civil administrative services of benefit to the said territory but not attributable directly or indirectly to military purposes.³⁸

³¹ Ninth Report, *supra* note 1, para. 118.

³² *Id.*

³³ See Cahn, *The Responsibility of the Successor State for War Debts*, 44 AMER. J. OF INT'L L. 480 (1950).

³⁴ "Article 24, applying to Saxony and Danzig as well as to Westphalia, provided that, while debts contracted by the sovereign in its capacity as ruler of a certain area were recognized by the succeeding states, debts contracted during the war between France and Prussia were excluded." *Id.*

³⁵ Article XVII of the Treaty provided that

[T]he new Government of the Duchies (Schleswig-Holstein) succeeds to the rights and obligations contracted by the administration of His Majesty the King of Denmark which concern the ceded areas. It is to be understood that obligations resulting from contracts concluded by the Danish Government in connection with the war and the federal execution are not comprised in the aforementioned provision.

Id. at 481-82.

³⁶ For example, under the Treaty of Versailles, Denmark which had succeeded to Schleswig after the separation of that territory from Germany, had been exempted from the war debts of the German Empire, although it had remained neutral during the 1914-1918 war. Ninth Report, *supra* note 1, at para. 146.

³⁷ Annex X, subpara. 5 (economic and financial provisions concerning the Free Territory of Trieste and Annex XIV), subpara. 6 (economic and financial provisions concerning the ceded former Italian colonies).

³⁸ Quoted in Cahn, *supra* note 33, at 485-86.

Thus, the broadened concept of war debt reinforces the concept that a successor state should be responsible for the war debt contracted by the predecessor state, although the debt may be contrary to the nation's interest.

Subjugation debts are described as "debts contracted by a State while attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate to strengthen its economic colonization of that territory."³⁹ A commentator discussing regime debts stated: "no people is obliged to pay debts that are like the chains it has been forced to bear for centuries."⁴⁰ This statement is applicable, with great force, in the case of subjugation debts. Historical precedents for repudiation of subjugation debts are exemplified in the Cuban debts of 1898,⁴¹ the installation debt of German settlers in Posen in 1919,⁴² and the problem of the Indonesian debt of 1949.⁴³

Apart from war and subjugation debts, debts contracted for committing acts in violation of fundamental principles of international law may also be considered odious debts. For example, when a predecessor state contracts a debt which violates treaty obligations, the successor state will consider the debt as odious.⁴⁴ The successor state may also consider as odious those debts which enable the predecessor state to breach obligations of human rights or the right to self-determination. For example, if the predecessor state contracted a debt to purchase arms which were used to infringe human rights, commit genocide, or institute apartheid, the successor state will consider the debt as odious. Even if the successor state has not been victimized by the wrongful acts of the predecessor state, the successor state should declare a debt as odious to refrain from supporting an act which is a violation of international law.⁴⁵ Thus, debts contracted contrary to the interests or independence of the successor state, or debts contracted in violation of international law would be odious debts and could be repudiated by the successor nation.

E. *Vienna Convention: Article 33*

In accordance with Article 33 of the Vienna Convention,

State debt means any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law.

³⁹ Ninth Report, *supra* note 1, at para. 157.

⁴⁰ CHICHERIN, *L'EUROPE NOUVELLE* 1439 (1921).

⁴¹ In the course of negotiations, the American delegation maintained that the loans contracted were used for odious purposes so far as they were spent on foreign expeditions of Spain and the cost of repression of insurrections against Spanish rule. The debt was repudiated principally on moral grounds. It was also reinforced by the affirmation that "the creditors knew that the revenues were pledged for the continuous effort to put down a people struggling for freedom, and that they took the obvious chances of their investment in so precarious a security." Cahn, *supra* note 33, 482.

⁴² Since Germany had contracted loans in order to establish its nationals as settlers on Polish territory, the Treaty of Versailles (28 June 1919) absolved a restored Poland from having to assume the debt contracted by Germany for the economic subjugation of Poles by Germans. Ninth Report, *supra* note 1, at para. 188.

⁴³ At the Round Table Conference held in The Hague from 23 August to 2 November 1949, Indonesia refused to assume debts resulting from Netherlands military operations against the Indonesian National Liberation Movement, especially the financing of guerilla operations. *Id.* at paras. 169–70.

⁴⁴ *Id.* at para. 133.

⁴⁵ *Id.* at para. 134.

As the following discussion will demonstrate, the above definition can be restrictive or broad depending on the circumstances.

First, the definition limits the notion of state debt to a strictly financial obligation. It does not cover obligations to perform or to refrain performance for the benefit of a certain party which is not of a financial nature. Interestingly, under Anglo-Saxon common law, "the system of writs made it possible to initiate proceedings for the recovery not only of financial debts, but also of debts for professional or personal services."⁴⁶ Thus, in certain jurisdictions, the word "debt" is used as synonymous with "obligation." The Vienna Convention, however, does not deal with obligations in general, but is restricted to financial obligations.⁴⁷

Second, the notion that the obligation should arise in conformity with international law means that the debt should be an international financial obligation arising from dealings, such as treaties between subjects of international law. Therefore, an obligation contracted with any natural or legal person, in particular with a nation's own citizens, would not come within the meaning of the term "state debt" under the Vienna Convention. According to proponents of this restrictive principle:

The transfer of debts that were not international could constitute interference in the internal jurisdiction of the successor State. Matters relating to the financial obligations of a State to private creditors or, in other words, to creditors who were not subjects of international law should be regulated by internal law and could not be subject to international codification.⁴⁸

However, the concept that obligations arise in conformity with international law "would not only restrict the sources of credit available to States and international organizations, but would also be detrimental to the international community as a whole, particularly the developing countries."⁴⁹ One representative, Mohammed Bedjaoui, stressed:

... that international law had always dealt with the relationship between a State and nationals of other States. Although those nationals could not claim their rights directly at the international level and had to exhaust the resources provided by domestic law, it was recognized that the "receiving State" had an obligation to treat such persons in conformity with international law and that the State of which those persons were nationals had authority to act on their behalf with a view to ensuring that they were so treated. At the current stage in the development of international law, when both theory and practice were moving towards recognition of the rights of individuals, it did not seem right to exclude the possibility that a successor State might be a debtor of subjects other than subjects of international law.⁵⁰

Moreover, the restrictive principle would "suggest to banks and similar bodies that they should not lend to any State likely to be involved in an occurrence of succession,

⁴⁶ Summary Records of the 1421st Meeting *supra* note 25, at para. 25.

⁴⁷ Summary Records of the 1418th Meeting, *supra* note 25, at para. 38. "The problem of non-financial obligations had been largely resolved by the Commission during its consideration of succession of States in respect of treaties, when it had studied certain objective territorial regimes created for the benefit of one or more States." *Id.* at para. 39.

⁴⁸ Thirteenth Report on Succession of States in Respect of Matters Other Than Treaties *reprinted in* [1981] 2 Y.B. INT'L L. COMM'N, para. 132, U.N. Doc. A/CN.4/345/1981/Add.1.

⁴⁹ *Id.* at para. 129.

⁵⁰ *Id.* at para. 127.

and would therefore be contrary to the aims of the North-South dialogue,⁵¹ which included the widening of access to private capital markets.”⁵²

According to the definition, the creditor might be another state, an international organization or any other subject of international law. The overall intention is to settle debts between subjects of international law. Subjects of international law enjoy a *locus standi* in the law of nations and bear an international personality.

There was considerable controversy concerning the legal personality of international organizations during the first half of this century.⁵³ Fortunately, since the International Court of Justice gave its Advisory Opinion in 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*,⁵⁴ the international community has increasingly come forward to consider international organizations as subjects of international law. The status of these organizations, especially the International Monetary Fund, the World Bank and its affiliates (the International Development Association and the International Finance Corporation), is important because these organizations are the main financial lending agencies to most developing nations.

The expression “any other subject of international law” creates controversy as to what constitutes a generally acceptable definition of a “subject of international law.” Are national liberation movements, transnational corporations, or individuals “subject[s] of international law?”⁵⁵ A consensus to the answer of this question is difficult to achieve. For example, in classical international law, an individual was regarded as an object; he enjoyed no rights and at times was burdened by duties. Some modern writers consider the state a fiction. In the ultimate analysis it is the individual who is the subject of international law. These writers claim that the antiquated doctrine of previous centuries should be discarded. For international human rights to have any real significance it is necessary to accept the principle that the individual can derive these fundamental rights directly from positive international law. However, in spite of the large volume of literature that has been produced to prove the international personality of the individual, individuals still may not receive the recognition of their full status under international law.

