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Summary record of the 1660th meeting

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

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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

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[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.

concerned with retroactive application; it had to do only with the conformity of a succession with international law. In point of fact, article 3 established a prerequisite with respect to the problem of temporal application. That being so, he thought that the article might be referred to the Drafting Committee.

9. With regard to the second problem, there appeared to be general agreement in the Commission that a new article should be formulated, that the Commission itself should do the drafting and that it should take as its starting point article 7 of the 1978 Vienna Convention.[5] The Commission might make the deciding factor in the new provision either the date of the succession, the date of entry into force of the future convention, or the date on which a particular State acceded to that convention. As Mr. Jagota had pointed out, the draft answered that particular problem only in relation to State property. In that case, the determinant was the date of the succession of States. However, the Commission would be well advised to draw up a more general provision, to be inserted after article 3 and drafted in the light of article 7 of the 1978 Vienna Convention, and, perhaps, of any new article that might be devised concerning State archives and State debts. The task could be entrusted to the Drafting Committee, which might, if need be, set up a small working group.

10. With respect to irregular successions, Mr. Calle y Calle had referred, at the previous meeting, to the case of Namibia under South African occupation; that was not really a case of succession of States, but one of annexation pure and simple. Immediately after the territory of present-day Namibia had been placed under South African mandate, after the First World War, South Africa had stated its intention of annexing it, alleging that its mandate entitled it to do so. In the advisory opinion it had handed down in 1950,[6] the International Court of Justice had stated that the essence of a mandate precluded any form of annexation. Since then, and particularly since the International Court had stated in its advisory opinion of 1971[7] that South Africa was an illegal occupier, the international community had been striving to end the occupation of Namibia. The Security Council and the General Assembly had requested South Africa to respect Namibia's State property. In 1974, the United Nations Council for Namibia had issued an order[8] designed to protect the State property of Namibia, particularly, its natural resources, against plunder. One member of the Council had even called on that occasion for South Africa to compensate Namibia for the plunder of its State property. That question was, in any case, one which would arise when Namibia became independent.

11. For the sake of completeness, mention must be made of the possibility that, following an irregular succession, the successor State might express its willingness to comply with the future convention. It would then have to be able to ratify the convention, if the instrument were to apply to the legal effects of the succession. What would become of article 3 in such a case? Since the hypothesis in question was almost certainly purely academic, the Commission need not dwell on it.

12. Sir Francis VALLAT assured the Special Rapporteur that nothing he himself had said at the previous meeting concerning article 7 of the 1978 Vienna Convention had in any way been intended to suggest any conceivable change in article 3 of the present draft. His comments had been designed solely to remind the Commission that the question of temporal application had arisen out of what had become article 7 in the Commission's draft on succession of States in respect of treaties.

13. In that respect, the background to the Commission's ultimate proposal concerning the non-retroactivity of the draft articles on succession in respect of treaties was clearly explained in the commentary to the article 7, paragraph (1) of which read:

> During the discussion of article 6 at the present session of the Commission, some members expressed doubts as to the possible implications of the article with respect to events that had occurred in the past. It was observed that reference to the Charter of the United Nations might not have the effect of limiting these implications to recent events or even to those which had occurred since the Charter came into force. One member of the Commission attached particular importance to establishing beyond doubt that article 6 had no retroactive effect. Accordingly, he submitted a draft article which, after consideration and some redrafting by the Commission, is now included as article 7.

Paragraph (4) of the same commentary read:

> Although the draft of the article was submitted to the Commission in relation to article 6, it is cast in general terms. This is necessary because, if an article were to provide for non-retroactivity in respect of one article alone, this would obviously raise implications and doubts as to the retroactive effect of the other articles. Accordingly, article 7 is drafted as a general provision and is placed in Part I of the draft immediately after article 6.[9]

14. The United Nations Conference on Succession of States in Respect of Treaties had been entirely in accord with the opinion thus expressed by the Commission, and its only problem in discussing article 7 had been with its substance.

