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Summary record of the 1425th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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to questions, criticisms and doubts to which chapter II of his report had given rise.

32. He would concentrate on one basic problem, namely, the scope to be given to the draft articles which the Commission was preparing for the international community. Nearly all the members of the Commission had referred to that problem, which could be summarized under three main heads: first, the definition of State debt; second, the legal nature of the relationship established by the transfer of the debt, which some considered to be a relationship between the predecessor State and the successor State while others considered it to be a triangular relationship between the predecessor State, the successor State and the creditor third State; and, third, the status of the creditor—must the creditor be a State or might it also be another subject of international law or a natural or juridical person in private law?

33. Members of the Commission had expressed different views on that last point. Some thought that, for reasons of principle or methodology, the relationship should be limited to subjects of international law, whether States, international organizations or unions of States. He shared that view, but, since he had realized that different opinions might be expressed in that regard, he had planned the draft in such a way that, without changing its structure entirely, its scope might be extended to cover private creditors. Members of the Commission had displayed great powers of imagination in their efforts to find a solution to that problem, but most of them had stressed the basic relationship which linked the predecessor State and the successor State. It was Mr. Dadzie who had perhaps gone farthest by stating that the triangular relationship should not be retained and that the requirement of the consent of the third State should be eliminated. Mr. Riphagen had been of the opinion that the triangular relationship was established only when the relationship between the predecessor State and the successor State was projected on to the creditor third State. He (the Special Rapporteur) accepted that view, but believed that the situation was actually more complicated than that.

34. The discussion of the articles proposed in chapter II of the report and of the basic questions of the definition of debt and the nature of the relations established for the transfer of the debt could be summarized in the following way. Some members of the Commission thought that article R alone should be retained and that its wording should be amended. They had said that the other articles which had been proposed were helpful, but not really necessary because they dealt with procedural matters. Other members of the Commission had expressed the view that articles R, S, T and U were necessary and adequate although their wording might need to be improved; they had also said that those articles might be further clarified and, possibly, combined. Still other members of the Commission had been of the opinion that those articles were necessary but inadequate, and that they should be rearranged and supplemented so that it would, for example, be clear that they applied to creditors in private law.

Appointment of a drafting committee

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to appoint a drafting committee consisting of the following twelve members: Mr. Tsuruoka as Chairman, Mr. Ago, Mr. Calle y Calle, Mr. Días González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Tabibi, Mr. Ushakov, Mr. Verosta and, *ex officio*, Mr. Bedjaoui, the Commission's Rapporteur. It was, of course, understood that a special rapporteur was always entitled to attend meetings of the Drafting Committee when the latter was considering the topic for which he was responsible.

It was so agreed.

Appointment of a committee for the Gilberto Amado Memorial Lecture

36. The CHAIRMAN said, that if there was no objection, he would take it that the Commission agreed that the Committee for the Gilberto Amado Memorial Lecture should consist of Mr. Ago, Mr. Castañeda, Mr. El-Erian, Mr. Sette Câmara, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat and Mr. Yankov.

It was so agreed.

The meeting rose at 1 p.m.

1425th MEETING

Monday, 23 May 1977, at 3.05 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, 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 R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)[1] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) said that three trends had emerged from the discussion of chapter II of his ninth report (A/CN.4/301 and Add.1).

2. Some members of the Commission, including Mr. Ushakov, thought that only article R should be retained. That view raised the problem of the comparison between State property and State debts. Mr. Ushakov had said that, in the final analysis, the role played by the third State was the same, whether what was involved was a succession to State property or a succession to State debts; the third State would be bound by a transfer of property from the predecessor State to the successor State, and it would similarly be bound by a transfer of debt between those two States. That view, in turn, raised the problem of the legal nature of debt, a question which lay in the realm of the general theory of law. As a rule, the transfer of debts was prohibited in legal systems; there could thus be no subrogation in the matter of debts. If State A was the depositary of funds of State B and State B requested State A to transfer those funds to State C, whose economic development it wished to promote, State A would probably have no objection to doing so. If, however, State A was a creditor of State B and, as a result of a succession of States, the debt passed to a State with which State A did not maintain diplomatic relations, or to an enemy State, it was quite reasonable that State A should have to give its consent. That was why, in all internal law systems, the transfer of a debt was possible only with the express consent of the creditor.

