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Summary record of the 1627th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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more, in their replies Governments had cited may cases in which decisions had been subsequently overruled, leading to the conclusion that the principle of immunity was uncontested.

14. The question of exceptions to, or limits on, immunities would be dealt with in greater detail in the third report, in the light of further information provided by Governments. Thus far, twenty-two Governments had provided source materials and seven or eight had replied to the questionnaire. None of them had contested the validity of the principle of State immunity.

15. He suggested that it might be helpful for future consideration of the topic to refer draft articles 1 and 6 to the Drafting Committee. Meanwhile, the Secretariat should be requested to renew its invitation to Governments to provide information and should make the necessary preparations for publication of the replies and source materials already received.

16. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that draft articles 1 and 6 should be referred to the Drafting Committee and that the Secretariat should be invited to seek further information from Governments and to publish the information already received.

It was so decided.[2]

The meeting rose at 11.10 a.m.

[2] For consideration of the texts proposed by the Drafting Committee, see 1634th meeting, paras. 42–61, and 1637th meeting, paras. 57–58.

1627th MEETING

Monday, 7 July 1980, at 3.05 p.m.

Chairman: Mr. C. W. PINTO

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

Also present: Mr. Ago.

State responsibility (*continued*)* (A/CN.4/318/Add.5–7, A/CN.4/328 and Add. 1–4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 34 (Self-defence)[1] (*continued*)

1. Mr. TSURUOKA said that, by and large, he agreed with draft article 34, but the phrase "if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations" should be replaced by "if the act constitutes a measure of self-defence under the Charter of the United Nations".

2. In the article under consideration, reference could be made either to international law or to the Charter, and in the latter case, either Article 51 or the Charter as a whole could be mentioned. In his view, the latter course was preferable. By referring simply to international law, the Commission might give the impression that it recognized the existence of a right of self-defence other than that envisaged in the Charter. A reference to Article 51 alone would inevitably give rise to controversy, as the Commission's discussions had shown. Again, the Commission usually refrained from interpreting the Charter. The fact that self-defence was mentioned should on no account induce the Commission to define that concept. Any attempt to do so would be a departure from the Commission's customary method of leaving aside the primary rules. A reference to the Charter as a whole would cover not only Article 51 but also Article 2 and Chapter VII of that instrument.

3. Regarding the commentary to the draft article, and more specifically the passage in paragraph 114 of the report (A/CN.4/318/Add.5–7) in which Mr. Ago stated that learned writers took the view that the principles that had been current in general international law at the time when the Charter was drafted had in no way differed, as to substance, from those laid down in Article 51, that assertion was incorrect so far as Japan was concerned. Japanese writers had emphasized that in formulating Article 51 the authors of the Charter had taken an immense step towards pacifism by taking care to restrict the exercise of the right of self-defence to one clear-cut case. The Japanese writers could not be said to have been unanimous in acknowledging that Article 51 reflected a principle rooted in the legal thinking of the time.

4. Mr. DÍAZ GONZÁLEZ said that underlying the concept of self-defence there was a question of equal or even greater importance, namely, the definition of aggression. It therefore seemed to him that draft article 34 embodied two elements which were unduly restrictive and would make it difficult for the Commission to accept the article as it stood. In the first place, the text referred specifically to an armed attack, whereas it would have been more appropriate to refer to an act of aggression; secondly, the concept of self-defence was limited by the reference to Article 51 of the Charter of the United Nations. That Article was simply a safeguard clause which provided for an exception

* Resumed from the 1621st meeting.

[1] For text, see 1619th meeting, para. 1.

based on an inherent right of individual or collective self-defence. The Charter did not, however, define an inherent right nor say what was to be understood by self-defence. It merely spoke of a right of self-defence, from which it could be inferred that the content of that right had to be sought within the rules of *jus cogens* in order to determine when self-defence could be pleaded. Article 2, paragraph 4, of the Charter established a further exception, since it was implicit that any measure other than those it expressly prohibited must, when taken by the threatened State, be regarded as a measure of self-defence. Article 2, paragraph 7, likewise afforded a basis on which measures of self-defence could be applied. Moreover, the right of individual or collective self-defence as enunciated in Article 51 of the Charter was restricted by the second sentence of that Article. Accordingly, it was for the Security Council to determine whether or not an act of aggression had occurred and, as a consequence, measures of self-defence could be applied.

