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**Summary record of the 1395th meeting**

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

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## 1395th MEETING

Tuesday, 22 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, 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 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)<sup>1</sup> (continued)

1. Mr. USHAKOV, continuing the statement he had begun the previous day, reiterated his opinion that, as a general rule, provision could not be made for an agreement between two States when one of them did not yet exist. In practice, two parties—the administering Power and a State which was not yet a State—could agree to conclude devolution agreements, since that depended on their reciprocal will to do so, but the Commission could not assume that that possibility existed as a general rule and provide expressly, in the case of newly independent States, for the possibility of agreements between the predecessor State and the successor State.

2. He was also in doubt about the meaning of the word “decided” in the phrases “Unless otherwise agreed or decided” at the beginning of article 14, paragraph 1. By whom and for whose benefit was the decision taken? It was clearly not the newly independent State which decided, so it might be asked whether the decision was taken for its benefit or to its detriment. He believed that it was contrary to the interests of the newly independent State to raise the possibility of a decision taken by another authority.

3. With regard to movable property, he wondered why the Special Rapporteur had distinguished between movable property situated in the territory of the newly independent State (article 14) and movable property situated outside that territory (article 15). State practice, of which the Special Rapporteur had cited some examples, showed that all State property, movable and immovable alike, that was situated in the territory to which the

succession of States related, passed to the successor State. Although it could be provided in specific cases that property situated in the territory passed to the successor State even if it was movable property (since the States concerned knew where the property was and could draw up an inventory of movable property in the territory), it was not possible, in formulating general rules, to make a distinction between movable property in the territory and movable property outside the territory, for the criterion of the location of the property no longer played any part, since it was not known where the movable property was. The general rules on the passing of movable property should be based on a criterion other than that of the property’s location. Instead of movable property situated in the territory, reference should be made to movable property necessary for the activity of the predecessor State in the territory, or to movable property belonging to the dependent territory. It would therefore be necessary to define property belonging to the dependent territory in such a way that the definition would be valid in all cases.

4. With regard to article 14, paragraph 3, he observed that the rule of the permanent sovereignty of States over their natural resources was valid for all members of the international community, not only for newly independent States. To limit that rule to newly independent States would reflect on the permanent sovereignty of other States over their natural resources. The rule should therefore be enunciated for all States without distinction. Sovereignty was an attribute of every State and the sovereignty of States was a reality of the contemporary world. The question of the economic independence and dependence of States had been posed by famous revolutionaries, in particular by Lenin, whom he had quoted in his book, on sovereignty in contemporary international law and who had clearly demonstrated the correlation between the sovereignty of States and their economic independence.

5. The Special Rapporteur had chosen to cast article 14, paragraph 2 (b), in negative form by providing that the movable property of the predecessor State situated in the territory passed to the successor State unless “such property has no direct and necessary link with the territory...”. The direct and necessary link between the movable property and the territory could be very tenuous, however, and it was dangerous to use negative wording, which ruled out any intermediate cases.

6. It would be necessary to consider the question of property belonging to dependent territories and to supplement the definition of State property given in article 5<sup>2</sup> so that it could apply to newly independent States. In the light of those comments, articles 14 and 15 could be referred to the Drafting Committee.

7. Mr. TSURUOKA said that the Special Rapporteur had convinced him of the need to devote two separate articles to the case of newly independent States. In articles 14 and 15, as in articles 12 and 13, the Special

<sup>1</sup> For texts, see 1393rd meeting, para. 34.

<sup>2</sup> For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev. 1, chap. III, sect. B.

Rapporteur had rightly confined himself to stating general rules. But as they were residuary rules, it might be well to provide for a procedure to ensure their just and equitable application in all cases.

8. With regard to article 14, paragraph 1, he agreed with Mr. Ushakov that the notion of a newly independent State should be defined. He understood that that notion would apply only to States which became independent after the entry into force of the draft articles as a convention, but he would like the Special Rapporteur to confirm that point. Like Mr. Šahović,<sup>3</sup> he thought the words "right of ownership" should be avoided, and he was confident that the Drafting Committee would find a suitable expression. As to the distinction between immovable property (paragraph 1) and movable property (paragraph 2), he understood that it was the internal law of the predecessor State which would determine whether the property was movable or immovable, but on that point, too, he would like to have the Special Rapporteur's opinion.

