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Summary record of the 1393rd meeting

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

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1393rd MEETING

Friday, 18 June 1976, at 10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned)¹

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned)² (concluded)

1. Mr. BEDJAOUÏ (Special Rapporteur), continuing his statement of the previous meeting, pointed out that in assimilating to succession of States in respect of part of territory the case of a non-self-governing territory which was decolonized by integration into a neighbouring State, he had only been following the Commission's instructions. To reduce succession in respect of part of territory to a mere rectification of frontiers or sale of land—for example, to enlarge an airport adjoining a frontier—as Mr. Ushakov proposed,³ would be to reduce that type of succession of States to its simplest form. The peculiarity and also the difficulty of succession in respect of part of territory lay in the fact that the part of the territory transferred might be great or small in size or importance. Of course, if the transfer involved only a few hectares, as in the case of a frontier adjustment, the problems of currency, State funds and archives did not arise. But when a larger piece of territory was transferred those problems arose *in concreto*.

2. Mr. Ushakov had tried to reduce that type of succession of States to a mere frontier adjustment, arguing that the transfer of a relatively large part of a territory was inconceivable, since contemporary law prohibited any forced cession of part of a territory.⁴ That was perfectly true, but a large province might be transferred to a neighbouring State on the basis of self-determination

for its inhabitants. The right of peoples to self-determination must be taken into account and that right did not apply only in cases of decolonization: it applied to all peoples, including those already independent.

3. In the *Western Sahara* case,⁵ Mr. Georges Vedel, representing Morocco before the International Court of Justice, had maintained that if there was a higher principle partaking of *jus cogens*, it was not the right of peoples to self-determination, but decolonization. In his view, decolonization was the higher principle, whereas self-determination was only a means of achieving decolonization. It was perfectly possible for a country to gain independence by means other than self-determination, for since the principle of self-determination was not *jus cogens*, it was not necessary to consult the population. He (Mr. Bedjaoui), representing Algeria before the Court in the same case, had argued the opposite view, maintaining that self-determination was the higher principle and decolonization merely one of its applications. The right of peoples to self-determination pertained not only to colonized States, but also to independent States; that was clear from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁶ which affirmed that all peoples had the right to choose whatever political, economic and social system they wished. The right of peoples to self-determination was now recognized for Non-Self-Governing Territories, but it undoubtedly still needed to be more firmly established for States which were already independent. That right held good for all peoples, whether colonized or independent.

4. Mr. Ushakov had proposed that articles 14 and 15, concerning newly independent States, should simply be deleted, rightly observing that the process of decolonization was practically finished and that in dealing with the problem of newly independent States the Commission would be regulating a type of succession of States that was likely to vanish in the near future. However, if the Commission decided not to consider cases of succession involving newly independent States, it would be jeopardizing the typology of succession it had adopted for succession of States in respect of treaties. Besides, although decolonization had already been largely effected, it had unfortunately not yet been completed. The 1975 report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples⁷ showed that many Non-Self-Governing Territories remained. Admittedly, they included territories of small area—small islands and about a score of archipelagos; but there were also larger territories such as Bermuda, Puerto Rico, Brunei and Belize, to which might be added Gibraltar, the enclaves in northern Morocco which were still under Spanish domination, French

¹ For text, see 1389th meeting, para. 37.

² For text, see 1390th meeting, para. 1.

³ See 1392nd meeting, para. 17.

⁴ See 1390th meeting, para. 18.

⁵ Advisory Opinion of 16 October 1975, *I.C.J. Reports 1975*, p. 12.

⁶ General Assembly resolution 2625 (XXV), annex.

⁷ *Official Records of the General Assembly, Thirtieth Session, Supplement No. 23 (A/10023/Rev.1)*.

Somaliland and Djibouti, and even the Comoros, whose status was not yet quite settled. In Africa, especially, there were large areas in which decolonization had not yet been effected—the western Sahara, where the principle of self-determination had not yet been applied, and above all, Rhodesia and Namibia.

5. It should also be borne in mind that the Commission had received a precise mandate from the General Assembly, which had requested it to study the problem of decolonization and newly independent States. The Assembly had even requested it to examine the problems of succession of States taking into account the interest in them of newly independent States. In particular, in its resolution 1765 (XVII) of 20 November 1962, the Assembly had requested the Commission to study the question of succession of States “with appropriate reference to the views of States which have achieved independence since the Second World War”. The question of succession of States could therefore be said to be of considerable interest to the developing countries, as the Sixth Committee had affirmed at the twenty-second session of the General Assembly.⁸

6. It was true that decolonization was almost completed, which was certainly a cause for rejoicing, but the Commission had not yet codified the part of succession of States relating to matters other than treaties; and that was regrettable, because by doing so, it could have assisted in the process of decolonization. It could still do so, if it made haste to complete the draft articles in preparation. For that aim to be achieved, it must not stop to reconsider problems of the typology of succession, which might mean calling the whole draft in question again.

