

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

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20th meeting of the Committee of the Whole

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graph 1(b) was a considerable improvement on the earlier version proposed by Pakistan. In the voting on article 16 as proposed by the International Law Commission his delegation had abstained because it did not consider the text completely satisfactory.

71. Mr. MUCHUI (Kenya) said that, while he appreciated the reasons why Pakistan had proposed its amendments, he was not convinced that they were

sufficiently weighty to warrant the adoption of a text which would have disturbed the balance and consistency of the draft as a whole. He had therefore voted against the amendments.

72. The CHAIRMAN said that the text of article 16, as adopted, would be referred to the Drafting Committee.

The meeting rose at 1 p.m.

20th meeting

Tuesday, 15 March 1983, at 3.15 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 19 (State archives) (continued)

1. Mr. BEDJAOU (Expert Consultant), commenting on proposals which had been made for amendment of article 19, said that the Algerian amendment (A/CONF.117/C.1/L.34) and the Austrian amendment (A/CONF.117/C.1/L.35) were based on paragraphs (2) and (3) respectively of the International Law Commission's commentary on the article (A/CONF.117/4). The Algerian amendment suffered from the drawbacks inherent in any enumeration, which always tended to be interpreted restrictively. It was therefore not surprising that the representatives of Viet Nam and Yemen had proposed to add other qualifiers to the list in that amendment.

2. The Austrian amendment was interesting, but the term "State institutions" was liable to be interpreted in different ways by States. It was open to question, for example, whether the definition would include the private papers of royal families or the archives of State economic institutions. In fact, it was difficult to equate "State archives" with "the archives of State institutions". The primary criterion for State archives was that they should indeed belong to the State, not to individuals, institutions or collectivities other than the State. There must be a common understanding on that point. The definition must be further refined by reference to the internal law of the predecessor State. There appeared to be some disagreement on whether or not the definition should make reference to internal law, but both the Algerian and Austrian amendments contained such a reference and it could not easily be excluded. The Austrian delegation had further explained that its amendment had subsumed the Kenyan amendment (A/CONF.117/C.1/L.27).

3. He welcomed the Tunisian oral amendment, submitted at the previous meeting, to replace the opening phrase of article 19 by the words "For the purposes of

the articles in the present Part"; that constituted a distinct improvement.

4. In conclusion, he observed that his remarks at the eighteenth meeting of the Committee had not been intended to imply that a sufficiently broad definition would enable all archives coming under it to pass automatically to the successor State. The passing of archives was regulated by the specific articles containing provisions on that subject.

5. Mr. LAMAMRA (Algeria) said that his delegation was prepared to accept in its amendment the insertion of the word "cultural" after "historical", as proposed by the Vietnamese representative, and the proposal of the representative of Pakistan to substitute the word "or" for "and" before "other purposes". It was not necessary to add the word "administrative" to his delegation's amendment, as had also been proposed by the Vietnamese representative, since that concept was already covered by the words "official" and "practical".

6. Speakers who had not agreed with his delegation's amendment were divided into those who thought its definition too broad and those who considered its enumeration insufficiently exhaustive. In his view the six qualifiers in the amendment, supplemented by the words "or other purposes", were sufficiently exhaustive to meet all requirements. On the other hand, the definition should be as complete as possible, in view of the fact that the rules relating to the passing of State archives had yet to be discussed. The text his delegation proposed was based on a desire to maintain a balance between the internal legislation of the predecessor State and that of the successor State. It had been suggested that that definition would encompass museums, libraries and other institutions. Such was not the case. Although those bodies belonged to the State, they would naturally be subject to the provisions in Part II of the draft convention, which related to State property. In view of the fact that there was no universally accepted definition of State archives, the Conference should endeavour to find a definition adapted to the exclusive requirements of the proposed convention which dealt with some specific aspects of the succession of States.

7. He had no objection to the establishment of a working group to consider article 19. However, the Committee should give that group a chance of completing its work successfully by making it both small and representative and by ensuring that it had the necessary language services. The working groups should be requested to report as soon as possible to the Conference in plenary. Meanwhile, the Committee of the Whole should not delay its consideration of the other articles in Part III of the convention.