III. PASSING OF STATE DEBTS

A. *Date of the Passing of State Debts*

Article 35 of the Vienna Convention provides that: “[u]nless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the

⁵¹ Originally, the *Conference on International Economic Co-operation* which opened in Paris in December 1975.

⁵² Summary Records of the 1447th Meeting, *supra* note 25, at para. 16.

⁵³ See generally, Jenks, *The Legal Personality of International Organizations*, 22 BRIT. Y.B. INT'L L. 267 (1945).

⁵⁴ (1949) I.C.J. 174. Finding it necessary to affirm the international personality of the United Nations, the Court said:

This is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a ‘super-State,’ whatever that expression may mean . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

Id. at 179.

⁵⁵ Thirteenth Report, *supra* note 48, at para. 157.

passing of State debts of the predecessor State is that of the succession of States." The date of the succession of states is "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."⁵⁶ However, the date of the passing of state debts usually does not automatically coincide with that of the succession of states. Generally, the passing of the debt is subsequent to state succession for the obvious reason that acknowledgment of the signature of the predecessor state, endorsement by the successor state, and novation by the creditor may take some time. During this transitional period, the predecessor state continues to remain accountable to the creditors for its debt. However, the successor state will pay the predecessor state the servicing charges associated with those debts.⁵⁷

Additionally Article 35 is a residuary rule which provides alternative methods to determine the date of passing of state debts. The residuary character of Article 35 is indicated by the proviso "unless otherwise agreed by the States concerned or decided by an appropriate international body." The proviso favorably introduces flexibility into the rule by allowing the date of the passing of the debt to be stipulated either by an agreement or by a decision. The agreement, as referred to in the proviso, may be a bilateral agreement between the predecessor and the successor state, or it may be a tripartite agreement concluded between the predecessor state, the successor state, and the creditor. The phrase "decided by an appropriate international body" calls for a decision rendered by a principal organ of the United Nations, such as the General Assembly, the Security Council, the International Court of Justice, or a properly constituted international arbitral tribunal.

Circumstances may vary from one case to another and in certain instances it may not be feasible for the debt to pass on the date of succession. In those cases, application of the Article 35 proviso will contribute to the certainty of international law and provide a legal basis for choosing a date for passing the debt other than that of the succession of states. This may be done in the interests of a predecessor state, successor state, or the creditor in order to prevent disputes.

Regardless of the length of the transitional period required for the settlement of the organizational problems associated with the replacement of the predecessor state by the successor state as the new debtor, the purpose of Article 35 is to make the legal principle clear: "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."⁵⁸

B. *Effects of the Passing of State Debts*

Closely following Articles 9 and 21 of the Vienna Convention dealing with the effects of the passing of state property and state archives, Article 34 states that: "[t]he passing of State debts entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of the State debts which pass to the successor State, subject to the provisions of the articles. . . ."⁵⁹ The rule stated in Article 34 confirms the dual juridical effect of a succession of states: (1) the

⁵⁶ Vienna Convention, *supra* note 6, at Article 2, para. 1(d).

⁵⁷ See *Report of the International Law Commission on the Work of Its Thirty-Third Session 4 May-24 July 1981*, Article 33, Commentary.

⁵⁸ See *supra* note 56.

⁵⁹ Vienna Convention, *supra* note 6, at Article 34.

extinction of the obligations of the predecessor state in respect to the debts in question; and (2) the arising of the obligation of the successor state to those debts.

The automatic equation between succession of property and succession of debts has been subject to criticism in the Commission. Several members⁶⁰ have emphasized the triangular relationship involved in a debt — predecessor state, successor state, and the creditor state — as opposed to the bilateral relationship in the case of property. It is a generally accepted principle of law that there can be no change in the identity of the debtor unless the creditor agrees to the change. The creditor should express its willingness for the debt owed to it to be transferred to the successor state. In this way, the interests of both the creditor and successor state will be protected.

C. *Effect of a Succession of State on Creditors*

The succession of states creates a legal relationship between the predecessor and successor states. It may not affect the creditor state, who is a third party, without its consent. Articles 35 and 36 of the 1969 Vienna Convention on the Law of Treaties⁶¹ allow obligations and rights to accrue to successor states if this is the intention of the parties to the treaty and the third party consents. Consent is presumed in the case of rights⁶² but must be expressed in the case of obligations.⁶³

⁶⁰ Castaneda, 1422nd Meeting (18 May 1977), para. 10; Thiam, *id.*, para. 16; Sette Camara, *id.*, paras. 21–22; Calle Y Cale, *id.*, para. 27; Francis, *id.*, para. 36; Jagota, 1423rd Meeting (19 May 1977), para. 21; Sahovic, *id.*, para. 24; Tabibi, 1424th Meeting (20 May 1977), para. 25. Emphasizing the importance of creditor's consent, the Special Rapporteur also pointed out that:

[A]s a rule, the transfer of debts was prohibited in legal systems; there could thus be no subrogation in the matter of debts. If State A was the depository of funds of State B and State B requested State A to transfer those funds to State C, whose economic development it wished to promote, State A would probably have no objection to doing so. If, however, State A was a creditor of State B and as a result of succession of States, the debt passed to a State with which State A did not maintain diplomatic relations or to an enemy State, it was quite reasonable that State A should have to give its consent. This was why, in all internal law systems, the transfer of a debt was possible only with the express consent of the creditor.

Summary Records of the 1425th Meeting, *supra* note 25, at para. 2.

⁶¹ Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969.

⁶² It is generally agreed that a third state can obtain rights under a treaty if the parties to the treaty so intend. But there is a doctrinal controversy about the precise manner in which rights are obtained. According to one school of thought, the treaty itself can confer rights on the third state while the other school holds that no right can arise until the third state accepts the right conferred upon it. Article 36(1) of the Vienna Convention adopts a middle position between the two views by providing: "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right . . . and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides." See M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 163–64.

If a treaty stipulation for the benefit of a third state lays down conditions under which the benefit is offered, compliance with those conditions by the third state is necessary before it is entitled to claim the benefit. For instance, the United Nations Charter, in Article 35(2), provides that "a State which is not a member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party," but it immediately adds: "if it accepts in advance for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter." Therefore, the non-member state which brings a dispute to the attention of the Security Council or General Assembly exercises a right stipulated in its favour, but, before doing so, it is bound to accept a complex statute, such as the one establishing the obligations of pacific settlement provided in the Charter.

⁶³ In the *Free Zones of Upper Savoy and the District of Gex* case, the Permanent Court of Interna-

Succession in municipal law is the passing of rights and obligations that takes place on the demise of a person by operation of law rather than by the consent of the parties. In the international forum however, it is unlikely that a situation would arise where "one State has succeeded directly to another upon its demise."⁶⁴ In municipal law, succession implies that the predecessor is relieved of rights and obligations. In international law it is unlikely that the predecessor state would be relieved of responsibility for the fulfillment of obligations which relate to the territory forming the successor state.⁶⁵ As such, the law of succession in municipal law is not strictly analogous to that of international law.

Furthermore, the succession of states results in the conclusion of a devolution agreement between the predecessor and successor states. In essence, a devolution agreement is only a statement of intention concerning the future enforcement of pre-existing treaties concluded by the predecessor state with the third state. A devolution agreement is concluded between the successor and the predecessor states, and it does not create a legal nexus between the successor state and the third state. This theory is consistent with the principle of sovereign equality of states and respects the independence of third states in their relations with the successor state.

Reflecting the contemporary position on devolution agreements, Article 8, paragraph 1 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (Vienna Convention on Treaties)⁶⁶ states:

The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States [who are] parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

In order to remove any possible doubt, the Vienna Convention determined that a devolution agreement does not of its own force create any legal nexus between the successor state and other state parties. Paragraph 2 of Article 8 further states that even if a devolution agreement has been concluded, "the effects of a succession of States on treaties would be governed by the rules of international law as codified in the convention."⁶⁷

tional Justice said: "it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it." P.C.I.J. Ser.A/B.No.46 141 (1932).

It is sometimes said that Article 2(6) of the United Nations Charter imposes obligations on states without their consent. The Article provides: "The Organization shall ensure that States which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." In reality this provision does not create legal obligations for states not parties to the United Nations Charter, but indicates an intention on the part of the United Nations to enforce certain principles upon states not legally bound thereby. See M. AKEHURST, *supra* note 62, at 163; W. BRIGGS, *THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES* 871; Jessup, *Modernization of the Law of International Contractual Agreements*, 41 AM. J. INT'L L. 378 (1947).