9. He approved of the idea expressed in article 14, paragraph 2, but wondered whether it should not be worded differently, for in his opinion it was practically impossible to prove the absence of a link. Because of the negative formulation of the condition it laid down, subparagraph (b) gave the impression that the burden of proof rested entirely on the predecessor State, whereas subparagraph (b) of article 12, which stated the same condition in positive form, did not give the impression that the whole burden of proof fell on one of the parties.

10. He certainly had no objection to the idea expressed by the Special Rapporteur in article 14, paragraph 3, but that idea had already been the subject of draft article 10 submitted by the Special Rapporteur in his seventh report.<sup>4</sup> The Commission had reserved its position on that draft article and had pointed out in its report on the work of its twenty-seventh session that

as regards article 10 it considers it unnecessary that the draft articles should affirm the principle of the sovereignty of the successor State over its natural resources, since that principle derives from statehood itself and not from the law of succession of States.<sup>5</sup>

There would have to be a compelling reason for the Commission to go back on the decision it had taken at that session. In any case, it would be necessary to find a more appropriate place than article 14 in which to state the principle of the permanent sovereignty of the State over its wealth and natural resources, since such sovereignty was recognized as appertaining not only to newly independent States, but to all sovereign States. Moreover, if the Commission wished to formulate that principle (which had no direct connexion with the law of succession of States) it should be guided by existing instruments, in particular by article 1, paragraph 2, of the International Covenant on Economic, Social and

Cultural Rights,<sup>6</sup> which affirmed that "All peoples may, for their own ends, freely dispose of their natural wealth and resources" and that "In no case may a people be deprived of its own means of subsistence".

11. He endorsed the principle stated in article 15, subparagraph (b), but thought that its practical application would be difficult. In his opinion, the Commission should consider a procedure for the settlement of disputes on that point. It should also provide for recourse to equity, for when the application of rules was difficult, equity could be invoked, as the Special Rapporteur had said.

12. With regard to article 15, subparagraph (c), he wondered whether it was really necessary to refer to the "fortuitous or temporary" location of property outside the territory, and whether the criterion of a direct and necessary link between the property and the territory would not be sufficient.

13. He agreed with the Special Rapporteur that separate articles should be devoted to cases of succession involving newly independent States and that only general rules should be formulated; but he thought the Commission should consider establishing a procedure to ensure the just and equitable application of those rules in all cases.

14. Mr. THIAM congratulated the Special Rapporteur on his clear and full report, which attested to personal experience of the process of decolonization. Articles 14 and 15 raised questions both of principle and of law. First of all, it was open to question whether articles on newly independent States were necessary. The same question had arisen during the preparation of the draft articles on succession of States in respect of treaties, and the Commission had then decided that it should devote a few articles to the case of newly independent States. Succession of States was not a new topic, but since 1960, with the emergence of a considerable number of newly independent States, it had come to be of particular interest: that was why the Commission had been asked to study the subject. Although decolonization was already far advanced, the problem of newly independent States had not yet been completely solved, and the Special Rapporteur had given many examples of States which were not yet independent or which, if they were independent, still had problems of State succession. It was therefore necessary to study the question of succession in relation to newly independent States. The Drafting Committee would have to determine when a State could be considered to have become independent.

15. It was obvious that the idea of sovereignty had not only a political, but also an economic content. Political decolonization had often been wrongly considered as completing the process, and economic decolonization had only followed much later. UNCTAD had examined that question and the United Nations had decided to pay greater attention to the economic sovereignty of States. The Second Ministerial Meeting of the Group of 77 (Algiers, February 1975), had also stressed that principle. It was therefore necessary to adopt in the draft articles

<sup>3</sup> See 1394th meeting, para. 21.

<sup>4</sup> See *Yearbook... 1974*, vol. II (Part One), p. 98, document A/CN.4/282, chap. IV.

<sup>5</sup> See *Yearbook... 1975*, vol. II, p. 108, document A/10010/Rev.1, para. 66.

<sup>6</sup> General Assembly resolution 2200 A (XXI), annex.

provisions affirming not only the political, but also the economic, sovereignty of States. It had rightly been pointed out that that principle was valid not only for newly independent States, but for all States. There were, however, States whose economic sovereignty was not threatened and other, weaker States, whose economic sovereignty should be protected. Newly independent States were particularly vulnerable in that respect, so it was well to stipulate in article 14 that the great Powers had no right to infringe the economic sovereignty of those States.

