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Summary record of the 1426th meeting

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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*

ARTICLE D (Non-transferability of odious debts) [1] (*continued*)

1. Mr CALLE y CALLE said that articles C and D concerned debts which could be repudiated because, quite apart from any considerations of the validity of the manner in which they had been contracted or of their source, they were intrinsically contrary to international morality. As to the terminology of the articles, although imprecise, the phrase "major interests" contained in article C, paragraph (*a*), was intelligible, for all members of the Commission were familiar with concepts such as that of *force majeure*, the notion of "serious breach" to which Mr. Ago had alluded in respect of certain international crimes, and the fundamental rights of States, such as survival or independence, to which reference had also been made. It was obvious that debts which had been employed for purposes contrary to the right to survival or independence of a State were by their very nature to be considered odious and would therefore not be transferable.

2. It would be preferable to divide article D into two paragraphs, the first of which would simply state the rule that "odious debts contracted by the predecessor State are not transferable to the successor State". The exception to that rule, at present placed within square brackets, could then be stated in the second paragraph, which might read "The odious nature of a debt may not be invoked as a ground for its non-transferability in the event of a uniting of States". In suggesting that change, he had in mind the provisions of article W (A/CN.4/301 and Add.1, para. 456).

3. Mr. USHAKOV said that the Commission was dealing not with debts as such but with the effects of State succession in respect of debts, and was considering only the case of lawful debts. From the legal standpoint, lawful debts could not be odious, since odious debts were necessarily unlawful debts. However, from the political standpoint or from the standpoint of international morality, even a legally valid debt could be odious, although it might be difficult to specify by which moral or political criterion it was to be assessed.

4. The Commission was dealing with succession of States, a term which, according to the definition given in article 3, paragraph (*a*),[2] meant "the replacement of one State by another in the responsibility for the international relations of territory", and not with succession of Governments, meaning the replacement of one political régime by another, which was an altogether different matter. "Régime debts" should not, therefore, be taken into consideration in the draft articles.

5. With regard to the definition of odious debts, it should be noted in connexion with the criterion set forth in article C, paragraph (*a*), that the successor State did not exist at the time when the debt was contracted and that, consequently, the predecessor State would not have been able to foresee what would be the "major interests" of the successor State. On the other hand, he could tentatively endorse the criterion set forth in paragraph (*b*).

6. With regard to the non-transferability of odious debts, in the case of a debt contracted by the predecessor State for the purposes of committing aggression, article D would mean that the aggressor State, if it united with another State, would be relieved of its debt, since an odious debt was not transferable to the successor State, despite the fact that it included the aggressor State. The aggressor predecessor State would also be relieved of its debt if it split into several States. Again, if part of the territory of the aggressor predecessor State separated from that State, the newly independent territory, despite the fact that it had formed part of the aggressor State, would then, as a successor State, be relieved of the debt. Lastly, if the aggressor predecessor State transferred part of its territory to another State, the territory transferred would also be relieved of odious debt. Such were the consequences of article D, when considered in conjunction with the definition given in article C, paragraph (*b*).

7. Article D was not acceptable, therefore, and for the time being it would be better to give up the attempt to formulate a general rule concerning odious debts. From the point of view of methodology, it would be preferable to begin by working out specific rules before going on to formulate general rules. It would be better to consider first succession to State debts in the different cases of State succession—transfer of territory, uniting or separation of States, and so forth—envisaged by the Special Rapporteur in his typology of succession.

8. Mr. TSURUOKA said he agreed with Mr. Ushakov's views concerning the methodology to be followed in elaborating the draft articles, but only in part, since everything depended on the way in which the general provisions proposed by the Special Rapporteur were interpreted. Mr. Ushakov would be justified if the Commission were being called upon to proceed forthwith to formulate precise and definitive general rules. If, however, those general rules were regarded merely as a pointer to indicate the direction to be followed in elaborating specific rules, the methodology adopted by the Special Rapporteur was acceptable.

