Document:-

A/CN.4/SR.1223

Summary record of the 1223rd meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1973, vol. I

public property, without specifying what that property was. In drafting the article, he had followed the instructions of the Commission, which, at its twentieth session, had asked him to deal with succession in respect of economic and financial matters.[17] One of the sub-divisions of his study was entitled "Public property": the article which covered that point was not necessarily related to article 5, which defined public property.

48. Mr. KEARNEY said he feared that it would cause some confusion in the Sixth Committee of the General Assembly if the Commission submitted to it a series of articles which did not include an article, such as article 3, on the use of terms. The Commission should at least indicate to the Sixth Committee, in some way, that it was working with a different definition of "succession of States" from the one it had adopted at its previous session.

49. The CHAIRMAN speaking as a member of the Commission, said he fully agreed with Mr. Kearney that it was very important that the Commission should avoid creating any confusion in the minds of the Sixth Committee. He suggested that it should state clearly in its report that, in accordance with its usual practice, the definitions article would be dealt with at a later stage.

50. Mr. USTOR said that at its 1968 session, when dealing with the topic of relations between States and inter-governmental organizations, the Commission had included a definitions article, but had stated that it was provisional and subject to later decision of the Commission. He therefore supported the suggestions of Mr. Kearney and the Chairman.

51. Mr. MARTÍNEZ MORENO said that he supported the suggestions put forward by Mr. Kearney, the Chairman and Mr. Ustor. He proposed that the Commission set up a small working group, consisting of the Special Rapporteur, Mr. Ago, Mr. Kearney, Mr. Ushakov, Mr. Ustor and Mr. Yasseen, to draft a satisfactory text of article 3 for submission to the General Assembly.

52. The CHAIRMAN proposed that articles 1, 2 and 4 be referred to the Drafting Committee, but not article 3.

53. Mr. AGO said that in his opinion, article 4, which defined the subject-matter to be considered, was a key article that must be examined thoroughly. Hence he could not agree to its being referred to the Drafting Committee.

54. Mr. REUTER said he agreed with Mr. Yasseen that article 4 was closely connected with article 5 and that it would be premature to refer it to the Drafting Committee.

55. The CHAIRMAN suggested that articles 1 and 2 be referred to the Drafting Committee,[18] that article 4 be discussed together with article 5, and that article 3 be dealt with at a later stage.[19]

It was so agreed.

[17] *Ibid.*, p. 221, para. 79.

[18] For resumption of the discussion see 1230th meeting, paras. 8 and 35.

[19] See 1230th meeting, para. 8.

Other business

[Item 10 of the agenda]

56. The CHAIRMAN said that, before adjourning the meeting, he wished to announce two decisions which had been taken by the officers of the Commission and former chairmen.

57. First, it had been decided that it would be impractical to attempt to celebrate the Commission's twenty-fifth anniversary at the present session, since most of the Judges of the International Court who were former members of the Commission had intimated that they would be unable to attend such a ceremony. It had therefore been agreed that the Commission's anniversary should be celebrated at its next session in 1974 and that Mr. Sette Câmara should be asked to maintain contact with the General Assembly with a view to making the necessary preparations.

58. Secondly, it had been decided that, owing to lack of funds, it would be impossible to send a delegation of members to the twenty-eighth session of the Gencral Assembly and that the Commission should be represented there by its Chairman alone, in accordance with its usual practice.

The meeting rose at 1.5 p.m.

1223rd MEETING

Friday, 8 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
Later: 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.

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)

ARTICLES 4 AND 5

Article 4
Sphere of application of the present articles

The present articles relate to the effects of succession of States in respect of public property.

Article 5
Definition and determination of public property

For the purposes of the present articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State,

were not under private ownership in the territory affected by the change of sovereignty or which are necessary for the exercise of sovereignty by the successor State in the said territory.

1. The CHAIRMAN invited the Special Rapporteur to introduce article 5 of his draft (A/CN.4/267).

2. Mr. BEDJAOUI (Special Rapporteur) said that the question of defining public property was fundamental and must be closely linked with the question of determining such property. Several approaches were possbile. It was possible to give a definition *a contrario*, a definition according to ownership of the property, or a definition according to internal public law. In some situations one could note the existence of an internationalist definition, a unilateral definition, or a definition given by certain international organizations, in particular the United Nations. He proposed to examine the advantages and disadvantages of each of those formulas.

