Document:-
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Summary record of the 1570th meeting

Topic:
<multiple topics>

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34. Sir Francis VALLAT suggested that the words "the succession", at the beginning of paragraph 1, should be replaced by the words "a succession", to ensure consistency with articles 9 and 17.

35. With regard to paragraph 2, he shared some of the difficulties mentioned by Mr. Tsuruoka, but thought there was one point that might help to explain the position. Whereas paragraph 1 of the article dealt with a succession of States as such, paragraph 2 dealt with an agreement between the predecessor and successor States. Consequently, as he understood it, paragraph 2 (*a*) referred not to the consequences of a succession of States as such, but to the consequences of the agreement; it therefore followed that the phrase "the other applicable rules of the articles in the present part" did not refer to paragraph 1, but to those provisions in the draft that related to the terms of a relevant agreement. He would like to know whether the Chairman of the Drafting Committee agreed with that view.

36. Mr. USHAKOV agreed that it would be better to use the indefinite article before the words "succession of States" in article 18, paragraph 1, as the phrase "*a* succession of States" was to be found in articles 11 and 12 of the 1978 Vienna Convention.[23]

37. He proposed that the words "with the other applicable rules of the articles", in paragraph 2 (*a*), should be replaced by the words "with the provisions of the other articles".

38. Mr. RIPHAGEN (Chairman of the Drafting Committee), referring to the point raised by Mr. Tsuruoka, said his own understanding of paragraph 2 of article 18 was that it dealt not with the position of creditors, which was covered by paragraph 1, but with the possibility of invoking an agreement on the passing of State debts against a third State or an international organization. However, that possibility would arise only if one of the two conditions laid down in subparagraphs (*a*) and (*b*) of paragraph 2 was satisfied. In the case of subparagraph (*a*), the consequences of the agreement had to be tested against the principles set out in the articles that followed article 18, including, for example, the principle of equitable proportion (article 19, paragraph 2, and article 22, paragraph 1), and the principles that the permanent sovereignty of every people over its wealth and natural resources should not be infringed and that the fundamental economic equilibria of the newly independent State should not be endangered (article 20, paragraph 2). In his view, it was to those principles that the phrase "other applicable rules", in paragraph 2 (*a*), referred.

39. As far as the wording of the article was concerned, he thought Sir Francis Vallat's proposed amendment to paragraph 1 would be an improvement. He could also accept the amendment to paragraph 2 (*a*) proposed by Mr. Ushakov.

40. Mr. TSURUOKA thanked the Chairman of the Drafting Committee for his explanations. He hoped, however, that the drafting of article 18 would be improved on second reading. His doubts would be partly removed if, in paragraph 2 (*a*), the words "with the other applicable rules" were replaced by the words "with all the applicable rules" or "with all the applicable provisions".

41. Mr. REUTER said that he had no objection to replacing the definite article by the indefinite article before the words "succession of States" in paragraph 1, but that it would be necessary to revert to the matter when the draft was finally adopted so as to harmonize articles 6, 9 and 17, which sometimes spoke of "*the* succession of Sates" and sometimes of "*a* succession of States".

42. Mr. USHAKOV observed that the provisions of articles 19, 22 and 23[24] were not applicable to the consequences of an agreement between the predecessor State and the successor State on the passing of State debts since, according to those provisions, any agreement was possible. The only provision limiting the scope of the agreement was that contained in article 20, paragraph 1.

43. Mr. VEROSTA failed to see the purpose of the word "other" in article 18, paragraph 2 (*a*).

44. Mr. QUENTIN-BAXTER said that the expression "other applicable rules" referred to rules other than the rule that the predecessor State and the successor State could make such agreements as they saw fit. It was necessary to exclude the latter rule by the use of the word "other" since, if the fact that the successor State and the predecessor State had concluded an agreement satisfied the requirement, there would in effect be no requirement. Possibly, therefore, the provision required further consideration.

45. The CHAIRMAN proposed that it should be stated in the commentary that some members of the Commission had criticized draft article 18.

It was so decided.

Article 18 was adopted.

The meeting rose at 6.5 p.m.

[23] See 1568th meeting, foot-note 3.

