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Summary record of the 1560th meeting

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

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need to recast the article, although some minor drafting points might require attention.

52. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 60 to the Drafting Committee.

*It was so decided.*¹¹

The meeting rose at 5.30 p.m.

¹¹ *Idem.*

1560th MEETING

Tuesday, 26 June 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in respect of matters other than treaties (A/CN.4/322 and Corr.1 and Add.1 and 2)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE A (Transfer of State archives)

1. The CHAIRMAN invited the Special Rapporteur to introduce his eleventh report on succession of States in respect of matters other than treaties (A/CN.4/322 and Corr.1 and Add.1 and 2), and in particular draft article A (*ibid.*, para. 89), which read:

Article A. Transfer of State archives

1. Except as otherwise agreed or decided, and subject to the provisions of paragraph 3 below, State archives of whatever nature that relate exclusively or principally to the territory to which the succession of States relates, or that belong to that territory, shall pass to the successor State.

2. The successor State will permit any appropriate reproduction of the State archives that pass to it, for the purposes of the predecessor State [or of any interested third State].

3. Except as otherwise agreed or decided, the predecessor State will keep the originals of the State archives referred to in paragraph 1 above, if they are archives of sovereignty, subject to the proviso that it will authorize any appropriate reproduction thereof for the purposes of the successor State.

2. Mr. BEDJAOUÏ (Special Rapporteur) drew attention to the fact that, by its resolution 33/139, adopted at its thirty-third session, the General Assembly had requested the Commission to complete, at its thirty-first session, the first reading of the draft articles on succession of States in respect of State property and State debts. At the Commission's previous session, some members had also expressed the hope that the draft articles would be supplemented by provisions on succession to State archives. By submitting, in his eleventh report, six draft articles on succession to State archives, he had endeavoured to comply with those two requests. Since the problem of succession to State archives was a complex and difficult one, he believed that the Commission should help States to avoid disputes concerning archives by proposing rules on the subject. He had also seen in that problem an opportunity of enriching the draft articles. Lastly, if the draft articles were to be submitted to a diplomatic conference, he believed it would be better for the conference to have too much material before it rather than too little.

3. The adoption of provisions on succession to State archives was further justified on four grounds related to the specific character of State archives and to the special problems they raised in the case of a succession of States. First, although they were movable property of the type whose transfer had already been considered by the Commission, State archives had the particular characteristic of being property that could be reproduced, which facilitated their transfer by making it possible to satisfy both the predecessor State and the successor State. Secondly, State archives constituted a common heritage. It was therefore necessary, while respecting the integrity of a collection of archives, to recognize the rights of all States that shared in that heritage. Thirdly, while it was possible to conceive of a successor State existing in the absence of certain movable or immovable property—for example, a navy—without prejudice to its viability, it was not possible to conceive of a State without archives. Fourthly, archives could be the documentary evidence of movable or immovable property transferred to the successor State or retained by the predecessor State.

4. The question of State archives had given rise to extensive discussion, of which he had endeavoured to give some account in his eleventh report. Although international organizations had never concerned themselves with the fate of other movable property in the event of a succession of States, they had endeavoured to alert States to the problem of archives; that was true not only of UNESCO but also of the United Nations and other international organizations such as OAU, or the conferences of the non-aligned countries. It would therefore be regrettable if the Commission did not adopt provisions on such an important question.

5. To facilitate the Commission's task and enable it to complete its first reading of the draft articles on State property and State debts at the current session, as the General Assembly had requested, he proposed that, while the Commission was examining the six

draft articles on State archives, the Drafting Committee should review the 25 draft articles previously adopted.¹ Those 25 draft articles presented no major difficulties and the few problems outstanding could be resolved by the Drafting Committee. As to the provisions on the peaceful settlement of disputes, which were to be added to the draft articles, he proposed that the Commission should follow the Vienna Convention on Succession of States in respect of Treaties.²

6. His eleventh report was divided into two chapters, one dealing with State archives in modern international relations and in succession of States and the other with provisions peculiar to each type of succession of States in respect of State archives.

7. In chapter I, he had discussed the problem of State archives in modern international relations, starting with the definition of archives affected by succession of States. He had not considered it necessary to devote an article to that definition, but had analysed the content of the concept of archives and sought to define that concept in the light of State practice regarding succession of States.

8. From the answers of 33 States to the questionnaire drawn up by the round table conference on archives, it could be inferred that "archives" were generally taken to mean "the documentary material amassed by institutions or by natural or legal persons in the course of their activities, and deliberately preserved".³ State archives could therefore be defined as the documentary material amassed by State institutions in the course of their activities and deliberately preserved by them.

9. In his previous reports, he had drawn a distinction between administrative archives, which served administrative purposes, and historical archives, which were used for research. But that distinction was not absolute; first, because historical archives were often no more than old administrative archives, and secondly, because administrations sometimes consulted historical archives in their day to day business and, conversely, research workers made greater use of current administrative archives when access to them was permitted by the State.

