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Summary record of the 1603rd meeting

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

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been collected locally and which belonged to a municipal authority.

40. Lastly, he said that, in his view, draft article B' could be referred to the Drafting Committee.

41. Mr. USHAKOV said that most of the difficulties arising in connexion with the succession to State archives were due to the indivisible nature of certain archival stocks, which were, as a consequence, distinguishable from the other movable State property; in most cases, movable State property was divisible and capable of being evaluated for the purposes of compensation, where applicable.

42. The Special Rapporteur's commentary on draft article B' explained that, in the context of that article, the transfer of part of a State's territory to another State corresponded essentially to a frontier adjustment carried out by agreement between the States concerned. That explanation should be taken into account when the Commission came to draft the article. It was hardly necessary, for example, that paragraph 1 should refer specifically to "State archives connected with the administration and history of the territory", since the transfers in question were the subject of an agreement between the States which settled the question what archives would pass to the successor State. The provisions of paragraph 3 of article B might be a useful guide in that connexion, in order that provision should be made also for archives connected with the history or culture of the transferred part of a territory.

43. He suggested that draft article B' might be referred to the Drafting Committee, which would surely be able to work out the appropriate language.

The meeting rose at 1 p.m.

1603rd MEETING

Tuesday, 3 June 1980, at 3.45 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Add.1 and 2,¹ A/CN.4/333)

[Item 1 of the agenda]

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

ARTICLE B' (Transfer of a part of the territory of one State to another State)² (*concluded*)

1. Mr. BARBOZA said that the reason why, at its thirty-first session, the Commission had not included among the draft articles submitted to the General Assembly³ the article concerning succession to State archives in the case of the transfer of a part of the territory of one State to another State had not only been lack of time but also that some of its members had felt that the article was superfluous. However, he considered that the draft as it stood was somewhat incomplete and, as he had said in the Sixth Committee,⁴ the criteria for the transfer of movable State property would require some adaptation before they could be applied to State archives. Draft article B' was proof that adaptation was necessary. Like the Special Rapporteur, he thought that the title of the draft article should be reconsidered at the second reading, as should the definition of State archives, since any defects in the articles dealing with the subject would only become apparent during the discussion.

2. A comparison of article B' and article 10⁵ showed the difference in the criteria for the transfer of property and for the transfer of archives. Article 10, paragraph 2 (b) provided merely for the passing of "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory ...". The Special Rapporteur had, in his introduction, clearly shown that the criteria in article B', subparagraph 2 (a) (ii), were broader since it provided that all the archives concerning exclusively or principally the territory would pass to the successor State, but that provision was also narrower in that it stipulated that archives passed to the successor State only if they were constituted in the territory.

3. The Special Rapporteur had proposed a simplified version of article B', but he (Mr. Barboza) preferred the first version of article B'—although he realized that it posed a delicate legal problem—because the reference to archives of every kind belonging to the territory created an interesting concept of cultural heritage in the context of State archives, which could be used for interpretation of the other articles.

4. Mr. Thiam and Sir Francis Vallat had at the preceding meeting drawn attention to the fact that, strictly speaking, only State archives should be considered. The documents which formed part of the cultural heritage of a State or territory were not State

² For text, see 1602nd meeting, para. 1.

³ See 1602nd meeting, foot-note 2.

⁴ See *Official Records of the General Assembly, Thirty-fourth session, Sixth Committee, 46th meeting, paras. 40–46; and ibid., Sessional fascicle, corrigendum.*

⁵ See 1602nd meeting, foot-note 2.

¹ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

archives within the meaning of the definition contained in Article A, possibly because the definition was defective. If the Commission wished to maintain the concept of “belonging” and the reference to a cultural heritage, the definition might perhaps be broadened to cover certain types of archives that were not directly owned by the State but were a part of its “eminent domain”, which would prevent them from being removed from the national territory. He felt that the concept should be further explored in the Drafting Committee. Article B’ concerned archives which belonged to a territory—but a territory was not a legal entity in international law, and it might be preferable therefore to make a reference to the State and to its “eminent domain”.

