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Summary record of the 1229th meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1973, vol. I

1229th MEETING

Monday, 18 June 1973, at 3.15 p.m.

Chairman: Mr. Milan BARTOŠ
later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, 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 7 (Date of transfer of public property) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 7 in the Special Rapporteur's sixth report (A/CN.4/267).

2. Mr. TAMMES said that if the main purpose of rules on succession to public property was to contribute to the certainty of international law and provide a basis for making a choice in the interests of a predecessor State, a successor State, or some other entity, in order to prevent disputes, article 7 in its present form would serve that purpose well. It provided a residuary rule for application in the absence of devolution agreements. Where no date had been stipulated, it would be natural to assume that the date of the change of sovereignty would be the date of entry into force of the relevant agreement, rather than the date of its ratification as specified in the present draft. He preferred the principle stated in the Special Rapporteur's fourth report, that "Where no time is expressly laid down in an agreement, the transfer is legally effected as soon as the agreement enters into force by virtue of the law of treaties, i.e. generally from the date on which the instrument is ratified".[1]

3. He agreed with the underlying idea of sub-paragraph (ii). If there was no agreement on the effective date, the only device available to international law was that of effectiveness—in the present case, the effective replacement of one sovereignty by another. There was a generally recognized exception to the principle of effectiveness: the effective situation must not be contrary to modern international law. However, retroactivity of sovereignty could only apply to future cases, which would be illegal under the United Nations Charter and to which, consequently, the draft articles would not apply, as provided in article 2. The phrase "and is deemed to be retroactive to the date of its termination", apart from lacking precision, had no place in the present articles.

4. Mr. KEARNEY said he agreed that the reference to retroactivity of sovereignty raised problems, though they were more practical than legal. It would be difficult to determine on what basis sovereignty deemed to be retroactive would have been restored. He assumed that the restoration would relate to a situation in which a pre-existing State had been over-run and placed under the sovereignty of another State, but there could also be an amicable union of States which subsequently agreed to separate. It was also unclear whether the return of public property was to be retroactive to the time of the loss of the original sovereignty. If so, what were the consequences of such retroactivity? He assumed that the return of public property which had not been in existence at the time of the loss of the original sovereignty would be retroactive, not to the date of the loss of sovereignty, but to the date when the property had been acquired by the intervening sovereignty. Or perhaps there would not be any retroactivity in such a case. It might be desirable not to deal with the matter in article 7. During its discussion of the draft articles on succession of States in respect of treaties, the Commission had decided not to include a reference to the problem of States which were regaining rather than acquiring independence, despite certain decisions of the International Court of Justice, for example, in the *Case concerning rights of nationals of the United States of America in Morocco*,[2] which would have warranted the inclusion of such a reference. The largely practical considerations which had prompted the exclusion of the reference were perhaps equally relevant in the present case.

5. If the word "otherwise" in the phrase "by treaty or otherwise" was intended to include any possible act, statement or other manifestation of intent, that should be made clear. If it was not so intended, the phrase was redundant and should be deleted, as it might add to the problems of interpretation. He also had doubts about the relationship between the whole phrase "where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time" and the phrase in sub-paragraph (*b*) "reference is made in an agreement to the said effective date". There seemed to be no real difference between a clause referring to a particular effective date and one which provided for the transfer of property upon the lapse of a fixed period of time. The use of change of sovereignty as a touchstone, implicit in the introductory clause, would depend on the definition given to succession. It might therefore be necessary to postpone judgement on that point until agreement had been reached on the meaning of succession.

6. The term "*de jure*" in sub-paragraph (*a*) appeared to be used as a limitation. Was it only through the ratification—or entry into force, which Mr. Tammes quite rightly preferred—of devolution agreements that change of sovereignty occurred *de jure*, or was it the transfer of property which occurred *de jure* on the basis of the entry

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[1] See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 171, document A/CN.4/247 and Add.1, part two, para. (8) of the commentary to article 2.

[2] *I.C.J. Reports 1952*, p. 176.

into force of such agreements? Was *de jure* validity limited to the case of the entry into force of devolution agreements? If that was what was meant, it was too limited a concept. There could be *de jure* succession in other ways than through devolution agreements. It was therefore unnecessary to refer specifically to devolution agreements, unless the term was given a very broad definition. The meaning of the word "effectively" in subparagraph (*b*) was also unclear. Mr. Tammes had interpreted it as meaning the effective replacement of one sovereignty by another, but the term was susceptible of different interpretations. For example, it could be interpreted as meaning that what was required was some effective act of transfer of particular items of property between the predecessor State and the successor State. That point should be clarified.