3. Both Mr. Ushakov [2] and Mr. Šahović [3] had suggested that article R should be modelled on article 6 [4] on the rights of the successor State to State property passing to it. Although he was not against that suggestion, which the Drafting Committee might consider, it would have the effect of considerably reducing the value of article R. As it stood, article R offered the advantage of establishing a legal relationship between the successor State and the predecessor State, which continued to be subject to the consent of the third State. As Mr. Castañeda had said,[5] it was a complex legal act, a legal norm in a state of suspension; the consent of the third State was required for that norm to become applicable to it. It was only the conjunction of the various elements composing that complex legal act that produced the expected results with regard to the third State. Article R would not reflect that complex situation if it were modelled on article 6. The role played by the third State in the cases covered by article R and article 6 was not the same.

4. Mr. Ushakov had also suggested the deletion of articles S, T and U, which he found useful, but premature,[6] on the ground that the rules they contained were rules of procedure designed to implement the principle stated in article R. He (the Special Rapporteur) was of the opinion that articles S, T and U contained substantive rules without which the complex legal act of transfer of the debt could not take full effect, at least as concerned the third State.

5. Most of the members of the Commission had said that they were in favour of retaining articles R, S, T and U, but many of them had requested further clarifications. They had made general comments on the articles. Mr. Tabibi,[7] Mr. Njenga [8] and Mr. Castañeda [9] had said that they would like those articles to be considered as a whole. Mr. Šahović and Mr. Riphagen [10] had agreed with him on methodology, but would like the Drafting Committee to try to combine those articles and word them positively. He would see that their suggestions were taken into account by the Drafting Committee.

6. Some members of the Commission had again raised the question of the legal nature of the triangular relationship established in the articles. The views on that problem, with which he had already dealt orally, had been described by Mr. Jagota [11] in the following way: Mr. Ushakov had said that consent was a procedural matter; Mr. Njenga had said that it was a power of veto, and his (the Special Rapporteur's) view lay somewhere in between. Mr. Jagota had then asked what happened when the predecessor State ceased to exist, as in the case of South Viet Nam referred to by Mr. Sucharitkul, and had suggested that provision should be made for such a possibility, which would constitute an exception to articles R, S, T and U. He (the Special Rapporteur) was of the opinion that, in such a case, the creditor State would be quite wrong to refuse its consent because the exercise of its "power of veto" would be suicidal. Indeed, it was not necessary to limit the third State's power of veto as Mr. Njenga had suggested for obviously, in its own interest, the third State would never exercise that power if it jeopardized the existence of its debt-claim. Moreover, if the rule of succession unquestionably specified that the successor State was the new debtor, as in the case of localized State debts for instance, it was obvious that the third State would not exercise its power of veto since it would be aware that there was no legal basis for its claim. On the contrary, it would hasten to give its consent.

7. Mr. Sette Câmara,[12] Mr. Njenga,[13] Mr. Yankov and Mr. Tabibi [14] had recognized that it would be dangerous to say that unilateral declarations and devolution agreements gave rise to obligations for the successor State. To reinforce that point, Mr. Sette Câmara [15]

[1] For texts, see 1421st meeting, para. 32.

[2] 1422nd meeting, para. 43.

[3] 1423rd meeting, para. 24.

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

[5] 1422nd meeting, para. 10.

[6] *Ibid.*, para. 42.

[7] 1424th meeting.

[8] 1423rd meeting.

[9] 1422nd meeting.

[10] 1423rd meeting, para. 26.

[11] *Ibid.*, paras. 19-20.

[12] 1422nd meeting.

[13] 1423rd meeting.

[14] 1424th meeting.

[15] 1422nd meeting, para. 25.

had referred to article 35 of the Vienna Convention, [16] which related to the notification by which a third State expressly accepted an obligation arising from a treaty. Emphasis had also been placed on the fact that the will of the successor State was not always freely expressed, and some members of the Commission had said that it might be better to delete article S in order to avoid serious complications. Their view was not to be disregarded, but he would come back to it later when mentioning other important aspects of that provision.

