

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

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**28th meeting of the Committee of the Whole**

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category in its draft. That approach was a major contribution to the progressive development of international law. Article 26 was closely modelled on article 14, on State property. In her delegation's view, it was a very important article.

72. Paragraph 7 of the article, which deserved special praise, laid down a peremptory rule that agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State should not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage.

73. The right to development referred to social, cultural, political and other aspects of development. The right to information denoted the right of peoples to be informed of their own history and existed *per se*, independently of the right of ownership of the archives. The right to cultural heritage referred to archives as constituting an essential part of the heritage of a national community.

74. The three major rights mentioned in paragraph 7 were of crucial importance to the newly independent States.

75. In its commentary to article 26, the Commission had commendably drawn attention to numerous resolutions on the subject adopted by UNESCO, the General

Assembly of the United Nations, the Conferences of Heads of State or Government of the Non-Aligned Countries, the Seventeenth International Round Table Conference on Archives and the plea of the Director-General of UNESCO, calling upon metropolitan Powers to return cultural property, objects of art, archives and other irreplaceable masterpieces to the countries of their origin and to conclude bilateral agreements or settle disputes by negotiation. The practical measures suggested by the Commission and the resolutions cited, if implemented in good faith, would go a long way to achieve that end.

76. Archives were the soul, the conscience and the memory of peoples and the foundation of the national identity. They constituted an important part of the cultural heritage of nations. Hence the imperative need to formalize the principle of restitution, pure and simple.

77. Her delegation supported in principle the text of article 26 as proposed by the Commission. Paragraphs 2, 4 and 7 of the article in particular would provide directions that would benefit newly independent States. Her delegation also viewed with favour the Nigerian amendment to paragraph 7 but was not very clear as to the scope of the new subparagraph (c) of paragraph 1 proposed by the Egyptian delegation.

*The meeting rose at 1 p.m.*

## 28th meeting

Tuesday, 22 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 26 (Newly independent State) (continued)*

1. Mr. MARCHAHA (Syrian Arab Republic) said that the comments made at the 14th and 16th meetings by his delegation in connection with article 14 concerning the necessity of formulating rules to be applied exclusively to newly independent States were also relevant to article 26. The International Law Commission's draft of article 26 had his delegation's support because it took into consideration all the requirements of such States. His delegation also supported the Nigerian amendment (A/CONF.117/C.1/L.40), which improved the clarity of paragraph 7 and strengthened the connection with *jus cogens*.

2. Mr. COUTINHO (Brazil) said that his delegation supported the International Law Commission's text of article 26. However, in its view, the reference in paragraph 7 to the right of people to information about their history and their cultural heritage should apply to all cases of succession of States and not only to the case of

newly independent States. Although the International Law Commission had pointed out in paragraph (32) of its commentary on article 14, paragraph 4, that the principle of permanent sovereignty over wealth and natural resources applied to every people, it had considered it particularly necessary to stress that principle in connection with newly independent States. The provisions contained in article 14, paragraph 4, and in article 26, paragraph 7, should, he felt, be included in a separate article among the General provisions of Part I. His delegation had submitted an amendment to that effect (A/CONF.117/C.1/L.43) regarding the insertion of a new article 6 *bis* after article 6 which it would introduce when the General provisions were examined.

3. Mr. EDWARDS (United Kingdom) said that the provisions for archives in article 26 were similar to those for property in article 14. It was therefore not surprising that his delegation experienced the same kind of difficulties with both articles. As it had explained at the 5th and 13th meetings during the discussion of articles 8 and 14, the International Law Commission's proposals simply did not fit the practice which the United Kingdom and, he believed, other countries had followed in such matters. As the government of a United Kingdom dependent territory proceeded towards independence, it kept its own archives, which never formed part of the public records of the

United Kingdom. On independence, the newly independent government succeeded to all the archives of its predecessor. Thus the archives in the hands of the new government were comprehensive and that government was therefore able to carry out effectively the administration of the newly independent State.

4. In addition to establishing and maintaining local dependent territory archives during the years leading up to independence, his country had provided training courses for officials working in the local administration and in many cases had subsequently provided technical assistance to the newly independent States in the form of qualified archivists and funds for improving the arrangement, housing and accessibility of local archive collections.

5. The United Kingdom delegation also had a number of specific difficulties with article 26 as proposed by the International Law Commission. In paragraph 1, subparagraph (a), the expression "archives having belonged to the territory to which the succession of States relates" was used. The presence of similar ambiguous phraseology in article 14, subparagraphs 1(b) and (e) had led his delegation to propose alternative wording (A/CONF.117/C.1/L.19). The expression "normal administration of the territory" in paragraph 1(b) was likewise vague and that subparagraph should be redrafted along the lines suggested for article 14, paragraph 1(c), in the United Kingdom amendment to that article. Paragraphs 2 and 3 were generally acceptable, provided it was made clear that they should be interpreted in accordance with the internal law of the predecessor State. Paragraph 4 was acceptable in principle, apart from the repetition of the vague expression "having belonged to the territory to which the succession of States relates", but there might well be severe limitations on its practical implementation in view of the wide scope of the term "archives" as described in the International Law Commission's commentary on article 19. Many of the items mentioned in that commentary might be in private ownership and in such a case the United Kingdom would not be able to enforce their return to the newly independent State.

6. In article 26, paragraph 7, as in article 14, paragraph 4, the International Law Commission seemed to be suggesting the existence of some sort of *jus cogens* which, however laudable the underlying principle, should not be allowed to cast doubt upon agreements concluded between predecessor and successor States in respect of archives. The representative of the Federal Republic of Germany had, at the 13th meeting, explained the legal difficulties involved, during the discussion on article 14, paragraph 4. Those difficulties applied also in the case of article 26, paragraph 7. For the same reasons, the United Kingdom delegation could not support the Nigerian amendment to that paragraph.