8. Mr. KADIRI (Morocco) said that in formulating the definition of State archives, the precedent of the approach to *jus cogens* in article 53 of the 1969 Convention on the Law of Treaties¹ might profitably be borne in mind. In the case of that instrument there had initially been attempts to establish an enumeration but it had been decided, finally, to rely on international practice and jurisprudence. Any enumeration must be restrictive and not exhaustive. The Austrian amendment was a laudable attempt to clarify the definition of State archives but the scope of the word "institutions" was uncertain. His delegation found the International Law Commission's text of article 19 acceptable as holding the balance between conflicting schools of thought. However, it might be improved, particularly by adoption of the Tunisian amendment to its opening phrase. He supported the proposal to establish a working group and hoped the group would work in a spirit of conciliation and compromise.

9. Mr. MIKULKA (Czechoslovakia) said that State archives were a specific element of State property governed by specific rules, as opposed to the rules that were generally applicable to State property as a whole. Part III of the draft convention, which set forth those special rules, should be seen as an exception to Part II, which applied to State property in general. Seen in that light, the definition of State archives assumed particular importance.

10. That definition should assist those called upon to interpret the convention in deciding whether particular documents were simply State property or whether they were the specific element of State property known as State archives, and consequently whether Part II or Part III of the convention should apply.

11. The text proposed by the International Law Commission contained three criteria for the definition of State archives: they should be documents; they should belong to the predecessor State; and they should have been kept as archives. In order to distinguish State archives from other types of State property, at least the first and third criteria must be met. The first element would not be sufficient unless complemented by the requirement that the documents should have been kept as State archives. The third element was important in deciding whether the documents were State archives or living documents. Without it, the definition would cover not only State archives but any documents whatsoever. Accordingly, his delegation could not accept amendments to article 19 which would have the effect

of excluding the criterion that the documents in question should have been kept as State archives.

12. His delegation could accept the text proposed by the International Law Commission without difficulty, but if it was generally felt in the Committee that a more detailed definition was necessary, it would support the idea of establishing a working group.

13. Mr. MONNIER (Switzerland) said that his delegation could accept the International Law Commission's text. It could also accept the United Kingdom amendment (A/CONF.117/C.1/L.20), which it regarded as a drafting change. In Switzerland, as probably in many other countries, "living archives", although they were documents not available to the public for a certain period of time, were none the less regarded as archives.

14. In his view, the definition of State archives must display a minimum of rigour and of plausibility. The Kenyan amendment was lacking in both respects, since its undue broadening of the definition would have the effect of encompassing all documents belonging to the State. The Algerian amendment would have the same effect, since the concluding phrase, "or other purposes", indicated that the list it contained was not exhaustive and that any other purpose might be invoked. His delegation was therefore unable to accept either the Kenyan or the Algerian amendments.

15. It had been observed that the definition was only one element in the draft convention and that the passing of State archives was regulated by the provisions in section 2 of Part III. Such was indeed the case, but those regulations were based on the prior definition of State archives.

16. The Austrian amendment was a compromise solution for which his delegation had much sympathy. However, the word "amassed" used in the English version of the amendment seemed more suitable than the word "*constituée*" used in the French version, since the former did not necessarily imply that the documentary material concerned was the result of State activity. The material could consist of documents produced by State institutions, or of family or private documents relating to the political or public life of the State in question and donated to the State. That case would not be covered by the word "*constituée*". He would be glad to have the view of the proposed working group on that point.

17. Mrs. VALDÉS (Cuba) said that her delegation could support the text of article 19 as proposed by the International Law Commission, despite the difficulties to which reference had been made. The concern of members of the Committee was apparent from the number of written and oral amendments proposed but, as the discussion had shown, none of those amendments appeared to be altogether satisfactory. The Cuban delegation therefore supported the proposal of the Polish representative at the previous meeting that a working group be established. The group should be composed, basically, of the authors of the amendments to article 19 but it should also be open to participation by other delegations.

18. Mr. SHASH (Egypt) also supported the proposal to establish a working group. His delegation proposed,

¹ *Official Records of the United Nations Conference on the Law of Treaties, 1968 and 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

as a further amendment to be considered, that the present text of article 19 should be replaced by the following:

“For the purposes of the present articles, ‘State archives’ means all documentary material of whatever kind amassed and preserved by States in the course of their current activities or for the purpose of conserving their historical and cultural heritage, which, at the date of succession of States, belonged to the predecessor State according to its internal law.”