5. In his view, the concept of aggression should not be confined solely to armed attack. As was abundantly clear from the debates held at the United Nations on the definition of aggression, there were other types of aggression which could be far more effective in threatening or destroying a State, such as economic, ideological and cultural aggression. Again, armed attack did not necessarily involve attack by a regular army but could mean an attack by an armed band directly or indirectly supported by another State.

6. In the light of those considerations, it seemed to him that the Commission was not in a position to state categorically when the use of force was lawful and when an act of aggression should be deemed to have taken place. Consequently, it was necessary to define what was meant by an act of aggression that justified measures of self-defence.

7. So far as the American regional system was concerned, the Charter of the Organization of American States[2] was explicit on that score. The principle of self-defence was expressly stated in article 18, under which the American States undertook not to resort to the use of force in their international relations, save in the case of self-defence, in accordance with the treaties in force. Conversely, article 24 of the Charter of the OAS stipulated that any aggression by a State against the integrity, sovereignty or political independence of an American State was to be deemed to be an act of aggression against the other American States. As a logical consequence, article 25 provided that if the integrity, sovereignty or political independence of an American State was affected, *inter alia*, by an armed attack or by an aggression not involving an armed attack, the American States would take the measures prescribed in the relevant treaties.

8. The most important of those treaties was the Inter-American Treaty of Reciprocal Assistance,[3] signed at Rio de Janeiro in 1947. Under article 3 of that treaty, which restated the terms of article 24 of the Charter of the OAS any aggression against an American State was to be deemed an act of aggression against the other American States, and the latter undertook to react accordingly in the exercise of their inherent right of individual and collective self-defence as recognized in Article 51 of the Charter of the United Nations.

9. Lastly, although persuaded by Mr. Ago's excellent report of the need to include a rule on self-defence in the draft on State responsibility, he considered that draft article 34 should be couched in more general terms, to refer to the Charter of the United Nations as a whole rather than to Article 51 alone, and also to the principles of international law. He would therefore favour some wording along the lines proposed by Mr. Tsuruoka.[4]

10. Mr. BARBOZA said that one of the main issues to be decided by the Commission was whether the concept of self-defence should extend to the use of force against the threat of imminent armed attack. In that connexion, the question had been raised of whether Article 51 of the Charter of the United Nations was more restrictive in scope than were the rules of general international law and, if so, whether those rules should be codified. His own view was that Article 51 in fact reflected general international law, although it also incorporated certain additional elements relating to the United Nations system of collective security which were of paramount importance. Article 51 would apply, for example, in cases where a Member of the United Nations had already been attacked and until such time as the Security Council had taken the necessary measures to maintain international peace and security; also, under the terms of the Article, the measures taken by Members in the exercise of their right of self-defence had to be reported to the Security Council immediately.

11. At the same time, it had to be recognized that, despite its importance, Article 51 of the Charter was not a comprehensive statement of international law on the matter. It did not, for example, mention the prerequisite for the exercise of self-defence or the rule of proportionality, both of which derived from international law. His understanding, therefore, was that self-defence related primarily to the use of force and possibly the threat of the use of force.

12. Aggression and self-defence were two sides of the same coin, and hence Mr. Ago had been right to exclude from the concept of self-defence such extraneous matters as self-help. In the international community, as in any national community, the concept

[2] United Nations. *Treaty Series*, vol. 119, p. 3.

[3] *Ibid.*, vol. 21, p. 77.

[4] Para. 1 above.

of self-defence consisted of three elements: a prohibition on aggression, the legitimacy of the force used in self-defence, and the community's monopoly on the use of force. In the case of the international community, that monopoly was clearly wasted in the United Nations by virtue of Article 2, paragraph 4, Article 51 and the provisions of Chapter VII of the Charter, although the United Nations did not in fact resort to the use of force in the strict sense of the term.

13. Bearing those facts in mind, he did not think that the Commission could seek to modify the United Nations system of collective security, something that could be achieved only by revising the Charter with a view to bringing it up to date. Nor should it seek to introduce the notion of self-help in chapter V of the draft, since that would undermine the concept of self-defence. All it could do was to proceed within the framework laid down by the Charter and treat the existing system of collective security as still being in force. If that was agreed, an article on self-defence would then be required for the purpose of laying down the exceptions to the prohibition on the use of force.