16. In article 14, the Special Rapporteur had made a distinction between immovable property and movable property. The concise wording he had used in regard to immovable property was justified, as was his fuller and more flexible treatment of movable property. He had also been right to distinguish between immovable property which did not belong to the territory—and was not affected by the succession of States—and immovable property which belonged to the territory as such and passed to the successor State. It sometimes happened that property situated in the territory of a newly independent State and belonging to the administering Power had not been acquired with the funds of that Power. Thus, in Africa, administering Powers had been able to appropriate by means of a simple registration procedure, property owned by traditional communities. Cases of that type justified the strictness of the rule on the passing of immovable property proposed by the Special Rapporteur.

17. In the case of movable property, it was well to make the rule less strict by providing that when the property had no direct and necessary link with the territory, the predecessor State could claim it within a reasonable period, as was stipulated in article 14, paragraph 2 (b).

18. The saving clause “unless . . . the two States otherwise agree”, in paragraph 2 (a), raised the problem of devolution agreements mentioned by Mr. Ushakov.<sup>7</sup> It was, indeed, difficult to imagine any agreement between a sovereign State and another State which was not yet independent. But in that context a distinction must be made between law and practice, and concrete cases must be taken into consideration. In fact, newly independent States had often negotiated agreements on economic and financial matters with the former metropolitan country. Should that fact be ignored by denying the existence of devolution agreements, or should it be taken into account? In theory, the validity of devolution agreements could be denied on the ground that they were concluded between a dominating Power and a dominated country. Moreover, newly independent States were free to denounce such agreements later. But in practice, countries which had signed devolution agreements usually preferred not to denounce them, because those agreements gradually evolved and were not always harmful to the interests of newly independent countries. In the case of military agreements, for example, it was sometimes the newly independent State itself which asked the predecessor State for military assistance and which, in return, agreed that certain military installations in its territory should remain the property of the predecessor State. Similarly,

with regard to currency, some newly independent States had preferred not to introduce a national currency immediately and had requested that the monetary *status quo* should be maintained. Thus certain west African countries had been able to establish a monetary and Customs union. Consequently, although devolution agreements had no value in international law, they might have certain advantages in practice, because they often appeared to constitute necessary stages in the process of decolonization. What the Special Rapporteur had said on that question in his commentary was thus quite right, but perhaps the Commission should find a formula better adapted to international law.

19. Mr. RAMANGASOAVINA said that articles 14 and 15 were the counterpart, for newly independent States, of articles 12 and 13. Articles 12 and 13 dealt with two internationally equal States, whereas articles 14 and 15 dealt with a nascent State which did not yet possess international personality. Some members of the Commission had expressed doubt about the advisability of using, in the articles under consideration, terms already defined in the draft. For instance, the definition of State property in article 5 referred to the internal law of the predecessor State. That definition was satisfactory where two independent States were concerned; but in the case of a newly independent State, a definition referring to the internal law of the predecessor State might give rise to abuses. Thus the same terms, used in different cases, could have different meanings.

20. The expressions “Unless otherwise agreed or decided” and “unless . . . the two States otherwise agree”, which appeared in paragraphs 1 and 2 (a) respectively, of article 14, reflected an unchallenged principle: the autonomy of the will of the parties to a treaty. In view of the inexperience of newly independent States and the fact that they might not yet possess international personality at the time when a treaty was concluded, the scope of those reservations could vary very widely. There were two possible cases. When the French-speaking African States had acceded to independence, agreements had sometimes been concluded before independence or at the moment of accession to independence. It had happened that States acceding to independence had allowed themselves to be defrauded through lack of experience. Sometimes, the agreements had not been concluded until after the granting of independence.

21. In the case of Madagascar, agreements relating to the apportionment of immovable property situated in the whole Malagasy territory had been concluded before the granting of independence (1960). Not only had France had the best of the bargain, but it had been rather tactless in reserving for itself the former residence of the High Commissioner, in other words the former Governor-General, in which it had established its embassy. That arrangement might be justified historically, because the residence had been built when Madagascar had been a French protectorate, but in the eyes of the Malagasy people, the residence was the embodiment of colonial Power. It was not until 1974 that Madagascar had been able to obtain the revision of the co-operation agreements with France. That two-stage solution had finally been advantageous to Madagascar.

<sup>7</sup> See 1394th meeting, para. 43; see also para. 1 above.