7. It might also be asked whether in 1970, in 1965—or even in 1960—it had not already been known in advance and with certainty, that the part of succession of States whose codification would be the least durable would be that relating to decolonization. It had already been well known that decolonization would take only a few more years, since the day in October 1960 when Khrushchev had denounced colonialism in resounding terms from the podium of the United Nations, and since the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁹ which called for immediate independence. Thus even before work had begun on the codification of succession of States, it had been known that the part relating to decolonization would age fastest. It must be accepted that it was aging quickly, but not that it would be stillborn.

8. What did “decolonization” mean? If it was taken to mean the end of a political relation of domination, the process was very far advanced. But as he had noted as long ago as 1968, in his first report, the marks of domination were much less quickly erased from economic than from political relations.¹⁰ In that report, he had pointed

out that “political independence is not true independence and that new States often remain under *de facto* domination for long periods of time because their economies are dependent on that of the former metropolitan country, to which they remain firmly bound by the ties of State succession”, adding that “Ultimately, political independence itself often seems an illusion”.¹¹

9. It was thus difficult to deny the potential usefulness of the draft articles under consideration, not only for countries such as Rhodesia and Namibia, which were still dependent, but also for countries such as Angola, Mozambique and Guinea-Bissau, which had already achieved political independence, and even for countries which had attained political independence 15 or 20 years ago, such as Chad, which, although independent for the last 16 years, had only a few weeks previously secured the transfer of all the State property to which it was entitled by succession. It was that idea—namely, that the elimination of past and present colonialism should pave the way for the future development of newly independent States through the application of rules on State succession—that the representative of the Byelorussian Soviet Socialist Republic to the Sixth Committee had meant to emphasize in 1963 in stating that “the twentieth century had been characterized by the elimination of colonialism and the appearance of a large number of new State whose development depended upon the solution adopted in the question of the succession of States”.¹²

10. In the same line of thought, he attached much importance to Mr. Šahović’s remark concerning the purpose of the codification and progressive development of international law.¹³ In his opinion, that task of codification should be viewed as part of a dialectical movement; the codification of succession of States would thus be marked by successive stages in history, in particular the peace treaties concluded after the First and Second World Wars and the period of decolonization.

11. In the draft articles on succession of States in respect of treaties, which were soon to be submitted to a conference of plenipotentiaries, the Commission had dealt very fully with newly independent States. It could not now, in a complementary draft on the same topic of succession of States, wipe newly independent States off the slate, as it were. When it had adopted the draft on succession of States in respect of treaties on second reading, two years ago, had the Commission not already known that decolonization was in process of completion? A few months previously, all the representatives in the Sixth Committee of the General Assembly had mentioned the natural link between the two drafts; some had even said that they should be combined in a single text. The representative of France had said that the study on succession of States in respect of matters other than treaties would complement the study on succession of States in respect of treaties and help

⁸ *Ibid.*, Twenty-second Session, Annexes, agenda item 85, document A/6898, para. 83.

⁹ General Assembly resolution 1514 (XV) of 14 December 1960.

¹⁰ See *Yearbook... 1968*, vol. II, p. 102, document A/CN.4/204, para. 52.

¹¹ *Ibid.*, p. 105, para. 73.

¹² *Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 791st meeting*, para. 11.

¹³ 1391st meeting, para. 40.

to clarify its scope.¹⁴ As Mr. Reuter had observed, the draft articles on succession of States in respect of treaties had even, by the provisions of article 33, paragraph 3, created a new category of newly independent States.¹⁵ If, as Mr. Ushakov had suggested, the Commission deleted all reference to newly independent States from its present draft, it would be calling in question the typology of succession it had adopted in its draft articles on succession of States in respect of treaties, which was bound to have an adverse effect on the future of that draft.