10. In any case, it was not easy to define archives, because there was no absolute distinction between the categories of archival, library and museum items. Writing was not a decisive criterion, because archives were not necessarily written documents; they could include, for example, numismatic collections, iconographic documents, photographs, sound records and cinematographic films. Archival items could be found in libraries or museums and, conversely, library or

museum items could be found in archives. National archives could also include objects seized by the police and exhibits relating to criminal proceedings, as well as models, drawings, prototypes, scale models and samples.

11. State practice, of which there was a great abundance, showed that the expression "State archives" was generally understood in the broadest sense to cover "State documents of every kind". In the event of a succession of States, it was the internal law in force in the predecessor State at the time of succession that indicated what was meant by State archives, and the successor State was bound by that definition. The expression "State documents of every kind" showed that archives of every kind belonging to the predecessor State might be included. It thus referred to ownership. It also referred to the type of archives, whether diplomatic, political, administrative, military, civil or ecclesiastical, historical or geographical, legislative, judicial, financial, fiscal or cadastral; to the character of the archives, whether secret or accessible to the public; and to the nature of the items, whether hand-written or printed, drawings, photographs or films, paper or parchment, originals or copies. The detailed list set out in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, concluded pursuant to the Treaty of Peace of 10 February 1947,⁴ clearly showed the diversity of documents covered by the expression "State archives".

12. Archives played a very important role in the modern world. According to a group of experts convened by UNESCO in March 1976, they were "an essential part of the heritage of any national community" because "not only do they provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights".⁵ Moreover, the scientific and technological revolution and the advances in data processing had changed the factors of the problem of State archives in State succession. The difficulties that had formerly arisen between States through the indivisibility of archives could now be overcome in part thanks to modern means of reproduction. Nevertheless, a reproduction, however faithful, was not the same as the original document. The reproduction of documents was only a means of facilitating the transfer of archives between the predecessor State and the successor State, and should not obscure the fact that the successor State had the right to ownership of the archives.

13. In a world in which information had become one of the keys to power, the possession of archives and their exploitation was of capital importance, but that importance also derived from the fact that archives were an essential part of the cultural heritage of any national community. That explained the interest of

¹ For the text of all the draft articles adopted so far by the Commission, see *Yearbook... 1978*, vol. II (Part Two), pp. 111 *et seq.*, document A/33/10, chap. IV, sect. B, 1.

² For the text of the Convention, see *Official Records of the United Nations Conference on Succession of States in respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31.

³ See A/CN.4/322 and Corr.1 and Add.1 and 2, para. 8.

⁴ *Ibid.*, para. 23.

⁵ *Ibid.*, para. 25.

UNESCO in the problem and the measures it was taking for the restitution of archives, not only as such, but also in the context of the reconstitution and protection of national cultural heritages. Peoples liberated from colonialism were now claiming the right to their cultural heritage in the framework of a new international cultural order; they were seeking a lost collective "cultural memory" and their cultural identity, which constituted the very basis of their national identity. Thus the Fourth Conference of Heads of State or Government of the Non-aligned Countries, held at Algiers in September 1973, had adopted a declaration on the preservation and development of national cultures in which it had emphasized "the need to reassert indigenous cultural identity and eliminate the harmful consequences of the colonial era, and call for the preservation of their national culture and traditions".⁶ Similarly, in its resolution 31/40, of 30 November 1976, the General Assembly had declared its conviction "that the protection by all means of national culture and heritage is an integral part of the process of preservation and future development of cultural values", and had affirmed "that the restitution to a country of its... manuscripts, documents and any other cultural or artistic treasures constitutes a step forward towards the strengthening of international co-operation and the preservation and future development of cultural values".

14. Thus the object of the new international cultural order was that each people should have a right to its cultural heritage, and in particular to its archives. At the present time, however, all or nearly all the sources of African, Asian and Latin American history were under European control, in so far as they were preserved in European archives.

15. State practice regarding archives in cases of succession of States showed that almost all succession agreements concluded between European countries from 1600 to the present day contained provisions on the transfer of archives, whereas agreements on State succession concluded under decolonization arrangements practically never contained such provisions. Similarly, while the removal of archives had occurred at all times and places, such archives had nearly always been restored to their owners in the end, except in cases of decolonization. State practice also showed that administrative archives, which were the most necessary for the conduct of the routine business of the State, had nearly always been left to the successor State. Historical archives, on the other hand, had given rise to many more difficulties than administrative archives; their transfer had tended to depend on circumstances, and it was not always possible to discover what principles had determined their transfer to the successor State or, conversely, their retention by the predecessor State.

