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

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5th meeting of the Committee of the Whole

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been the Special Rapporteur on the subject for the International Law Commission.

22. Mr. BEDJAOUI (Expert Consultant), after paying a tribute to the President of the Conference, the Chairman of the Committee of the Whole and all other members of the General Committee as well as to the Secretary of the Conference and his staff, reviewed the history of the International Law Commission's work on the topic of the succession of States, first in respect of treaties and, more recently, in respect of matters other than treaties. The very fact that it had taken 13 years to produce the text now before the Conference was a measure of the complexity of the subject matter. Moreover, unlike most other topics in international law, the question of the succession of States in respect of State property, archives and debts had never before formed the subject of any attempt at codification by learned societies or individual experts, and hence in undertaking the task the International Law Commission had broken completely new ground. As the former Special Rapporteur, he assumed responsibility for any imperfections of the text; however, the Conference would surely bear in mind the great difficulties of the task and the efforts that had been made to arrive at compromise solutions capable of satisfying the whole of the international community. While looking forward to a full and thorough discussion leading to the adoption of a text that would supplement and enrich the existing body of international law in an important area, he hoped that the Conference would deal gently with a text which, as it were, had been held over the baptismal font for a period of 13 years.

Organization of work

23. The CHAIRMAN, responding to a request by Mrs. BOKOR-SZEGÖ (Hungary) to indicate what stage had been reached in the consideration of articles 7 to 12, said that the Committee had decided to defer examination of article 7 pending consideration of articles 1 to 6. So far as articles 8 to 12 were concerned, it had been thought desirable to await the arrival of the Expert Consultant, who would doubtless clarify the numerous points raised in connection with each article. Those articles would then be considered together with the amendments proposed by various delegations.

The meeting rose at 5.40 p.m.

5th meeting

Friday, 4 March 1983, at 10.20 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 12 (Absence of effect of a succession of States on the property of a third State) (*continued*)

Article 8 (State property) (*continued*)*

1. The CHAIRMAN said that the Expert Consultant was ready to answer questions on points raised in the course of earlier discussions.

2. Mr. FISCHER (Holy See) said that, on reflection, his delegation had decided to withdraw its proposal for a separate vote on the phrase "according to the internal law of the predecessor State" in article 12.

3. Mr. SHASH (Egypt) asked the Expert Consultant what would be the effect of the operation of the phrase "according to the internal law of the predecessor State" in article 12.

4. Mr. BEDJAOUI (Expert Consultant) said that there appeared to be no major difficulties with article 12 except for the reference to the internal law of the predecessor State. The same reference also occurred in other provisions in Part II of the draft convention and he felt it would be preferable to discuss it in greater depth when considering the definition of State property in article 8. Article 12 was a general safeguard clause intended to ensure that a succession of States could not have any negative effect on a third State. As a succession of States concerned the predecessor and successor States as such and could not therefore affect the property, rights and interests of third states, the International Law Commission had considered it preferable to include the phrase in question.

5. Mr. ASSI (Lebanon) said that, while appreciating the motive for the inclusion of a safeguard clause to protect third States, he considered that the vital question in that context was how and when the third State had acquired the property concerned. Either it should be made quite clear in the text that the property had been acquired lawfully or the article should be amended in some other way.

6. Mr. MOCHI ONORY DI SALUZZO (Italy) asked the Expert Consultant what was intended by the phrase "situated in the territory of the predecessor State". His delegation felt that "territory" in that particular article should be understood to be the entire territory actually involved in the succession.

7. Mr. MONCEF BENOUNICHE (Algeria) said that article 12 as drafted by the International Law Commission was acceptable. However, his delegation wondered whether the idea of a critical period immediately prior to succession, during which a certain amount of State property might be passed to a third State by the

* Resumed from the 1st meeting.

predecessor State, should not be taken into account, since such an operation might infringe the rights of the successor State. He appreciated, however, that such a period would be extremely difficult to define.

8. Mr. OBEID (Syrian Arab Republic), on the subject of the internal law of the predecessor State, asked what would be the position in the event of the predecessor State amending its internal law just prior to succession to meet its own requirements, to the detriment of the successor State.

9. Mr. MEYER LONG (Uruguay) suggested that the purpose or use of the property of the third State concerned ought perhaps to be taken into consideration in view of its possible importance for the future of the successor State.