⁶⁴ Vallat, *Some Aspects of the Law of State Succession*, 41 TRANSACTIONS OF THE GROTIUS SOCIETY 121 (1955).

⁶⁵ *Id.*

⁶⁶ Vienna Convention on Succession of States in Respect of Treaties, concluded Vienna 23 August 1978, Text Pub. U.N. Conf. on Succession of States, Doc. Vol. 3, (U.N. Pub. Sales No. E79V10).

⁶⁷ *Id.* at Article 8, para. 1.

A unilateral declaration by a successor state concerning the debt-claims of a third state vis-a-vis the predecessor state does not have legal effect per se. A unilateral declaration is not a treaty, nor is it subject to the procedures applicable to treaties. It is not sent to the United Nations Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the United Nations Charter, and it is not published as a treaty in the United Nations Treaty Series. At best, a unilateral declaration may furnish a basis for a collateral agreement in simplified form between the successor state and the third state. Article 9 of the Vienna Convention on Treaties provides:

Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States party to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

A similar situation arose regarding state property in Part II of the Vienna Convention. The question is: what will happen to the property of a third state which is situated in the territory to which the succession relates? In order to protect the property of a third state from any disturbance as a result of a territorial change, the Vienna Convention adopted the rule that a succession of states can have no legal effect on the property of a third state.⁶⁸ Similarly, to safeguard the interests of third states, Article 24 of the Vienna Convention formulated the rule that a succession of states cannot affect archives owned by a third state.⁶⁹ In keeping with these rules, Article 36 states: "a succession of States does not affect the rights and obligations of creditors."

The debt-claims of the third state must not cease to exist or suffer as a result of the territorial change. In other words, the succession of states in respect of debt can create a relationship between the predecessor and successor states with regard to debts but it cannot establish any direct legal relationship between the creditor third states and the successor state, should the latter assume the debt of its predecessor. Therefore, the creditor may not have a right to recourse against the successor state. The predecessor state will continue to retain its debtor status and thus be responsible for the debt.

This rule has been criticized for its ambiguity and inadequate protection of creditors. First, it is not clear whether the term "creditors" would include private creditors (non-state entities of a private character such as bank consortia and individuals). Cognizance of loans by such individuals is important because the bulk of existing debt consists of loans from such parties.⁷⁰ Second, Article 36 appears to contradict Article 34 which holds that when the obligations of a predecessor state are extinguished and the obligation

⁶⁸ In accordance with Article 12 of the Vienna Convention, "[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."

⁶⁹ "A succession of States shall not as such affect 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." *Id.*

⁷⁰ Summary Records of the 1423rd Meeting, *supra* note 25, at para. 10. See also the comments of Aldrich who said that if the Article did not "include debts owed to persons as well as to States and international organizations, . . . his interest . . . would be minimal and the prospects for the future would be poor indeed." Summary Records of the 1675th Meeting, *supra* note 25, at para. 39.

of the successor state arises, there is a novation. Third, Article 34 is a disservice to the creditor. In situations where the predecessor state ceased to exist, "the creditor would be seriously prejudiced if he did not automatically obtain rights, as a result of succession, against the successor State or States."⁷¹

IV. SPECIFIC CATEGORIES OF SUCCESSION OF STATES

The previous sections have reviewed the general provisions that are applicable to all types of succession to state debts. This section will examine supplementary provisions relating specifically to each type of succession of states as it affects state debts. This section will follow the pattern of the Vienna Convention and deal with the succession of states under five separate situational headings: (1) the transfer of part of the territory of a state; (2) the newly independent state; (3) the unitary state; (4) the separation of part or parts of the territory of a state; and (5) the dissolution of a state.

A. *Transfer of Part of the Territory of a State*

The transfer of part of a state's territory closely follows Article 15 of the 1978 Vienna Convention on Treaties dealing with the traditional "moving treaty-frontiers" rule. The rule covers cases where a territory which is not a state undergoes a change of sovereignty, for reasons of succession, cession, or the attachment of territory where the successor state is an already existing state.

In this situation, the rules concerning the passing of the state debt of the predecessor state to the successor state are relatively less developed. The practice of states has not been sufficiently uniform to suggest that a body of rules has become part of customary international law. Decisions of international tribunals are few and have limited use in the development of general principles. The writings of publicists in clarifying and identifying the governing principles are not only few but are divided. Yet, it is crucial to examine state practices, judicial precedents, and the views of writers concerning both the passing of the general debt of a state and the passing of localized state debts before it is possible to examine and understand the rules contained in the Vienna Convention.

1. General Debt of a State

There are several schools of thought concerning the passing of part of the general state debt during the transfer of territory. On the whole, these views can be divided into two schools — one in favour of the passing of part of the general debt, the other denying that passing. The proponents of the passing enunciate different theories. The theories of these scholars can be divided into four groups.⁷² The first theory, of the patrimonial state and of the territory encumbered in its entirety with debts, is based on the principle of indivisibility.⁷³ A second group of writers advocates the theory of profit derived from

⁷¹ Thirteenth Report, *supra* note 48, para. 168.

⁷² *Report of the International Law Commission on the Work of Its Thirty-third Session 4 May–24 July 1981* [hereinafter cited as *ILC Report*] Article 35, Commentary, para. 3.

⁷³ According to Sack:

[w]hatever territorial changes a State may undergo, State debts continue to be guaranteed by the entire public patrimony of the territory encumbered with the debt. The legal basis for public credit lies precisely in the fact that public debts encumber the

the loan by the transferred territory.⁷⁴ This theory is based on the adage "whoever owns owes," thus a transfer of the property carries a transfer of the obligation. A third theory refers to the "contributory capacity" of the transferred territory.⁷⁵ Finally, the fourth argument is based on considerations of justice and equity.⁷⁶

Writers who advocate the denial of passing theory advance their arguments on two principles. The first principle is based on the sovereign nature of the states.⁷⁷ The second principle is derived from the nature of the state debt, which is considered to be a personal debt of the predecessor state that contracted the debt. "The general debt of a State is a personal obligation . . . since the rights which have been contracted by the State are personal rights and obligations, the new State has nothing to do. The old State is not extinct."⁷⁸

Actual state practice on the question of the passing of general state debts with a transfer of part of the territory of a predecessor state is confusing and contradictory. First, early cases held that the successor state assumed the debts. For example,

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

territory of the debtor State When taking possession of assets, one cannot repudiate liabilities: *ubi emolumentum, ibi onus esse debet, res transit cum suo onere*

Sack, *La Succession aux dettes publiques d'Etat*, 23 *Recueil des Cours* 274-77 (1928).

⁷⁴ According to Bonfils, "[t]he 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." H. BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC (DROIT DES GENS)* 117 (1908).

⁷⁵ "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 The criterion of the territory's financial capacity takes no account of the extent to which that territory may have profited from the loan." *ILC Report, supra* note 72, at para. 7.

⁷⁶ 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.

Id. at para. 8.

⁷⁷ 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.

Id. at para. 9.

⁷⁸ W.E. HALL, *A TREATISE ON INTERNATIONAL LAW*, 93, 95 (1917). O'Connell also maintains that in the case of unsecured debts, there can be no obligation on the successor state with respect to the creditor. The position is the same in the case of pledged revenues. In the case of pledged assets (secured debt) possibly "the predecessor and the successor States become jointly liable to the creditor, the one on a contractual basis, the other on a basis of restitution." D.P. O'CONNELL, *THE LAW OF STATE SUCCESSION* 159, 167, 170 (1956).

of the Papal States 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.⁷⁹

There are several cases, however, where the successor state has been exonerated from payment of any part of the debt contracted by the predecessor state. For example, when Texas was transferred to the United States in 1840, Texas argued against the inference that Texas is bound in any degree, for any portion of the said debt, or any principle of international law, or by any one obligation of private justice.⁸⁰ When Chile annexed the province of Tarapaca from Peru, under the 1883 Treaty of Ancon, it refused to assume responsibility for any of Peru's national public debt.⁸¹ Similarly, Japan did not accept any part of Russia's public debt when it received the Southern part of the island of Sakhalin in 1905.⁸² Treaties concluded after World War II generally excused the successor state from being obligated for the predecessor state's national debt.⁸³

2. Local and Localized State Debts

It has been almost universally accepted that the responsibility for local debts rests entirely upon the local government. The central government is not concerned with the amortization of the debt. Thus, "local debts follow the political fortunes of the territory with which they are concerned."⁸⁴ State practice in general supports this assumption.⁸⁵

A localized debt is contracted by the central government but intended particularly to benefit a specified locality. If that locality is transferred to the successor state, it is generally agreed that the successor state shall be responsible for local debts. State practice is consistent in this regard. For example, the 1807 Treaty of Peace between France and Prussia made the successor state liable for debts contracted by the former sovereign for,

⁷⁹ *ILC Report*, *supra* note 72, at Article 35, Commentary, para. 12. In terms of actual judicial precedents, very little has developed. In *Sechter v. Minister of the Interior*, a Romanian Court held that international law sanctions the principle of universal succession to rights and obligations only in the case of total succession. In 1850, the Court of Appeals at Jena delivered a judgment based on two opinions rendered by the law faculties of Halle and Berlin relating to the obligations of Saxe-Weimar to liquidate a debt of the Prussian treasury in ceded territory. The Berlin opinion held that:

if a part of the territory is ceded, it cannot be said that the personal obligations of the ceding Power pass wholly or partly to the acquiring State unless this has been expressly stipulated. The Power originally obligated remains the real debtor, although its means have been diminished. *Id.*

In the case of the *Ottoman Public Debt*, the arbitrator E. Borel said 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."