14. Lastly, he agreed that the draft article should be couched in general terms and refer to the Charter of the United Nations as a whole, rather than to Article 51 alone. In that connexion, he had been persuaded more particularly by the arguments of Sir Francis Vallat (1621st meeting), who had questioned whether the Commission had a mandate to interpret Article 51 of the Charter. He also noted that Mr. Ago had warned the Commission in paragraph 116 of his report against seeking to interpret Article 51 and against taking any position on preventive self-defence.

15. Mr. QUENTIN-BAXTER said that Mr. Ago's report was a very rich addition to the literature on one of the most vital issues of modern international law.

16. Chapter V, section 6, of the report rightly explained how the concept of self-defence had come to achieve special significance during the twentieth century with the recognition that recourse to war, save in self-defence, was not only unlawful but was also a breach of a peremptory norm. A difficulty arose because Mr. Ago had also invited the Commission to go a step further and to say that the transition from the old imperfect order had been completed, so that self-defence could be equated with response to an attack within the meaning of Article 51 of the Charter of the United Nations. Self-defence, however, was still not a permanent part of the law of nations. Although States had moved away from the time when might was right, they had not yet reached the millenium they had hoped for when the Charter of the United Nations had been adopted. Theirs was not yet a peaceful world ruled entirely in accordance with law, in which all matters were held in a fair and equal balance by the objective decisions of the principal organs of the United Nations. It was within the context of the interim period through which the world was passing that the concept of self-defence had to be considered. Indeed, if the Charter regime were fully effective, there would be little or no need for States to resort to self-defence, any more than citizens in a well-ordered society needed to do so—at least for more time than was required for the forces of law and order to arrive. It was mainly because the international community was passing through an interim period that the term "self-defence" had such a vital part to play in the modern conception of law; for that reason, too, the term was necessarily somewhat imperfect and vague, as was the world order itself.

17. Mr. Ago's position was very similar to that adopted by the International Court of Justice in the *Corfu Channel* case,[5] namely, that the world had entered upon a period in which self-defence and intervention, under whatever guise or provocation, were not acceptable. However, so long as the world order was less than perfect, States would naturally be concerned about attacks on their territory and people. In view of that imperfect situation, he considered that draft article 34 must necessarily provide for a *renvoi* to the Charter as a whole and would therefore favour an amendment to the draft article along the lines proposed by Mr. Tsuruoka.

18. The CHAIRMAN, speaking as a member of the Commission, said that he sympathized with those who considered that draft article 34 should not be included under the heading of "Circumstances precluding wrongfulness" (of an act of a State), since self-defence had implications that went far beyond the preclusion of wrongfulness. However, it was important to remember that Mr. Ago was attempting not to codify the rules on self-defence but rather to place self-defence within a somewhat special schematic presentation of the elements which attracted wrongfulness and of the circumstances which precluded it. Within the context of that systematic exposition, he saw no reason to object to the inclusion of the draft article in chapter V of the draft.

19. With regard to the scope of the draft article, he felt that self-defence was too elemental to be termed a concept. Deriving, as it did, from the basic instinct for self-preservation, it was as old as life itself. Although it might seem expedient, in the light of the politics of any given time, to attempt to place self-defence within a neat set of limits with a view to regulating the abuses to which it could give rise, the chances were that such attempts would not be successful. The narrower the limits, the more likely they were to be overtaken by events.

20. As a legal concept, self-defence had not been introduced by the Charter of the United Nations, but dated back to the origins of the law itself. He had not had time to ascertain whether the authors of the Charter had intended, in Article 51, to define self-defence in its broadest sense or simply to deal with the

[5] *Corfu Channel, Merits, Judgment, I.C.J. Reports, 1949*, p. 4.

limited case of the action that a Member of the United Nations could take in the event of an armed attack against it or against another Member until such time as the Organization's machinery for the maintenance of peace and security could be activated. Nor was he clear as to the intent behind Article 2, paragraph 4, of the Charter, which, as had rightly been pointed out, might possibly imply that defensive measures could be taken in the event of the threat of force, as opposed to an actual armed attack.

