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COMMITTEE OF LEGAL ADVISERS
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FOLLOW-UP TO THE PILOT PROJECT CONCERNING STATE PRACTICE RELATING TO STATE SUCCESSION AND ISSUES OF RECOGNITION

Secretariat memorandum
prepared by the
Directorate of Legal Affairs

Foreword

Following the decision taken by the CAHDI at its last meeting concerning the preparation of a report on the basis of the material collected in the framework of the Pilot Project of the Council of Europe on State practice relating to State succession and issues of recognition (*the Pilot Project*), the Secretariat concluded a contract with the directors of the T.M.C. Asser Institute, the Max-Planck-Institute and the Castren Institute for International Law and Human Rights.

The following document includes general information concerning the preparation of this report, a draft table of contents and a summary analytical report developing in some detail the draft table of contents.

It should be noted, however, that the information contained in this document is subject to change following further discussions with the Secretariat in view of CAHDI's instructions. Moreover, the table of contents is likely to be amended following a more thorough analysis of the documents contained in the different national reports.

Action required

Members of the CAHDI are called upon to consider and approve the course of action proposed by the Secretariat in consultation with the consultant-experts for the follow-up to the *Pilot Project*.

REPORT ON THE PILOT PROJECT CONCERNING STATE PRACTICE RELATING TO STATE SUCCESSION AND ISSUES OF RECOGNITION

A.Content of the envisaged publication

1.General issues

The Pilot Project was approved by the CAHDI in March 1994. It covers the period from 1989 to 1995. 14 member states of the Council of Europe have submitted national reports, namely: **Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, the Slovak Republic, Sweden, Turkey and the United Kingdom**. The last report was received in January 1997. The length of the reports and the number of documents referred to and/or annexed to the report vary significantly.

Under the "Guidelines for documentation on State practice relating to State succession and issues of recognition" adopted by the Council of Europe, the national reports were to contain, where relevant, official documents and statements made by all three branches of government, i.e. the executive, the legislative and national courts and tribunals. A preliminary analysis shows, however, that most of the national reports mainly focus on relevant action taken by the respective executive power.

Given the fact that the most important issues of recognition and state succession arose in an European context, and taking into account the fact that therefore almost all national reports focus to a large extent, if not exclusively, on the cases of Germany, the Union of Soviet Socialists

Republics (USSR), the Socialist Federal Republic of Yugoslavia (SFRY), and the Czech and Slovak Federal Republic (CSFR), it is the view of the consultants that it is appropriate to limit both the analysis as well as the reproduction of documents to those cases mentioned. That does not preclude, however, reference where appropriate (e.g. in a footnote) to other cases and documents dealing with developments that took place outside Europe between 1989 and 1995, such as e.g. the independence of Namibia and Eritrea, or the uniting of North Yemen and South Yemen.

2.Summary of envisaged content (see also the Draft Table of contents in appendix 1)

The report could possibly include a foreword by the Secretary General of the Council of Europe (one page), a joint introduction by the Chairman of the CAHDI and/or the Director of Legal Affairs of the Council of Europe (5-10 pages), an analytical part (70-80 pages), a conclusion (5-10 pages) and documentary appendices containing a selection of documents contained in the respective national reports (120-170 pages). Thus, the total length of the report would be around 180-220 pages.

3.Analytical part (section C) and conclusion (section D)

The analytical part, which together with the documentary annexes will form the core of the publication, will on the whole consist of approximately 70-80 pages. According to the draft table of contents which appears in appendix 1 to this document, a division of the analytical part into three chapters by subject is envisaged, namely:

-recognition of states and governments (Chapter 2, 20-25 pages)
-state succession in respect of treaties (Chapter 3, 20-25 pages) and finally
-state succession in respect of other matters (property, archives and debts, and nationality) (Chapter 4, 20-25 pages).

Given this division, it seems logical to discuss separately within each chapter the four main cases of state succession above referred to in the above-mentioned chronological order. However, in order to avoid duplication, it is suggested to begin this analytical part with a General Introduction (Chapter 1, 5 -10 pages), in which basic information, dates and events will be given about all the cases that will be dealt with later. Thus, the authors of the respective analytical chapters can then refer back to this information.