3. A definition *a contrario* was not incompatible with legal technique. Examples were to be found in treaty practice, in particular in a treaty signed in 1924 between Hungary and Romania concerning distribution of the property of the counties *(comitats)*, towns and villages situated in the territory ceded under the Treaty of Trianon. Article 2 of that treaty did not include in the distribution any funds or endowments which were not the property of the counties, towns or villages, but had been, or were, merely administered by them, or any funds or endowments which were not assigned exclusively to the said counties, towns or villages.

4. In his third report he had proposed defining public property by the fact of its "belonging to the State, a territorial authority thereof or a public body".[1] That was the definition most frequently found in treaties, but it did raise some problems.

5. First of all, to whom was the ownership of public property to be confined? Mr. Ushakov believed that it could only be property of the State. That might indeed be sufficient. But the notion of public property, as deduced from internal practice, including the practice of the Soviet Union, was wider. Soviet law recognized other property which was genuinely public, for instance, the property of the *sovkhozes* and *kolkhozes*. And in some countries, such as Yugoslavia and Algeria, there was property placed under self-management which belonged neither to the State nor to public authorities; it was the property of the people. Thus there was a problem to be solved there.

6. Similarly, in treaty practice the devolution of public property was not confined to property of the State. For instance, the trade agreement concluded in 1921 between the Russian Socialist Federal Soviet Republic and the United Kingdom[2] referred, in article (10), to "the funds or other property of the late Imperial and Provisional Russian Governments in the United Kingdom" and provided that other provisions might be included in a general treaty to specify further what was meant by other public property. Again, in default of an adequate definition, the peace treaty between the RSFSR, Poland and the Ukraine, signed at Riga in 1921,[3] spoke of objects, collections, libraries, war trophies, etc. The peace treaty signed in 1920 between the RSFSR and Lithuania[4] referred to national property of all kinds, securities and objects of virtu, while the peace treaty signed in 1920 between Finland and the RSFSR[5] contained the formula "Property... belonging to the Russian State and to Russian National Institutions".

7. That showed the difficulties raised by the criterion of ownership, and those difficulties were all the more real because in some cases of succession, particularly cases of decolonization, it was impossible to say whether certain property belonged to the State or not. That applied, for example, to the property of the *British South Africa Company*, which had been established in 1883 to exploit the copper deposits in Rhodesia and what was now Zambia, had had the power to conclude treaties and promulgate laws, and had been the pre-eminent public power in those territories. That was a problem the Commission should study if it adopted the criterion of ownership for defining public property.

8. Public property could also be defined by its public character, which generally comprised three elements: a special legal régime under the public internal law of the State; public ownership; and use for all purposes which came within the objectives of the State. Although that was an internal law definition, it was used in various international agreements.

9. The fourth possible type of definition would be an "internationalist" definition, which would leave it to the States concerned to agree on what they meant by "public property" and would say that unless the predecessor State and the successor State agreed otherwise, public property meant all property belonging to a legal person who was a subject of public law, without specifying whether the property belonged to public authorities or to the State. States did in fact make such arrangements, as was shown by the numerous agreements concluded on the subject, either by themselves making an inventory of the property in question or by drawing up a list of it. The agreements concluded between France and its former African colonies provided examples. There were also cases in which States drew up neither a list nor an inventory, but stated in general what property they were referring to. For instance, the treaties which had terminated the Second World War referred to property belonging to the German Reich or to one of the German states.

10. Besides the term "property", certain treaties, such as the Treaty of 1960 concerning the Establishment of the Republic of Cyprus,[6] used the expression "rights and interests". That expression was frequently used in the main treaties which had ended the First World War—the treaties of Versailles, St. Germain, Trianon, Sèvres, etc.

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[1] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 133, document A/CN.4/226.

[2] League of Nations, *Treaty Series*, vol. IV, p. 128.

[3] *Ibid.*, vol. VI, p. 123; see article 11.

[4] *Ibid.*, vol. III, p. 122; see articles 9 and 10.

[5] *Ibid.*, p. 65; see article 22.

