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Summary record of the 1320th meeting

Topic:

Succession of States in respect of matters other than treaties

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that such a rule was necessary. It seemed, however, that the order of articles 8 and 9 should be reversed: the provision that State property passed to the successor State should come first, and be followed by a provision specifying how the passing was to take place.

33. The *raison d'être* of article 9 was the phrase "State property necessary for the exercise of sovereignty over the territory to which the succession of States relates". The word "territory" was important, first because there was no succession if no territory passed from one sovereignty to another, and secondly because it served to localize the property subject to succession. It was essential to determine whether the word "sovereignty" meant the exercise of sovereignty within the territory concerned or the sovereignty of the territory itself. Colonies had formerly been considered as an integral part of the metropolitan country, but the modern view, confirmed by United Nations declarations, was that the colonial Power merely administered a territory and that sovereignty was vested in the territory itself and, by extension, in its inhabitants.

34. It was important that the word "sovereignty" should be retained in the article, for sovereignty constituted the reason why a State existed and why it had property, some property being virtually essential for the manifestation of sovereignty. As the Special Rapporteur had clearly explained, property so closely linked to the exercise of sovereign power could not be left in the hands of the predecessor State; if it were, there would be no succession, since there would be no transfer of sovereignty. The Commission itself had defined "succession" as "the replacement of one State by another in the responsibility for the international relations of territory". [12]

35. With regard to the amended text proposed by Mr. Hambro, Mr. Ago had suggested that the expression "performance of State tasks" might be replaced by a more precise phrase such as "the exercise of governmental authority". [13] In addition, Mr. Ustor had pointed out that a State might acquire property which was neither necessary nor used for the performance of State tasks, but which it would be reasonable to transfer. [14] Noting that the title of draft article 9 spoke of the passing of "all" State property, but that the word "all" did not appear in the body of the article, he reiterated his view that all State property connected with the exercise of governmental authority in the territory to which the succession related, and belonging to the predecessor State, should pass to the successor State. That being so, he found the amendment proposed by Mr. Elias both succinct and essentially correct, particularly in view of its reference to the definition of State property given in article 5.

36. Mr. HAMBRO said that apparently he had been unclear in his statement at the previous meeting, [15] for he had been misunderstood. He had neither said that sovereignty did not exist, nor tried to abolish the concept. What he had said—and his view had been confirmed by subsequent speakers—was that the concept of sovereignty was so disputed and so vague that it could not possibly be used as a frame of reference for legal rules. He still held that view.

37. Furthermore, the criticism that the phrase "used for the performance of State tasks" was as vague as the words it was designed to replace was unjustified, for in making his proposal he had added that the property in question must be "necessary" for the performance of State tasks, an idea that should be understood in the light of the internal law of the State concerned. There could be no once-and-for-all definition of the State property concerned, since the situation varied according to the nature of the State.

The meeting rose at 12.55 p.m.

[12] See document A/9610/Rev.1, chapter II, section D, article 2.

[13] See previous meeting, para. 45.

[14] *Ibid.*, para. 28.

[15] *Ibid.*, paras. 13-16.

1320th MEETING

Monday, 2 June 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/282) [1]

[Item 2 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (General principle of the passing of all State property) [2] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 9.

2. Mr. QUENTIN-BAXTER said he was struck by the importance assumed by the situation of sovereignty over a piece of territory. Where there were no special circumstances and where no special rules applied, the new sovereign in the territory to which the succession of States related would succeed to the State property situated in that territory. That would be so in all cases, ranging from one extreme to the other. The first extreme was that of an orderly devolution, where a newly independent State emerged from a slow and disciplined process of development of autonomous institutions; in cases of that kind, the vast preponderance of State property, expecially corporeal property, in the territory to which the succession related, would pass to the new sovereign. At the other extreme, there were the cases of emergence of a new

[1] *Yearbook . . . 1974*, vol. II, Part One, pp. 91-115.

