

Document:-  
**A/CN.4/L.194**

**Draft articles on State responsibility: titles of the draft and of chapters II and II, titles and texts of articles 1-6 adopted by the Drafting Committee - reproduced in A/CN.4/SR.1225 and SR.1226**

Topic:  
**State responsibility**

Extract from the Yearbook of the International Law Commission:-  
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ownership” needed to be clarified, because there was also private property of the State. Although Mr. Ushakov had maintained that all State property was public property,<sup>4</sup> under Turkish administrative law there was also private property of the State, which was placed in that category by reason of the use made of it. It would therefore be preferable to contrast public property with property not under the “ownership of private persons”. That formula would also apply to the private property of the State, since when a State owned private property, it dealt with it in the same way as a private person.

48. The CHAIRMAN, speaking as a member of the Commission, said that the problem of defining public property was necessarily complicated by differences in systems of government. He would suggest that, for the purposes of the present draft articles, public property should be considered to be property which had been so considered by the predecessor State.

49. Mr. QUENTIN-BAXTER said he agreed with previous speakers that the successor State was a new lawgiver with powers that were subject only to the overriding requirements of international law. He agreed essentially with what had been said by Sir Francis Vallat, but wondered whether the latter had not gone too far in suggesting that the reference to the law of the predecessor State should be deleted from the definition of public property. As had been rightly pointed out, the fundamental principle of succession was respect for continuity, whether in public or private rights. Thus, the title to the New Zealand High Commission in London was not vested in Her Majesty the Queen, but in a corporation created by the New Zealand Parliament.

50. As to property which was “necessary for the exercise of sovereignty by the successor State,” he did not question the right of the State to legislate in that matter, but wondered what would happen to property in the territory of a third State.

51. Mr. KEARNEY said he had two comments to make. First, the problem the Commission was dealing with perhaps went beyond what property was in the title of the State at the time of succession. For example, certain lands which were in the title of the United States were covered by a series of agreements with the American Indians, under which rights to the territory had been retained by a particular tribe, and those rights remained in the members of the tribe as a collectivity. Those agreements were not considered international treaties, but they had a special status which placed them above the level of an ordinary contract between the State and individuals. It would be difficult to solve, simply by a definition, the problems involved when that kind of legal relationship was affected by a succession, and special provisions could well be necessary.

52. Secondly, it had been pointed out that the high seas had been defined by means of a negative formula.<sup>5</sup> In view of recent developments, however, that did not seem to be the happiest precedent to follow.

The meeting rose at 6 p.m.

## 1225th MEETING

Tuesday, 12 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 4 (Sphere of application of the present articles) and

ARTICLE 5 (Definition and determination of public property) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 4 and 5 in the Special Rapporteur's sixth report (A/CN.4/267).

2. Mr. RAMANGASOAVINA said that the discussion on article 5 and the various alternatives proposed by the Special Rapporteur in his successive reports showed how difficult it was to define public property. The last formulation proposed, the present article 5, could be divided into two parts: the first part was an attempt to define the public property, rights and interests to be transferred, and the second part characterized as public all property necessary for the exercise of sovereignty by the successor State.

3. He could easily accept the first part of the article, which was wide enough to cover the differences between the internal laws of different countries and, although in negative form was preferable to an enumeration, which was never exhaustive. The second part, on the other hand, which was obviously intended to include everything not covered by the first, was too imprecise; and there was a danger that, instead of complementing the first part as it should, it might deprive that part of its content, since it practically left the field open for the successor State. Consequently, the Commission should either delete the last phrase or find a formula which was not open to misinterpretation.

4. The transfer of property in cases of succession was generally regulated by agreement, but successions were also very often the result of a conflict in which the balance of the forces was unequal; hence it was important to find, for article 5, a formulation which could serve as a residuary rule in cases where no agreement had been concluded.

5. The CHAIRMAN invited the Special Rapporteur to reply to the comments made during the discussion.

<sup>4</sup> See 1220th meeting, para. 35.

<sup>5</sup> United Nations, *Treaty Series*, vol. 450, p. 82, article 1.

6. Mr. BEDJAOUI (Special Rapporteur) said he noted that the problems he had submitted to the Commission in the hope that it would find solutions had remained unsolved, and that other problems had been added to them. There were differences of opinion about what should be done with article 5. Some members considered that the problem of the definition should be discussed thoroughly, because the rest of the draft depended on it; others thought that article 5 should be referred to the Drafting Committee; he himself since he required the assistance of all members in the continuation of his work, saw only advantages in continuing the discussion in the Drafting Committee, to which he was prepared to submit new drafts of the article; yet other members—and they were the majority—thought the article could be retained unchanged as a working hypothesis, on a precarious and revocable basis. Mr. Reuter had expressed the opinion that the problems should be discussed and the solutions sought later;<sup>1</sup> Sir Francis Vallat had said that the definition had two functions: to limit the topic, and to make it possible to apply the subsequent articles where items of public property were not individually mentioned;<sup>2</sup> Mr. Yasseen thought it advisable to go ahead and examine the other articles.<sup>3</sup> It was clear that the Commission was trying to find its way, but he now needed precise instructions.

7. Some members of the Commission thought that it should start from two premises—the replacement of one State by another and the actual date of the replacement—and try to deduce only rules of public international law governing the cession to the successor State of property considered to be public in the internal legal order of the predecessor State, the conduct of the successor State after the succession being of no further concern to the Commission. That was why Mr. Ustor had expressed doubts about the advisability of drafting articles on such problems as concession rights and the privilege of issue.<sup>4</sup> If the Commission adopted that procedure, however, it would soon find that the rules of public international law in question were very few. The General Assembly expected the Commission to draft a text applicable to concrete situations, and if it drafted a small number of articles, which would probably not settle much, the Commission might give the impression that succession to public property was not part of succession of States in the strict sense, as understood in international law. On the other hand, the Commission should also be careful not to engage in drafting a sort of wide-ranging code of conduct which would take it many years to complete. For his part, he had chosen a middle way by drafting articles which would allow the Commission to go ahead and prune the draft as it went.

8. Mr Reuter had asked what would be the future consequences of a succession to public property and if the real problem did not consist in deciding whether or not succession entailed compensation or indemnification.<sup>5</sup>

He had said that, logically, the question of compensation was posterior to the succession, that the Commission might not need to deal with it, and that it could be reserved in a separate provision. But the Commission's difficulty over the definition was partly due to the fact that State succession brought about an automatic and gratuitous transfer of a body of property which involved the highest functions of sovereignty. That was why he had referred to property "necessary for the exercise of sovereignty" and had drafted article 9, on the general principle of the transfer of all State property, automatically and without compensation. Thus the same problem constantly recurred.