5. Sir Francis Vallat and Mr. Evensen had pointed out at the 1602nd meeting the difference in scope between paragraphs 1 and 2 of article B’, since paragraph 1 referred more particularly to archives connected with the administration and history of the territory. The point should be considered by the Drafting Committee.

6. Mr. CALLE Y CALLE thanked the Special Rapporteur for having referred to the latest developments on the subject in the General Assembly and UNESCO.

7. The Special Rapporteur had said that the relationship between archives and a territory was based on two principles, namely the territorial origin of the archives and their functional connexion with the territory. The territorial origin of the archives depended on whether they belonged to the part of the territory being transferred and, if so, the type of archives concerned would be primarily local, municipal or regional registers relating or belonging to the territory. The functional connexion depended on whether the archives were linked to the territory, and a parallel concept appeared in article 10, on property.

8. In his view, the references to a “part of a territory” should be understood to mean a sizeable piece of land with a sizeable population, since the transfer of small pieces of land would be dealt with in frontier agreements rather than in the context of a succession of States. It was implied that the main interest would be in administrative archives rather than in archives of a historical or cultural nature. However, the populations of the territories transferred to another State had their own history, and often the reason for the transfer was ethnic, cultural or historical.

9. He pointed out that no distinction had been made between what could be called living archives, namely titles to land and birth and marriage registers, and archives of a historical nature, which were no longer in use.

10. He would have no objection to accepting either version of article B’, although he preferred the simplified version, because the longer version contained a contradiction as to the basis for the rule,

which was to ensure that the successor State was not deprived of the documents connected with the territory. The ownership and functional connexion of the archives were recognized, and their location was taken into account. If the archives were physically present in the territory and had been constituted there, there was no doubt that they should remain there; but if they were not located in the territory, the predecessor State was entitled to keep them, though it must supply copies of them. Paragraph 2 of the simplified version of article B’ set out the rule, and obviously implied that if the archives had not been constituted in the territory they could remain in the possession of the predecessor State.

11. Paragraph 3 referred to the obligation to provide reproductions of archives. He felt that the obligation might be extended to cover the possibility of transferring specific originals, since archives were not an absolutely indivisible entity. Sometimes ownership of the original document was essential, for example, in the case of title deeds, where a copy was not a sufficient guarantee since the original could disappear. A Royal Decree of 1802 had re-integrated the entire Amazon region, taken a few decades previously to form the Vice-royalty of Nueva Granada, in the Vice-royalty of Peru, and that document was essential to Peru. Throughout America, the principle of *uti possidetis* had been applied when countries had gained their independence: thus each State had had to be able to show its title deeds, which were State documents issued by the Spanish Crown. In some cases, therefore, it was appropriate to deliver the original document to the new sovereign of a territory. Some representatives in the Sixth Committee had stated that it was essential to ensure that certain documents were preserved and transmitted to the successor State, by virtue of a basic right inherent in national or territorial sovereignty.

12. He agreed with Mr. Barboza that there were archives which were not really State archives: they were privately owned and had frequently been taken from State institutions during wars, and kept as a private heritage. Since the State had the power to expropriate private property in the general interest, it also had a duty to expropriate documentary archives and works of art which were privately held and return them to their legitimate owners, namely, the territory to which they belonged.

13. Mr. VEROSTA (Chairman of the Drafting Committee) said he would be grateful for the Commission’s guidance with regard to the two versions of article B’. His personal preference was for the simplified version, principally because, unlike the other version, it referred, not to “archives of every kind belonging to the territory to which the succession of States relates” but only to “State archives”.