22. With regard to the article in *The New York Times* of 15 January 1976, quoted by the Special Rapporteur in his eighth report<sup>8</sup> in which France's attitude to the Comoros had been compared with its attitude to Guinea at the time of that territory's accession to independence, he observed that statements in the press should be treated with caution and not referred to in commentaries to articles. In the case in question, the facts were correct, but the way they were reported was clearly tendentious: it gave the impression that General de Gaulle had himself ordered the action criticized in the article. With regard to the situation in the Comoros, there was a contradiction between what the Special Rapporteur had said in paragraph 20 of his commentary and the second paragraph of the press excerpt quoted.

23. It thus appeared from practice that it was difficult for newly independent States to decide whether to conclude agreements before or after independence. That was why the Special Rapporteur, although he had reserved the principle of autonomy of the will of the parties, had drafted a provision on the permanent sovereignty of newly independent States over their wealth and natural resources, and over their economic activities. Thus it should not be possible to take advantage of the weakness or neediness of a newly independent State to alienate part of its natural resources under the terms of a treaty. With regard to article 15, he observed that, before independence, Madagascar had formed part of the French Republic and had had an agency for the sale of vanilla in New York. Naturally, at the time of accession to independence, that agency had reverted to Madagascar. Both article 14 and article 15 had been drafted in general terms, in accordance with the instructions the Commission had given the Special Rapporteur in 1975. In view of the general character of those provisions, numerous examples should be given in the commentary, relating to currency, public funds and archives, which were of very great importance to newly independent States.

24. Mr. MARTÍNEZ MORENO said he believed that it was necessary to include articles 14 and 15 in the draft for a number of reasons. The first was that there were still some cases of colonialism in the world; the Special Rapporteur had given many examples of territories that still had some form of colonial tie. Moreover, problems concerning State property still arose in regard to newly independent States themselves; for instance, the Special Rapporteur had mentioned that there were some questions of State property outstanding between his own country, Algeria, and the former metropolitan Power.

25. The reference by the Special Rapporteur, in his commentary, to Non-Self-Governing Territories, should not be construed in the narrow sense of Chapter XI of the Charter which, as Mr. Ushakov had pointed out<sup>9</sup> would exclude Trust Territories and protectorates. He understood the Special Rapporteur to have used the

expression "Non-Self-Governing Territory" to cover all territories which had not yet attained independence.

26. In article 14, paragraph 1, he thought that some of the difficulties caused by the use of the expression "right of ownership" could perhaps be overcome by substituting the legal concept of "eminent domain", which was familiar in French, Italian and Spanish legal literature. In non-socialist countries, a reference to "ownership" might lead to confusion with private property. It would therefore be preferable to recognize, in paragraph 1, the existence of a right of eminent domain by which the successor State could claim immovable property situated in its territory.

27. He urged the Special Rapporteur to consider Mr. Yasseen's proposal<sup>10</sup> made in connexion with articles 12 and 13, that the unduly restrictive formula "direct and necessary link" should be replaced by the words "reasonable link", which could be used in all the articles of the section 2 of the draft. In the case of documents, however, it could happen that some of them were of interest both to the predecessor State and to the successor State. It was therefore desirable to introduce the concept of priority of interest and to allow for the fact that a particular item of movable property might be more closely linked to one of those States than to the other.

28. Bearing in mind the fact that the Special Rapporteur had been given certain instructions by the Commission and had followed them admirably, he thought it was desirable to mention certain specific questions in the commentary, subject to the Special Rapporteur's approval.

29. He was thinking, in the first place, of the privilege of issuing currency. As the Special Rapporteur had pointed out, that privilege was an attribute of sovereignty and could give rise to a number of problems in connexion with State succession. Reference to those problems had been made by Mr. Kearney, who had proposed at the twenty-seventh session a very technical draft article on the subject (A/CN.4/292, para. 25). For his part, he wished to refer to a specific point. For the privilege of issue of currency to have any meaning for the successor State, that State would have to receive all the gold, foreign exchange and other reserves which constituted the backing of the currency. The question of a new international monetary system was at present under discussion and a number of different formulas had been put forward. It was not known whether the future international currency unit would consist of an average value of a number of strong international currencies or, as the majority seemed to favour, of what were called "special drawing rights". In the latter case, IMF would have an important role to play. Those were, of course, technical matters which could not be the subject of a draft article, but he wished to place on record, for the purposes of the commentary, that newly independent States had an indisputable right to issue their own currency and to benefit from any decision regarding "special drawing rights" taken at the international level.