7. In his view, article 26 should be rearranged in the way suggested by his delegation for article 14, so that agreement between the States concerned constituted the primary rule and the remainder of the article contained residual rules.

8. His delegation had not proposed specific amendments to article 26 in view of the fact that those delega-

tions which had opposed the United Kingdom amendments of a similar nature to article 14 had not been able to indicate any movement at all towards accepting them. When the International Law Commission's text of article 26 was put to the vote, his delegation would therefore be obliged to vote against it.

9. Mr. MAAS GEESTERANUS (Netherlands) said that the idea of including in the draft convention a separate article on the passing of State archives in the case of newly independent States was acceptable in principle. The first six paragraphs of article 26, while capable of improvement, were also on the whole acceptable. His delegation wondered whether the essence of the new subparagraph 1(c) proposed by the Egyptian delegation was not already included in paragraph 2 in the International Law Commission's text.

10. Paragraph 7, on the other hand, would create many legal difficulties for those States and courts which would have to apply its provisions. It referred to three major rights which were assigned to the peoples of both the predecessor and successor States. In so far as the paragraph could be interpreted as outlining a programme of action by which States should be guided in their negotiations concerning the apportionment of State archives, his delegation was in full agreement with the desirability of permitting peoples full access to information about their history and cultural heritage. However, the wording and the proposed place of paragraph 7 in the draft convention seemed to imply that it stated a rule of law and even that reference was being made to already existing rules of customary international law. It could indeed, in the opinion of his delegation, be argued that the right to development was in the process of evolving into a principle of international law. However, neither that right nor the other rights mentioned in paragraph 7 had as yet been defined in any general international convention. Furthermore, the paragraph itself did not contain the necessary elements to assist in understanding the exact scope of those rights. It was the duty of the Conference to avoid such a legally unacceptable situation. His delegation had been unable to devise a satisfactory text for paragraph 7. The amendment to that paragraph proposed by Nigeria was also unacceptable to his delegation. He would therefore prefer to see the paragraph deleted.

11. A possible solution to the difficulty might be the adoption of the Brazilian proposal to include in the draft convention a new article drafted on the lines of article 13 of the 1978 Vienna Convention on Succession of States in Respect of Treaties,<sup>1</sup> to replace both article 26, paragraph 7, and article 14, paragraph 4.

12. He formally proposed that a separate vote should be taken on paragraph 7. If that paragraph were deleted, the rest of the article would be acceptable to his delegation.

13. Mr. ROSENSTOCK (United States of America) said that article 26, like article 14, was unnecessary. His delegation's comments on article 14 at the 15th meeting also applied to article 26. With a sufficient will to find

<sup>1</sup> See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), p. 185.

common ground, the problems encountered with paragraphs 1 to 6 could be remedied. Paragraph 7 raised the issue whether there was desire for a convention covering what should reasonably be covered in a convention on succession of States or whether some delegations would insist on using the present draft convention as an opportunity for embodying formulations not previously included in such instruments. A convention on succession which included unnecessary and highly political provisions would not achieve the general acceptance that was essential if the instrument was to make the desired contribution to international law. Thus the entire process called for by Article 13 of the Charter of the United Nations would be jeopardized. Paragraph 7 of the present draft article 26 raised extraneous issues and it did not state existing law, as was abundantly clear from the International Law Commission's commentary, which provided evidence of an attempt to assimilate a right without legal basis to the treatment accorded to *jus cogens*.

14. His country was not involved in the question at issue either as a predecessor State or as a successor State. It was prepared to be flexible and to assist in bridging gaps between States directly concerned in order to achieve a successful effort at codification. It was not, however, prepared to make major concessions on irrelevant matters such as those dealt with in articles 14, paragraph 4, 26, paragraph 7, and 36, paragraph 2. He therefore urged reconsideration of the necessity of including those provisions in the draft convention.

15. The Nigerian amendment to article 26, paragraph 7, was not helpful, in his view, and he also doubted the usefulness of the Brazilian suggestion of a new article 6 *bis* in Part I.

16. Mr. KADIRI (Morocco) said that the act of political decolonization did not resolve all the problems inherited from the colonial period. Many painful issues connected with the succession of States often remained pending for years after the accession to political independence.

17. Some appeared to think that the Conference was formulating transitional rules relating essentially to newly independent States at a time when the transitional period itself was almost at an end. Such was not the case. The new rules which the Conference would establish, even if not legally impeccable, would guide States in their conduct of negotiations. The close link between the 1978 Vienna Convention on the Succession of States in Respect of Treaties and the draft convention under discussion also militated in favour of the inclusion in the latter of provisions relating to newly independent States. The draft convention certainly had a declaratory aspect, but it also contained material that contributed to the progressive development of law.

18. Referring to the text of article 26, he agreed with the International Law Commission that it was scarcely realistic for a newly independent State to expect to obtain the immediate transfer of all the archives associated with the rule of the predecessor State, but it was contrary to equity that the newly independent State should be deprived of those documents which were also of interest to it. The evidence mentioned in paragraph 3

of article 26 was particularly important in the event of disputes between the newly independent State and a third State relating to part of the former's territory or to its frontiers. His delegation was also in favour of the obligation which paragraph 4 laid on a predecessor State to co-operate in efforts to recover archives that, as was often the case, had been dispersed during the period of dependence. That obligation was associated with a concomitant obligation to locate and sort the archive collections before passing them to the successor State, a procedure which was rendered more difficult by the fact that the archives of most importance from the viewpoint of the newly independent State were sometimes removed by the predecessor State before the accession to independence and by the fact that the predecessor State was sometimes reluctant to transfer such archives to the successor State and therefore did not reveal their existence. The predecessor State must discharge its obligation to co-operate in good faith.

