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Summary record of the 1605th meeting

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

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1605th MEETING

Thursday, 5 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. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, 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 ARTICLE SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE E (Separation of part or parts of the territory of a State) *and*

ARTICLE F (Dissolution of a State)² (*concluded*)

1. Mr. BARBOZA said that he endorsed the general approach adopted in draft articles E and F and agreed that those articles should be referred to the Drafting Committee.

2. Like Mr. Evensen (1604th meeting), he noted, however, that the wording of subparagraph 2 (a) of draft article E differed somewhat from that of subparagraph 2 (a) (ii) of draft article B'³ since, whereas the former referred to State archives "connected with the activity of the predecessor State in respect of the territory", the latter referred to State archives "that concern exclusively or principally the territory". It was more than a matter of drafting. There could be cases of sizeable private collections of documents that were expropriated by a State prior to a succession or were donated to the predecessor State: those collections would not be connected in any way with the activity of the State in respect of the territory, but would exclusively or principally concern the territory. The Special Rapporteur had given a very clear example of such a case when he had referred at the previous meeting, to the case of manuscripts and parchments relating to Iceland which had been collected in Denmark by an Icelander and had been returned in 1971 to the Government of Iceland, which had been claiming them ever since the termination of the Union of Denmark and Iceland. To make provision

for such cases, he preferred the language used in draft article B'.

3. The remarks which he had made at the 1603rd meeting on "eminent domain", during the discussion on draft article B', were likewise relevant in the present context. He had been thinking then of the magnificent private collection of gold objects, dating from the time of the Inca and pre-Inca civilizations, which belonged to a private citizen of Peru and were housed in the Museo del Oro in Lima. Under which rules of international law would the successor State be able to claim such objects in the event of the dissolution of the predecessor State? On reflection, it seemed to him that the answer lay in the draft articles themselves, and specifically in the definition of State property in draft article 5,⁴ under which a predecessor State would have a right or interest in archives that were not necessarily State archives. That right was reflected in the internal law of many States which, for instance, limited the freedom to export or to dispose of private collections of archives, and he considered that the right would also pass from the predecessor State to the successor State. He would therefore suggest that, if archives were considered to fall within the terms of the articles relating to State property, a reference to such a right in the commentary on articles E and F would suffice; if they were not considered to fall within those terms, however, an article along the lines of article 5 should be incorporated in the articles concerning archives.

4. Lastly, he noted that the Spanish text of draft article B' used the words "*se refieren*" whereas, in the same context, paragraph 2 (a) (ii) of draft article F used the word "*concernen*". If the intent were the same, those two provisions should perhaps be aligned.

5. Sir Francis VALLAT, expressing his agreement with the general thrust of draft articles E and F, said that he was pleased to note the place accorded to two principles, namely, the principle of agreement, which was fundamental to the draft, and a new principle relating to the provision of copies, which would be a valuable aid in solving the problem of State archives in cases of State succession.

6. There was, however, another principle, which some had termed the indivisibility of archives but which he preferred to call the unity of archives. Draft articles E and F seemed to take full account of the need to preserve the unity of archives in the event of the separation of part or parts of the territory of a State or of the dissolution of a State. No doubt the Special Rapporteur would also underline the importance of that principle in the commentary. He (Sir Francis) did not, however, think that the concept of division in an equitable proportion, as embodied in paragraph 2 (b) of draft article E, could be applied to archives. A point both of drafting and of substance was involved, and he trusted that it would be considered further by the Drafting Committee.

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

² For texts, see 1604th meeting, para. 26.

³ For text, see 1602nd meeting, para. 1.

⁴ See 1602nd meeting, foot-note 2.

7. For the sake of uniformity, the wording of draft articles E and F should be aligned. He did not, however, believe that it necessarily had to be aligned with the articles dealing with other kinds of property since, given the special nature of archives, there might be good reason for some difference in wording and possibly also in presentation.