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[5] See 1658th meeting, footnote 2.

[6] International Status of South West Africa, Advisory Opinion: *I.C.J. Reports 1950*, p. 128.

[7] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion: *I.C.J. Reports 1971*, p. 16.

[8] *Official Records of the General Assembly, Twenty-ninth session, Supplement No. 24A* (A/9624/Add.1), para. 84.

[9] *Yearbook ... 1974*, vol. II (Part One), p. 182, document A/9610/Rev.1, chap. II, sect. D.

15. The CHAIRMAN suggested that draft article 3 should be referred to the Drafting Committee.

It was so decided.[10]

16. The CHAIRMAN suggested that the Drafting Committee should be asked to prepare—if necessary, by setting up a small working group—a new article on the temporal application of the draft.

It was so decided.[11]

ARTICLE 4 (Scope of articles in the present Part) *and* ARTICLE 5 (State property)

17. The CHAIRMAN invited the Commission to proceed to Part II of the draft articles (State property), beginning with section 1 (General provisions), and to consider articles 4 and 5, which read:

Article 4. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State property.

Article 5. State property

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

18. Mr. BEDJAOUI (Special Rapporteur) said that in 1979, one representative to the Sixth Committee had suggested that articles 4 and 5 should be combined. In its written comments, the German Democratic Republic (A/CN.4/338) had found article 4 acceptable, whereas Czechoslovakia (A/CN.4/338/Add.2) had proposed that article 4 and article 15,[12] its equivalent in respect of State debts, should be deleted. In the view of Czechoslovakia, the Commission could dispense with articles 4 and 15 if it mentioned expressly in article 1 the topics covered in the draft.

19. He believed that article 4 was justified by the need to specify the field of application of the articles in Part I of the draft. The same justification applied to article 15 in Part III of the draft.

20. With regard to article 5, there had been a proposal that State property should be defined not only with reference to the internal law of the predecessor State, but also with reference to public international law or private international law. The hope had been expressed that the expression "State property" would be supplemented by the words "movable or immovable".

21. Those who wished a reference to be made to public international law argued that State property might be owned by two or more States or be part of the common heritage of mankind. In his view, it was not absolutely essential to refer to public international law, any more than to private international law, since the relevant texts of international law were necessarily subject to "absorption" by the internal law of the predecessor State.

22. The Commission had always been mindful of the difficulties that might be created by referring solely to the internal law of the predecessor State and excluding the internal law of the successor State. When article 5 had been formulated, he had cited cases in which the law applied had been the internal law of the successor State or international case law, rather than the internal law of the predecessor State. However, in the interests of simplification, and because it was easier to determine the attribution of State property from the internal law of the predecessor State, it was for that law that he had opted.

23. It had sometimes been said in the Sixth Committee that the phrase "property, rights and interests" was unsuitable. The phrase was one which the Commission had discussed at length and which was useful for referring to assets without limiting them to movable and immovable property. Furthermore, it was not a new expression, for it had been used in international treaties and, in particular, in the Treaty of Versailles.[13]

24. Since the expression "State property" was defined in article 5 by reference to the internal law of the predecessor State, it must mean the State property of the predecessor State; there was no need to spell that out. It would, however, be inexpedient to use that expression in other parts of the future convention—particularly when speaking of the State property of a third State. The difficulty should not be exaggerated, however, since the Commission had taken the precaution of stating that the definition of the expression "State property" appearing in article 5 was applicable for the purposes of the articles in that part of the draft which concerned State property. It could therefore retain the words "State property" in the other parts of the draft even if they did not apply to the State property of the predecessor State, but it would have to delete the words "of the predecessor State" qualifying "State property" in article 8, since that article was in the part of the draft concerning State property.