12. With regard to the criterion to be adopted for the passing of State property, the great majority of members of the Commission favoured the requirement of a "direct and necessary link" between the property and the territory, but they had asked him to clarify that idea so as to avoid all ambiguity. He had already tried to define the criterion in his previous reports, without ever being personally satisfied with the formulas he had proposed, because they might not be understood in the same way in the different legal systems, owing to the extreme diversity of those systems. In his third report, he had discarded the expression "property in the public and private domain of the State" because some countries did not distinguish between the public and private domains of the State; he had referred instead to "Property appertaining to sovereignty over the territory".¹⁶ In his following reports, he had used successively the expressions "property necessary for the exercise of sovereignty over the territory"¹⁷ and "property connected with the State's "exercise of its sovereignty or its activity in the territory".¹⁸ Mr. Ushakov has chosen the notion of "activity in the territory" in his suggestion for article 12 (A/CN.4/292, foot-note 18). It was for the Drafting Committee to choose the most satisfactory wording.

13. The criterion he had proposed for the passing of State property had been enriched in the course of the debate. Mr. Yasseen had referred to a "reasonable" link and to the requirement of "good faith" which was the rule in public international law, maintaining that a direct reference to those criteria would add a positive element to the draft articles.¹⁹ Mr. Tammes considered that the wording proposed by the Special Rapporteur was no less valid than the expression "a genuine link" applied to the nationality of ships in article 5 of the Convention on the High Seas.²⁰ Mr. Tabibi had said that other factors of prime importance, such as physical, economic and social links, should be taken into account.²¹ Mr. Tsu-

ruoka had raised the question whether the criterion proposed took all those factors into account or was of a purely legal character.²² Mr. Ushakov had proposed that, in regard to movable property, it should be provided that property "connected with the activity of the predecessor State in the territory... shall pass to the successor State"²³ and had cited the example of railway wagons. But whereas railway wagons were State property in the Soviet Union, that was not the case in all countries. Mr. Reuter had asked that examples should be given in the commentary to clarify the precise meaning of the expression "direct and necessary link" in each article.²⁴

14. Other members of the Commission had proposed that the criterion of a "direct and necessary link" should be clarified by reference to procedural law. In that connexion, Mr. Ago, Mr. Kearney, Mr. Hambro, Mr. Sette Câmara, Mr. Tsuruoka, and Mr. Martínez Moreno had raised the question of the settlement of disputes, and he thought it would indeed probably be necessary to consider that question. Mr. Hambro had made at the 1391st meeting the practical suggestion that it should be stated in the commentary that some members of the Commission recommended States to make provision for the settlement of disputes.

15. In that connexion, he pointed out that the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947 had given an opinion on the concept of property "necessary for the viability" of a local territorial authority in a dispute relating to the apportionment of the property of local authorities in a frontier area, mentioned by him in his sixth report.²⁵

16. Recourse to the principle of equity had been approved unanimously by the members of the Commission. Some of them even thought that special attention should be devoted to that principle in order to balance and clarify the notion of a "direct and necessary link". Mr. Šaković had asked²⁶ how he interpreted the concept of equity, while Mr. Reuter had wondered what place that concept should occupy in the draft articles.²⁷ Mr. Hambro and other members believed that the Commission should give some prominence to the principle of equity, maintaining that it would be the basis of future international law.

17. He himself did not think that that principle could be given a pre-eminent position in the draft articles, since everything would then be reduced to the rule of equity. As the limit, that rule would make any attempt at codification unnecessary, and all that would be required would be one article stating that the rule of equitable apportionment of property must be applied in all cases. In fact, the principle of equity was not a basic element, but a balancing element, a corrective factor designed to prevent

¹⁴ *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1549th meeting, para. 37.

¹⁵ See 1391st meeting, para. 32.

¹⁶ *Yearbook... 1970*, vol. II, p. 143, document A/CN.4/226, part II, article 2.

¹⁷ *Yearbook... 1972*, vol. II, p. 66, document A/CN.4/259, para 39; and *Yearbook... 1973*, vol. II, p. 22, document A/CN.4/267, part IV, article 9.

¹⁸ *Yearbook... 1973*, vol. II, p. 28, document A/CN.4/267, part IV, article 11; and *Yearbook... 1974*, vol. II (Part One), p. 98, document A/CN.4/282, chap. IV, article 11.

¹⁹ See 1391st meeting, para. 3.

²⁰ *Ibid.*, para. 7.

²¹ *Ibid.*, para. 23.

²² See 1392nd meeting, para. 16.

²³ See 1390th meeting, para. 25.

²⁴ See 1391st meeting, para. 35.

²⁵ *Yearbook... 1973*, vol. II, p. 24, document A/CN.4/267, part IV, para. 12 of the commentary to article 9.

²⁶ 1391st meeting, para. 43.

²⁷ *Ibid.*, para. 38.