8. Mr. JAGOTA said that the subject of State archives was of special interest to his country, where a wide body of State practice had been developed in the matter, both under earlier treaties which provided for the transfer from France to India (1951, 1954, 1956) of certain territories and also under the more recent Treaty of Lisbon (31 December 1974), which provided, *inter alia*, for the transfer from Portugal to India of Goa.

9. The Special Rapporteur had asked whether State archives could be assimilated to movable property since, if they could be, there would presumably be no need for separate provisions; if they could not, however, it would not only be necessary to have separate provisions but those provisions should differ somewhat from the other provisions on movable property.

10. His own view was that State archives indeed differed from movable property by virtue of their special link with a territory and with the cultural and historical unity of its people. Archives, which had been aptly termed cultural property, had a certain sentimental value and, unlike other movable property, could not therefore be compensated for by money alone. That being so, it seemed to him that, in cases of succession which resulted in the constitution of a State, the principle was that documents relating to the cultural history of a territory would run with the land. At the same time, however, as a result of developments in modern reproduction techniques, the question of the indivisibility (or unity) of archives arose. The problem which faced a number of countries, including his own, therefore, was how to reconcile the need to preserve the organic unity of archives, in the interests of scientific and historical research, with the special sentimental value of certain archives which ran with the land.

11. It was with a view to resolving that problem that Article 5 of the Treaty of Lisbon had been modified in March 1975, in an exchange of notes between Portugal and India.⁵ In the course of that exchange, it had been recognized that the origin, or provenance, of the archives was the decisive element. Thus, the obligation to return archives had been confined to those archives which had been removed from the territory concerned to the metropolitan capital, no division of such archives being permitted. In all other cases, both parties were allowed to retain the archives which had

originated in their respective territories, even if those archives related to the other territory. It had also been agreed that each party would have a right of access to the archives retained by the other party. No provision had been made for the payment of compensation to either party. He did not know whether that solution would work elsewhere, but in that particular case no problem had arisen as yet.

12. Turning to draft articles E and F, he said that he agreed with their broad approach and, in particular, with the basic principle that any problems of succession to archives should be settled by agreement between the parties. As those articles were drafted, however, the rules prescribed were residual; in other words, they would only apply in the absence of such agreement, whereas in his view they should have the status of normative rules since they would be embodied, even if only in a modified form, in any agreement between the parties.

13. One question to be considered concerned the relationship between, on the one hand, draft article E and, on the other, draft articles F, B⁶ and, to some extent, B'. The relationship between draft articles E and F was clear: if the predecessor State had disappeared, article F applied; if not, article E applied. So far as the relationship between draft articles E and B was concerned, the point to be decided by the Commission—if possible before the second reading of the draft articles—was whether there were any similarities in the way in which a newly independent State was formed in either of the two situations covered by those articles, and, if so, whether some cross-reference was needed. It had been said during the discussion on draft article B' and in connexion with article E, that the separation of a part or parts of a territory—as distinct from its transfer—might involve an element of self-determination, for example, through the consultation of the people by plebiscite or referendum. Once draft article E was understood to import such an element of self-determination, it necessarily had similarities with article B. That was why the Commission, in the draft articles on succession of States in respect of treaties, had included a provision linking certain cases of separation of parts of a State with the formation of a newly independent State, although that provision had in the end not been retained.⁷

14. His proposition was, therefore, that in the event of the separation of part or parts of the territory of a State and the constitution of such part or parts as a separate State, the latter was entitled to the archives which ran with its territory. If the Commission accepted that proposition, the wording of paragraph 2

⁶ See 1602nd meeting, foot-note 2.

⁷ See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), pp. 160 and 161, document A/CONF.80/30, para. 87, art. 33, para. 3, and paras. 93 and 96.

⁵ See A/CN.4/322 and Add.1 and 2, chap. I, sect. D, treaty No. 175.

(a) of article E would have to be broadened, preferably along the lines of paragraph 2 (a) of draft article F or, alternatively, of the relevant part of article B. The reference, in paragraph 2 (a) of article E, to State archives connected with the "activity" of the predecessor State was unduly restrictive, since it would confine the terms of that paragraph to State archives connected with administrative matters only and hence would not cover the cultural and historical documents that might set forth the very reasons for which the separation had taken place, nor would it provide for a right to have such documents returned.