21. What did seem clear to him was that, irrespective of the intent of the Charter and of those who had drafted it, the concept of self-defence, if codified, would extend beyond armed attacks. Such codification might well have to encompass the ways in which a State could defend itself against threats to its economy or to its legitimate interests outside its territory or, indeed, outside the territory of any State; it might have to take account of whether or not such threats involved the use of armed force, in the sense of full-scale military operations, or of some other form of coercion which fell short of military operations, and whether or not there had been overt aggression. It might also have to determine whether defensive measures taken by a State were legitimate in cases where such measures were not in themselves of a warlike nature, but were aimed at warding off an armed attack at some time in the future, rather than an attack that was imminent or was actually taking place.

22. The term "self-defence" connoted the idea not only of forceful resistance or defence, but also of preventive or security measures which could comprise a variety of legitimate external actions. It could be argued, for example, that the notions of zones of peace, nuclear-weapon-free zones and zones of neutrality, together with the measures taken to implement the corresponding regimes, derived from a modern concept of self-defence. It could also be argued that the concept of self-defence must be expanded in direct proportion to the destructive capacity and concentration of modern weaponry. Thus, Article 51 of the Charter of the United Nations, whatever its initial purpose, was now no more than a narrow part of a far broader concept of self-defence. It was therefore not so much a question of interpreting Article 51 of the Charter as interpreting the scope of an inherent right conferred on every State by customary international law.

23. Article 51 of the Charter might be applied with some justification in the case of a State that was militarily strong and ready for combat, since the Article assumed that a defensive military machine, whether of the State under attack or of an allied State, could be effectively mobilized within a very short time to repel an armed attack that was taking place. Even so, some life and property might well have to be sacrificed in order to comply fully with the restraint imposed by Article 51. Given modern weaponry and the size of some modern States, the absurd result might be that a whole State would have to be sacrificed to satisfy the terms of Article 51. Application of that Article to the majority of States that were not large, had only limited military capability and were not parties to any military alliance, seemed far less reasonable.

24. He mentioned those considerations since draft article 34 in its present wording could reinforce the view that the only type of self-defence that was legitimate, and therefore precluded wrongfulness, was the type provided for under Article 51 of the Charter, namely, the self-defence to which a State could resort when "an armed attack occurs". In his view, it would be advisable not to prejudice the progressive development of the concept or the value of certain widely-held interpretations of it. Moreover, the application of draft article 34 should not be unduly restricted by linking it to Article 51 of the Charter.

25. Consequently, while he supported the idea underlying draft article 34, he proposed that the last part of it, starting with the words "in order to defend itself", should be deleted and replaced by "in defence of itself or of another State in accordance with international law, including the provisions of the Charter of the United Nations". The expression "to defend itself or another State" also seemed to convey a heavy burden of unexplored meaning and some further thought should be given to developing that expression at a later stage.

Succession of States in respect of matters other than treaties (*concluded*)* (A/CN.4/322 and Add.1 and 2,[6] A/CN.4/333, A/CN.4/L.313)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES C, D, E AND F

26. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Committee (A/CN.4/L.313).

27. The texts proposed by the Drafting Committee read:

Article C. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the

* Resumed from the 1606th meeting.

[6] Reproduced in *Yearbook ... 1979*, vol. II (Part One).

territory in question is transferred, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part referred to in subparagraph (*a*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the transferred territory or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. (*a*) The predecessor State shall, at the request and at the expense of the successor State, make available appropriate reproductions of documents of its State archives connected with the interests of the transferred territory.

(*b*) The successor State shall, at the request and at the expense of the predecessor State, make available appropriate reproductions of documents of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

Article D. Uniting of States

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

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

Article E. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part referred to in subparagraph (*a*), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the successor State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the people to those States to development, to information about their history and to their cultural heritage.

5. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of documents of their State archives connected with the interests of their respective territories.

6. The provisions of paragraphs 1 to 5 apply when part of the territory of a State separates from that State and unites with another State.

Article F. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(*a*) the part of the State archives of the predecessor State, which should be in the territory of a successor State for normal administration of its territory, shall pass to that successor State;

(*b*) the part of the State archives of the predecessor State, other than the part referred to in subparagraph (*a*), that relates directly to the territory of a successor State, shall pass to that successor State.

2. The passing of the parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the respective territories of the successor States, shall be determined by agreement between them in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. Each successor State shall provide the other successor State or States with the best available evidence of documents from its part of the State archives of the predecessor State which bear upon title to the territories or boundaries of that other successor State or States, or which are necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, appropriate reproductions of documents of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

6. The provisions of paragraphs 1 to 5 shall not prejudge any question that might arise by reason of the preservation of the unity of the State archives of the successor States in their reciprocal interest.

