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Summary record of the 1561st meeting

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

Extract from the Yearbook of the International Law Commission:-
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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 5[2] 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.

term used in the internal law was "archives" or any other. Generally speaking, internal law provided that all papers and documents registered as such formed part of the State archives, and that entailed decisions on classification. Such decisions could even affect sets of private papers; for instance, account books and journals had been classified in France as State archives because they were documents of great value for the history of the nation. On the other hand, internal law sometimes treated as State archives all documents that had a material bearing on affairs of State or that emanated from State officials, even if they had not been classified as State archives. Thus, although the private correspondence of a head of State did not form part of the State papers, a letter in that correspondence containing some reference to State affairs became a State paper. Supposing, for example, that Emir Abdel-Kader had written a private letter containing considerations on the Algerian State before its colonization: under French internal law, that letter would have been part of the State papers of France, and decolonization would not have changed the rule. Under the international law embodied in the draft, however, the letter would pass to Algeria.

7. Such considerations of protection might relate to objects other than State papers. If the internal law of the predecessor State provided that certain cultural and historical objects of a colony were inalienable, that property ought to remain inalienable after decolonization. Thus the Commission should not deviate, in the case of archives, from the definition of State property given in article 5, but should specify the objects it wished to include in the concept of State archives.

8. Secondly, was it really necessary to draft articles relating specifically to State archives? In the absence of such articles, State archives would come within the scope of the draft because they were State property. That point called in question articles 5 and 9, and article 13, paragraph 3. According to the general rule stated in article 9, State property situated, on the date of the succession of States, in the territory to which the succession of States related, passed to the successor State. The Special Rapporteur did not seem quite sure that all State archives situated in the territory of the successor State passed to that State. He had proposed an exception for "archives of sovereignty". In the case of administrative State papers concerning, for instance, the organization of military units of the colonial Power, the newly independent State might be expected to surrender them without difficulty, but was it really obliged to return them because they were papers of sovereignty? The Special Rapporteur had answered that question in the affirmative, arguing that certain movable property situated in the territory of the predecessor State should pass to the successor State, a rule that ran counter to an *a contrario* interpretation of the general principle stated in article 9.

9. In that connexion, he pointed out that the rule proposed by the Special Rapporteur in draft article A was valid for all cases, whereas the rule requiring the transfer of movable property situated in the territory of the predecessor State was valid only in the case, dealt with in article 13, of newly independent States. He shared Mr. Riphagen's concern on that point.

10. Thirdly, it would be necessary to settle separately two groups of preliminary questions relating, respectively, to the transfer of State archives and to the status of State archives of common interest, whether transferred or not.

11. Fourthly, what was the nature of the rules on the transfer of State archives? It would of course be desirable for such rules to be precise and clear, and to apply automatically. If the Commission laid down transfer rules that were not clear, their application would give rise to many difficulties. The Commission might also consider that certain cases were straightforward, whereas in others contradictory principles had to be taken into consideration. For cases of that kind, without going as far as to lay down rules, the Commission could indicate principles, such as the principle of negotiation in good faith in compliance with certain subsidiary principles. If the Commission proclaimed the obligation to negotiate, it would also have to state the principles of negotiation.

12. Fifthly, in which cases was the passing of archives automatic? He could identify three. First, a simple case, but one that was not expressly covered by draft article A: that in which archives were situated in the territory of the successor State and subject to the exception proposed by the Special Rapporteur for papers of sovereignty. Secondly, in regard to newly independent States, there was the case of papers predating colonization that could be regarded as State papers. That case showed the need for an international definition of State papers, for it was to be feared that a simple reference to the law of certain human societies predating colonization, which had possessed State papers, would not suffice to protect those papers adequately. Lastly, there was the case of State papers situated in the territory of the successor State before the succession of States, but transferred during the period described as suspect by the Special Rapporteur.

13. In his report and in draft article A, the Special Rapporteur had found it possible to apply other criteria, such as that of territorial connexion. That criterion would be acceptable only if it were clearly defined. As to the criterion of functional connexion, he thought it was covered in paragraph 1 of the draft article by the words "that relate exclusively or principally to the territory". That criterion seemed too general, even if it was moderated by the concept itself rather vague, of "papers of sovereignty". It would be dangerous to give that concept too broad a meaning and make it include, for example, judicial archives.