19. Finally, he noted with interest that, in paragraph 7, the International Law Commission had elevated the protection of certain inalienable rights to the status of a positive norm of international law. The importance of those rights had been stressed in various international forums, particularly in the recent work of UNESCO and in the resolutions adopted at various meetings of the Heads of State or Government of the Non-Aligned Countries. The International Law Commission had not, however, ignored the obligation to negotiate. That principle was well established in international jurisprudence, in particular in the North Sea Continental Shelf case<sup>2</sup> where the International Court of Justice had held that the parties were required to enter into negotiation with a view to reaching an agreement and that they had an obligation to conduct themselves in such a way that the negotiation would be meaningful—which would not be the case if one of the parties insisted on maintaining its position without contemplating any concession.

20. Mr. PHAM GIANG (Viet Nam) said that his delegation fully supported the International Law Commission's text of article 26. In the past, dependent peoples had been treated as objects of international law. They had had no rights over either the archives belonging to them before the colonial period or those relating to the colonial administration. Now that those peoples were recovering their national identity, such archives should pass to them automatically without prior agreement between the former colonial power and the ex-colony. The archives were of fundamental importance to the newly independent State for the efficient administration of the territory. It was from that standpoint that his delegation read paragraph 1 of the article. Paragraph 3 was another important provision, in view of the disputes which many newly independent States had had over frontiers with third States or other newly independent States, largely owing to the confusion in which the predecessor State had left the relevant archives. Predecessor States were in a position to clear up disputed

<sup>2</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3.*

points from their vast accumulation of archives. His delegation therefore endorsed the formulation of paragraph 3 and the judicious observations in paragraphs (20) to (22) of the International Law Commission's commentary on article 26.

21. His delegation also approved paragraphs 2 and 4 of article 26, particularly the obligation placed on the predecessor State to co-operate in recovering historical objects and *objets d'arts*, associated with the national identity of newly independent States, which had been dispersed during the colonial period. Paragraph 7 opened up the way for the States concerned to conclude agreements, provided that they did not infringe certain rights of the peoples of the newly independent States. He congratulated the International Law Commission on producing a text of historic significance.

22. In conclusion, he said that he supported the Nigerian amendment which strengthened the formulation of paragraph 7. On preliminary examination of the Egyptian amendment, he was also inclined to favour its adoption.

23. Mr. LEITE (Portugal) said that his delegation supported neither the Egyptian nor the Nigerian amendments. The Egyptian amendment attempted to make it a duty of the predecessor State to pass part of its own archives to the successor State, which was unacceptable, and the Nigerian amendment undermined the principle of State sovereignty, which was equally unacceptable.

24. Mr. KEROUAZ (Algeria) said that article 26 was the counterpart of articles 14 and 36 and laid down a series of rules in respect of State archives to cover the case of newly independent States. The International Law Commission had assessed the newly acquired rights of such States, which had already been defined by the United Nations and other international organizations over the past two decades and represented full rights in contemporary international law. The Commission had removed all doubts regarding the ownership of archives in the case of newly independent States, acknowledging that they were the property of the successor State and not of the predecessor State, since they belonged to the territory to which the succession related or were acquired in the course of its existence. It had also acknowledged that archives compiled prior to colonial rule were without doubt the property of the newly independent State, and that there had to be a regular transmission of archives from the predecessor State to the newly independent State.

25. The International Law Commission had also acknowledged that access to all archives by the newly independent State had to be ensured, and had therefore invited the States parties to the succession to reach an agreement on the joint use of those archives, based on understanding, equity and mutual interest. Paragraph 2 of the draft article proposed by the Commission recognized the obligation to co-operate on a mutually advantageous basis. However, while such co-operation was both desirable and feasible, it might not come about, for a number of reasons; hence the necessity for the Egyptian amendment which called for the insertion of a new subparagraph (c) in paragraph 1.

26. In line with the spirit of article 14, paragraph 7 of article 26 made reference to the inalienable threefold right to development, to information and to cultural heritage, which had been recognized and enshrined by the United Nations and other bodies in numerous resolutions. Archives were the permanent elements of a country's cultural heritage and as such were part of its cultural wealth. To deprive a people of the ownership of archives, therefore, was to destroy the memory of that people.

27. The International Law Commission, in addition to calling for an agreement between the States parties to the succession, had probably also been aiming to eliminate the after-effects of colonization and the resultant expropriation of their cultural heritage. The Algerian delegation considered that the high priority given by the United Nations and other international organizations to the question of the preservation and restitution of cultural property to its legitimate owners was fully justified. The Fifth Conference of Heads of State or Government of the Non-Aligned Countries, held in Colombo in 1976, had considered such restitution to be a condition for dialogue and improved international relations. However, the text of article 26 did not fully reflect the concerns and the claims of the newly independent States. The Berne Convention of 1886 on the protection of literature and works of art and that of 1890 on the protection of artistic property both acknowledged that, if an agreement concluded between States infringed the inalienable rights of one of those States to its cultural property, it should be considered null and void. A similar formula was embodied in many other, more recent, international instruments such as the Brussels and Rome treaties, the treaty between France and Italy and the London Declaration of 1943. In the light of those examples, his delegation regarded the Nigerian amendment as fully justified.

28. Mr. de OLIVEIRA (Angola) said that his delegation fully supported article 26 as drafted by the International Law Commission. As a newly independent State Angola was grateful to the Commission for having proposed such a just and effective provision to protect the legitimate interests of countries which had formerly been dominated and exploited. It was an excellent example of the concern contemporary international law should have to rectify the inequalities of so-called classical international law.