9. With regard to "odious" debts, while subscribing to the principle expressed by the Special Rapporteur, he considered it difficult to lay down that principle in the form of a legal rule and to express that rule sufficiently precisely to ensure that it was applied objectively in all cases, and to overcome the practical difficulties to which its interpretation was likely to give rise.

10. With regard to the placing of the provisions contained in articles C and D, since they constituted an exception to the normal rule concerning succession to State debts, they should appear after those rules instead of before them.

11. With regard to the definition of odious debts, he was of the opinion that the criterion set forth in article C, paragraph (*a*) introduced two subjective elements: first, the judgment of the successor State, which was left to decide whether the debt contracted by the predecessor State was contrary to its major interests; and, secondly, the intention of the predecessor State, which might maintain that the debt had not been intended to impair the interests of the successor State. Again, as Mr. Ushakov had rightly observed, the predecessor State could argue that, at the time when it had contracted the debt, it had

[1] For texts, see 1425th meeting, para. 28.

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

been unaware that a successor State would subsequently emerge as a result of a succession of States. The expression "major interests" was vague and ambiguous and lent itself to arbitrary interpretations, for it was difficult to determine to what extent a debt "Seriously impaired the major interests of the successor State", as the Special Rapporteur had put it in his introductory statement.[3]

12. With regard to the criterion set forth in article C, paragraph (*b*), he wondered whether a distinction should not be made between the various rules of international law, since some rules were more important than others. The Special Rapporteur had referred particularly to "the principles of international law embodied in the Charter of the United Nations"; it might be appropriate to indicate what those principles were. Without going so far as to reproduce the list contained in the sixth preambular paragraph of the Vienna Convention,[4] which referred to "the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all", it should nevertheless be specified what was meant by "not in conformity with international law", so that cases which could be said to involve "odious debts" could be distinguished from cases which could not. He noted that article C, paragraph (*b*) raised only the question of the lawfulness of debts and not that of the lawfulness of the succession of States, a matter which, as the Special Rapporteur had observed, had already been dealt with in article 2.

13. With regard to article D, the exception which the Special Rapporteur had made to the rule of the non-transferability of odious debts in the case of the uniting of States did not seem very clear. Since article D constituted only a preliminary general provision designed to indicate the path which the Commission should follow in elaborating other provisions, he proposed that the expression between brackets be replaced by the words "subject to the present articles".

14. In conclusion, he endorsed the idea that in most cases odious debts were non-transferable but that idea was extremely difficult to translate into legal language and to apply objectively in practice; it could well raise more difficulties than it would resolve.

15. Mr. ŠAHOVIĆ said he was willing to follow the Special Rapporteur's lead in his efforts to formulate, as part of the general provisions, a clause which would fix the limits of succession in respect of State debts. The idea formulated by the Special Rapporteur in articles C and D should be the subject of a thorough discussion which would enable the members of the Commission to reach agreement on the definition of a special category of State debts known as "odious debts".

16. The fact that the Special Rapporteur had placed the expression "odious debts" within inverted commas seemed to show that he himself was not sure that such debts constituted an entirely separate category. In fact, odious debts were more in the nature of a theoretical concept deriving from doctrine which the Special Rapporteur was proposing to make into a juridical concept by according it a separate place in international law.

17. The State practice which the Special Rapporteur had cited in his report showed that he had been right to lay down, in article D, the principle of the non-transferability of odious debts. However, the question was whether odious debts could be made into a special category of State debts and whether they should be made an exception to the general rules concerning succession in respect of State debts.

18. He agreed with Mr. Ushakov that it would be better to begin by formulating specific rules for particular cases before going on to work out general rules. It would therefore be preferable to consider the question of odious debts by reference to the different types of State succession and to see at a later stage whether a general rule could be formulated to cover them. It would be premature to start by laying down a definitive general rule, but the rule proposed by the Special Rapporteur in article D might perhaps be accepted on a preliminary basis.

