

Document:-
A/CN.4/L.328/Add.2

Draft articles on succession of States in respect of State property, archives and debts. Texts proposed by the Drafting Committee: articles 3 quater, L and B to F - reproduced in A/CN.4/SR.1694, paras. 34 et seq

Topic:
Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

articles in Part II, Section 1 (State property). It had decided, in the light of the comments made in the Commission, to maintain the parallelism between the introductory sections of Parts II and III. To that end, it had made the same drafting amendments to the articles under consideration as had been made to the articles in Part II, section 1, with the result that the articles were now identical—except as concerned the use of the terms “property” and “archives”.

Articles G, H, I and J were adopted.

31. Mr. ALDRICH said that, in his view, article K, like article 9, was neither necessary nor desirable.

Article K was adopted.

ARTICLE A¹¹ (State archives)

32. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article A as proposed by the Drafting Committee (A/CN.4/328/Add.1) read:

Article A. State archives

For the purposes of the present articles, “State archives” means all documents of whatever kind which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been kept by it as archives.

33. A number of drafting changes had been made to the article to preclude the possibility of its being interpreted restrictively: the words “the collection of documents of all kinds” had been replaced by the words “all documents of whatever kind”, while, at the end of the article, the word “preserved” had been replaced by the word “kept” and the term “State archives” had been replaced by the term “archives”, which, in the context of the definition, included all types of official record. The replacement of the word “preserved” by the word “kept” made clear the scope of the definition, which covered the archives known as “living archives”.

Article A was adopted.

ARTICLE 3 *quater* (Rights and obligations of natural or juridical persons)

34. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed an article 3 *quater* (A/CN.4/L.328/Add.2) which read:

Article 3 quater. Rights and obligations of natural or juridical persons

Nothing in the present articles shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.

The article was designed to forestall the impression that the effects of a succession of States in respect of

State property, archives or debts might prejudice in any way any question relating to the rights and obligations of natural or juridical persons. The Drafting Committee had felt it particularly appropriate to formulate such a safeguard clause in view of the Commission’s decision (1692nd meeting) not to refer in article 16 to “any other financial obligation chargeable to a State”.

35. Article 3 *quater* had been drafted in very general terms and had, therefore, been included in Part I, which contained general provisions applicable to the draft as a whole.

36. Sir Francis VALLAT said that, while he was not opposed to article 3 *quater*, and understood its intention, he was of the opinion that it did not make good the omission of article 16, subparagraph (b), from the set of draft articles, which now contained no provision that would enable natural or juridical persons to have recourse against any of the successor States formed as a result of the dissolution of a State.

Article 3 quater was adopted.

ARTICLE L (Preservation of the unity of State archives)

37. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article L as proposed by the Drafting Committee (A/CN.4/L.328/Add.2) read:

Article L. Preservation of the unity of State archives

Nothing in the present Part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the unity of State archives.

The article was based on the former paragraph 6 of article F, which had been adopted in first reading the previous year.¹²

38. In the light of the discussion within the Commission, the Drafting Committee had felt it advisable to draw up a separate article laying down, in a general form, the principle of the unity of State archives. That principle was relevant not only to the category of State succession covered by article F, but also to the other such categories covered by Part III, section 2. The Drafting Committee had, therefore, stated it in general terms and included it in Part III, section 1, the provisions of which were applicable to Part III as a whole.

39. Since it contained a safeguard clause, article L had been modelled on the other similar clauses to be found in articles 3 *ter* and 3 *quater*.

Article L was adopted.

ARTICLE B¹³ (Newly independent State)

¹² For text, see 1690th meeting, para. 1.

¹³ For initial consideration of the text by the Commission at its present session, see 1689th meeting, paras. 16–42.

¹¹ *Idem*, 1688th meeting, paras. 33 *et seq.*

40. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article B as proposed by the Drafting Committee (A/CN.4/L.328/Add.2) read:

Article B. Newly independent State

1. When the successor State is a newly independent State:

(a) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those mentioned in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives having belonged to the territory to which the succession of States relates and having been dispersed during the period of dependence.

5. Paragraphs 1 to 4 apply when a newly independent State is formed from two or more dependent territories.

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

7. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

41. Article B, which together with articles C, D, E and F constituted Section 2, entitled "Provisions concerning specific categories of succession of States", of Part III of the draft, was basically identical to the article the Commission had approved in first reading. However, in response to fears voiced in the Commission that the draft as a whole would otherwise be without effect, the Drafting Committee had added a new paragraph 4, concerning the duty of the predecessor and successor States to co-operate in attempting to recover any archives having belonged to the territory to which the succession of States related that, as was often the case, had been dispersed during the period of dependence. The old paragraphs 4 to 6 had accordingly been renumbered 5 to 7, and the references they had contained to paragraphs 1 to 3 had been extended to the new paragraph 4.