14. Mr. RIPHAGEN said that he would confine his remarks to the phrase “belonging to the territory”, which recurred in various forms in several parts of the text. Thus, subparagraph 1 (a) of article B which the

Commission had adopted⁶ contained the words “having belonged to the territory ...”, which in that context had an entirely different meaning from the phrase “documents of all kinds which ... belonged to the predecessor State ...” to which the definition of State archives in article A referred. In article B, which dealt specifically with newly independent States, the use of the past tense in the phrase “having belonged to” was intended, as it were, to give retroactive effect to State succession; it meant that, when the right of self-determination was exercised, archives that had belonged to the territory prior to colonization should be restored to it. The principle was a very just one, but it applied only to newly independent States.

15. He tended to agree with the point made by Mr. Quentin-Baxter at the previous meeting that, except in the cases covered by articles B and E (A/CN.4/322 and Add.1 and 2, para. 204), there seemed to be no particular reason for elaborating the question of succession to State archives in great detail. It was the right to self-determination which gave the problem its particular meaning and colour; in cases where the question of self-determination did not arise, the matter might as well be left to the States concerned. He added that he had already made a similar comment in the Sixth Committee.⁷ The fact that certain archives were the property of a territory in the sense that they actually related to that territory and thus belonged to its administration was adequately taken into account in paragraph 1 of article B.

16. The CHAIRMAN, speaking as a member of the Commission, said he would refer only to the point raised by Sir Francis Vallat (1602nd meeting) and by Mr. Riphagen concerning the phrases used in various parts of the text to describe the relationship between State property—in the particular case, archives—and the territory affected by the succession of States. The relationship might be described by the phrase “belonging to” used in subparagraph 2 (a) (i) of article B', or in the terms of the definition of State property given in article 5. In paragraph 56 of his latest report (A/CN.4/333), the Special Rapporteur defined State archives as “a class of movable State property”. In article A, State archives were defined as “the collection of documents of all kinds which ... belonged to the predecessor State according to its internal law ...”. Elsewhere in the draft, the relationship was indicated by the words “situated in” (article 10), “connected with the activity of the predecessor State in respect of the territory” (articles 10 and 11), and, in paragraph (1) of article B', “... connected with the administration and history of the territory”. In his view, the phrases used did not convey the same meaning in each context, the words “belonging to”, in particular, being of uncertain legal content.

⁶ *Ibid.*

⁷ See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 39th meeting, para. 5; and *ibid.*, *Sessional fascicle*, corrigendum.

17. He hoped that the Special Rapporteur would review the different phrases in order to preserve the essential clarity of the draft.

18. Mr. BEDJAOUI (Special Rapporteur) said that the comments made in the course of discussion on article B' could be arranged under three major headings.

19. First, what kind of territory and what kind of succession were involved? Did the succession relate to large tracts of the territory of a predecessor State, or was the article concerned only with minor frontier adjustments affecting tiny parcels of the predecessor State's territory? That was the issue underlying the entire debate, and he gathered that what was in the Commission's mind was the kind of succession that followed from the transfer of a part of one State's territory to another State, not in consequence of territorial conquest or annexation by force but in consequence, essentially, of boundary adjustments which, even though they might be minor, could nevertheless affect the persons and localities concerned.

20. Apparently Mr. Ushakov and Mr. Quentin-Baxter (1602nd meeting) thought that article E was the relevant provision. Sir Francis Vallat (*ibid.*) had said, however, very rightly, that article E related to the separation of part or parts of a State's territory that was followed by the formation of another State. He (Mr. Bedjaoui) would point out that under paragraph 2 of article 13 (concerning property) and paragraph 2 of article 22 (concerning debts) the transfer of part of a State's territory to another State was equated with the separation of part or parts of a State's territory. Accordingly, the Commission might perhaps refer to article E even if, as Sir Francis had noted, that article contemplated implicitly the population's exercise of its right to self-determination, whereas minor frontier adjustments were operated by governments. Admittedly the difference was an important one, even though in the case of frontier adjustments it had happened that the local population had been consulted by plebiscite, for example after the First World War (case of Eupen and Malmedy) and after the Second World War (case of Tenda and Briga).

