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Summary record of the 1417th meeting

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

Extract from the Yearbook of the International Law Commission:-
1977, vol. I

Under certain constitutional arrangements, public enterprises were sometimes completely autonomous, but more often a public enterprise was simply an arm of the central Government that had limited financial autonomy and was usually indirectly accountable to the central Government, which kept watch over its activities. The Special Rapporteur might wish to comment on those points so that ways and means could be found to incorporate that element of a guarantee from the central Government in the definition, and thus broaden the scope of the articles.

42. Mr. VEROSTA said that State succession in respect of State debts raised a question of principle. The draft articles should not, in theory, touch on questions of State succession in respect of treaties, which were the subject of another draft convention. But State debts were not always based on treaties governed by international law: they could also be based on contracts—concluded, for example, with consortia of banks—which were not governed by international law. For instance, after the dissolution of the Danubian monarchy, the financial and economic problems of Austria and Hungary had been settled by treaties—the 1922 Geneva Protocol and the 1931 Lausanne Protocol—governed by international law, whereas the financial and economic problems of Czechoslovakia and Yugoslavia had been settled by more or less private loans granted by a consortium of banks and guaranteed by the State, which were not governed by international law.

Organization of work

43. Mr. QUENTIN-BAXTER said that he wished, first of all, to congratulate the Chairman and the officers of the Commission on their election.

44. He was struck by the contrast between the present situation and the situation at the beginning of the previous five-year period, when the Commission had embarked on a substantial debate on its long-range programme, its methods of work and the balance of its obligations. The attendance of so many members of the Commission at the forthcoming conference on the law of the sea would indeed benefit the Commission itself and enrich the experience of the members concerned. However, it could follow from that, that in the course of the present session, it would be difficult at times to muster enough members to perform the normal work of the Commission. It was also clear that, since it had long been the custom of the Commission to deal early in its session with the difficult and fundamental question of State responsibility, a further strain would be imposed if it had to be dealt with at the end of the session. Experience showed that draft articles on that subject tended to require very lengthy consideration and the officers of the Commission would be faced with a challenge that did not have to be met in normal circumstances.

45. The Commission should never fail to keep under review its relationship with the General Assembly. The question of the length of the Commission's reports, touched on by Mr. Ago at the 1414th meeting, was but one example of the continuing need to seek a perfect understanding with the General Assembly. In recent years, speakers in the Sixth Committee had singled out for special praise the efforts made by the Commission to review its procedures and, despite the constraints of the present session, the Commission should not lose sight of the need to discuss its methods of work. Obviously, a successor was needed to Mr. Kearney in his capacity as the advocate of a planning committee.[6] He hoped that, with the attendance of a greater number of members at the end of the present session, some consideration could be given to the long-range programme, the character of the Commission and the way in which the General Assembly looked on its work.

46. The CHAIRMAN, speaking as a member of the Commission, said that he shared the concern expressed by Mr. Quentin-Baxter. The work of the informal planning group had been greatly appreciated in the General Assembly, for almost every speaker in the Sixth Committee had expressed satisfaction at the manner in which the Commission was endeavouring to improve its procedures and organize future work. The question of the informal planning group or committee would almost certainly be raised at the next meeting of the Enlarged Bureau.

47. Mr. EL-ERIAN said that a number of representatives in the Sixth Committee had raised the question of the possibility of issuing the Commission's report in two parts.[7] He hoped that it would be possible to do so, thus affording more time for Governments and delegations to study the report.

48. Mr. RYBAKOV (Secretary of the Commission) said that it would be possible to issue the report in two parts and, in so doing, facilitate study of the report by delegations in the Sixth Committee. It would mean that after the discussion of perhaps one item the draft articles and related commentaries by the Special Rapporteur would have to be available for approval by about the middle of the session.

The meeting rose at 12.55 p.m.

[6] *Yearbook ... 1976*, vol. I, p. 298, 1413th meeting, para. 19, and A/CN.4/L.252.

