Document:-
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Summary record of the 1224th meeting

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

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

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

notion of public property. The basic idea of article 5 was acceptable, but the Special Rapporteur and the Drafting Committee should try to find a clearer formulation, so that the rule to be drawn up might conform to the general principles of law and the true meaning of the notions used be more explicit.

5. Mr. HAMBRO said that, as the Commission's work advanced, its task was becoming more difficult. Article 5 raised many far-reaching problems which the Special Rapporteur, for all his efforts, had not been able fully to solve.

6. He very much appreciated the Special Rapporteur's endeavours to simplify the concept of public property. In his first report,[1] the Special Rapporteur had decided in favour of dropping the distinction between public *(domaine public)* and private property *(domaine privé)* of the State. That distinction was obsolete, and public property, as defined in article 5, was intended to cover all State property. The new approach might well be the most practical, but it created difficulties for a number of members of the Commission.

7. The Special Rapporteur had been right to take the position that the qualification of property was a matter for the law of the predecessor State, not that of the successor State. It was desirable, however, to take into account the case in which the territory itself, as a dependency of the predecessor State, had had a law of its own; in such a case, it would be reasonable to refer to that law rather than to the law of the predecessor State itself.

8. The socialist conception of property, which had been discussed by Mr. Ushakov, did not raise any insurmountable difficulties in the realm of succession. Clearly, no problem would arise in the case of a succession involving two socialist States. Nor would there be any major problem in the case of a predecessor State with a socialist system of properly and a successor State with a different system, since the latter State could apply its own system after the succession.

9. In the case in which a territory formerly under a capitalist system was transferred to a successor State having a socialist system, the ordinary rules of jurisdiction would enable the new sovereign to use its internal law to nationalize private property. Any difficulties that might arise would not be problems of State succession, but problems of State responsibility in respect of claims based on alleged acquired rights.

10. The fact that under Soviet law there was no private property, as such, was not of decisive importance. For the purposes of the present discussion, the "personal property" of Soviet law could be taken as broadly equivalent to what was known elsewhere as private property.

11. The most important problem that arose in connexion with article 5 related to the concluding words "or which are necessary for the exercise of sovereignty by the successor State in the said territory". Apart from the difficulties arising from the many meanings of the word "sovereignty", it was inconceivable that any property of that kind should not be already the public property of the predecessor State. He could not think of any example of private property which could be said to be necessary for the exercise of sovereignty. He therefore suggested that the concluding phrase be deleted.

12. Lastly, he wished to urge that references to sovereignty should be eliminated from the draft wherever they were not absolutely necessary. The concept of sovereignty was difficult to define, to understand and to apply; it was used with many different meanings; it was shrouded in ideology and full of emotional content. Whenever an attempt was made to advance international solidarity and the progressive development of international law, sovereignty was almost always invoked by those who wished to resist progress. He was disappointed to see jurists from newly independent States laying so much stress on sovereignty, when it was sovereignty that had been invoked by the colonial Powers in the recent past precisely in order to resist decolonization.

13. Sir Francis VALLAT said it was necessary to ascertain the function which the definition in article 5 was going to perform, because that function would govern its content. As he saw it, the definition was likely to have two quite different functions.

14. The first was to indicate the boundaries or limitations of the present topic in the sense of article 4. For that purpose, it was clearly necessary to determine what was meant by public property.

15. The second was quite a different function: it related to the effect and application of other articles of the draft. The expression "public property" was used as a term of art in many articles. A definition of that term was not essential for application of the provisions of article 6, since that article stated that property would be transferred to the successor State "as it exists and with its legal status". Article 7, on the date of transfer, was itself part of the definition.

16. A definition became essential, however, for understanding the important provisions of article 10. Those provisions needed careful consideration, but, as the article was drafted, "public property" was an essential part of its content.

17. A survey of the various draft articles confirmed that it was necessary to determine what was meant by "public property". It was evident that a precise definition would be very difficult to arrive at. As usual, that could only be done at a later stage, when the Commission had determined how the term would actually be used in other articles. Nevertheless, it was necessary at present to have some common understanding of the meaning of "public property".

18. He believed that the Commission's task would be facilitated by examining first what was meant by "property". He agreed with the Special Rapporteur that that term should be taken in its broadest sense. The concept of "property, rights and interests" was quite acceptable; it had been used in numerous modern treaties and had in itself led to remarkably few difficulties. It embraced all manner of property and all manner of legal rights and interests.