14. Sixthly, with regard to the status of documents of common interest, he was not in favour of retaining the words "or of any interested third State", which the Special Rapporteur had placed in square brackets in paragraph 2 of the draft article. Archives of that kind should be placed at the disposal of third States, or of the public, only with the consent of the two States

concerned. That was why the documents in an arbitration were not State papers, even if they were classified as such, and the States concerned had a genuine right to them. In regard to consideration of the needs of other States, he was thus less generous than the Special Rapporteur.

15. Mr. USHAKOV doubted whether State archives could be treated as State property. A distinction should be made between corporeal property, whose value could be expressed in money, and incorporeal property which, strictly speaking, had no material value and of which archives formed a part. Hence it was difficult to accept that the concept of State property, as defined in article 5, included archives.

16. With regard to the definition of the term "archives", he noted that the Special Rapporteur had retained only one of the three elements of the definition given by archivists, namely, "the documentary material amassed by institutions or natural or legal persons in the course of their activities, and deliberately preserved" (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 8). Later in his report, the Special Rapporteur had even included in the concept of State archives documentary material not amassed by State institutions, since he had extended it to cover engravings, drawings and coin collections. But a coin collection, for example, could have been formed by private persons before belonging to the State. It should therefore be made clear what was meant by "documentary material amassed by State institutions in the course of their activities and deliberately preserved by them" (*ibid.*).

17. In the Soviet Union, State archives could be defined by the fact that they belonged directly to the State or were under its control. Private collections of objects that might not be sold abroad were placed under State control. If a private person had letters of Pushkin in his possession, they belonged to him, but they constituted State archives because they were placed under State control. Similarly, local archives were State archives in the sense that they were controlled by the State, but from the point of view of ownership they were the archives of the local authorities. The collections of manuscripts preserved in the museums of the Soviet Union belonged not to the State but to the museums, which, under State control, could decide for example to hold exhibitions.

18. Thus all archives in the Soviet Union, whether administrative, political, diplomatic, economic, technical, literary or artistic, were State archives in the broad sense, because they were either the property of the Soviet State or under its control. The criterion of control made it difficult to determine whether archives belonged to a territory to which a succession of States related.

19. It was just as difficult to determine whether archives related "exclusively or principally" to a territory. For example, it might be considered that archives concerning the history of Moscow related exclusively to Moscow. But it might also be held that they related to the Soviet Union as a whole, in so far as Moscow was the capital of the Soviet Union. Similarly, it could be considered that archives situated in Armenia related principally to that territory. But it could also be argued that, since Armenia had become part of the Russian Empire 150 years ago, those archives concerned the whole of the Soviet Union, for they contained documents relating to the history of Russia as a whole. Soviet internal law provided no means of resolving that problem.

20. The problem would be easier to resolve in the case of administrative and technical archives, because the same criterion could be applied for the passing of those archives as for the passing of moveable property by stipulating that the archives must be connected with the activity of the predecessor State in respect of the territory to which the succession of States related. It was obvious that technical archives relating to the construction of a bridge were connected with the State's activity in respect of the territory in which the bridge had been built, and therefore passed to that territory. But the internal law of countries made no distinction between administrative or technical archives and other archives, for it regarded State archives as indivisible.

21. Lastly, he thought that article A was not really necessary and raised more problems than it resolved. He believed that it was unnecessary to state a general rule and that it would be enough, as in the case of State debts, to lay down particular rules for each type of succession of States. It was only after such particular rules had been drafted that it might be possible to deduce a general rule.

22. He also pointed out that the criterion of "sovereignty", applied in draft article A, paragraph 3, did not appear in the following draft articles.

23. Mr. PINTO fully agreed with the Special Rapporteur that archives had a character of their own that warranted separate treatment, and that they not only represented the cultural heritage of a State but could also constitute a national asset of considerable value. He likewise endorsed the general principles adopted by the Special Rapporteur regarding the passing of State property preserved in archives, which would provide the Commission with an excellent starting point for its study.