⁸⁰ See O'CONNELL, *supra* note 78, at 160.

⁸¹ *ILC Report*, *supra* note 72, at para. 18.

⁸² *Id.* at para. 19.

⁸³ "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, except with regard to the holders of bonds for those debts issued in the ceded territory." *Id.* at para. 20.

⁸⁴ O'CONNELL *supra* note 78, at 182.

⁸⁵ O'CONNELL cites several examples from state practice. See O'CONNELL, *supra* note 78, at 174-82.

or in the ceded territories.⁸⁶ Article 24 of the Treaty provides: “[s]uch undertakings, debts and obligations of whatever 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 . . .”⁸⁷

3. The Vienna Convention: Article 37

Against this background, rules regarding the passing of state debt when part of the territory of a state is transferred by that state to another state are articulated in Article 37.

Paragraph 1 of Article 37⁸⁸ is aligned with Articles 14 and 27, which deal with state property and state archives respectively. Paragraph 1 seeks to settle the passing of state debt by forming an agreement between the predecessor and successor states. This approach is in keeping with the basic principles of international law, particularly the principle of the sovereign equality of states. Settlement by an agreement is appropriate and advisable because the problems involved vary from one case to another that it is prudent for states to take such a precaution.⁸⁹ In practice, when the predecessor states take the initiative by giving a part of its territory to another state, the passing of the debt is usually settled by an agreement between the predecessor and successor states.⁹⁰ However, if part of the territory secedes from the predecessor state and unites with another state, possibilities for settlement by an agreement are very slim.⁹¹ To deal with those situations, a residuary rule has been formulated in paragraph 2 of Article 37. This rule provides that:

In the absence of such an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to that State debt.

This provision adopts the concept of equity. 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 relevant factors such as property rights and interests which pass to the successor state in relation to the debt will be taken into consideration. Definition of the provision’s terms such as “property”, “rights” and “interests” is necessary to have an equitable distribution of the debt. The term “property”

⁸⁶ *ILC Report, supra* note 72, at para. 28.

⁸⁷ *Id.* Only on rare occasions has the passing of localized debts been refused. One such example is Article 255 of the Treaty of Versailles, which provided a number of exceptions to the general principle, governing the passing of public debts of the predecessor state. Thus, in the case of all ceded territories other than Alsace-Lorraine, that portion of the debt which represented expenditures by the German Empire or the German States on property and possessions situated in the ceded territories was not assumed by the successor states. Obviously, political considerations played a role in this particular case. *Id.* at para. 35.

⁸⁸ 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. *Id.*

⁸⁹ Summary Records of the 1427th Meeting *supra* note 25, at para. 31.

⁹⁰ *Id.* at para. 27.

⁹¹ *Id.*

means rights in corporeal property and the term "rights" applies to the rights in incorporeal property including debt-claims.⁹² The term "interest" indicates "a potential right, or the expectancy of a right; no actual right exists yet but, under certain circumstances, a 'right' could come into existence, emerging from the interests."⁹³ An "interest" was illustrated by one of the Commission Members as follows:

[T]here was a law in many countries to the effect that property of a deceased person which was not claimed by any heir within a specified time reverted to the State. The territory which was the subject of a succession of States could well contain property that was in suspense because its owner had died and the time-limit for claims by heirs had not yet expired. Such property would not be "owned" by the State on the date of the succession, yet the successor State might well become its owner if no heir appeared. It undoubtedly had what could correctly be termed an "interest" in the property.⁹⁴

The introduction of the concept of equity is a welcome feature. One jurist has defined equity as "the law which stood above written law, the law which was engraved on the human conscience, the natural law which proceeded from the very nature of beings and things without the positive intervention of any legislator."⁹⁵ The notion of equity is different from *ex aequo et bono* as stated in paragraph 2, Article 38 of the Statute of the International Court of Justice.⁹⁶ It has been noted on the application of the principle of equity that:

It was obvious that equity was an autonomous and independent source of law. But there was an enormous difference between the role of equity in internal law and its role in international law. In internal law, if the judge did not find a solution in positive law, he had to apply the principle of equity; but in international law, the *non liquet* existed, because it was accepted that

⁹² Summary Records of the 2131st Meeting, [1973] *supra* note 25, para. 41; *see also id.* at para. 33.

⁹³ *Id.* at para. 46.

⁹⁴ *Id.* at para. 27.

⁹⁵ In *Serbian Loans Case* [P.C.I.J.] Series C, No. 16 (III) p. 211, *cited in* Bedjaoui, 1400th Meeting [1976], para. 24.

⁹⁶ In the *North Sea Continental Shelf* cases, the International Court of Justice sought to establish a distinction between equity and equitable principles. In its judgment, the Court decided that in the cases before it, international law referred to equitable principles, which the parties should apply in their subsequent negotiations. The Court said:

... it is not in question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself required 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.

In the view of the Court, equitable principles are actual rules of law founded on very general precepts of justice and good faith. 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.

North Sea Continental Shelf, 1969 I.C.J.; *Fisheries Jurisdiction* (United Kingdom v. Ireland) 1974 I.C.J.; and *see also Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland) *cited in ILC Report, supra* note 72, at Chapter II, para. 84.

the international law order was not complete. Thus, in the absence of a rule, an international tribunal could refuse to give judgment without being guilty of a denial of justice.⁹⁷

B. *The Newly Independent State*

A newly independent state is defined as "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."⁹⁸ The definition reproduces the text of Article 2, paragraph 1(f) of the 1978 Vienna Convention on Treaties and the commentary⁹⁹ thereof is equally applicable here.

Before becoming a successor state, the dependent territory has a special juridical status. As stated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operations Among States in accordance with the Charter of the United Nations, 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.¹⁰⁰ As such, the dependent territory is not a part of the predecessor state; it is juridically different from that of the metropolitan country and the latter does not exercise sovereignty, having only the status of an administering power.¹⁰¹

Furthermore, in accordance with the Decolonization Resolution,¹⁰² all people, even if they are not politically independent at a certain stage of their history, possess the

⁹⁷ Yassen continued to say that "Article 38 of the Statute of the International Court of Justice allowed the Court to settle a dispute in accordance with the principle of equity only if the parties agree thereto." Accordingly, there could be no recourse to equity in international law unless the parties expressly agreed to it. Equity could however, be a rule of positive law when it is prescribed as a solution by a rule of positive law. For instance, when the Convention stated that the principle of equity applied in the absence of agreement between the parties, it was stating a rule of positive law. Thus, if a dispute between the parties to the convention is referred to an international arbitral tribunal, the tribunal does not need the consent of the parties to judge according to equity, because equity had become a rule of positive law. Summary Records of the 1399th Meeting, [1976] 1 Y.B. INT'L L. COMM'N para. 15.

⁹⁸ Vienna Convention, *supra* note 66, at Article 2, para. 1(e).

⁹⁹ The definition given in para. 1(f) includes any case of emergence to independence of any former dependent territories, whatever their 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". See [1974] 2 Y.B. INT'L L. COMM'N, (Part One), 1974 [Doc. A/9610/Rev.1] p. 176, para. 8 of the Commentary to Article 2.

¹⁰⁰ G.A. Res. 2625 (XXV).

¹⁰¹ Eighth Report on Succession of States in Respect of Matters Other Than Treaties *reprinted in* [1976] 2 Y.B. INT'L L. COMM'N para. 125, U.N. Doc. A/CN.4/292/1976.