10. Mr. ECONOMIDES (Greece) asked for an explanation of the words "as such" as they appeared in article 12.

11. Mr. BEDJAOUI (Expert Consultant) answering the last question first, concerning the use of the words "as such", explained that there were two essential and separate elements in the concept of the successor State, in that it was both a successor and a State. A succession of States as a legal institution could not affect a third State's property, rights and interests. Since, however, the successor State had sovereign rights, its sovereignty had to be taken into account. It was conceivable that immediately after the succession the successor State in the exercise of its sovereignty took a number of decisions that might affect the property of a third. But that was not governed by international law on the succession of States which, "as such", had no effect on third States. Those actions would be governed by other branches of international law.

12. The question of the "critical period" prior to succession had been raised in different ways by the representatives of Algeria, Lebanon, Syria and Uruguay. When a succession of States occurred, and particularly if it occurred in circumstances of tension, it was understandable that there should be fears that, immediately before the succession, there might be a passing of State property from the predecessor State to a third State in such a way as to reduce the nature, substance, value or amount of State property to be passed on to the successor State. In some countries, private law and commercial law covered that aspect with regard to individuals and corporations, particularly where fraudulent bankruptcy was concerned, for example, but it was not easy to make provision for a period immediately prior to a succession of State to prevent the illegal passing of State property to a third party. He personally believed that, if a predecessor State intended during that difficult period to pass on State property, it would do so more to its own advantage than to the advantage of a third State. Moreover he did not think that, on the eve of a succession, a third State would risk acquiring property title to which might well be contested by the successor State. The risk of a third State undertaking operations in connection with State property of the predecessor State on the eve of succession was therefore minimal and consequently it would not be wise to encumber the wording of article 12 further by inserting another safeguard clause within the existing safeguard clause. It was understood that article 12 dealt with a succession of State which took place legally, meaning, generally, that anything that took place in an irregular manner would have no legal effect.

13. In reply to the representative of Italy, he said that he personally tended to interpret the phrase "situated in the territory of the predecessor State" restrictively, in the sense that it referred only to that property of the third State which was situated in the territory involved in the succession of States.

14. Referring to the question asked by the representative of Syria concerning the possibility that the predecessor State might *in extremis* amend its own legislation during the critical period just preceding the succession, and the possibility open to the successor State to contest such an amendment, he explained that the Commission had not attempted to cover all cases of succession of States as the subject was far too wide. In some cases, where a succession of States had occurred in consequence of decolonization, newly independent countries had continued to apply pre-existing colonial legislation for a specific period of time, purging it of all elements which might be damaging to their own sovereignty. The question of internal law was extremely complex and the Commission had had no time to consider it in all its aspects. He would refer to the problem again in connection with article 8.

15. The representative of Uruguay had suggested that different kinds of State property might be distinguishable, and treated differently, according to the purpose for which the property was used. While the idea was a good one and while he personally had originally tended to make a distinction between State property and other property, it had become clear that codification in that area would have encroached upon private international and commercial law. The Commission had consequently restricted itself to dealing with State property within the context of public international Law *stricto sensu*.

16. The CHAIRMAN asked the Committee whether it was ready to take a decision to refer article 12 to the Drafting Committee.

17. Mr. HALTTUNEN (Finland) said that his delegation would prefer not to make a decision on article 12 at the moment, since the article was linked to article 8. Furthermore, he announced that his delegation intended to propose an oral amendment to article 12 when the Danish amendment to article 8 (A/CONF.117/C.1/L.1) was considered.

18. Mr. SHASH (Egypt) suggested that further consideration should first be given to article 8, particularly since the Expert Consultant intended to comment on the words "according to the internal law of the predecessor State" which also occurred in that article.

19. Mr. BOCAR LY (Senegal) supported that suggestion. Referring to the principle in article 12 that a succession of States as such should not affect property, rights and interests of a third State, he asked what was the link between that principle and that referred to in paragraph (2) of the commentary, namely that a succession of States in no way prejudiced any measures that the successor State, as a sovereign State, might adopt

subsequent to the succession, and in what way the two principles were compatible. He suggested furthermore that the reference to the internal law of the predecessor State in article 12 might become redundant if the meaning of "State property" was defined in article 8.