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

19. As to the relevant date, he agreed in principle that it ought to be the date of change, as stated in article 7. The determination of the date of change, however, might not be easy, because it was linked with the problem of article 3, sub-paragraph (*a*). Furthermore, he was not at all convinced that "sovereignty" was the right word to use in that connexion; perhaps the matter should be further considered under article 7. As in the case of succession in respect of treaties, "succession of States" should be taken as a fact and the date of succession should be the relevant date.

20. The question then arose of determining the location of the property. If article 5 had been intended to deal only with internal property—property within the territory affected by the change—no great problem would have arisen. Such property would be subject to the law of the successor State, which could make sovereign dispositions with regard to it. He believed, however, that article 5 should deal with all property affected by the change, even if it was not situated in the transferred territory. It was precisely when the property concerned was in the territory of the predecessor State, or of a third State, that the real difficulties appeared, even leaving aside questions of recognition, which unfortunately often arose in practice.

21. Where such external property was concerned, the reference to "the law of the predecessor State" would not always be appropriate. In the case in which the property was situated in a third State, the law of that State would in many cases have to be applied.

22. Another problem was that the predecessor State might not have a unified system of law; a reference to the "law of the predecessor State" would then be ambiguous. It would be necessary to make a precise reference to the law of the territory.

23. In order to avoid all those difficulties, he suggested that the words "in accordance with the law of the predecessor State", in article 5, be replaced by the words "in accordance with the applicable law", thus leaving the problem to be solved in accordance with rules of private international law.

24. Major difficulties also arose in regard to the link with the State and the difficult problem of the nature of public property.

25. The link with the State should be understood as a legal link. Since it was the legal consequences of the fact of succession which were being considered, the matter should, basically, be dealt with in legal terms. There might be grounds for extension or limitation, but the only clear and sound approach was to start from the concept of State property. Since property covered all "property, rights and interests", some form of ownership test would cover the main or central case, whether one spoke of "ownership", of "belonging to" or simply of "property of the State".

26. Property belonging to other entities gave rise to a different series of problems. He was thinking, for example, of municipalities and public corporations such as the BBC in the United Kingdom. In general, such problems could be adequately dealt with by applying the principle of continuity. If the property of those other entities was to be covered by the draft, he believed that, in addition to the principle of continuity, the principle of equitable distribution should apply.

27. The question of the nature of the property, or rather the purpose for which it was held or used, gave rise to extremely difficult problems of definitions and application. He himself would not wish at that stage to attempt to define precisely what constituted a public purpose.

28. Although he understood the reasons which had led the Special Rapporteur to define public property by exclusion, he himself favoured a positive approach to the definition. It was not enough to say that public property meant property which was "not under private ownership", because that involved defining "private ownership", which was just as difficult as defining "public property". Both concepts were equally subject to variation.

29. With regard to the concluding phrase of article 5, he shared the misgivings expressed by many of the previous speakers. The articles should deal with the problem of succession at the date of change; they should not try to govern the exercise of sovereignty after that date.

30. Lastly, he shared the Special Rapporteur's view that the provisions of article 5, like those of other articles of the draft, should apply only "unless otherwise agreed". A valid agreement between the parties concerned ought to have priority over those provisions.

31. Mr. YASSEEN said it was bound to be difficult to define and determine public property in an international instrument. The term might have a clear and precise meaning in internal law, but the meaning ascribed to it varied from one country to another, according to the different economic and social systems. Hence it was difficult to find in international law a generally acceptable definition of public property. It was all the more difficult for the Commission to define public property, because it had agreed to follow the empirical method proposed by the Special Rapporteur, so that any definition should be the outcome, not the starting point, of the whole of the Commission's work on the topic.

32. When he had drafted the definitions, the Special Rapporteur had had the advantage of having studied the whole of the topic, whereas the Commission had hardly begun to examine it. It would be better for the Commission to go ahead, examine the various provisions proposed to it and deal with the problems as they arose, so that it could see its way more clearly and be in a position to draft a definition. For example, the Special Rapporteur had proposed articles on what he regarded as public property. After examining those articles the Commission would have a better idea of what it thought that notion should include.

33. It was true that the definition adopted by the Commission would have a dual objective: to provide a framework for its deliberations and to confer a status on certain property which was not directly mentioned. The latter objective, which was the more important, but which raised many problems, should certainly not be excluded. For even before a definition of public property had been adopted, there was no logical reason why the rules governing its transfer should not be drawn up.