15. The use of the term "equitable proportion" in paragraph 2 (b) of draft article E raised the question whether archives could be equated with movable property and whether that term was in fact broad enough to cover documents which ran with the land. His own view was that the word "proportion" was likely to be construed in a very restrictive manner, and that some other word should be found.

16. Lastly, with regard to paragraph 3 of draft article E, he said that the Commission should consider two related questions: first, whether to include a provision indicating which party should bear the costs of reproduction or (as under the treaty of Lisbon) to leave the matter to the agreement of the parties; and, secondly, whether to include a provision concerning the payment of compensation. In that connexion, the Commission might wish to bear in mind the points raised by the Special Rapporteur in his eleventh report (A/CN.4/322 and Add.1 and 2, paras. 82-83). Since the relationship between reproduction and compensation was more clearly brought out in paragraph 2 (b) of draft article F, a similar provision might perhaps be included in draft article E.

17. Mr. RIPHAGEN said that at the previous session the Drafting Committee had prepared draft articles A and B on the assumption that those two articles might be the only ones dealing with State archives. Paragraphs 4 and 5 had thus been included in draft article B to make it clear, in cases relating to the right to self-determination, that, although State archives were, legally speaking, movable property, they could also be considered as immovable or cultural property.

18. Now that new articles on State archives had been proposed, the Drafting Committee should ensure that the cross-references they contained were as accurate as possible. For example, article B, paragraph 5, seemed to be relevant to the case covered by article B' or to that covered by article E, paragraph 5. Similarly, article B, paragraph 4, was closely linked to articles D,⁸ E, paragraph 5, and F.

19. Mr. SCHWEBEL said that, in his opinion, draft articles E and F could be referred to the Drafting Committee.

20. Mr. USHAKOV said that he would submit to the Drafting Committee a number of proposals for bringing the terms of draft articles E and F into line with those of article B.

21. Mr. VEROSTA said that the meaning of the expression "equitable compensation", which appears in article E, paragraph 4, should be spelt out in the commentary.

22. He added that the three subparagraphs of paragraph 2 of article F, which were to be applicable "in the absence of an agreement", were so complex that the eventual settlement would still have to take the form of an agreement. That being so, were those subparagraphs to be regarded as residual rules?

23. Mr. BEDJAOUI (Special Rapporteur), reviewing the comments made in the course of the debate on articles E and F, said that his first remark would be that he endorsed Mr. Jagota's observations on the special nature of archives in the sense that archives were connected with their home ground and that they were of inestimable value for a nation's cultural heritage. The point had been stressed more than once in his eleventh report on the subject; besides, historic and cultural archives were not the only ones to which a people might attach special value and which deserved special treatment. Other movable property of potentially great historic importance for a nation might include, for example, such objects as the obelisk removed from Ethiopia and set up in Rome at the time of the Fascist regime; under the Treaty of Peace of 1947,⁹ the obelisk had had to be restored to Ethiopia and the transport costs had been chargeable to the Italian Government.

24. In general, the members of the Commission had stressed that articles E and F should be brought into line with the other draft articles in order to avoid any contradiction, though opinions had varied as to the method to be employed for the purpose. Some members had suggested that there should be a greater parallel between articles E and F, or between article E and article 13 on the one hand and between article F and article 14 on the other. Others had suggested that article E should be brought more closely into line with article B; and Mr. Barboza had by implication requested that article E should take into account the terms of article B', on the ground that the criterion of the exclusive or principal connexion of the State archives with the transferred territory and the criterion of the connexion of the archives with the predecessor State's activity in the territory that was separating should be unified. Each of those suggestions deserved to be taken into account; yet it would be wrong to copy indiscriminately the terms of one article from another, for that might risk overlooking the peculiar features of each type of succession, with the eventual

⁸ For text, see 1603rd meeting, para. 28.

⁹ See United Nations, *Treaty Series*, vol. 49, p. 142, Treaty of Peace with Italy, art. 37.

result that the articles might all resemble each other or that there might be just one single article.