20. The CHAIRMAN said that, in view of the links between articles 12 and 8, and in view of the Finnish delegation's announced intention, it would be preferable to settle the provisions of article 8 first.

21. Mr. BEDJAOUI (Expert Consultant) said that article 8 had been one of the more difficult provisions so far as the International Law Commission was concerned, mainly because of the perennial problem of drawing up legal definitions.

22. The amendment proposed by Denmark to article 8 had the great merit of clarity and simplicity but, in his view, the definition of State property as all that was owned by the predecessor State was rather too broad. A distinction was made in some internal legal systems between the "private domain" of the State and its "public domain". Both "belonged" to the State but had separate legal statutes. On the other hand, while it was true that, in general, property was what was owned, some things belonged to the State not solely under property law but by virtue of the State's sovereignty. It had been quite clear to the International Law Commission that sovereignty, could not be the subject of transfer; a successor State exercised its own sovereignty. By postulating such a broad definition of State property, the Danish amendment ran the risk of including in the concept of State property elements which were not subject to transfer, and thus implying that the successor State would be exercising the transferred sovereignty of another State. Thus while the proposal might appear attractive, it would give rise to serious problems of interpretation.

23. The amendment submitted by France (A/CONF.117/C.1/L.5) raised problems inasmuch as it attempted to define the meaning of "property" in terms of its opposite; in other words, an asset in terms of a liability. He felt that, in the interests of clarity and consistency, it would be better to deal with the matter of obligations elsewhere in the text, preferably in Part IV, which related to debts.

24. Many delegations had asked questions concerning the definition and scope of "internal law". The representative of India had asked whether the internal law of the predecessor State included treaties which had become part of the internal legal order of that State. In his own opinion, treaties duly ratified by the predecessor State did indeed become part of that State's domestic legislation; the point acquired greater subtlety, however, when one considered the relationship between the existing draft Convention and the 1978 Vienna Convention on Succession of States in Respect of Treaties.

25. The representative of Japan had asked a question at the Committee's 1st meeting concerning the succession of States from the point of view of the constitution of an international organization, citing the case of a predecessor State having subscribed to the capital of an international financial institution. The provisions of an international legal instrument of that kind would certainly form part of the internal legal order of the predecessor State, but, in practice, the problem would arise only if the successor State did not wish to succeed to the instrument in question, thereby depriving itself of a number of rights, including the right of membership in the organization or institution concerned. Leaving aside the fact that it was difficult to see why a State should wish to forgo such rights, it was a moot point whether the successor State would acquire the attributes of a member of the institution in question by virtue of the succession of States or by virtue of being a sovereign State.

26. After lengthy discussion, the International Law Commission had decided to take as its point of reference that the internal law to be applied for the purpose of determining "State property" should be that of the predecessor State at the precise date of succession. He believed that that should be the premise on which the Conference should base its work; otherwise it might become enmeshed in inextricable problems. The questions raised had all demonstrated the need for some reference to internal law. While there were several possible ways of defining State property (either by identification of property, by convention or agreement, through an international organization or multilateral peace treaty), they all involved reference back to internal law. The International Law Commission was aware that situations had occurred in which identification of State property had been made by reference to an internal law other than that of the predecessor State. For example, there had been cases in which the internal law of a territory affected by a succession of States—which might differ from that of the predecessor State—had been invoked. There had also been cases in which the successor State had considered its own internal law as the only law which applied in determining State property subject to succession.

27. The conclusion had been that the internal law of the predecessor State was the most convenient and logical yardstick, even if it had not always been applied in the past. The reference to the internal law of the predecessor State should be seen as both desirable and inevitable.

28. The United Kingdom delegation had observed that article 8 made no reference to property which at the time of the succession of States belonged to the government of a dependent territory. If the succession in question was the result of decolonization, the property that had formerly belonged to the dependent territory did not require the application of the law of succession of States in order to continue to belong to that territory. Alternatively, if the succession was of another type, the only property that would pass would be that of the predecessor State under its own internal law.