[6] United Nations, *Treaty Series*, vol. 382, p. 10.

Moreover, public property included things that were material or corporeal, and other things that were incorporeal. A credit was not, strictly speaking, property, so much as a right. That was why it had been necessary to adopt the enumeration "property, rights and interests", it being understood that the last word meant legal interests.

11. One difficulty to which an internationalist definition might give rise was that, in the case of decolonization, it was not always two States that were involved, but the former metropolitan Power and a potential State. He had discussed in his first report the problem of the legal character of "agreements" concluded between the former metropolitan Power and the new State about to be born.[7] Sometimes it was a unilateral definition of public property that was found in the instrument by which the former colonial Power granted independence and defined its legal consequences for public property, debts, etc.

12. International organizations, in particular the United Nations, had also defined public property. General Assembly resolutions 530 (VI), on economic and financial provisions relating to Eritrea, and 388 (V), on economic and financial provisions relating to Libya, were examples. The question which arose in those cases was that of the legal character of those particular resolutions.

13. There could be yet other types of definition of public property. States sometimes took the precaution of providing for procedures, or even for the setting up of bodies such as commissions for conciliation, arbitration, distribution of property, partition and so on, to clarify the relationship between treaty law and internal law and settle any disputes which might arise.

14. He hoped the Commission would give him precise instructions on the point of view to be adopted in defining both public property and State succession, since all the rest of the draft depended on it. But whatever the point of view adopted in defining public property, another problem arose, namely, the actual determination of such property.

15. In determining public property it was necessary to refer to internal law, but should it be the law of the predecessor State or of the successor State? It would be logical to refer to the law of the predecessor State, but the need to do so was far from being completely confirmed by practice. To refer to the law of the successor State, however, would render all codification useless, since that State would be entirely free to decide what property should pass to it. In some cases, such as partial transfer of territory or decolonization, there was also the law of the territory itself, or local law. Should that law also be taken into account in determining public property? The only solution seemed to be to leave it to States to settle the matter by agreement.

16. Mr. SETTE CÂMARA said that, in his attempt to define and determine what constituted "public property" the Special Rapporteur had made a great effort to achieve a formulation which would be as simple as possible and eliminate certain highly controversial elements in his former proposals, such as article 5, paragraph 2, in his fourth report (A/CN.4/247/Add.1) which read: "Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty".

17. The deletion of that clause was an improvement, since it would be very difficult to decide when such a serious conflict with the public policy of the successor State occurred. Likewise it would be doubtful whether both the predecessor and the successor States would agree on the application of the exception. In the case of controversy, for example, to which municipal law would reference be made? If it was for the successor State to decide whether such a conflict existed, it could always find a justification for the exception. And, *vice versa*, the predecessor State would normally contend that the general rule of reference to its municipal law should be followed.

18. The present article 5 followed the formulation of article *5bis*, which appeared as a variant in the Special Rapporteur's fourth report, with some slight changes in arrangement. However, the new text still presented many problems on which the Commission would have to reach agreement before proceeding with the other articles.

19. The first problem was that of the basic criterion for defining public property by the method of exclusion. All property which was not private property in the territory affected by the change of sovereignty was considered to be public property. That provision was a useful and ingenious expedient, but it was still necessary to define what was meant by private property. Did it include the private domain of the State? And what would happen when the concepts of private property in the municipal law of the predecessor State and the successor State conflicted radically, as would be the case when the succession occurred between States with different political systems? In paragraph (11) of the commentary to article 5 in his fourth report, the Special Rapporteur had himself recognized those enormous difficulties.

20. The second problem was the reference to "rights and interests", as included in the concept of property. The Special Rapporteur had admitted that he had used that expression because it was included in some international treaties; but he did not seem to be entirely convinced of its accuracy and had even acknowledged, in paragraph (10) the commentary to article 5 (sixth report) (A/CN.4/267), that his reason for including it was "insufficient".

21. Another difficulty was that of the property, rights and interests "which are necessary for the exercise of sovereignty by the successor State in the said territory". That was a very vague and complex formula, which had replaced the concept of "property appertaining to sovereignty", appearing in former drafts. The latter formula had, indeed, been still more imprecise, since, in principle, sovereignty was an absolute concept and all that belonged to the State appertained to sovereignty. Nevertheless, the change had not eliminated the difficulties. The reference

[7] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 104, para. 70.

to municipal law would not be of much help, since internal legislation did not include any specific determination of the property which was necessary for the exercise of sovereignty.