8. Many members of the Commission had said that the scope of the articles under consideration should be extended to cover subjects of international law other than States. Such an extension would not pose any problems in view of the flexibility he had provided for in the structure of the draft. Mr. Quentin-Baxter [17] had again referred to the question of the definition of State debt, in which he thought not only financial debts, but also fiscal, economic or monetary obligations, should be included. He (the Special Rapporteur) had no objection, provided the definition was not extended to include real obligations, which established boundary régimes or territorial régimes, and had already been examined in connexion with succession in respect of treaties. It was in the commentary to the articles that it should be explained that the Commission had in mind not only money debts, but also all financial obligations or obligations with financial implications. Mr. Yankov[18] had said it should be made clear that the topic of State succession, which was, for the time being, limited to treaties, property and debts, did not stop at financial obligations. An explanation on that point might also be included in the commentary.

9. Several members of the Commission, particularly Mr. Quentin-Baxter, had emphasized the importance of maintaining a parallel between the articles relating to property and those relating to debts. In addition, Mr. Quentin-Baxter had contrasted succession to treaties, in which there was a triangular relationship, with succession to debts and to property. In his opinion, there should be a *renvoi* to internal law in respect of property and debts, but not in respect of treaties. That was why he had stressed the importance of the bilateral relationship between the predecessor State and the successor State, but had also drawn attention to the need to safeguard the rights and interests of the creditor third State. The fate of the debt should first be considered in terms of the bilateral relationship between the predecessor State and the successor State in order to decide how far the articles relating to State property could serve as a model for the articles on State debt. It seemed to him (the Special Rapporteur) difficult, *a priori*, to justify considering from the point of view of two partners only something which directly affected a third party. A triangular relationship undeniably existed. The articles under consideration were preliminary provisions which described the limits within which the predecessor and successor States could act, while the articles which followed and which related to each type of succession dealt exclusively with the bilateral relationship between the predecessor State and the successor State and were, as far as possible, based on the provisions relating to State property. Thus, when he had suggested that it should be considered that localized State debts passed to the successor State, it was because the territory to which the succession related had generally benefited from such debts in the form of property. Moreover, Mr. Quentin-Baxter had never suggested that there was an automatic equation between succession to property and succession to debts. It might be possible to take account of his comments in the articles relating to the various types of succession by stipulating that, in the case of the transfer of a part of territory from one State to another, the State which took over the property took over the debt in the same proportion, due regard being paid at the same time to considerations of equity.

10. Comments had also been made on each separate article under consideration and some members of the Commission had asked how they were interrelated. It had been noted that there should be a close relationship between article R and article U, and Mr. Castañeda had drawn a parallel between article R and the second paragraph of article U.[19] If it was true that the extinction of the debt depended on the consent of the creditor, that should be made clear in article R. However, he would point out that he had made a bridge between articles R and U by including in article R the words "in accordance with the provisions of the present articles", in other words, in accordance with article U. Also in connexion with article U, Mr. Tsuruoka had suggested that it should be stated that consent "shall be expressed in a formal act by that State".[20] It would be for the Drafting Committee to consider all those problems.

11. Mr. Thiam [21] seemed to have had the impression that the debts of the predecessor State were transferred to the successor State by some sort of sleight-of-hand, and had asked whether or not a drafting problem was involved. That was the result of the complexity of the triangular legal operation. In practice, the predecessor State might have private creditors if it had, for instance, issued treasury bonds. If a succession of States occurred, it would continue to honour such bonds for a certain time, even if it had been decided that the debts of the predecessor State should pass to the successor State. Taking the example even further, the creditor third State might refuse to consent to a transfer of debts agreed upon by the predecessor State and the successor State, and the predecessor State might then continue to repay the debt, and be reimbursed by the successor State. Although such situations were rare, they had occurred during the period of uncertainty immediately following successions of States and had then been remedied by the payment of compensation. He had given that explanation in order to reply to Mr. Šahović,[22] who had said that the triangular relationship had been raised to such a level that it was

[16] See 1417th meeting, foot-note 4.

[17] 1422nd meeting, para. 29.

[18] 1424th meeting, para. 17.

[19] 1422nd meeting, para. 10.

[20] 1424th meeting, para. 15.

[21] 1422nd meeting, para. 17.

[22] 1423rd meeting, para. 24.

difficult to see what the predecessor and successor States were doing. Those States were, in fact, doing what they could: if the third State did not give its consent, it could not be bound to accept an assignment of debt. In paragraph 58 of his report, he had made it clear that he was limiting his study to the debts of the predecessor State, without, for all that, neglecting the problem of the creditor third State.

