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Summary record of the 1659th meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1981, vol. I

42. He agreed with the Special Rapporteur that the title to the draft articles and article 1 should be amended. He would, however, state the problem in reverse. The important thing was to ensure that article 1 accurately reflected the scope of the draft articles. Those articles dealt with State property, State archives and State debts; they did not deal with other matters that might be affected by a succession of States. It seemed to him that, in the circumstances, article 1 should reflect only the content of the draft articles, and it followed, as a matter of common sense, that the title should follow along the same lines.

43. Mr. USHAKOV was of the opinion that it would be desirable at the present stage of the Commission's work to prepare a draft safeguard clause. The Special Rapporteur might wish to consider as a possible starting point for the elaboration of such a provision a text reading:

"Nothing in the present articles shall be considered as prejudging in any manner whatsoever any question relating to the effects of State succession in matters other than those dealt with in the present articles".

The meeting rose at 6 p.m.

1659th MEETING

Tuesday, 26 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–3, A/CN.4/345)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 1 (Scope of the present articles)[1] AND TITLE OF THE DRAFT (*concluded*)

1. Mr. DÍAZ GONZÁLEZ said that he agreed entirely with the Special Rapporteur's proposed amendment to the title of the draft articles (1658th meeting, para. 10). He was not sure, however, whether the Commission was not limiting the draft articles unduly by confining them to the three topics of State property, State archives and State debts, or whether, if on the contrary it did not stop there, the draft articles would not be too broad in scope. Since, however, it had been made quite clear at the first reading that the draft articles would deal only with those three topics, and, in addition, the comments submitted by States had been to the same effect, he thought that the Commission should accept the title as amended.

2. Mr. QUENTIN BAXTER said that he had been much impressed by the wealth of the documentation which the Special Rapporteur had laid before the Commission, and he recognized that the variety of ways in which States arranged their affairs had caused many problems for the Special Rapporteur in his endeavour to reduce the huge volume of State practice to the measurable compass of a set of rules.

3. He shared the general feeling that it should be made clear that the Commission had dealt with three subdivisions of what could be regarded as an integral, yet extensible subject. It went without saying that what the Commission had done within those subdivisions would be helpful to lawyers faced with problems in other areas of the subject of succession, but the responsibility for drawing analogies must be theirs and not the Commission's.

4. In the final analysis, archives were, of course, State property, but the comparison between their value as property and their value as archives could be likened to the face value of a postage stamp that had achieved an enormous price tag in the world of philately. Sometimes archives would have to be measured not in terms of their commercial value, but, like rare stamps, of their intrinsic value, for their value to nations and peoples was so great that it was only right to single them out for special attention and, in so doing, give the draft articles an entirely new dimension.

5. It seemed to him that at second reading the Commission should give some thought to the way in which the reader could be guided as to the relationship between archives as archives and archives as property. The main point, however, was to stress that the rules relating to archives as archives took priority over the residual rules affecting their status as property.

6. Mr. JAGOTA said that he had indicated at the previous meeting his preference for the title and text of article 1 as drafted, mainly because of the categorization that had been attempted. It was, however, no more than a preference, and he was fully prepared to abide by the majority view.

7. With regard to Mr. Riphagen's question (1658th meeting) as to what he had meant by his reference to analogy, he was well aware that the concept of analogy could be abused. In that connection, he would remind members that article 33 of the draft articles on the succession of states in respect of treaties adopted by the Commission, which provided for an analogy between a State that had separated from another State and a newly independent State, had not been adopted in

[1] For text, see 1658th meeting, para. 5.

that form by the United Nations Conference on Succession of States in Respect of Treaties.[2] The Commission's recommendation with regard to a separated State had been that, if there had been dependence on the State from which it had separated, then the rules should apply *mutatis mutandis*. In other words, it had sought to extend the concept of newly independent State to another category of new State. The Conference had not agreed, because it thought that the analogy might be abused: it considered that a new State created by a separation was in an entirely separate category, and that any difficulties that arose should be taken care of by some other means, and not by way of analogy under a convention.