[24] For texts, see 1568th meeting, para. 3.

1570th MEETING

Tuesday, 17 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi,

Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/322 and Corr.1 and 2, A/CN.4/L.299/Rev.1 and Rev.1/Add.1)

[Item 3 of the agenda]

Draft articles proposed by the Drafting Committee (*concluded*)

Articles 1–23 (*concluded*)

Section 2 (Provisions relating to each type of succession of States)

The title of section 2 was adopted.

Article 19 (Transfer of part of the territory of a State)[1]

Article 19 was adopted.

Article 20 (Newly independent State)[2]

1. Mr. REUTER wished to make a reservation with regard to article 20. His understanding was that the article implied an obligation to conclude an agreement on the basis of the principles embodied therein, but he did not think the article was worded sufficiently clearly to express that idea.

2. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted draft article 20, subject to the reservation entered by Mr. Reuter.

It was so decided.

Article 21 (Uniting of States),

Article 22 (Separation of part or parts of the territory of a State), *and*

Article 23 (Dissolution of a State)[3]

Articles 21, 22 and 23 were adopted.

Articles A and C

3. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles A and C, on State archives, as adopted by the Committee (A/CN.4/L.299/Rev.1/Add.1), which read:

Article A. State archives

For the purposes of the present articles, "State archives" means the collection of documents of all kinds which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been preserved by it as State archives.

Article C. Newly independent State

1. When the successor State is a newly independent State:

(*a*) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(*b*) 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 newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State, otther 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 newly independent 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 newly independent 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 newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the articles in the present Part.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State 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.

4. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had been unable to decide whether draft articles A and C should be included in part II of the draft, relating to State property, or whether they should form the subject of a new part IV. It had finally taken the view that the question was one for the Commission itself to decide. It had therefore kept to the arrangement suggested by the Special Rapporteur in his report and had submitted the two draft articles as an addendum (A/CN.4/L.299/Rev.1/Add.1) to the document setting forth articles 1 to 23.

5. Article A defined "State archives" and, like article 5,[4] which defined "State property", referred to the internal law of the predecessor State. Unlike article 5, however, it contained the words "and had been preserved by it [the predecessor State] as State archives", so as to make it clear that the reference to internal law related only to the belonging of archives and not to their preservation as State archives. The object was to ensure the public documents of recent origin, which under the law of some countries would not be designated as State archives until a certain period had elapsed, should not be excluded from the scope of the draft. The Commission would note that the word "appartenaient" had been used in the French version of

[1] For text, see 1568th meeting, para. 3.

[2] *Idem.*

[3] *Idem.*

[4] *Idem.*

both article 5 and article A, whereas in the English version the words "were owned" had been used in article 5 and the words "belonged to" in article A. That was because the latter term was considered more appropriate for archives. The word "documents" included not only paper but also any other materials, a point that the commentary should reflect.

6. Article C, entitled "Newly independent State", was modelled on article 11 [5] of the draft, relating to State property, but in essence it retained the provisions of article C as submitted by the Special Rapporteur. [6] Paragraph 1 (*a*) set forth the same rule for archives as did paragraph 1 (*a*) of article 11 for movable property. Paragraph 1 (*b*) dealt with State archives required for the administration of the territory concerned. The phrase originally proposed by the Special Rapporteur, "administrative and technical archives connected with the activity of the predecessor State in regard to the territory", had been replaced by the words "which for normal administration of the territory... should be in that territory", to obviate the need for defining "administrative and technical archives" and to make the text more precise by referring to the criterion of situation in the territory rather than mere connexion with it. Paragraph 2 of the original text had been deleted as relating not to succession of States but to relations of co-operation between the two States after State archives had passed. The new paragraph 2 was a modified version of the original paragraph 3. In addition to making certain changes for the sake of precision, the Committee had added the words "or the appropriate reproduction of", to encourage the exchange of the reproductions in question where appropriate. Paragraph 3 was new and had been formulated to take account of the newly independent State's need for evidence from documents relating to its territorial sovereignty or clarifying the meaning of the State archives that had passed to it. Paragraphs 4 and 5 were simplified versions of paragraphs 4 and 5 of the original text and corresponded to paragraphs 2 and 3 of article 11. The changes made in paragraphs 4 and 5, which concerned style alone and not the substance of the provisions, might perhaps be introduced in article 11 as well. Paragraph 6 was a slightly modified version of the original paragraph 6. Apart from making certain purely drafting changes, the Committee had added a reference to the right to development of the peoples of the States concerned, to take account of views expressed in the Commission.