28. Mr. VEROSTA (Chairman of the Drafting Committee) said that the four draft articles before the Commission, as adopted by the Drafting Committee, were part of the series of six articles dealing with the question of succession of States in the matter of State archives.

29. At its thirty-first session, the Commission had adopted the first two articles in that series: draft article A, on the definition of State archives, and article B, on succession to State archives in the case of a newly independent State.[7] The last four draft articles were article C, originally presented by the Special Rapporteur as article B′, with the title "Transfer of a part of the territory of one State to another State",[8]

[7] For texts, see *Yearbook ... 1979*, vol. II (Part Two), pp. 79 and 81–82, document A/34/10, chap. II, sect. B.

[8] For text, see 1602nd meeting, para. 1.

and articles D, E and F.[9] Since the draft already included A and B, adopted previously by the Commission, the Drafting Committee had decided to renumber draft article B' as article C.

30. Commenting on the four draft articles as a whole, he said that the Drafting Committee had drawn on the wording of the articles already adopted by the Commission. That had been found advisable for the purpose of using the agreed terminology, care having been taken by the Committee to make the appropriate and necessary adjustments in the borrowed phraseology or terminology so as to adopt it to the particular case of succession covered by the draft articles under consideration. In drafting articles C, E and F, the Drafting Committee had used the agreed wording of articles 10, 13 and 14, on State property, and the corresponding articles on State debts (articles 19, 22 and 23), as well as article B.[10] Efforts had also been made to harmonize the wording of draft articles C, E and F, so far as was possible.

31. In the light of the plenary discussion on the twelfth report of the Special Rapporteur (A/CN.4/333), the Drafting Committee had been guided in the preparation of draft articles C, E and F by the basic principle of agreement between the States concerned. In the absence of agreement, those articles enunciated the rule of the passing to the successor State of the part of State archives of the predecessor State that, for normal administration of the territory to which the succession of States related, should be in the territory of the successor State or, in the case of transfer of part of the territory of a State, should be at the disposal of the State to which the territory in question was transferred. In addition, under draft articles C, E and F, the part of State archives of the predecessor State (other than the part already referred to) that related *directly* (or in the case of article C, *exclusively* or *principally*) to the territory to which the succession of States related, also passed to the successor State.

32. With regard to the types of succession envisaged in articles E and F, the passing of the parts of State archives of the predecessor State (other than those already mentioned) that were of interest to the territory or territories to which the succession of States related, was to be determined by agreement between the States concerned (predecessor and successor States or successor States among themselves) in such a manner that each of those States could benefit as widely as possible from those parts of State archives.

33. Furthermore, articles C, E and F enunciated the rule whereby the predecessor State must provide the successor State—or, in the case of dissolution of a State, each successor State must provide the other successor State or States—with the best available evidence of documents from State archives of the predecessor State which bore upon title to the territory of the successor State or its boundaries or were necessary to clarify the meaning of documents of State archives that passed to the successor State pursuant to other provisions of the article concerned.

34. Similarly, articles C, E and F enunciated, with the adaptations required by each type of succession of States envisaged therein, the rule relating to provision, at the request and at the expense of a successor State, or predecessor State, as the case may be, of appropriate reproductions of documents of State archives connected with the interests of the territory of the requesting State. In the case of article C, given the characteristics proper to the transfer of part of the territory of a State, the rule was to the effect that the predecessor State was entitled to be furnished with appropriate reproductions of documents of State archives that had passed to the successor State.

35. Both article E and article F included the safeguard clause found in article B regarding the right of the peoples of the States concerned to development, to information about their history and to their cultural heritage.

36. The Drafting Committee suggested that, in its commentary to the draft, the Commission should bring to the attention of Governments the question of whether the articles on succession to State archives should be contained in a separate part or included as a separate chapter in part II of the draft, dealing with succession to State property. Views had already been expressed on that question by Member States in the Sixth Committee during the thirty-fourth session of the General Assembly, and had been aptly summarized by the Special Rapporteur in presenting his twelfth report to the Commission (1602nd meeting).