19. With regard to article C, he wondered whether it was really necessary to define odious debts and what was the relationship between article C, paragraph (*b*), and article 2. He also wondered whether it was necessary to make a distinction between the criteria set forth in paragraph (*a*) and those in paragraph (*b*), since if the situation covered by paragraph (*a*) could not be accepted as lawful, it fell under the provisions of paragraph (*b*). There was therefore no reason to lay down two separate criteria for odious debts.

20. Mr. NJENGA said he approved, in principle, the approach adopted by the Special Rapporteur in articles C and D. It would, indeed, be contradictory for the Commission to say that the criterion for rejecting the transferability of odious debts was their moral reprehensibility and then to go on to say that such debts should none the less pass to the successor State. With regard to régime debts, the Commission could not say that a people which replaced an oppressive régime should be made to pay the debts which that régime had contracted for the purpose of maintaining its oppression. If the Commission accepted that any debts of the type mentioned in article C, paragraph (*b*), should pass to the successor, it would be saying in effect that action contrary to international law would not give rise to any consequences for the predecessor State. Their sanctionary power with regard to States which contravened the principles of international law was an aspect of the draft articles which some speakers had minimized, but which must on no account be overlooked.

21. Care must also be taken to ensure that the interests of creditors who had knowingly contributed to loans contracted for illegal purposes were not secured. States such as the western countries which had helped to finance the construction of the Cabora Bassa dam in Mozambique even though they had known that the purpose of the project was to enable Portugal to settle large numbers of its own nationals in that country and thereby oppress

[3] 1425th meeting, para. 38.

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

the local population, should not be allowed to claim, after an occurrence of succession, that they had been ignorant of the proposed use of the loan and were therefore entitled to repayment. With that consideration in mind, and in order to ensure that the new State did not find itself under an obligation to repay such loans simply because it was the only entity left to do so, he favoured the deletion from article D of the words which appeared in square brackets. With a provision such as article D, the sanctionary aspect was particularly important.

22. With regard to article C, paragraph (*a*), he considered it preferable to replace the words "with a view to attaining objectives contrary to" by the words "with a view to injuring".

23. Mr. SUCHARITKUL said he shared the view expressed by the Special Rapporteur, but also subscribed to the general observations of Mr. Ushakov and the drafting comments of Mr. Tsuruoka.

24. With regard to the definition of odious debts, he agreed with the criterion expressed in article C, paragraph (*a*). With regard to the criterion expressed in paragraph (*b*), however, debts "not in conformity with international law" were unlawful and consequently invalid *ab initio* and thus fell within the definition of odious debts given by Mr. Ushakov.

25. In article D the Special Rapporteur had laid too much emphasis on the protection of the interests of the successor State without taking sufficiently into account the interests of the creditor State. It might be asked what would become of the odious debts if the predecessor State were to disappear: would the debts disappear also?

26. State practice varied in the matter of the transfer of such debts as régime debts and war debts, which made him fear that a rule as absolute as that laid down in article D would be very difficult to accept. In the case of the war debt contracted by Japan vis-à-vis Thailand during the Second World War, by mutual agreement Japan and Thailand recognized the validity of that debt and its transferability from the Japanese Empire to the new Japanese State.

27. Mr. EL-ERIAN said that chapter III of the report and the wording of articles C and D bore out what the Special Rapporteur had said in his report with regard to the conflict between the requirements of a sound international legal order and those of equity (A/CN4/301 and Add.1, para. 92). The Special Rapporteur had been very courageous in tackling so complex a subject as that of odious debts.

28. The fact that, in his presentation, the Special Rapporteur had had no difficulty in quoting examples from writers, practice, treaties and jurisprudence showed that the concept of odious debts existed. However, very difficult problems arose when an attempt was made to give a clear definition of that concept. Perhaps the Commission might consider, at the present stage, adopting a similar approach to the one it had followed in the case of the concept of *jus cogens*, by formally recognizing the existence of the concept, giving examples in the commentary of cases in which it would apply, but avoiding giving a categorical definition.