8. His own argument was, however, somewhat different. It was to the effect that, where the law was perhaps not directly applicable, the Commission's work would have persuasive force so far as the three topics dealt with in the draft articles were concerned, irrespective of the exact wording of the title; and that persuasive force could be invoked by way of analogy. Two examples could be cited in support of that proposition.

9. First, during the Second World War, prisoners of war taken by one of the parties to the conflict had been sent to India, which had not been independent at the time. Upon India's becoming independent, the question arose who was to pay for the upkeep of those prisoners of war in India. The metropolitan State had disclaimed responsibility, stating that the cost should be met from the colony's accounts. The colony had argued that it had not even been a party to the conflict. It had then become a "newly independent State". It would be possible under the draft to invoke article 11 (1) (*b*)[3] and to argue that only such movable State property would pass as was connected with the activity of the predecessor State in respect of that territory. The metropolitan State had, however, argued, as it had been entitled to, that it had left such money as it had had in the predecessor State and that, consequently, the movable property to which the newly independent State had succeeded included the money which the metropolitan State was required to pay (if indeed it was required to pay at all). If, on the other hand, the cost of the prisoners' upkeep was deemed to be not property but a debt, it would be possible to invoke articles 16, 17 and 18, and to argue that the debt, if debt there was, was not a financial obligation of one State to another State that would pass to the newly independent State.

10. If article 11 or articles 16, 17 and 18 were successfully invoked, the question of analogy would not arise; if, however, it were argued that the case was not one of succession *per se*, but of liability to pay, then, in his submission, the concepts developed in the Commission as well as in various treaties regarding newly independent States could still apply by analogy. Those concepts were: that a newly independent State was a previously dependent territory; that the activities of the metropolitan State in relation to that territory were not the activities of that territory; and that, in any case of doubt, equity should apply. In the event, the metropolitan State had agreed to pay the cost of the prisoners' upkeep.

11. Another more recent example concerned the seizure by the metropolitan Power, by way of retaliation, of property belonging to foreigners in a colony. That colony had subsequently been granted independence and had become a newly independent State. If such seizure of property prior to independence was a wrongful act, if the persons to whom the property belonged should be compensated and if, moreover, the State of their nationality had a cause of action, the question arose whether the amount due fell to be paid by the newly independent State or by the metropolitan State. Again, the articles could be interpreted as placing an obligation on the newly independent State, but it was also possible that the issue might turn more on whether or not the seizure was wrongful. The metropolitan State could argue that, even though it had seized the property of foreigners, that property had passed to the newly independent State and the newly independent State should therefore pay.

12. In his submission, if the principles relating to the rights and obligations of a newly independent State were directly applicable, the question of analogy might not apply; but if they were not directly applicable, then they would have value by way of analogy. It was in that sense that he had used the word "analogy", although it would also be possible to refer to the persuasive value of the Commission's work in interpreting the draft articles liberally. Whatever value, however, those articles might have by way of analogy, it would be unaffected by the wording of the title.

13. Mr. BEDJAOUI (Special Rapporteur) said that he noted that a large majority of the Commission appeared to be in agreement with his suggestion that the wording of article 1 should be amended by listing in it the topics actually dealt with in the draft articles: State property, State archives and State debts.

14. There was, however, less unanimity among the members concerning the title, since some had proposed that a decision should be deferred and others that the title should be amended provisionally, while it had even been suggested that the topics dealt with should be listed between brackets both in the title and in article 1. The comments that had been made would undoubtedly facilitate the work of the Drafting Committee.

15. It was always extremely difficult to assign a title to a draft. He recalled that the Commission had hesitated for a long time in that regard, and that the

[2] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.79.10), pp. 160–161, document A/CONF/80/30, paras. 87–96.