7. Mr. SETTE CÂMARA said that article 7 was particularly important because, as pointed out by the Special Rapporteur, in the last paragraph of his commentary, "the obligations imposed on the predecessor State by international law and codified in the present articles are independent of the existence or validity of treaties." In that context, residuary rules on the date of succession to public property were most necessary.

8. Article 7 was closely related to the problem of the definition of succession. If the definition given in article 2, paragraph 1 (*b*), of the draft articles on succession of States in respect of treaties was chosen for the present draft, it would be logical also to adopt the definition of the date of succession given in article 2, paragraph 1 (*e*).[3] That would avoid many problems.

9. He agreed, in general, with the comments made by Mr. Tammes and Mr. Kearney about the saving clause, which had clearly been drafted with cases of annexation and occupation by force in mind. In cases such as those of Ethiopia, Albania, and Poland, no one would dispute the principle of retroactivity of sovereignty when it was restored; the property was considered never to have ceased to be subject to the exercise of the restored sovereignty, though serious practical problems had arisen from that solution and had been treated differently by different tribunals. A recent example was the re-establishment of relations between the Federal Republic of Germany and Czechoslovakia, one of the conditions for which had been that the Munich Agreement be treated as non-existent. The situation was quite different where the restoration of sovereignty was the result of the dissolution of a union which States had entered into by mutual consent. The principle of retroactivity itself was legitimate, but had no place in the present draft. Article 7 should be so drafted as to dispel any doubts that might arise on that point.

10. He agreed with Mr. Kearney that change of sovereignty might occur *de jure* in other ways than by the ratification of devolution agreements, in cases of succession not resulting from decolonization. He also agreed with Mr. Tammes that it would be better to refer to the entry into force of such agreements, rather than to their ratification. For all those reasons, a general formula similar to the one adopted in the draft articles on succession of States in respect of treaties would be more appropriate than the text now proposed by the Special Rapporteur.

11. Mr. YASSEEN said that the principle of the retroactivity of restored sovereignty was indisputable. Sovereignty was sometimes temporarily eclipsed for reasons which were incompatible with the international legal order. That was the case when a State was attacked in violation of the existing rules against the use of force. To recognize a situation resulting from such an attack would amount to denying the fundamental principles of the international legal order. The unduly rigid effects of the rule of retroactivity of sovereignty on the transfer of public property could nevertheless be mitigated by an agreement or by any other means.

12. The date of transfer of public property could only be that of the *de jure* or effective change of sovereignty. When the change of sovereignty occurred *de jure*, the date was that of the entry into force, not of the ratification, of the devolution agreement, as Mr. Tammes had pointed out. The expression "change of sovereignty" was correct, but its precise meaning would depend on how the Commission finally defined the expression "date of the succession of States".

13. In conclusion, he hoped that the word "simply" would be deleted from article 7.

14. Mr. HAMBRO said that a provision along the lines of article 7 was clearly necessary, but he had serious doubts about the reference to the retroactivity of sovereignty.

15. It was difficult to incorporate such a principle satisfactorily in a draft article. The historical importance of the principle was obvious, but it was of such a special and extraordinary character that it should not be necessary to include it in a draft convention, especially at the beginning of the article under consideration.

16. It was always difficult and dangerous to accept such a principle. Serious difficulties could arise if attempts were made to recreate, with retroactive effect, a sovereignty lost long ago, especially when the change of sovereignty had been recognized by third States. He was aware of the political importance and justice of the principle, but the principle of the effectiveness of international law must also be borne in mind. The re-opening of an issue of sovereignty might violate that principle of effectiveness. The disappearance of sovereignty could be legal, for example in the case of the voluntary fusion of States. If those States subsequently decided to dissolve their union, that was perfectly admissible, but it would be wrong to make such a dissolution retroactive. The disappearance of sovereignty resulting from an illegal act, however, should not be recognized, and it would be right to recognize the rebirth of such sovereignty retroactively.

17. The draft was based on the assumption that changes in sovereignty were effected legally and not in violation of the United Nations Charter or of fundamental principles of international law. The articles would be more readily acceptable if the principle of the retroactivity of restored sovereignty were not incorporated

[3] See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter II, section C.

in them. It would be better for the Commission to state in its report that it had discussed the possibility of incorporating that principle and had reached certain conclusions.