¹⁰² G.A. Res. 1514 (XV).

attributes of national sovereignty inherent in its existence. When that group of people declare independence, they exercise their own sovereignty and not that of the sovereignty supposedly transferred to them.¹⁰³

The principle question is whether the change of territorial sovereignty over a given territory carries with it some or all of the former sovereign's international rights and obligations concerning that territory. State practice has been inconsistent and contradictory. The views of publicists have been used to suit the nation's advantage but do not reflect juristic treatment of the subject matter. Generally, two major views exist: "[O]ne favouring an orderly transmission of rights and duties from the predecessor to the successor State, the other disavowing the settlement of the predecessor's liabilities for misuse of the faculties of Government."¹⁰⁴ Nevertheless, it is useful to review the practice followed by states with respect to state debt during the periods of colonization and decolonization. Decolonization can be divided into two eras: early decolonization and decolonization since the Second World War.

1. Colonization Period

In the cases of the annexation of Hawaii by the United States in 1898 and Korea by Japan in 1910¹⁰⁵ both annexing states — the United States and Japan — assumed all or part of the national debts of the respective territories. Providing for the annexation of Hawaii, the Attorney-General of the United States said:

[T]he general doctrine of international law, founded upon obvious principles of justice is that in the case of annexation of a State or cession of a territory, the substituted sovereignty assumes the debts and obligations of the absorbed State or territory — it takes the burdens with the benefits¹⁰⁶

The French and British practices have been inconsistent with this theory in certain circumstances. When annexing Tahiti in 1880, France assumed responsibility for Tahiti's debt.¹⁰⁷ France however did not accept any financial obligations of its protectorate states, Tunis and Madagascar.¹⁰⁸ In the latter case, shortly after signing the Treaty with the Government of Madagascar, the French Minister of Foreign Affairs declared in the Chamber of Deputies: "[t]he 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."¹⁰⁹

Britain assumed the national debts of both the Transvaal and the Boer Republics when it annexed those countries in 1877 and 1900 respectively.¹¹⁰ During the annexation of the Fiji Islands in 1874, Great Britain agreed to undertake payment of certain debts as "an act of grace."¹¹¹ Nevertheless, while annexing Burma in 1886, Great Britain

¹⁰³ See also Menon, *United Nations Special Committee and Decolonization*, 9 INDIAN J. INT'L L. 19-46 (1969).

¹⁰⁴ O'Connell, *Independence and Problems of State Succession*, in THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY (W. O'Brien ed. 1965).

¹⁰⁵ O'CONNELL, *supra* note 78, at 152.

¹⁰⁶ Quoted in O'CONNELL, *supra* note 78, at 150.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Cited in Ninth Report, *supra* note 1, at para. 253.

¹¹⁰ O'CONNELL, *supra* note 78, at 150-51.

¹¹¹ *Id.* at 149-50.

refused to recognize any legal duty to discharge Burma's financial obligations. Perhaps, "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."¹¹²

2. Early Decolonization Period

When the thirteen British colonies in North America became independent, the United States, the successor state, rejected all of the debts of the colonies.¹¹³ Similarly, Brazil refused to pay the debts of the predecessor state when it gained its independence from Portugal in the 1820's.¹¹⁴ Both these precedents were followed in the Cuban debt controversy in 1898 following the war between the United States and Spain. The 1898 Treaty of Paris "did not allow succession to any portion of the Spanish State debt that Spain had charged to Cuba."¹¹⁵

A departure from these practices may be noted in the decolonization of the former Spanish dependencies in South America. Spain did not recognize the independence of any of its colonies unless they spontaneously assumed the debts which Spain had contracted during its sovereignty. Thus, all the treaties by which Spain recognized the independence of its colonies transferred to the newly independent states debts owned by Spain. None of the treaties however, speak of "an incontestable rule of law, the principle of succession to State debts contracted by the former colonial power in the colony."¹¹⁶ On the other hand, "[m]ost of these treaties consider the matter as one of 'grace, equity and justice'"¹¹⁷

3. Decolonization Since the Second World War

Practices of the newly independent states after the establishment of the United Nations are marked with inconsistency and contradiction. They are not dictated by any accepted legal principles. There are precedents both in favor of and against succession,

¹¹² *ILC Report*, *supra* note 72, at 208 n. 409. This refusal to accept succession to the debts of colonized territories had the force of a principle, even though in the relations between "civilized States, it was a rule that assumption of the debt of the predecessor State was obligatory." This seems to be borne out *a contrario* by a number of cases referred to by Lord Robert Cecil, acting as lawyer for the West Rand Central Company, which establish that:

By international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State. Calvin's case (1609), 4 Coke 1; Blankard v. Galdy (1693), 2 Salk. 411; Campbell v. Hall (1774), 1 Comp. 204.

¹¹³ The real goal of the colonies in seeking independence was financial autonomy. "No taxation without representation" was the slogan of the time.

¹¹⁴ The Brazilian plenipotentiaries, in a dispatch of August 2, 1824, said:

Neither Holland nor Portugal itself, when they separated from the Spanish Crown, paid anything to the Court of Madrid in exchange for recognition of their independence; recently, the United States likewise paid no monetary compensation to Great Britain for similar recognition.

Cited in, Ninth Report, *supra* note 1, at para. 289.

¹¹⁵ *Id.* at para. 290.

¹¹⁶ *Id.* at para. 292.

¹¹⁷ O'CONNELL, *supra* note 78, at 176.

and also cases of repudiation of debts after their acceptance as may be seen from the following examples.

The independence of India and Pakistan is an example of where the successor state accepted the debts of the predecessor state. All financial obligations, including loans and guarantees of the central government of British India remained the responsibility of India.¹¹⁸ The Philippines also assumed the debts and liabilities of its predecessor state when it became independent.¹¹⁹ However, the General Assembly of the United Nations resolved the Libyan problem, stating that "Libya shall be exempt from the payment of any portion of the Italian public debt."¹²⁰ In accordance with the 1949 Round Table Conference Agreement, Indonesia agreed to succeed the debt and liabilities created by the predecessor state. Indonesia however, later repudiated the debts and liabilities by Decree in 1956.¹²¹

4. Vienna Convention: Article 38

Article 38 of the Vienna Convention attempts to standardize these contradictory practices by establishing rules governing the passing of state debts when the transferred territory is a newly independent state. Paragraph 1 of Article 38 states:

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 them 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.

The debts directly covered by this article are those "contracted by the Government of the administering Power on behalf of the defendant territory."¹²² Debts proper to the territory to which a succession of states relates and contracted by one of its territorial authorities are excluded.¹²³ Other excluded debts are "miscellaneous debts," those debts which are assumed by a successor state within the context of an agreement providing for the independence of the dependent territory.¹²⁴ Cases with regard to odious debt¹²⁵

¹¹⁸ "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." O'CONNELL, *supra* note 78, at 166 (referring to Indian Independence) (Rights, Property and Liabilities) Order, 1947, GAZETTE OF INDIA EXTRAORDINARY. §§ 9(a), (b), (c) and (d) (14 August 1947).

¹¹⁹ Under Article 17 of the Philippine Constitution and the Treaty between the United States and the Philippines of July 4, 1946, the Philippines assumed all the debts and liabilities of the islands. Ninth Report, *supra* note 1, at paras. 297-300.

¹²⁰ G.A. Res. 388A(V) of 15 December 1950.

¹²¹ See Ninth Report, *supra* note 1, at paras. 304-09.

¹²² ILC Report, *supra* note 72, at Article 38, Commentary, para. 52.

¹²³ *Id.*

¹²⁴ *Id.* at para. 53.

¹²⁵ A guaranteed debt is a debt:

. . . 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 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

are similarly treated. The Commission considers it important "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."¹²⁶

A factor that is taken into consideration in formulating the rule of Article 38 is the capacity of the newly independent state to pay the debts of the predecessor state.¹²⁷ The problem of capacity to pay is vital because it arises when the developing countries are burdened by an external debt of several billion dollars. The question of Third-World indebtedness has been a crucial issue in the North-South dialogue¹²⁸ at international conferences.¹²⁹ A crippling debt on a newly independent state "would not only jeopardize its prospects of survival but would be prejudicial to the world economy in general and to the interest of its creditors in general."¹³⁰

Emphasizing the breadth of the notion of capacity to pay in relation to the concept of sovereignty over natural resources, one Commission member drew a parallel from domestic law as follows:

On the whole, it was believed that an individual should pay his debts but that belief was never carried to the point of insisting that the individual must starve himself to death in order to satisfy his creditors. The first priority was to keep the debtor alive and in reasonably good health. Similarly, the principle of sovereignty over natural resources meant that a State was not to be deprived in a covert manner of its overt authority to order its own affairs by elevating the question of indebtedness to a higher plane than that of the freedom of will of the State itself.¹³¹

An excessive debt burden would no doubt be incompatible with international cooperation and development. It may run counter to Article 55 of the United Nations Charter which "provided for the promotion of economic and social progress and development with a view to the creation of conditions of stability and well-being which were necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples."¹³²

Considering the exigencies of the contemporary international financial situation of Third-World countries, the General Assembly and the Conference on International Economic Cooperation envisaged the possibility of the cancellation of debts contracted

State of all charges and obligations which it assumed by virtue of the guarantee given by it earlier.