<sup>8</sup> See A/CN.4/292, chap. III, para. 20 of the commentary to article 14 and foot-note.

<sup>9</sup> See 1394th meeting, para. 39.

<sup>10</sup> See 1391st meeting, para. 3.

30. Another specific question which deserved to be mentioned in the commentary was that of archives. The experience of Latin America was of interest in that regard; most of the Latin American States had been unable to obtain all the archives of interest to them when they had attained independence. The bulk of the documents relating to the Spanish colonial era had remained in the Archivo General de Indias, at Seville. His own country—El Salvador—had practically no archives relating to the original administration of its territory. Most of the old documents were in Spain and others were in the Archivo Central de Guatemala, because they had remained in that country after the breaking up of the union of the five Central American States. In view of those facts, the commentary should indicate that the successor State, and also the predecessor State, had the right to consult the archives and to obtain certified copies of the documents in them. A passage to that effect would usefully supplement the 1974 UNESCO resolution calling for the return to the newly independent States of documents relating to their history.<sup>11</sup>

31. He found the concept of economic sovereignty, referred to in article 14, paragraph 3, very interesting. Every people had an inherent right ultimately to exercise sovereignty over its natural resources and peoples which were struggling for their independence indisputably had that right. As he saw it, those peoples could be regarded as subjects of international law and could enter into devolution agreements, even though they did not yet constitute States. There were many schools of thought on the legal problem of subjects of international law, and the leader of one of them, the Italian writer Mancini, had maintained that it was the nation rather than the State which was the real subject of international law. According to that view a people, consisting of a group of persons united by such ties as history, race and language, could be regarded as capable of entering into international agreements.

32. He himself had always favoured the view that States were not the only subjects of international law. That position was consistent with the legal tradition of El Salvador; it was a matter for pride that individuals had had access to the former Central American Court of Justice. That being so, he saw no difficulty in accepting the conclusion of international agreements by entities which had not yet attained the status of States, but which could, like belligerents, be regarded as subjects of international law. He shared the Special Rapporteur's views on sovereignty in economic matters. The notion of sovereignty had changed considerably since the early writings on the subject; sovereignty was no longer regarded as absolute, but rather as limited by law. Similarly, sovereignty now had its economic as well as its political aspects. In order to develop freely, a State had to have the right to use its wealth and its natural resources and to carry out its economic activities without restriction. He agreed with Mr. Ushakov that all States—both new and old—had that right. It was nonetheless true that the

issue was a crucial one in cases of succession of States, in which it had given rise to grave problems and serious injustices. Unless a provision on the lines of article 14, paragraph 3, were included in the draft to cover questions of economic independence, the real problems that arose today would not have been faced.

33. The newly independent State entered international life with something of a handicap. It occurred to him that a remedy could perhaps be found by introducing a provision on the question of burden of proof, to which Mr. Tsuruoka had referred.<sup>12</sup> It would be recalled that in labour legislation, the burden of proof was invariably placed on the employer; from the outset, labour law had moved in that direction in order to remedy the injustice imposed by civil law on workers who did not have the means of defending their rights. He suggested that, in the same way, the predecessor State should bear the burden of proving that the property did not have a link with the territory. The predecessor State was better equipped to defend its rights than a newly independent State which was struggling for survival.

34. The Special Rapporteur's ideas were both fair and founded on fact. Nevertheless, the proposed provisions would undoubtedly raise problems in their application. Disputes would arise over such matters as determining whether a link—"direct and necessary" or "reasonable"—existed between the property and the territory. He therefore agreed with Mr. Kearney's suggestion that some provision should be made for a procedure for the settlement of disputes.<sup>13</sup> The Special Rapporteur was to be commended for his great efforts to ensure that the articles would serve the essential purpose of ensuring the greatest measure of justice and fairness in a succession of States.

35. Mr. NJENGA said that articles 14 and 15 were of the greatest importance in the draft. The Special Rapporteur had made a very convincing case for retaining them, and had replied conclusively to the doubts expressed by those members who had argued that, since decolonization was virtually completed, there was no need for the articles. The excellent reasons given in the commentary in support of the articles had been supplemented by some points raised during the discussion. For instance, Mr. Quentin-Baxter had mentioned at the previous meeting the case of certain small territories which were not yet in a position to assume full statehood; they might wish to become fully sovereign in the future and that possibility should be covered, even if decolonization had already been completed, which was not yet the case.