25. Mr. USHAKOV said that, while he found draft article 4 acceptable, article 5 called for a drafting comment.

26. As the Special Rapporteur had pointed out in his thirteenth report (A/CN.4/345, para. 35), the fact that the articles on each matter applied exclusively to that matter raised the problem of whether the articles on State property applied to State archives if the latter were regarded as constituting a special category of State property. That question arose mainly in con-

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[10] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, para. 53.

[11] *Idem*, paras. 54–55.

[12] See 1658th meeting, footnote 3.

[13] See *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 7.

nection with the general articles on State property, articles 4 and 9. There were two possible solutions: the articles concerning State archives could be treated either as a separate part of the draft or as a section of the part dealing with State property. In the latter case, the general articles concerning State property would be applicable to State archives, and that would inevitably give rise to drafting problems. In the former case, the part dealing with State archives would have to be supplemented by general articles. He preferred that course, for it had the advantage of simplicity. In any event, the question would require the attention of the Drafting Committee when it dealt with articles 4 and 5.

27. With respect to the definition of the expression "*biens d'Etat*" appearing in article 5 and the inappropriateness, pointed out by the Special Rapporteur, of the phrase "*biens d'Etat de l'Etat prédécesseur*" contained in article 8, he noted that the English version of article 8 presented no problem, since the phrase was there translated as "State property from the predecessor State".

28. Perhaps the reference in article 5 to the "internal law of the predecessor State" was not quite accurate, inasmuch as law other than metropolitan law might be applicable in the territory to which succession related. It might, therefore, be wise to provide for that possibility too, either by amending article 5 to suit or by mentioning the possibility in the commentary to that article. The same question would arise in connection with article 9, as well as with certain articles relating to State archives.

29. Finally, it would be preferable, in order to avoid reopening discussion on the matter, not to refer in article 5 to private international law.

30. Mr. ŠAHOVIĆ said that he understood the reasons adduced by the Special Rapporteur for maintaining article 4, but felt that it would not be illogical to delete it, since the matters with which it dealt were enumerated in article 1.

31. With respect to article 5, he wondered if the definition of the expression "State property" would not be better placed in article 2. The reason the Commission had set the definition in article 5 was that it had drafted it while preparing the draft part by part. The Drafting Committee should examine the question without delay.

32. The Drafting Committee should also consider the possibilty of combining the ideas expressed in articles 4 and 5 into a single provision. A more comprehensible article might result.

33. With respect to the articles concerning State archives, he felt that since the Commission had decided in principle to mention State archives in article 1, there would have to be a separate part of the draft on that subject. That part should obviously be aligned with the part concerning State property, but combining those two parts was impossible.

34. Mr. Ushakov's remarks concerning the notion of internal law of the predecessor State deserved attention. Since the expresion "internal law" appeared in several provisions of the draft, the Commission might try to define it in article 2; it was clearly likely to give rise to numerous problems of interpretation.

35. Mr. JAGOTA said that he found draft article 4 acceptable. Mr. Šahović's comments concerning that article could appropriately be discussed by the Drafting Committee.

36. With regard to article 5, it might be helpful if a clearer indication was given of what was meant by the "internal law" of a predecessor State. Since the article did not stipulate that the State property to which it referred must be located in the territory to which the succession of States related, he considered that the "property, rights and interests" in question might include, for example, the exclusive economic zone established by the emerging law of the sea. The Special Rapporteur discussed such matters in paragraph 43 of his thirteenth report (A/CN.4/345). To the suggestion that the internal law of the predecessor State might not be relevant to title to property or to the validity of rights and interests, the Special Rapporteur had responded in that paragraph by stating that, where such rights and interests arose out of an international instrument, that instrument would, in fact, become part of the internal law of the predecessor State upon its ratification by that State. That response was only partially adequate, for, in some countries, treaties to which the State had become a party did not formally become part of internal law until the parliament or its equivalent had passed some kind of enabling legislation. Accordingly, it must be made clear that the term "internal law of the predecessor State" as used in article 5 included treaties which had been ratified by that State, irrespective of any national requirement for enabling legislation in their regard.

