

**United Nations Conference on Succession of States  
in respect of State Property, Archives and Debts**

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**18th meeting of the Committee of the Whole**

Extract from Volume I of the *Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

61. After a discussion on procedure in which Mr. ROSENSTOCK (United States of America), Mr. DELPECH (Argentina) and Mr. LAMAMRA (Algeria) took part, the CHAIRMAN said that he would take it, in the absence of objection, that the Committee of the Whole wished to adopt article 17 as proposed by the Inter-

national Law Commission without a vote and refer it to the Drafting Committee.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 18th meeting

Monday, 14 March 1983, at 3.10 p.m.

Chairman: Mr. ŠAHOVIĆ (Yugoslavia)

**Consideration of the question of succession of States in respect of State property, archives and debts, in accordance with General Assembly resolutions 36/113 of 10 December 1981 and 37/11 of 15 November 1982 (continued) (A/CONF.117/4, A/CONF.117/5 and Add.1)**

[Agenda item 11]

*Article 18* (Scope of the articles in the present Part)

1. Mr. ECONOMIDES (Greece) said he believed the feeling in the Committee was that article 18 should be considered in conjunction with similar articles appearing elsewhere in the draft convention. His delegation had already requested that such identical provisions be considered together in greater depth, in line with an earlier suggestion by the Algerian delegation. He wished finally to propose that a working group be established to review all provisions that were of a similar nature and to make recommendations to the Committee of the Whole regarding the placing of those provisions in the draft convention.

2. Mr. NAHLIK (Poland), supporting that proposal, said that the working group should comprise representatives from all groups of countries.

3. Mr. PIRIS (France) said that his delegation had no objection to the Greek representative's proposal. He wished only to remind the Committee that it had decided to defer its consideration of article 7 pending its consideration of article 1. Furthermore, since the scope of the articles in Part III depended on the definitions in Part I, the Committee should take the same course of action in respect of article 18 as it had already done in respect of article 7.

4. Ms. BOKOR-SZEGÖ (Hungary) questioned the need to establish a working group; she could not see what its mandate might be.

5. The CHAIRMAN proposed, in the light of the statements made, that the Committee should defer its consideration of article 18 until it took up articles 1 to 6.

*It was so decided.*

6. The CHAIRMAN further proposed that the proposal of the representative of Greece that a working group be established should be considered after informal discussions had taken place between delegations and between the Chairman and the various regional groups concerning the mandate for the working group.

*It was so decided.*

*Article 19* (State archives)

7. Mr. EDWARDS (United Kingdom), introducing his delegation's amendment (A/CONF.117/C.1/L.20), said that the definition of "State archives" in article 19, as proposed by the International Law Commission, was circular. In effect, it said that State archives meant documents kept by a State as archives. The definition contained three crucial elements: that archives encompassed all documents of whatever kind, including engravings, drawings, plans, etc.; that they had belonged to the predecessor State according to its internal law; and that they had been kept by the predecessor State as its archives. It was worth noting that the last element was not qualified by the words "according to its internal law". His delegation had carefully considered the points made in the second part of paragraph (1) of the International Law Commission's commentary on the article but did not agree that there were practical difficulties because such protection as was needed by States was already well accepted in international practice and related to such matters as State security or the proper protection of the privacy of private individuals. His delegation believed that the practice of States in the keeping of documents needed to be qualified by the term "according to its internal law". His delegation's proposal provided a much clearer definition. In commending its amendment to the Committee, his delegation reserved the right to comment at a later stage on the Kenyan delegation's proposal (A/CONF.117/C.1/L.27) and on the question generally.

8. Mr. MUCHUI (Kenya), introducing his delegation's amendment (A/CONF.117/C.1/L.27), said that, as drafted by the International Law Commission, article 19 was neither satisfactory nor convincing. He could only assume that the Commission had wished to include in the definition all the documents relating to a territory which had been used for administrative purposes, whether they were active, dormant or placed in a repository. Unfortunately, however, the text of the definition covered only documents kept as archives. His delegation believed that the definition should also include documents still in registries or attics awaiting attention, since it was well known that the United Kingdom, for example, regarded as archives only documents that were 30 years old, which excluded those still kept in registries. The United Kingdom amendment did not, in his view, deal convincingly with the question. His delegation had therefore proposed the deletion of

the words “and had been kept by it as archives”. The determination of what were archives would then be made according to the internal law of the predecessor State, which included all the rules and regulations that might formerly have existed in a particular territory.