42. In paragraph 3, the phrase "the best available evidence of documents from the State archives of the predecessor State" had been replaced by the words

"the best available evidence from its State archives", and the same change was made at the other points in section 2 where the phrase had appeared, namely, in paragraph 3 of article C, paragraph 3 (now para. 2) of article E, and paragraph 3 of article F. Similarly, the Drafting Committee had deleted the words "documents of" from all the provisions of section 2 where they had previously appeared before the words "State archives", namely article C, paragraphs 4 and 5 (formerly subparagraphs 4 (a) and (b)); article E, paragraph 4 (formerly paragraph 5); and article F, paragraph 5. Finally, in paragraph 2, the term "mentioned" had been preferred, for the sake of consistency with the articles already adopted, to the term "dealt with". In the English version of the draft, the word "mentioned" had also been substituted for forms of the verbs "to deal with" and "to refer to" in other provisions of section 2, namely article C, subparagraph 2 (b), and subparagraph 1 (b) of each of articles E and F.

43. Sir Francis VALLAT said that although article B was drafted in terms of the newly independent State, it was not clear to what territory paragraph 6 of that provision referred. Indeed, since the wording of paragraph 6 was defective, it would be difficult to apply paragraph 2 in relation to paragraph 3, and also difficult to apply paragraph 7. He therefore suggested that those questions should be clarified in the commentary to article B.

44. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the suggestion made by Sir Francis Vallat concerning the commentary to article B was acceptable.

45. Mr. NJENGA said that the wording of article B, paragraph 4, would be clearer if it was amended to read:

"The predecessor State shall co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence".

46. Mr. USHAKOV said that it should be emphasized in the commentary to article B that subparagraph 1 (a) referred to archives that had belonged to the territory to which the succession of State related and that had become "State archives . . . during the period of dependence", whereas paragraph 4 concerned archives that had belonged to the territory and that had "been dispersed during the period of dependence".

47. Mr. ALDRICH said that the wording of article B, subparagraph 1 (a), might be clearer if the word "having" was added between the word "and" and the words "become State archives of the predecessor State . . .".

48. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article B with the amended wording

proposed by Mr. Njenga and the addition proposed by Mr. Aldrich.

Article B, as amended, was adopted.

ARTICLE C¹⁴ (Transfer of part of the territory of a State)

49. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the text which the Drafting Committee proposed for article C (A/CN.4/L.328/Add.2) read:

Article C. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

50. Apart from the drafting changes which he had already mentioned, the Drafting Committee had merely replaced the phrase "in question" ("*en question*") by the word "concerned" ("*concerné*") in the English and French versions of subparagraph 2 (a). The former subparagraphs 4 (a) and 4 (b) had now become paragraphs 4 and 5 respectively.

Article C was adopted.

ARTICLE D¹⁵ (Uniting of States)

51. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the text which the Drafting Committee proposed for article D (A/CN.4/L.328/Add.2) read:

Article D. Uniting of States

1. When two or more States unite and so form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or to its component parts shall be governed by the internal law of the successor State.

Article D was adopted.

ARTICLE E¹⁶ (Separation of part or parts of the territory of a State)

52. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed that article E should read (A/CN.4/L.328/Add.2):

Article E. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor otherwise agree:

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

3. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

4. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of their State archives connected with the interests of their respective territories.

5. The provisions of paragraphs 1 to 4 apply when part of the territory of a State separates from that State and unites with another State.

53. Apart from the drafting changes which he already mentioned, the Drafting Committee had deleted from article E the text adopted in first reading as paragraph 2.¹⁷ That text had corresponded to the second paragraph of article B, where it had been maintained. In article E, it had raised great problems of legal logic because of its dual reference to "passing" and "appropriate reproduction" and because of its final part, which had stated that the passing or reproduction "shall be determined by agreement

¹⁴ *Idem*, 1690th meeting, paras. 1-31.

¹⁵ *Idem*.

¹⁶ *Idem*.

¹⁷ For text, see 1690th meeting, para. 1.

between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and as equitably as possible from those parts of the State archives”.

54. Sir Francis VALLAT, referring to paragraph 4, said that the words “at the request and at the expense of one of them”, the words “their State archives” and the words “their respective territories” were not at all clear and made it seem as though that paragraph was drafted both in the singular and in the plural.

55. Mr. USHAKOV said that, while Sir Francis Vallat was right, the text of the paragraph had been adopted in its present form in first reading. Perhaps its wording could be improved at some later stage.

56. Mr. ALDRICH said that, while paragraph 4 had not been discussed at length in the Drafting Committee, the Committee had noted that the word “appropriate” would give the predecessor and successor States involved grounds for determining exactly which reproductions they should make available to one another.

Article E was adopted.

ARTICLE F¹⁸ (Dissolution of a State)

57. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article F as proposed by the Drafting Committee read (A/CN.4/L.328/Add.2):

Article F. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) the part of the State archives of the predecessor State, which should be in the territory of a successor State for normal administration of its territory, shall pass to that successor State;

(b) the part of the State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates directly to the territory of a successor State, shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1 shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State,

appropriate reproductions of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

58. In addition to undergoing drafting changes similar to those made to other articles, article F had lost its former paragraph 6, which had become article L. Furthermore, the Drafting Committee had decided to replace the original paragraph 2, which, except for referring only to “passing” of parts of State archives, had corresponded to paragraph 2 of articles B and E adopted in first reading. The new wording of paragraph 2 was based in part on article 23, concerning State debts, with the difference that the phrase “an equitable proportion” which appeared in article 23 had been replaced by the phrase “in an equitable manner”.