7. Lastly, the Committee had considered the question of the temporal application of the draft articles in the light of article 7 of the 1978 Vienna Convention. [7] It had decided not to draft an article on that subject and to refer the matter to the Commission.

8. The CHAIRMAN suggested that the Commission should first take a decision on the wording of draft articles A and C as presented by the Drafting Committee and then on the two general questions raised by the Committee's Chairman, namely, the placing of the articles on State archives in the draft as a whole and the temporal application of the draft articles.

ARTICLE A [8] (State archives) [9]

9. Mr. BARBOZA was unable to approve the definition contained in article A, which was tautological and therefore meaningless. Moreover, it made reference to internal law not only to determine which documents belonged to the predecessor State but also for the purpose of the definition itself. A better approach would be first to define archives in the light of their basic component, namely, the documents themselves, and by reference to the concept of a collection made either by the State or by a private individual. Having thus defined State archives, the draft could then specify that they were archives which, under the internal law of the predecessor State, belonged to that State. Such a definition would reflect the views of the Commission more accurately.

10. Mr. REUTER expressed entire agreement with Mr. Barboza.

11. Mr. QUENTIN-BAXTER also endorsed Mr. Barboza's comments. The discussion in the Drafting Committee had shown how difficult it was to find wording that reflected accurately the intention behind the definition. For example, an expression such as "public records", in current usage under the system of law of his own country, New Zealand, did not necessarily have any particular meaning for those versed in different systems of law. He therefore thought that the Commission would be greatly assisted by comments on the matter from Governments.

12. Sir Francis VALLAT warmly congratulated the Drafting Committee on its work on the draft articles, but considered that the Commission's study of the topic of State archives was not sufficiently advanced to enable him to approve unreservedly either of the proposed articles A and C. Although not opposed to those articles, he considered, like Mr. Quentin-Baxter, that it would now be extremely useful for the Commission to have the comments of Governments, not only on the concept or archives itself but also on the question whether archives should be dealt with in a general article alone, or in a general article supplemented by articles dealing with particular cases. He would therefore refrain from detailed comment on the question of State archives at the moment, but would not object to the Commission approving articles A and C at the current session.

13. Mr. USHAKOV considered article A acceptable as a first attempt at defining State archives. He too reserved his position on the article, however, because the part of the draft dealing with State archives was

[5] *Idem.*

[6] See 1563rd meeting, para. 21.

[7] See 1568th meeting, foot-note 3.

[8] For consideration of the text initially submitted by the Special Rapporteur, see 1560th to 1562nd meetings, and 1563rd meeting, paras. 2–20.

[9] For text, see para. 3 above.

incomplete and it would be premature to take a final decision on the definition of State archives at the first reading.

14. The CHAIRMAN proposed that the Commission should adopt draft article A and state in its commentary that it would examine the article further in the light of the views expressed by Governments in the General Assembly.

It was so decided.

ARTICLE C[10] (Newly independent State)[11]

15. Mr. VEROSTA said that the words "or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State", in paragraph 3 of article C, proved that the definition in article A was inadequate, since it was necessary to explain more fully what was meant by State archives. In his opinion, the Special Rapporteur should send a questionnaire to States asking them what they understood by the expression "State archives".

16. Mr. REUTER thought that the word "or", at the beginning of paragraph 2, should be replaced by the word "and", since, in the case of archives of common interest to the predecessor State and the successor State, either State was entitled to call for the reproduction of archives passing to the other. Archives of the predecessor State passing to the newly independent State might therefore have to be reproduced as well if each State were to "benefit as widely and equitably as possible from those parts of the State archives", as provided in paragraph 2.

17. Paragraph 6 did not accurately reflect the intention of the members of the Drafting Committee and the Commission, who had not sought to lay down a rule of *jus cogens*. He thought a positive formulation would be better, with the words "shall respect the right" replacing the words "shall not infringe the right".