[7] See *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 243.

1417th MEETING

Thursday, 12 May 1977, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

Draft articles submitted by the Special Rapporteur (*continued*)

Article O (Definition of State debt) [1] (*continued*)

1. Mr. FRANCIS congratulated the Special Rapporteur on the high quality of his ninth report (A/CN.4/301 and Add.1) and of his introductory statement. The presentation of the report by chapters would be of great assistance in understanding a complex subject.

2. In seeking to delimit the concept of State debt, the Special Rapporteur had stressed what he considered to be the essential elements of that concept and also indicated certain elements which he felt should be excepted from it. In that connexion, and with reference to the definition of State debt proposed in article O, he would be grateful if the Special Rapporteur would state whether there could be any special reasons why a State debt could be charged to an institution rather than to the total national resources of a country, as was normally the case.

3. Mr SUCHARITKUL said that Mr. Reuter had referred [2] to the possibility of an agreement concluded by the State with an international organization such as the International Monetary Fund, the World Bank or the Asian Development Bank. Provision must also be made for the case of succession to State debts contracted towards an international organization. International organizations were composed of member States, and the funds of such organizations were derived from contributions by member States—in other words, from State funds. But creditors could include private financial institutions or individual nationals or aliens. In such a case, the financial obligation of the State was a strictly internal obligation, which could not be dealt with within the framework of international law, or at any rate, not until internal remedies had been exhausted. Thus that category of State debts contracted with respect to a private third party, fell within the sphere of State responsibility and should, he thought, be left aside for the time being.

4. Mr. CALLE Y CALLE said that the Special Rapporteur's latest report was as clear and as well documented as the previous ones. That was all the more remarkable an achievement as the Commission was now entering a field in which there were no universal rules of international law: there was no absolute rule which determined succession to debts, whether national debts, public debts, régime debts or others.

5. While it was important to determine the source of a State debt, it was essential to determine who must pay the debt. In other words, it had to be determined whether a debt continued to attach to the entity which had contracted it, or whether, in specific circumstances and because there were good reasons for such a change, the original debtor could be replaced by another. The Special Rapporteur had alluded in his report to what he had termed the "voluntary and spontaneous" assumption by the republics of the former Spanish America, on their accession to independence, of the State debts of Spain (A/CN.4/301 and Add.1, paras. 281-294). In the case of Peru, at least, the acceptance of the Spanish debt had been less voluntary than it might seem, for it had been a condition imposed by Spain for the recognition of its independence.

6. He supported the definition of State debt proposed by the Special Rapporteur in draft article O, which could form a basis for the elaboration of specific rules relating to the various types of State debt considered later on in the report.

7. Mr. USHAKOV said he fully endorsed the approach which the Special Rapporteur had taken in chapter I of his report in deciding to limit his study to debts of the predecessor State and to exclude from it all other categories of debts. He believed that the Commission should concern itself only with State debts. But what was meant by "State debt"? In his opinion, a "State debt" was a "debt of the State", according to the definition given by Alexandre Sack. That definition, which the Special Rapporteur had quoted in paragraph 60 of his report and which he had criticized as being almost tautological, at least had the virtue of excluding government debts and régime debts. Indeed, it was questionable whether it was appropriate to speak of "government debts", since the Government, as an organ of the State, had no possessions of its own and when it contracted a loan, it did so on behalf of the State. It was equally questionable to refer to "régime debts", since it was not the régime as such but the State which possessed wealth. "State debts" could therefore properly be defined as "debts of the State". That was an extremely important point, since the Commission should concern itself solely with relations between subjects of international law which were governed by public international law. Consequently, only debts contracted by a subject of international law to another subject of international law, and therefore governed by public international law, should be considered. The Special Rapporteur had been right to limit his study to State debts and to exclude other categories of debts since the latter were governed, not by public international law, but by private international law, which reflected various systems of internal law.