18. Mr. AGO said that article 7 should not concern change of sovereignty, but only the transfer of public property in cases of change of sovereignty. The Special Rapporteur seemed to have allowed himself to be drawn into dealing also with change of sovereignty and the conditions under which it took place.

19. With regard to the saving clause relating to the restoration of sovereignty, he acknowledged that it was sometimes necessary in specific cases, for reasons of "international morality", to accept the fiction of a restoration of sovereignty. But if the situation were as simple as it appeared from the proposed article, the saving clause would be unnecessary. For if public property which had passed temporarily under the control of another sovereignty subsequently reverted unchanged to the original sovereignty, as if it had never changed hands, there was no transfer of public property, just as there was no change of sovereignty.

20. In practice, however, *de facto* sovereignty might be exercised for a long time, during which the *de facto* sovereign inevitably created new public property, for example, by building. In such a case it could not be considered that there was no transfer of public property, even though it was assumed that there had been only a *de facto* transfer of sovereignty. The fate of the property created by the *de facto* sovereign should be the same as that prescribed for public property in the event of a transfer of sovereignty, otherwise it would remain in the hands of the State which had wrongfully exercised sovereignty.

21. The two sub-paragraphs of article 7 dealt with the manner in which the change of sovereignty took place. There, he thought the Special Rapporteur had unnecessarily given too much prominence to the conditions under which the change occurred. There was no need to go into that aspect of the problem; but if it did so, the article should bring out the difference between the transfer of property in internal law and the transfer of sovereignty in international law. In internal civil law a contract gave title and transfers of property were based on contract; in international law a treaty only created the obligation to transfer, and the change of sovereignty took place only at the moment of effective transfer.

22. He therefore suggested that the principle should be stated more concisely, and be to the effect that unless provided for by treaty, the transfer of public property occurred at the time of the change of sovereignty, irrespective of the manner in which the change of sovereignty occurred. It was necessary to reserve the case in which the States concerned agreed on a date for the change of sovereignty and, possibly, the transfer of public property, in a special agreement. Moreover, different dates might be fixed for different kinds of property.

23. Mr. RAMANGASOAVINA said he supported the principle that when sovereignty was restored the transfer of public property was retroactive; that principle certainly reflected an idea of justice. However, the period during which sovereignty disappeared or was suspended might be very long, as was shown by the examples given by the Special Rapporteur. Furthermore, after a State had seized a territory by force, it might try to obliterate all trace of the former sovereignty by destroying its property.

24. To take the case of his own country, in 1895, after an armed conflict, the Kingdom of Madagascar had fallen into the hands of the French. Previously, the Kingdom of Madagascar had concluded international treaties with other States and had maintained diplomatic missions abroad. After being a protectorate for a year, Madagascar had become a colonial territory. It was difficult to consider that when it had attained independence 65 years later its sovereignty had been restored. Even if the principle of restoration were accepted in such cases, it would obviously be very difficult to reconstitute the property which had existed at the time of the original sovereignty.

25. It was, perhaps, unnecessary to state expressly the principle that the transfer of public property was retroactive when sovereignty was restored, since that principle reflected an idea of justice. In stating it at the beginning of article 7 the Special Rapporteur seemed, indeed, to have regarded it as an accepted principle of which only a reminder was needed.

26. As to the change of sovereignty and the date of transfer of public property, he agreed that, where there was a devolution agreement, the change of sovereignty occurred *de jure* in accordance with the devolution agreement. In the absence of an agreement, the effective date should apply, as Mr. Tammes had pointed out. Nevertheless, that date was sometimes difficult to determine, for instance, when a State was born as the result of a proclamation by a government in exile or by a government which had appropriated a piece of territory. In the absence of an agreement, public property should be considered to be transferred on the date when the provisional government effectively established its authority or took over part of the territory. The Special Rapporteur had ignored such cases, because he thought it unnecessary to consider them.

27. In the second part of article 7, the Special Rapporteur had deliberately avoided contrasting the terms "*de jure*" and "*de facto*". In fact, the latter term covered the idea of effectiveness, which deserved to be given more prominence, since it should apply both when there was no special agreement between the parties and when the parties could not agree on a date for the transfer of public property.