22. What, after all, was the exercise of sovereignty? To him it appeared to be a very broad concept which coincided with the very existence of the State as such. Any act of the State, *lato sensu*, whatever its nature, was a form of the exercise of sovereignty. Hence any property belonging to the State was, in one way or another, necessary for the exercise of its sovereignty.

23. Furthermore, what authority had the power to determine such property? In paragraph 40 of his fifth report (A/CN.4/259), the Special Rapporteur had recognized those difficulties and had confirmed that "There is no indication as to which State, the predecessor or the successor, would be used as a point of reference for the determination of the 'property necessary for the exercise of sovereignty' over the territory". And in paragraph 41 of the same report, the Special Rapporteur seemed to consider that the determination should be based on the concept of public property as being everything which was not private property. If that was so, the same difficulties arose concerning the definition of private property.

24. For example, property in parts of the territory which were not private property should be an outstanding example of property necessary for the exercise of sovereignty. In federal States, such as Brazil, however, property on land which was not private property belonged to the patrimony of the member state in which it was situated, or, to use the terminology of the Special Rapporteur, "to territorial authorities". In the case of a change of sovereignty, and if the federal structure disappeared, what would be the fate of such property, which according to article 37 was to remain intact? Was it to be considered necessary for the exercise of sovereignty? If so, how did the predecessor State transfer property that was not its own under its own internal legal order?

25. Mr REUTER said he would examine certain problems of method raised by article 5.

26. The Special Rapporteur had asked the Commission whether it was the law of the predecessor State, the law of the successor State or the law of the territory by which public property would be determined. But the Commission was awaiting the Special Rapporteur's answer to precisely that question. The solutions it adopted in the draft articles would, of course, necessarily be rules of international law, but that did not settle anything, because those rules could refer to national law and the Commission could not say in advance what the extent of the *renvoi* would be in each case. It was for the Special Rapporteur to say to what extent the rules of international law drawn up by the Commission should refer to national law and to which national law.

27. With regard to the definition of public property, the Commission could not, at that stage, take a final decision on article 5. To decide what it wished to include in the draft, it must first examine the concrete cases chosen by the Special Rapporteur. Then, and only then, would it know what the definition should contain. For the time being the Commission could identify the problems that arose, but it could not solve them.

28. The first of those problems was whether the reference to public property in article 4 was useful for defining public property, or whether only article 5 should be referred to for that purpose. It followed from article 6 that the territory was public property; it could only be so within the meaning of article 4, not within the meaning of article 5, because that article defined public property as property not under private ownership "in the territory" affected by the change of sovereignty. The Commission was therefore obliged to settle the question whether the draft as a whole should or should not contain provisions concerning the territory as such and, if it decided in the affirmative, it would have to solve the problem of certain territorial annexes and certain real rights attaching to the territory. Consequently, it could not yet be said what the subject-matter of the draft articles would be. If the Commission did not wish to take up the question of the territory, it would have to amend article 6.

29. Another problem in article 5 was the reference to public property not under "private ownership". Did that mean private ownership by the State or ownership by a private person? Moreover, article 8 referred to "public or private" property of the predecessor State. Obviously the fate of the private property of the predecessor State must be settled, but then either the sphere of application of the draft would not be confined to public property, or there would be two definitions of such property, the international definition not being the same as the definition in the internal law of the predecessor State. It could thus be seen how dangerous it would be to try to give at the outset, in article 5, a general definition that would delimit the whole scope of the draft.

30. Article 5 raised yet another problem when it used the expression "in the territory". Although the territory was regarded as a subject of succession, it was also considered as a framework, the legal effects of which were fundamental for the succession. The Special Rapporteur had said that if it was accepted that the law of the successor State was applicable to the territory, there was no longer any problem of succession, since all property situated in the territory would be subject to the law of that State. But that did not solve the problem of property situated outside the territory, whether it was the property of the State or of a local authority. Under what legal régime was such property placed? As drafted at present, article 5 excluded property situated abroad from the definition of public property, and that again raised the problem of article 4, that was to say the problem of the scope of the draft articles.