21. The real problem was what kind of situation and what kind of territorial adjustment should be governed by article B' and what other kind of situation or territorial adjustment should preferably be governed by article E. That was the heart of the difficulty since, as Sir Francis had pointed out, there were no legal criteria for differentiating between a minor and a major boundary or territorial adjustment.

22. The second question was what kind of archives were to be the subject of article B'. Opinions in the Commission were apparently divided on the meaning to be attached to the expression “archives of every kind belonging to the territory to which the succession of States relates” (subparagraph 2 (a) (i)); Sir Francis

Vallat had gone so far as to suggest that subparagraph (i) should be omitted altogether. That was feasible, since, after all, the archives involved were generally local archives; the point would be considered in the Drafting Committee. However, article B' referred also to other kinds of archives: "archives connected with the administration and history of the territory", archives necessary for the administration of the territory transferred and also historic or cultural archives, which might be of definite importance, for even in the case of minor frontier adjustments there might be some frontier town that had been the capital of a former empire or the centre of great cultural activity where valuable archives might have been kept. He had endeavoured in his draft to stress the link of the archives to the territory in question, but if the matter should give rise to difficulties, he would be prepared to redraft the provisions.

23. Alternatively, as Mr. Quentin-Baxter and Mr. Ushakov had said, the archives might not have been constituted in the territory affected but might be of interest to the successor State in regard to its new frontiers. Hence, it would be desirable to provide that the successor State should possess reliable evidentiary title or proof of its claim to the territory, and consequently a useful guide might be the relevant provisions in article B (Newly independent State). He would press for the acceptance of that idea in the Drafting Committee; the idea was not totally lacking in draft article B' as drafted, e.g. subparagraphs 2 (a) (i) and 2 (b), and also paragraph 3. It might, however, be sound practice to state the idea expressly.

24. He wished to explain at that stage that he had not meant to differentiate among categories of archives; indeed, the whole of the article related exclusively to State archives. The reason why he had introduced the concept of "State archives connected with the administration and history of the territory"—a concept that was admittedly remote from the definition of archives and that he was quite prepared to drop—was that he had been thinking of the case where at some point in its history a central State might have held certain property, cultural archives or manuscripts in a frontier province that had subsequently been transferred to another State, in which case the archives had to be restored to the predecessor State because they had no connexion with the administration or history of the transferred territory. The "archives of every kind belonging to the territory to which the succession of States relates" were archives specific to the transferred territory and, in any case, passed to the successor State. In his simplified version of article B' that class of archives was not referred to; it might be sufficient to mention that class in the commentary, or in the article itself, in more appropriate language to be drafted with the help of the Drafting Committee.

25. Thirdly, which of the draft provisions should serve as a model for the terminology? That was an important point as Mr. Šahović had said (1602nd

meeting); it would be the Drafting Committee's task to ensure the general consistency of the draft as a whole.

26. In reply to Mr. Evensen (*ibid.*), he explained that the meaning of the expression "archives ... constituted" in the territory affected by the succession of States was intended to mean archives in fact constituted in that territory, but possibly removed from that territory just before the succession of States occurred; in reply to Sir Francis Vallat, who had noted the ambiguity in the expression "archives ... constituted in the territory of the predecessor State", he explained that the expression was obviously intended to mean archives constituted in that part of the territory which remained with the predecessor State. Lastly, in reply to Mr. Calle y Calle he explained that article B' was intended to provide for the transfer of the original documents and not for the delivery of mere copies.

27. The CHAIRMAN, noting that no objection of principle had been raised to article B' in either of its versions, suggested that the article should be referred to the Drafting Committee.

*It was so decided.*⁸

ARTICLE D (Uniting of States)

28. The CHAIRMAN invited the Special Rapporteur to introduce draft article D (A/CN.4/333, para. 65), which read:

Article D. Uniting of States

1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision in paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

29. Mr. BEDJAOUI (Special Rapporteur) said that the succession to State archives was clearer and simpler in the case of a uniting of States, where the agreement of the parties was paramount. Indeed, in no other case was that agreement more decisive, for what was involved was a consensual act *par excellence*, an act of the free will of two or more States. The agreement was intended to settle all the problems of succession. In so far as any points were not settled or if any uncertainty remained regarding the disposition of the archives, it must be assumed that it was the common will of the States to rely on the future provisions of the internal law of the successor State, which would prevail.