Id. at paras. 54, 56.

¹²⁶ *Id.* at para. 57.

¹²⁷ *Id.* at para. 60.

¹²⁸ According to Robert McNamara:

... the North/South economic division was a seismic crack, which went deep into the sociological crust of the earth and could cause violent tremors, for, if the rich nations did not manage to fill that crack, nobody would be safe in the end, no matter how large their stockpile of weapons.

Quoted in, Summary Records of the 1445th Meeting, [1977] 1 Y.B. INT'L L. COMM'N, para. 33, U.N. Doc. A/CN.4/301/1977/Add.1.

¹²⁹ Summary Records of the 1444th Meeting, [1977] 1 Y.B. INT'L L. COMM'N, para. 24, U.N. Doc. A/CN.4/301/1977/Add.1.

¹³⁰ *Id.*

¹³¹ Summary Records of the 1445th Meeting, *supra* note 25, at para. 37.

¹³² Summary Records of the 1444th Meeting, *supra* note 25, at para. 27.

by newly independent states in their sovereign capacity after decolonization.¹³³ Consequently Article 38, paragraph 1 states the basic rule: the predecessor state debt will not pass to the newly independent state.¹³⁴

This rule, based on the traditional clean slate principle does not however, exclude the possibility of an agreement freely arrived at between the predecessor and the successor states. In certain cases equity will require an exception. For example, the newly independent states often need a favourable atmosphere for attracting capital investment. Thus, the second part of paragraph 1 encourages the predecessor and successor states to settle the question of the passing of state debts by an agreement between themselves. Apart from free will, paragraph 1 spells out other conditions for concluding the agreement. One of the conditions is that the state debt of the predecessor state must be "connected with its activity in the territory to which the succession of States relates."¹³⁵ The other condition is that such a state debt should be linked with "the property, rights and interests which pass to the newly independent States."

Paragraph 2 of Article 38 provides further safeguards as follows:

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.¹³⁶

This rule embodies two modern concepts favoured by the developing countries: (1) the permanent sovereignty of every people over its wealth and natural resources; and (2) the fundamental economic equilibria of newly independent states. With the establishment of the United Nations, the less developed countries, most of whom were newly independent states, wanted to exercise their inherent right of permanent sovereignty over wealth and natural resources in order to improve their economic position in relation to the developed countries. Those efforts have surfaced in the United Nations General Assembly, the Economic and Social Council, the United Nations Conference on Trade and Development, and other general and regional organizations.

The question of permanent sovereignty over wealth and natural resources was raised for the first time in 1952 in the United Nations General Assembly.¹³⁷ The United Nations was at that time engaged in formulating the principle of self-determination as a basis for the draft Covenants on Human Rights. The concept of permanent sovereignty over wealth and natural resources emerged as an expression of the principle of economic self-determination. Most of the United Nations' members felt that the right of peoples to self-determination as guaranteed in the Charter should not be regarded solely from a political point of view but should also be considered from an economic viewpoint.

¹³³ Summary Records of the 1445th Meeting, *supra* note 25, at para. 12.

¹³⁴ Vienna Convention, *supra* note 6, at Article 38, para. 1.

¹³⁵ *Id.*

¹³⁶ *Id.* at para. 2.

¹³⁷ For genesis of the concept see Banerjee, *The Concept of Permanent Sovereignty Over Natural Resources—An Analysis* 8 INDIAN J. INT'L L. 515-46 (1969); Gess, *Permanent Sovereignty Over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis* 13 INT'L & COMP. L. Q. 398-449 (1964); Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854-67 (1956); Jain, *Permanent Sovereignty Over Natural Resources and Nationalization in International Law*, 19 J. INDIAN L. INST. 241, 256 (1977); O'Keefe, *The United Nations and Permanent Sovereignty Over Natural Resources* 8 J. W. T. L. 239-82 (1974).

Since political independence was based on economic independence, it was argued that the right of the peoples to freely dispose of their own natural resources had to be recognized as an essential element of economic independence. In recognition of the needs and interests of the developing countries, in 1952, the General Assembly adopted Resolution 626(VII) which contained the proposition that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty" The General Assembly recommended that all member states, in their exercise of this right, "have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic cooperation among nations." Furthermore, the General Assembly urged all member states "to refrain from acts, direct, or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources."¹³⁸

Numerous General Assembly Resolutions following Resolution 626(VII) have defined and affirmed the concept of the right of peoples and nations to permanent sovereignty over their natural wealth and resources.¹³⁹ Of special significance is the Chapter of Economic Rights and Duties of States.¹⁴⁰ Article 2, paragraph 1 of that chapter states that: "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."¹⁴¹ Furthermore, in Section VIII of its Programme of Action on the Establishment of a New International Economic Order,¹⁴² the General Assembly stated that, "[a]ll efforts should be made: 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."¹⁴³

The principles of Article 38 have influenced the content and conclusion of agreements. In most cases, the succession takes place under difficult circumstances. Thus, at times the agreements may prove to be "of a leonine character, with the result being that the new state subscribes to agreements detrimental to its essential interests."¹⁴⁴ In order

¹³⁸ Reliance and binding character of the resolution may be noticed from the following two situations: (1) Just six months after adoption of the resolution, the Government of Guatemala relied upon it, at least as a supporting argument, for its position taking the property of the United Fruit Company in Guatemala. See 29 *Department of State Bulletin* 357-600 (14 September 1953), as cited in Hyde, *supra* note 137, at 854; (2) the following year the Civil Tribunal of Rome, in supporting the Iranian oil nationalization law, stated that the resolution might be regarded as recognition of the international legitimacy of that law, see 49 *AM. J. INT'L L.* 259-61 (1955).

¹³⁹ See G.A. Res. 824 (IX) of 11 December 1954; 1515 (XV) of 15 December 1960; 1803 (XVII) of 14 December 1962; 2158 (XXI) of 25 December 1966; 2386 (XXIII) of 19 November 1968; 2692 (XXV) of 11 December 1970; 3016 (XXVII) of 18 December 1972; 3171 (XXVIII) of 17 December 1973; 3201 (S-VI) and 3202 (S-VI) of 1 May 1974.

¹⁴⁰ Resolution 3281 (XXIX) of 12 December 1974.

¹⁴¹ Elaborating the concept, Article 16 states in para. 1, that:

It is the right and duty of all States, individually and collectively to eliminate colonialism . . . neocolonialism . . . and the economic and social consequences thereof, as a prerequisite for development. States which practice 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.

¹⁴² G.A. Res. 3202 (S-VI) of 1 May 1974.

¹⁴³ *Id.*

¹⁴⁴ Summary Records of the 1394th Meeting, [1976] 1 *Y.B. INT'L L. COMM'N*, para. 27, U.N. Doc. A/CN.4/301/1976/Add.1.

to protect the interest of these states, provisions must be made to ensure that the principles of permanent sovereignty of every people over their wealth and natural resources take precedence over agreements which may be concluded between the predecessor and the newly independent state to determine succession of state property. Additionally, Article 38 is the result of the realization by developing countries that political independence is meaningless without economic independence. At the First Conference of Heads of States or Government of Non-Aligned Countries held at Belgrade in 1961, newly independent states demanded a right to reparation and compensation. This demand has been repeated at all their subsequent conferences. At its sixth special session held in 1974, the General Assembly of the United Nations recognized the right of colonized and exploited countries to restitution and compensation for damages and pillaging of their resources.¹⁴⁵ This right to restitution has been incorporated in the Charter of Economic Rights and Duties of States.¹⁴⁶

Finally, the Commission has suggested that a newly independent state should be liable for the debt only if it benefited from the debt¹⁴⁷ and was financially capable of paying the debt.¹⁴⁸ The principle of maintaining "fundamental economic equilibria" presupposes that the agreement should be concluded on an equal footing and should not be ruinous to the economy of the successor state. This principle "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."¹⁴⁹

C. *The Uniting of States*

In the past, unions of states have been created in numerous forms. Between a unitary state and a confederation of states there is a wide range of other forms such as an association of states, a federation, a political union, or a merger. Political and economic pressures have increased the emergence of new unions of states in all forms. Historical examples of unions of states are the formation of the United States of America, the Swiss Confederation, the German Confederation of 1871, the union of Belgium and the Netherlands, the unification of Italy, the Central American Republic (El Salvador, Honduras, Nicaragua) in 1897, and the Federal Republic of the United States of America (Costa Rica, El Salvador, Guatemala and Honduras) in 1921. Post World War II unions include the formation of Malaysia,¹⁵⁰ the United Arab Republic (Egypt and Syria) in 1958, and the United Republic of Tanzania (Tanganyika and Zanzibar) in 1964.