It has been agreed that Chapter 2, dealing with recognition of states and governments, will be prepared by the T.M.C. Asser Institute (Dr. Olivier Ribbelink), Chapter 3, dealing with succession in respect of treaties, by the Max-Planck-Institute (Dr. Andreas Zimmermann) and Chapter 4, covering other succession issues, by the Erik Castren Institute for International Law and Human Rights (Prof. Martti Koskenniemi & Dr. Jan Klabbers).

In each chapter, reference will be made to the practice of the member States of the Council of Europe who have participated in the Pilot Project and which is reflected in their respective national reports. In addition, note will be made, where appropriate, of other relevant information which is accessible through other sources including academic writing dealing with the issues addressed.

Analytical Section C will be followed by a relatively short overall conclusion (section D) of 5-10 pages which will try to summarise the outcome of the previous section.

4.Documentary appendices (section E)

The appendices referred to under section E include selected texts of the Pilot project: national contributions in the form of short national files. Depending on their format, length, content and language, the documents to be included will in each case be either :

-the original documents sent in by the respective national rapporteurs,
-excerpts of such documents,
-the standard forms used (including, where appropriate, the extracts/summaries contained), or finally
-a combination of those documents.

On the whole the documentary appendices will consist of approximately 120-170 pages. Given the amount of documentation provided by the national rapporteurs and further taking into account the limited space just mentioned, there must be a relatively strict selection of relevant documents. The consultants will however try to make this selection representative in that it covers not only the different cases of state succession and the different issues addressed in Chapters 2, 3, and 4, respectively, but that it also covers the practice of all member states of the Council of Europe who have participated in the Pilot Project.

B.Technical questions and time-table

It is expected that the draft report will be submitted to the CAHDI for approval at its 16th meeting, in the last quarter of 1998. Once approved by the CAHDI, the resulting publication will be a joint undertaking by the Council of Europe and Kluwer Law International (KLI).

The Secretariat will ensure coordination between the consultants, the CAHDI delegations and, once the report is approved by the CAHDI, with KLI.

It is envisaged that the report will be published in the first quarter of 1999 and it will be part of the Council of Europe's contribution to the United Nations Decade of International Law.

Appendix 1

DRAFT TABLE OF CONTENTS

Appendix 2

DRAFT ANALYTICAL SUMMARY REPORT
(prepared by the expert-consultants)

CHAPTER 1: GENERAL INTRODUCTION

This Chapter will contain basic information about the specific cases which will be discussed in the Report, i.e the cases of Germany, the Union of Soviet Socialist Republics (USSR), the Socialist Federal Republic of Yugoslavia (SFRY), and the Czech and Slovak Federal Republic (CSFR). This information will be restricted to dates and events, and will serve as a reference for the later chapters, so as to avoid unnecessary duplication.

CHAPTER 2:STATE SUCCESSION AND THE RECOGNITION OF STATES AND GOVERNMENTS [1]

State succession involves a change of sovereignty over territory, or the "replacement of one State by another in the responsibility for the international relations of territory". In order to be able to deal with the consequences (e.g. in respect of treaties, property, archives, debts, or nationality) it is necessary for other States, as well as for international organizations, to identify the States involved.

Thus, other States and international organizations will look into the claim(s) forwarded by the States involved and determine how they will act upon that claim, that is, decide on their position in respect of the consequences of the events. This includes the determination whether only existing States are involved or new States as well.

Succession involving two existing States (e.g. the transfer of - part of - the territory) will, generally speaking, not require any act of recognition of either States or Governments but, at the most, recognition of the legitimacy of the act or process leading to this specific outcome.

In cases of unification (or "merger") of States, the latter is generally assumed. In fact, most of the (few) cases have been the result of a voluntary undertaking of the States involved, and any other way is likely to be assumed contrary to international law. Nevertheless, in some instances the question may come up whether the unified State is to be considered a new State or the enlargement of one predecessor State.