37. In addition, it should be stated in the commentary that draft article 5 entailed no requirement concerning the validity of the internal law of a predecessor State. He had in mind in that respect the present situation with regard to the law of the sea, where both an international draft convention and the internal law of certain States sought to regulate the same activities in the international sea-bed Area, and the question whether, in that and similar situations, the international convention or the internal law of the predecessor State would apply in the event of a succession of States.

38. Mr. CALLE Y CALLE said that on first sight article 4 did not seem likely to cause any difficulties. However, as Mr. Šahović had pointed out, the need for the article had been somewhat reduced by the definition of the scope of the draft articles given in article 1 and by the formulation of the title of the draft as a whole. The same effect resulted from the inclusion in the draft of articles relating to State archives, which

were, after all, a form of State property, albeit of a special kind.

39. Article 5 contained a definition of State property sufficiently broad to cover all the forms which such property might take. Concerning the criticism made of the use of the phrase "property, rights and interests", he observed, like the Special Rapporteur, that those words had been widely employed in other international instruments, including the Treaty of Versailles, which had dealt with the disposition of substantial amounts of State property. However, it should perhaps be made clear in the article that the phrase "rights and interests"—which obviously could not include the rights, such as the right of sovereignty and the right to conclude treaties, that could not be the subject of succession because thay were inherent in the nature of a State—meant the patrimonial rights of the predecessor State.

40. Mr. Jagota had been right to mention the need for some statement of what was meant by the "internal law" of a predecessor State, for that expression occurred not only in article 5, but also elsewhere in the draft. In his opinion, everything that international law recognized to States formed part of their internal law. To refer in article 5 to private international law or international law at all would complicate matters unnecessarily. For example, while a State had sovereignty over the ecological and sea-bed resources present within its exclusive economic zone, he did not think that it could be held, for the purposes of a succession of States, that property in the fish living in that zone was transmitted to a successor State. Since title in the area of the sea-bed and the ocean floor denoted as "the common heritage of mankind" would be shared by all States, it was clearly not an appropriate matter for regulation by the Commission's draft articles.

41. Mr. FRANCIS said that he had no argument with draft article 4.

42. So far as draft article 5 was concerned, however, he assumed that the intent was to identify the *corpus* of property, rights and interests out of which that portion relating to the succession of States might be drawn. While he endorsed the substance of the Special Rapporteur's comments on that article, he agreed with Mr. Jagota and Mr. Šahović that the expression "internal law" should be clarified. In particular, he subscribed to the view that some of the current negotiations on the law of the sea—and indeed on other matters—might be relevent to the article.

43. The internal law of the State could be narrowly construed to mean such law as had been incorporated in its statutes, decrees and legal text-books. In some of the common law countries, international law had automatic application as internal law, and in certain Commonwealth countries, when international law was deemed to form part of internal law, the doctrine of incorporation applied.

44. The question arose, however, how was the expression "internal law" to be applied in cases where an international instrument having a bearing on article 5 had been ratified, but had yet to be incorporated into statute law. For that reason, he considered that a definition of "internal law" was necessary and that it should be sufficiently elastic to take account of such cases.

45. Sir Francis VALLAT said he agreed that it would be more satisfactory from the drafting point of view to place the articles on State archives in a separate part of the draft. That should be the lead given to the Drafting Committee, although not as a binding direction.

46. With regard to the expression "internal law", it seemed to him that it did require clarification. Since the expression should be treated with a degree of flexibility, he was inclined to think, for the time being, that it would be better to deal with the matter in the commentary rather than by a definition. That, however, was a matter which called for further reflection.