25. In Mr. Jagota's opinion, article E should be aligned with article 13, and he had inquired whether article E referred to a category distinct from those covered by articles F, B' and B. He had said that article E (Separation of part or parts of a State's territory) had a connexion with article B (Newly independent State), and had pointed out that the Commission had earlier discerned resemblances between the case of a newly independent State and that of a State that came into being in consequence of a separation. In reply, he (Mr. Bedjaoui) would point out that those resemblances had not been taken into account by the United Nations Conference on Succession of States in Respect of Treaties.

26. In his opinion, articles E and F ought definitely to be interrelated, although the relationship would be subject to certain limitations. In that connexion, Mr. Jagota had pointed out that in the case contemplated by article F the predecessor State disappeared, with the consequence that the totality of its archives would have to be disposed of; the archives would thereupon pass to the successor States, for otherwise they would become *bona vacantia*. In the case contemplated by article E, on the other hand, the predecessor State remained in existence. Consequently it was impossible to establish a complete parallel between article E and article F.

27. He thought that the Drafting Committee would likewise have to take into account the suggestion that article E, concerning the separation of a part or parts of a State's territory, should correspond more closely with article B', concerning the transfer of part of the territory of one State to another State.

28. The debate had been dominated by an essential but very delicate problem: the indivisibility of archival collections. Indivisibility was certainly one of the special features of archives. Admittedly, modern processes of reproduction had made the problem less acute, but it was still a fact that, so far as cultural and historic documents were concerned, no copy, even if indistinguishable from the original, could replace the original. Still, the principle of the indivisibility of archives should not imply that archives could not be attributed to a State. For example, in the case dealt with by article F the archives could surely not be left ownerless. The problem of indivisibility might likewise crop up in the case covered by article E. In that connexion, Mr. Yankov had inquired at the previous meeting whether, under article E, paragraph 2, it was possible that indivisible archives could pass to the successor State. In reply, he (Mr. Bedjaoui) pointed out that the rule stated in that paragraph was qualified in two ways. First, the archives in question were those connected with the activity of the predecessor State in respect of the territory; in such a case, the archives in question would probably consist of documents relating to a specific and identifiable activity of the predecessor

State in the territory that was separating. Secondly, subparagraph 2 (b) imported the notion of equity by virtue of which it should be possible to work out, as regards the remainder of the indivisible archives, solutions that would not jeopardize the unity of the archival collections. Sir Francis Vallat had expressed the view that it would be undesirable to refer to the concept of equity.

29. Several members of the Commission had commented at some length on the expression "equitable proportion" in subparagraph 2 (b) of article E. Mr. Tsuruoka in particular had pointed out (at the 1604th meeting) that the term might not be easy to apply. Actually, the same expression had been used in other articles, including those relating to State property, and as the Commission was in favour of a standardization of the articles he (Mr. Bedjaoui) could hardly be criticized for having used the term in article E. Besides, the expression was probably the best one, in the light of the various criteria governing the application of the concept of equity. Mr. Evensen had mentioned (*ibid.*) as some of the criteria, the historic value, the nature, origin and present ownership of the archives.

30. In the opinion of Mr. Jagota, it would be wrong to speak of an equitable "proportion" in connexion with archives closely linked to their home ground and incapable of being apportioned in any manner whatsoever. So far as that point was concerned, he (Mr. Bedjaoui) agreed that better wording should be devised.

31. Both Mr. Tsuruoka and Mr. Jagota had suggested that article F should refer to equitable compensation in the same terms as those used in articles 13, 14 and E. There was indeed a reference to compensation in article F.

32. In that connexion, he would add that the compensation envisaged would not necessarily be of a monetary kind. If the archives were historic, for example, the compensation might take the form of a transfer of other historic archives or of other movable property. As Mr. Jagota had emphasized and as was also indicated in paragraphs 82 and 83 of the eleventh report on the subject, there was a right to claim reparation in the form of the delivery of documents of equivalent importance.