18. Mr. BARBOZA said that the expression "title to the territory", in the English version of paragraph 3, had been rendered in Spanish by "el dominio sobre el territorio". The word "dominio", however, generally had internal law connotations, and he knew of no case in which it had been used to refer to territory as understood in international law. It therefore seemed to him that the words "título sobre el territorio" would reflect the English wording better, although he would be prepared to accept any other suitable wording that the Secretariat might suggest.

19. Mr. REUTER said that in French the word "domaine" referred not to the territory of the State but to the régime of State property. Accordingly, in paragraph 3, the Commission had a choice between two solutions: to follow the French terminology and speak of the "domaine de l'Etat nouvellement indépendant", or to bring the French version into line with the English and use the words "titres territoriaux de l'Etat nouvellement indépendant".

20. Mr. USHAKOV said that the word "or" should be retained at the beginning of paragraph 2, for there would be reproduction of archives only if they failed to pass. Also, the word "appropriate" should apply to both passing and reproduction.

21. With regard to paragraph 3, he suggested that for the time being the Commission should adopt the English version, which was the original, and then bring the French and Spanish versions into line with the English.

22. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that paragraph 3 had been adopted in its English version, and that there was some difficulty in translating terms peculiar to the English system of law into other languages. However, the translation problem could perhaps be resolved by the Secretariat in consultation with the French-speaking and Spanish-speaking members of the Commission.

23. There were two separate limbs to paragraph 3. The first, which related to the possible need of the newly independent State for evidence of its sovereignty over territory, took the form of an obligation of the predecessor State to provide the newly independent State with the best available evidence from documents in the predecessor State's archives. The second concerned the possibility that the part of the archives that passed to the newly independent State made reference to documents that did not pass, and that that part could not be fully understood unless evidence from those documents was made available. In his view, the expression "best available evidence" applied to the first limb of the paragraph but not to the second.

24. With regard to Mr. Reuter's suggestion that in paragraph 2 the word "or" should be replaced by the word "and", he pointed out that the paragraph provided that, leaving aside the cases in which archives passed automatically to the newly independent State in their original form, the States concerned would have a choice between the passing or the appropriate reproduction of archives. In that sense he considered that the paragraph was correctly worded.

25. Mr. QUENTIN-BAXTER felt bound to point out that in the English version—and, he believed, in the French version—the expression "best available evidence" clearly and rightly applied not only to documents bearing on title to the territory or boundaries of the newly independent State but also to documents that clarified the meaning of State archives which had passed to it. For example, if evidence yielded by documents in court proceedings in the successor State was incomplete or misleading, the court would not be satisfied with mere information about the content of other pertinent documents; it would require evidence from those documents, for instance in the form of a certified photostat copy of the original. That was the intention behind the provision.

[10] For consideration of the text initially submitted by the Special Rapporteur, see 1563rd meeting, paras. 21 *et seq.*, and 1564th and 1565th meetings.

[11] For text, see para. 3 above.

26. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, whereas title to territory or boundaries might well be the subject of court proceedings, the same could not be said of what was dealt with in the second limb of the paragraph, namely, the need to know the content of documents, as opposed to knowing of their existence, in order to have a clear understanding of the meaning of archives that had passed to the newly independent State. The second limb of the paragraph therefore seemed to apply to something a little wider than mere submission of evidence in court.

27. Mr. USHAKOV proposed the replacement at the end of paragraph 3 of the words "pursuant to other provisions of the articles in the present part" by the words "pursuant to other provisions of the present article", since the provisions of article C would be the only ones to apply to the passing of State archives to a newly independent State.

28. Mr. DÍAZ GONZÁLEZ said that the expression "best available evidence" was rather obscure in the context, at least in the Spanish version. It was not so much a question of proving the existence of a document as of securing the best copy available, for production as evidence. Perhaps the best course would be to ask the Secretariat to align the French and Spanish versions with the English.

29. Mr. RIPHAGEN thought the amendment proposed by Mr. Ushakov would improve the draft.

30. With regard to the comment of Mr. Díaz González, it would be for the court concerned to determine what constituted the best available evidence and whether, for example, it would be satisfied with a certified copy. He agreed that the question of aligning the different versions should be left to the Secretariat.