31. The discussion on article 5 should enable members to appreciate the problems it raised and to explain them, but it was obviously not possible to solve them at the moment. After the discussion, article 5 should be left aside until the Commission had examined more closely the concrete proposals contained in the later articles. It could then decide what property the articles would apply to.

32. Mr. KEARNEY after congratulating the Special Rapporteur on his impressive attempt to explore all the

different ways of defining public property, said that, while not fully agreeing with the present text of article 5, he doubted whether it would be possible to produce anything much better.

33. His main difficulty was with the proposition in that article that, in effect, public property was everything which was not under private ownership. In that kind of syllogistic thinking, the minor premise would be that something which was not privately owned was public property, but one could immediately think of a number of cases to which that would not apply. Mr. Reuter had offered the best example in his discussion of the transfer of territory, which in internal law was often privately owned.

34. It seemed to him that to start with a negative rule such as that stated in article 5 would lead to a series of logical difficulties which that rule would not justify. Those difficulties had, in fact, been illustrated by the variety of alternatives suggested by the Special Rapporteur himself. He was inclined to agree with Mr. Reuter, therefore, that the wisest course would be to postpone the discussion of the definition of public property until agreement had been reached, in the subsequent articles, on the concrete problems it involved.

35. He shared the doubts expressed by Mr. Sette Câmara concerning the qualifying clause at the end of article 5: "... or which are necessary for the exercise of sovereignty by the successor State in the said territory". That clause would seem to grant a blanket authority to the successor State to make its own determination of what constituted public property. Such a provision did not really bear any relationship to the rules of succession, but dealt rather with other problems in other contexts, such as the right of permanent sovereignty over natural resources, problems of State responsibility and the like. Since, therefore, the incorporation of that clause in article 5 might prejudge those and other fields of law, it did not seem to him either necessary or desirable.

36. The Commission's basic objective should be to produce a set of rules which would permit a succession of States to come into effect as simply, easily and with as little controversy as possible. The final clause of article 5 was so vague that it ran counter to that objective and might lend itself to abuse. He was convinced that its adoption would open the way to much friction and quarrelling, not only between the predecessor State and the successor State, but also between the latter and third States.

37. Mr. BEDJAOUI (Special Rapporteur), replying to the objections raised by Mr. Reuter and Mr. Kearney on the question of territory, said that he had carefully distinguished in his first report [8] between questions of public property and the transfer of territory. He had said that he would deal with several subjects in turn and he had started with public property, leaving territorial questions to the end. He had, however, referred in that report to the questions of succession to boundaries, real rights, fishing rights, rights over the continental shelf, servitudes, rights of way, enclaves and incomplete territorial devolutions. He thought it preferable to leave those questions aside for the moment, so as not to complicate the task of defining public property. If the Commission wished to consider them immediately, it would have to allow him to draft a number of articles. He agreed that he ought not to have referred to the transfer of territory in article 6, but in his view, paragraph 1 of that article was merely the introduction to paragraph 2.

38. Mr. AGO said that all the draft articles were related and it would be bad policy to leave some aside. Article 4 was linked not only with article 5, but also, and especially, with article 3, and the Commission could not accept it without being perfectly clear about the meaning of article 3. For the moment, however, it would have to be taken as provisionally agreed that, within the meaning of article 3, succession was represented by a change of sovereignty over a given territory. The problem which then arose was what happened to public property when such a change occurred.

39. Articles on territory had no place in a text devoted to the fate of public property. It was essential to distinguish clearly between international law and internal law. Territory was a concept of international law; the replacement of one sovereignty over territory by another was the essence of succession as a phenomenon of international law; public property was property situated in the territory and determined as such by the internal legal order. Admittedly such property could be the subject of a provision of international law, which might lay down, for example, that a public or private ownership ceased and was replaced by another, but always within the framework of internal law. Territorial problems should therefore be set aside for the moment.