8. It might be sufficient to provide that "State debt" meant an international obligation, for since an international legal obligation could arise only between subjects of international law, the study would then be limited to debts contracted by a subject of international law to another subject of international law. However, it might also be stipulated that "State debt" referred to debts of the predecessor State, as the Special Rapporteur suggested in his report.

9. The Special Rapporteur had been right to specify, in his proposed definition in article O, that "'State debt' means a financial obligation", since a debt was invariably a financial obligation. However, it was not always a financial obligation assumed by a State towards another State or towards several States, either together or separately. It might also be a financial obligation assumed by a State towards subjects of international law other than

[1] For text, see 1416th meeting, para. 1.

[2] 1416th meeting, para. 28.

States—an international organization, for instance. It should therefore be stipulated that a State debt was a financial obligation assumed by a State towards other States or towards other subjects of international law.

10. It might also be appropriate to explain that "State debt" referred to State debts which were lawful under international law. However, it was not really necessary to include an express provision on that point in the draft articles, since it was a presumption which could be brought out quite adequately in the commentary. In the case of the draft articles on succession of States in respect of treaties, the Commission had also presumed that succession of States was limited to valid treaties and had not raised the question of the validity or legitimacy of treaties, a matter which it had considered to be covered by the Vienna Convention on the Law of Treaties.[3,4] While, therefore, the Commission should proceed on the assumption that the draft articles related only to debts lawful under international law, it did not have to go into the question of the rules determining the legitimacy of debts, since it was not dealing with debts as such but with succession of States to debts.

11. Nor should the Commission concern itself with the manner in which the State had contracted a financial obligation to another subject of international law. The fact that the obligation had been contracted through the central Government or through some authorized private individual was of little consequence: all that mattered was the existence of a financial obligation.

12. The source of the obligation was another extraneous consideration. It was of little importance whether or not an obligation was a conventional one. What was important was that there was a lawful financial obligation. The way in which that obligation had come into being was irrelevant. Indeed, he wondered whether it was appropriate to use the term "contracted", since the obligation did not necessarily arise from a contract.

13. Succession of States in respect of State debts raised several important questions. As Mr. Sette Câmara had said,[5] in some States like Brazil, the different states composing the federation could assume their own share of certain financial obligations, and could therefore have debts. The same applied to the Soviet Republics and the Swiss cantons. The question therefore arose whether, in the case of a federal State or a union of States, only debts of the central Government should be taken into consideration, or whether account should also be taken of debts contracted by the component parts of the State. His own view was that the debts of component parts could be taken into consideration if those parts were subjects of international law. The same problem had arisen in connexion with succession of States in respect of treaties, since the component parts of a union of States could conclude treaties when they were subjects of international law. Admittedly, the Commission had left that question aside in the case of succession of States in respect of treaties, and it might therefore wish to do the same in the present case.

14. A problem also arose in the case of former dependent territories. The metropolitan State or the administering Power might have assumed certain financial obligations towards the territory under its administration. In that case, however, the debts concerned were debts contracted by the predecessor State to the successor State.

15. The question of security and guarantees did not fall within the scope of the present draft articles but belonged to another sphere of international law.

16. The question of "localized debts" arose in cases of the transfer of part of the territory of a State to another State and in cases of separation or uniting of States. However, it was permissible to ask whether it was really the debt that was localized or whether it was not, rather, the property or funds which were the source of the debt and were used for the benefit of the territory that were localized. That was perhaps the most delicate question of all and the most difficult to resolve.

17. Mr. QUENTIN-BAXTER said that the Special Rapporteur's latest report (A/CN.4/301 and Add.1) represented a work of great scholarship. He was sure that the concentration in the report on the question of State debts did not imply any intention to omit from the final set of draft articles the very important question of archives.