31. Sir Francis VALLAT suggested that, to dispel any doubts about the intention behind paragraph 3, a colon should be placed after the words "State archives of the predecessor State", and that the remainder of the paragraph should be subdivided into two subparagraphs, (*a*) and (*b*). That would reproduce the format of articles 34 and 35 of the 1978 Vienna Convention.

32. Mr. VEROSTA fully supported that suggestion, although the doubts he had expressed in the Drafting Committee regarding the second limb of the paragraph remained.

33. Mr. NJENGA said that the subdivision of paragraph 3, as suggested by Sir Francis Vallat, could give rise to serious problems. He for one could not accept the change if it meant that the second limb of the paragraph did not refer to documents bearing upon title. In the circumstances, it would be better for the paragraph to stand as drafted.

34. Sir Francis VALLAT said that his suggested amendment would have precisely the effect Mr. Njenga wished: in other words, subparagraph (*b*) would be entirely general in its terms.

35. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to replace the words "pursuant to other provisions of the articles in the present part" by the words "pursuant to other provisions of the present article".

It was so decided.

Article C, as amended, was adapted.

PLACING OF ARTICLES A AND C IN THE DRAFT

36. The CHAIRMAN invited the Commission to settle the question of the position of articles A and C in the draft. By issuing the texts of those articles in an addendum, the Drafting Committee had to some extent indicated the path the Commission might follow. Furthermore, the Commission's discussion of articles A and C had shown that the Commission might take the same course as the Drafting Committee. If it did so, it should make it clear that by adding articles A and C to the draft articles it intended that the question of their ultimate place in the draft should be decided in the light of comments made by Governments after they had studied the draft.

37. Mr. USHAKOV thought that was undoubtedly the best solution: it was too early to decide whether articles A and C should be included in the part of the draft articles dealing with State property or whether they should form the subject of a separate part of the draft. However, articles A and C did not exhaust the question of State archives in the case of succession of States, for consideration would have to be given to the various types of State succession. It was true that the Commission had completed its first reading of articles 1 to 23, but it could not be regarded as having completed its work on the provisions relating to State archives.

38. Sir Francis VALLAT said he could agree to the course suggested by the Chairman provided that the Commission's report indicated the background to articles A and C and included the text of the other articles submitted by the Special Rapporteur in connexion with State archives. It was important that Governments should be able to examine the material that had been placed before the Commission during its consideration of the topic.

39. The CHAIRMAN proposed that the Commission follow Sir Francis Vallat's suggestion, but on the understanding that the other articles submitted by the Special Rapporteur would be reproduced in the report for information only.

40. If there were no objections, he would take it that the Commission decided to adopt that procedure.

It was so decided.

TEMPORAL APPLICATION OF THE DRAFT ARTICLES

41. The CHAIRMAN said that the Drafting Committee had considered the question of the temporal application of the draft articles; it had not deemed it possible to propose a definite text on the subject for the time being, and had suggested that the matter should be dealt with on the basis of article 7 of the 1978 Vienna Convention.

42. Mr. USHAKOV said that he had been responsible for the Drafting Committee's suggestion. The draft in course of preparation contained no provision on temporal application corresponding to article 7 of the 1978 Vienna Convention. Since that article was of fundamental importance, he proposed that the Commission should take it as a basis, but using only paragraph 1. It would thus be clear that, unless otherwise agreed, the draft articles would apply solely to a succession occurring after their entry into force. Article 7 of the 1978 Vienna Convention stemmed from article 28 of the Vienna Convention on the Law of Treaties,[12] which laid down the general principle of the non-retroactivity of treaties. Unless the draft articles contained a provision on temporal application, a number of States might be reluctant to accept them.

43. The CHAIRMAN said that it was his understanding that the Drafting Committee was merely suggesting that the Commission should sooner or later settle the question of temporal application by reference to article 7 of the 1978 Vienna Convention. If that was correct, it would suffice to say in the report that the Commission had examined the question in general terms and that it favoured the course of action recommended by the Drafting Committee. Mr. Ushakov, however, seemed to be saying that the Committee should draft an article corresponding to article 7 of the 1978 Vienna Convention at the current session.