12. Many members of the Commission had said that the articles under consideration should be supplemented by provisions relating to private creditors. Others had shared his view that the scope of the articles should be limited to creditor third States. He had not avoided that problem in his report, but he had refrained from taking a final decision on it until he had heard the opinion of other members of the Commission. He had made the draft articles sufficiently flexible to apply, with minor changes, to the debt-claims of subjects of international law other than States, or even to the debt-claims of natural or juridical persons in private law. In his definition of State debt, he had made it clear that the debtor was a State, but he had not said that the creditor must necessarily also be a State. In any event, the important thing was to start from the assumption that the creditor was a State, on the understanding that provisions on the debt-claims of other subjects of international law or of juridical or natural persons in private law could be added subsequently. In such a case care would have to be taken not to bring into play the consent of the third State of which a private creditor was a national, because then account would have to be taken of the problems of the treatment of aliens and diplomatic protection, which came under the heading of State responsibility. Serious difficulties might also be encountered because of the existence of the Calvo clause and the Declaration on the Establishment of a New International Economic Order, adopted by the General Assembly on 1 May 1974 (resolution 3201 (S-VI)), and which provided, *inter alia*, that aliens were subject to national jurisdictions on the same footing as nationals.

13. Replying to the comments of Mr. Francis,[23] he said it would be possible to extend the scope of the draft articles to cover private creditors without any change in the definition of State debt, or in the chapter on the creditor third State, or the structure of the draft or the articles relating to each type of succession. Those articles referred to general or localized State debts, but did not specify to whom such debts had been contracted; they could therefore be made to apply to debts contracted to private creditors.

14. The wording proposed by Mr. Tsuruoka [24] to safeguard the interests of private creditors was simple and elegant. It would also meet the concern expressed by Sir Francis Vallat.[25]

15. The question raised by Mr. Schwebel [26] was irrelevant to the topic under consideration. If it were to be assumed that all private creditors, whether nationals of the predecessor State or aliens, were to be treated equally, then any idea of the consent of the third State of which the private creditors were nationals must be ruled out, because the triangular relationship would cease to exist, while the bilateral relationship between the predecessor State and the successor State would take full effect. It should be made clear that the consent of the third State was not required for the passing of the debt if there was a rule providing for the transfer of private debts. Such a rule of transfer should not, as Mr. Schwebel thought, be sought in the successor State's obligation to take account of the internal laws of the predecessor State, because that would mean entering into an entirely different subject, namely, that of succession to the laws and the internal legal order of the predecessor State. Moreover, the interests of private creditors which preoccupied Mr. Schwebel would not be served in that way because, as a sovereign State, the successor State could not be required to submit to foreign laws. In such a case, reference should be made to the draft articles on different types of succession. It was also important not to require the prior consent of the third State of which the creditors involved were nationals. If the third State was to become involved, that would not be before the occurrence of the bilateral legal novation bringing about the change of debtor, but at a later stage, for instance, if the successor State or the predecessor State failed to respect the principle of equality of treatment of national and alien private creditors.

16. In that connexion, it was desirable to leave aside the question whether a measure which discriminated between national and alien creditors and took the form either of an act by the successor State or an agreement between the predecessor and successor States for the transfer of debts engaged the responsibility of a State and, if so, which State. That question related not only to the question of State responsibility, which came into play after succession, but also to that of the diplomatic protection of nationals abroad. The Commission should not try to seek solutions to problems which were not related to the topic it was studying, such as the problem of the exhaustion of local remedies referred to by Mr. Njenga.[27]

17. The reasons given for extending the scope of the draft articles to private creditors were not equally valid. It had been noted that, to a large extent, State debt consisted of domestic loans contracted with private national creditors or loans contracted abroad with private banking consortia. That reason was certainly valid. Mr. Ago had,[28] however, given a less valid reason when he had claimed that, by limiting the study to inter-State debts, which were usually governed by treaties, the Commission would be returning to the question of succession of States in respect of treaties. Mr. Ushakov [29] had, however, rightly pointed out that a treaty could be declared invalid or unlawful and that there could not be

[23] 1422nd meeting, para. 37.

[24] 1424th meeting, para. 13.

[25] *Ibid.*, para. 26.

[26] 1423rd meeting, paras. 6 *et seq.*

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

[28] 1422nd meeting, para. 19.