[3] See 1658th meeting, footnote 3.

title of the topic had been amended for the first time in 1968 and changed once more in 1979, when the Commission had replaced the words "*dans les matières*" by "*dans des matières*".[4] The best moment for finalizing the title of a draft was as near as possible to the completion of the work, since it was then that the subject-matter was really known. The Commission had now reached that final stage and, since it had declared in favour of amending the wording of article 1, it would be desirable to avoid any contradiction between the definitive title and the contents. Consequently, the decision to amend the wording of article 1 ought to entail a decision to change the title also.

16. To retain the title unchanged might, it was true, offer some advantages. First of all, it would show that the Commission's work was not really complete, since the draft articles covered only the three topics specified. It would also enable some States to proceed by analogy in seeking a solution to problems arising in areas other than those specifically forming the subject of the draft articles. The arguments adduced by Mr. Jagota in that regard were not without cogency.

17. However Mr. Šahović (1658th meeting) had rightly stressed that, in order to impose the use of analogy, the Commission should draft transitional provisions or expand the general introduction in such a way as to encompass all instances of successions of States in respect of matters other than treaties—but it no longer had sufficient time to do so. Moreover, the desire to suggest the use of analogy in other matters would lead it to go still further than Mr. Jagota advocated and to amend the title of the draft articles, reverting to the title used prior to 1979 with the expression "*dans les matières*". He was nevertheless convinced that States which might have to resolve problems of succession of States in respect of matters not covered by the draft articles would take that set of rules into account and would proceed by analogy even when there was no formal obligation to do so. It was obvious that the Commission had not exhausted in its draft articles the question of the succession of States in respect of all matters other than treaties, and that reasoning by analogy could and should be applied to a whole range of matters which had of necessity been left aside because of their extreme specificity and complexity.

18. Noting that Mr. Ushakov (*ibid.*), supported by Mr. Díaz González, had proposed the insertion of a saving clause among the first articles of the draft, he said that the Drafting Committee would be able to examine that possibility.

19. He considered it worth recalling, as Mr. Riphagen (*ibid.*) had done, that the Commission was concerned with the effects of succession and not with succession itself. He noted that draft article 3 specified that the cases of succession of States covered by the articles were those occurring in conformity with international law, and in particular with the principles of the Charter. He was in favour of the proposal to insert the adjective "legal" before the word "effects" in article 1, the better to specify the scope of the articles.

20. Regarding the order in which the three topics should be cited, he would like property to be mentioned first, then archives, and finally debts. He noted that some members of the Commission had pointed out that archives constituted a subdivision of State property, and thought that, at the appropriate time, the articles in the draft concerning archives should be placed after those dealing with property.

21. Noting the comments by Mr. Quentin-Baxter, who had pointed out that the historical value of archives was quite unrelated to their commercial value, he said that he was in favour of that attitude, which incidentally, most members of the Commission appeared to share. He suggested that the Drafting Committee might study the possibility of drawing up a provision specifying that the rules concerning archives had some degree of priority over the somewhat residual rule worked out for State property.

22. Lastly, he accepted the proposal by Mr. Tabibi (*ibid.*) that the Commission should allow the African and Asian States enough time to formulate comments on the draft articles before the Commission's next session. Such comments would be welcome and would certainly be useful for the final review of the draft before its possible submission to an international conference.

23. Mr. TABIBI suggested that, to assist the Special Rapporteur in his work and the Sixth Committee in its discussion at the next session of the General Assembly, Member States should once again be invited to submit their comments.

24. The CHAIRMAN proposed that the Commission should refer the title and draft article 1 to the Drafting Committee.

It was so decided.[5]

ARTICLE 2 (Use of terms)

25. The CHAIRMAN invited the Special Rapporteur to introduce article 2, which read:

Article 2. Use of terms

1. For the purpose of the present articles:

(*a*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

[4] See *Yearbook ... 1979*, vol II (Part Two), p. 10, para. 21; and p. 15, para. (3) of the commentary to art. 1.