States from deviating from the “reasonableness” referred to by Mr. Yasseen. Equity made it possible to interpret the concept of a “direct and necessary link” in the most judicious fashion and to give it an acceptable meaning. That was, in a sense, what Mr. Quentin-Baxter had meant when he had said that the principle of equity should serve to temper the concept of State power.²⁸ Equity could not be assigned the main role, because there was also a material criterion concerning property situated in the territory and also because, as Mr. Sette Câmara had said,²⁹ States mistrusted equity, as was shown by the experience of the International Court of Justice. That criterion might be amplified by providing, as Mr. Ago had requested,³⁰ that States were under an obligation to negotiate an agreement in good faith. That was what the International Court of Justice had attempted to do in the *North Sea Continental Shelf* cases.³¹

18. Some members of the Commission, in particular Mr. Njenga,³² had asked why the principle of equity had not been uniformly applied in articles 12 and 13. But the situation dealt with in article 12 and article 13 were different and therefore required different treatment. The explanations he had given showed that the rule of equity was a residuary rule which should only be resorted to in case of need. Article 12, which applied to property situated in the territory, was based on two main criteria: that of the physical situation of the property, which applied especially to immovable property; and that of a “direct and necessary link” between the property and the territory, which applied to movable property. The criterion of equity was more important in article 13 than in article 12, because article 13 referred to property situated outside the territory.

19. The problem of equity arose in particular in connexion with article 13, subparagraph (c), which provided that State property should be “apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property”. At the 1390th meeting, Mr. Ushakov had criticized that rule, pointing out that, in the Soviet Union, the whole population contributed to the creation of all State property, whether it was situated in Moscow or in ceded frontier territory, which made any application of the principle of equity impossible. His own hypothesis was nevertheless quite simple: in the case of a frontier province ceded by one State to another, for example, a cultural institute representing the folklore of that province might have been built in a third State with contributions from the province and the predecessor State. That was a case which might very well occur.

20. Should consideration of State property *in concreto* be abandoned altogether? The problem of archives had frequently been raised, but as Mr. Ago had observed at the 1392nd meeting, there was other State property

besides archives, currency and public funds. Mr. Ago had raised the problem of ships, which he himself had mentioned in his third report. He had cited in that report the case of the cession of vessels for navigation on the Danube,³³ in which the Allied Powers had been opposed to Germany, Austria, Hungary and Bulgaria after the First World War, and which had been the subject of an arbitral award in 1921. He had also cited the case of the Baltic ships which had been in United States and United Kingdom ports at the time of the incorporation of the Baltic States in the USSR, and which the United States and United Kingdom Governments had refused to hand over to the Soviet Union.³⁴ But in the course of his researches, he had found very few cases relating to questions other than those of archives, currency and public funds, discussed in his seventh report:³⁵ that was easily explained, for one could conceive of a State without ships (the case of a land-locked State), but hardly of a State without currency or archives.

21. The problem of archives occupied a very important place in the life of nations and in succession of States. All the members of the Commission recognized its importance and he understood the concern expressed about that problem by Mr. Ustor. Mr. Ramangasoavina regretted the deletion of the articles devoted to archives in his seventh report;³⁶ Mr. Kearney wished a separate paragraph on archives to be added in articles 12 and 13; and Sir Francis Vallat would like a special article to be devoted to that problem.³⁷ Only Mr. Ushakov considered that archives were not even State property.³⁸

22. Mr. Ustor would prefer it to be expressly stated that articles 12 and 13 did not apply to the case of archives,³⁹ whose extremely complex character he had emphasized. But he (the Special Rapporteur) could not agree with him on that point, because the “direct and necessary link” which must exist between the archives and the territory was, in the present case, reflected in two cardinal principles, which had been formulated by international conferences of archivists: the principle of the territorial origin—or territoriality—of archives, according to which archives originating in the territory to which the succession of States related must pass to the successor State; and the principle of pertinence, according to which archives must pass if they related to the activity of the territory, regardless of where they were kept. It was that “archives-territory” link which he had defined in his third report when he had enunciated the principle of the handing over to the successor State of archives “relating directly or belonging to the territory”.⁴⁰

²⁸ *Ibid.*, para. 14.

²⁹ *Ibid.*, para. 28.

³⁰ See 1392nd meeting, para. 32.

³¹ *I.C.J. Reports 1969*, p. 3.

³² See 1390th meeting, para. 33.

³³ See *Yearbook... 1970*, vol. II, p. 166, document A/CN.4/226, part II, paras. 27-28 of the commentary to article 8.