The phrase "unions of states" is somewhat misleading because it is applied primarily to organizations like the United Nations which are excluded from the Vienna Convention. These situations are not merely successions of states but successions of states to an international organization. The phrase "uniting of states" is used in Article 39 of the Vienna Convention in the same sense as it was in the Vienna Convention on Treaties, namely, the "uniting in one State of two or more States, which had separate international

¹⁴⁵ G.A. Res. 3201 (S-VI), para. 4(f).

¹⁴⁶ G.A. Res. 3281 (XXIX).

¹⁴⁷ Summary Records of the 1445th Meeting, [1977] 1 Y.B. INT'L L. COMM'N, para. 18 U.N. Doc. A/CN.4/301/1977/Add.1.

¹⁴⁸ *Id.*

¹⁴⁹ ILC Report, *supra* note 72, at Article 36, Commentary, para. 65.

¹⁵⁰ Two mergers of states have occurred in Malaysia. First came the formation in 1957 of the Federation of Malay, which was succeeded by Malaysia in 1963.

personalities at the date of the succession.”¹⁵¹ The term covers the cases where one state merges with another state, even if the international personality of the latter continues after they have united.¹⁵² International personality may mean internal autonomy and not independence in international terms, otherwise “uniting” would not have any significance. Attempting to clarify the definition of “union”¹⁵³ Sir Francis Vallat stated:

The logic of the draft articles demanded that a new State was either formed or not. If the uniting of States was such that certain constituent units retained only some of their powers, the result would essentially be a State with federal structure. If, on the other hand, the constituent units retained their identity as States, what emerged was a union or, in ordinary parlance, a confederation. The latter case — that of a Confederation — would fall completely outside the existing definition of a successor State . . .¹⁵⁴

In one of the earliest cases of the uniting of states — the United States of America — it was held that: “[a]ll debts contracted and engagements entered into before the adoption of the Constitution shall be as valid against the United States under the Constitution as under the Confederation.”¹⁵⁵ Stated otherwise, the debts were taken over by the United States. In the case of the Swiss Confederation, neither the Constitution of 1848 nor that of 1874 contained any provision dealing with succession to debts. Since the Swiss federal system allowed the Cantons a great deal of financial autonomy, it is likely they assumed their own debts.¹⁵⁶ When Italy was unified in the 1860’s, the state assumed the debts of the various separate states.¹⁵⁷ In the Austro-Hungarian Union of 1807, since the sovereignty of the member states continued to exist, the pre-existing public debt was determined by agreement between the two halves of the Union.¹⁵⁸ In the 1895 unification of the Central American Republic, each state of the Union retained its financial autonomy. The states wished to constitute a single political entity only for the exercise of their external sovereignty. As such the Union did not assume the debts of the predecessor states (El Salvador, Honduras and Nicaragua).¹⁵⁹ The same was true for the Federation of Central America formed in 1921.¹⁶⁰

¹⁵¹ See 2 Y.B. INT’L L. COMM’N, Volume II (Part One), 1974 [Doc.A/9610/Rev.1] para. 1 of the Commentary to Articles 30–32.

¹⁵² *Id.*

¹⁵³ The “unions” may even be of different forms. For example:

. . . the United States functioned in many ways as a unitary State but in other ways it constituted a union of States. It could not easily be placed in any particular category because of the division of governmental powers as between the Federal authorities and the authorities of the individual States. For example, even now the individual States had authority to conclude international agreements but those agreements had to be approved or authorized by the United States Congress . . . Moreover, the rules on the division of governmental powers as between a union and its component parts could vary according to the category of subject matter concerned.

1398th Meeting [1976], para. 11, U.N. Doc. A/CN4/301/1976/Add.1.

¹⁵⁴ *Id.* at para. 27.

¹⁵⁵ U.S. CONST. art. VI, § 1.

¹⁵⁶ Ninth Report, *supra* note 1, at paras. 403–07.

¹⁵⁷ *Id.* at paras. 417–19.

¹⁵⁸ *Id.* at paras. 420–25.

¹⁵⁹ *Id.* at paras. 437–38.

¹⁶⁰ *Id.* at paras. 441–42.

Upon a uniting of states, the passing of the state debt is generally regulated by the internal law of the states; it is rarely settled at the international level. One rare international arrangement was the union of Belgium and the Netherlands by the Act of July 21, 1814. In accordance with Article VI of the Act: "[s]ince 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."¹⁶¹

In the formation of the Federation of Malaya in 1957, Article 167 of the Malaysian Constitution provided that: "[a]ll rights, liabilities and obligations relating to any matter which was the responsibility of the Federation Government immediately before Merdeka Day (the day of uniting) but which on that date becomes the responsibility of the Government of a State, shall on that day devolve upon that State."¹⁶² Similar provisions may be found in the *Malaysia Act* of 1963. It appears that each state entity was concerned only with the assets and liabilities of its particular sphere. Debts contracted were the responsibility of the component States from the date of uniting.¹⁶³

In the creation of the United Arab Republic, by Article 29 of their Provisional Constitution of March 5, 1958, only the National Assembly had the power to contract loans. Article 70 to the Provisional Constitution provided for a single budget for the two regions, Egypt and Syria. Consequently, there is justification to agree that "the United Arab Republic would seem to have been the only entity competent to service the debt of the two regions . . ."¹⁶⁴

In the case of Tanzania, the *Union of Tanganyika and Zanzibar Act* of April 26, 1964, does not make an express reference to succession of state debts. Under the interim constitution however, responsibility for certain matters such as external relations and defense was vested in the United Republic, but not responsibility for other important issues. In Zanzibar for instance, questions relating to the ownership of state and private property and the administration of justice remained the sole responsibility of the government of Zanzibar.¹⁶⁵ In the recent unification of Vietnam, the present Vietnam assumed many of South Vietnam's rights and debts, particularly in ESCAP and those contracted with the Asian Development Bank.¹⁶⁶

From these examples, it may be seen that the constituent states ceased to exist from the standpoint both of international and internal law when a uniting of states resulted in the creation of a unitary state. All powers passed to the successor state which assumed the power of the constituent states. In the case of a confederation of states however, the constitutional links are so vague and the degree of integration so weak that each constituent state retains its autonomy and must continue to bear the debts it contracted.¹⁶⁷

¹⁶¹ Cited in *ILC Report*, *supra* note 72, at Article 37, Commentary.

¹⁶² *Id.* at para. 8.

¹⁶³ *Id.*

¹⁶⁴ I D.P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 386. It may also be noted that the then Foreign Minister of the United Arab Republic, in a letter to the United Nations Secretary-General, stated that "the United Arab Republic would be bound by all the obligations contracted by the two constituent States, not only by those deriving from treaties." El-Erian, 1501st Meeting [1978], para. 4.

¹⁶⁵ Summary Records of the 1500th Meeting, [1978] 1 Y.B. INT'L L. COMM'N, para. 44, U.N. Doc. A/CN.4/301/1978/Add.1.

¹⁶⁶ Summary Records of the 1422nd Meeting, [1977] 1 Y.B. INT'L L. COMM'N, para. 35, U.N. Doc. A/CN.4/301/1977/Add.1.

¹⁶⁷ Summary Records of the 1500th Meeting [1978] 1 Y.B. INT'L L. COMM'N, paras. 24-25, U.N. Doc. A/CN.4/301/1978/Add.1.

Article 39 of the Vienna Convention attempts to solve the various problems which may arise during the unification of states. It is modeled on Article 16 relating to succession in respect to state property and on Article 29 on succession in respect to state archives. Article 39 states: "[w]hen two or more States unite and so form one successor State, the State debt of the predecessor States, shall pass to the successor State."