[5] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 47–48 and paras. 50–51.

(*d*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*e*) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(*f*) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

26. Mr. BEDJAOUI (Special Rapporteur) said that the article had elicited from Governments five comments of equal importance.

27. First, the Commission had been asked to maintain the closest possible parallelism between the draft articles under consideration and the 1978 Vienna Convention.[6] He wished to emphasize that it had been the Commission's constant concern to do so.

28. It had also been suggested that, with regard to the successions of States considered, the case of new States which came into being as a result of a separation should be assimilated to that of newly independent States. He was not in favour of such assimilation, and recalled that the Commission had itself taken the view that the situation of newly independent States differed from that of States created by a separation in that it was essentially characterized by a previous dependence which, throughout its duration, had created a distortion to the detriment of the new State. Consequently, it did not seem possible to combine the two cases.

29. The definition of the expression "third State" in paragraph 1, subparagraph (*f*) had been considered insufficiently clear, but he doubted whether it could be improved on without risk. He also considered that the proposal to delete paragraph 2 of article 2, thought by some to be superfluous, would not be justified; such a provision served a specific purpose and was entitled to a place in the draft articles.

30. Lastly, he drew attention to the suggestion by the Government of Czechoslovakia that definitions of State property, State archives and State debts should be included among those given in article 2 (A/CN.4/338/Add.2). He emphasized, however, that the definitions in article 2 applied to the draft articles as a whole, whereas the parts devoted to State property, State archives and State debts contained specific definitions applicable to the provisions they contained and not to the draft articles as a whole. It was hard to imagine any argument that could justify the grouping of all definitions in article 2.

31. Sir Francis VALLAT said that he agreed in general with the Special Rapporteur's comments.

32. With regard to the definition of a newly independent State, as laid down in draft article 2, subparagraph 1 (*e*), he said that, had the question arisen five years earlier, he might have shared the view that the definition should be a different one, since there was indeed a factual analogy between some cases of the separation of a State and some cases of newly independent States. But, as Mr. Jagota had pointed out, the Commission's view on that particular point had not been upheld by the United Nations Conference on Succession of States in Respect of Treaties.

33. It was difficult to ascertain the exact reason for the Conference's stand, but he thought that the underlying feeling had been that the position of the newly independent State had come to have special recognition in the international community, as expressed through the General Assembly, that there should be no confusion regarding that very special position, and that it would be out of keeping with the general attitude to newly independent States if another aspect were introduced by analogy—in other words, if the separation of part of a State was treated in the same way as a newly independent State. He believed that the Conference had also felt that there was a risk of abuse, coupled with the difficulty of determining cases in which the analogy should be applied. It had therefore reached a clear-cut decision to reserve the position taken by the Commission, and had refused to extend the special advantages granted to newly independent States to cases where part of a State had become independent, even where the circumstances were similar.

34. In the face of that decision by the Conference, he wondered whether it would be wise for the Commission to change the position it had adopted at the first reading and to re-open that controversial question. It seemed to him that the better course for the Commission was to follow the 1969 Vienna Convention on the Law of Treaties[7] on that point and not to take the initiative, particularly at that stage, in re-opening the question of the application of the concept of the newly independent State by analogy to other cases. In spite of the fact that there were advantages in so applying that concept, he thought that, in the context of the draft articles, the Commission should adhere to the definition laid down in article 2, subparagraph 1 (*e*).

35. Draft article 2, paragraph 2, served a useful purpose, in his view, and should be retained.

36. It would be appropriate to keep the definitions on State property, State archives and State debts in the

[6] See 1658th meeting, footnote 2.

[7] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5.), p. 287. The Convention is hereinafter referred to as "1969 Vienna Convention".

parts of the draft to which thay were related. It would only give rise to problems of drafting and possibly cause confusion if they were inserted in the general definition. The point could, however, be dealt with by the Drafting Committee.