29. One of the problems was that, with regard to régime debts in particular, the Commission found itself on the borderline between succession of States and a question it had decided to leave aside, succession of Governments. The difficulties of determining where that borderline lay were illustrated by the example given by Mr. Njenga of a change in régime so radical that it could be held to represent more than a mere change of Government. With a view to illustrating the difficulties involved, he might mention similar problems of international law, such as that of determining where responsibility lay when a State had both an established and a *de facto* Government at the same time, or when one of them was confirmed as the sole authority. In the same vein, there was the question whether responsibility for the acts of rebels who assumed the status of belligerents should be attributable to the rebels or to the Government of the State concerned; the answer to that question would be different for those who recognized belligerency and those who did not.

30. Mr. Ushakov and Mr. Sucharitkul had raised questions as to the possibility that a debt might be invalid *ab initio*. Other questions to be taken into account were the recognition, as in the judgment by the French Conseil d'Etat in 1916 in the Bordeaux Gas case,[5] that in some instances performance of an obligation, while still possible, could be so burdensome that considerations of justice warranted special treatment for the debtor; the difficulty of formulating considerations of justice into rules; and the existence, in article 46, paragraph 1, of the Vienna Convention of clear provisions concerning conditions under which a treaty could be considered as an odious burden and therefore not binding.

31. The exception which the Special Rapporteur was suggesting might be included in article D was presented within square brackets, but was, in his view, so sweeping that it would automatically entail the transfer to the new State, born of a uniting of States, even of obligations which were clearly and indisputably odious.

32. Mr. FRANCIS said that, in general, he agreed with the approach adopted by the Special Rapporteur in dealing with the question of odious debts. The report cited a number of cases of great moral turpitude on the part of the debtor State. He had no objection to designating such cases as cases of odious debt and it was quite clear that they had to be considered by the Commission.

33. In article C (*a*), Mr. Ushakov had rightly pointed out that the successor State might in fact be the actual territory transferred. If the successor State existed at the time the debt was contracted, it could be said that the intention of the debtor State had been to injure the major interests of an existing State. Where, however, the successor State consisted exclusively of the territory transferred, the question of intent hardly arose. Consequently, the loan ought perhaps to be viewed in terms of consequences rather than intent. In other words, where the transferred territory itself became the successor State,

[5] *Compagnie générale d'éclairage de Bordeaux* v. *ville de Bordeaux*. See M. Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine* (Paris, Jurisprudence générale Dalloz, year 1916), part three, pp. 25 *et seq.*

it was possible to discern not the intent but the consequences of the loan. On the other hand, if the successor State already existed, for instance if State A, the successor State, took over a portion of State B's territory, it was then possible to discern ill intent against the successor State. Thus, article C (*a*) dealt with both intent and consequence, since two different situations were conceivable: one in which the successor State already existed, and the other in which a State came into being as a result of territory transferred from the debtor State.

34. Article C (*b*), however, plainly dealt with deliberate ill intent, for it covered "all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law". Accordingly, the provisions contained in the two subparagraphs of article C were disjunctive and not necessarily cumulative.

35. With regard to article D, he shared Mr. Njenga's view that, as a general principle, odious debts should not in any way be transferable to the successor State, although certain exceptions could of course be envisaged—for example, instances in which the borrowing State might have used the loan for purposes entirely different from those explained to the creditor State. Nevertheless, generally speaking, odious debts should not be transferable to the successor State.

36. Mr. RIPHAGEN said that, in discussing so-called odious debts, the Commission was dealing with a very special aspect of the relationship between the predecessor State and the successor State. At the same time, the subject raised the question of the extent to which a debt, as such, was tainted by the use made of the money received—something that was by no means self-evident.