40. The next question was what should be the object of the rule of international law applicable to succession to public property. In his opinion, the only question governed by international law was that of the cessation of public ownership by the predecessor State of property described as public in its internal legal order. What happened subsequently was the effect not of the transfer of sovereignty, but of an independent determination by the successor State, which could either agree that all property which had been public property under the legal order of the predecessor State should remain so, or decide that part of it should become private property, or—as frequently happened—convert into public property certain property which had been private under the internal legal order of the predecessor State. Thus the basic rule to be borne in mind was that of the cessation of ownership under international law, by the predecessor State, of property which had been public property under its legal order. It was to that rule that the definition of public property in article 5 should correspond.

41. Should the Commission concern itself with the fate of all public property of the predecessor State? For in addition to property which had been the public property of the State, not to mention property which had been its private property, there was the property of various public institutions: that of institutions close to the State, such as a single party; that of institutions which intervened more and more directly in the economic life of the State;

[8] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 94, document A/CN.4/204.

and, lastly, that of territorial authorities which usually survived a change of sovereignty. Should the Commission consider all those questions?

42. He thought the Commission should not be too ambitious: it should leave a good many of those questions to be settled by the treaties concluded in each particular case and confine itself to drafting a few residual principles. It should state clearly that the definite rule in matters of succession was that the predecessor State ceased to be the public owner of its former property and that the successor State was free to decide, in the exercise of its own sovereignty, what should happen to that property under its own internal legal order.

Mr. Castañeda took the Chair.

43. Mr. USHAKOV thanking the Special Rapporteur for his explanations, said they had made it quite clear that the rights and interests referred to in the expression "property, rights and interests" were solely those attaching to public property, not rights and interests in general.

44. As a member of the Commission representing the socialist legal system, he saw special difficulties in article 5, which defined public property by contrast with private property. That kind of definition was acceptable if it was agreed that property could be divided into public and private property, but it was not satisfactory in the context of the Soviet socialist legal system, because in the Soviet Union private property did not exist. Article 4 of the Constitution of the Soviet Union read:

Article 4

The economic foundation of the USSR is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instruments and means of production, and the elimination of the exploitation of man by man.

45. Socialist property comprised State property and social property, which was the property of the co-operatives and collective farms, as stated in article 5 of the Constitution, which read:

Article 5

Socialist property in the USSR exists either in the form of State property (belonging to the whole people) or in the form of co-operative and collective-farm property (property of collective farms, property of co-operative societies).

46. The first paragraph of article 7 defined the concept of co-operative and collective-farm property in the following terms:

Article 7

The common enterprises of collective farms and co-operative organizations, with their livestock and implements, the products of the collective farms and co-operative organizations, as well as their common buildings, constitute the common, socialist property of the collective farms and co-operative organizations.[9]

47. In addition to those two forms of property, there was personal property, which was defined in the second paragraph of article 7 and certain subsequent provisions. According to that paragraph, "Every household in a collective farm, in addition to its basic income from the common, collective-farm enterprise, has for its personal use a small plot of household land and, as its personal property, a subsidiary husbandry on the plot, a dwelling-house, livestock, poultry and minor agricultural implements". Clothing, cars and savings were also part of personal property. Such personal property, however, could in no way be assimilated to private property, so that the definition proposed by the Special Rapporteur was not acceptable to Soviet socialist-law countries.

48. Nor was it satisfactory, from the point of view of socialist law, to mention the law of the predecessor State in article 5. For example, a large part of the private property which had existed under the Czarist régime had been nationalized shortly after the revolution and had become State property. That nationalization had been carried out in accordance with the internal law of the Soviet Union, not the law of the predecessor State.

49. In order to define property, rights and interests "which are necessary for the exercise of sovereignty by the successor State", the Special Rapporteur had referred to the privilege of issuing currency, which he regarded as a right necessary for the exercise of sovereignty. He himself considered that everything pertaining to sovereignty belonged to the State as such, whether there was a succession of States or not. He therefore approved of the idea in the last clause of article 5, but not the basis of the idea. The issue of currency was not necessary for the exercise of sovereignty. Legally, a State would be equally justified in introducing a domestic barter system instead of issuing currency. It was therefore quite clear that the definition of public property must refer to property belonging to the State as a subject of international law endowed with sovereignty.

50. The most delicate question was that of the property of third States situated in the territory which was the subject of the succession: for example, the premises of embassies, which belonged to the sending State as a State. Another source of difficulty lay in the fact that, conversely, State property could be situated in the territory of a third State, as Mr. Bedjaoui had pointed out.