18. The Special Rapporteur had said that the difficult work which lay ahead of the Commission on the subject of State debts could be seen as the counterpart of what it had already done on the question of State property. While it would be dangerous to assume that rules applying to State property would necessarily apply to any other subject, it could be taken as a working hypothesis that guidance as to the right approach to the question of State debts and obligations could be found in the articles on State property which the Commission had already adopted. During the Commission's consideration of those articles, it had become clear that practice with regard to succession to State property was very diverse, and that international scholars had never really reached agreement on the boundaries of the subject of succession of States in respect of matters other than treaties. The lesson to be drawn from that seemed to be that the study of State succession should be limited to the immediate effects of the change of sovereignty, leaving aside such matters as the relationships of the successor State with private individuals or third States, which belonged to the realm of the primary rules governing State responsibility towards aliens, and so on. The essence of the topic was to be found in article 4[6] of the articles already adopted, and lay in the conjunction of the change of international personality with the internal law of the predecessor State.

19. That was a concept which he felt must also be applied to the study of succession to the negative elements of State property, namely, obligations. Given that view, he was very sympathetic to what other members of the Commission had said concerning the extent of such obligations.

[3] *Yearbook ... 1974*, vol. II (Part One), p. 181, document A/9610/Rev.1, chap. II, sect. D, commentary to article 6.

[4] For the text of the Convention, see *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. 289. (Hereafter referred to as the "Vienna Convention".)

[5] 1416th meeting, para. 38.

[6] See above, 1416th meeting, foot-note 2.

With regard to the question of guarantees raised by Mr. Njenga,[7] for example, he considered that, in principle, a debt guaranteed by a State constituted a contingent financial obligation of that State and, as such, came within the scope of the definition of State debt now proposed. It could also be recalled, with reference to the question raised by Mr. Verosta as to whether State obligations were necessarily financial, that the Permanent Court of International Justice had characterized the case of the German settlers in Poland as a matter of succession by Poland to obligations towards people in its territory which had formerly been those of Germany.[8] He believed, therefore, that the Commission could employ in its approach to the question of succession to obligations principles of the same degree of generality as those it had used in considering succession to property.

20. In that connexion, he drew attention to the problem of the third State, which was discussed in chapter II of the Special Rapporteur's report. The fundamental distinction between succession in respect of treaties and succession in respect of other matters was that the first form of succession necessarily involved the substitution of one international person for another in relations with a third international person or several third international persons, whereas the second involved essentially only two parties, namely, the predecessor State and the successor State. It was precisely for that reason that the Commission had decided to confine its attention to succession to State property and debts, since the property and obligations in the name of an entity other than the predecessor or the successor State would not automatically be affected by the succession as such. If that limitation was maintained, the Commission would, once again, have to consider whether the articles it was now about to draft should represent a full counterpart to those on succession to property, or whether its approach should be more limited. He was not convinced that the latter solution was the right one, although he was very well aware that the application to State debts or other obligations of the categories employed in respect of State property would occasion many problems, including perhaps that of the need to take into account the relationship between positive rights and debts and obligations which were in some way associated with such rights. He had in mind in that respect the private law maxim that it was not possible at one and the same time both to approbate and to reprobate, an idea which it might prove necessary to include in the draft articles at some point.

21. Finally, the Commission might wish initially to adopt a broader concept of a State obligation than that implied by the reference in draft article O to a link with the State treasury. Not all the obligations which the Commission would have to consider were so linked.

22. Mr. EL-ERIAN said he congratulated the Special Rapporteur for a masterly report on a subject concerning which there was a great diversity of precedent and of theoretical opinion. In general, he agreed with the approach adopted by the Special Rapporteur.

23. The Special Rapporteur had been right to draw attention, in chapter I, section A, of the report, to the fact that in private law the relationship between debtor and creditor was personal, and to question whether the same relationship obtained in international law. Great care should be exercised in drawing analogies between private and international law, for while the former was at the origin of the latter, international law had now become a separate science and obligations under it differed from the obligations between individuals governed by private law. The same comment applied to the reference by Mr. Quentin-Baxter to the possible inclusion of a provision specifying that a benefit must be taken with the attendant obligation. That was so not only because of the differences between international and private law, but also because of the differences between private law systems themselves: in Muslim law, for example, there could be no succession without prior settlement of debts, so that a debt did not pass to the successor but remained attached to the estate of the person who had contracted it.