37. Mr. CALLE Y CALLE said he noted that the requisite parallelism with the 1978 Vienna Convention had been respected to a large extent throughout the draft, and particularly in draft article 2, where the definition of a newly independent State was worded in exactly the same terms as in that Convention. That wording should be retained, for it was important not to confuse newly independent States with new States. Basically, the former emerged from a condition of dependence to acquire a new status of independence, which made them masters of their own destiny. The fact that a new State was formed as a result of unification did not mean that it attained independence, although it did obtain a new personality. The same applied to States which were formed on the separation of territory that had previously formed part of the dependent territory.

38. He also noted that the 1978 Vienna Convention contained no definition of a third State, although it did contain a definition of the "other State party". It was important for the structure of the draft articles to have a definition of a third State, because, in matters of property, third States—in other words, States that were not privy to the special relationship that existed between predecessor and successor States—could and did have rights.

39. Draft article 2, paragraph 2, was designed to protect the meaning accorded under the internal law of States to the terms used in the draft articles. The terms defined in the text under consideration, however, unlike those defined in article 2 of the 1978 Vienna Convention, were generally to be found in international treaties and not in the internal law of States. He therefore suggested that, in paragraph 2, the words "treaties and in" be added before "the internal law of any State".

40. Lastly, since no substantive change was required in draft article 2, he recommended that it be referred to the Drafting Committee for such minor adjustments as might be necessary.

41. Mr. ŠAHOVIĆ said he supported the comments made by Mr. Calle y Calle, and would like to hear the Special Rapporteur's reactions to the proposal made in connection with article 2, paragraph 2.

42. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion, said that the three members of the Commission who had spoken on article 2 had confined themselves to recalling past facts and offering explanations.

43. Sir Francis Vallat had given the Commission the benefit of the experience he had acquired as Special Rapporteur on the topic of the succession of States in respect of treaties; he had given the background of the typology question in relation to newly independent States and other new States. The Commission had no need to dwell on that problem, which would come up once again when it considered the provisions relating to newly independent States under the various headings of State property, State archives and State debts. The decision as to how the problem should be resolved could be left to a future conference of plenipotentiaries, or else it could be discussed in the Drafting Committee or the Sixth Committee.

44. Both Sir Francis Vallat and Mr. Calle y Calle had expressed the view that article 2, paragraph 2, was genuinely useful and should not be deleted. As to the insertion in that paragraph of the words "treaties and in" before the words "the internal law of any State", he had no objection to that proposal. In the last analysis, everything—subject to questions of *jus cogens*—was a matter for agreement. Two States could agree between themselves on whatever they wished, it being understood that their agreement was not opposable to third parties. Any definition appearing in an international instrument was by its nature conventional, and depended on the object of that instrument. If the definitions in the article under consideration gave rise to any difficulties, they would do so in a field related to the actual object of the draft articles. Since the draft articles were of an international nature, any danger of confusion or contradiction could arise only at the international level. If the existence of past or future treaties containing different definitions really involved such a danger, the proposed qualifications could be added to article 2, paragraph 2, so that States would remain free to give a different meaning in treaties to the definitions set forth in that article.

45. As for the question of the repercussions of those definitions on the internal law of States, that formed part of a problem which was much more general and could be discussed endlessly, namely, that of the relationship between international law and internal law. In that connection, he pointed out that once an international instrument had been ratified by a State it was received into the internal law of that State. The reference to internal law which appeared in article 2, paragraph 2, applied therefore to States that had not ratified the convention which might emerge from the draft articles.

46. The CHAIRMAN proposed that article 2 should be referred to the Drafting Committee.

It was so decided.[8]

ARTICLE 3 (Cases of succession of States covered by the present articles)

47. The CHAIRMAN invited the Special Rapporteur to introduce article 3, which read:

[8] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, para. 52.