³⁴ *Ibid.*, p. 169, para. 41 of the commentary and foot-note 222.

³⁵ *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

³⁶ See 1391st meeting, para. 21.

³⁷ See 1392nd meeting, para. 34.

³⁸ See 1390th meeting, para. 22.

³⁹ See 1392nd meeting, para. 12.

⁴⁰ *Yearbook... 1970*, vol. II, p. 155, document A/CN.4/226, part II, para. 16 of the commentary to article 7.

And that amounted to having recourse, there again, to the principle of equity.

23. Mr. Ustor had referred to the UNESCO resolutions which called for the handing over of archives to the country of origin,⁴¹ and Mr. El-Erian had also mentioned the problem of the country of origin.⁴² In the case of Hungary, the peace treaty had not imposed on that country the transfer of its cultural heritage. Indeed, article 11, paragraph 2, of the Treaty of Peace with Hungary, of 10 February 1947 very rightly laid down that the successor States, Yugoslavia and Czechoslovakia, would have no rights in archives or objects "acquired by purchase, gift or legacy" or in "original works of Hungarians".⁴³ Paragraph 1 of the same article stipulated that Hungary should hand over to the successor States only objects constituting their cultural heritage which had originated in the territory of those States.

24. A distinction should be made between administrative archives, which were used in the daily activities of the territory, and historical archives, which represented a cultural heritage. Historical archives which belonged to the territory should not be surrendered to the predecessor State, since they represented a very important cultural heritage for newly independent States, of which they should not be deprived. Within administrative archives, a distinction could be made between current archives, which were used for daily activities, and political archives, which were connected with sovereignty. Mr. Kearney had observed that, having regard to future relations between the two States, it might not be desirable to surrender political archives to the successor State.⁴⁴

25. Above all, however, a distinction should be made between archives removed from the territory and archives constituted outside the territory, but relating to that territory. Archives constituted outside the territory were not affected by the succession of States, but archives removed from the territory should return to the successor State, in accordance with the criterion of the country of origin. Thus, the criterion of origin applied in that case, in addition to the criterion of pertinence of the archives.

26. Mr. Tammes had rightly spoken of the cultural heritage which archives represented.⁴⁵ It would indeed be a serious error to regard archives as mere material property; they constituted patrimonial assets of inestimable value. In his various reports, he had given examples relating to such cultural and historical heritages. In his third report, he had mentioned the restitution by Italy to Ethiopia of an obelisk which had been erected in a square in Rome,⁴⁶ and in his fourth report, he had referred to articles 245, 246 and 247 of the Treaty of Versailles, which had laid upon Germany the obligation to return archives, historical souvenirs and works of

art.⁴⁷ Mr. Tammes had rightly referred to the resolutions adopted on that subject by UNESCO and other international organizations. The most recent was resolution 3391 (XXX) adopted by the General Assembly of the United Nations on 19 November 1975 and entitled "Restitution of works of art to countries victims of expropriation". That resolution, which mainly concerned cases of decolonization since, in its preamble, it recalled the Declaration on the Granting of Independence to Colonial Countries and Peoples, stressed that "the cultural heritage of a people conditions the flowering of its artistic values and its over-all development, which are tokens of its authenticity".

27. He noted that the members of the Commission had unanimously endorsed the distinction between movable property and immovable property. Three of them—Mr. Reuter, Mr. Calle y Calle and Mr. Tsuruoka—had raised the question how such property was to be defined. Was article 5⁴⁸ applicable and should reference be made to the internal law of the predecessor State? Personally, he thought it should; since the Commission had chosen, in article 5, to refer to the internal law of the predecessor State, it should continue to do so.

28. In comparing articles 12 and 13 with articles 14 and 15, Mr. Reuter had said that the two latter articles introduced a rule which was severe though fair in the case of decolonization, to the advantage of the successor State. He did not wish that rule to be transferred to articles 12 and 13, for he feared that while it was fair in the régime of decolonization covered by articles 14 and 15, it would be unfair, because of its severity, in a "neutral" régime of succession such as that covered by articles 12 and 13. He (the Special Rapporteur) wished to reassure Mr. Reuter about his intentions, which were the contrary of what was supposed, and about the solutions he had arrived at. The régime provided for in articles 12 and 13 was, indeed, much less strict and much less severe for the predecessor State; that was shown by the fact that at least three members of the Commission—Mr. Yasseen, Mr. Quentin-Baxter and Mr. Šahović—had found that, in article 12, he had been too hard on the successor State. Mr. Šahović had spoken of somewhat unduly rigid criteria which should be made more flexible;⁴⁹ Mr. Yasseen had said that it was sufficient for the link to be "reasonable" without having to be "direct and necessary";⁵⁰ and Mr. Quentin-Baxter had gone so far as to suggest that the rule in paragraph 12, subparagraph (b), should be reversed and that the principle underlying the whole of article 12 should be that of the transfer of property to the successor State, unless it was proved that some particular property had a direct and necessary link with the predecessor State.⁵¹

⁴¹ See 1392nd meeting, para. 13.