[29] *Ibid.*, para. 38.

any succession to such a treaty even if the debt existed, and that, moreover, inter-State debts did not all come into being as a result of treaties. That brought the Commission back to the problem of the source of the debt. Some members had pointed out that there were other sources of debt than treaty sources. For example, Mr. Verosta [30] had mentioned the case of a debt incurred for non-payment by the predecessor State of its contribution to an international organization. A debt could also have its source in the pecuniary reparation payable by the predecessor State as a result of an internationally wrongful act. The draft on succession of States in respect of treaties [31] governed the fate of treaties as a subject-matter of succession; it did not govern the fate of the debts for which such treaties might provide.

18. In order to take account of the comment by Sir Francis Vallat, who had said at the 1424th meeting that a debt either passed with its conditions or not at all, it would be necessary to include a provision in the draft to explain that debts could not be considered in isolation from the circumstances in which they had come into being, and the conditions to which they were subject.

19. In conclusion, he said that, on the basis of the many opinions expressed, the Drafting Committee would be able to examine the four articles as a whole and, if it deemed it appropriate, combine them into one, two or three. It could consider the wording which Mr. Tsuruoka had proposed in order to safeguard the interests of private creditors, or, if it wished to go further, draft an article stating that national or alien private creditors were to be treated equally in a bilateral relationship between successor and predecessor States when a debt passed from one to the other.

20. Mr. DÍAZ-GONZÁLEZ said that if the Commission accepted article O in its present form or decided to incorporate the changes suggested by Mr. Castañeda,[32] with which he could agree, articles R, S, T and U were simply a logical outcome of article O. The comments by previous speakers and the Special Rapporteur's summing up had confirmed his opinion in that regard. The articles now under consideration contained all the necessary elements for acceptance, and could even meet Mr. Ushakov's view [33] that article R should be drafted in such a way as to allow more room for the triangular relationship between the predecessor State, the successor State and the creditor third State. The Drafting Committee therefore had an ample basis for the preparation of a number of appropriate articles to propose to the Commission.

21. Mr. VEROSTA said that, at the beginning of the discussion on chapter II, he had proposed [34] that the Commission should formulate rules relating not only to debts contracted by States to other States, but also to debts contracted to other subjects of international law. He had not mentioned debts contracted to juridical persons which were not subjects of international law, or to private creditors. If the Commission decided to limit the draft articles to debts contracted to States or to other subjects of international law, it would have to draft a safeguarding clause similar to the one contained in article X, relating to third State property.

22. Mr. AGO said that he had the impression that, in examining the question of private debts, several members of the Commission had strayed from the real problem of State succession, a problem which was governed exclusively by public international law. Like the Special Rapporteur, he considered that it was not necessary to deal with the protection of the interests of private creditors, because that question belonged elsewhere. It was not even necessary to deal with the possibility that a third State might intervene to protect a private creditor whose interests might have been jeopardized during a succession of States. In such a case, the third State would not become involved as a matter of succession, but as a matter of the treatment of aliens and diplomatic protection. The Commission should deal only with the subject of State succession.

23. Since he did not think that his views had always been clearly understood, he wished to stress that, in his opinion, the problem of State succession was, above all, a problem of the bilateral relationship between the predecessor State and the successor State. It was only in certain cases that the problem was complicated by the involvement of a third subject of international law and the question of its consent to the settlement of a succession. If a State floated a loan on its domestic market and then split into several States, it was between the predecessor State and the new States that questions of succession would have to be settled. Questions involving a creditor third State would arise only incidentally and in exceptional cases. He had therefore been surprised at the amount of importance given to such questions, particularly in view of the definition of State debt contained in article O.[35]

24. Cases of succession involving trilateral relationships did not, in his opinion, necessarily come under succession of States in respect of treaties. Questions of succession frequently formed the subject of treaties and the subject-matter under consideration was perhaps less important than it seemed. That was why he did not think it was possible to concentrate attention on the problem of the succession of one State to another in respect of debts contracted to a third State or to another subject of international law, and devote only a short safeguarding clause to the case which he considered to be the normal case. It should be explained that the Commission would deal subsequently with the normal case, which involved a bilateral relationship having nothing to do with a third State.