24. With regard to the relationship between the present topic and that of State responsibility, he agreed with the statement by the Special Rapporteur in the first sentence of paragraph 32 of his report. The Special Rapporteur had obviously taken great care to distinguish between problems which were pertinent to the current study and others which were not problems of State succession proper, but in connexion with which State responsibility might be engaged. The Special Rapporteur had given a sound definition of what constituted State debt and had justifiably avoided using the confusing expression "public debt". He agreed with Mr. Ushakov that the debt must be lawful and must genuinely be the debt of a State.

25. Finally, the Special Rapporteur had been right to point out, in paragraph 92 of his report, that the payment of debts was necessary for the maintenance of a sound international legal order, but that, at the same time, considerations of equity required that the debtor State be allowed to remain a viable entity. To combine those requirements was one of the main challenges before the Commission.

26. Mr. AGO said that, in chapter I of his report, the Special Rapporteur had taken great care to delimit the subject-matter under consideration as precisely as possible. He had thus had to make choices which, as was always the case in matters of delimitation, necessarily involved some element of arbitrariness. The problem was not so much whether the choices were good or bad, but rather whether they were actually in line with the Commission's objectives.

27. The concept of the State adopted by the Special Rapporteur for the purposes of the definition of State debts was one which was normally used in internal law. He excluded the debts of territorial authorities, as well as debts contracted by a non-territorial entity, such as a public establishment, and proposed to take into consideration only the debts contracted by the "central Government". It might be better to refer to a central organ of the State apparatus in order to cover the debts which could, for example, be contracted by a State's

[7] 1416th meeting, paras. 40 and 41.

[8] Advisory Opinion of 10 September 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, 1923, *P.C.I.J.*, Series B, No. 6.

central bank. What caused him rather more concern, however, was the fact that the concept of the State adopted by the Special Rapporteur was entirely different from the concept which the Commission had adopted in connexion with State responsibility, where the State was considered as a subject of international law presenting external unity, even if it could be broken down internally into a number of persons. In the study of the subject of State responsibility, it had been clearly established that an internationally wrongful act was considered as an act of the State, even if it was, for example, attributable to a municipality, a member State of a federal State or a public establishment. Of course, the Commission was free to adopt, for a different subject, a different concept of the State, but it must realize the consequences which such a choice might entail. If, for example, a State violated an international obligation attaching to a debt and the immediate author of the violation was a territorial authority, the responsibility of that State would be engaged at the international level, but the debt would not fall within the provisions of article O proposed by the Special Rapporteur in the matter of State succession. If the Special Rapporteur intended to exclude the debts of territorial authorities and especially those of public establishments, not for genuine reasons of principle, but merely in order to simplify the study of the subject-matter, it would perhaps be advisable to reflect before adopting as a concept of the State one drawn from internal law.

28. The question of "odious" debts and régime debts, though the Special Rapporteur intended to deal with them later, called for some comments forthwith. In paragraphs 45 to 47 of his ninth report, the Special Rapporteur contrasted State debts with régime debts. He had thus been compelled to use vague concepts such as those of régime and change of régime. The meaning of the word "régime" was unclear. Thus in France, the words *ancien régime* had been used to describe, not a temporary régime but the whole period of the monarchy which had preceded the Revolution. The words "change of régime" could, in extreme cases, apply to a change of State, but, in most cases, they referred to a change of Government. The definition of régime debts formulated by Charles Rousseau and to which the Special Rapporteur had referred was hardly enlightening. According to that definition, régime debts were debts contracted by the State "in the temporary interest of a particular political form" and the term could "include, in peacetime, subjugation debts specifically contracted for the purpose of colonizing or absorbing a particular territory, and, in wartime, war debts".[9] Such wording left many things in doubt. Was it the interest of the political form which was temporary or the political form itself? It should also be noted that war debts normally came into being after the cessation of hostilities. As Mr. Ushakov had pointed out,[10] the question of the lawfulness of the debt could also be raised, but it was a very delicate one. A debt imposed by an aggressor State as a result of a war of aggression would probably not be considered valid, but a debt imposed by the victorious victim of a war of aggression would not be classified as "odious".