24. At the same time, he saw certain difficulties, the first of which related to the definition of archives. Despite the wealth of material in the report, which emphasized not only the documentary but also the cultural and historical significance of archives, he considered that the definition should be confined to documentary material, and it was his impression from section A of chapter I of the report, that the Special Rapporteur also favoured that restrictive definition. If the Commission agreed to deal specifically with archives in the form of documents, it might wish to consider whether further articles should be drafted to cover cultural and historical material.

25. It would also be necessary to determine what constituted a document. He agreed, of course, that for

the purposes of State archives documents should be understood to include films. However, documents were records not only on paper but also on wax, stone, ivory or other materials, and the latter records should also be treated as documents for the purposes of State archives. In Sri Lanka, for example, such documents had been in existence for 25 centuries; not only were they of historical and archaeological importance, but they were sometimes also of considerable administrative importance, even in modern times. For example, the rules governing operations in the market place in certain areas were recorded in that way. In determining what constituted a document, the Commission should perhaps also consider a rather objective definition referring to the manner in which a record was conveyed to the mind, for instance by sight or by hearing.

26. Another important point concerned the ownership of archives, in other words, which archives were State archives. He noted that, under article 5 of the draft, such ownership would be determined in accordance with the law of the predecessor State. He presumed that that meant the law at the time of the succession, for if the predecessor State continued to exist in one form or another it should not be able to declare that the archives belonged to the predecessor State after succession had taken place.

27. He noted further that draft article A made no reference to the location of archives at the time of the succession of States. He presumed, from paragraphs 84 and 85 of the report, that the Special Rapporteur's intention had thus been to broaden the sphere of application of the article, and hence the rule on the passing of State archives to the successor State, wherever they might be situated at the time of the succession. He fully agreed with that approach, but wondered why it had not also been adopted for State property in general, in article 9 of the draft.

28. The case of newly independent States raised two particular points. First, although the draft dealt with direct succession from the metropolitan State to the newly independent State, there had been cases in which property had passed first from one metropolitan Power to another, and thereafter to a newly independent State, the archives being redistributed at each stage of that process. For instance his own country, Sri Lanka, had been colonized by the Portuguese in the early sixteenth century and subsequently by the Dutch and the British. When the British had finally handed over their records to the newly independent State, those records had been no more than fragmentary administrative archives covering four centuries. Although some of the records, particularly those of especial cultural or material value, had been returned, others had not. It would therefore be useful to provide for some means of recovering records in cases where one or more intermediate successions had taken place. Although in the case of Sri Lanka, for example, the records dated back to the sixteenth and seventeenth centuries, they were nonetheless of considerable significance, particularly in regard to territorial claims.

29. Secondly, it could also happen that the metropolitan Power had constituted archives common to several territories which it administered. In such cases, the records had often not been properly distributed among the countries concerned, and a few directives might be useful. For instance, the provisions of paragraph 2 (*b*) of draft article F (Dissolution of a State) (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 206) might also be applied to newly independent States when there was more than one successor State.

30. He agreed with the Special Rapporteur that the successor State should be deemed to have an absolute right to the archives to which it was entitled, for to qualify that right might result in records being withheld on unjustifiable grounds. He would like to know, however, whether the Special Rapporteur had not also been thinking in terms of a duty—a trust, as it were—of the successor State to preserve the archives, not merely as part of the national cultural heritage but also as part of the heritage of mankind as a whole.

31. Draft article A, like several of the articles already adopted, was a residual provision subject to the will and agreement of the parties, as was shown by the words "except as otherwise agreed or decided". Possibly the Drafting Committee might wish to consider whether a single article might not suffice for that purpose.

32. In paragraph 1 of the draft article, the phrase "belong to that territory" seemed to him rather too concise, since other rules drafted by the Special Rapporteur would apply in determining the connexion between the archives and the territory. The expression "archives of sovereignty", in paragraph 3, also seemed too concise to convey the exact meaning intended.

33. The cost of reproduction provided for in paragraphs 2 and 3 should be equitably apportioned and, as in other articles, it was necessary to indicate who should bear the cost. In the case provided for in paragraph 3, the successor State should not have to bear the cost, which could be considerable. Lastly, the Commission should consider whether the expression "appropriate reproduction", in paragraph 3, referred to photographs only or also covered other modes of reproduction.