33. With regard to the question of which State would be liable for the expenses of reproducing certain archives, he explained that, in the case covered by subparagraph 2 (b) of article F, it would be the successor State to which the archives passed that would be answerable for those expenses, for the archives were indivisible ones relating equally to the territories of the various successor States, and it was purely by reason of the fortuitous accident of their physical location that they passed to one of them. Hence it was normal that the expenses of reproduction should be chargeable to that State, which would, but for that fortuitous circumstance, have no right to those

archives. In the course of some more general remarks on the question of the expenses of reproduction, he said that if a State—whether predecessor or successor State—was entitled to archives but it was impossible to transfer them to that State, for example, owing to the operation of the principle of the indivisibility of the archives, it was normal that the State to which the archives passed should be responsible for the expense of reproduction. By contrast, if a State was not entitled to archives but asked for a reproduction of the archives from the State to which they passed, then, logically the expenses of reproduction should be chargeable to the requesting State. He suggested that the Drafting Committee might consider how the principle could be formulated.

34. Mr. Barboza had very pertinently compared the criteria of the connexion of archives that were referred to in article E and in article B' respectively, and had made an incidental reference to situations in which private property might be expropriated. He (Mr. Bedjaoui) pointed out, however, that the criterion of the connexion with the predecessor State's activity in the territory, referred to in article E, subparagraph 2 (a), should be seen in the light of the notion of equity, which, under subparagraph 2 (b), governed State archives other than those referred to in subparagraph 2 (a). In his comments concerning archives belonging to the territory Mr. Barboza had referred to article 5, which defined the meaning of the expression "State property" in terms covering not only property but also rights and interests. Allowance might perhaps be made for the concern of a State to ensure that certain archives should not leave the territory affected by the succession.

35. He thought that the Drafting Committee might try to bring article E into line with article 13, as had been suggested by Mr. Yankov at the 1604th meeting, but the Committee would have to make sure that in article E the importance and necessity of an agreement were not minimized. As several members of the Commission had said, in the final analysis agreement was always necessary in cases where part of a State's territory separated from that State and formed another State.

36. The rules in articles E and F that would be applicable "in the absence of an agreement" were not of course residual rules. Those rules offered guidelines, without prejudice to the sovereignty of States, in all cases where an agreement was concluded.

37. Unlike Mr. Jagota, who took the view that article E related exclusively to administrative archives, he considered that the article might apply to any archives, including historic ones, for the archives connected with the State's activity might be the archives of an ancient State and hence of historic value. Similarly, the archives referred to in subparagraph 2 (b) of article E might be historic archives.

38. It had been pointed out by Mr. Riphagen that at its previous session the Commission had agreed that

only two articles would be drafted concerning State archives, and that those articles would form a self-contained whole. Since the Commission had been invited to supplement articles A and B, it might perhaps need to review the terms of those articles, and in particular those of paragraph 5 of article B. In his (Mr. Bedjaoui's) opinion, the point was one to be considered by the Drafting Committee, not by him as Special Rapporteur.

39. A point which would probably be taken up by the Commission in the course of the second reading was that mentioned by Mr. Quentin-Baxter at the 1604th meeting: in preparing the draft articles the Commission had followed the typology employed in the case of the succession of States in respect of treaties, but was now in some respects a prisoner of that typology. For example, article B', which dealt only with territorial adjustments, possibly of a minor character, seemed to prevail over article E, which dealt with true cases of secession. The order of those articles might be changed accordingly.

40. In conclusion he wished to thank Mr. Jagota for the information he had provided at the present meeting about India's experience, and Mr. Sucharitkul for the interesting examples he had cited at the 1604th meeting concerning events in the Asian region.

41. The CHAIRMAN suggested that draft articles E and F should be referred to the Drafting Committee.

*It was so decided.*¹⁰

The meeting rose at 11.55 a.m.

¹⁰ For consideration of the texts proposed by the Drafting Committee, see 1627th meeting, paras. 26 *et seq.*

1606th MEETING

Friday, 6 June 1980, at 11.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, 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.

Co-operation with other bodies

[Item 10 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN said that it was his privilege, on