⁴² *Ibid.*, para. 21.

⁴³ United Nations, *Treaty Series*, vol. 41, p. 178.

⁴⁴ See 1392nd meeting, para. 28.

⁴⁵ See 1391st meeting, para. 6.

⁴⁶ *Yearbook... 1970*, vol. II, pp. 165-166, document A/CN.4/226, part II, para. 22 of the commentary to article 8.

⁴⁷ *Yearbook... 1972*, vol. II, p. 68, document A/CN.4/259, para. 46.

⁴⁸ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

⁴⁹ See 1391st meeting, para. 42.

⁵⁰ *Ibid.* para. 3.

⁵¹ *Ibid.*, para. 15.

29. Several members of the Commission had emphasized the prominence that should be given to agreement between the parties and had stressed the necessarily residuary character of the rules stated in articles 12 and 13. Mr. Ago and Sir Francis Vallat had even proposed at the 1392nd meeting that the obligation of States to negotiate should be placed at the beginning of those articles. He wished particularly to thank Mr. Ushakov, Mr. Njenga, Mr. Quentin-Baxter and Mr. Yasseen for their comments on that point and he assured them that the Drafting Committee would take those comments into consideration.

30. Many members of the Commission, including Mr. Calle y Calle, Mr. Ushakov and Mr. Šahović, had proposed that subparagraph (a) of article 13, should be deleted because, in their opinion, it merely stated an obvious fact. That subparagraph had been included mainly for the sake of clarity; it was, as Mr. Ramangasoavina had rightly said at the 1391st meeting, a simple reminder intended to strengthen subparagraphs (b) and (c). He was not opposed to its deletion. He was, on the other hand, strongly opposed to the merging of articles 12 and 13 proposed by Mr. Ushakov;⁵² for he considered that the balance between the criterion of the direct and necessary link and the criterion of equity was necessarily different in articles 12 and 13, since the notion of good faith and equity was more important in article 13 than in article 12.

31. Mr. USHAKOV said he had not meant to call in question the typology of succession adopted by the Commission. He had simply asked whether it was necessary, at the present time, to deal with decolonization and the case of newly independent States. He was now convinced that it was necessary to deal with those matters, but he still believed that the case of decolonization and the case of the separation of States should be treated separately, and not in the sub-division of succession of States in respect of part of territory. In his opinion, sub-divisions could very well be adopted in the present draft which differed from those adopted in the draft articles on succession of States in respect of treaties. The Commission should begin by dealing with the case of decolonization and the case of the separation of States under different headings from those of articles 12 and 13. If it was subsequently found that the same rules applied to those different cases, they could be brought together under the same heading. It would be for the Drafting Committee to decide that point.

32. Mr. BEDJAOUI (Special Rapporteur) said he had always considered that the case of succession of States in respect of part of territory and the case of non-self-governing territories decolonized through integration were not assimilable, because the second case did not relate to part of the territory of the predecessor State. But the Commission had wished to assimilate those two cases and had obliged him to do so. He would be very pleased if that assimilation was abandoned, and would submit a separate draft article on the case of integration.

The Commission would then see whether the rules applicable to that case were the same as those which applied to succession of States in respect of part of territory.

33. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 12 and 13 to the Drafting Committee for consideration in the light of the suggestions made by members of the Commission.

*It was so agreed.*⁵³

Mr. Calle y Calle, second Vice-Chairman, took the Chair.

ARTICLE 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State)

34. The CHAIRMAN invited the Special Rapporteur to introduce articles 14 and 15, appearing in his eighth report, reading as follows:

Article 14. Succession to State property situated in newly independent States

1. Unless otherwise agreed or decided, the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State.

2. Movable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent shall pass to the successor State unless:

(a) the two States otherwise agree;

(b) such property has no direct and necessary link with the territory, and the predecessor State has claimed ownership thereof within a reasonable period.

3. Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities.