37. He had some difficulty in understanding the relationship between odious debts and the justification, so to speak, for the transfer of debts in cases of State succession. Viewed as a whole, the draft articles based the justification for the transfer of debts on three objective facts: first, the contributory capacity of the territory transferred, which, obviously, did not relate to the nature of the debt; secondly, the fact that State property, which might be the economic counterpart of a debt, passed from the predecessor State to the successor State; and thirdly, the benefit to the transferred territory itself, which played a role in determining whether debts passed to the successor State. One could imagine a case in which the predecessor State used a loan or loans to establish a military infrastructure in a part of territory which was later transferred to another neighbouring State. That infrastructure, which would normally pass to the successor State, would be of benefit to the successor State and perhaps to the territory involved. In that instance, the purpose for which the military infrastructure was originally established might well be irrelevant. The example was perhaps a special one and he had no wish to assert that odious debts did not exist. He doubted very much, however, whether typically odious debts would fall into the category of debts to be passed to the successor State under the special rules that the Commission would be discussing later.

38. He agreed with Mr. Šahović that the best course would be first to consider the rules on the transfer of debts and then to determine the need to provide for exceptions. At the present stage, he considered that allowance for exceptions would not prove necessary, for the Commission regarded non-transferable debts as debts which should not fall into any of the categories of debts that passed to the successor State.

39. Mr. QUENTIN-BAXTER said that, obviously, the Commission must recognize the existence of the problem involved in the question of odious debts, but he tended to share the view of those members who thought that it would be better to consider indivivual kinds of State succession before attempting to reach any final conclusions on the matter.

40. The two subparagraphs of article C covered two quite different cases. Admittedly, a loan could be extended without any particular stipulations regarding its purpose, but the Commission had to accept the hypothesis that a debt could be contracted for an illegal purpose. The draft articles should not in any way imply that international law would recognize the existence of such a debt or of the obligation to repay it. Nevertheless, he was of the opinion that the debts mentioned in article C (*b*) lay outside the confines of the law of State succession.

41. Article C (*a*), however, did fall within the Commission's subject, for it was acknowledged that, even in instances of succession of Governments, in which no change of international personality occurred, there were none the less limits to the basic rule of continuity of obligations, a principle which, *a fortiori*, must apply to cases of true succession of international persons. In the case of subparagraph (*b*), what was illegal was also certainly immoral, but subparagraph (*a*) dealt with situations in which the outcome had to be known before the debt could be stigmatized as odious. Events such as the separation of States had particular consequences and, as with the precedents relating to succession of Governments, the decisive factor was the outcome, rather than the intrinsic immorality, of the transaction.

42. In the literature on succession of States in respect of treaties, many learned authors were ready to recognize that the extent to which rights and obligations were transferred depended on the circumstances which gave rise to the new international person. In the present draft, allowance had to be made for the special case of a new State which came into being in circumstances of bitter enmity towards the predecessor State and would, presumably, be unwilling to assume any burden of debt that might be regarded as continuing a situation against which it had successfully rebelled. Obviously, the law itself should take account of situations of that kind.

43. The CHAIRMAN, speaking as a member of the Commission, said it was clear that consideration must be given to the significant question of odious debts. Nevertheless, he experienced great difficulties in accepting articles C and D, at least in their present form. There appeared to be a tendency to move away from the realm of law into that of morality and away from the realm of the law of the effects of a succession of States into that of the law affecting the validity of a debt or, at any rate, its legal incidence. The Commission should be cautious about extending the boundaries too far but it ought to bring the matter to the attention of the General Assembly, which would make its views known in due course.

44. When it affirmed that particular debts were not transferable, the Commission was expressing an opinion on the validity or the legal effects of those debts and thus dealing with the internal law of contracts. For example, how was the illegal purpose or objective to be determined? A minority Government might contract a loan in order to purchase supplies of wheat, although its true objective was to release other sources of finance in order to buy weapons to suppress the majority of the people of the country concerned. Was a debt incurred in that way to be deemed odious and how could such situations be differentiated by means of a general rule? If the Commission attempted to deal with the concept of odious debts for the purpose of codification, it would be embarking on a task which was, if not impossible, at least extremely difficult. Perhaps it would be better to state, in effect, that the topic, although important, was not yet ripe for codification or for the establishment of positive rules.