29. The Angolan delegation fully supported the Nigerian amendment. The International Law Commission's commentary on article 14 indicated that some members of the Commission had been in favour of sanctioning any violation of fundamental principles by making agreements null and void *ab initio*. To render agreements null and void *ab initio* and *ope legis*, particularly when they affected fundamental rights such as the right of peoples to development, information and their cultural heritage, was a perfectly reasonable and just solution, and in line with the progressive development of international law. It was reasonable therefore to conclude that, in the case of agreements which were prejudicial to such basic rights, there was no equality of will, and with such a lack of equality *de jure* and *de facto* there did not exist any real agreement.

30. The Angolan delegation also supported the Egyptian amendment and considered that it improved the original text by covering cases of succession of States which also needed to be taken into account.

31. Mr. MUCHUI (Kenya) said that, since article 26 was based on the same reasoning as article 14, his delegation's comments at the 14th meeting on the latter applied *mutatis mutandis* to article 26. Both article 14 and article 26 constituted landmarks in the progressive development and codification of international law, for which the International Law Commission was to be congratulated.

32. The Nigerian amendment to paragraph 7 of article 26 restated an important principle of international law, namely the inviolable right of a people to development, to information about its history and to its cultural heritage. The inviolability of those rights was beyond dispute. Paragraph 7, as it stood, provided that any agreement concluded between a predecessor State and the newly independent State with regard to State archives should not infringe or violate those inviolable rights. However the text contained no explicit provision concerning cases in which such agreements did infringe or violate those rights. The only logical consequence of such infringement was to render the agreements null and void *ab initio*. The Nigerian amendment sought to make that sanction explicit, and for that reason Kenya fully supported it.

33. The Egyptian amendment (A/CONF.117/C.1/L.46) contained a provision similar to one in article 25 in respect of succession in the case of transfer of part of the territory of a State. He saw no reason why the same provision should not apply in respect of succession in the case of newly independent States. According to article 26, the only archives which passed automatically to a successor State were those which belonged to the territory concerned before independence and those which formed part of the normal administration of the territory to which the succession related. There was, however, another category of archives, those which related exclusively or principally to the territory subject to succession, which did not fall into the categories covered by paragraph 1(a) or (b) of the article and which therefore did not pass automatically from the predecessor State to the successor State. He thanked the Egyptian delegation for drawing the Committee's attention to that gap in article 6 and expressed his full support for the Egyptian amendment.

34. The United Kingdom delegation had considered paragraph 4 of article 26 to be vague. In his delegation's view, that paragraph was crystal clear. It imposed on the predecessor State the very important and vital obligation to co-operate with the successor State in the latter's efforts to retrieve those archives which rightly belonged to it but which had been dispersed during dependence. In Kenya's experience there had been very little co-operation on the part of the predecessor State and such co-operation as there had been had been very selective, in the sense that the archives and information passed had been carefully chosen. In some cases co-operation had been totally lacking. The Kenyan delegation therefore commended the International Law Commission for having recognized that problem and having sought to resolve it.

35. Mr. AMANULLAH (Indonesia) said that, in general, his delegation had no difficulty with article 26 as drafted by the International Law Commission. By using the term "archives" rather than "State archives" in that article the Commission had intended to include the historical archives of the pre-colonial period of the territory concerned. Paragraph 3 stipulated that the predecessor State should provide the newly independent State with the "best available evidence" from the State archives. In paragraph (21) of its commentary, the Commission had stated that the best available evidence meant either the originals or reproductions thereof. His delegation held the view that the "best available evidence" should mean the originals in the case of archives to be used as proof, but it could accept the term "best available evidence" as meaning reproductions in the case of archives used simply as a source of information.

36. Mr. OESTERHELT (Federal Republic of Germany) said that the Nigerian amendment to paragraph 7 answered one of the questions raised by his delegation during the discussion of article 14, paragraph 4, which had not received a complete and fully satisfactory answer. However, the other question, that of interpretation, remained. His delegation took Nigeria's amendment to mean that the legal consequence of an infringement of paragraph 7 was to be the immediate invalidity of the agreement without the need to await denunciation from either side, in other words nullity *ab initio*. Such invalidity would be nullity *inter partes*, as contracted between the parties to the convention with effect only for the parties, and not nullity on other grounds, or with effects in other fields of application.

37. States were in principle free to agree to treaties or treaty clauses which under certain circumstances would invalidate the acts which they performed. States might or might not be willing to restrict their own sovereign treaty-making power, but there was no doubt that they could do so if they so wished. In that narrow respect, therefore, the Nigerian amendment caused his delegation no difficulty, even though the limitations placed upon the treaty-making powers of States went very far indeed. However, nullity, as foreseen by the amendment, was not the only conceivable form of legal reaction to remedy the deficiencies of an agreement, although it was certainly the most severe sanction that could possibly be imposed in that it overruled the express will and intention of the parties to an agreement freely and willingly concluded between them. Nullity should therefore be used only as a last resort in cases where the parties were unable to reach a fair and balanced agreement by any other legal means, and it should be employed only when the prerequisites were very clear.