25. Mr. BEDJAOUI (Special Rapporteur) said that he shared Mr. Ago's view. He would, however, point out that, when he had submitted the first articles relating to State property, he had dealt only with the bilateral relationship between the predecessor State and the successor State. He had then immediately been requested to draft an article X designed to safeguard the interests

[30] *Ibid.*, para. 13.

[31] See 1416th meeting, foot-note 1.

[32] 1417th meeting, para. 36.

[33] 1422nd meeting, para. 43.

[34] *Ibid.*, paras. 11 *et seq.*

[35] 1416th meeting, para. 1.

of third States. He had therefore thought it advisable to follow a similar procedure for debts. After having defined State debt, he had shown how the involvement of a third State created a triangular relationship. He had then gone on to the articles on the various types of succession, which again only concerned bilateral relationships.

26. The CHAIRMAN said it appeared to be the wish of the Commission that the Drafting Committee should discuss, in particular, the scope of the subject matter, and also the status of the draft articles in question, on which a final decision would not be taken until the Commission had considered other articles dealing with specific cases.

27. If there was no objection, he would take it that the Commission agreed, on that understanding, to refer articles R, S, T and U to the Drafting Committee.

It was so agreed.[36]

ARTICLE C (Definition of odious debts) *and*

ARTICLE D (Non-transferability of odious debts)

28. The CHAIRMAN invited the Special Rapporteur to introduce chapter III of his ninth report (A/CN.4/301, p. 53), and in particular articles C and D, which read as follows:

Article C. Definition of odious debts

For the purposes of the present articles, "odious debts" means:

(*a*) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

(*b*) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article D. Non-transferability of odious debts (Except in the case of uniting of States), odious debts contracted by the predecessor State are not transferable to the successor State.

29. Mr. BEDJAOUI (Special Rapporteur) said that, in article 6 of its draft on succession of States in respect of treaties,[37] the Commission had been careful to point out that it applied only to the effects of a regular and valid succession of States, "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". It had also deemed it advisable to specify, in article 13 of the draft, that "Nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty".

30. In the present draft, the Commission had adopted article 2,[38] which corresponded to article 6 of the draft on succession of States in respect of treaties, but it could not adopt an article corresponding to article 13 of that draft because, in the case of succession of States in matters other than treaties, the problem was not that of the validity of the source of the obligation. Even if the treaty by which the debt had been created was not valid, the debt could have come into being, the money could have been paid to the predecessor State and the latter could even have begun to service the debt by paying interest and annual instalments. On the other hand, even if the treaty was regular, in other words, even if the legal source of the debt was valid, there was another element which might be irregular, invalid or odious, namely, the application or use of the debt, and it was with that problem that the Commission was concerned.

31. Both the literature and practice favoured the "clean slate" principle with regard to "odious" debts, that was to say, they viewed such debts of the predecessor State as not transferable to the successor State. It was important therefore, to define "odious" debts and to determine their legal régime in the context of State succession.

32. There was no valid definition of odious debts either in the literature or in State practice, both of which appeared to confuse "odious" debts, "régime" debts, "war" debts and "subjugation" debts. The classification of such debts in relation to one another was uncertain. What was certain, however, was that all were excluded from any succession of States, essentially on the basis of moral principles; the successor State objected to assuming such debts either on grounds of public policy or because they were contrary to the major interests of the successor State or of the territory transferred.

33. He proposed to include all such debts under the expression "odious debts", which seemed to cover them all, and to avoid the expression "régime debts", which could cause confusion. The two expressions meant roughly the same thing and the only difference between them appeared, *prima facie*, to be one of approach—debts were odious when viewed from the standpoint of the successor State, and régime debts when viewed from the standpoint of the predecessor State. However, he preferred to speak of "odious debts", since the expression "régime debts" could give rise to two misunderstandings.

34. First, some writers, like Gaston Jèze, considered that "régime debts" were not State debts,[39] whereas, as Mr. Ushakov had rightly pointed out,[40] the debt of a régime or a Government was a State debt, since it related to the finances or patrimony of the State. Second, the expression "régime debts" gave the impression that they were debts linked to a particular political régime or a particular form of government in terms of internal constitutional law—a monarchy, a fascist régime, a bourgeois régime, and so on. The expression might therefore be employed in the context of a succession of internal law régimes, in other words, of a succession of Governments, for it seemed to imply, in the eyes of some writers, the continuity and identity of the State. It was better, therefore, in the context of State succession, to speak of "odious debts" so as to avoid any risk of confusion.