However, in cases of separation of States, meaning all cases where one or more parts of the territory of a State form(s) one or more new States, whether the predecessor State continues to exist or not, the situation is different.

Other subjects of international law will have to determine whether the predecessor State continues to exist (as a "rump-State") with one or more new State(s) having separated from it. In that case relations with the "old" State will (at least can) continue, albeit under different circumstances and conditions, and therefore adapt to the new situation. At the same time a decision will have to be taken as to the position towards the new State(s) and their Government(s).

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1. To be prepared by Dr Olivier M. Ribbelink, T.M.C. Asser Instituut, The Hague

When it is decided that the predecessor State has ceased to exist ("dissolution" or "dismemberment") there can only be new States and similar decisions will have to be taken. A complicating factor may be the position taken by the States involved.

As a rule, there can be no State succession when the successor-State is the same international legal person as the predecessor-State. In that case, when there is continuity and identity between these States, they must be considered as the same State.

A distinction must be made between recognition of States and recognition of Governments. Recognition of a State only becomes an issue with the appearance of a "new" State. When there is no new State the issue does not arise. Recognition of a State means that the State concerned fulfils the criteria for statehood.

The recognition of a Government, however, involves rather different issues. A change of Government can, in principle, occur in any given State at any given moment. The question whether this new Government should be recognized (or not) is of a highly political nature. It does not only involve the recognition of effective control over the territory in question, but it also involves, at least for some States, e.g. questions regarding approval of (the coming to power of) the new government.

Also, the recognition of a Government implies the recognition of that State, while recognition of a State does not automatically imply the recognition of that state's Government.

Recognition has political as well as legal aspects, both before and after the factual recognition. Often, the decision whether to recognize or not is highly political and taken at the political level, while at the same time an act of recognition has of course obvious legal consequences. Also, the effects of recognition may differ between States, given the differences between national legal systems.

The four selected cases, the (re-)unification of *Germany* (paragraph 2.2 of the Draft Table of contents in Appendix 1), the complex cases of the dissolution / dismemberment of the USSR (2.3) and the SFRY (2.4), and the separation of the CSFR (2.5), will be discussed on the basis of the national reports by member States of the Council of Europe who have participated in the Pilot Project.

Two of these four cases (Germany and the CSFR) have taken place in agreement between the States involved, and did not create problems regarding recognition of States and Governments. The two other cases (USSR and SFRY) did pose specific problems with respect to recognition, due to differences of opinion regarding the status of the States involved, not only among themselves but between third States as well. The latter was e.g. also expressed through action of the European Union, which adopted "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", and in the United Nations with respect to membership of specific States.

CHAPTER 3:STATE SUCCESSION IN RESPECT OF TREATIES[2]

The international law of state succession in respect of treaties was codified by the 1978 Vienna Convention on Succession of States in Respect of Treaties which entered into force in December 1996. The Convention distinguishes between different categories of forms of succession. Apart from the specific category of *newly independent states*, which was supposed to cover the legal rules governing former dependent territories, it deals with the transfer of territory (Art.15), the separation of a state or its complete dissolution (Art.34 and 35) and with the unification of two or more states (Art.31).

As to the transfer of territory, Art.15 of the Convention contains the moving-treaty frontiers or moving-boundary-rule, i.e. it prescribes that treaties of the predecessor previously in force in the territory which form the object of the succession cease to apply while the treaties in force for the successor state automatically extend to the very same territory.

As to the separation of a State or the complete dissolution of a State, Art. 34, as a matter of principle, applies the rule of automatic succession to all treaties of the predecessor state regardless of whether the predecessor state continues to exist or not.

Finally, as to the unification of States, Art.31 specifies that all treaties of both predecessor states are supposed to remain in force, but only for that part of the territory for which they already were in force.

In general, the 1978 Vienna Convention in its Art.11 and 12 also contains specific rules with respect to localized treaties and to boundaries determined by a treaty, both of which are considered not to be put into question by the occurrence of an incidence of state succession.