29. In conclusion, he referred to a point raised by a number of delegations in respect of both article 8 and article 12, namely, defining the concept of "property" by the words "property, rights and interests". That definition was not perfect, but it had been the best solution that the International Law Commission had been able to arrive at. It appeared in several instruments, including the 1919 Treaty of Versailles[1] and the

[1] *British and Foreign State Papers*, 1919, vol. CXII, p. 146.

1943 Declaration of London[2] on the protection of cultural property.

30. Mr. MONNIER (Switzerland) said that his delegation had been fully convinced by the arguments advanced by the Expert Consultant to justify the reference to internal law, particularly in article 8. Moreover, the use of the expression "property, rights and interests" appeared to be appropriate as it had the support of past treaties and of case law.

31. The Expert Consultant had suggested that the amendment submitted by France should be dealt with under Part IV concerning State debts. The Swiss delegation had some doubts as to the logic and implications of that suggestion. The kind of obligation envisaged in the French amendment, charges or mortgages attaching to buildings, was not covered in Part IV, which related to the financial obligations of States.

32. He believed strongly that the idea underlying the proposed amendment should not simply be discarded, particularly as it was implicitly referred to in the draft. The succession of States did not remove the obligations attaching to State property, as the Expert Consultant himself had recognized. The fundamental fact that property passed as it was should be referred to somewhere in Part II of the draft. Either the French proposal or the proposed amendment by the Federal Republic of Germany to article 9 (A/CONF.117/C.1/L.3) could be taken as the basis.

33. Mr. LEHMANN (Denmark) said that the proposal submitted by his delegation had been motivated by a desire to facilitate the discussion. A number of delegations had felt that the definition offered by the International Law Commission was not sufficiently exhaustive and was circular in its logic. Moreover the reference to property, rights and interests was not central to the basic thrust of article 8, which was to determine what property belonged to the State. The formulation offered by his delegation corresponded fully to the definition of State archives in article 19. He could not understand the argument advanced by the Expert Consultant that the proposed definition was too broad. His delegation would be interested to learn whether other delegations were equally concerned by the need for a more exhaustive definition; if they were not, he might be able to accept the definition offered by the International Law Commission in article 8, preferably with the amendment proposed by France.

34. Mr. GUILLAUME (France) emphasized that the International Law Commission had accomplished an extremely difficult task on a very complex subject which had highly varied precedents. He recalled the remarks of the Expert Consultant, the former Special Rapporteur of the International Law Commission, according to which that body had had to show imagination and creativity. Basically, its work was to develop international law, not to codify existing practice. Such development could, of course, only be achieved with the formal agreement of States. In order to obtain that agreement, the Conference naturally had to find compromises on the basis of the Commission's draft, making the amendments necessary to arrive at a text which was acceptable to all.

35. He said that he had been convinced by the arguments of the Expert Consultant with regard to the use of the expressions "property, rights and interests" and "internal law". The purpose of his delegation's amendment was to stress that the passing of the ownership of property was indissolubly linked with the passing of relevant obligations, although that fact was admittedly inherent in the general principles of the law of property and obligations.

36. Mr. NATHAN (Israel), referring to the Danish amendment, said that the International Law Commission terminology "property, rights and interests" had the advantage of being derived from the numerous treaties in which State property was so defined and from the case law of the International Court of Justice. For the sake of continuity therefore that terminology should be retained. The French amendment embodied the maxim of Roman law *res transit cum onere suo*. It should appear somewhere in the draft convention but it was not clear that its proper place was in article 8, which defined assets, rather than in article 9, which dealt with the corresponding liabilities. The proposed amendment was concerned to safeguard rights *in rem* and hence should not be considered in the context of Part IV which dealt with State debts.

37. Mr. HALTTUNEN (Finland) considered that the Danish amendment was more precise than the draft text of article 8 proposed by the International Law Commission. It was not however aligned with articles 19 and 31; perhaps the terms "State archives" and "State debts" should also be defined. Article 8 was closely associated with article 12. Neither the Commission's draft of article 8 nor the Danish amendment were consonant with article 12. In order to take into account the position both of the predecessor State and of third States, he proposed that the Danish amendment should be further amended to read ". . . 'State property' means all that is owned by a State, according to the internal law of the predecessor State . . .". For the sake of consistency, it would then be necessary to amend the title and text of article 12 to read:

> "*Article 12* (Absence of effect of a succession of State on State property of a third State)
>
> "A succession of State shall not as such affect State property which, at the date of the succession of States, is situated in the territory of the predecessor State and is owned by a third State according to the internal law of the predecessor State."