[36] For the consideration of the texts proposed by the Drafting Committee, see 1447th meeting, paras. 3, 8, 9 and 27 *et seq.*, and 1450th meeting, paras. 7-47.

[37] See 1416th meeting, foot-note 1.

[38] *Ibid.*, foot-note 2.

[39] See A/CN.4/301 and Add.1, para. 122.

[40] 1417th meeting, para. 7.

35. Although odious debts and régime debts overlapped to a large extent, there was nevertheless some difference between them, since the scope of régime debts appeared in some respects to be wider than that of odious debts. All odious debts were régime debts because they could be charged to a particular régime, but not all régime debts were necessarily odious. Some régime debts were linked to a given policy, either internal or external. The successor State, without necessarily disavowing that policy, might disapprove of it and as a consequence be unwilling to assume the debts in question.

36. Moreover, in the imaginary case he had suggested in paragraph 127 of his report, if State A contracted a war debt for the purposes of a conflict with State B and then united with State C, State C, against which the war had not been directed and which had affinities with State A, since it had agreed to unite with it, might consider that the war debt—the régime debt—of State A was not an odious debt, especially if it felt that State A had been engaged in a war of self-defence.

37. He therefore preferred to confine non-transferability to cases of odious debts, so as to avoid any errors of interpretation. Such debts could, in his opinion, be defined from two angles: the standpoint of the successor State, the main party concerned, since it was the State that might become the new debtor, and the standpoint of the international community, which would also have something to say if the debt had been contracted for a purpose that was not in conformity with international law.

38. From the standpoint of the successor State, an odious debt was a State debt assumed by the predecessor State in furtherance of purposes contrary to the major interests of the successor State or of the territory transferred to it. The interests must be "major", for any political, economic or social action by a State, such as an increase in customs tariffs or in the price of raw materials, was capable, ultimately, of impairing the interests of another State, whether a neighbour or not. Obviously, in such a case the debts were not odious debts for the successor State that had been injured in some degree; otherwise, any debt of the predecessor State might be deemed odious by the successor State and cause it to reject practically all debts of the predecessor State. Thus, "odious" debts must be confined to debts which seriously impaired the major interests of the successor State.

39. If, through its political, economic or social system—which, like any other State, it had the right to choose freely—the predecessor State gravely impaired the major interests of another State, the latter could probably do nothing to remedy the situation, since the acts in question were lawful; but if, following a succession of States, it acquired the status of a successor State, it could not be compelled to succeed to a debt which had entailed harmful effects for itself. It might be, however, that, once it had become a successor State, it benefited from the action of the predecessor State about which it had previously complained. The debt must, therefore, constitute a serious impairment of the major interests of the successor State *at the moment of the succession of States.*

40. From the point of view of the international community, odious debts were debts contracted for purposes recognized as wrongful in international law. In the case, for example, of a debt contracted by the predecessor State with a view to violating obligations incumbent on it under a multilateral or even a bilateral treaty, the identity of the victum was of no consequence: even if there was no direct impairment of its major interests, the successor State would have to consider the debt as odious, since it had helped the predecessor State to breach obligations imposed upon it by a treaty. The successor State must refuse to lend support to a wrongful act, and it would be all the more inclined to take that course since by so doing it would rid itself of a debt.

41. There was also the case of debts which enabled the predecessor State to breach obligations in respect of human rights or the right of self-determination. For example, if the predecessor State contracted a debt in order to purchase arms which were used to infringe human rights, commit genocide or institute *apartheid*, the successor State would have to consider that debt as odious, even if it had not been a direct victim of the wrongful acts in question, since it must not lend support to the breach of international law. The same was true of debts contracted for the purposes of subjugation or colonization. In the same way, debts contracted by the predecessor State in order to wage a war of aggression were not transferable, irrespective of whether or not the war had been directed against the successor State.

42. That meant that account must be taken both of the interests of the successor State and of those of the international community, which did not always coincide, and that was what he had done in the definition of odious debts which he proposed in article C.

43. Once odious debts had been defined, their fate seemed clear. War debts were, in principle, rejected by State practice, as he had shown in his report.[41] Under the terms of the Treaty of Versailles, for example, Denmark, which had succeeded to Schleswig after the separation of that territory from Germany, had been exempted from the war debts of the German Empire, although it had remained neutral during the 1914-1918 war.[42] That showed that the war debt was considered odious by the successor State, even though the latter had not been a victim of the war waged by the predecessor State.