38. Two questions then arose. The first was whether the nullity provided for in the Nigerian amendment was the only conceivable possibility, or whether there were other forms of legal reaction which would ensure that the rights and interests of the newly independent State were efficiently respected. Would not a right to vitiate the agreement or to have it revised, for example, better reflect the State's intention to regulate the passing of archives on agreed terms than an invalidity *ab initio*, which might be effective even against the will of both

parties in a given case? Secondly, given that nullity was the most severe sanction, the cases to which it might apply had to be pertinent and defined in such a way as to eliminate any uncertainty about its entry into effect. According to paragraph 7, an infringement of the "right . . . to development" made the agreement invalid. That so-called right to development was one of the more controversial items discussed in other forums, particularly the Commission on Human Rights and the General Assembly of the United Nations. Part of the controversy stemmed from the fact that a clear concept of the scope, content and limits of that right had not yet been elaborated. The intergovernmental working group responsible for that elaboration had not completed its work and had had its mandate extended for a further year. That working group, which was also studying the cultural aspects of the right to development, had never established a link between development and archives, and it appeared that government experts in that field saw the two as unrelated. That being so, his delegation wondered whether the reference to the right to development in paragraph 7, and in articles 28 and 29, was to be understood in the sense of a very general notion referring to the right of each and every State to unimpeded development, a notion to which his delegation would not hesitate to subscribe, or whether it went beyond that and, if so, in what respect. Since his delegation was not certain of the meaning to be given to that expression or to other expressions used in paragraph 7, and since it was not certain of its effects or its legal and factual prerequisites, it was not in a position to vote in favour of either the article as drafted by the International Law Commission or the Nigerian amendment.

39. As to the right of peoples to information about their history and to their cultural heritage, in the light of paragraphs (29) to (35) of the International Law Commission's commentary on article 26, his delegation took it that the term "right" had been used in a non-technical sense without reference to the rights in a technical sense accorded by contemporary international law. As in the case of article 14, therefore, his delegation regarded article 26 as embodying new rules which belonged to the sphere of progressive development of international law and not to the codification of international law. States were free to accept such rules or to reject them; in other words States had a sovereign right to decide whether or not they wished to abide by those rules in the future.

40. Mr. DJORDJEVIĆ (Yugoslavia) said that his delegation supported article 26 as proposed by the International Law Commission, since it took a balanced approach to the delicate problem of the passing of archives in the case of newly independent States.

41. The use of the term "archives" instead of "States archives" in paragraph 1, subparagraph (a), was fully justified. It was important to make it clear that historical archives of the pre-colonial period were archives not of the predecessor State but of the territory itself; they should therefore revert to the newly independent State, quite independently of any question of the succession of States. That approach was supported by historical practice. A similar provision concerning the passing of administrative archives was contained in subparagraph (b). His delegation considered the Egyptian

tian amendment fully consistent with the provisions of subparagraphs (a) and (b) of paragraph 1.

42. Paragraph 2 set forth the important principle that the conclusion of agreements between the parties concerned should be on the basis of mutual benefit and equity. The interested parties should in that connection take into account the principle of the unity of archives.

43. The use of the broad formulation "best available evidence" in paragraph 3 was of particular importance for newly independent States which needed evidence concerning title to part of their territory or boundaries.

44. Paragraph 4, which established the obligation of co-operation between the predecessor State and the successor State, was in his delegation's view valid not only for paragraph 1, subparagraph (a), of article 26, but for all of Part III of the draft convention.

45. His delegation fully supported paragraph 7 and could not agree to its deletion. In view of the fundamental importance of that paragraph, his delegation was ready to consider alternative formulas and in that sense could support the Nigerian amendment.

46. Mr. MURAKAMI (Japan) said that, as his delegation had already stated during the discussion on article 14 at the 13th meeting, it attached primary importance to agreements concluded between the parties concerned as a criterion to regulate the passing of State property to the successor State. Paragraph 1 of article 26 should, in its view, be modified to reflect the primacy of that principle.

47. Paragraph 1, subparagraph (a), and paragraph 4 of the article used the phrase "having belonged to . . ."; he reiterated his delegation's position that whether and in what manner an entity had possessed the archive in question before the period of its dependency was a matter for determination in accordance with the rules of international and internal law applicable at the time.

48. His delegation had again to express concern at the use of certain imprecise terminology in article 26, such as "normal administration" in paragraph 1(b), and "of interest to the territory" and "benefit as widely and equitably as possible" in paragraph 2. Some of those and other similar phrases also appeared elsewhere in the draft convention. He trusted that the Drafting Committee would be given the task of reviewing such loosely formulated phrases.

49. Turning to paragraph 3, he said that his delegation considered it important that due regard should be paid to the legitimate interests of third States.

50. His delegation had great difficulty in accepting paragraph 7. The concepts of the right of peoples to development, to information about their history and to their cultural heritage were both vague and difficult to apply in concrete situations. His delegation greatly doubted, moreover, that such "right" really existed as established concepts of international law. Furthermore, paragraph 7 was at variance with his delegation's fundamental position that agreement between the parties concerned should have primary importance. In his delegation's view, therefore, that paragraph should be deleted.

51. Those arguments applied *a fortiori* to the Nigerian amendment which was totally unacceptable to his delegation.

52. With regard to the Egyptian amendment, he recalled that his delegation had expressed concern at the 26th meeting regarding the lack of clarity of the two criteria mentioned in paragraph 2 of article 25. That concern also extended to the use of the phrase "... that relates exclusively or principally ..." suggested by Egypt for subparagraph (c) of paragraph 1 of article 26.

53. Mr. SKIBSTED (Denmark) said that his delegation had already observed in connection with article 14 that the primacy of agreement between the States concerned should be clearly stated; that observation also applied in respect of article 26.

54. A number of the criteria referred to in the article were vague and that was particularly true in the case of paragraph 7. While his delegation was sympathetic to the underlying motivation of that provision, it found it unacceptable to restrict the freedom of the parties concerned to conclude agreements. The concepts of the right of the peoples of newly independent States to development, to information about their history and to their cultural heritage were not sufficiently precise to be used as legal terms. As had already been noted, the concept of the right of peoples to development, in particular, which was under dispute in other international forums, required clarification.