Taking into consideration this attempt of codification, the analysis of the practice of the member states of the Council of Europe which have participated in the Pilot Project, will have to show to what extent - if at all - the States concerned have followed the different categories of state succession just outlined, what rules they have applied, and to what extent they have either followed or deviated from the rules contained in the 1978 Vienna Convention on Succession in Respect of Treaties. That is, whether recent state practice as contained in the Pilot Project confirms that certain rules of state succession in regard of treaties do exist or whether, to the contrary, states do not feel bound by legal rules but rather act on an *ad hoc*-basis in each individual case of state succession.

The (re-)unification of Germany is one of the most important examples of a unification of two states in recent times. One has to distinguish between, on the one side the possible extension of treaties previously entered into by the Federal Republic of Germany (FRG) to the territory of the former German Democratic Republic (GDR), and on the other side the succession by the FRG as to treaties which before German reunification, had been concluded by the GDR.

As to treaties previously concluded by the FRG, even a relatively succinct analysis of the documents submitted shows that as a matter of principle - although with some exceptions - almost all of the bi- and multilateral treaties to which the FRG has been a party have been extended to the territory of the former GDR. Thus, one might realise that the general rule

2. To be prepared by Dr Andreas Zimmermann, Max Planck Institut, Heidelberg.

contained in Art.31, para. 2 of the 1978 Vienna Convention on Succession of States in Respect of Treaties according to which in a case of unification, the treaties of both predecessor states remain in force within the territorial limitations which applied beforehand, was not abided by. On the contrary, as a matter of principle, the moving-boundary-principle seems to have been applied.

The analysis of the documents submitted will also focus on those treaties of the FRG that were not extended to the territory of the former GDR; that is that either they were localized on the territory of West Germany, or any such extension would have been incompatible with the object and purpose of those treaties

As to treaties of the GDR, it seems that the vast majority of both bilateral and multilateral treaties to which the GDR had been a party were considered to have ceased to be in force by that date by virtue of the absorption of the GDR into the FRG. The analysis to be undertaken in the report will however focus in particular on those treaties which exceptionally have been taken over either permanently or at least *ad interim* by the FRG as the successor state to the GDR. The analysis will in that regard in particular refer to both localised treaties and to boundary treaties concluded by the GDR with Poland and the CSFR.

With regard to the Union of Soviet Socialist Republics (USSR), this chapter will distinguish between three categories of countries, i.e. the Baltic states which do not consider themselves as successor states of the USSR, the Russian Federation as the "continuing state" of the USSR and finally the other former Republics of the USSR.

The three Baltic states have from 1991 onwards claimed to be identical with the three states that had existed on their territory until 1940, that is they claim to have restored their independence. The report will focus as to whether - notwithstanding the claim of the Baltic states of legal identity - localized treaties which had been concluded by the USSR between 1940 and 1991 were continued at least *de facto*.

At the same time it will be considered whether treaties concluded by the Baltic states between the end of World War I and 1940 were considered by third states as having survived the de facto-incorporation of those states into the USSR.

The analysis of the documents submitted to the Council of Europe will have to show whether the claim by the Russian Federation to be the "continuing state" of the USSR, has led to the automatic continuation of all treaty obligations of the former USSR by the Russian Federation, or whether any such treaties were considered to have lapsed and if so on what legal grounds.

Given the fact that the member states of the Commonwealth of Independent States (CCIS) in the Alma Ata Declaration of 1991 had guaranteed the fulfilment of the treaty obligations of the former USSR, the report will analyse whether and to what extent both the states concerned, as well as third states, have followed this approach or whether they considered that treaty obligations of the former USSR could only survive in case of an agreement between the respective successor state and the other third party.

The Badinter Commission as well as several international organs have found that the Socialist Federative Republic of Yugoslavia (SFRY) has ceased to exist. This finding,which is disputed by one of the States concerned, implies a case of a complete dismemberment of a state.

Against this background, the question arises whether the successor states, as well as third states, took Art. 34 of the Vienna Convention on State Succession in Regard of Treaties as a starting point when resolving issues of state succession in regard of treaties.