[2] For text see 1318th meeting, para. 7.

international personality as a result of internal dissension; there was no agreement and no good will, and all matters had to be settled after the event, but even in those cases State property situated in the territory would normally fall within the patrimony of the new sovereign. Article 9 thus covered cases in which might and right were allied, and the rule of international law stated in the article reflected reality.

3. It would therefore be perfectly logical to adopt the text of article 9 proposed by the Special Rapporteur, after adding the necessary qualifications. The first proviso would be that the property must be situated in the territory to which the succession related. The second would relate to agreements or decisions of the parties. The third would make the rule in article 9 subject to the special rules in subsequent articles. Lastly, it would have to be made clear that the State property covered by article 9 was State property as defined in article 5.

4. The rule in article 9 would apply to the simple core of cases that solved themselves; those which caused anxiety and which complicated the subject would need to be settled by special agreements entered into by the predecessor State and the successor State. It should be the Commission's aim to encourage such understandings between the States concerned, bearing in mind that the making of special agreements would be influenced to some extent by the kind of residuary rule embodied in article 9. That rule would indicate what was reasonable and provide general guidance; hence every effort should be made to narrow the range of the differences revealed by the discussion.

5. A rule that the new sovereign had a prior right to State property in the territory to which the succession related would not imply that the new State might not have rights in State property outside that territory. That thought strengthened his doubts about the position in the draft of the residuary rule in article 9. The value of the Commission's draft, both in its own right and as an inspiration for special agreements, would depend on the manner in which it would deal with the various types of special case covered by section 2. Only after the Commission had dealt with all the special cases would it be able to reach a definite conclusion on the general rule in article 9. As he saw it, the formulation of article 9 at the present stage was not so important as the question whether it would lead to an orderly discussion of the special cases.

6. The Commission should take full advantage of the definition of State property in article 5, on which it had already agreed. Article 9 was concerned solely with the rights and interests that arose because the internal law of the predecessor State made that State capable of owning property. Article 9 should therefore deal only with property owned by the predecessor State according to its internal law. In that connexion, he noted that the Special Rapporteur would shortly be introducing a redraft of article 10 without the former paragraph 3 dealing with the right of eminent domain of the State over public property and natural resources in its territory. That reformulation would help to solve the conceptual problems involved and facilitate the Commission's work.

7. Mr. TAMMES said that in 1973, during the discussion on the former article 9 (now article 8), he had stated his preference for the test of sovereignty in the present context. [3] The interesting debate now proceeding had not given any promise of a better criterion. The test of sovereignty was used in international law for the purpose of delimiting acts of State, for example. It had been long used in legal documents to indicate appurtenances to the public domain. Sovereignty was referred to for the same purposes in specialized works on State succession: O'Connell, for instance, spoke of "such property as pertains to sovereignty" passing to the successor State *ipso jure*. [4] The Commission was therefore likely to reach the conclusion that some reference to sovereignty was necessary in the formulation of article 9 and the following articles.

8. Apart from that, the question arose whether a general article on the lines of artilce 9 was really necessary, and Mr. Elias had proposed that it should be replaced by a simple reference to article 5, which contained a definition of State property. [5] He (Mr. Tammes) was not certain that such a reference would be sufficient. There were cases in which property that was not State property under the internal law of the predecessor State became State property by the very fact of the change of sovereignty.

9. An interesting example was the case of State archives and libraries, which was covered by four articles in section 2 of the draft (A/CN.4/282). Sometimes those documents and collections were placed in the charge of foundations in the predecessor State and hence were not State property according to its internal law; often the purpose of the foundation was, precisely, to detach the property from the State. The collections in question might, however, be essential to the successor State because they went back to the roots of its cultural history. An example was the 1600 invaluable Icelandic parchments brought to Copenhagen during the period of union between Iceland and Denmark and bequeathed in perpetuity to a university foundation. Upon the dissolution of the union, pursuant to a decision by the Danish High Court, those documents had been restored to the successor State. They were not State property, but had nevertheless passed to the successor State by the very fact of its becoming sovereign. That example was mentioned in several passages in the Special Rapporteur's reports, notably in paragraph (3) of the commentary to article 22 of his seventh report (A/CN.4/282, chapter IV). Comparable cases were pending between the Netherlands and Indonesia; they would have to be settled, and had been partly settled already, as a matter of principle and without litigation.