9. The transfer of the infrastructure of a country to the successor State was one example. It was obvious that the successor State succeeded to it automatically. Roads, for instance, did not remain the property of the predecessor State merely because it had built them. The older treaties, of which he had given some examples in his third report (A/CN.4/226), expressly provided for the transfer of roads to the successor State; that was not done in contemporary treaties, which regarded such a transfer as being self-evident. But other means of communication, such as railways, were dealt with in contemporary treaties. That difference was explained historically by the fact that the transfer of railways, unlike that of roads, raised the problem of the acquired rights of private persons. However, there were now private, toll-paying motorways, which sometimes represented a larger investment than the building of a small railway line.

10. Another problem was whether the definition of public property should include only property of the State, to the exclusion of the property of all other authorities, independent administrations, etc., or whether it should be of wider scope. He himself had provisionally opted for the wider sense and had proposed two working hypotheses: the definition *a contrario* and the definition by ownership.

11. The definition *a contrario* had given rise to several objections. Some members regarded it as sterile in itself but it was not unusual to have recourse to definitions of that kind in various sciences, including jurisprudence; one had been used in the case of the high seas, which had been defined *a contrario* by reference to the territorial sea.<sup>6</sup> Other members had been unable to accept the definition because very often the reference datum did not exist. For instance, Mr. Ushakov had pointed out that under the Soviet Constitution there was no private property in the USSR. But that simplified the problem, because it meant that all property was public and it only remained to define its nature, not its character. Other members, again, had objected that such a definition would make it necessary to define private property, which would be all the more difficult because there was such a thing as private property of the State. But the private property of the State was public property—property belonging to a national entity, not to a private person, even though it was subject to a special legal

<sup>1</sup> See 1223rd meeting, para. 27.

<sup>2</sup> See 1224th meeting, paras. 13-16.

<sup>3</sup> *Ibid.*, para. 32.

<sup>4</sup> See 1221st meeting, paras. 44 and 45.

<sup>5</sup> See 1224th meeting, paras. 36-38.

<sup>6</sup> United Nations, *Treaty Series*, vol. 450, p. 82, article 1.

régime. It had been very well said that the expression "private property of the State" contained a contradiction *in objecto*. The same answer could be given to the objection raised by Mr. Reuter, who had set the term "public property", defined in article 5, against the expression "private property of the . . . State", used in article 8. He (the Special Rapporteur) could equally well have referred simply to State property, public or private, and he admitted that he had followed the distinction made in French law between the public and the private domain of the State. Lastly, Mr. Bartoš had referred to the difficulties created by successor States deciding to declare as public, items of property which had been private in the legal order of the predecessor State.<sup>7</sup> But those were problems posterior to the succession—acts performed by the successor State as a sovereign State, not as a successor.

12. With regard to the definition by ownership, that raised the question whether the Commission should concern itself only with property of the State, or with all public property. Some members, including Mr. Ago and Mr. Ushakov, considered that only property of the State should be taken into consideration. His task would be simplified if the Commission adopted that view, but in addition to the fact that the rules of international law which could be deduced would be very few, several difficulties would remain.

13. First, there was State property even in the patrimony of certain communes or certain public institutions in which the State had a share. The property of those entities would thus not be entirely excluded from the Commission's field of study. It would therefore be better to wait until a complete inventory had been made before deciding on that course.

14. Secondly, many conventions gave definitions of State property that included property which the Commission did not regard as such. That applied, for example, to the peace treaty between the RSFSR, Poland and the Ukraine, signed at Riga in 1921.<sup>8</sup>

15. Lastly, in the peoples' democracies there were State companies—commercial import-export organizations—which, being in contact with foreign countries, were also in contact with the legal systems of other countries. Soviet law made a distinction between State property and the property of State bodies, in particular for purposes of immunity from jurisdiction—State bodies could be prosecuted in foreign courts. But that distinction would certainly not apply if it was a case of succession, not of trade.

16. The question of sovereignty had given rise to several objections. Mr. Sette Câmara had been concerned about the fate of property of which, under article 37, the ownership would not be transferred, whereas article 6 provided for the transfer of public property as it existed.<sup>9</sup> The example of Brazil, which he had chosen, was not relevant, for if Brazil adopted a unitary structure, it would not be a case of succession; for succession to occur, there must be at least two States and the federated states of Brazil

were not subjects of international law. A distinction must be made between property which the State could receive as a successor and property which it would receive by reason of its own jurisdiction. As a sovereign State, it could enlarge or reduce its patrimony by procedures of internal law which it was fully justified in applying.

17. With regard to sovereignty, Mr. Kearney had raised the problem of natural resources.<sup>10</sup> But the situation had evolved considerably since the United Nations had first examined that problem in the 1950s, and UNCTAD was now trying to define the economic rights of States. The Commission must admit that he had been relatively discreet on that point in his sixth report. Moreover, Mr. Kearney had merely considered that it would be premature to deal with the matter.

18. It was mainly the determination of public property which had led him to take up the problem of the internal law of the State. But which State? Practice showed that in many cases it was the internal law of the successor State which applied. To accept that fact would make codification illusory, but it would not be wise entirely to reject it either. It would be better to compromise. There was always some conflict between internal legal systems and it was necessary to choose, or to find compromise formulas. He had tried to take account of the facts, first in his third report (A/CN.4/226), by affirming the principle of *renvoi* to the internal law of the predecessor State, but allowing an exception based on the public policy of the successor State,<sup>11</sup> and a second time in his sixth report (A/CN.4/267), by referring to the notion of property "necessary for the exercise of sovereignty", which evoked the general principle of the viability of the successor State. The successor State must have a viable country in which it could operate. It was necessary to find a definition which would lead to that functional determination.

19. He agreed with Mr. Reuter that the future articles would be rules of international law, that the *renvoi* to internal law should be made article by article, and that it was not possible to formulate a general rule on the subject at once.

20. With regard to the question of territory, he had himself asked that a distinction be made between the case of public property and that of territory. He intended to delete paragraph 1 of article 6, which had been an anticipation on his part. But there remained the major objection relating to property situated outside the territory. He had always considered the case of such property to be a separate question, so much so that he had given a definition which related only to property situated in the territory. But the reason why he had decided to deal separately, for each type of succession, with the case of property situated abroad, was that the transfer of such property raised the problem of recognition of the State, and that entailed the intervention of a third State in the relations between the predecessor and successor States. Perhaps another formula should be

<sup>7</sup> See previous meeting, paras. 2 and 3.

<sup>8</sup> League of Nations, *Treaty Series*, vol. VI, p. 123.

<sup>9</sup> See 1223rd meeting, para. 24.

<sup>10</sup> *Ibid.*, para. 35.

<sup>11</sup> See *Yearbook of the International Law Commission*, 1970, vol. II, p. 133, article 1.

found for the attachment: for instance, economic attachment. But if the search for an appropriate basis for the replacement of sovereignty over property situated outside the territory should raise unduly difficult problems for the definition of public property, or if it should prove inelegant to have a second definition for property situated outside the territory, it would be necessary to amend article 5, either by referring to property "attached to the territory" instead of property situated "in the territory", or by deleting all reference to the territory.