28. To sum up, he approved of the principles stated in article 7, but would like to see them better formulated and, if possible, expressed in simpler terms. The rule was that the transfer of public property coincided with the change of sovereignty. It was important, however, not to ignore certain special cases.

29. Mr. USHAKOV said he agreed with Mr. Ago that the proposed article 7 dealt with change of sovereignty rather than with the transfer of public property.

30. When it had examined the draft articles on succession of States in respect of treaties, and especially the definition of the term "date of the succession of States",

the Commission had not specified the conditions under which one State replaced another, or the date of that replacement, because those matters were foreign to the subject of succession of States. In article 7, however, the Special Rapporteur had tried to define the concept of change of sovereignty, although it belonged to another branch of international law.

31. With regard to the restoration of sovereignty, he referred to the Special Rapporteur's article 2, entitled "Cases of succession of States covered by the present articles". The draft certainly applied only to contemporary situations, which had arisen since the entry into force of the United Nations Charter; situations which were wrongful and contrary to international law were not covered. He wondered whether sovereignty could be restored after it had terminated quite lawfully. However, such a situation, if it arose, would not come under succession of States. Restoration of the sovereignty of Arab States over those parts of their territory which were now occupied would not constitute a case of succession of States.

32. The Drafting Committee should consider all the hypothetical situations covered by article 7 and redraft it in simpler terms, perhaps on the basis of the definition which the Commission had adopted in 1972 for the expression "date of the succession of States".

33. He even doubted whether it was really opportune to draft a general article on the date of transfer of public property. In the case of fusion of two States the question did not arise, either for the merging States or for third States. It might be better to wait until the whole draft had been considered, to see whether a general article should be drafted on whether each case of succession of States, especially of newly independent States, required different provisions.

Mr. Castañeda took the Chair.

34. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 7 and reply to the comments of members.

35. Mr. BEDJAOUI (Special Rapporteur) said he must first explain that the passage from his report quoted by Mr. Sette Câmara had not been intended as part of the commentary to article 7. Owing to an error, the asterisks in his manuscript which had clearly divided off the last three paragraphs from the rest of the text had not been reproduced. Those three paragraphs merely mentioned some hypotheses which he had considered, but had not put forward in draft articles.

36. Mr. Ushakov doubted whether it was useful to discuss article 7 at present, because examination of the various cases of State succession might subsequently show that the date of transfer of certain public property did not bear out the rule—too general in his opinion—laid down in that article. He himself believed that a general provision was justified nevertheless. Mr. Ushakov had cited the case of fusion of States, in which, he held, there would be no transfer of public property. That was not his own view. A State formed as a result of the fusion or union of two or more other States was legally a separate State from those which composed it. As such, it possessed public property and could decide that some or all of that property was the property which had previously belonged to the States which had united to form it. However, Mr. Ushakov had raised a question of principle which could not be settled immediately. Perhaps the Commission could refer article 7 to the Drafting Committee provisionally, on the understanding that it would work out a less general provision later if necessary.

37. With regard to the date of transfer itself, some members, including Mr. Ago, thought that it should simply be defined as the date of the change of sovereignty. He had feared that such a definition might be criticized as merely defining one thing in terms of another, so he had tried to define the date of change of sovereignty as well, and had accordingly drawn the distinctions contained in article 7. However, he would fall in with the Commission's view if it preferred the simpler formula of defining the date of transfer of public property by the date of the change of sovereignty.

38. As to the question of the restoration of sovereignty—an exceptional occurrence, it was true, but not unknown to history—he had wished to deal with it because, although the problem of retroactivity which it raised was so extremely complex, in both international and internal law, that it constituted an exception in most national legal systems, there had been occasions when the principle of retroactivity had been applied in international relations, mainly on grounds of international morality. He had considered only the case of wrongful termination of sovereignty, not the case of its lawful termination, for instance by a fusion of States; that was to avoid giving the impression that international law could implicitly recognize the effects of a situation whose wrongfulness, in his opinion, could not be obliterated by the passage of time. He had confined himself to an existing situation by using the words "deemed to be retroactive to the date of its termination".

39. Mr. Kearney had asked on what basis restored sovereignty would be considered retroactive. The basis might be a treaty; for example, the Treaty of Peace with Italy, of 10 February 1947,[4] or an express manifestation of the will of the successor State, as in the case of Poland in 1918.

40. It was for the Commission to decide whether to disregard facts of that kind, or to seek a more flexible formula which took account of the passage of time, since sovereignty might not be restored until many years had elapsed and it was certainly difficult to return property in its original condition.