34. Mr. DÍAZ GONZÁLEZ observed that, in the case of decolonized nations, the Special Rapporteur had approached the question of archives as being the "lost collective memory" which those nations were entitled to recover. However, a distinction should perhaps be made between newly independent States and States such as those of Latin America, which had achieved independence in the nineteenth century. In the case of States that were already old, it would be wrong to maintain that the archives situated in the former metropolitan Power should be transferred to them. It could not be asserted that the enormous volume of material on Latin America now housed in Seville by Spain, as the former administering Power, belonged to any particular State, for it was the com-

mon heritage of the Spanish people of Europe and the Spanish people of Latin America.

35. Moreover, it should not be forgotten that, when the Spanish had first arrived in what was now Latin America, there had been no archives in the sense now attributed to that term, although cultural property had existed, for instance in the form of monuments. When Spain had recognized the new Spanish-speaking States of Latin America *de jure*, the archives had been reconstituted in the territory of the metropolitan Power. Only the archives of Cuba and Puerto Rico had been transferred, and they had passed to the new metropolitan Power, the United States of America.

36. The Special Rapporteur had rightly made reference in his report to the cultural property removed from the newly independent States of Latin America. It was well known that there were few, if any, Latin American *objets d'art* in Spain. Indeed, even an object of symbolic value such as the golden Inca mask was now in Austria, not Spain. All such cultural property had been removed after independence by other States or by archeological societies that had undertaken excavations in Latin America. A typical case was the Machupicchu site in Peru; almost everything excavated at that site was now on view in the museums of other countries. Excavations in the territories of the Toltecs and Aztecs, also after independence, had likewise yielded treasures that had been taken abroad. There had been no treasure to find in Venezuela, since the nomadic tribes that had lived there had left behind neither archives nor monuments, but a collection of gold objects found in Colombia had recently been on display in Europe, and there were more Ecuadorian *objets d'art* in the United States of America than in Ecuador itself. In none of those cases could it be asserted that the predecessor State was under an obligation to return cultural property, because it had not been removed by the administering Power.

37. In those circumstances, could such property be treated as archives that should pass to the successor State by succession? For his part, he was not clear about the distinction between artistic and cultural property, on the one hand, and archives on the other, which together formed the historical heritage of a State. That heritage was to some extent protected by the various conventions adopted under the auspices of UNESCO, in particular by the Paris Convention of 14 November 1970.[3] Account should perhaps be taken of existing international jurisprudence in so far as it related to the protection of the cultural and artistic heritage, which should however be differentiated from archives. A consideration of that general point might assist the Commission in its task.

38. With regard to paragraph 1 of draft article A, the idea of belonging to the territory should not be stressed. It was not so much a question of State archives that belonged to the territory as of those relating to or concerning the territory. For example, written documents might exist that belonged to the territory but did not concern it. Certain documents of great importance concerning Latin American countries were not even in Spain; they were in the Netherlands, the United Kingdom or the United States of America.

39. The Special Rapporteur had drawn an interesting distinction between the actual transfer of documents to the State concerned, on the one hand, and the communication of such documents, on the other. Actual transfer was impossible where the material concerned was the joint property or common heritage of several States; in such cases, however, there was the possibility of reproduction by modern techniques. Obviously, a copy did not have the same value as the original, but if a State did not have the original it could always obtain accurate information on a given historical event, or scientific and cultural data of interest to it, from microfilms or photocopies. France, the Netherlands and the United Kingdom, for example, held certain archives that related not only to the policies pursued on their behalf by their agents in the territories of Latin America but also to their general policy in the context of the balance of power in Europe. It would be impossible for those States to surrender the documents in question, which did not concern Latin America only, but they could supply photocopies or microfilms. In that connexion, he pointed out that Venezuela had recently sent a mission to Europe, as a result of which photocopies would have been made, by the end of 1979, of nearly all the documents on Latin America now to be found in Europe, except in the Soviet Union.

40. Lastly, he stressed the need to examine the draft articles on succession to State archives with the utmost care, in view of the importance of the subject, and to distinguish clearly between that subject and a number of similar matters dealt with in other conventions.

The meeting rose at 1 p.m.

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[3] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (United Nations, *Treaty Series*, vol. 823, p. 231).

1562nd MEETING

Thursday, 28 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. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.