21. Mr. SETTE CÂMARA said that the Special Rapporteur's very lucid explanation would greatly facilitate the Commission's understanding of article 5, and help it to reach a decision.

22. He wished to clear up a misunderstanding, however, about the hypothetical example he had given at a previous meeting relating to the application of article 6 (Transfer of public property as it exists) and article 37 (Public property proper to territorial authorities). He had not been referring to a federal State which became a unitary State; in such a case, there would be no room for application of the rules of State succession. What he had had in mind was the possibility of the predecessor State being a federal State, and the fate of property belonging to a component unit of that State and situated in the transferred territory. The problem then was the extent to which such property would be transferred to the successor State or retained as the property of the territorial authority.

23. The CHAIRMAN said that, as the Commission had heard the comments of its members and the replies of the Special Rapporteur, it might perhaps be wise to approve article 5 as a working hypothesis, so as to be able to proceed to the subsequent articles, leaving it open to the Commission or the Drafting Committee to revert to article 5 if necessary and if the programme of work permitted.

24. Mr. KEARNEY said that, during the discussion, several members had raised serious objections to the concluding phrase of article 5: "or which are necessary for the exercise of sovereignty by the successor State in the said territory". They had expressed concern at the vagueness of that phrase. It was therefore extremely doubtful whether that particular phrase could be accepted as part of the text to be used as a working hypothesis.

25. Mr. HAMBRO said he fully agreed.

26. Mr. AGO said he recognized that it was essential to have a working hypothesis in order to continue the examination of the draft articles, but he could not accept draft article 5 for that purpose. The discussion had shown that the Commission could accept a simpler hypothesis, namely, that public property was property which, at the time of the succession, that was to say at the time of transfer of sovereignty, had been property of the predecessor State under its internal legal order. That was the only hypothesis he found acceptable.

27. Mr. BARTOŠ said he agreed with Mr. Ago. As Mr. Reuter had pointed out at the previous meeting, the Commission need not concern itself with the conduct of the successor State after the succession. It should confine itself to saying what property was transferable.

That was a point to which the attention of the Drafting Committee should be drawn.

28. Mr. REUTER said he could accept article 5 as a working hypothesis, but without committing himself to any of its provisions. The discussion and the Special Rapporteur's excellent summing up had given an idea of the problems involved, but those problems remained unsolved. It was obvious that article 5 would come up again in connexion with each of the subsequent articles and that the Commission would be obliged to revert to it.

29. Mr. SETTE CÂMARA said he shared the view of previous speakers that article 5, as it stood, raised too many difficulties for the Commission to accept it even as a working hypothesis. Personally, he would be prepared to accept a simple formula such as that outlined by Mr. Ago, if a formal proposal were made to use it as a working basis which did not involve any commitment on controversial issues.

30. It would be a delusion to think that article 5 could be left aside. The problems it involved were bound to arise at every turn. Perhaps the Commission could agree to take no decision on article 5 at that stage, but to discuss its controversial elements as occasion arose during the examination of subsequent articles. Later on, the Commission could take a decision on the question whether a definition of public property was necessary in the draft and, if appropriate, on the contents of that definition.

31. Mr. BILGE said he agreed with Mr. Ago. After hearing the comments of the Special Rapporteur, he maintained his reservation concerning the last clause of article 5.

32. Mr. TSURUOKA said he thought article 5 should be referred to the Drafting Committee, with the request that it draft a provisional abstract formulation which would enable the Commission to examine the subsequent draft articles.

33. Mr. USTOR said that the formula outlined by Mr. Ago was simpler than that put forward by the Chairman (Mr. Castañeda) at the previous meeting.<sup>12</sup> He thought that, for practical purposes, it would perhaps be well first to restrict the topic to succession in property belonging directly to the State, and then proceed to examine the problem of other types of "public property".

34. Mr. RAMANGASOAVINA said that the Commission must have a basis to work on. The hypothesis suggested by Mr. Ago would be satisfactory, but so was the first part of article 5 as it stood. The last phrase, which several members could not accept because they considered the concept of sovereignty to be vague or dangerous, could be deleted without difficulty, since in any case it made the first part of the article meaningless. The working basis would then be the idea—very close to that of Mr. Ago—that public property meant all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, had not been under private ownership.

<sup>12</sup> See para. 48.

35. The CHAIRMAN,\* speaking as a member of the Commission, said that the Commission should not let itself be held up by the obstacle of article 5. It was not essential to adopt, even provisionally, an article on the definition and determination of public property. Acceptance of the article as a working hypothesis did not mean adopting it as it stood. Of course, the wording used by the Commission at the present stage would influence its future work, but that work would also be subsequently reflected in the wording. Only when examination of the chapter had been completed would it be possible to work out the final formulation.

36. He therefore proposed that the Drafting Committee be asked to try to work out, with the help of the Special Rapporteur, an acceptable provisional formula taking account of all the comments of members, on the understanding that it could be amended as the Commission proceeded with the work. The Special Rapporteur had himself said that he was willing to submit further proposals to the Drafting Committee. Members could also submit specific comments in writing on the problems they had mentioned, in order to facilitate the work of the Drafting Committee and the Special Rapporteur. As Chairman of the Drafting Committee, he would ask them to do so, if the Commission decided to refer article 5 to the Committee on the terms he had outlined.

37. Mr. USHAKOV supported that proposal.

38. Mr. AGO said he could agree to the article being referred to the Drafting Committee, on the clear understanding that the Committee would function as a working group and not as a committee called upon to prepare a final draft of a provision which presented no further problems of substance. It would be merely a matter of seeing whether agreement could be reached on an idea.

39. The CHAIRMAN endorsed that interpretation. The Drafting Committee would have before it all the ideas put forward during the discussion and would re-examine them, with the assistance of the Special Rapporteur, in an attempt to work out a provisional formula which, in the words of the Special Rapporteur, would be "precarious and revocable".

40. Mr. REUTER said he would support the proposal if it was clearly understood that the Drafting Committee would, in fact, be resuming the present discussion in a smaller body. Before it did so, however, it would be better to wait until the Commission had examined articles 6, 7, 8 and 9, which were basic articles.

41. The CHAIRMAN said that that was indeed the only possible course. If there were no objections, he would take it that the Commission agreed to refer articles 4 and 5 to the Drafting Committee and to ask members to submit their written comments to that Committee, on the understanding that it would examine article 5 if such examination seemed useful and was warranted by the Commission's rate of progress.

*It was so agreed.*<sup>13</sup>

\* Mr. Yasseen.

<sup>13</sup> For resumption of the discussion see 1230th meeting, para. 41 and 1231st meeting, para. 1.

## State responsibility

(A/CN.4/L.194)

[Item 2 of the agenda]

(resumed from the 1215th meeting)

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

42. The CHAIRMAN\*\* invited the Commission to consider the titles of the draft and of Chapters I and II and the titles and texts of articles 1 to 6 adopted by the Drafting Committee.