ARTICLE C[11] (Transfer of part of the territory of a State)[12]

37. Mr. VEROSTA (Chairman of the Drafting Committee) said that, in draft article C (formerly article B'), the wording of paragraph 1 had been aligned with that of article 13. In recasting the entire article in four paragraphs instead of the three presented in the Special Rapporteur's version, the Drafting Committee had, where appropriate, borrowed from the language of article B. For example, the Committee had abandoned the phrase "State archives connected with the administration and history of the territory" used in the Special Rapporteur's draft, and adopted instead the phrase "State archives . . . for normal administration of the territory" contained in paragraph 1 (*b*) of article B. Paragraph 3, which was a new addition by the

[9] For the texts submitted by the Special Rapporteur, see 1603rd meeting, para. 28, and 1604th meeting, para. 26.

[10] See foot-note 7 above.

[11] For consideration of the text initially submitted by the Special Rapporteur (art. B'), see 1602nd meeting and 1603rd meeting, paras. 1–27.

[12] For text, see para. 27 above.

Drafting Committee, was modelled on paragraph 3 of article B, which covered the same question. The Committee had also redrafted paragraph 3 of the original article B′, and in its present version, as paragraph 4 of article C, it consisted of two sub-paragraphs deemed necessary to state the rules in a clearer fashion: the first set forth the obligation of the predecessor State to make available at the request and expense of the successor State, appropriate reproductions of documents of its State archives connected with the interests of the transferred territory; the second set forth the same obligation on the part of the successor State vis-à-vis the predecessor State in the same terms.

38. Mr. QUENTIN-BAXTER said that, as he recalled, a problem of terminology had arisen during the drafting in connexion with the notion of part of the territory of a State, for it meant two different things: a physical piece of territory, as in article C, and a territory in the sense of something having a personality of its own, although not at the level of international law, as in articles E and F. He had understood it to be the Commission's policy to state, as was the case in draft article C, "When part of the territory . . .", and to say "When a part or parts of the territory . . ." at the beginning of article E, as if the Commission wished to make a clear distinction. Regarding article C, paragraph 3, the phrase "upon title to the territory of the transferred territory or its boundaries" seemed to be rather clumsy, and he wondered if there was any reason for not using a phrase such as "upon title to the territory to which the succession of States relates or its boundaries".

39. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Drafting Committee had decided on the expression "part of the territory" because it was already contained in articles 13 and 19. However, he had no objection to the wording suggested by Mr. Quentin-Baxter.

40. Mr. DÍAZ GONZÁLEZ said that when the matter had been discussed in the Drafting Committee the notion had been quite clear. The French text had been taken as the point of departure, and the Spanish version corresponded exactly to the French text. Perhaps the matter could be solved by bringing the English version closer to the French text.

41. Mr. SUCHARITKUL said that the third line of paragraph 3 might be clearer, yet keep the same meaning, if the words "the territory of" were deleted.

42. Mr. TSURUOKA said that there was no reason to alter the French text of paragraph 3, which was the original text, and that it was enough to change the English version.

43. Sir Francis VALLAT said that he agreed with Mr. Tsuruoka. It was not simply a drafting matter, but the meaning of the paragraph in its present form was quite clear and it would be wiser to leave the text as it was until the second reading.

44. Mr. QUENTIN-BAXTER said that he was satisfied with the comments that had been made. In his opinion, the main point to note was that the text had been drafted originally in French and was apparently satisfactory in that language. He therefore agreed that the question could be left for the second reading.

45. Sir Francis VALLAT said that, to his mind, the relationship between articles C and E should be taken into account. Once note was taken of the title and of paragraph 6 of article E, the balance between the two articles became quite clear.

46. Mr. USHAKOV proposed that the text of article C, paragraph 4, should be replaced by the following:

> "4. (*a*) The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of documents of its State archives connected with the interests of the transferred territory.
>
> (*b*) The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of documents of State archives which have passed to the successor State in accordance with paragraph 1 or 2."

47. Mr. VEROSTA (Chairman of the Drafting Committee) supported the proposal by Mr. Ushakov.

48. The CHAIRMAN suggested that the Commission should adopt article C in the form proposed by the Drafting Committee, with the exception of paragraph 4, which would be replaced by the text proposed by Mr. Ushakov.

It was so decided.