44. The peace treaties after the First World War had extended the notion of "war debt" to cover all debts contracted during the war. Thus, a loan concluded by Germany in 1917 for the construction for non-military purposes of a bridge in Upper Silesia had been treated as a war debt—and thus as non-transferable—by the German Reparations Commission, simply because of the date of its conclusion.[43]

45. But as he had pointed out,[44] there were also instances in State practice of the assumption of war debts, apparently on the basis of considerations of political expediency.

[41] See A/CN.4/301 and Add.1, paras. 142-152.

[42] *Ibid.*, para. 146.

[43] *Ibid.*, para. 150.

[44] *Ibid.*, paras. 153-156.

46. Subjugation debts—debts contracted by a State in order to repress, in a territory which it dominated or sought to dominate, an insurrectionary movement or a war of liberation, or to strengthen its economic colonization of the territory—were also non-transferable, for, as Chicherin, the People's Commissar for Foreign Affairs of Soviet Russia, had stated in 1921, "No people is obliged to pay the cost of the chains it has borne for centuries".[45]

47. Thus, in the Cuban debt controversy after the Spanish-American war that ended with the Treaty of Paris (1898)[46] the United States had repudiated the debts which Spain had contracted to keep Cuba under its domination and in particular to oppose the insurrectionary movements of 1868 and 1895. The United States had maintained, on the one hand, that the financial burdens resulting from Spanish war loans had been imposed upon Cuba without the consent of the Cuban people and, on the other hand, that the loans had served to finance operations contrary to the island's interests. Spain, for its part, had in the end renounced its claim for the assumption of the loans contracted by it in order to combat the Cuban insurrectionary movements, but it had asked that the latter should assume debts which had been used for the economic development of the island.

48. In the case of the loans contracted by Germany in order to Germanize part of Poland by establishing German nationals in Polish territory (the Posen settlers case), the Treaty of Versailles had excused Poland from assuming the debt.[47] Similarly, at the Round Table Conference held at The Hague in 1949, Indonesia had refused to assume the Netherlands debts resulting from its military operations against the Indonesian national liberation movement.[48] Algeria had likewise refused to assume debts which had served to finance French military operations in its territory.[49]

49. The practice showed, therefore, that successor States had, in the majority of cases, rejected the odious debts of the predecessor State.

50. It was important to distinguish between the problem of odious debts and that of the validity of the succession of States, which had already been settled in article 2. The two matters were independent of each other, for the existence of odious debts did not preclude the occurrence of a perfectly regular succession of States. A distinction must also be made between the problem of odious debts and that of the validity of the legal source of the debt, which were also separate.

51. It was sufficient therefore to state, as he had done in article D, that odious debts contracted by the predecessor State were as a general rule not transferable to the successor State. But consideration must also be given to the question of the fate of such debts in the event of the disappearance of the predecessor State. Since the Commission had agreed to deal only with valid instances of the succession of States, the case of the annexation of the predecessor State could be left aside; there remained the case of the disappearance of the predecessor State as a result of the uniting or separation of States. When the predecessor State disappeared, did the debt also disappear, or should it be assumed by the successor State or States? He had not felt competent to answer that question. For that reason, he had placed the phrase "except in the case of the uniting of States", which appeared at the beginning of article D, within square brackets.

[45] *Ibid.*, para. 157.

[46] *Ibid.*, paras. 159-167.

[47] *Ibid.*, para. 168.

[48] *Ibid.*, para. 169.

[49] *Ibid.*, para. 334.

Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76) (A/CN.4/300)

[Item 5 of the agenda]

52. The CHAIRMAN said that the Commission had decided[50] to establish a working group to study the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in accordance with paragraph 4 of General Assembly resolution 31/76. He proposed that the group, the formation of which would be without prejudice to the possible appointment of a special rapporteur, should have as its members: Mr. El-Erian (Chairman), Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Ushakov and Mr. Yankov.

53. If there was no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

The meeting rose at 6 p.m.

[50] 1415th meeting, para. 4.

1426th MEETING

Tuesday, 24 May 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

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

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 C (Definition of odious debts) *and*