#### TITLE OF THE DRAFT

43. Speaking as Chairman of the Drafting Committee, he said the Committee had noted a large measure of agreement in the Commission to exclude from the draft anything that touched on responsibility for risk. The rules on responsibility for risk were different from those which governed responsibility for internationally wrongful acts, and to mix the two types of responsibility in a single draft would introduce an element of confusion which ought to be avoided.

44. The Drafting Committee had considered whether, as several members had suggested, the title should itself specify that the draft concerned only responsibility for internationally wrongful acts; but after due reflection, the Committee had preferred to retain the title proposed by the Special Rapporteur: "Draft articles on State responsibility". That was the traditional designation of the topic and any other designation might lead to misunderstanding. The Committee suggested, however, that the Commission's report, and more particularly the commentary to the draft articles, should make it clear that responsibility for risk was excluded from the draft, and give the reasons for its exclusion.

45. Speaking as Chairman of the Commission, he said that if there were no comments he would take it that the Commission provisionally approved the title of the draft as proposed by the Drafting Committee.

*It was so agreed.*

#### TITLE OF CHAPTER I

46. The CHAIRMAN speaking as Chairman of the Drafting Committee, said that several amendments to the title of chapter I had been suggested. The Committee nevertheless proposed that the Commission should retain the Special Rapporteur's title "General principles". Chapter I did in fact contain general principles, in other words, rules of law applicable to the draft as a whole. No other expression such as "fundamental rules" or "basic principles" would be as appropriate. Other chapters of the draft contained rules or principles of a fundamental character, but only the provisions of chapter I were general principles applicable to the draft as a whole.

47. The Drafting Committee had considered it unnecessary to add the qualification "of State responsibility"

\*\* Mr. Yasseen.

to the words "General principles", since the title of the draft, immediately above that of chapter I, showed that only State responsibility was concerned.

48. Speaking as Chairman of the Commission, he said that if there were no comments he would take it that the Commission provisionally approved the title of chapter I as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 1<sup>14</sup>

49. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had retained the French text of article 1 without change. The key phrase in that text, "*engage sa responsabilité internationale*" was hallowed by abundant precedents, but the Committee had found the English and Spanish translations of the word "*engage*" unsatisfactory, and had replaced them by the words "entails" and "*da lugar*" respectively.

50. The Drafting Committee had given the article the title "Responsibility of a State for its internationally wrongful acts", as that seemed clearer and more precise than the one originally proposed, "Principle attaching responsibility to every internationally wrongful act of the State".

51. The Committee thought the commentary should explain that the principle stated in article 1 suffered no exception. It was true that justifying circumstances might be an obstacle to the attribution of international responsibility, and some provisions of the draft would be devoted to such circumstances. But justifying circumstances did not constitute exceptions; they divested the act of the State of its wrongful character. Thus, where there was justification, there was no internationally wrongful act and the conduct of the State did not fall within the scope of article 1.

52. The text proposed for article 1 read:

##### *Article 1*

##### *Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

53. Mr. USTOR said that he could accept article 1, but would point out that the English version of the title spoke of "a State", whereas the French text read "*de l'Etat*".

54. Sir Francis VALLAT said that was purely a question of style; in the present context he preferred the expression "responsibility of a State".

55. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved article 1 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 2<sup>15</sup>

56. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had reversed the order of articles 2 and 3. Article 2, as proposed by the Special Rapporteur, introduced a new concept in sub-paragraph (a): that of the attribution of conduct to the State. In the Committee's view, article 2 should therefore follow article 3, which merely developed the idea set out in article 1. Thus article 1 would proclaim the principle of responsibility and article 2 would provide that every State was subject to being considered as having committed an internationally wrongful act entailing its international responsibility.

57. The Commission's discussion on the former article 3 had dealt mainly with a question of drafting. There seemed to have been broad agreement on the principle stated by the article, namely, that every State had the capacity to commit an internationally wrongful act; but the use of the word "capacity" could give rise to misunderstanding. The Committee had therefore had to find a formulation which, on the one hand, did not contain the word "capacity" and, on the other, would not offend the susceptibility of States.

58. The title given by the Special Rapporteur to article 3 had been "Subjects which may commit internationally wrongful acts". As the draft was only concerned with State responsibility and not with the responsibility of other subjects of international law such as international organizations, the Committee proposed that the title should be changed.

59. The text proposed for the new draft article 2 read:

##### *Article 2*

##### *Possibility that any State may be considered as having committed an internationally wrongful act*

Every State is subject to being considered as having committed an internationally wrongful act entailing its international responsibility.

60. Sir Francis VALLAT said he was essentially in agreement with the substance of article 2, but suggested, as a matter of drafting, that it be amended to read: "Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility".

61. Mr. AGO (Special Rapporteur), referring to Sir Francis Vallat's suggestion, said he thought the words "subject to the possibility of" rendered the idea contained in the French text better than the present English version.

62. Mr. USTOR pointed out that, in the English version, the title referred to "any State", whereas the text of the article said "Every State".

63. The CHAIRMAN said that, to avoid any misunderstanding, it would be better to use the same terms in the title and the text of the article.

64. Mr. CALLE y CALLE said that the Spanish version of article 2 was somewhat too mandatory; he pro-

<sup>14</sup> For previous discussion see 1202nd meeting, para. 15.

<sup>15</sup> For previous discussion see 1207th meeting, para. 27.

posed that the word “*sujeto*” be replaced by the word “*susceptible*”, which would be closer to the French.

65. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Secretariat had drawn his attention to an error in the Spanish translation. Consequently, he suggested that Mr. Calle y Calle should consult the Secretariat on the precise wording of the text.

66. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission provisionally approved article 2, as proposed by the Drafting Committee, on the understanding that the Spanish version would be slightly amended.

*It was so agreed.*

#### ARTICLE 3<sup>16</sup>

67. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had noted that each of the two sub-paragraphs of article 3 (former article 2) in a way introduced a separate chapter of the draft. It had therefore preferred to retain those two sub-paragraphs rather than merge them into a single paragraph, as some members had proposed. In the introductory phrase of the article, the Committee had added the words “of a State” after the words “internationally wrongful act” because the draft was concerned only with State responsibility, to the exclusion of the responsibility of other subjects of international law.

68. In sub-paragraph (a), the Committee had replaced the expression “in virtue of international law” by the expression “under international law”, in order to meet the wishes of some members.

69. In sub-paragraph (b) the Committee had replaced the words “failure to comply with” by the words “breach of”, which was the expression used in article 36 of the Statute of the International Court of Justice.

70. Lastly, the Committee had given the article a title which, it thought, better reflected its contents than the title originally proposed.

71. The text proposed for the new draft article 3 read:

#### *Article 3*

##### *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when:

(a) Conduct consisting of an action or omission is attributable to the State under international law; and

(b) That conduct constitutes a breach of an international obligation of the State.