10. In the light of those examples, he preferred the Special Rapporteur's original and broader wording "Property appertaining to sovereignty over the territory" [6] to the latest, more utilitarian formula "State property necessary for the exercise of sovereignty over the territory".

[3] *Yearbook ... 1973*, vol. I, p. 154, para. 8.

[4] D. P. O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. I, pp. 199-200.

[5] See 1318th meeting, para. 36.

[6] *Yearbook ... 1970*, vol. II, p. 143, article 2.

Subject to that preference, he believed that article 9 would be a useful supplement to article 5, particularly if it started with the word "Property" instead of "State property". That would make it clear that sovereignty was an autonomous source of conversion of property into State property, quite apart from its characterization as such by the predecessor State.

11. Mr. BILGE said that the difficulties inherent in the subject entrusted to the Special Rapporteur were particularly evident in article 9. All the members of the Commission seemed to be in agreement on the principle stated in that provision, but not on its formulation. The differences of opinion revolved round three questions: Should the property passing to the successor State be differentiated? Should each type of succession be taken into account? Should the article be restricted to property situated in the territory affected by the succession?

12. Neither international jurisprudence and doctrine nor the practice of States was of much help in answering those questions, as they did not provide uniform solutions. The practice of one and the same State might change. For example, after the First World War Turkey, as heir to the Ottoman Empire, had surrendered public and private property without payment by virtue of article 60 of the Lausanne Peace Treaty; [7] whereas in 1939, at the time of the retrocession to Turkey of the Sanjak of Alexandretta, Turkey had paid an aggregate compensation in respect of the property inherited from Syria and France. Furthermore, the Commission should take into account the provisions of the articles already considered: not only article 5, which defined "State property", but also article 6, which provided for the extinction of the rights of the predecessor State and the arising of the rights of the successor State, and article 8, which laid down the principle of the passing of State property without compensation.

13. The first of the three questions he had mentioned had been deliberately avoided by the Special Rapporteur, because all legal systems did not distinguish between property in the public domain and property in the private domain. That was why he had used the expression "State property necessary for the exercise of sovereignty". In his commentary to article 9 the Special Rapporteur indicated that the article was intended to supplement article 8 which, as adopted by the Commission, did not provide the key to automatic identification of the State property which actually passed to the successor State. The property in question was that used by the State for a public service or property which served the general interest, and it was, precisely, to the use made of the property, rather than to the notion of sovereignty, that article 9 should refer. Of all the criteria suggested, that seemed to be the most appropriate.

14. The second question raised even greater difficulties. It would, indeed, be difficult to draft a rule applicable to all types of succession, especially where the case of total disappearance of the predecessor State was concerned.

15. As to the question whether article 9 should be restricted to property situated in the territory to which the succession of States related, he was not convinced that such a limitation would provide an equitable solution in all cases. Perhaps the principle should be broadened so as to apply to cases like that of a predecessor State that had inherited some private property under civil or public law, which might be either in the territory affected by the succession or outside that territory.

16. In view of the drafting difficulties which article 9 involved, no decision should be taken on it until the other draft articles had been discussed.

17. The CHAIRMAN, speaking as a member of the Commission, said that the question of State property was very complicated, because it was directly connected with the social, economic and political life of the State. It was difficult, for that reason, to formulate rules satisfactory for all States.