Article 3. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

48. Mr. BEDJAOUI (Special Rapporteur) said that the article which was modelled on article 6 of the 1978 Vienna Convention, did not appear to give rise to any major problems. Some representatives in the Sixth Committee had, however, asked whether the proposed text did not call into question some older successions which might not be in conformity with the principles of international law incorporated in the Charter of the United Nations or with international law in general. On that point, he remarked that the Commission was legislating for the future, and should not concern itself with such situations. It had also been suggested in the Sixth Committee that the reference to the principles of international law embodied in the Charter of the United Nations should be deleted, the Charter being an instrument of an essential politically character. For their part, the German Democratic Republic (A/CN.4/338) and Czechoslovakia (A/CN.4/338/Add.2) had judged article 3 to be acceptable in their written comments.

49. In his own view, the Commission should beware of mutilating the article under consideration by deleting the reference to the Charter, not only because the text of the article was modelled on article 6 of the 1978 Vienna Convention but also because a mere reference to conformity with international law would be insufficient—the more so in that there was a danger that it might revive the controversy that had arisen over the reference to international law in the draft Charter of Economic Rights and Duties of States. On that occasion, the industrialized countries had maintained that nationalization should be carried out "in accordance with the applicable rules of international law",[9] but the provision had been deemed inadequate by the Group of 77.

50. The last phrase of the article under examination was thus in conformity with the current aspirations of the international community. While it was true that the Charter was an essentially political document, it was not entirely without a juridical framework. Moreover, it was not the first time that an international legal instrument had referred to the Charter. It should be noted that any reference to the principles embodied in that instrument also covered the principles contained in those General Assembly resolutions considered to be interpretative of the Charter, such as resolution 2625 (XXV), containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[9] TD/B/AC.12/4 and Corr. 1, p. 10.

51. Mr. USHAKOV said that, while he had no difficulty with the article under consideration, he wished to emphasize the link between article 6 of the 1978 Vienna Convention and the next article, which concerned the temporal application of that instrument. If in due course the Commission proposed that a convention be prepared on the basis of its draft articles, the question of the temporal application of that convention would also arise. According to the law of treaties, a convention applied, in principle, only to situations subsequent to its entry into force; yet a newly independent State, or any other new State, could not become a party to a convention on State succession until it had come into being. That was why it had been provided, in article 7 of the 1978 Vienna Convention, that the rules set forth in that instrument could, by agreement among the States parties concerned, be applied retroactively to a succession of States which had occurred after its entry into force. The drafting of a similar article could be left to any plenipotentiary conference which the General Assembly might convene, but it would be better for the Commission to draft an article itself.

52. Mr. TABIBI said he endorsed the opinions concerning article 3 which the Special Rapporteur had expressed in his report and his statement, and that they fully justified the maintenance of the article in its existing form. He believed that it would be very helpful if there were discussion in the Sixth Committee and at the possible plenipotentiary conference of the nature of the international law relevant to the topic, for the principles in question included not only those embodied in the Charter of the United Nations but also rules which had evolved in keeping with the expansion of the international community since the drafting of that instrument.

53. Mr. CALLE Y CALLE was of the opinion that no change should be made to the existing text of article 3: the few States which had felt it necessary to comment on the article had declared it acceptable, and the provision reproduced the text of the corresponding article of the 1978 Vienna Convention.

54. Moreover, by its reference to "a succession of States occurring in conformity with international law", the article implied that "anomalous" succession (in which, as in the case of Namibia and certain other areas in southern Africa, there was no more than fictitious transfer to a territory of responsibility for its international relations) was illegal. He further interpreted the reference to "international law" as meaning the international law currently in force, an opinion in which he was comforted by the particular mention of the "principles of international law embodied in the Charter of the United Nations". He noted that, in the report under consideration, the Special Rapporteur deemed that reference to include the interpretative developments of the Charter to be found in various United Nations declarations, such as General Assembly resolution 2625 (XXV) (see A/CN.4/345, para. 30).