72. Mr. USTOR, referring to the French text, pointed out that the expression “*fait internationalement illicite de l'Etat*” had been used both in the title and in the text of article 3, whereas the expression “*fait internationalement illicite d'un Etat*” appeared in the text of article 1. The formula used in article 1 should perhaps be repeated in article 3, especially since it corresponded with the wording used in the English version of both article 1 and article 3.

73. Mr. REUTER said he thought it would be better not to change the French title of article 3, because the provision applied to a State which had already been determined. Moreover, even though the words “of a State” appeared in the title and the introductory phrase of article 3 in the English version, the words “to the State” and “of the State” were used in sub-paragraphs (a) and (b).

74. Mr. AGO (Special Rapporteur) said he thought that the words “*de l'Etat*” should be retained in the French version.

75. Mr. KEARNEY said that the use of the indefinite article followed by the definite article was standard usage in English and perfectly satisfactory.

76. Mr. USTOR said he thought the English word “breach”, in sub-paragraph (b), was stronger than the French word “*violation*”.

77. Mr. AGO (Special Rapporteur) said that he had proposed the word “*manquement*”, but as the Committee had followed Mr. Kearney’s suggestion and used the word “breach” in the English version, the word “*violation*”, which was the translation of “breach” in Article 36 of the Statute of the International Court of Justice, had been substituted for the word “*manquement*” in the French version.

78. The CHAIRMAN, speaking as a member of the Commission, said that he had formerly defended the use of the word “*manquement*”, which was less strong than “*violation*”, but the discussions in the Drafting Committee had convinced him that it was advisable to follow the Statute of the International Court.

79. Mr. BARTOŠ said that the basic idea of article 3, sub-paragraph (a), was to place actions and omissions on the same footing. The use of the word “*violation*” in the French version of sub-paragraph (b) was unsatisfactory, because it did not cover those two concepts: one could not commit a “*violation*” by omission. That was why he preferred the term “*manquement*”, which had a broader meaning.

80. Mr. KEARNEY said he was not competent to criticize the French terminology, but the word “breach” in English would also cover an omission. Failure to pay for a purchased article, for example, quite clearly constituted a breach of contract.

81. Mr. REUTER said that the words “*d'après le droit international*” in article 3, sub-paragraph (a), were essential, and they would be more emphatic if they were placed immediately before the words “*à l'Etat*”, instead of after them.

82. The CHAIRMAN, speaking as a member of the Commission, said he supported that suggestion. The words “*à l'Etat*” and “*d'après le droit international*” should not be joined together as if they formed a unit.

83. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission provisionally approved article 3, with the amendment proposed by Mr. Reuter.

*It was so agreed.*

The meeting rose at 12.50 p.m.

<sup>16</sup> For previous discussion see 1205th meeting, para. 2.

## 1226th MEETING

Wednesday, 13 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/L.194)

[Item 2 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(continued)

ARTICLE 4<sup>1</sup>

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.194). He asked the Chairman of the Drafting Committee to introduce article 4.

2. Mr. YASSEEN (Chairman of the Drafting Committee) said that, as originally drafted, article 4 had read: "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law".

3. During the Commission's discussion, that text had been criticized mainly from two points of view. Some members had maintained that municipal law could be relevant, in certain circumstances, for determining whether some particular conduct of a State did or did not constitute an internationally wrongful act. They had therefore considered that the formulation of article 4 was too absolute. Other members had observed that article 4 did not emphasize the basic rule, namely, that in the last resort it was international law which characterized an act as internationally wrongful. As it then stood, the article had appeared to deal only with the particular case in which a State accused of committing an internationally wrongful act invoked its internal law to prove an exception. They therefore considered that a more general formula should be found.

4. The Drafting Committee had taken those two points of view into account in the text it was now proposing to the Commission. It had also amended the title of article 4 to bring it into line with the new text.

5. The new version of article 4 read:

Article 4

*Characterization of an act of a State as internationally wrongful*

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be

affected by the characterization of the same act as lawful by internal law.

6. The CHAIRMAN said that if there were no comments he would take it that the Commission decided provisionally to approve article 4 as proposed by the Drafting Committee.

*It was so agreed.*

TITLE OF CHAPTER II AND ARTICLE 5<sup>2</sup>

7. Mr. YASSEEN (Chairman of the Drafting Committee), introducing the title of chapter II, said that in the interest of uniform terminology, the Drafting Committee had replaced the words "according to international law" in the title of chapter II, by the words "under international law". Thus the new title proposed for chapter II read: "The 'act of the State' under international law".

8. The discussion on article 5 had related mainly to the question whether, from the Commission's point of view, it was possible to distinguish, in an organ of a State, between the organ proper and the natural person who must necessarily act on behalf of the organ. Some members had maintained that only an organ could act on behalf of the State. They had acknowledged that in most cases there was physical intervention by a natural person, but in their opinion he was acting solely in the capacity of an organ, so that natural persons must be disregarded whenever a certain conduct was attributed to a State.

9. In order to avoid any abstract discussion on that point and not to come out in favour of a particular theory, the Drafting Committee proposed the following title and text for article 5:

Article 5

*Attribution to the State of acts of its organs*

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State, will be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

10. Mr. USTOR said he fully approved of the text of article 5, but noted that the tenses of the verbs were not the same in the French and English versions.

11. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee had been very careful with the concordance of the different versions, but that in some cases, for purely linguistic reasons, it had been obliged to abandon strict parallelism.

12. Sir Francis VALLAT proposed that the words "will be considered" be replaced by the words "shall be considered", as the word "shall" was less permissive than the word "will".

13. Mr. REUTER said he thought the idea of anteriority should be expressed in the last phrase of article 5. He therefore suggested that the words "*il agisse en cette qualité*" be replaced by the words "*il ait agi en cette qualité*": the past tense was used in the English version.

<sup>1</sup> For previous discussion see 1209th meeting, para. 1.

<sup>2</sup> For previous discussion see 1211th meeting, para. 1.

14. Comparing the title and text of article 5, he questioned whether it was appropriate for the French version to speak sometimes of the “*faits*” and sometimes of the “*comportement*” of an organ.

15. Mr. AGO (Special Rapporteur) said he concurred with Mr. Reuter’s remarks. The term “*fait*” should be reserved for the expression “*fait de l’Etat*” and it would therefore be preferable to replace the words “*des faits*” by “*du comportement*” in the title of the article. It would also be preferable to use the past tense in the final phrase.

16. The CHAIRMAN said that in the English version the words “will be considered” would be replaced by the words “shall be considered”, and to take account of the amendments proposed by Mr. Reuter and Mr. Ago the title would be amended to read: “Attribution to the State of the conduct of its organs”.

17. Mr. KEARNEY said he had no objection to the revised text of article 5, but wished to make the reservation that at some stage in the discussion it would be necessary to define a “State organ”. A reference to that problem should be included in the commentary.