18. Like other members of the Commission he thought that article 9 should be retained. The issues mentioned during the discussion were terminological, the most crucial one being the use of the term "sovereignty". The notion of sovereignty was important to all States, particularly young States. As a citizen of a small country, he shared the feelings to which that notion gave rise, which were intimately associated with the very idea of independence. Over the years, however, experience had shown that the best safeguard for small countries was the rule of law under the United Nations Charter. Hence the Commission should stress the new concept of the sovereign equality of States, which meant that all States were equal before the law and before justice. That concept was a better shield than the notion of sovereignty by itself, for in defence of its sovereignty, a strong country could use its strength to override the sovereignty of a small country. It was only the rule of law under the United Nations Charter, so staunchly defended by President Tito of Yugoslavia and the other leaders of the non-aligned world, which could afford adequate protection to all.

19. The old theory of sovereignty, as expounded by European jurists from the sixteenth century onwards, was essentially associated with the idea of the absolute power of the individual sovereign, who admitted no limitation of his sovereignty. In the seventeenth century, some European thinkers had gone so far as to proclaim the sovereign power of kings and princes over religion. It was in those circumstances that sovereignty had emerged as the first principle of international law in Europe. It had not, however, remained totally unchallenged and it had been the merit of Grotius to proclaim the freedom of the high seas, in opposition to Selden who had claimed that the open seas were subject to sovereignty.

20. His own views on the question of sovereignty had undergone a change in 1949 when, as a member of the Sixth Committee of the General Assembly, he had been privileged to witness the introduction, by the late Manley O. Hudson, of the first report of the International Law Commission, containing the Draft Declaration on Rights and Duties of States. [8] Article 14 of that Declaration affirmed the duty of every State "to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State

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

[8] *Yearbook ... 1949*, p. 287.

is subject to the supremacy of international law". The preamble to the Declaration also referred to the supremacy of international law.

21. From that time on, he had been convinced of the vital importance of the rule of the sovereign equality of States, under which all States were equal before the law and before justice. Absolute sovereignty had given way to the rule of international law, and he accordingly believed that there was no place in the article under discussion for the phrase "necessary for the exercise of sovereignty". He welcomed the proposals by Mr. Hambro and Mr. Elias, which retained the essential idea of article 9, but without that phrase.

22. Mr. BEDJAOUI (Special Rapporteur), replying to the comments made during the discussion on article 9, said that although that provision raised objective difficulties inherent in the subject, it concealed no pitfalls. Furthermore, he had tried to establish a principle valid for all cases of succession, and not to treat the problem from the point of view of decolonization only, as some members of the Commission might have supposed he would.

23. As to the question of method raised by Mr. Ushakov at the previous meeting, [9] he had preferred to proceed from the general to the particular. Perhaps it was too soon to establish a general rule applicable to all cases of succession, but the principle of the passing of State property from the predecessor State to the successor State was so well established that it was important to recognize it from the outset. The Permanent Court of International Justice had regarded it as a generally accepted principle of law, [10] and both writers and States considered it to be unchallenged. As Mr. Quentin-Baxter had pointed out, article 9 really stated no more than an obvious rule: State property could not remain under the authority of the predecessor State. If, in certain cases and for certain types of State succession, the principle had to be moderated, the Commission might later find it necessary to amend article 9.

24. Referring to the statement made at the previous meeting by Mr. Šahović, [11] who believed that the passing of property was only a consequence of the succession of States and doubted the need for a general rule on the subject, he said that succession created new legal situations which ought to be studied, and which had effects on the property, rights and interests of States. Article 5 only contained a definition; it did not settle the question.