29. The Special Rapporteur had rightly distinguished a special category of debts, described as localized debts, which were debts contracted by the predecessor State for the benefit of a specific part of its territory, which might subsequently separate from that State. In the case of the separation of part of a territory, however, problems of succession to debts could arise even if the debts had not been contracted in the exclusive interest of the part of the territory in question. The case would be simple if, for example, the United Kingdom contracted a debt for the benefit of the development of Northern Ireland and Northern Ireland then separated from the United Kingdom. But what would happen, in such a situation, if the debt had been contracted for the benefit of the territory of the United Kingdom as a whole? It was important that such cases should be taken into account.

30. Referring to a question raised by Mr. Reuter [11] and by Mr. Ushakov [12] concerning the source of debts, he pointed out that, in French, it was not improper to refer to a debt *contractée* by the predecessor State since the word *contractée* did not necessarily imply that there was a contract. He would stress, however, that if the debt resulted from a wrongful act, difficulties might be encountered as a result of the fact that the concept of the State was not the same in the present article and in the draft articles on State responsibility.

31. In view of those considerations, he invited the Commission to think again before adopting the proposed definition of State debt.

32. Mr. CASTAÑEDA said that the Special Rapporteur had made an admirable effort at systematization in a very difficult and extremely fluid area in which many of the concepts were imprecise and even the elements of private law were far from clear. Obviously, he had been compelled to make a selection from concepts that were vague and imprecise and a selection of that type necessarily involved some arbitrariness.

33. He agreed basically with the Special Rapporteur's choice of the field of study and fully endorsed the method of gradually eliminating a number of entities related to the State, thus leaving as the core of the study the debt of the predecessor State, either to a third State or to the successor State. The essence of the study was, in fact, the debt of the predecessor State. Indeed, the Special Rapporteur seemed to imply that the report related only to the debt of the predecessor State to a third State because, as he rightly pointed out in paragraph 57 of the report, a decision to transfer the debt of the predecessor State to the successor State would mean cancellation or extinction of the debt. That pertinent observation practically eliminated the debt of the predecessor State to the successor State and, in his opinion, it was the correct way to circumscribe the problem, which therefore centred on the debt of the predecessor State to a third State.

34. However, certain matters still had to be clarified. He assumed that the answer to the question of the source of the debt lay in paragraph 61 of the report, which indicated that, although the Special Rapporteur was

[9] See A/CN.4/301 and Add.1, para. 47.

[10] See para. 10 above.

[11] 1416th meeting, para. 28.

[12] See para. 12 above.

basing his arguments on cases of State loans, it was understood that a State debt might be a commercial, administrative or other debt. It was precisely in that connexion that the Special Rapporteur had been obliged to make a somewhat arbitrary but none the less correct choice. The Commission should consider only patrimonial debts, in other words, debts with a financial content, although it should be noted that the concept of debt was not clearly defined in international law. Even in private law, most legislations defined simply the concepts of debtor and creditor, but not that of "debt" as such. On the other hand, the wider concept of obligation, which might require performance or non-performance in a context that was not necessarily financial, existed in private law. Mr. Quentin-Baxter had referred [13] to treaty obligations of States towards nationals of another country, a subject which unquestionably related to succession of States. It was nevertheless a separate issue, which the Commission would have to consider in due course.