18. The CHAIRMAN, speaking as a member of the Commission, said he fully supported Mr. Kearney’s remarks.

*Article 5, as amended, and subject to the reservation made by Mr. Kearney, was approved.*

19. Mr. AGO said that if the Commission so desired he would endeavour to define the expression “State organ” in the commentary. He pointed out, however, that it would not be an easy task, since the views of members of the Commission on that subject differed widely.

#### ARTICLE 6<sup>3</sup>

20. Mr. YASSEEN (Chairman of the Drafting Committee) said that when the Commission had examined article 6 as originally drafted, some members had observed that it might raise difficulties in the common-law countries. For lawyers of those countries, the draft article seemed only to state a rule of evidence. The word “hierarchy”, which appeared in the phrase “a superior or a subordinate position in the hierarchy of the State”, had also been criticized. There had not, however, been any great difference of opinion on the substance of the article.

21. The new text proposed for article 6 read:

*Article 6*  
*Irrelevance of the position of the organ*  
*in the organization of the State*

The conduct of an organ of the State is considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

22. Mr. SETTE CÂMARA said he still felt the misgivings he had previously expressed about the enumera-

tion of the constituent, legislative, executive, judicial or other powers; it was a departure from the traditional tripartite structure of the State.<sup>4</sup> The constituent power was not on the same level as the others; it was a short-lived phenomenon which was soon replaced by the legislative power. It was possible to refer to an organ of the executive or judicial power, but hardly to an organ of the constituent power, whose decisions were taken in plenary.

23. Mr. KEARNEY said that the legislative power could undoubtedly possess organs, since it was empowered to appoint committees for a variety of purposes. It was quite possible, though unlikely, that such a committee might commit an internationally wrongful act by requiring the presence of the ambassador of a foreign country at a committee meeting.

24. Mr. SETTE CÂMARA said that, in his view, an organ of the legislative power, such as a committee, was responsible only for reporting to the legislature in plenary; he doubted that it would be capable of committing an act engaging the responsibility of the State.

25. Mr. MARTÍNEZ MORENO said he could accept article 6 in its present form. He appreciated Mr. Sette Câmara’s comment on the traditional tripartite structure of the State, but in Latin America there were instances of organs belonging to other powers, such as the electoral power, which exercised certain specific functions on election days.

26. Mr. YASSEEN, speaking as a member of the Commission, said that the constituent power was not sporadic; although it manifested itself sporadically, it was always latent.

27. Mr. SETTE CÂMARA said that the term “constituent power” meant not so much a “power” as a “constitution”.

*Article 6 was approved.*

28. The CHAIRMAN said that the Commission had now completed its consideration of the draft articles on State responsibility proposed by the Drafting Committee.

#### Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

*(resumed from the previous meeting)*

#### ARTICLE 6

29. The CHAIRMAN invited the Special Rapporteur to introduce article 6 of his draft (A/CN.4/267), which read:

*Article 6*  
*Transfer of public property as it exists*

1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.

<sup>3</sup> For previous discussion see 1213th meeting, para. 39.

<sup>4</sup> *Ibid.*, para. 58.

2. In accordance with the provisions of the present articles, public property shall be transferred to the successor State as it exists and with its legal status.

30. Mr. BEDJAoui (Special Rapporteur) said that article 6 was the first of three articles containing the general provisions of his draft. He still felt the doubts he had expressed in his fourth report (A/CN.4/247 and Add.1, commentary to article 2) about the need for such a provision, which corresponded to his former article 2. The Commission would have to decide whether to retain article 6, but paragraph 1 should be regarded as having been deleted.

31. The question raised by article 6 was, basically, whether the rights of third parties—both third States and private persons—should be reserved. It might perhaps be advisable to wait until other questions arising out of succession in respect of matters other than treaties had been considered, particularly the question of acquired rights, before taking a decision on article 6.

32. By virtue of the succession, the successor State would have no more rights over the property transferred than the predecessor State. It might therefore be asked what happened to any defects in the title to the property, and what was the extent of the title of the successor State. It might perhaps be laid down as a principle that no person and no predecessor State could convey more rights than he or it possessed. He had tried to find out whether there was any rule of international law which obliged the predecessor State to clear the transferred property of any charges there might be on it; no such rule appeared to exist.

33. It might also be asked whether the successor State could receive more than it had been given, by freeing itself of obligations attached to the property transferred. It seemed, however, that that was perhaps not strictly a problem of succession of States, but a matter within the exclusive competence of the successor State in its capacity as a State.

34. Finally, must the legal status and condition of the property received be compatible with the rules of the internal law of the successor State? In other words, if there was a legal rule in the predecessor State which had no counterpart in the legal system of the successor State, was that rule binding on the successor State? That raised particularly difficult problems, some of which related to required rights.

35. Mr. REUTER said he fully endorsed the views of the Special Rapporteur, but was concerned about the serious problems raised by article 6. In his opinion, one question was more important than all the rest: was there or was there not a transfer?

36. One could imagine an article which was confined to stipulating the conditions under which the rights of the predecessor State were extinguished. If it was accepted that, following such extinction, there was a break and a new legal order was established, it must then be asked whether the rights of third parties survived the extinction.

37. On the other hand, if there was a transfer, as implied by the titles of articles 6, 7 and 9, the Commission must move away from the internal law of the predecessor State and the successor State into the sphere of inter-

national law. For the notion of transfer was not compatible with a simple *renvoi* to the internal law of the predecessor State for the past, and to the internal law of the successor State for the future. It must be affirmed that there was some link between those two legal orders, and all the consequences of that affirmation, which was based on considerations of international law, must be accepted.

38. In his view, it was clear that the rights of the predecessor State were extinguished, but that, by virtue of a general principle of legal security, the extinction did not affect the rights of third parties. If one opted for that narrow conception, one could not go so far as to affirm that public property was transferred "as it exists and with its legal status", as did article 6.

39. The notion of transfer would also arise in connexion with other articles of the draft. Personally, he was inclined to think that there was no transfer in the cases dealt with in the draft.

40. Mr. SETTE CÂMARA said he was glad the Special Rapporteur had decided to delete paragraph 1, since it tended to confuse the concepts of property (*proprietas*) and possession (*possessio*). The principle in article 6, of course, related to the old rule of Roman law *nemo plus iuris ad alium transferre potest quam ipse habet*.

41. To the extent that the problem of transfer of territory fell within the sphere of succession of States in respect of treaties, he did not think the Commission would have any difficulties. Under the system adopted in the Commission's draft on succession of States in respect of treaties,<sup>5</sup> the transfer had to be conducted in such a way that the successor State would be bound by its own will alone in regard to treaties of the predecessor State limiting or circumscribing sovereignty over the territory.

42. Paragraph 2 of article 6 was a revised version of the corresponding paragraph 3 of article 2 of the former draft (A/CN.4/247). The reservation "in so far as this is compatible with the municipal law of the successor State" had been deleted, and that, in his view, was an improvement, since at the time of the transfer it was the law of the predecessor State which prevailed, irrespective of any provisions of the law of the successor State.