45. Again, in most systems of private law, a relevant factor would be the creditor's knowledge of the illegal purpose of the loan. If the creditor was not considered guilty, it could be assumed that the debt would not be tainted by the secret wrongful intent of the debtor. He questioned whether the knowledge of the creditor could be taken into account in the draft articles; it would certainly be a very difficult element to include in the definition in article C.

46. Article 1 spoke of "the effects of a succession of States" and a number of the other articles already adopted spoke of the "passing" of State property. Article D, however, stated that odious debts were "not transferable", which implied that in the case of debts that did pass to the successor State, there was an act of transfer. Obviously, article D should speak of the passing, and not the transfer, of debts; otherwise, it would seem to be establishing an imperative rule and, moreover, one that could not apply in the cases covered by article C (*a*). For instance, if a successor State expressed its readiness to assume a debt, it could then reverse its position and claim that the debt was contrary to its major interests. Transferability was not a pertinent question in the context of State succession; rather, it was necessary to consider the question of the effects of a succession of States. It would be preferable to think in terms of some kind of saving clause instead of attempting to establish positive rules.

47. He noted in that connexion that article 6 of the draft articles on succession of States in respect of treaties [6] and article 2 and article C of the draft articles now under consideration contained a provision which employed virtually the same form of language. However, in the case of article C, the concept involved had been converted from a limitation on the scope of the draft articles into a positive rule relating to particular classes of debts, a change that was of very great significance. In the one case, the terms were being employed in a limitative fashion, and in the other they were being used for the purpose of positive legislation. He failed to see the justification for such a course. If a saving clause were used, it might be possible to raise the matter for future consideration, without going beyond the terms of reference of the subject matter.

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

Organization of work

48. Mr. BEDJAOUI (Special Rapporteur) said that he would answer the next day the questions raised by the debate on the non-transferability of odious debts, but for the moment would confine himself to a few proposals regarding the next stage of the session's work.

49. Since the Commission had only three meetings left in which to study the articles relating to each type of succession, and since a large number of articles had been proposed for the first type of succession—the transfer of part of territory of a State—it might find itself in the position of being unable to submit to the General Assembly a substantial number of articles on the typology of succession. Instead of considering one by one the articles relating to the transfer of part of territory of a State in the order in which they appeared in the report (A/CN.4/301 and Add.1, chap. IV, sect. F), the Commission would be well advised to concentrate on a single recapitulary article on the understanding that it could come back to the various provisions later. Starting the next day, the Commission could consider an article recapitulating the solution proposed by the Special Rapporteur in article YZ for the general debt of the predecessor State and in article B for the special debts of the predecessor State, the text of which would be distributed to members of the Commission. If the Commission accepted that text without difficulty, it would still have time to study other provisions.

50. Mr. USHAKOV supported the Special Rapporteur's proposal but was sure that the Commission could make still more rapid progress if a few extra meetings could be held the following week and devoted to the Special Rapporteur's subject.

51. The CHAIRMAN said that the Commission had adopted a time-table according to which, as from the following week, it was to concentrate on the subject for which Mr. Reuter had been appointed Special Rapporteur. It could not change its time-table in Mr. Reuter's absence. Furthermore, the Special Rapporteur for the present topic would be unable to be present the next week. He would therefore consult Mr. Reuter to see if it would be possible to devote a few meetings later on to the topic of succession in respect of matters other than treaties.

52. Mr. TSURUOKA said he agreed with the Chairman, but would also suggest that the Commission hold afternoon meetings so as to make more progress.