35. He agreed with the comments by Mr. Ushakov and Mr. Ago on lawful and unlawful debts, but would go even further and assert that a debt must be lawful for it to be regarded as an obligation in law. Therefore, it was to be understood that the study dealt only with lawful debts.

36. The key word "contracted" used in draft article O did not signify a contractual debt but one that was voluntarily assumed by the State. That voluntary aspect of the question therefore excluded all delictual or quasi-delictual acts which might give rise to an obligation. He was not fully persuaded by the reasons advanced by the Special Rapporteur, in paragraph 40 of his report, to justify that approach. It was certainly true that delictual debts, arising from unlawful acts committed by the predecessor State, raised special problems with regard to succession, that the solution of such problems was governed primarily by the principles relating to international responsibility of States, and that delictual debts were of far less importance than contractual debts. However, delictual debts might well be of importance in some instances, and he failed to see why such a substantial category of law as unlawful acts should be excluded from the study. Mr. Ago had mentioned acts by an authority giving rise to the responsibility of the State, but regardless of which organ or entity committed the act, the question arose as to whether or not the Commission should, in general, exclude obligations resulting from something more than voluntary legal acts. His own view was that all acts generating international obligations should be included in the study. It might therefore be advisable to replace the words "contracted by" in draft article O by the words "chargeable to", and thus broaden the scope of the definition, if the Special Rapporteur could agree.

37. Further examination was required of the concept of a debt incurred by a local authority but guaranteed by the State, since it would be difficult to determine whether the debt was a local debt or a State debt. Moreover, very difficult problems arose in connexion with localized debts. At the previous session, during the discussion on succession to State property in the case of separation of parts of a State. Mr, Njenga had given the excellent example of a dam whose cost of construction had been paid by all parts of the predecessor State and which might be attributed to the successor State in whose territory it was situated.[14] In the context of a debt incurred for the construction of a dam, it would be difficult to distinguish between local or localized benefit and benefit to the country in general. While he had no objection to the approach adopted by the Special Rapporteur, in that case it would be necessary to consider very carefully the kinds of problem that might arise.

38. Lastly, on the topic of régime debts, the Special Rapporteur rightly pointed out in paragraph 46 of his report that régime debts must be regarded as State debts. Consequently, the problem of a succession of Governments, as opposed to a succession of States, did not at present arise. Later, during the discussion of chapter III of the report, the Commission would be able to establish whether the phenomenon of succession of States entailed the transfer of régime debts to the successor State and whether the Special Rapporteur's conclusions in that connexion were correct.

39. Mr. ŠAHOVIĆ said that the general debate on chapter I of the report was proving very useful. It was important to bear in mind the orientation the Commission had so far given to its study of succession of States in respect of matters other than treaties. That orientation was based on an empirical analysis which should bridge the gap and resolve the contradictions between doctrine and jurisprudence. In order to formulate modern rules appropriate to current needs, the Commission should make a special effort to study the practice followed after the Second World War in respect of succession to State debts, particularly by international banks. As there were no universally acceptable customary rules in that field, the general debate should be continued and, in accordance with the Commission's practice, the formulation of definitions should be left until the final stage of its work.

40. With regard to the definition of State debt contained in draft article O proposed by the Special Rapporteur, it was important to stress the international aspects of the problem, although the internal organization of the State should not be overlooked. In his report, the Special Rapporteur had begun by studying the concept of debt as such, but he had then rightly considered that concept from an international point of view.

41. In order to reach a definition of State debt, the Commission ought therefore to take account of the outcome of the current discussion with regard to the internal and international aspects of the functions of the State and also of the definition of State succession, which emphasized the idea of territory. Thus it would be better for the Commission to wait until it had considered the other chapters of the report because it first had to settle the question of relations between the predecessor State, the successor State and third States.

42. Lastly, the question of succession to State debts, which basically involved the transfer of the debts of the predecessor State to the successor State, was one which involved two sovereignties. His own opinion was that,

[13] See para. 19 above.