⁸ For consideration of the text proposed by the Drafting Committee, see 1627th meeting, paras. 26 *et seq.*

30. The passing of the archives depended, however, on the form which the uniting of States took and on the kind of archives involved. Where States united to form a federation or confederation, there was no reason why the archives of the predecessor States should pass to the successor State: each predecessor State would retain its own archives. Where States united in order to form a unitary State, the archives might perhaps be rearranged—but that was a question for the successor State.

31. So far as the kinds of archives were concerned, he said that historical archives, for example, manifestly were of interest primarily to the predecessor State. Hence it would not be desirable to make provision for the transfer of those archives, unless by virtue of internal law it was decided to assemble all the archives in the capital of the successor State. Similarly, a union of States might have less need of the administrative archives of the various component States than did those States themselves; in such a case, therefore, those archives did not necessarily pass. At the time of the unification of Spain in the fifteenth and sixteenth centuries, for example, each kingdom had received its autonomy, exemplified by the establishment of the office of Viceroy and separate councils. Accordingly, the archives had not been centralized in the capital of Spain; some had to be consulted in Seville, others in Cadiz, none of them in Madrid.

32. Nevertheless, even if under the public internal law the predecessor States retained the legal ownership of their archives, in public international law—which took cognizance only of the new State—the archives would pass to the successor State, even in cases where all the problems, including the disposition of the archives, were settled by the internal law of the successor State, as happened where the predecessor States forming the union were determined to fulfil all the conditions to make the union viable.

33. He explained that the terms of article D were modelled on those of article 12, concerning the succession of State property in the case of a uniting of States. During its first reading of article 12 the Commission had decided to omit the words “subject to paragraph 2” from the end of paragraph 1 and to add at the beginning of paragraph 2 the words “without prejudice to the provision of paragraph 1”.⁹ For the sake of consistency he had made an analogous change in his draft article D.

The meeting rose at 5.15 p.m.

⁹ See *Yearbook . . . 1979*, vol. I, p. 179, 1568th meeting, para. 16.

1604th MEETING

Wednesday, 4 June 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Organization of work (*continued*)*

1. The CHAIRMAN said that, at its meeting held on 3 June 1980, the Enlarged Bureau had decided that the topic of jurisdictional immunities of States and their property, for which Mr. Sucharitkul was the Special Rapporteur, would be discussed by the Commission on 3, 4, 7 and 8 July.

2. The Enlarged Bureau had further decided to set up a Planning Group of the Enlarged Bureau and to appoint Mr. Thiam as Chairman of the Group. Mr. Thiam had suggested that the Planning Group should be composed of the following members: Mr. Calle y Calle, Mr. Díaz González, Mr. Njenga, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov and Sir Francis Vallat. The meetings of the Planning Group would, of course, be open to all members of the Commission.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Add.1 and 2,¹ A/CN.4/333)

[Item 1 of the agenda]

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

ARTICLE D (Uniting of States)² (*concluded*)

3. Mr. TABIBI said that the question of succession to State archives, which was dealt with in the Special Rapporteur's twelfth report (A/CN.4/333) and related to the administrative, cultural and historical heritage of peoples and States, had received close attention at the General Assembly's twenty-eighth, thirtieth and thirty-fourth sessions in the course of discussions on the subject of the restitution of works of art to countries victims of expropriation; the Assembly had invited³ all Member States to ratify the Convention on the Means

* Resumed from the 1591st meeting.

¹ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

² For text, see 1603rd meeting, para. 28.

³ Resolutions 3187 (XXVIII), 3391 (XXX) and 34/64 of the General Assembly.