A similar question had arisen with regard to the régime of the sea-bed, which some people had not wished to establish before knowing the limits, whereas others had considered that that was not essential provided the basic idea was clear. Perhaps the Commission had not, at the moment, a precise idea of what constituted public property, except for a certain number of items, the nature of which no one would question. But that was enough for a start. Without leaving article 5 entirely aside, the Commission should proceed to examine the various solutions proposed for the transfer of public property, which would enable it to reach a more precise definition of such property.

34. He agreed with those who had referred to the difficulty of the question of property situated outside the territory affected by the change of sovereignty. No doubt the transfer of such property could raise problems of private international law, but it belonged in principle to public international law and, as the fate of such property had to be settled in the draft, the definition should cover it.

35. Mr. USTOR said that, in dealing with the question of public property, it was necessary to distinguish clearly between what, in Roman law, were known as *dominium* and *proprietas*. *Dominium* was the sum-total of the rights of the State in the field of international law, whereas *proprietas* was property within the legal system of the State in question, some parts of which might be in the ownership of private persons and other parts in the ownership of the State itself.

36. Mr. REUTER said he wished to refer to a question which had already been raised by some members of the Commission: the compensation to which the transfer of public property could give rise. Logically, the Commission could leave that question aside, because it arose after the transfer and thus did not properly belong to succession of States. It could be reserved in a separate provision. It might also be necessary to reserve other questions, because the change in status of the property transferred could raise other delicate issues, particularly in the case of property situated abroad.

37. Such an attitude on the part of the Commission would be disappointing, however, for common sense required that State succession should bring about a transfer without compensation, at least in the case of property such as public property.

38. The Commission might envisage either a very simple draft consisting of a few provisions only, or a complete draft, in which case the question of compensation would have to be dealt with. That raised the question whether it might be advisable to confine the draft to property for which compensation was excluded.

39. Mr. BILGE said that, following the Iraqui revolution, Turkey had had some difficulty in determining what was the property of the ex-King which should be returned to Iraq. That, however, had not been a case of succession of States, but of succession of governments.

40. The question of the determination of public property, which the Special Rapporteur had dealt with in article 5, was very important for defining the subject-matter of the transfer. But that question was closely bound up with the question of the transfer proper, which was not mentioned. Since he did not know the Special Rapporteur's intentions in that matter, he was not at the moment in a position to state an opinion on the question of the determination of public property.

41. With regard to the practice concerning Turkey, article 60 of the Treaty of Lausanne[2] mentioned the property of the Ottoman Empire, but without defining it, and simply referred to the municipal law of the Ottoman Empire. Again, when Turkey had entered into negotiations with France, the mandatory Power for Syria, over boundary questions, the items of public property affected had each been mentioned individually, without any definition being given.

42. It was therefore open to question whether a provision should be drafted to facilitate the determination of public property. Personally, he thought that an attempt should be made, not to define public property, but to determine it—a matter on which there seemed to be fewer differences of opinion. That was the only possible method, because public property could not be defined in international law, and it was in fact the method which the Special Rapporteur had adopted in drafting article 5. In view of the difficulties to which the article gave rise at the present stage, it would be better to consider that, for the time being, it reflected the opinion of the Commission as a whole.

43. There were two general comments he wished to make on article 5. Referring to Mr. Reuter's remarks at the previous meeting,[3] he said that if the question of the transfer of territory was not dealt with in the draft, article 5 would have to be reworded. For that reason, he could not at present endorse article 5 or either of the two previous versions proposed by the Special Rapporteur (A/CN.4/267, para. (3) of the commentary to art. 5).

44. With regard to the difficulties raised by the last phrase of article 5, which referred to property, rights and interests "which are necessary for the exercise of sovereignty by the successor State", he was not opposed to the principle of viability or to the right of States to dispose of their natural resources. Nevertheless, he wondered whether the question Mr. Reuter had raised in that connexion was not alien to the subject under consideration. The phrase in question should perhaps be separated from the rest of the article.

45. As to drafting, article 5 in fact covered only the determination of public property and the words "Definition and" should therefore be deleted from the title.

46. In version A, it should be made clear that the property must be public in character, because there could also be semi-public property.

47. If the Commission decided in favour of article 5, it could insert a reference to the law of the territory concerned. He was not opposed to the use of the term "sovereignty", since it served to indicate the nature of the functions performed by the successor State in the territory. On the other hand, the concept of "private

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[2] League of Nations, *Treaty Series*, vol. XXVIII, p. 53.

[3] See para. 28.

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,[4] 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.[5] In view of recent developments, however, that did not seem to be the happiest precedent to follow.

The meeting rose at 6 p.m.

[4] See 1220th meeting, para. 35.

[5] United Nations, *Treaty Series*, vol. 450, p. 82, article 1.

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.