In the case of the Federal Republic of Yugoslavia (Serbia/Montenegro) (FRY), the situation is complicated by the fact that the FRY has, starting from 1992, considered itself as being identical, although in a limited geographical sense, with the former Yugoslavia. Against this background the documents submitted will be analysed with a view whether they reveal an acceptance of such a claim or not.

Unlike the FRY, the other States now existing on the territory of the former Yugoslavia: Bosnia and Herzegovina, Croatia, Slovenia, and "the Former Yugoslav Republic of Macedonia", have all stated that they are all successor states to the SFRY. Given this fact, it will have to be considered whether the practice of third parties as well as statements of these successor States themselves confirm that the principle of automatic succession to treaties of their predecessor State is at the least the basic starting point when considering treaty succession, or whether instead the States concerned took the clean-slate rule as the starting point.

It seems that both successor States of the CSFR, which ceased to exist on January 1, 1993, have accepted the principle of automatic succession to regard of all treaties to which the CSFR had been a party before the separation. Nevertheless, the question arises whether third parties and in particular the member states of the Council of Europe that have participated in the Pilot Project have accepted that view.

Furthermore, it will also have to be analysed whether this specific instance of state succession confirmed the special character of localized treaties, e.g. with regard to the treaty dealing with the Gabcikovo dispute between Slovakia and Hungary.

CHAPTER 4:STATE SUCCESSION IN RESPECT OF STATE PROPERTY, ARCHIVES, DEBTS, AND NATIONALITY [3]

Whenever States dissolve or merge, whenever parts of a State secede, whenever a colony becomes independent, the transitions involved in a succession of States provoke difficult legal questions. Traditionally, the law on State succession has been relatively unsettled (which is not to say that it is devoid of meaning or impact); this holds true with respect to issues involving State succession with regard to treaties, and holds equally true with respect to a number of other issues.

Instances of State succession invariably lead to questions as to what to do with the debts of the predecessor state, the division of its properties, the distribution of archives, and the legal bonds between individuals and States. Given the relatively unsettled nature of much of the law concerning State succession and the dearth of authoritative decisions of international tribunals, it is of the utmost importance to analyze the practice of States.

Some normative guidance on issues of State succession in respect of debts, property, and archives can be found in a Convention concluded in 1983: the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. This Convention has yet to enter into force, and is premised on the same type of thinking as its 1978 counterpart on State

3. To be prepared by Prof.Dr Martti Koskenniemi & Dr Jan Klabbers, Erik Castren Institute, Helsinki.

Succession in Respect of Treaties: it distinguishes between various ways in which a succession of States may occur.

The main difference between the two Conventions is that in the 1983 Convention, separation and dissolution of States are treated as separate categories, whereas in the 1978 Vienna Convention they are not. The 1983 Vienna Convention also heavily relies on the willingness of the successor States to agree among themselves on the division of debts and assets in an equitable fashion. When such willingness is not present, guidance has to be sought from the general law.

With respect to State succession and nationality, no universal convention existed at the time of the State practice which will be analyzed. Presently, however, an important instrument is under preparation within the United Nations' International Law Commission. And, a provision on this topic has been included in the European Convention on Nationality, adopted on 6 November 1997 in Strasbourg.

The present section of the Analysis will analyze the practice of a number of European States in regard of four recent instances of State succession. The dissolution of the USSR; the violent break-up of the SFRY; the "Velvet Revolution" in the CSFR leading to its separation into two new states, and the merger of the FRG and the GDR: all highlight legal problems in several issue-areas. The present chapter will analyze how a number of European States have approached and digested the new realities, and in doing so will focus on State succession in respect of debts, property, archives, and nationality.

Thus, typical issues to be discussed include the division of the debts of the former USSR, the division of the property of the former SFRY (and the definition of the very term 'State property'), and issues relating to the nationality legislation of the various States concerned.

This chapter will provide an analysis of the reported State practice of the above-mentioned States, in the hope of finding out more about the law on State succession in respect of debts, property, archives, and nationality. The main purpose is to discern which normative guidance (if any) international law has to offer in cases of State succession. In the absence of an authoritative international convention, such normative guidance is to a large extent formed by the actual practice of States.