9. Mrs. THAKORE (India) drew attention to the difficulties of defining the term “archives” which had been referred to by the Special Rapporteur in his eleventh report to the International Law Commission.<sup>1</sup> The Special Rapporteur had suggested that the range of items transferable in the event of a succession of States should be taken in the broadest sense, unless the predecessor and successor States had expressly agreed otherwise. Such items should include “archives and documents of every kind”. The Special Rapporteur had further pointed out that the successor State was bound by the meaning attached by the predecessor State to the term “State archives” in conformity with its own legislation in force at the time of the succession of States, if the treaty governing the devolution of archives concerning the territory transferred had not defined the nature of those archives differently. The domestic law in force in the predecessor State, therefore, indicated what was meant by State archives, namely written, sound and photographic or graphic material. Objects of all kinds accompanying those documents were archives by reason of their purpose.

10. In the light of those comments, the Indian delegation considered the definition of State archives in article 19 to be of extreme importance, since it determined the entire structure of the articles which followed. According to that definition, two conditions had to be fulfilled. First, the documents must have belonged to the predecessor State according to its internal law and, second, they must have been kept by the predecessor State as archives. An essential feature of the definition was the broad reference to “documents of whatever kind”, which precluded the possibility of restrictive interpretation. The position of works of art depended on the definition of State archives given in each system of internal law. Where works of art were not treated as State archives, they were not excluded from succession since they came under the heading of State property.

11. The Commission had wisely decided against enumeration in article 19 of the various kinds of documents covered by the definition, since such enumeration could not be complete. It had also rightly decided not to use the words “collection of” before “documents of whatever kind”, in order that individual documents which were not interconnected should not be excluded from the succession. Furthermore, since State archives—excluding custodial institutions and premises—were undoubtedly movable State property, the Commission had placed the articles on State archives immediately after those on State property to establish a link between State archives and State property. Finally, like article 8 on State property, article 19 defined State archives by reference to the internal law of the predecessor State so as to maintain a similarity between the two articles.

<sup>1</sup> *Yearbook of the International Law Commission 1979*, vol. II (United Nations publication, Sales No. E.80.V.5 (Part I)), document A/CN.4/322 and Add.1 and 2.

12. Since a predecessor State could exclude the bulk of public papers of recent origin from a succession by virtue of their not being designated under its internal law as State archives, the Commission had detached the reference to the internal law of the predecessor State from the documents kept by it as archives. That also ensured a parallelism between the definition of State archives and that of State property. The Indian delegation considered the definition proposed by the International Law Commission acceptable in principle, but would like the Expert Consultant to indicate whether the words “and international law” might usefully be added as a safeguard after the words “internal law”.

13. The United Kingdom amendment appeared to be of a drafting nature and could perhaps be dealt with by the Drafting Committee. She believed that the concern expressed by the representative of Kenya was met by the existing text of article 19.

14. Mr. ENAYAT (Islamic Republic of Iran) said that the second element in the definition of archives, “had been kept by it as archives”, was both superfluous and unnecessary. On the one hand, it conflicted with what he believed the International Law Commission had intended and, on the other, it was unnecessary even as part of a definition. The Commission had wished to make only the first element in the definition subject to the internal law of the predecessor State. However, the second element was also determined by the internal law of the predecessor State since the condition of being kept by a State as archives was in itself sufficient proof of the qualification as archives. If the predecessor State’s recognition of documents as archives was a necessary qualification, so then was the application of its internal law. Paragraphs (2) and (3) of the International Law Commission’s commentary mentioned two definitions of the concept of archives under which the element “and had been kept by it as archives” was subject to application of the internal law of the predecessor State, which the Commission had not wanted. The Commission had also made it clear in paragraph (4), particularly in its reference to sound documents and cinematographic films, considered in some countries to be an integral part of State archives, that application of the predecessor State’s internal law had in the past enabled States to exclude the bulk of public papers from succession. International practice therefore tended to define archives in the same manner as in the Agreement of 23 December 1950 between Italy and Yugoslavia and the other instruments referred to in paragraph (7) of the International Law Commission’s commentary.

15. Analysis of the terms used in article 19 revealed that the phrase “kept by it as archives” contributed nothing. The phrase in fact contained three elements, all of which were embodied in the expression “archives”. There could be many documents which the predecessor State did not “keep” and which were therefore not archives, but they would qualify as “movable State property”. With regard to the element “by it”, which referred to the predecessor State, any case in which a document had been kept by a third party either temporarily or permanently should be resolved under the provisions of article 26, paragraph 4. That element

was therefore unnecessary. The third element, “as archives”, involved the internal law of the predecessor State, which was to be avoided. The Iranian delegation therefore supported the Kenyan amendment calling for the deletion of the last phrase of article 19.