55. A space should be left between article 3 and the existing article 4 for the insertion of safeguard clauses and provisions on retroactivity. The drafting of such articles would be a complex and sensitive matter and could, therefore, more appropriately be undertaken by the Commission than by a conference of plenipotentiaries.

56. It was clear that the codification of the rules relating to succession entailed some form of retroactive application of those rules if successor States desirous of subscribing to them were not to be deprived of many of their benefits. The effects of succession might well arise for a new State before, or at the moment of, its birth, and hence before it had had any opportunity of becoming a party to the instrument by which it wished its rights and obligations to be governed. The 1978 Vienna Convention provided, with respect to its own temporal application, for a system of declarations and acceptances of declarations, and the Commission should give thought to the advisability of including a similar provision in the current draft articles.

57. Mr. JAGOTA said he agreed that article 3 should be retained as it stood.

58. With respect to the question of temporal application mentioned by Mr. Ushakov and Mr. Calle y Calle, he observed that the 1978 Vienna Convention had departed from the traditional rule of the non-retroactivity of international instruments as expressed in, for example, article 4 of the 1969 Vienna Convention. It was his impression that the change had been occasioned by the emergence of the concept of the "newly independent State", and that the relevant article of the 1978 Vienna Convention (art. 7) thus represented a major contribution by the Commission to the progressive development of international law.

59. The alterations which had been made to that article, as compared with article 4 of the 1969 Vienna Convention—namely, the addition to the residual rule in the first paragraph of the words "except as may be otherwise agreed", the introduction in paragraphs 2 and 3 of the system of declarations concerning definitive or provisional retroactive application of the convention, and the statement in paragraph 4 of the modalities for the making of such declarations—had, he believed, all been made in order to ensure that the benefits of the 1978 Convention were extended to newly independent States. If that belief was correct, it would be appropriate for the Commission to look into the possibility of incorporating similar provisions in the current draft articles, for the subject matter was akin to that of the 1978 Vienna Convention, and the situation of newly independent States was again of importance.

60. He had no firm opinion as to whether the provisions in question should be drafted by the Commission itself or by a conference of plenipotentiaries.

61. Sir Francis VALLAT said that his recollection was that the question of the retroactivity or otherwise of what had become the 1978 Vienna Convention had originally arisen, in an acute form, in the Commission, and that the cause of that situation had been the rule concerning the non-retroactivity of treaties which was set out in article 28 of the 1969 Vienna Convention. Without the inclusion in the 1978 Convention of some kind of provisions such as those which had ultimately been incorporated in article 7, article 28 of the 1969 Vienna Convention would effectively have blocked the retroactivity of the later instrument. That would, as Mr. Jagota had said, have been particularly hard on newly independent States, but the situation would not have been confined to such States, any more than it would be in the case of the potential treaty which the Commission was currently drafting.

62. The draft article which the Commission had eventually proposed to the United Nations Conference on Succession of States in Respect of Treaties had looked more to retroactive activity than non-retroactivity, because it had been obvious that, without such an emphasis, any convention adopted by the Conference would have been useless to newly independent States. However, the Commission had been very much aware that the draft article in question was not wholly satisfactory; it had therefore taken the attitude that, while it ought to draw the attention of the Conference to the problem of temporal application, the solution of that problem was properly a matter for the Conference itself. That attitude had been motivated by concern not only over the question of principle that had been at issue, but also over the formal matters involved, particularly those that had ultimately been regulated in paragraphs 2 and 3 of article 7 of the 1978 Vienna Convention. That article had been one of the two to give rise to major difficulties at the Conference, and a compromise had been reached on its wording only after considerable effort by a specially created Informal Consultations Group.