36. The report mentioned many instances in which the process of succession of States was still continuing long after decolonization. Some of the settlements entered into by newly independent States on attaining independence were having to be renegotiated. In that context, the provisions of articles 14 and 15 were vitally important.

37. With regard to the text of the two articles, he did not think there was any need to include a definition of

<sup>11</sup> UNESCO, *Records of the General Conference, Eighteenth Session*, vol. I, *Resolutions*, resolution 3.428.

<sup>12</sup> See para. 9 above.

<sup>13</sup> See 1390th meeting, paras. 11 and 12.

the term “newly independent State”. The meaning of that term was obvious. Besides, an attempt to define it would be almost like trying to define the concept of a State itself. The Commission should not delay its work by making any such attempt.

38. He entirely agreed with Mr. Quentin-Baxter’s criticism of the opening clause of article 14 (“Unless otherwise agreed or decided”).<sup>14</sup> Reference had been made during the discussion to devolution agreements concluded in the past, but he did not believe that the terms of those agreements should be hallowed in the present draft articles just because they had in fact been concluded. The question of devolution agreements had been discussed at length, both in the Commission and in the Sixth Committee in connexion with the topic of succession of States in respect of treaties. The conclusion reached had been to disavow those agreements for purposes of succession of States.

39. The Special Rapporteur had given very cogent reasons for viewing devolution agreements with suspicion. He had pointed out the “unequal and unbalanced legal and political relationship between the two parties” to those agreements and had stressed the need for the successor State to “enjoy favourable provisions because, as it enters international life, it needs as solid a foundation as possible in order to guarantee its sovereignty and consolidate its independence, and also because the predecessor State will tend not to ‘play fair’ in transferring property”.<sup>15</sup>

40. Experience showed that in many instances devolution agreements were really a device for giving unfavourable treatment to the State acceding to independence. In the long run, most of those agreements had had to be renegotiated and the Commission should not set its seal of approval on them. His own proposal was therefore that the opening clause “Unless otherwise agreed or decided” should be deleted from paragraph 1 of article 14. The remaining text would then constitute a clear statement of the factual situation and would provide the newly independent State with the best guarantee that it would receive its immovable property without being obliged to grant special privileges to the former colonial Power.

41. Fortunately, his own country had not been obliged to enter into a devolution agreement giving such special privileges, although some attempts had been made to exert pressure on it to do so. The kind of pressure that could be exerted by the former colonial Power was well illustrated by the examples of Guinea and the Comoro Islands, which had been mentioned during the discussion. The State aspiring to independence could find itself obliged to sign an unfavourable devolution agreement, because it was offered as an alternative either the refusal of independence or independence under the unfavourable conditions experienced by those two countries.

42. In paragraph 2 of article 14, he would favour dropping subparagraph (a), for the same reasons as he had

given in proposing the deletion of the opening clause of paragraph 1. Two States could, of course, reach any agreement they wished, and that fact raised no problem if they were of equal strength. In the present context, however, that was not the case, and he suggested that the only exception to the rule stated in the opening clause of paragraph 2 should be that now stated in subparagraph (b), namely the exception relating to the case in which the property had no direct and necessary link with the territory.

43. He sympathized with the views expressed by Mr. Tsuruoka concerning the negative form in which subparagraph (b) was cast.<sup>16</sup> That presentation, however, served to create a presumption that if the property was in the territory, it belonged to the successor State. If the predecessor State wished to claim the property, it would have to produce convincing evidence that the property had no direct and necessary link with the territory.

44. He fully agreed with the Special Rapporteur’s approach in paragraph 3 of article 14, on the permanent sovereignty of a newly independent State over its wealth, its natural resources and its economic activities. It would be unthinkable for the Commission to ignore the reality of that permanent sovereignty in the light of the 25 years of United Nations practice so well described by the Special Rapporteur in his commentary.

45. He could not accept Mr. Šahović’s suggestion that a separate article should be included in the draft affirming the permanent sovereignty of all States over their wealth and natural resources.<sup>17</sup> The concept in question had been developed to protect newly independent States against depredations by stronger Powers or multinational corporations. Other States were also entitled to permanent sovereignty over their wealth and natural resources, but in their case it would be superfluous to recognize that right expressly. The need to assert the principle existed only in regard to newly independent States.

46. As far as article 15 was concerned, he had no objection to its wording and agreed that it should be referred to the Drafting Committee.