25. When drafting article 9 he had considered whether it should be restricted to property in the territory to which the succession related, or extend to property outside the territory; he had also considered whether the article should be made applicable to all State property, like article 8. Since practice was not uniform and only some systems of law had recourse to the notions of the public domain and the private domain, he had preferred to restrict article 9 to State property "necessary for the exercise of sovereignty". The principle stated in article 9 was clearly applicable to that class of property, but as one moved further away from it the principle became increasingly vague. The whole difficulty arose from possible references to internal law; for in internal law there was a great variety of political and philosophical ideas which affected the concept of ownership. Hence it was important to refer to internal law as little as possible. To refer indiscriminately to State property which belonged to the predecessor State, as Mr. Elias had proposed, did not solve the problem, since the passing of property other than that necessary for the exercise of sovereignty occurred frequently, but not always.

26. As to the concept of sovereignty, he was not surprised that many members of the Commission had rejected it, since he himself had said in his commentary that it was only for want of a better expression that he had used that term. He thought, however, that the fears expressed by some members of the Commission were exaggerated. If the term "sovereignty" had to be dropped, it might be replaced by the expression "governmental authority", as suggested by Mr. Ago, [12] or by a reference to the purpose for which the property was used, as suggested by Mr. Bilge.

27. All the members of the Commission seemed to think that a distinction between the public domain and the private domain should not be introduced into article 9. Many of them had referred to the links between article 5 and article 9; but the only link between those two articles was the fact that article 5 contained a definition and article 9 an application of that definition. That did not justify the conclusion that one article was more useful than the other, or that one could replace the other. In particular, article 5 could not be amended in such a way as to make article 9 unnecessary. On the other hand, the Commission might consider drafting other articles referring to State property other than that necessary for the exercise of sovereignty. Perhaps the misunderstanding was due to the fact that the title of article 9, which would have to be amended, was not in harmony with the content of the article.

28. The question of the law applicable seemed to be already settled by article 5, which defined "State property" by reference to the internal law of the predecessor State. When the Commission had opted for internal law, he had stressed that the practice of States was by no means uniform. [13] Referring to the comments made by Mr. Kearney, [14] he said that it was certainly the internal law of the predecessor State which made it possible to determine what property passed to the successor State under the conditions laid down in article 9, even if the successor State established a different political régime. The principle mentioned by Mr. Ustor, that no one could transfer a greater right than he had, was in fact applied in article 9: the predecessor State could give only that property which, under its law, was State property to the successor State.

29. In reply to the members of the Commission who had questioned whether there was any State property which was not necessary for the exercise of sovereignty, he said

[9] Para. 6.

[10] *P.C.I.J.* Series A/B, No. 61, p. 237.

[11] Paras. 20-23.

[12] See 1318th meeting, para. 45.

[13] *Yearbook ... 1973*, vol. I, p. 150, para. 55 *et seq.*

[14] See 1318th meeting, paras. 17-21.

that property which, under certain legal systems, belonged to the private domain of the State, came into that class. It was to be found, for example, where a State engaged in commercial activities. It was precisely because of the existence of that class of property that he had used the expression "State property necessary for the exercise of sovereignty".

30. So far as the location of the State property was concerned, article 9 should relate essentially to the property within the territory affected by the succession. That was why he had not mentioned embassies, for example, among the property covered by the article. The treatment of property situated outside the territory in question was the subject of four separate provisions corresponding to the four types of succession, namely articles 15, 19, 23 and 31.

31. The principle stated in article 9 was thus limited, first, by the exclusion of property outside the territory to which the succession related, and secondly, by the fact that it applied only to State property necessary for the exercise of sovereignty, in other words, property considered, in certain legal systems, to be in the public domain. Some members of the Commission would prefer article 9 to deal with all State property, as defined in article 5. Others would like to insert a new provision on State property not covered by article 9. State practice showed that State property used for the exercise of governmental authority always passed to the successor State, without compensation. In that respect, article 9 was consistent with article 8. Other property, which was in the private domain of the State, generally passed to the successor State, sometimes with and sometimes without compensation. It was because of that uncertainty that he had not been able to draft a general rule confirming the passing of all State property without compensation.