63. It was his personal impression that the considerations which had applied in the case of the draft articles on succession in respect of treaties also applied in the current case. If the draft articles currently under consideration became a treaty, they would be subject to article 28 of the 1969 Vienna Convention, thereby precluding the retroactive application of the new instrument to facts and events that had preceded the entry into force of that instrument for a newly independent State or any other new State.

64. He agreed that if the Commission could contribute to the resolution of that problem it should do so. He was, however, uncertain whether it should put forward a draft article or merely draw attention to the problem of temporal application. On balance, he thought that it should try to prepare a draft article, at least as a basis for discussion by itself and by the Drafting Committee. Whatever its final decision, the Commission should make use of the term "temporal

application", because, as the 1978 Vienna Conference had recognized in choosing that expression, the problem at issue was a problem both of retroactivity and of non-retroactivity.

65. Mr. VEROSTA suggested the establishment of a small working group composed, in particular, of members of the Commission having a special knowledge of the question, to assist the Special Rapporteur in working out a draft article on the question of the temporal application of the articles.

The meeting rose at 1.00 p.m.

1660th MEETING

Wednesday, 27 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–3, A/CN.4/345)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 3 (Cases of succession of States covered by the present articles[1] (*concluded*)

1. Mr. SUCHARITKUL said that he agreed entirely with the arguments adduced by the Special Rapporteur in favour of retaining the existing wording of article 3.

2. With regard to the question of the temporal application of the draft, which Mr. Ushakov had raised in connection with that article at the previous meeting, it appeared essential to draft a new article, since the temporal aspect was a constituent element of any rule of international law: no such rule could exist outside the framework of time. The drafting of the new article could be entrusted to the Special Rapporteur, who might base himself on article 7 of the 1978 Vienna Convention.[2]

3. When formulating the new article, regard should be had to the fact that the question of the retroactive application of the draft did not arise in cases of succession entailing the disappearance of the predecessor State. Account must be taken, however, of the interests of third States. If the draft gave rise to a convention, the States which would become parties to that instrument would in the main be third States. Moreover, several of the draft articles referred expressly to third States, either as creditors or as debtors.

4. Mr. JAGOTA said that, since his statement on the problem of the temporal application of the draft articles at the previous meeting, he had noticed that the difficulty to which he had alluded was at least partly resolved in the case of State property by the provisions of draft article 7.[3] However, there were no corresponding provisions in the sections of the draft dealing with State archives and State debts. He hoped that the Commission would look into the justification for that distinction when considering the problem of temporal application.

5. Mr. USHAKOV pointed out that the applicability of article 7 was dependent on the applicability of the convention as a whole. It was precisely to ensure that all the articles could be applied that a new article was required.

6. Mr. JAGOTA, referring to the statement by Mr. Ushakov, said that the point which he himself had been trying to make was that, if the draft articles became a treaty, article 7 would dispense any successor State which became a party to that instrument from the need to take any special action—such as the formulation of a declaration—in order to succeed to State property from the date of the succession of States. He had further drawn attention to the fact that the draft did not provide for any such dispensation in the case of succession to State archives and State debts.

7. Mr. BEDJAOUI (Special Rapporteur) noted that the discussion on article 3 had brought out two problems: that of irregular successions and that of the temporal application of the draft.

8. The first of those difficulties was resolved by article 3, which provided that the draft did not apply to the effects of a succession not in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. The problem of the temporal application of the draft arose only in respect of regular successions, and was not, therefore, directly linked to article 3. Its solution might require the Commission to supplement the draft and so establish closer parallelism with the 1978 Vienna Convention. At the previous meeting, Sir Francis Vallat had drawn a comparison between article 3 of the draft and article 28 of the 1969 Vienna Convention[4] by stating that each constituted a barrier to retroactive application. While that was quite true of article 28 of the Convention, the article under consideration was not

[1] For the text, see 1659th meeting, para. 47.
[2] See 1658th meeting, footnote 2.
[3] See para. 70 below.
[4] See 1659th meeting, footnote 7.