47. One point that had emerged from the discussion, though not in any articulate form, was that the expression "internal law" in fact performed two functions, which represented two aspects of one legal situation: first, internal law determined the existence of title to property, rights and interests; and, secondly, it determined the attribution of that title to a State. Those two functions could involve different considerations in any particular case, and he therefore suggested that the Drafting Committee should bear that in mind when examining the expression "internal law".

48. The role of private international law was clearly important in connection with determination of title. There would, however, have been no need to worry about private international law had it not been for the use of the word "internal", which could have different effects under different legal systems. There was a risk that the courts might take the view that the word "internal" was deliberately used to exclude private international law, with the result that they would look only to local law and not to the law of another State. That, clearly, was not the intent of draft article 5. It should therefore be specified in the commentary that, in using the word "internal", the Commission did not mean to exclude the application of the rules of private international law in accordance with the law of the State concerned.

49. The other issue of substance concerned the question that arose in independent territories. He was inclined to think that that question answered itself, because unless title was vested in the predecessor State, under the law of that State, no question of succession to the property could really arise. If property were vested in accordance with local law, it must also be vested in accordance with the law of the predecessor State. Consequently, the reference to the law of the

territory did not really matter. If, on the other hand, the property were vested in the local Government and not in the predecessor State, the problem once again settled itself, for in that case there was no real question of succession: the property remained exactly where it had been before—or, if there was a question of succession, it was not really of the type with which the Commission was concerned. The problem was a difficult one, requiring careful consideration in the Drafting Committee.

50. Mr. ALDRICH said that he agreed almost entirely with the general points raised by Sir Francis Vallat. On the point regarding the potential for conflict between internal law and international law, however, he considered, so far as property beyond the national jurisdiction, such as the seabed, was concerned, that Mr. Jagota had correctly stated the case. The draft was not concerned with the legality or illegality under international law of any particular internal law. If the internal law of a State gave a title that was internationally worthless, then the successor State would acquire an internationally worthless title too. That point could perhaps best be dealt with in the commentary.

51. Mr. VEROSTA said that he found draft article 4 acceptable.

52. Draft article 5, on the other hand, could give rise to difficulties, and the Commission should refrain from adding to it new elements such as an explanation of the concept of internal law or a reference to private international law. It would unquestionably be preferable to leave the Special Rapporteur to supplement the wording of the provision with an appropriate commentary.

53. Like Sir Francis Vallat, he believed that the rules on archives should be kept separate from those concerning State property, as otherwise considerable complications might ensue. Since it was conceivable that States might one day decide to conclude a convention relating to State property, State archives or State debts, it was preferable to separate the rules relating to each of those subjects.

54. Mr. BEDJAOUI (Special Rapporteur) observed that draft article 4 had not given rise to any problems, apart from the proposal made by a number of members to delete it and to incorporate in draft article 1 a list of the topics dealt with in the articles.

55. In his view, draft article 4 was both useful and necessary, since it served to show that Part II of the draft, which was concerned with State property, contained articles applicable only to such property. Similarly, article 15, which was the first provision of the part dealing with State debts, Part III, stated that that part also contained provisions which applied only to such debts. The Commission should define at the beginning of each part the field of application of the articles it contained.

56. All members appeared to agree that draft article 5 should not be complicated by the addition of a reference to public or private international law. Moreover, most members were of the view that the nature of the concept of internal law referred to in article 5 should be clearly explained (for example, in draft article 2).

57. In that regard, the observations made by members of the Commission appeared to coincide. He was especially grateful to Mr. Ushakov for having referred to the problem of determining which internal law was to be taken into account. He recalled that in 1970 he had himself come up against that question, and that in his third report he had cited a number of situations that had arisen in the practice of States[14] which might help the Commission in reaching a decision on the matter. In 1970, attention had been drawn to the existence, in the statutes of colonies, of the principles of legislative specialization and treaty specialization, whereby laws or treaties of the administering State were not directly applicable in a colony without the approval of the competent local authority. Apparently, then, the system entailed choosing between the legislation of the territory to which the succession related and the internal law of the predecessor State. In the event, the Commission had considered it preferable to employ the more general notion of internal law, according to which the law of the metropolitan Power served both as the internal law of the colonizing State itself and the law applicable to the colonized territories. That fiction had been reflected in draft article 5 ever since. Nevertheless, he was at the disposal of the Drafting Committee, should it wish to take up the question again.