43. Since the legal order of the predecessor State continued to apply until modified by a legislative act of the successor State, any limitations or restrictions on public property were unaffected by the change. But of course that was a transitory situation, for once the transfer had taken place nothing prevented the successor State from maintaining or modifying the legal status of public property or even the legal concept of what constituted it.

44. With regard to the drafting of paragraph 2, he thought the French text expressed the Special Rapporteur's ideas much better than the English, so his remarks would apply mainly to the latter. The introductory phrase "In accordance with the provisions of the present articles" seemed unnecessary, for, unless there was a stipulation to the contrary, it was obvious that the provision was bound to be in conformity with the general

<sup>5</sup> See *Yearbook of the International Law Commission, 1972, vol. II, document A/8710/Rev.1, chapter II, section C.*

philosophy of the draft. He did not understand the meaning of the words "as it exists". If public property was to be defined and determined by the law of the predecessor State, in accordance with article 5, it was evident that such property could not be envisaged in a different way from that in which it had existed under the legal order of that State. He hoped the Special Rapporteur would explain the exact meaning of that piece of legal existentialism.

45. He also had some misgivings about the use of the expression "legal status", as applied to public property. As he understood it, the Special Rapporteur intended to convey the idea that public property was transferred with any limitations or restrictions with which it might be encumbered under the legal order of the predecessor State. If that was so, would it not be better to say so clearly in the text of the article, instead of speaking of the "legal status" of public property, which was a much broader expression involving a wide range of municipal law provisions that removed public property from the régime of private property?

46. Mr. USHAKOV said that the purpose of article 6 was to make it clear that the fate of public property was governed by the draft. Article 6 was thus a very general provision and it was perhaps premature to determine, at that stage, what was governed by the draft and what was not. As in many other cases, the Commission might subsequently have to draft a special provision on that point.

47. Moreover, to state that the fate of public property was governed by the draft articles ruled out at once the possibility of concluding agreements on the subject, although that possibility had been recognized by the Special Rapporteur. It therefore appeared that the drafting of article 6 was too strict.

48. With regard to Mr. Reuter's comments on the question whether there was a transfer, he could quote two examples of State succession where there was no transfer. The first was the case in which property belonging to two States which had merged into a single State was situated in the territory of a third State. The second was the case of a partial transfer of territory from one State to another, both States agreeing that the property of the predecessor State situated in the territory of a third State should remain its property. In neither of those cases was there a genuine transfer, and the Commission should beware of that term, which did not always correspond to reality.

49. The CHAIRMAN, speaking as a member of the Commission, said that the comments made by Mr. Ushakov and Mr. Reuter related mainly to the question whether a transfer took place or not; he wondered whether that question was not raised rather by article 8.

50. What article 8 meant was that when succession took place, or when there was replacement of one State or sovereignty by another, the public and private property of the predecessor State passed into the patrimony of the successor State; other property, which was not State property, passed within the legal order of the successor State, which was not the same as passing into its patrimony. In his view, therefore, the rule stated in

article 6 should properly follow that stated in article 8, which was the basic rule, and it might be better to examine the latter article first.

51. Mr. BARTOŠ said it was his understanding that article 6 concerned the devolution of all property falling under the sovereignty over the territory concerned. But the Special Rapporteur had surely not meant that all property, public or private, devolved gratuitously to the new sovereign State. A distinction must be made between two aspects of the matter: on the one hand, property attached to a territory was subject to the new sovereignty as it had been to the old; on the other hand, in so far as ownership and enjoyment were concerned, it was difficult to accept that all such property passed at the discretion of the new sovereign State, without compensation and without regard to either its former use or its existing condition.

52. Although it was true, as Mr. Reuter had pointed out, that property was subject to the legal order of the successor State once the rights of the predecessor State had been extinguished, that did not mean that there was legal devolution of the property. It was not in consequence of a devolution, but because the property was attached to the territory in question that the successor State was able to impose its public order on it. Moreover, that happened after the succession.

53. Lastly, he doubted whether the expression "property of the territory", in sub-paragraph (c) of article 8 was adequate. That expression implied that the territory possessed property of its own; it would be better to speak of property "situated in the territory".

54. Sir Francis VALLAT said that, although he shared to a large extent the misgivings expressed by other members about the concept of "transfer", he had no difficulty with the underlying principle of article 6, which was absolutely sound.

55. That principle was akin to the adage "What is sauce for the goose is sauce for the gander". Article 6 stated, in effect, that if the public property in question was subject to certain obligations, restrictions or limitations, it passed to the successor State subject to the obligations, restrictions or limitations attaching to it. For example, a government house in a territory which became independent would naturally become the property of the new State. Supposing, however, that it was surrounded by large grounds where the local people had the right to grow vegetables, that right would not be extinguished because the house and its grounds had passed to the new State. The principle was an elementary one which needed to be expressed in the draft articles. Otherwise there might be a tendency to consider exclusively the positive side of the operation, without taking the negative aspects duly into account.

56. He agreed with Mr. Sette Câmara about the discrepancy between the English and French texts. The French text was much nearer to his idea of the intended meaning of article 6. That, however, was a matter of drafting which could be settled at a later stage.

57. Mr. MARTÍNEZ MORENO said that the question raised by Mr. Reuter was a fundamental one. The Commission would have to decide the preliminary issue

whether, upon a succession, there was a transfer of public property from the predecessor State to the successor State, or an extinction of the rights of the predecessor State and novation in favour of the successor State. The issue was not purely academic; it had important legal effects, and he would be grateful if Mr. Reuter would go into greater detail on it.

58. He welcomed the Special Rapporteur's decision to drop paragraph 1, which could have caused many difficulties. In particular, the reference to possession was unfortunate, because of the essential distinction between *uti possidetis de facto* and *uti possidetis de jure*. This was a matter of great importance with regard to boundaries in Latin America and, more recently, in Africa and Asia, as a result of the emergence of many new States.

59. Paragraph 2, the only remaining paragraph, should be examined with due regard to the provisions of later articles. For example, there appeared to be some contradiction with sub-paragraph (c) of article 8. The purpose of article 6 was to state that if the property in question was, say, mortgaged, it would pass to the successor State subject to the mortgage. The terms of sub-paragraph (c) of article 8 would, however, make it possible for the mortgage to be disregarded if it were considered contrary to "the juridical order of the successor State".

60. To give some idea of the difficulties involved, he would quote an example which provided a useful illustration, though it was not, strictly speaking, a case of State succession. In the boundary dispute between Honduras and Nicaragua,<sup>6</sup> the International Court of Justice had ordered the return to Honduras of part of the disputed territory, which had previously been in the possession of Nicaragua. It had been agreed that the property rights of private individuals would be respected. Under the constitution of Honduras, however, aliens were forbidden to own property within a certain distance of the international boundary. Nicaraguan nationals affected by the application of that provision of the Honduran juridical order were now involved in litigation which, when the judgement of the Supreme Court of Honduras was known, was likely to lead to further international litigation.