41. Several members had expressed the view that there was no need to reserve the case of restoration of sovereignty, because article 2 specified that the draft articles applied only to the effects of a succession occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations, and that it would therefore be sufficient to mention the case of wrongfully terminated sovereignty in the commentary. If that view was endorsed by the Commission and the Drafting Committee he would accept it.

[4] United Nations, *Treaty Series*, vol. 49, p. 126.

42. In reply to Mr. Ushakov's question whether sovereignty could be restored if it had terminated lawfully, he cited the case of Poland, which, while taking the view in 1918 that there had been a succession of States, had applied the *tabula rasa* principle and held that it did not derive its rights from the predecessor State.

43. Mr. Kearney had suggested that it might be useful to include in article 7 the notion of a manifestation of intent or act of the predecessor State, to show that a change of sovereignty could be effected by other means than a devolution agreement. He agreed and would ask the Drafting Committee to take that point into account. In certain cases of decolonization, for instance, there might be some kind of charter granted by the former metropolitan Power.

44. He saw no objection to deleting the word "simply" and replacing the word "ratification" by the words "entry into force".

45. He suggested that article 7 might now be referred to the Drafting Committee.

46. Mr. RYBAKOV (Secretary to the Commission) said the Secretariat regretted the omission of the asterisks from the Special Rapporteur's report, which had been unintentional and without the approval of the Codification Division.

47. The CHAIRMAN said that, if there were no objections, article 7 would be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLE 8

48. *Article 8*

General treatment of public property according to ownership

All other conditions established by the present articles being fulfilled,

(*a*) Public or private property of the predecessor State shall pass within the patrimony of the successor State;

(*b*) Public property of authorities or bodies other than States shall pass within the juridical order of the successor State;

(*c*) Property of the territory affected by the change of sovereignty shall pass within the juridical order of the successor State.

49. The CHAIRMAN invited the Special Rapporteur to introduce article 8.

50. Mr. BEDJAOUI (Special Rapporteur) said that the sole purpose of article 8 was to distinguish, in regard to their treatment, between State property and property which, although public, did not belong to the State.

51. In the case of State property, the situation was simple: it passed within the patrimony of the successor State. He acknowledged that the terminology would have to be changed, because not all legal systems regarded the State as owning a patrimony and in all probability the notion of patrimony was not recognized by international law. With regard to public property of authorities or bodies other than States and property of the territory, it remained the property of those entities, but passed from the juridical order of the predecessor State into that of the successor State, for purposes of international protection, for example.

52. Article 8, which did not indicate the conditions of transfer, was not a substantive article. It was merely intended to show the difference between the right of ownership and the juridical order. If the Commission thought the article might raise more problems than it solved, he would not press for its retention.

53. In addition, in the light of the discussions held so far, he intended to suggest to the Drafting Committee that the definition of public property, in article 5, be confined to State property, and that public property belonging to authorities, public establishments and so forth should be provisionally left aside. If such a definition were adopted, it would be bound to affect article 8. In the interests of consistency, the Commission should likewise define public debts as being exclusively debts of the State; that would relieve it of the need to consider a whole range of problems to which the international community devoted much attention. In point of fact, public debts were mainly the debts of public establishments, public bodies, public corporations and so on, and rarely debts of the State as such. But perhaps the Commission could later extend its study to public property and public debts other than State property and debts.

54. The CHAIRMAN asked the Special Rapporteur to explain why he now proposed that the notion of "public property" should be replaced by that of "property of the State".

55. Mr. BEDJAOUI (Special Rapporteur) said that the discussions had shown him that it would be very difficult to deal with all public property at the same time and that it might be more useful and more reasonable to proceed by categories, beginning with State property. If the Commission succeeded in working out a certain number of rules of international law concerning such property, it would probably then be able to proceed to consider other public property. The same applied to public debts. For his part, he was prepared either to confine himself for the time being to a single category of public property—State property—or to proceed with the study of all public property as he had originally intended. He would do whatever the Commission wished.[6]

The meeting rose at 5.50 p.m.

[5] For resumption of the discussion see 1239th meeting, para. 18.

[6] For resumption of the discussion see 1231st meeting, para. 66.

1230th MEETING

Wednesday, 20 June 1973, at 11.50 a.m.

Chairman: Mr. Jorge CASTAÑEDA

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