[14] *Yearbook ... 1976*, vol. I, p. 230, 1400th meeting, para. 6.

in the final analysis, the successor State should express its will, regardless of the legal aspects of the problem.

The meeting rose at 1.10 p.m.

1418th MEETING

Friday, 13 May 1977, at 10.35 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Organization of work (*continued*)*

1. The CHAIRMAN said that the Enlarged Bureau had recommended that the special meeting to pay tribute to the memory of Mr. Edvard Hambro should be held on Monday, 16 May 1977, at 3 p.m. Unfortunately, Mrs. Hambro would not be able to attend, but the Norwegian Ambassador would be present at the meeting.

2. Mr. QUENTIN-BAXTER suggested that the participants in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, currently being held in Geneva, be informed of the special meeting, which they might well wish to attend.

3. The CHAIRMAN said that arrangements would be made to inform the secretariat of the Diplomatic Conference. If there were no objections, he would take it that the Commission agreed to the recommendation of the Enlarged Bureau.

It was so agreed.

4. The CHAIRMAN said the Enlarged Bureau had also recommended that the Commission should hold a closed meeting at 10 a.m. on Thursday, 19 May 1977, for the purpose of filling the casual vacancy caused by the death of Mr. Hambro. If there were no objections, he would take it that the Commission agreed to that recommendation.

It was so agreed.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE O (Definition of State debt) [1] (*continued*)

5. Mr. YANKOV congratulated the Special Rapporteur on a very scholarly report which contained many thought-provoking ideas and reflected great breadth of vision.

6. He agreed with the principal preliminary conclusions and, in general terms, with the definition contained in draft article O, which he regarded not as the final outcome of the Special Rapporteur's analysis but as a valid and stimulating basis for further discussion. While he concurred with the Special Rapporteur's premise, set forth in paragraph 2 of the report (A/CN.4/301 and Add.1), that "a debt might be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something for the benefit of a certain party, called the creditor", it was difficult to see why such a very broad concept had been reduced in the Special Rapporteur's proposed definition, to a financial obligation chargeable to the treasury of the State. The question arose of other obligations, to do or to refrain from doing something, which did not derive from international treaties and were not expressed in financial terms. In other words, the basic concept appeared to be much wider than the actual definition, which contained several elements, namely, the financial nature of the debt, the fact that it should be contracted in some way and the fact that it should be chargeable to the treasury of the State. He could accept for the moment the restrictive definition of State debt, but certain matters still had to be clarified. As a new member, he was not acquainted with the background of the earlier discussion of the topic, but he wondered whether the Special Rapporteur should not also consider other instances of obligations to do or to refrain from doing something for the benefit of a certain party, which were not of a financial nature and, therefore, were not chargeable to the treasury of the State.

7. His doubts concerning the harmony between the basic premise contained in paragraph 2 and the definition itself were reinforced by other parts of the report, more particularly paragraph 61, in which the Special Rapporteur introduced a broader concept of State debt. There were several possible courses of action. Either the general concept should be restricted so as to be in keeping with the Special Rapporteur's conclusion, as crystallized in the proposed definition, or the Special Rapporteur might for the time being focus his attention on financial obligations but keep open the possibility of studying wider obligations of the predecessor State towards the successor State or a third State. For example, how would the fishing or transit rights granted to a third State under a municipal law of the predecessor State with respect to a particular territory be affected if the territory in question were transferred to the successor State as a consequence of a succession of States?

8. The Commission was, of course, dealing with the realm of international law and, in the present instance, the subject must be the State. Like Mr. Ushakov,[2] he experienced some difficulties in clearly differentiating between the situations regarding local and localized debts. The arguments advanced by the Special Rapporteur were convincing, yet there appeared to be some lacunae and it would be useful if more light could be shed on that aspect of the problem.

* Resumed from the 1415th meeting.

[1] For text, see 1416th meeting, para. 1.

[2] 1417th meeting.