55. His delegation had difficulty in understanding why the International Law Commission had included paragraph 6 in the article. The economic and social circumstances envisaged did not necessarily correspond to those of newly independent States. As had been pointed out in connection with article 14, paragraph 3, there might be a case of a territory adjoining a State which was larger and richer than the predecessor State.

56. For the above reasons, his delegation was unable to support either the draft article as proposed by the International Law Commission or the Nigerian amendment.

57. Mr. BOSCO (Italy), referring to the Nigerian amendment, expressed concern at the introduction of such a controversial concept as the rendering of international agreements void. He wished to remind those who had spoken in favour of the amendment that it was at variance with the hypothesis expounded in the 1969 Vienna Convention on the Law of Treaties. Since the Conference was codifying international law, it was extremely important to be on firm ground in such a matter.

58. His delegation would be unable to vote in favour of article 26 as a whole and, in particular, could not support paragraph 7.

59. Mr. PIRIS (France) said that his delegation's comments on article 14 at the 13th and 16th meetings also applied to article 26. His delegation could not accept the text proposed by the International Law Commission or the Egyptian and Nigerian amendments, for a number of reasons.

60. First, it was essential for article 26 to begin in the same way as article 25, with a paragraph providing that what was to happen to State archives likely to be transferred from the predecessor to the successor State should be determined by agreement between the States concerned.

61. Secondly, article 26 contained a number of provisions which gave rise to difficulties. For instance, the word "State" should be inserted before "archives" in paragraphs 1(a) and 4; in any case, in that context, the word "territory" should be interpreted as covering the juridical person concerned; and some nebulous and imprecise terms such as "of interest to the territory", "belonging or having belonged" and "normal administration" should be clarified.

62. Thirdly, the article should include a provision, on the lines of article 25, paragraph 5, which would allow the predecessor State to be supplied with appropriate reproductions of State archives passed to the successor State.

63. Fourthly, as the representative of Denmark had pointed out, the meaning of paragraph 6 was not clear. What was the distinction between the provisions of that paragraph and the cases covered by articles 25 and 28? In what way did they correspond to the heading of article 26, since paragraph 6 was not concerned with a newly independent State?

64. Finally, without prejudice to his delegation's position regarding the various rights referred to in paragraph 7, he considered that paragraph as drafted to be unacceptable, as it corresponded neither to State practice nor to international law. Negotiations must be entered into to convert it into a provision which could apply to all types of succession and could be couched in the form of a recommendation. In any event, the paragraph would obviously be binding only on the States which became parties to the convention and would not affect other States.

65. Mr. BARRERO-STAHN (Mexico) said that his delegation found the text of article 26 as proposed by the International Law Commission fully acceptable. It would support the Nigerian amendment.

66. Mr. PÉREZ GIRALDA (Spain) said that his delegation shared some of the concerns voiced by earlier speakers, particularly regarding the unsatisfactory definition of the "archives-territory" link and the provisions of paragraph 7. It would therefore not be able to support either the Egyptian or the Nigerian amendments.

67. While it was clear that the debate on article 26 mirrored to a large extent the discussion on article 14, his delegation preferred to concentrate on new elements that had emerged during the consideration of article 26. The representative of Brazil had proposed a compromise solution which, in his delegation's view, could represent an important contribution to the success of the future convention. He urged that serious consideration be given to that proposal or any other suggested compromise, his delegation's reservations concerning article 26 as it stood notwithstanding.

68. Mr. KIRSCH (Canada) said that his delegation had reservations concerning a number of the formula-

tions used in article 26, which it considered unduly vague. It believed, furthermore, that article 26 should have had an initial provision giving priority to agreements concluded between States. The absence of such a provision, taken in conjunction with the wording of paragraph 7, was regrettable.

69. While the objectives of paragraph 7 were laudable, that paragraph as it stood was unacceptable to his delegation. Concepts which, irrespective of their intrinsic merits, were not generally recognized as norms of international law could, under that paragraph, be given precedence over agreements that had been concluded in accordance with legal norms. Furthermore, the concepts referred to in paragraph 7 raised insurmountable problems of interpretation; the International Law Commission's commentary, with its selective use of sources, did nothing to allay his delegation's concerns in that connection.

70. Recalling that a number of objections had been raised concerning the divergent interpretations that could be given to certain elements of article 24, he pointed out that that provision was in fact much clearer in outline and scope than article 26, paragraph 7. He trusted that a similar desire for intellectual clarity would be brought to bear on the latter paragraph.

71. It was to be hoped that a vote would not be taken on article 26 as it stood, since its acceptance would constitute only an illusion of progress.

72. For the reasons he had given, his delegation would also be unable to support the Nigerian amendment.

73. Mr. KOLOMA (Mozambique) said that, from a legal standpoint, the Nigerian amendment represented an improvement over the International Law Commission's text of article 26, since it would have the effect of nullifying agreements between States which infringed such basic rights of the peoples of newly independent States as the right to development, to information about their history, and to their cultural heritage. Moreover, the amendment foresaw the possibility of legal sanctions for such infringements.

74. In his delegation's view, the Nigerian amendment did no more than state explicitly elements that were implicitly contained in the International Law Commission's draft. His delegation had therefore had no difficulty in supporting that amendment.

75. His delegation also considered that the Egyptian amendment improved the Commission's text, and would accordingly support it.

76. Mr. MONNIER (Switzerland) said that his delegation's position on article 26 corresponded largely to that which it had indicated in connection with article 14. The possibility that the concepts referred to in paragraph 7 of article 26, which were questioned as legal norms, could invalidate agreements concluded between the predecessor and the successor State made that provision very difficult to accept. By analogy, his delegation would also be unable to support the Nigerian amendment.