47. Mr. YASSEEN said he noted that the Special Rapporteur had taken great pains to ascertain whether the criteria specified in the draft could be applied. He had, for example, pointed out that movable property could be transferred by the predecessor State to its own territory and that it was then difficult for the successor State to recover that property. The Commissioner’s task, however, was to formulate rules on succession of States, and if the criteria it specified were not applied effectively, that would be attributable to the international legal order. Certainly, the international legal order had its own means of enforcing legal rules, but those means were never as effective as those of internal law. International law was law in process of development. The Commission should not hesitate to establish certain criteria, even if their application promised to be difficult, for it was not concerned at present with the more general

<sup>14</sup> See 1394th meeting, para. 29.

<sup>15</sup> See A/CN.4/292, chap. III, paras. 7 and 8 of the commentary to article 14.

<sup>16</sup> See para. 9 above.

<sup>17</sup> See 1394th meeting, para. 19.

question of the implementation of rules of international law. In any case, the normative development of international law must not depend on its institutional development. What was more, normative development could even influence institutional development.

48. With regard to articles 14 and 15, the inclusion in the draft articles of provisions relating to newly independent States was perfectly justified. Admittedly, the phenomenon of decolonization had reached its peak during recent decades, but there were still a number of dependent territories for whose problems it was advisable to provide solutions. In addition, the provisions drafted by the Commission could help to regularize certain situations created at the time of decolonization which were not consistent with the criteria established by the Commission. For example, there might be an agreement between a former colony and the former metropolitan country, establishing ties between them which were inequitable from the standpoint of the draft articles. Without going so far as to assert that such an agreement should be considered void, he hoped that, once the international community had accepted the criteria of the draft articles relating to newly independent States, some States would be induced to reconsider certain situations that were incompatible with those criteria and to begin negotiations for their rectification.

49. Where succession of States was concerned, the case of newly independent States should be considered separately, for it was characterized, first, by a bond of dependence between two international entities, and secondly, by the fact that succession often took place in difficult circumstances. Those circumstances often led to arrangements that were inequitable, grudging or even imposed. A Non-Self-Governing Territory was often prepared to subscribe to agreements detrimental to its essential interests as the price of its independence. It was in the economic sphere, which was now of considerable importance, that the characteristics of newly independent States were most marked.

50. In connexion with the economic sphere, the Special Rapporteur had introduced, in article 14, paragraph 3, a reservation relating to the permanent sovereignty of the newly independent State over its wealth and its natural resources. In his report, he had examined with great skill the problems which had arisen and continued to arise for peoples struggling for their independence. It was with full knowledge of the facts that he had expressed his views, since he had himself experienced the fight of the Algerian people to gain their independence. The solutions he proposed bore witness to his regard for intellectual honesty, for he had endeavoured to formulate criteria that would be acceptable to the administering Powers.

51. The reservation the Special Rapporteur had drafted concerning sovereignty over natural resources would not be sufficient, however, to protect States against themselves. There were, indeed, certain leonine situations resulting from conventions in good and due form which could not be considered void unless one of the causes of nullity accepted in international law could be invoked. Military coercion undoubtedly constituted grounds of

nullity but political or economic coercion exercised to procure the conclusion of a treaty was not yet a recognized cause of nullity. Moreover, in some cases treaties incompatible with the permanent sovereignty of newly independent States over their natural resources had not been concluded as a result of coercion. Perhaps one day it might be possible to observe the emergence of a rule of *jus cogens* under which all agreements incompatible with the sovereignty of States over their natural resources would be void. International law might thus come to protect States against their own weaknesses.

52. With regard to the wording of articles 14 and 15, he reiterated the criticisms he had made of the expression "direct and necessary link" during the consideration of articles 12 and 13.<sup>18</sup> In his opinion, it would be sufficient to speak of a "reasonable link".

*The meeting rose at 1 p.m.*

<sup>18</sup> See 1391st meeting, para. 3.

### 1396th MEETING

*Wednesday, 23 June 1976, at 10 a.m.*

*Chairman:* Mr. Paul REUTER

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, 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 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)<sup>1</sup> (*continued*).

1. Sir Francis VALLAT thanked the Special Rapporteur for having set aside his personal preferences and followed the Commission's general wishes, particularly in articles 14 and 15. The case of the newly independent State should certainly be provided for in the present draft. Wherever possible, and especially in the case in question, the Commission should follow the pattern set

<sup>1</sup> For texts, see 1393rd meeting, para. 34.