19. Mr. THIAM (Senegal) said that the debate clearly indicated that the definition proposed by the International Law Commission was still acceptable, despite its shortcomings. In his delegation’s view, the United Kingdom’s proposal to refer to the internal law of the predecessor State made little improvement to the Commission’s definition, whose limitations should be clearly specified. The definition contained two cumulative criteria: that the documents should have belonged to the predecessor State under its domestic legislation and that they must have been kept as archives. What was lacking was a clear idea as to what documents should be included, other than those related to ownership or conservation. There existed no clear definition of State archives in international law and references to domestic legislation might restrict the number of transferable documents.

20. The Austrian amendment attempted to overcome the inadequacies of the Commission’s text by relating the documents in question to the activities of State institutions. A reference to that link between the administration of State activities and its resulting documentation would be one way of improving the International Law Commission’s text and did not run too great a risk of affecting the spirit of the various amendments. As a possible alternative, for further discussion, his delegation proposed that the following text should be submitted for the existing article 19:

“For the purposes of the articles in the present Part, ‘State archives’ means all documents of whatever kind, linked with the administration by the predecessor State of the territory to which the succession of States refers and which at the date of the succession of States belonged to the predecessor State according to its internal law and had been kept directly by it or under its control.”

21. That proposal had the advantage of using the Commission’s text as a basis, embodying both the Kenyan and Austrian ideas, and also meeting the concerns expressed by the Polish delegation. The Senegalese delegation did not press for a vote on its proposal but if the ideas it contained, as well as those put forward by Austria and Kenya, were rejected, it would be unable to accept the United Kingdom amendment and would support the International Law Commission’s text, possibly modified by the Kenyan and Austrian amendments. His delegation did not exclude the idea of establishing a working group to consider the definition of State archives in greater depth. Such a group might, in considering the amendments put forward, envisage adding the following phrase at the end of the Senegalese amendment: “as well as all other documents kept,

directly or indirectly, by the predecessor State and regarded by it as archives”.

22. Mr. BEDJAOU (Expert Consultant) said that, while the Austrian amendment had considerable merit, some of the expressions used had given rise to difficulties of interpretation, some caused by the use of the expression “State institutions”, and others by the use of the word “*constituée*” in the French version of the amendment. The problems were semantic ones which he would not attempt to resolve. The word “*constituée*” might indeed give the idea of the creation of archives, or of preparing them, in addition to simply amassing them. It might also suggest a case in which a State acquired archives by paying for them or receiving them as a gift. Its internal legislation made them State archives. Under the internal legislation of a number of countries both types of documents would also be considered to be archives amassed by the State in the manner implied by the French term “*constituée*”.

23. The idea, embodied in the oral amendment proposed by the Senegalese delegation, of associating documents with the activities of the predecessor State in the territory to which the succession of States referred was an attractive one which avoided a large number of the difficulties involved in other amendments. However, he doubted whether State archives could really be defined satisfactorily that way, since it gave the impression that the predecessor State had no archives other than those associated with its activities in the territory involved in the succession of States, when the predecessor State in fact had other archives associated with its activities elsewhere, particularly in the part of its territory not involved in the succession of States.

24. Mr. MONNIER (Switzerland) thanked the Expert Consultant for his comments. His own query relating to the French version had been purely a drafting point and had not been intended to detract from the merits of that proposal.

25. Mr. OESTERHELT (Federal Republic of Germany) said that although the Algerian amendment to article 19 was a helpful attempt to make the definition of State archives more specific, it had the serious drawback of giving the same weight to the general, open-ended phrase “or any other purposes” as to the enumeration of specific elements that preceded that phrase. The Algerian amendment was therefore very similar to the amendment submitted by Kenya. His delegation did not believe that it was legally defensible or realistic to define State archives as all documents of whatever kind that had belonged to the predecessor State. He reiterated his delegation’s support for the United Kingdom amendment.