16. Ms. LUHULIMA (Indonesia) observed that, as the International Law Commission had pointed out in its commentary on article 19, the term “archives” did not, in a number of countries, include both historic and recent documents. The Indonesian delegation felt that Kenya’s amendment improved the text of the article, but it would like to see included in the definition current records, which were essential for maintenance of administrative continuity in a territory, avoidance of disruption and facilitation of proper administration. The United Kingdom amendment was essentially a drafting matter and could therefore be dealt with by the Drafting Committee.

17. Mr. BARRERO-STAHN (Mexico) said that his delegation was concerned at the dangers implicit in the universe implied by the use in article 19 of the phrase “all documents of whatever kind”. It was conscious, however, of the greater dangers of producing a restrictive effect by substituting a detailed definition listing every item which might constitute archives. Some essential item might be omitted from the list. His delegation was also concerned about the passing to a successor State of *objets d’art*, referred to by the International Law Commission in paragraph (6) of its commentary on the article. Furthermore, there was no absolute distinction between “archives” and “libraries” or between “archives” and “museums”, a distinction which, in his delegation’s view, would extend to the property included under those classifications whether as archives or as *objets d’art*.

18. His delegation was concerned that a nation’s heritage might be impoverished by the disposal of *objets d’art* whose passing could not be regulated by the simple requirements of the normal administration of the territory transferred. The Mexico City Declaration on Cultural Policies contained in the Final Report of the World Conference on Cultural Policies organized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1982 had stated that the cultural heritage of a people included works of art, archives and libraries.

19. He therefore asked the Expert Consultant to clarify the question of the passing of, or the obligation to return, as the case might be, State archives which had the character of *objets d’art*. Nations had the right to keep and to recover their cultural and historic heritage together with the territory concerned in a succession of States.

20. Mr. SHASH (Egypt) said that the International Law Commission’s commentary on article 19 clearly demonstrated the difficulty of defining the term “archives”. While the criterion of the internal law of the predecessor State had been readily acceptable in respect of State property, its use in respect of State archives could create problems. Although it was normally undesirable to cite examples in a definition, it might be necessary, in order to safeguard the interests of successor States, to offer in the present case examples of

specific types of documents that should be considered archives. The Kenyan amendment was a successful effort to improve the text, but further elaboration of the article was none the less required.

21. Mr. KOLOMA (Mozambique) said that, despite the efforts of the International Law Commission, article 19 offered only subjective criteria for the definition of State archives, since it defined them as documents which had been kept by the predecessor State as archives. What would happen, for example, in a case where certain documents were considered archives by the successor State, but not by the predecessor State?

22. In his delegation’s view, the Committee could solve the problem in one of two ways: either by developing objective criteria for the determining of what were archives, or by accepting the Kenyan amendment.

23. Mr. NATHAN (Israel), stressing the importance of article 19 for the structure of Part III as a whole, said that the text proposed by the International Law Commission raised a number of problems. One was that the definition of State archives as “documents of whatever kind . . .” did not seem broad enough to cover all the items enumerated in paragraph (5) of the Commission’s commentary on the article. It might be preferable to refer to “documents of whatever subject matter, nature or material”. A second problem, already mentioned, was that the definition offered in the last phrase of the article was a circular one. The amendment submitted by the United Kingdom, which apparently sought to overcome that problem by identifying State archives according to the internal law of the predecessor State, presented problems of its own. In some countries, up to 10 years could elapse before documents kept by government offices were officially designated as “archives”. A reference instead to documents that had been kept by the predecessor State for record purposes might overcome the problem of the circularity of the definition, while at the same time safeguarding the security and internal interests of the predecessor State.

24. Mrs. TYCHUS-LAWSON (Nigeria) said that, before a satisfactory definition of “State archives” could be found, it would be necessary first to define the meaning of “archives”. Unless a definition acceptable to both predecessor and successor States could be found, the Kenyan amendment to article 19 should be adopted.

25. His delegation would welcome some explanation of the effects of the passing of State property on works of art, which, according to the International Law Commission’s commentary, were not covered by the definition of archives.