53. Mr. BEDJAOUI (Special Rapporteur) said that two or three extra meetings on succession of States in respect of matters other than treaties would be useful. However, as for urgent reasons he would be obliged to be absent for some time, and in order to allow Mr. Reuter to make some headway in the presentation of his draft articles, it would be better to wait until mid-June before devoting the extra meetings to succession of States in respect of matters other than treaties.

54. The CHAIRMAN said that it would therefore be advisable to proceed as he had already indicated. As regards afternoon meetings, he felt that apart from the meetings for the adoption of the report, which was practically automatic, it would be preferable to hold only morning meetings since, in the interests of the discussion, members of the Commission needed time for thought and reflection.

The meeting rose at 1 p.m.

1427th MEETING

Wednesday, 25 May 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, 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 C (Definition of odious debts) *and*

ARTICLE D (Non-transferability of odious debts) [1] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) said that, in summarizing the discussion of chapter III of his ninth report, he would first go through the general comments of members and then deal with the specific comments on article C and article D, respectively. The general comments could be grouped under three heads: Why should odious debts be dealt with at all? In which part of the draft should they be dealt with? How should they be dealt with?

2. To take the first question, some members had alleged that, in dealing with odious debts, the Commission was moving away from the realm of law into that of morality. Sir Francis Vallat [2] had said that, although consideration of odious debts should perhaps not be ruled out altogether, it would certainly prove to be difficult. Other members, such as Mr. Quentin-Baxter,[3] had said that merely by referring to the possibility that a debt might be contracted for an illegal purpose, the Commission was moving outside the confines of the subject with which it was supposed to be dealing. Other members had asked why the subject of odious debts should be studied since such debts concerned a very special aspect of the relationship between the predecessor State and the successor State. Mr. Riphagen had said [4] that that special aspect would not come up again in connexion with the articles on the different types of succession and that he had some doubts about the need to study odious debts since it was far from clear that the purpose for which the debt was intended was the criterion by which it should be categorized. Still other members, particularly Mr. Ushakov [5] and Mr. El-Erian,[6] had said that they did not think odious debts should be studied at all, since consideration of such debts raised the problem of régime debts and it was not certain whether they came under succession of Governments or succession of States. Finally, some other members had asked why it was necessary to discuss odious debts at all since that subject was, to a large extent, covered by draft article 2 [7] concerning the validity of a succession of States.

3. He (the Special Rapporteur) was of the opinion that odious debts had to be considered, simply because they existed. Both State practice, as analysed in his ninth report, and diplomatic history and jurisprudence, bore witness to the fact that odious debts existed. The question of odious debts should not however, be confused with the question dealt with in article 2, namely, the validity of a succession of States. Mr. Calle y Calle [8] had rightly claimed that, quite apart from any consideration of the validity of their source, odious debts were intrinsically immoral, and had referred to the "clean hands" theory. Mr. El-Erian [9] had referred to *jus cogens*, the principle of self-determination, and the unlawfulness of recourse to war. He (the Special Rapporteur) thought that the problems of the source of the obligation and the source of the succession were irrelevant because, even if a treaty was invalid, it could still have been the source of a debt, and the amount of the corresponding loan might already have been paid to the predecessor State. Conversely, even if the treaty was valid, the purpose for which the debt was intended could be unlawful. He had already had occasion to stress that a distinction should be made between the problem of the unlawfulness of the succession and the problem of odious debts. In a lawful succession, even some valid debts could be classified as odious debts because of the purpose for which they had been intended. Similarly, a distinction should be made between the problem of odious debts and that of the validity of the legal source of odious debts. He mentioned that distinction in order to answer those members who had referred to the concept of invalidity *ab initio*.

4. He would point out that he himself had recommended that it would be better for the Commission to avoid a discussion of régime debts on the ground that they could

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[1] For texts, see 1425th meeting, para. 28.

[2] 1426th meeting, paras. 43 and 44.

[3] *Ibid.*, para. 40.

[4] *Ibid.*, para. 37.

[5] *Ibid.*, para. 4.

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

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

[8] 1426th meeting, para. 1.

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