16. He believed that there were several reasons for the absence of clauses concerning archives in most of

the State succession agreements concluded in cases of decolonization. First of all, decolonization had not been complete at the outset, and the problem of archives had arisen only later. Moreover, the newly independent States had immediately been faced with urgent economic problems which had prevented them from realizing the importance of the problem of archives. Their lack of interest in the problem was also explained by the underdevelopment they had inherited from colonialism. Finally, the power relationship that had existed between the former administering Powers and the newly independent States had enabled those Powers to settle the problem of archives to their own advantage.

17. In view of the complexity of the problem, he thought the Commission should confine itself to establishing a general legal framework, leaving it to the States concerned to work out flexible arrangements in each particular case. The Commission should take account of the new demands of States regarding their right to archives and to their cultural heritage. It should also promote cultural exchanges between States, to enable research workers from every State to have access to the historical archives of other States, since archives relating to the history of a State were nearly always dispersed among several countries. It should thus make all countries aware of their interdependence in regard to historical archives, so that they might learn to be capable, in the words of UNESCO, of "managing mankind's knowledge"⁷ together.

18. He believed that the problems relating to disputes over archives should be demystified. If legitimate, a transfer of archives should not be regarded as a depletion of the national heritage, since co-operation between the predecessor State and the successor State could facilitate the transfer. Irregular additions to archives should be avoided. It was also necessary to refrain from delaying tactics, which merely prolonged disputes. Finally, the possibilities of reproduction on microfilm must not obscure the right of ownership of original documents.

19. The principle of the transfer from the predecessor State to the successor State was even more important for archives than for other State property, since archives were property pertaining to the sovereignty and the very existence of the State. That being so, documents that gave rise to disputes over archives must be regarded as being of interest to both the predecessor State and the successor State. All negotiations should be based on recognition of that mutual interest and be conducted in good faith by the two States with a view to a satisfactory settlement. Such a settlement might result from the application of several principles.

20. The principle of territorial origin applied in the case of removal of archives from the territory to which the succession of States related. That principle concerned archives originating in the territory, the concept

⁶ *Ibid.*, para. 55.

⁷ *Ibid.*, para. 67.

of origin implying the concept of ownership of the archives. The principle of territorial origin, which had initially been applied to administrative archives, had also been applied to historical and cultural archives. However, it was not an absolutely reliable criterion, for it sometimes happened that archives originating in the territory to which the succession related, and organically linked with that territory, were not transferable, so that the principle could not be applied.

21. The principle of functional pertinence made it possible to transfer archives that had not originated in the territory, but that related to it. There were several ways of moderating the effects of the application of that principle. First, microfilming could be used. Secondly, the principle of respect for the integrity of collections of archives could be taken into consideration, according to which it was necessary to respect the indivisible whole constituted by the central archives of the predecessor State concerning the territory to which the succession of States related. Thirdly, account could be taken of the concept of common heritage, according to which the archives could be of interest to both the predecessor State and the territory to which the succession related. That concept, which had emerged in UNESCO, could provide a solution in so far as States were prepared to resort to it in good faith and refraining from any improper appropriations.

22. The principle of the territoriality of archives implied the devolution of a territory's documents in such a way as to establish its rights, enable it to meet its obligations, preserve administrative continuity and protect the interests of the local population, in other words, to contribute to the viability of the territory.

23. Two subsidiary principles must also be mentioned: the right to a substitute copy and the right to reparation by delivery of documents of equivalent importance. The first often provided an acceptable solution, but must not obscure the legitimate right of ownership by one of the States concerned of the original archives. The second applied to situations in which, for various reasons such as respect for the integrity of archival collections, it was difficult to transfer collections or documents because of their great cultural or historical value. In such cases, the States concerned could agree to replace them by documents of equivalent importance, thereby making it possible to satisfy the twofold requirement of historical value and administrative value.

24. His proposed draft article A was a general provision on the transfer of archives to the successor State, and was applicable to all types of State succession. It could be placed in section 1 (General provisions) of part I (Succession to State property), and would thus precede the provisions peculiar to each type of succession of States regarding State archives. Draft article A was based on article 9, which laid down the general principle of the passing of State property situated in the territory to which the succession of States related. However, since archives were frequently removed by the predecessor State just before the date of State succession, it was necessary to supplement article 9 by

providing also for the passing of archives situated outside that territory. On the other hand, whereas all State property covered by article 9 was susceptible of assignment to the successor State, the same was not true of archives, which might be of concern to both the predecessor State and the successor State. Archives, however, had the special characteristic of being reproducible, and their duplication made it possible to satisfy both the predecessor State and the successor State.

25. Paragraph 1 of the draft article stated the principle of the primacy of agreement between the parties, which were free to agree to any arrangement whatsoever. The principle of the transfer of archives, in accordance with article 9, was then laid down for "State archives of whatever nature that relate exclusively or principally to the territory to which the succession of States relates".