Article 15. Succession to State property situated outside the territory of the newly independent State

Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State, unless:

(a) the two States otherwise agree; or

(b) it is established that the territory which has become independent contributed to the creation of such property, in which case it shall succeed thereto in the proportion determined by its contribution; or

(c) in the case of movable property, it is established that its being situated outside the territory of the newly independent State is fortuitous or temporary and that it has in fact a direct and necessary link with that territory.

35. Mr. BEDJAOUI (Special Rapporteur), introducing draft articles 14 and 15, said that those provisions concerned a particular type of succession of States which

⁵² See 1390th meeting, para. 26.

⁵³ For consideration of the text proposed by the Drafting Committee, see 1405th meeting, paras. 10-19.

occurred when a dependent territory acceded to independence and established itself as a State. Article 14 dealt with State property situated in the newly independent State and article 15 with State property situated outside the territory of that State.

36. Article 14 did not apply to property belonging to the Non-Self-Governing Territory which had become independent. Generally speaking, colonies enjoyed a special régime under what had been termed legislative and conventional speciality. They possessed a certain international personality, so that they could own property inside and outside their territory. Consequently, there was no reason why succession should cause colonies to lose their own property. Another class of property to which article 14 did not apply was property situated outside the territory of the newly independent State.

37. The succession dealt with in articles 14 and 15 was characterized by the fact that it concerned a non-self-governing country, whose people, territory and sovereignty were different from those of the administering Power. According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States already quoted.⁵⁴

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self determination . . .

38. Article 14, paragraph 1, confirmed the well-established rule that all immovable property passed to the successor State. That rule was, however, limited to immovable property belonging to the predecessor State and situated in the newly independent territory, at the time of the succession of States. That provision was really only an application of article 9, which established the general principle of the passing of State property.

39. At the theoretical level, the situation described in article 14, paragraph 1, had not raised serious difficulties. The solution proposed in that provision was commonly accepted by legal writers and international judicial opinion, although immovable property as such was seldom mentioned. Reference had often been made to broader categories of property, such as property within the public and private domains. If general transfer was the rule, however, the passing of the more limited category of immovable property must be accepted *a fortiori*.

40. The role of agreements between the parties might appear at first sight to be preponderant, because the rule stated in article 14, paragraph 1, was a residuary rule, as was clear from the use of the words "Unless otherwise agreed or decided". Paragraph 3 of the article nevertheless introduced an innovation in the codification of the topic. In his opinion, the principles of decolonization and self-determination partook of *jus cogens*. To appraise the role of devolution agreements and, in particular, of those

which limited the rights of peoples to self-determination and to control of their natural resources, it was not sufficient to refer to the law of treaties. The Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, which was annexed to the Final Act of the United Nations Conference on the Law of Treaties,⁵⁵ marked a step forward but it was necessary to envisage further steps to establish whether such agreements should be considered void *ab initio*.

41. Article 14, paragraph 2, settled a problem which seemed to be particularly dense and accentuated in cases of decolonization: that of movable property. The fact that such property was often removed from the patrimony of the dependent territory at the time of the succession of States must be ascribed to human frailty. In his eighth report,⁵⁶ he had given several examples of such action, relating to currency, treasury and public funds, and State archives and libraries. With regard to archives, he pointed out that, in resolution 3391 (XXX), the General Assembly had called for the "restitution of works of art to countries victims of expropriation". In that text, the Assembly had affirmed that

the prompt restitution to a country of its *objets d'art*, monuments, museum pieces and manuscripts by another country, without charge, is calculated to strengthen international co-operation . . .

and had invited the States Members of the United Nations to ratify the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the General Conference of UNESCO in 1970.

42. With regard to archives, articles 14 and 15 required the same distinctions to be made as in articles 12 and 13. A distinction should be made between living archives, which were current administrative archives and political archives or those relating to sovereignty, and dead or historical archives, which were archives removed from, or established outside, a dependent territory. Those distinctions, again, relied on the notions of viability, equity and a direct and necessary link, which could be combined. The efforts of the countries of the third world to combat their under-development were many-sided and, in addition to their economic and financial aspects, concerned cultural heritage and State archives. Both at the Conference on International Economic Co-operation (North-South conference) and in UNCTAD, the notion of equity had gained ground as a means of development of the third world countries. Some speakers had expressed the hope that certain property would be regarded as common property and shared equitably between States. Before any share-out was considered, however, the developing countries must receive what was due to them; it was in that context that it was important to give the countries of the third world their share of cultural heritage and archives.

⁵⁵ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285.