ARTICLE D[13] (Uniting of States)[14]

49. Mr. VEROSTA (Chairman of the Drafting Committee) said that so far as article D was concerned, there had been no difficulty in accepting the Special Rapporteur's text, which reproduced, with the necessary adaptations, that of article 12 on the passing of State property, the corresponding article on the passing of State debts being article 21. The Drafting Committee, however, had made one small drafting change by replacing the phrase "and thus form a successor State" with the phrase "and so form a successor State", already used in article 12.

Article D was adopted.

ARTICLE E[15] (Separation of part or parts of the territory of a State)[16]

50. Mr. VEROSTA (Chairman of the Drafting

[13] For consideration of the text initially submitted by the Special Rapporteur, see 1603rd meeting, paras. 28 *et seq.*, and 1604th meeting, paras. 3–25.

[14] For text, see para. 27 above.

[15] For consideration of the text initially submitted by the Special Rapporteur, see 1604th meeting, paras. 26 *et seq.*, and 1605th meeting.

[16] For text, see para. 27 above.

Committee) said that the text of article E had been harmonized with that of the articles already adopted. For example, the wording of paragraph 1 had been brought into line with that of paragraph 1 of article 13. The phrase "archives ... connected with the activity of the predecessor State" used in the original text of article E submitted by the Special Rapporteur had been replaced by the familiar phrase "archives ... for normal administration of the territory to which the succession of States relates". Paragraph 2, on the question of the passing or appropriate reproduction of State archives, paragraph 3, on supplying the best available evidence of documents from State archives bearing upon title to the territory or boundaries, and paragraph 5, on making available appropriate reproductions of documents of State archives, had all been redrafted to cover those three cases in a clearer manner and in harmony with the corresponding provisions elsewhere, more particularly in article B. The new paragraph 4 added to article E was likewise modelled on the corresponding paragraph of article B (paragraph 6).

51. Mr. USHAKOV pointed out that, when the draft articles were considered on second reading, the wording of paragraph 5 should be brought into line with that of article C, paragraph 4.

52. Sir Francis VALLAT said that the drafting point raised by Mr. Ushakov was rather important. Attention should be drawn to it in the commentary so that there was no risk of overlooking the matter on second reading.

53. Mr. ŠAHOVIĆ asked why article E, paragraph 1 (*b*), referred to the part of State archives of the predecessor State that related "directly" to the territory, while article C, paragraph 2 (*b*), referred to the part of State archives of the predecessor State that related "exclusively or principally" to the territory.

54. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Drafting Committee had retained that difference, which was to be found in the report of the Special Rapporteur.

55. Sir Francis VALLAT said that, in his opinion, the explanation lay partly in a matter of substance and related back to Mr. Quentin-Baxter's point that the wording of article C, paragraph 2 (*b*), was believed to be narrower than the wording of article E, paragraph 1 (*b*). The distinction was intentional. Article C dealt with an actual transfer that could be settled by agreement between the two States, whereas article E contemplated the case of a breaking away. The distinction was therefore understandable and defensible, and he was convinced that the Special Rapporteur would explain it in his commentary.

Article E was adopted.

ARTICLE F[17] (Dissolution of a State)[18]

56. Mr. VEROSTA (Chairman of the Drafting Committee) said that the wording of paragraph 1 of article F had been made consistent with that of paragraph 1 of article 14. By dividing article F into six paragraphs, the Drafting Committee had, as far as possible, attempted to align the wording with that of the corresponding paragraphs of article E. The use of similar phraseology in the first five paragraphs of articles F and E, taking into account the substantive differences between the issues involved, had made for the necessary uniformity of terminology.

57. Paragraph 6 of article F safeguarded the unity of State archives in the application of the substantive rules regarding the passing of State archives set forth in paragraphs 1 to 5 of the article. It reflected the principle of the indivisibility of archives, which was enunciated in paragraph 2 (*b*) of the article as originally proposed by the Special Rapporteur, and was particularly relevant in the case of dissolution of a State, where a problem might arise regarding the fate of the central archives of the State that had disappeared.

Article F was adopted.

The meeting rose at 5.05 p.m.

[17] For consideration of the text initially submitted by the Special Rapporteur, see 1604th meeting, paras. 26 *et seq.*, and 1605th meeting.

[18] For text, see para. 27 above.

1628th MEETING

Tuesday, 8 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, 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.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 34 (Self-defence)[1] (*continued*)

1. Mr. VEROSTA said that he wished to rectify

[1] For text, see 1619th meeting, para. 1.