26. Mr. A. BIN DAAR (United Arab Emirates) said that his delegation could support the Algerian amendment with the incorporation of the additions suggested by the representative of Viet Nam. Alternatively, he could also support the Kenyan amendment which would prevent the predecessor State from taking undue advantage in the interpretation of the term “archives”.

27. The amendment submitted by the United Kingdom would not, however, be acceptable to his delega-

tion. It was inappropriate to give the predecessor State the sole right to determine what constituted archives. Furthermore, that determination should not apply only to documents that belonged to the predecessor State at the date of the succession of States, since such a restriction could be used by the predecessor State to exclude documents which had been State archives before the date of succession.

28. His delegation also objected to qualifying as archives what the predecessor State had kept as archives. Leaving aside the question of abuse by the predecessor State, such a criterion could disqualify documents which at the date of succession happened to be in, or had been deliberately transferred to, another State.

29. The Austrian amendment constituted an improvement, but it did not take care of his delegation's principal concerns.

30. He supported the idea of establishing a small official working group to develop a common definition of archives. That group should take into account the proposal by the representative of Lebanon that the successor State should have an equal say in the matter of the transfer of archives to the successor State.

31. Mr. TÜRK (Austria), noting the considerable support expressed for the idea of establishing a working group on article 19, proposed that the Committee should now decide to set up such a group.

32. Following an exchange of views concerning the composition of the proposed working group, Mr. ROSENSTOCK (United States of America) moved the adjournment of the debate on the question of establishment of a working group to deal with article 19 and the amendments and sub-amendments thereto.

33. Mr. JOMARD (Iraq) and Mr. AL-KHASAWNEH (Jordan) supported the motion.

34. Mr. SHASH (Egypt) and Mr. MUCHUI (Kenya) considered that further discussion of the question was desirable.

The motion by the representative of the United States of America was rejected by 28 votes to 17, with 11 abstentions.

35. The CHAIRMAN suggested that the Committee should decide to establish a working group to review

article 19 and the written and oral amendments and sub-amendments thereto. The group's task would be to prepare a generally acceptable text for article 19 or, failing that, one or more possible texts, taking as the basis for discussion the text submitted by the International Law Commission. Since progress on the remainder of Part III of the draft articles hinged very largely on acceptance of a definition of the term "archives", he hoped that the working group would conclude its work with dispatch.

The suggestion of the Chairman was adopted.

Article 20 (Effects of the passing of State archives)

36. Mr. MAAS GEESTERANUS (Netherlands) said that article 20 resembled article 9 in that it posed the question of a possible interval in the passing of State archives from the predecessor to the successor State. In the case of article 9 the Committee had agreed to the insertion in the draft convention of an additional article which had been proposed by the delegation of Algeria. His delegation did not favour a similar solution in the present case, but thought it would be helpful to make it clear that, in the case of the passing of State archives, there was no extinction of the rights of the predecessor State without a simultaneous arising of the rights of the successor State. It had therefore submitted an amendment to article 20 (A/CONF.117/C.1/L.33) calling for the insertion of the word "simultaneous" between the words "the" and "arising" in that article.

37. Mr. LAMAMRA (Algeria) reminded the Committee that, upon the proposal of his delegation (A/CONF.117/C.1/L.22), it had adopted a new article 8 *bis* in connection with the passing of State property. For the sake of harmony a similar provision should be included in Part III as article 19 *bis*. The text might read as follows:

"A succession of States has the effect of making the State archives of the predecessor State pass to the successor State in accordance with the provisions of the present Part."²

The meeting rose at 6 p.m.

² Subsequently issued under the symbol A/CONF.117/C.1/L.39.

21st meeting

Wednesday, 16 March 1983, at 10.15 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 20 (Effects of the passing of State archives) (continued)

1. Mr. HOSSAIN (Bangladesh), after apologizing for his delegation's late arrival at the Conference, reit-

erated his Government's position as reflected in its statements in the Sixth Committee of the General Assembly and expressed general support for the articles under consideration.

2. Mr. ECONOMIDES (Greece) said that he supported the Netherlands amendment to article 20 (A/CONF.117/C.1/L.33). That the arising of the rights of the successor State was simultaneous with the extinction of the rights of the predecessor State was self-evident; however, it was preferable that it should be stated explicitly.