26. Mr. MASUD (Observer for the Asian-African Legal Consultative Committee) said that, while the first criterion offered by the Commission for the definition of State archives could be easily accepted, the second condition—that they must have been kept by the predecessor State as archives—raised a number of problems. Apart from the fact that in certain cases the predecessor State might have reason not to classify documents as archives, the categorization of documents as archives varied widely from country to country.

27. On the other hand, the deletion of the final phrase of article 19, as proposed by Kenya, would make the definition too broad.

28. Some objective and precise criteria should be developed, to ensure that documents, records and the like that were used for official purposes were included in the definition. One possibility would be to refer to documents which, according to State practice, were normally kept as archives.

29. Mr. OESTERHELT (Federal Republic of Germany) agreed that the definition given in article 19 was to some extent a circular one. As the International Law Commission had noted, it made use of the device of *renvoi* to a preconceived notion of "archives". Since international law offered no solution to the problem of what constituted archives, reference had of necessity to be made to the internal law of States. Only the predecessor State and the successor State(s) could determine whether or not documents were archives. His delegation believed that reference to the internal law of the predecessor State was appropriate. It therefore viewed the United Kingdom amendment as a welcome effort to clarify and improve the text.

30. The Kenyan amendment, on the other hand, would have the effect of extending the definition of State archives to include all documents, of whatever nature, that had belonged to the predecessor State. That, however, created a need to define what was meant by "documents". His delegation did not believe that the problems of article 19 could be solved in that way.

31. Several speakers had suggested that further efforts should be made to find objective criteria for the definition of State archives. He hoped that those efforts would be successful.

32. Mr. EVANS (Observer for the United Nations Educational, Scientific and Cultural Organization) was pleased to note that documentation prepared by UNESCO on the question of archives had been of use to the International Law Commission. As had already been noted, no single definition of archives existed under international law. On the basis of its experience, however, UNESCO had developed an operational definition of the term, which it found served as a useful common denominator. According to that definition, archives were described as the non-current documentary material, regardless of physical form or characteristics, created or received and maintained by an institution in the conduct of its business. It was clear that documentation classified as archival in character could be either current (active) or non-current (inactive). For pragmatic reasons, UNESCO had confined its working definition to non-current material.

33. Mr. THIAM (Senegal) said that the International Law Commission had made commendable efforts to develop a suitable definition of State archives. It would be useful to hear from the Expert Consultant to what extent the Commission had considered the inclusion of the second element, namely, that archives were documents that had been kept by the predecessor State as archives, to be necessary in the definition.

34. His delegation reserved its position on the United Kingdom amendment, which it did not regard as a

drafting change. That amendment appeared to alter considerably the substance of the provision, giving it a meaning which was precisely the one that the Commission's text and the Kenyan amendment endeavoured to avoid.

35. Mr. ASSI (Lebanon) said that he understood the desire of some delegations to find a more specific definition of State archives, not based solely on criteria of the predecessor State. He therefore supported the Kenyan amendment to article 19. At the same time, he suggested the addition to the article, as an opening phrase, of the words "Unless otherwise agreed or decided,". That would provide for the possibility of an agreement between the States concerned or a decision by an international body in the event of disagreement.

36. Mr. ECONOMIDES (Greece) said that his delegation considered the text proposed by the International Law Commission for article 19 satisfactory. The United Kingdom amendment markedly improved the text but it was really a matter of drafting. His delegation took a flexible position on the actual wording to be adopted.

37. Mr. LAMAMRA (Algeria) said that the International Law Commission's definition of State archives did not completely satisfy anyone and the amendments which had been proposed were representative of the two main trends of criticism of the provision. The United Kingdom amendment involved, not drafting, but substance. In his view, it weakened the entire definition. Displacement of the reference to internal law would affect the nature and number of the archives which formed the object of succession. A decision on the United Kingdom amendment should, he felt, be taken by the Committee of the Whole itself.

38. The Kenyan amendment was rightly concerned with precluding the possibility that some archives might not pass with the succession of States, but it also presented the danger that some documents which were not archives might become the subject of controversy between the States concerned. His delegation therefore proposed that the words "and had been kept by it as archives" in article 19 should be replaced by "and had been kept by it for official, historical, economic, scientific, practical and other purposes".<sup>2</sup>

39. Mr. TARCICI (Yemen) said he hoped that the delegations of Algeria and Kenya would be able to submit a common proposal. Meanwhile, his delegation fully supported the Kenyan amendment. Article 19, as proposed by the International Law Commission, gave too much latitude to the predecessor State to determine which documents should be considered archives. That State might be tempted, for example, to classify some documents as reference documents for archaeological or university research.