77. He believed it was more important to seek a solution to the problem than to reiterate earlier stated positions; the suggestions made by the representatives of Brazil and France offered a possible basis for engaging

in further dialogue. Both of those proposals would give article 26, paragraph 7, and article 14, paragraph 4 a less restrictive scope.

78. Mr. BEN SOLTANE (Tunisia) said that his delegation considered the provisions of article 26 extremely important. It fully supported the text proposed by the International Law Commission. The archives referred to in paragraph 1, subparagraph (a), constituted the collective memory of the newly independent State and would therefore contribute to its intellectual development. Subparagraph (b) was equally important for the viability of the newly independent State because the archives to which it referred constituted a vital element in the administration of its territory. The archives mentioned in paragraph 2 were equally indispensable. His delegation welcomed the inclusion in the article of paragraph 7, which responded to concerns expressed in connection with article 14, paragraph 4. The paragraph promoted the protection of three fundamental rights which had not yet been codified but constituted a major concern of international society. It was not necessary to define the right to development, which would be the subject of other conventions.

79. Mr. RASUL (Pakistan) said that his delegation had no difficulty in accepting the text proposed by the International Law Commission. He understood the Nigerian amendment to be an attempt to bring paragraph 7 of article 26 into line with article 8 of the 1978 Vienna Convention on Succession of States in Respect of Treaties,<sup>1</sup> in which the nullity of devolution agreements had already been accepted. The basis of article 8 of the 1978 Convention had been acknowledgement of the fact that parties to the devolution agreement were unequal. That basis could be valid in the case of paragraph 7 of article 26 also. His delegation therefore thought that the Nigerian amendment deserved favourable consideration. The difficulty faced by the representative of Nigeria might be the understanding of the real import of the words "shall not". Since the word "shall" was mandatory in legal language, infringement of the rights referred to would amount to a violation of an obligation, which would affect the validity of the agreement. Perhaps the Expert Consultant could throw light on the legal importance of the words "shall not".

80. Mr. A. BIN DAAR (United Arab Emirates) also expressed full support for the International Law Commission's text, which rightly reflected the concerns of newly independent States. His delegation would have no hesitation in accepting the amendments submitted by Nigeria and Egypt.

81. There was, however, also a danger that the predecessor State could deliberately damage or destroy certain archives relating to the newly independent State and which should be passed to it. That had in fact already been done by certain former colonial Powers or protectors of dependent States. His delegation therefore proposed the insertion of a new sentence in paragraph 3 reading as follows: "The predecessor State shall not arbitrarily damage or destroy any archives relating to the newly independent State."

82. Mr. NATHAN (Israel) said that paragraph 1 of the draft article did not appear to take account of the fact

that in many dependent territories the archives were not State archives of the colonial predecessor State but did in fact belong to the governing authority of the colonial territory which in many instances had a juridical status of its own.

83. With regard to paragraph 7, the question of the extent or the very existence of a norm of *jus cogens* that would nullify a treaty provision conflicting with it was problematic. The rights referred to in paragraph 7 had not as yet crystallized into a norm generally accepted by the international community as one to which no derogation was permitted. Consequently, the question of rendering void agreements between the predecessor and the successor State in regard to those matters did not arise.

84. It might also be asked why the newly independent State should be singled out with respect to development, cultural heritage and information and why similar benefits should not apply in other cases of succession of States. A compromise solution to those problems might be sought, along the lines suggested by the representatives of the Netherlands and Brazil, by including in Part I of the convention a provision which gave a positive expression to those principles in less normative terms than those used in paragraph 7.

85. Mr. YÉPEZ (Venezuela) said that his delegation could see no reason to accept any amendment to the text drafted by the International Law Commission, which it considered almost perfect. The concepts put forward in the Egyptian amendment were implicitly contained in paragraphs 1 and 2 of the Commission's text of article 26. It would be interesting to hear from the Expert Consultant why those concepts were included in article 25 and not in article 26.

86. With regard to the Nigerian amendment, the intention of the Commission's draft of paragraph 7 to encourage agreements between States and expressly to forbid any clause in such agreements which limited the right of the peoples of both the States concerned to development, to information about their history and to their cultural heritage would be weakened by any alteration of the existing text. No final decision could be reached on article 26 without further consideration of the Brazilian proposal, which called for a radical change in paragraph 7 to bring it into line with earlier paragraphs of the draft convention.

87. Mr. ECONOMIDES (Greece) said that he had noted in article 26 imprecise expressions similar to other such expressions in earlier articles. The most important part of the article was paragraph 7. His delegation fully endorsed the intention underlying that paragraph but considered the wording used more appropriate to penal law than to international law. The establishment in international law of the rights referred to would be better served by using a positive rather than a negative approach and by stating that agreements between the predecessor and the newly independent States should contribute to strengthening the rights of their peoples to development, to information about their history and to their cultural heritage. His delegation therefore agreed with those delegations which considered that paragraph 7 should be reworded and perhaps appear elsewhere.

88. Mr. BEDJAUI (Expert Consultant) said that article 26 was one of the most substantive in the entire draft convention. The International Law Commission had achieved a proper balance in its efforts in the codification and progressive development of international law. The article was dominated by two ideas: to preserve the historic and cultural heritage of the peoples of each of the States concerned by preserving their right to development, to information about their history and to their cultural heritage and, as a corollary, to try to reconcile the interests of the predecessor and successor States and to promote co-operation between them. The triple right referred to in paragraph 7 was new in international law. However, the surprising element was not that such rights were now being invoked but rather that they had not been invoked earlier.