The rule is simple and straightforward since the new state — the successor state — has been formed by the genuine and independent will of the constituent units. It is also logical for the successor state to succeed to the debt of the former states just as it succeeds to the former states' property. The basic rule *res transit cum suo onere* is generally accepted in legal theory and is applied here.

D. *Separation of Part or Parts of a State*

The separation of states can take place either by dissolution of a union or by dismemberment, such as secession from a state. Unlike cession, which is generally a peaceful transfer of a relatively small piece of territory, secession mostly takes place by violent means without a prior agreement. It may also involve a large area of territory resulting in the creation of a new state. The problems raised by a separation of states are more complex than those involved in a union of states. The questions of division, secession or separation must be addressed with caution and flexibility since no two cases are alike.

When a new state is established apart from the former state, the effect is the emergence of a new state by secession. The former state continues its existence unchanged except for its diminished territory. In the pre-United Nations period, most examples of secession were the secession of colonies which according to contemporary international law were classified as newly independent states.¹⁶⁸ Since the establishment of the United Nations, there have been at least three cases of secession which are not cases of decolonization: (1) the separation of Pakistan from India; (2) the withdrawal of Singapore from Malaysia; and (3) the secession of Bangladesh.¹⁶⁹ In the case of the Irish Free State, the 1921 treaty between Great Britain and Ireland apportioned debts between the predecessor and successor States on the basis of the principle of equity.¹⁷⁰

When the Federation of Malaya was established in 1963, provision was made for passing to it "all rights, liabilities and obligations" of the constituent States including Singapore. On its withdrawal from the Federation in 1965, Singapore retrieved all rights, liabilities and obligations it had transferred to the Federation. In brief, it was an automatic return to the *status quo ante* in regard to rights, liabilities and obligations to state property and state debts.¹⁷¹

¹⁶⁸ *ILC Report*, *supra* note 72, at Commentary of Articles 16 and 17, para. 5. "Whether the partition of British India constituted a dismemberment of the old international person or merely a secession of Pakistan, is the question which is probably insoluble." O'CONNELL, *supra* note 164, at 404.

¹⁶⁹ *Id.*

¹⁷⁰ Article V of the Treaty states the principle of equity, the means of implementing it, the acceptance, precisely in the name of equity, of any claims or counter-claims on the part of Ireland and the establishment of a procedure for the peaceful settlement of disputes. *Tenth Report on Succession of States in Respect of Matters Other Than Treaties*, reprinted in, [1978] 2 Y.B. INT'L L. COMM'N, para. 12, U.N. Doc. A/CN.4/313/1978.

¹⁷¹ *Id.* at paras. 13–16; Green, "Malaya/Singapore/Malaysia" *Comments on State Competence, Succession and Continuity*, 4 CAN. Y.B. INT'L L. COMM'N, 3–42 (1966); see also Jayakumar, *Singapore and State Succession: International Relations and Internal Law*, 19 INT'L & COMP. L. Q. 398–423 (1970).

Against this background, Article 40 of the Vienna Convention provides that:

When part or parts of the territory of a State separate from that State and form a State, 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, in particular, the property, rights and interests which pass to the successor State in relation to the State debt.

This rule is applicable when part of the territory of a state separates from that state and unites with another state.¹⁷²

Agreements which are concluded voluntarily have a decisive role in settling the problems arising from a separation. Paragraph 1 of Article 40 reiterates the primacy of the agreement between the predecessor and successor states in governing succession to state debts. Unlike the succession of state property and state archives in the succession of state debt there is a third party, the creditor. The question then may arise whether an agreement concluded by the predecessor and successor states can be defeated by the refusal of a creditor third state to accept the agreement.¹⁷³ The answer appears to be that the creditor has no choice in accepting the agreement if the debt is shared equitably.¹⁷⁴ If the apportionment happens to be inequitable or unfair, the creditor state may be justified in refusing the agreement. In order to dispel any possible misunderstanding the Commentary to the Vienna Convention adds:

Regarding the phrase 'unless . . . otherwise agree,' the Commission wishes to point out that it 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 of negotiations.¹⁷⁵

Since the chances of concluding an agreement between the predecessor and successor states are remote in cases of secession, the Vienna Convention provides a residuary rule by which the state debt "shall pass to the successor State in an equitable proportion" ¹⁷⁶

The rules embodied in Article 40 have been criticized for their impracticality. As one Commission member stated:

Who would determine what constituted 'an equitable proportion' of the State debt if the predecessor and successor States were unable to agree on that point themselves, . . . when would the 'equitable proportion' pass to the successor State, and how would it be determined. The process of deciding what was equitable might possibly take so long that an elderly private creditor would die before it was completed and never be reimbursed¹⁷⁷

¹⁷² Vienna Convention, *supra* note 6, Article 40, para. 2.

¹⁷³ Summary Records of the 1502nd Meeting, [1978] 1 Y.B. INT'L L. COMM'N, para. 22, U.N. Doc. A/CN.4/301/1978/Add.1.

¹⁷⁴ *Id.* at para. 40.

¹⁷⁵ *ILC Report*, *supra* note 72, at Commentary of Articles 38 and 39, para. 26.

¹⁷⁶ Vienna Convention, *supra* note 6, Article 40.

¹⁷⁷ Summary Records of the 1515th Meeting [1978] 1 Y.B. INT'L L. COMM'N, para. 62, U.N. Doc. A/CN.4/301/1978/Add.1.

E. *Dissolution of a State*

According to the Commission's 1972 draft, dissolution of a state occurs "when a State is dissolved and parts of its territory become individual States"¹⁷⁸ or "where parts of its territory become independent States and the original State ceases to exist."¹⁷⁹ These definitions refer literally to the dissolution of a unitary State and not to the termination of a union. However, dissolutions usually involve unions of states rather than unitary states.¹⁸⁰

After the dissolution of a unitary state or a union, the predominant state practice is an equitable apportionment of debts among the successor states. For example, after the dissolution of Great Colombia in 1831 the three successor states, New Granada, Venezuela and Ecuador, agreed to apportion the debts equitably taking into account their resources or capacity to pay.¹⁸¹ Similarly when the United Netherlands was dissolved in 1830, a treaty based on equity was concluded in 1839 between Belgium and the Netherlands which was guaranteed by the Five Powers of the Holy Alliance.¹⁸² Equitable apportionment of debt has also been supported by publicists such as Fauchille¹⁸³ and Bluntschli.¹⁸⁴

The rules governing the passing of State debts in the case of a dissolution and disappearance of a state are embodied in Article 41 of the Vienna Convention. These rules are the same as those governing the separation of part or parts of the territory of a state. The basic rule is to reach an agreement between the successor states. In its absence, the residuary rule is the passing of state debt in equitable proportions to the successor states "taking into account in particular, the property, rights and interests which pass to the successor States in relation to that State debt."¹⁸⁵

¹⁷⁸ [1972] 2 Y.B. INT'L L. COMM'N, (Doc.A/8710/Rev.1) p. 292, Article 27, para. 1.

¹⁷⁹ *Id.* at para. 1 of the Commentary.

¹⁸⁰ Summary Records of the 1399th Meeting [1976] 1 Y.B. INT'L L. COMM'N, para. 2, U.N. Doc. A/CN.4/301/1976/Add.1.:

Almost all the precedents of a disintegration of a State resulting in its extinction have been the dissolution of a so-called union of States. For example, the dissolution in 1829-1831 of Great Colombia, formed earlier by the uniting of New Granada, Venezuela and Ecuador, the dissolution of the union of Norway and Sweden in 1905, the termination of the Austro-Hungarian Empire in 1918, the breakdown of the union of Mali, etc. See *Eighth Report on Succession of States in Respect of Matters Other Than Treaties*, reprinted in [1976] 2 Y.B. INT'L L. COMM'N, para. 241, note 27, U.N. Doc. A/CN.4/292/1976.

¹⁸¹ They agreed to apportion the debts of Great Colombia among themselves in the following proportions: New Granada, 50%, Venezuela, 28.5%, and Ecuador 21.5%. *Tenth Report*, *supra* note 170, at para. 31.

¹⁸² *Id.* at paras. 34-48.

¹⁸³ According to Fauchille:

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.

Traité de Droit International Public 380 (1922).

¹⁸⁴ According to Bluntschli, "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." *Le Droit International Codifié*, 82 (5th ed.) (1895).

¹⁸⁵ Vienna Convention, *supra* note 6, Article 41.