40. Mr. TÜRK (Austria) said that his delegation was satisfied with the text of article 19 as drafted by the International Law Commission. It could also support the United Kingdom amendment to the article, as adding precision. It had the same difficulty with the Kenyan amendment as had other speakers. Should that

<sup>2</sup> Subsequently issued under the symbol A/CONF.117/C.1/L.34.

amendment be adopted, it proposed that the words “means all documents of whatever kind which . . .” should be replaced by “means documentary material of whatever kind amassed and deliberately preserved by State institutions in the course of their activities, which . . .”<sup>3</sup>

41. Mr. BEDJAOUI (Expert Consultant) said that the International Law Commission had had particular difficulty with the definition of State archives. The text proposed had been criticized as tautological. In article 8, dealing with the case of State property, the Commission had tried to meet that criticism by referring to “rights and interests”, as well as to “property”. In that article it had also referred to the date of the succession of States and the internal law of the predecessor State.

42. It had endeavoured to follow the same course in defining State archives, but it had been able to find only the word “documents” to describe the latter and that gave the impression of tautology. He was grateful for the suggestions which had been made with a view to improving the definition.

43. A question which had been raised was which body of rules should be determining—international law or internal law—and, if the latter, whether it should be the internal law of the predecessor State or that of the successor State. International law could not greatly help, since it contained no definition of archives except in conventional law, as for example in the Agreement of 23 December 1950 between Italy and Yugoslavia. It would be necessary to rely on agreement between the States concerned. It was not possible to leave the matter to international jurisdiction since that in turn would have to rely on the internal law of States in order to resolve the problem. The internal law of the predecessor State was certainly not always a satisfactory criterion, but it was difficult to do without it since the successor State could not unilaterally decide on the definition of State archives. The same problem had arisen with the definition of State property in article 8.

44. Since there was no criterion in international law for defining State archives, the International Law Com-

mission had been obliged to refer to the internal law of the predecessor State. As the discussion had shown, that reference was unsatisfactory but it was hard to avoid. As in the case of State property in article 8, a successor State could not unilaterally determine what were to be State archives. Some members of the International Law Commission had suggested omitting the definition or placing it in article 2, but that was no solution. A definition was needed. He felt, however, that to adopt the proposal made by the Lebanese representative would be to capitulate in advance.

45. As the UNESCO representative had pointed out, there was no internationally accepted definition of archives. It had been asked whether the term “archives” could cover works of art. In that connection, he pointed out that the commentary on article 19 made it clear that some works of art had indeed been treated as archives when accompanying archives. Also, an ancient manuscript could be part of historical archives and at the same time a work of art because, for example, of its illuminations.

46. Some national legislators were very specific as to the date on which a document became part of archives. Similarly, they gave the exact date on which those archives could be made public. However, under no circumstances should article 19 give the impression that all “living archives” that were essential for the running of a country were excluded from its scope. Besides, provision was made for administrative archives in specific cases in later articles.

47. Mr. MUCHUI (Kenya) thanked the Expert Consultant for his explanation. He confirmed that his delegation was prepared to give serious consideration to the Algerian amendment when it was circulated as a document, although it was not necessarily prepared to withdraw its own amendment. It was generally agreed that the International Law Commission’s definition was too broad, but he was not convinced that accepting the Algerian amendment would remedy that, for it did not seem to make clear what would be excluded from the definition.

<sup>3</sup> Subsequently issued under the symbol A/CONF.117/C.1/L.35.

*The meeting rose at 6 p.m.*

## 19th meeting

Tuesday, 15 March 1983, at 9.40 a.m.

Chairman: Mr. ŠAHOVIĆ (Yugoslavia)

**Consideration of the question of succession of States in respect of State property, archives and debts, in accordance with General Assembly resolutions 36/113 of 10 December 1981 and 37/11 of 15 November 1982 (continued) (A/CONF.117/4, A/CONF.117/5 and Add.1)**

[Agenda item 11]

*Article 19 (State archives) (continued)*

1. Mr. LAMAMRA (Algeria) noted that it was clear from the commentary that in its important pioneering

work in seeking a definition of “State archives” which would answer the specific needs of the process of succession the International Law Commission had encountered a number of difficulties. The principal defects of the resultant definition in article 19 were its circularity and the determining role given to the internal law of the predecessor State, prompting the fear that a sizeable category of State archives generally known as “living archives” might not be covered by the rule governing the passing of such archives to the successor State.