38. He felt that such redrafting would allay the concern expressed by many delegations. The notion of State property included that of third States and hence article 7, which defined the scope of the subsequent articles of Part II, was not consistent with the existing text of article 8. The French amendment could be inserted in his delegation's proposed text for article 8. Some small changes would also be required in articles 9, 10 and 11.

39. The CHAIRMAN asked the Finnish representative to submit his amendments in writing.

40. Mr. USHAKOV (Union of Soviet Socialist Republics) said that his delegation definitely preferred

[2] *Ibid.*, 1948, vol. 151, Part II, p. 217.

the International Law Commission's text of article 8. The expression "property, rights and interests" was a generally recognized definition of State property and another formulation, such as that proposed in the Danish amendment, should not be used. Furthermore, the opening phrase of that amendment appeared to be superfluous in view of article 7. The commentary to the French amendment was unexceptionable but the amendment itself merely complicated the general principle that, when property passed, the assets and liabilities passed together. The International Law Commission had fully discussed the matter. He added that it was not clear from the text of the proposed amendment whether the phrase "including the obligations attaching to them" applied only to "interests" or to property and rights as well.

41. He was in some difficulty about the oral amendments proposed by the Finnish representative. It would seem that they would not be available in writing in time for delegations to study before voting on article 8. He urged all delegations to submit amendments in good time in accordance with the rules of procedure.

42. Mr. do NASCIMENTO e SILVA (Brazil) agreed with the Soviet representative with regard to the late submission of oral amendments.

43. After hearing the comments of the Expert Consultant, he had no doubt that the International Law Commission's text of article 8 should be retained. The phrase "property, rights and interests" was internationally accepted and had a fairly definite meaning. It would be unsafe to adopt new terminology. It would be easy to insert the French amendment into the text, but there seemed to be no particular merit in so doing. Furthermore, the phrase "including the obligations attaching to them" appeared to apply not only to property, where it was relevant, but also to interests. The Expert Consultant had stated that he was not completely satisfied with the reference to internal law but it appeared to be the only solution and it would clarify the point which was the subject of the French amendment.

44. Mrs. OLIVEROS (Argentina) said that her delegation had previously expressed concern about an apparent inconsistency between the title of article 8 and the definition appearing in the text. Her delegation had also endorsed the Uruguayan Government's criticism (A/CONF.117/5, p. 81) of that definition as being tautological. However, if the concept of State property was in future interpreted in accordance with the comments of the Expert Consultant to include all forms of property, movable and immovable, the difficulties would be solved. With regard to the French amendment, it was clear that no right could pass to the successor State in a form different from that in which it had been held by the predecessor State; hence the ownership of State property could not pass without the corresponding charges. She inquired whether the concept of "rights" as defined by the International Law Commission would include shares held by the predecessor State in enterprises not situated on the territory which was the object of the succession of States.

45. Mr. MAAS GEESTERANUS (Netherlands) said that he had been convinced that the references in article 8 to "property, rights and interests" and to the internal law of the predecessor State should be retained. However, the discussion had shown that most delegations were agreed that rights could not pass without the corresponding obligations and that Part IV of the draft was concerned with State debts, not with State property. The point should be covered either in article 8 or in article 9 and the Drafting Committee might be requested to find the appropriate place and formulation.

46. Mr. MONCEF BENOUNICHE (Algeria) said that the Committee should bear in mind the overall structure and balance of the International Law Commission's text. Three distinct elements, namely, State property, State archives and State debts, were dealt with in three separate parts of the draft convention. Obligations attaching to State property were State debts and should logically be dealt with in Part IV which was concerned with that subject.

47. Mr. FREELAND (United Kingdom) supported the French amendment to article 8. It appeared that those who had expressed some doubt about it were concerned more with aspects of drafting or placing than with the substance of the amendment, as explained in the commentary which accompanied it in document A/CONF.117/C.1/L.5. It would be appropriate to refer it to the Drafting Committee. For his part, he continued to believe that it was a simple and useful text in the right place, given the integral relationship between the property, rights and interests and the attaching obligations.

The meeting rose at 1 p.m.