26. Under the terms of paragraph 2, when archives were transferred in accordance with paragraph 1, the predecessor State was entitled to obtain the reproduction of the archives it surrendered. He considered that that faculty should be granted even to any interested third State; for it was possible that some of the inhabitants of the territory to which the succession of States related might leave that territory and settle in the territory of the predecessor State or in that of a third State. In the latter case, the third State might need certain administrative archives, and it should be able to obtain them for the administration of that part of its population.

27. Lastly, paragraph 3 moderated the provisions of paragraph 1. In the case of archives of sovereignty, it would seem difficult for the predecessor State to surrender the originals. The successor State should then be given the right to obtain reproductions. After a certain time, some archives remaining in the predecessor State would in any case become accessible to the public under the law of that State. Hence there was no reason to deprive the successor State of copies of those archives.

28. The CHAIRMAN thanked the Special Rapporteur and congratulated him on his eleventh report on succession of States in respect of matters other than treaties.

29. As the Special Rapporteur had pointed out, the General Assembly, in its resolution 33/139, had recommended that the Commission should continue its work on succession of States in respect of matters other than treaties at its current session, with a view to completing the first reading of the draft articles on succession of States in respect of State property and State debts.

30. After a procedural discussion in which Mr. USHAKOV, Sir Francis VALLAT, Mr. REUTER, Mr. FRANCIS and Mr. QUENTIN-BAXTER took part, the CHAIRMAN noted that it seemed to be the general wish of the members of the Commission that the Drafting Committee should shortly begin to review the first 25 articles of the draft, and that, in principle,

the Commission should devote the next three weeks to consideration of the six draft articles on succession to State archives submitted by the Special Rapporteur.

The meeting rose at 1.5 p.m.

1561st MEETING

Wednesday, 27 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Corr.1 and Add.1 and 2)

[Item 3 of the agenda]

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

ARTICLE A (Transfer of State archives)¹ (*continued*)

1. Mr. RIPHAGEN said it was clear from the Special Rapporteur's report that State archives could not be treated in quite the same way as other State property. In principle, the importance of such archives lay in the information they contained. That information could be taken from the archives by means of various copying processes, whereas the originals themselves constituted cultural property. The subject had three aspects: first, the functional aspect, namely, the information contained in the archives; secondly, the physical and territorial aspect of the originals as objects; thirdly, what might be termed the "personal" aspect, which was the fact that some archives contained information of a privileged nature and could therefore be regarded as "archives of sovereignty". The general problem in all types of succession of States was to determine the importance of the connecting links between the archives and the predecessor State or the successor State. From that point of view, it was doubtful whether types of succession such as separation, uniting or dissolution of States, which might in any case overlap, really called for different treatment. The importance of

the various connecting links could of course prove different in different types of succession, particularly in a case of decolonization, in which a new State was formed. It might be useful to formulate a special article for that case. But with regard to the other types of State succession, he was inclined to think that a general rule would suffice, although it could be argued that some simplification of the connecting links was possible.

2. The wording of draft article A reflected the three aspects he had mentioned, but it was questionable whether the situations covered in articles B and E (A/CN.4/322 and Corr.1 and Add.1 and 2, paras. 140 and 204), namely, transfer of a part of the territory of one State to another State and separation of part or parts of the territory of a State, were really so different that separate articles were needed. Again, in the case of article D (*ibid.*, para. 189), which dealt with the uniting of States, it seemed self-evident that the archives could pass only to the new State.

3. Mr. REUTER thought the most tragic aspect of colonial domination was probably the injury inflicted on the soul of the colonized nations. As the Special Rapporteur had indicated, that situation should be remedied, although the Commission could not do much merely at the level of State archives. The problem was indeed beyond the scope of the Commission's work.

4. In his opinion, the draft articles on succession to State archives raised six questions. First, should State archives be defined in the draft? Although the Special Rapporteur had not proposed a definition, he did not seem to be opposed to one. It might therefore be asked whether such a definition should be provided by internal law, in the case in point the internal law of the predecessor State, or by international law, which meant the draft articles in preparation. In that connexion, reference should be made to the articles already adopted. The definition of State property in article 5² referred to the internal law of the predecessor State. It therefore seemed that any definition of State archives that departed from that general definition would have to be duly justified.

5. If the Commission did not define State archives, article 5 would apply, and the internal law of the predecessor State would determine the content of the concept of State archives in each case. That would not be a bad solution, since most countries, particularly the former colonial Powers, had laws on State archives. But as the concept of archives was extremely broad, covering not only State papers but also libraries or numismatic collections, the definitions under internal law might be very varied.

6. To ensure some degree of uniformity, therefore, it might perhaps be advisable for the Commission to specify that the internal law in question was that dealing generally with some particular subject, whether the

¹ For text, see 1560th meeting, para. 1.

² See 1560th meeting, foot-note 1.