⁵⁶ See document A/CN.4/292, chap. III, paras. 24-53 of the commentary to article 14.

⁵⁴ See para. 3 above.

43. Referring to article 14, paragraph 3, he emphasized that colonization was an intrinsically unlawful phenomenon and that, to have any meaning, decolonization must be complete. In particular, the transfer of State property to newly independent States should be effective and complete. In matters relating to decolonization, equity must be assessed in a special way: it must compensate the delays attributable to domination and exploitation. In the case in question, equity consisted in giving the newly independent State more than would be given to any other State. Hence the legal value of devolution agreements which did not transfer all property should be interpreted according to their degree of conformity with the right of self-determination. Those considerations led him to wonder whether the rules stated in article 14 were really residuary rules.

44. It must not be forgotten that the Commission's task was to codify the topic under study, taking due account of the objectives and needs of the developing States; nor should members forget the context in which decolonization and the re-evaluation of relations between the industrialized countries and the developing countries were placed. That context was becoming increasingly incompatible with any conventional restriction of the rule of the integral transfer of State property, which might be situated either on the soil or in the subsoil of the territory to which the succession related. In that connexion, he referred to paragraphs 56 to 62 of his commentary to article 14, in which he had shown how the permanent sovereignty of States over their natural resources had been affirmed in increasingly forceful terms. All the norms of conduct thus established proved to be incompatible with agreements which restricted the nature and scope of the transfer of property from the predecessor State to the newly independent State, and which were not designed to overcome the special difficulties of the developing countries.

45. In his report, he had outlined a new theory of the sovereign equality of States, according to which State sovereignty must be defined not only on the basis of its political elements, as had been done so far, but also on the basis of its economic elements. Equality among States, as conceived by traditional international law, would be mere hypocrisy and deception so long as the political and economic independence of a weak State remained purely fictitious. State sovereignty must therefore be given a new formulation capable of restoring to the State the fundamental bases of its national economic independence. He had examined those questions in detail in paragraphs 66 to 76 of his commentary and hoped that the members of the Commission would express their views on them. It should be noted that the Charter of the United Nations condemned infringements of the political sovereignty of States, but not of their economic sovereignty. In order to remedy that deficiency, the General Assembly had uttered increasingly forceful condemnations of infringements of the economic sovereignty of States. In his opinion, it was from that standpoint that devolution agreements and the rules stated in article 14 should be regarded.

46. Article 15 related to State property situated outside the territory of the newly independent State and dealt

mainly with the problem of property removed from the territory before independence. It did not cover property belonging to the territory, whether it was situated in the predecessor State or in a third State, but only the property of the predecessor State. Obviously, that property remained the property of the predecessor State, unless the newly independent territory had contributed to its creation or it had been removed from the newly independent territory. Judicial precedents and State practice, which dealt only with certain categories of property, such as archives, justified those rules.

47. With regard to the contribution of the successor State to the creation of property situated in a third State, he observed that the countries created by decolonization did not appear to have claimed part of the subscription of the States which had been responsible for their international relations in international or regional financial institutions. Having found no precedent on that point, he merely submitted it to the Commission for consideration.

48. The CHAIRMAN thanked the Special Rapporteur for his lucid oral introduction of articles 14 and 15, in which he had outlined a new conception of sovereignty. It was only with difficulty that sovereignty had been attained by certain peoples and it had not been fully realized by those which had acceded to independence under precarious conditions. The Special Rapporteur had brought out the economic aspects of sovereignty and the principles of economic independence and international economic security. He had given the Commission food for thought concerning the new economic order, which would constitute a genuine order only when the rules of international economic law and of the law of development were formulated as branches of international law.

49. Mr. USHAKOV said he wished to ask the Special Rapporteur four questions. First, should a distinction be made between Non-Self-Governing Territories in general and protectorates or trusteeship territories, although such a distinction had not been made for the topic of the succession of States in respect of treaties? Second, should a special provision, like article 29 of the other draft articles,⁵⁷ be devoted to newly independent States formed from two or more territories, or should that question be dealt with in articles 14 and 15? Third, should one speak of property belonging to the newly independent territory, since such property was similar to State property, though it did not belong to a State? Fourth, did not the phrase "unless otherwise agreed" (in article 14) presuppose the conclusion of an international agreement between the administering Power and the Non-Self-Governing Territory, which was impossible, because the latter did not have the status of a subject of international law?

The meeting rose at 12.55 p.m.

⁵⁷ See *Yearbook... 1974*, vol. II (Part One), p. 248, document A/9610/Rev.1, chap. II, sect. B.