32. The practice of States which did not distinguish between the public domain and the private domain seemed, however, to suggest a trend towards the passing of all State property without compensation; hence it had been necessary to restrict the rule in article 9 to property necessary for the exercise of sovereignty or of governmental authority. But as practice seemed close to acknowledging the passing of all State property to the successor State without compensation, he was not in favour of drafting a provision which would enable the successor State to receive the classes of property not covered by article 9, subject to payment of compensation to the predecessor State. That solution would be equivalent to establishing a rule which was applied only occasionally. For the time being it would be better to leave the parties to settle the question as they saw fit.

33. He hoped that the Drafting Committee would find a satisfactory solution taking account of the discussion and of the variants proposed by several members of the Commission.

34. The CHAIRMAN proposed that draft article 9 should be referred to the Drafting Committee.

It was so agreed. [15]

[15] For resumption of the discussion see 1329th meeting, para. 2.

ARTICLE 10

35. The CHAIRMAN invited the Special Rapporteur to introduce draft article 10, which read:

Article 10 [16]

Rights in respect of the authority to grant concessions

1. For the purposes of the present article, the term "concession" means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

2. Irrespective of the type of succession of States, the rights in respect of authority to grant concessions exercised by the predecessor State shall be extinguished and those of the successor State shall come into being in the territory to which the succession of States relates.

36. Mr. BEDJAOUI (Special Rapporteur) said that article 10 gave rise to special difficulties, because several problems converged on it. The first was whether the authority to grant concessions came within the scope of the topic of State succession. By its nature the successor State, like any other State, enjoyed rights in respect of authority to grant concessions as an attribute of its sovereignty. Hence it was open to question whether article 10 was really necessary. A second problem was that of acquired rights: could the concession be maintained by the successor State? The article also raised the problem of the international responsibility of States. And lastly, it might be asked whether the authority to grant concessions did not come within the sphere of State property; for the definition of State property given in article 5 included not only property in the strict sense of the term, but also rights and interests.

37. The definition of the term "concession", given in paragraph 1 of article 10, might later be included in the article on the "Use of terms". That definition was relatively simple. From the standpoint of the beneficiary, a concession could be regarded as an authorization to manage a public service or a right to work mineral deposits; from the standpoint of the conceding State, a concession was the act by which the governmental authority to a private enterprise, or a person in private law, the right to undertake work of a public nature, to exploit natural resources or to manage a public service.

38. He would deal only with the second aspect of that definition, the only one which concerned the Commission. The problem that arose was what happened to the rights of the conceding State in the event of a succession of States. It was a problem relating to State property. True, the right in question was not property: it was a right relating to property—part of the eminent domain of the State. To determine what happened to that right, a concession must be regarded as the juxtaposition of a contract and an act of sovereignty. If the question of the contract of concession and what happened to it in the event of a succession was left aside and only the act of sovereignty was considered, it would be found that no problem of State succession arose. For the successor State, like any other State, was sovereign and, as such, could express its will in the matter of concessions without

[16] Text as revised by the Special Rapporteur.

any restriction but that which might be imposed on it by contemporary international law or which it might freely impose on itself.

39. He wished to remove a possible doubt by pointing out that that right of eminent domain of the State, or the rights of "authority to grant concessions" amounted to an act of sovereignty. In a succession of States, there was never a transfer of sovereignty from the predecessor State to the successor State; there was substitution of one sovereignty—that of the successor State—for another—that of the predecessor State. The successor State which exercised its own sovereignty over the territory, would thus be exercising its own rights in respect of the authority to grant concessions. There was no subrogation of the successor State for the predecessor State in its rights as conceding authority; nor was there any transfer or succession from one to the other. It was by virtue of its own sovereignty that the successor State acquired title to the soil and subsoil of the territory to which the succession of States related. There was no "passing" of the rights of the governmental or conceding authority. Similarly, the soil and subsoil did not pass as though they were movable or immovable property: they constituted the territory which represented the territorial basis necessary for the exercise of the new sovereignty and the rights of the new governmental conceding authority.