51. The many treaties cited by the Special Rapporteur, in which the property transferred had been specified, all related to the same type of succession of States: the case of partial transfer of territory. In other types of succession, and particularly in cases of merger, no such treaty was concluded, since everything situated in the territory of the merging States passed under the sovereignty of the successor State, whether unitary or federal. In the case of partition, a distinction must be made between dissolution, or the division of one State into two or more States when that was the expression of the will of the predecessor State, and division of a State into two or more States independently of the will of the predecessor State. It was obviously the second case which the Special Rapporteur considered illegal and wished to remove from the draft.

[9] English translation published by the *Foreign Languages Publishing House*, Moscow, 1955.

52. The agreements on the partial transfer of territory, to which he had just referred, were not succession agreements. They provided for the transfer of everything situated in the transferred territory, not only public property, but also private property or, for socialist countries, State property, social property and personal property. The reason why those treaties referred only to State property was that other property usually raised no problems.

53. With regard to public property of a third State situated in territory which was the subject of a succession, certain land-locked States possessed ports in a maritime State and the question arose of what happened to those ports when the territory in which they were situated became the subject of a succession.

54. By "State property" should be understood not only property belonging to the State proper, in other words, to the central authorities, but also property belonging to local authorities. For example, what belonged to the Swiss cantons belonged to the Swiss Confederation. Under the Soviet legal system, only State property was affected by succession, not social or personal property.

55. Mr. MARTÍNEZ MORENO said that when he had first examined the definition of public property in article 5 he had experienced some difficulty, because it reminded him of the concept of public property embodied in the Civil Code of his own country, which was a copy of the Chilean Civil Code, itself based on the French Civil Code of 1804.

56. Actually, property vested in the State was known in El Salvador as "national property" *(bienes nacionales)* and was subdivided into two categories: public property *(bienes públicos)*, which included such property as roads and bridges belonging to the public at large, and other national property which was known as State property *(bienes del Estado* or *bienes fiscales)*.

57. As far as international law was concerned, the concept of public property expressed in article 5 seemed appropriate. With regard to the text of the article, most of the comments he had intended to make had already been made by other members of the Commission. There remained, however, the problem of property which a third State might own in the transferred territory. Such property should not be affected by the succession and should remain the property of the third State concerned.

58. With regard to the final clause, he suggested that the words "which are necessary for the exercise of sovereignty by the successor State" be replaced by the words "which are necessary to fulfil the social aims of the successor State". Specialists in public laws, constitutionalists and internationalists alike, had long emphasized the importance of the social aims which the State was intended to serve. International lawyers had pointed out that a community of pirates exercising control over an island did not constitute a State. Such a community had a territory, a population and even a government, but it lacked a social purpose and was therefore not a State.

The meeting rose at 1 p.m.

1224th MEETING

Monday, 11 June 1973, at 3.15 p.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 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. BARTOŠ said that it was very dangerous to refer to internal law in defining public property, since the notion of public property varied from one system of law to another. For instance, at the previous meeting Mr. Ushakov had said that in Soviet law real property was State property. But in some socialist States there were several gradations of ownership. In Yugoslavia, for example, landed property could be either private property—in which case the area was limited, but it remained private property in the Roman law sense; or "social" property—in which case it came close to the Soviet conception; or public property. The capitalist countries even made a distinction between the public domain and the private property of the State and of public authorities.

3. The situation would be still more complicated if, as the Special Rapporteur had proposed in his fourth report (A/CN.4/247 and Add.1), the determination of public property was made, save in the event of serious conflict with the public policy of the successor State, by reference to the municipal law which governed the territory affected at the time of the change of sovereignty. There were, indeed, many succession treaties whose application had raised insoluble problems for arbitration commissions, precisely because the notions of public property, property belonging to public authorities and private property, had not been the same in the law of the predecessor State and that of the successor State. And recently, when certain African countries had acceded to independence, the question had arisen whether land belonging to nationals of the former colonial Power—the big plantations, for instance—should be treated as private property or as collective property which had been usurped.

4. The Commission should therefore try to ascertain whether there were any general principles governing the