61. A similar problem could well arise in a case of State succession. It was therefore necessary carefully to co-ordinate the provisions of article 6 with those of article 8.

62. The problem became even more serious when the provisions of article 9 were taken into account, according to which property necessary for the exercise of sovereignty devolved "without compensation" to the successor State. A person placed by a State in a situation similar to that of the Nicaraguan property owners would, under the provisions of article 9, be dispossessed of his property without any compensation at all.

63. Mr. KEARNEY said that the concept of transfer raised serious problems, particularly when it was by no means clear what constituted public property. He agreed with Sir Francis Vallat that an article was needed to state the rule that the successor State took over State property

with its restrictions and limitations. For that purpose, the expression "with its legal status" was not broad enough.

64. The question was whether article 6 was sufficient to meet all the problems that arose regarding the taking over of public property by the successor State, and, if not, whether the subsequent articles filled all the gaps.

65. An example was provided by the fate of State-run railways in a predecessor State which split up into two successor States. It would not be enough to say that the track and other permanent installations would go with the territory on which they were situated. The formula "as it exists and with its legal status" would be of no assistance when it came to dividing the rolling stock, which was just as much public property as the track.

66. Similar problems would arise in connexion with State-owned shipping lines. One could imagine a case in which all the coast-line of the predecessor State went to one of the two successor States, the other being left land-locked. Difficulties of that kind could, of course, be settled by recourse to the principle of equitable distribution, but the net result would be to trade off one kind of property against another.

67. He was not in a position at the present stage to offer a solution to those problems; he merely wished to draw attention to their complexity.

68. Mr. HAMBRO said that article 6 embodied a simple rule which had been very clearly explained by the Special Rapporteur in a brief but important passage of his fourth report: "The successor State does not acquire more rights than the predecessor State itself had over the property transferred. This is a statement of the obvious, since no one, including a predecessor State, can 'give more than he has'".<sup>7</sup>

69. The Commission would have to adopt that rule in one form or another. The rule would have to be stated in simple terms and so worded as to apply generally to all the particular cases that could arise. It was not necessary, for the moment, to consider those particular cases in detail; but the Commission should have a general formula in mind for article 6 when it came to discuss the subsequent articles of the draft.

70. Mr. CALLE y CALLE said it would be impossible for a single article to solve all the problems that arose regarding the transfer of public property. Assuming that an agreed concept of public property existed, an article was needed to specify that the public property of the predecessor State passed to the successor State with the same physical features and the same legal status as had obtained prior to the succession.

71. A statement of that rule in simple terms would be acceptable to him. He suggested deleting the opening words "In accordance with the conditions of the present articles", which were unnecessary, since all the articles had to be read in the context of the whole draft. Moreover, like other provisions of the draft, article 6 contained a residuary rule which applied only unless otherwise agreed by the parties, so that the transfer might well

<sup>6</sup> *I.C.J. Reports 1960*, p. 192.

<sup>7</sup> See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 169, document A/CN.4/247 and Add.1, para. (13) of the Commentary to article 2.

take place in accordance with the terms of an agreement rather than with those of the articles.

72. Mr. BILGE said he approved of the idea expressed in paragraph 2 of article 6, which had become the sole paragraph. It must be expressly stated in the draft that public property was transferred to the successor State as it stood. That was perhaps an obvious truth, but since difficulties had arisen over the point in practice, it was not useless to repeat it.

73. However, the idea of transfer in good faith should also be introduced into the text; the words "by the predecessor State" should therefore be inserted after the words "public property shall be transferred", since that wording would call for a certain conduct showing goodwill on the part of the predecessor State. It should also be indicated in the commentary that the provision was intended to ensure the physical conservation of public property.

74. Mr. REUTER clarifying his position, said he agreed with Sir Francis Vallat and other members of the Commission that the rights of third parties—which could be not only States, but also, for example, international organizations—must be respected. The problems now facing the International Bank for Reconstruction and Development, as a result of certain open successions, showed that that reservation was an entirely practical one. The question of the rights of private persons should also be reserved.

75. He believed, above all, that it was natural for articles 6 to 10 to be considered in conjunction with each other. The comment he had made on the word "transfer" was a comment of substance in the sense that the true problem, which the Commission would have to discuss later, was whether the two terms of the change, namely, the property as it existed in the patrimony of the predecessor State and then its attribution to the patrimony of the successor State, should be determined—as was done very explicitly in article 8—or whether it was enough to determine that the rights of the predecessor State were extinguished and that its property, subject to the rights of third parties, passed under the sovereignty of the successor State. The Commission would have to decide whether it was really possible to say that public property passed into the patrimony of the successor State. That was open to question, for it was not certain that the concept of the patrimony of the State existed in international law, or even in all national systems of law.

76. Mr. QUENTIN-BAXTER said that, like Mr. Bilge, he assumed that the Commission was not concerned at the present stage with the problem of equitable distribution.

77. He had no objection to the idea expressed in paragraph 2 of article 6, the sole remaining paragraph; but he had some doubt whether the provision was necessary. Clearly, the successor State received only what the predecessor State had to give. He shared, however, Mr. Reuter's objections to the concept of "transfer" of property.

78. The question of continuity was of fundamental importance. The territory affected by the succession was

acquired by the successor State with its physical features and the law that it carried. It was the lawgiver that changed; the power to make the law was put in other hands.

79. In the draft on succession in respect of treaties, which it had adopted in 1972, the Commission had placed the emphasis on the replacement of one State by another. He thought that, in article 6, the concept of replacement in the ownership of public property should be introduced. The concept of replacement was different from that of transfer, and more suitable for present purposes.

The meeting rose at 12.35 p.m.

## 1227th MEETING

Thursday, 14 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

### Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 6 (Transfer of public property as it exists)  
(continued)

1. The CHAIRMAN invited the Special Rapporteur to reply to the comments of members on article 6.

2. Mr. BEDJAOUI (Special Rapporteur) said the debate had clearly shown that opinions were too definite to allow of any hope of reaching unanimity on the present text of article 6. Before discussing what should be done with the provision, he would reply to the comments that had been made.

3. Mr. Ushakov had criticized the text for being too rigid, in that it excluded the possibility of agreement to a different effect between the parties.<sup>1</sup> He admitted that and would try to find a remedy with the help of the Drafting Committee. Agreement between the parties was obviously important, because the rules the Commission was drawing up were residuary rules.

4. Mr. Ushakov had also considered that the Commission should not, for the moment, dwell on article 6, which dealt with the general régime of property—a subject also regulated by the following articles. Bearing in mind the Draft prepared by Sir Humphrey Waldock, he (Mr. Bedjaoui) wondered whether it had always been

<sup>1</sup> See previous meeting, para. 47.