40. That being so, it might be asked why article 10 was necessary. United Nations practice showed that for about fifteen years the General Assembly had been referring, in numerous resolutions, to "permanent sovereignty over natural resources". That sovereignty might be defined as the use by the State of the sum total of its powers—its "paramount competence" (*compétence majeure*)—to regulate the status of natural resources. Why, then, speak of "permanent sovereignty over natural resources"? Resources were not an additional attribute of sovereignty, but an object, or subject-matter, over which single and indivisible sovereignty was exercised. And yet the expression "sovereignty over resources" was used, as though it referred to some particular kind of sovereignty. In fact, the word "sovereignty" in that instance meant "ownership" of natural resources, and the words "permanent sovereignty" meant that such sovereignty was inalienable, although to say so might be thought redundant.

41. The Secretary-General of the United Nations had said that "Sovereignty over natural resources is inherent in the quality of statehood and is part and parcel of territorial sovereignty, that is 'the power of a State to exercise supreme authority over all persons and things within its territory'".[17] Thus, to understand the evolution of United Nations doctrine in the last fifteen years, one must not rely only on classical international law, whose conception of sovereignty had been based essentially on political criteria. The Charter defined sovereignty by its political elements, to the exclusion of its economic aspects. It condemned only infringements of political sovereignty: the sanctions it provided were for the breach of political obligations only, economic duties being excluded. Nevertheless, the Charter regarded the problem of underdevelopment and economic backwardness as a major problem of concern to the international community. That showed—and there lay the paradox of the Charter—how great a distance separated the affirmation of the principle of international economic co-operation from its realization through the application of operational rules.

42. An effort was now being made in the United Nations to state the problem of sovereignty in other terms. The traditional conception of sovereignty, disembodied, formal and based on the rules of classical law, was giving way, together with the problem of natural resources, to a new conception based on the principle of national economic independence. That principle had been given a new and very important legal function and had thus been erected into a principle of modern public international law.

43. The new version of article 10 was simpler than the previous one (A/CN.4/282): he had merely taken the consequences of article 6 and applied them to the particular case of rights in respect of the authority to grant concessions. In that context, paragraph 2 stated a self-evident truth. Paragraph 1 defined a concession, both as an act of the public authorities—in accordance with the arbitral award of 3 September 1924 rendered in the *German Reparations case*[18]—and as an act authorizing the management of a public service or the exploitation of a natural resource. It also specified that the concessionnaire could be a person, a private enterprise or a State.

44. Mr. CALLE Y CALLE agreed with the Special Rapporteur that the principle stated in article 10 might not belong specifically to the topic of State succession. The successor State had the right to grant concessions, not by virtue of its succession, but by virtue of its statehood. It was not a question of a right passing from one State to another, but of the replacement by a legal entity, the successor State, of an earlier legal entity, the predecessor State, which had exercised the right to grant concessions. Those concessions lapsed on succession.

45. The article proposed by the Special Rapporteur stated the principle in simple terms. The expression "national jurisdiction", which appeared in paragraph 1, was rather imprecise, however, and in his opinion it would be better simply to say "jurisdiction", "competence" or even "jurisdictional competence".

46. Mr. ELIAS said he shared the Special Rapporteur's doubts about the appropriateness of article 10. Its substance was not of obvious relevance to State succession in respect of rights other than those conferred by treaties. He would comment later on the definition of the term "concession" in paragraph 1, and deal only with paragraph 2, about which he had doubts. Was it intended to regulate the right of the successor State to grant concessions, or to specify whether, and in what circumstances, the concessions granted by the predecessor State remained binding on the successor State? Since the sovereign rights of the successor State obviously included the right

[17] *Yearbook ... 1973*, vol. II, p. 27, para. (13).