58. Mr. Ushakov had again raised the fundamental problem of the placement of the question of archives in the draft. It was important for the Commission to provide the Drafting Committee with some guidance in that regard.

59. All members of the Commission seemed to be of the view that the articles devoted to State archives should be placed after those relating to State property. However, the Commission must also decide whether those provisions should be incorporated into the part of the draft relating to State property, of which they would constitute only one section, or whether they warranted the maintenance of a separate part concerned solely with State archives.

60. He was inclined to favour the former solution. However, Mr. Ushakov had pointed out that such an association would call for substantial recasting of the draft by the Commission, since it would be necessary first to bring together the articles applicable to both questions, and then to separate into two additional sections the provisions relating solely to State property on the one hand, and those relating to State

[14] See *Yearbook ... 1970*, vol. II, pp. 136 *et seq.*, document A/CN.4/226, part two, commentary to art. 1, sect. III.

archives on the other. The Commission did not have time for such an undertaking.

61. Consequently, his preference went to the option which would avoid excessive disruption of the general order of the draft: dealing with State property and then with State archives in two separate parts, and connecting those parts by a provision stipulating that State archives were a category of State property having special characteristics.

62. In conclusion, he urged Mr. Calle y Calle not to press the point concerning the patrimonial aspect of the expression "property, rights and interests" which he had raised in his statement. He himself had endeavoured to avoid the use of the concept of patrimony throughout his work, because of the uncertainty surrounding it and the inextricable disputes to which its use would inevitably give rise.

63. The CHAIRMAN suggested that draft articles 4 and 5 should be referred to the Drafting Committee.

It was so decided.[15]

ARTICLE 6 (Rights of the successor State to State property passing to it)

64. The CHAIRMAN invited the Commission to examine draft article 6, which read:

Article 6. Rights of the successor State to State property passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part.

65. Mr. BEDJAOUI (Special Rapporteur) said that draft article 6 had provoked little reaction.

66. In the Sixth Committee of the General Assembly, a number of representatives had asked whether the extinction of the rights of the predecessor State had as its corollary the extinction of responsibilities or obligations encumbering the property. Actually, article 6 was concerned with the assets of the State rather than its liabilities, which were dealt with in the provisions on State debts and all other obligations. It might therefore be preferable to leave that question aside, since it concerned an area which the Commission had not explored and which it would not have time to consider in detail.

67. It had also been pointed out in the Sixth Committee that the terms "extinction" and "arising" of rights did not take sufficient account of the situation of the colonized territories which had been States before colonization and with respect to which it would have been more accurate to refer to the restoration or resurgence of rights by saying that they had "arisen once again". The argument was not without merit, and it might be as well to reflect the concern in question in the text of article 6. He noted, however, that the delegation that had made the comment in the Sixth Committee had itself proposed wording which ran counter to its own position, since it had retained the expression "the obtaining ... of those same rights" (see A/CN.4/345, para. 48), which expressed the idea of acquisition rather than restoration.

68. He himself was of the view that the current wording of draft article 6 had at least the tacit support of members of the Sixth Committee, and he hoped that it would gain similar approval in the Commission.

69. Mr. USHAKOV proposed that draft article 6 should be referred to the Drafting Committee.

It was so decided.[16]

ARTICLE 7 (Date of the passing of State property)

70. The CHAIRMAN invited the Commission to examine draft article 7, which read:

Article 7. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succesion of States.