89. Admittedly, there were gaps in the provisions of the article and problems which were only partially solved. Those had motivated the amendments submitted by Nigeria and Egypt, as well as those submitted orally during the discussion. No mention had for instance been made of archives which were of interest to several newly independent States but which were preserved either in the capital of the former colonial State or in the territory of one of the newly independent States.

90. Paragraph 1, subparagraph (a), referred to archives existing before the colonial period, the restitution of which should be immediately applied.

91. The Egyptian amendment contained a number of points which responded to the concerns that had been expressed by UNESCO. Their substance had not been completely overlooked by the International Law Commission, which had not wished to repeat the text contained in paragraph 2(b) of article 25 but had tackled the problem in paragraph 2 of article 26 through bilateral agreements between the predecessor State and the newly independent State. Paragraph 2 also showed that the archives to be passed to the newly independent State could be either original documents or reproductions. The final decision on the fate of such archives depended on the equitable balance between the needs of the predecessor and the successor States. In short, the International Law Commission had preferred to encourage co-operation between the predecessor and successor States by emphasizing the need for agreement between the two. The new subparagraph 1(c) proposed by the representative of Egypt might concern political or other archives dating from the colonial period which were part of the history of the former colonial State but were even more important to that of the newly independent State.

92. Paragraph 3 of the article was an extremely useful paragraph which had given rise to no comments. Paragraph 4 did not refer to an obligation to return archives which had been dispersed during the period of dependence but rather to co-operation between the two States to recover them.

93. There had been no comments from delegations concerning paragraphs 5 and 6, the substance of which had already been discussed in connection with previous articles.

94. In paragraph 7, the International Law Commission's intention had been to develop co-operation between the predecessor and the newly independent State. All the emphasis was on the rights of the peoples of both States, so that the rights of one should not be sacrificed to those of the other. He therefore felt that

the International Law Commission should have been congratulated on emphasizing co-operation between States in ensuring the rights of both peoples.

*The meeting rose at 6.10 p.m.*

## 29th meeting

Tuesday, 22 March 1983, at 7 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 26 (Newly independent State) (concluded)*

1. Mrs. TYCHUS-LAWSON (Nigeria) said that the trend of the discussion on article 26 had led her delegation to believe that the majority of the delegations at the Conference supported the formulation of a set of fair and equitable rules. The Nigerian delegation also noted with satisfaction the observation by the representative of the Federal Republic of Germany (28th meeting) that the Nigerian amendment to paragraph 7 (A/CONF.117/C.1/L.40) answered the question he had raised previously in connection with article 14. As the representative of the Netherlands had said, paragraph 7 as proposed by the International Law Commission gave guidance on international law and was not a programme of action. All that the Nigerian proposal sought to do was to find a basis for such a programme. She also agreed with the representative of Kenya that the idea underlying the Nigerian amendment was to render inviolable the rights mentioned in the paragraph, which should no longer be a matter of dispute. However, paragraph 27 as drafted did not explicitly state the possible result of infringement of those rights. The basic aim of the Nigerian proposal was to fill that gap to the benefit of both the predecessor State and the newly independent State.

2. However, in the light of the further explanation provided by the Expert Consultant and in view of its belief that the convention should aim at co-operation between all States in a spirit of compromise, the Nigerian delegation withdrew its amendment. It supported the amendment submitted by Egypt (A/CONF.117/C.1/L.46).

3. Mr. HAWAS (Egypt) considered that articles 26 and 14, taken together, constituted a real achievement, for which the International Law Commission deserved every congratulation. The discussion at the previous meeting had revealed broadly based support for the Egyptian amendment, but uncertainty had been expressed regarding its implications for paragraph 2 of article 26. That paragraph, as was perfectly normal,

was concerned with agreement on matters other than those covered by paragraph 1. The Egyptian proposal did no more than transfer the concept of article 25, paragraph 2(b), which the Committee had already approved, to the case of newly independent States. The amendment, if adopted, would form part of paragraph 1 and paragraph 2 would still refer to cases other than those mentioned in paragraph 1. Consequently, the Egyptian amendment would not affect paragraph 2.

4. With the regard to the question whether the Egyptian proposal would limit the scope of paragraph 2, the intention of the International Law Commission in drafting paragraph 2 had been, as the Expert Consultant had indicated (28th meeting), to provide a basis for agreement, co-operation and equity in matters not dealt with in paragraph 1. The Egyptian amendment would not conflict with that intention, for paragraph 2 would still leave room for reaching decisions by mutual agreement. It was unclear why an unrestricted attitude had been adopted in respect of the transfer of part of the territory of the State while a narrower view had prevailed on co-operation and agreement with newly independent States. It was difficult to explain why the concept of article 25, paragraph 3, had not been embodied in article 26. Some archives were of very ancient date and related exclusively to States affected by a succession. In view of the wide measure of support that the Egyptian amendment appeared to command, he believed that the simplest course would be to put it to the vote.

5. Mr. A. BIN DAAR (United Arab Emirates), referring to his delegation's oral proposal to amend paragraph 3 of article 26 (28th meeting), said that he withdrew that proposal, but reserved his delegation's right to resubmit it later.

6. Mr. TSYBOUKOV (Union of Soviet Socialist Republics) congratulated the Expert Consultant on his expert analysis of article 26 (*ibid.*), which his delegation fully supported. It took proper account of the legitimate interests of newly independent States and successor States and recognized that archives were an integral part of the development of those States. The article was well balanced and paragraph 7 took due account of the interests of the predecessor State.

7. Mrs. BOKOR-SZEGÖ (Hungary) considered that article 26 was entirely in the spirit of the various important resolutions adopted by the United Nations General