[18] *Ibid.*, p. 25, para. (3).

to grant concessions, there was no need for a provision on the passing of the predecessor State's rights in that respect. If draft article 9 [19] was accepted, with or without the amendments suggested by some members, the predecessor State's property, rights and interests, as defined in article 5, would pass to the successor State on succession. Logically, therefore, if there was to be an article on concessions, it should be concerned with the status of the concessions granted by the predecessor State and with the circumstances in which those concessions would or would not be binding on the successor State after succession.

47. Mr. BEDJAOUI (Special Rapporteur) said that, unlike Mr. Elias, he did not think the issue was whether the successor State continued to be bound by concessions granted by its predecessor. That was not the object of article 10 and the other articles submitted in his seventh report (A/CN.4/282), which dealt with the problem of property and not with the obligations which the successor State might assume. The question whether a concession was binding on the successor State was an entirely different one, which, for the time being, the Commission should not consider.

The meeting rose at 5.55 p.m.

[19] For text see 1318th meeting, para. 7.

1321st MEETING

Tuesday, 3 June 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuoruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/282) [1]

[Item 2 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Rights in respect of the authority to grant concessions) [2] *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of draft article 10.

2. Mr. HAMBRO said he agreed with the Special Rapporteur that within its territory the successor State had all rights in the matter of granting concessions, which was part of the ordinary exercise of sovereignty by any independent State. Thus draft article 10 stated what would seem obvious to some lawyers. It had also been rightly pointed out that the article concerned areas of international law other than that of State succession. But a complete, self-sufficient treaty sometimes had to state the obvious or to overlap with rules in other fields of international law. When the whole draft had been completed, the Commission would be in a better position to decide whether such provisions should be included in the final text.

3. A bald statement to the effect that the successor State had rights in regard to the granting of concessions might seem surprising if no reference was made to the more difficult problem of the rights of concessionaires and the possible payment of compensation when concessions were cancelled or replaced by new ones. As the Special Rapporteur had said, that aspect of concessions related, not to State property, but to the obligations of States, and perhaps to State responsibility. Hence the subject-matter of article 10 did not, strictly speaking, belong to the series of draft articles under consideration, and if the other members agreed, the Commission should say so clearly in its commentary.

4. Mr. SETTE CÂMARA also expressed doubt about the need for draft article 10 in its present form, especially in view of the economy with which the articles provisionally adopted by the Commission had been formulated (A/CN.4/282, chapter III). The inclusion of the article might be justified if the Commission adopted the approach to State property originally proposed by the Special Rapporteur, which was based on the distinction between State property "necessary for the exercise of sovereignty" and other classes of State property. Only the former class of State property would then pass automatically and without compensation to the successor State, and a provision would be needed to deal with other classes of property subject to the régime of concession. But that distinction had been discarded, and if article 9 was based, as proposed, on the definition of State property in article 5, all property of the State, even if a concession had been granted on it, would be automatically transferred. Thus the right of eminent domain, which corresponded to the *nuda proprietas* of private law, would pass to the successor State and there would be no need for a specific provision to that effect.

5. As it stood, the draft article raised some difficulties. The definition in paragraph 1—which, if the article was retained, should be moved to article 3, as suggested by the Special Rapporteur—contained ideas that would be misleading, because of the diversity of legal systems and political régimes. The reference to "a private enterprise", for example, would make the provision inapplicable to socialist régimes, which did not recognize private enterprises.

6. The Special Rapporteur had explained in his sixth report why article 10 dealt with the right of the conceding State to grant concessions only as an act of sovereignty and not with the contractual aspects of concessions. [3] The right to grant concessions passed, on succession, with the State property as defined in article 5, from the predecessor State to the successor State. Recognizing the advisability of applying, *mutatis mutandis*, the rules

[1] *Yearbook ... 1974*, vol. II, Part One, pp. 91-115.

[2] For text see previous meeting, para. 35.

[3] See *Yearbook ... 1973*, vol. II, pp. 24-25, para. (2).