71. Mr. BEDJAOUI (Special Rapporteur) recalled that in his fourth report he had cited, in connection with article 7, a number of cases in which succession had occurred at very different dates as the result of a treaty between the parties.[17] Consequently, he regarded the wording proposed in draft article 7 as a minimum, which would be subject to revision if the Commission decided to draft a new article 3 *bis* or 4 concerning the date of succession.

72. Of the States which had commented on the draft articles, Austria (A/CN.4/338/Add.3) had criticized the expression "unless otherwise agreed or decided". In that connection, he pointed out that in many instances of succession the States concerned had agreed to set a date for the passing of property in the light of the special circumstances of the case. In practice, as the numerous examples given in his fourth report confirmed, the time allowed under such agreements could be very long; disputes concerning archives could, indeed, last more than a hundred years.

73. It would be difficult to lay down a more restrictive provision than that contained in draft article 7, for the States concerned must have sufficient freedom to be able to adapt to circumstances. The inclusion of the word "decided" was justified by way of a reference to a possible decision of an institution or international court.

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[15] For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 58–59.

[16] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 60–61.

[17] *Yearbook ... 1971*, vol. II (Part One), pp. 170 *et seq.*, document A/N.4/247 and Add.1, commentary to article 3.

74. He would like the Drafting Committee to consider draft article 7 in conjunction with a possible new article 3 *bis* or 4.

75. Mr. CALLE Y CALLE said that the passing of State property was not such an automatic operation as it might seem to be, for it necessarily involved an identification of the property that was to pass. Moreover, the time it took for State property to pass could vary widely. The rule that in the absence of an agreement or decision the date of the passing of State property was that of the succession of States was, of course, residual. Whereas an agreement presupposed a meeting of minds, a decision could be unilateral. In his view, the reference in the article was to the decision of a court or of some body such as the Security Council or General Assembly. He considered the draft article to require no change whatsoever.

76. The CHAIRMAN suggested that draft article 7 should be referred to the Drafting Committee.

It was so decided.[18]

ARTICLE 8 (Passing of State property without compensation)

77. The CHAIRMAN read out the text of draft article 8, as follows:

Article 8. Passing of State property without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State shall take place without compensation.

78. Mr ŠAHOVIĆ proposed that draft article 8 should be referred to the Drafting Committee.

It was so decided.[19]

The meeting rose at 1 p.m.

[18] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, para. 62.

[19] *Idem*, para. 63.

1661st MEETING

Thursday 28 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

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

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 9 (Absence of effect of a succession of States on third party State property)

1. The CHAIRMAN invited the Commission to consider article 9, which read:

Article 9. Absence of effect of a succession of States on third party State property

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

2. Mr. BEDJAOUI (Special Rapporteur) said that in the course of the Commission's discussions it had been deemed necessary to make it clear in the draft that a succession of States had no effect on third party State property.

3. In the Sixth Committee, however, proposals had been made either to delete article 9, for it was considered to be axiomatic, or to retain it but simplify it, in particular by deleting the words "which ... are situated in the territory of the predecessor State" (see A/CN.345, paras. 71–72). It had also been proposed, as in the case of article 5, to add a reference to private international law (*ibid.*, para. 73).

4. Among the States which had made written comments, the German Democratic Republic had approved article 9 (see A/CN.4/338), whereas Czechoslovakia had considered it superfluous, because it was self-evident from the definition in article 5 that succession of States affected only the rights of the predecessor State and not those of third States (see A/CN.4/338/Add.2).

5. He was not inclined to accept those suggestions, since they were of minor importance and were not likely to improve the text.

6. In particular, the argument for deleting the words "which ... are situated in the territory of the predecessor State" could easily be turned back on itself. Obviously, third State property situated in the territory of the predecessor State must be protected from the effects of State succession. Deletion of the phrase would make article 9 completely superfluous. Furthermore, the problem of the possible effects of the succession on State property of a third State could arise only in connection with property that was situated in the territory of the predecessor State. When it was stipulated that the rights of third States could be determined only by reference to the internal law of the