59. Sir Francis VALLAT, referring to paragraph 2, said it might be made clear in the commentary to the article that the words “in an equitable manner” referred to the manner of the passing of State archives, not to the manner of their division.

Article F was adopted.

60. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) drew attention to the fact that, in the second section of Part II and of Part IV of the draft, the articles entitled “Newly independent State” (arts. 11 and 20) appeared immediately after the articles entitled “Transfer of part of the territory of a State” (arts. 10 and 19); in Part III, concerning State archives, however, the article “Newly independent State” (art. B) preceded the article entitled “Transfer of part of the territory of a State” (art. C).

61. It might be thought that the articles should be arranged identically in section 2 of each of Parts II, III and IV; should the Commission subscribe to that view, the Secretariat would reorder the provisions accordingly.

62. Mr. USHAKOV proposed that the articles of Part III, Section 2, in question should be placed in the same order as the corresponding articles in Parts II and IV.

It was so decided.

Statement by the Chairman of the Drafting Committee

63. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) reminded the Commission that, in addition to the articles on the succession of States, it had referred to the Drafting Committee the articles submitted at the present session by the special rapporteurs on the topics of: question of treaties concluded between States and international organizations or between two or more international organizations; State responsibility; jurisdictional immunities of States and their property; and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

¹⁸ For initial consideration of the text by the Commission at the present session, see 1690th meeting, paras. 1–31.

64. Bearing in mind the recommendations of the General Assembly, the Drafting Committee had concentrated on the two sets of draft articles submitted in second reading and, in particular, on the draft articles concerning succession of States in respect of State property, archives and debts. That being so, it had been unable to examine all the articles relating to treaties to which international organizations were parties, and any of the articles on the other topics. The Committee therefore remained seized of those articles, and would have to study them at the Commission's next session.

The meeting rose at 6.10 p.m.

1695th MEETING

Tuesday, 21 July 1981, at 11.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Draft report of the Commission on the work of its thirty-third session

1. The CHAIRMAN invited the Commission to consider its draft report on its thirty-third session, paragraph by paragraph.

CHAPTER I. *Organization of the session* (A/CN.4/L.329)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

2. Mr. FRANCIS (Rapporteur) noted that the Commission had to decide whether or not to retain the words "the law of the non-navigational uses of international watercourses", which had been placed in square brackets in the last sentence.

3. The CHAIRMAN, referring to the words in square brackets, said the Enlarged Bureau proposed that no new special rapporteur should be appointed at the present session for the topic on the law of the non-navigational uses of international watercourses. The Enlarged Bureau also proposed that the next session should begin on 3 May 1982.

4. Sir Francis VALLAT said he deeply regretted the fact that the Enlarged Bureau had decided not to appoint a new special rapporteur on the topic of the law of the non-navigational uses of international watercourses. The Commission had professed a wish

to further the continuity of its work on that topic, but the decision taken by the Enlarged Bureau would block such continuity. There was no real reason for failing to take a decision to appoint a new special rapporteur. If such a decision could not have been taken early in the session, it should be taken now, at a time when many States Members of the United Nations attached great importance to the question of international watercourses. He was concerned about the decision not to appoint a new special rapporteur because he had at heart the future interests of the Commission, whose capacity to deal with topics of great technical and practical significance was one of the touchstones on which its performance would be judged.

5. Most members had agreed that there was an eminently suitable person to deal with that topic, but the Commission had failed to take advantage of that person's availability and had not appointed him because of the opposition of three members and because of the practice of proceeding by consensus. In his opinion, when a large majority of the members of the Commission wished to follow a particular course, those in the minority should bow to the will of the majority.

6. Mr. NJENGA said he too found it difficult to understand why the Commission should shy away from taking a decision to appoint a new special rapporteur on the topic in question. If it now failed to appoint a special rapporteur, no work could be done on the topic at the following session, and he was not sure how the Commission would be able to justify its decision to the General Assembly. He also agreed with Sir Francis Vallat that it was quite unfair that a few members of the Commission should be able to block a decision favoured by the majority.

7. Mr. SUCHARITKUL said that he wished to associate himself with the views expressed by Sir Francis Vallat and Mr. Njenga concerning the Commission's failure to appoint a new special rapporteur because of the problem of a lack of consensus.

8. Mr. FRANCIS said that, in his opinion, the opposition to the appointment of a new special rapporteur for the topic of the law of the non-navigational uses of international watercourses would not be able to withstand the criticism that it would receive in the Sixth Committee. From his experience as a representative on that Committee, he knew how much significance many countries placed on the study of that topic, and was quite sure that a decision not to appoint a special rapporteur would be a miscalculation of the General Assembly's attitude to the only item on the Commission's agenda that involved people, rather than abstract ideas. It was therefore a matter of deep regret to him that he would be compelled to share the responsibility for such decision.

9. The CHAIRMAN said that, in the course of the discussions within the Enlarged Bureau, it had been pointed out that special rapporteurs had always been