44. Mr. USHAKOV said that it was his understanding that the Drafting Committee was asking the Commission for permission to prepare an article corresponding to that article 7. Merely to mention the question of temporal application of the draft articles in the commentary would mean leaving it unresolved.

45. The CHAIRMAN pointed out that the Committe had raised the question because the Commission had not had time to discuss it. The Commission would have to debate the question of the temporal application of the draft articles before it could give the Drafting Committee instructions on the matter.

46. Mr. REUTER could see no objection to the Commission stating now that it favoured the application of principle of non-retroactivity of treaties to the draft articles in course of preparation, but it should not embark on a technical discussion of the drafting of a provision on that subject at the current session. The members of the Commission should first have studied such additional articles as might be forthcoming on the question of State archives.

47. Sir Francis VALLAT said it was obvious that the Commission would find it virtually impossible, in the little time remaining at the current session, to deal with the question of temporal application, a matter that had to be examined in terms of the substance of the articles concerned. It would not be satisfactory to make use solely of paragraph 1 of article 7 of the 1978 Vienna Convention, nor would it be possible to include paragraphs 2, 3 and 4 of that article in the draft, since they involved special considerations and political and legal difficulties that had been discussed at great length at the United Nations Conference on Succession of States in Respect of Treaties. Nevertheless, the matter was of such importance that it should figure prominently in the Commission's report, possibly in the form of a subdivision of the introduction to the subject, with an indication that the Commission recognized the need for further consideration of the problem of temporal application of the draft articles and that it would find it most helpful to have the views of Governments in that regard.

48. Mr. USHAKOV said that he would not insist on the preparation by the Drafting Committee of an article on the question of temporal application at the current session, although that seemed to him an easy task, since article 7 of the 1978 Vienna Convention was available as a model. However, such an article would have to be drawn up sooner or later, failing which the draft articles would have a very limited application, since all successions of States occurring before they entered into force and entailing the creation of newly independent States would escape their provisions.

49. The CHAIRMAN said that all the members of the Commission who had spoken about the temporal application of the articles seemed to conclude that the Commission should consider the matter, but that it had insufficient time to do so at the current session.

50. If there were no objections, he would take it that the Commission decided simply to deal with the matter in its report by indicating the views expressed on the subject and by emphasizing the need to include in the draft articles, before their final adoption, an article on the temporal application of the draft.

It was so decided.

TITLE OF THE DRAFT ARTICLES AND ARTICLE 1 (Scope of the present articles)[13]

51. The CHAIRMAN reminded the Commission that the Chairman of the Drafting Committee had explained (1568th meeting, para. 7) why the Committee had not made any changes in the title of the draft or in the text of article 1. The main point was whether the Commission wished to state in the title and in article 1 the matters with which the draft articles dealt.

52. Mr. USHAKOV said he had no very definite view on the subject. Perhaps the Commission should state that article 1 was approved on an entirely provisional basis and that the final wording of the article would depend on the views expressed by Governments and the instructions of the General Assembly.

53. Mr. VEROSTA agreed with Mr. Ushakov. It would be best for the Commission not to alter the wording of article 1 until it knew whether the articles

[12] See 1568th meeting, foot-note 4.

[13] For text, see 1568th meeting, para. 3.

on State archives would be incorporated in the part of the draft dealing with State property or whether they would form a separate part of the draft.

54. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had not wished to prejudge the Commission's decision on the title of the draft and the text of article 1, a decision that would be taken in the light of the future programme of work. If the topic of succession of States in respect of matters other than treaties were placed on the agenda for the Commission's thirty-second session, the question could be left open. On the other hand, if the Commission took the view that it could not proceed further with the topic and submitted the draft articles to the General Assembly, it would be more realistic for article 1 to stipulate that the draft applied to the effects of succession of States in respect of State property, State debts and State archives.

55. Mr. REUTER did not think the title of the draft or the text of article 1 should be altered. As yet, the Commission did not even know whether the draft articles would result in a convention. If there had to be a drafting change, however, it should be in the French version of the title of the draft, in which the words "dans les matières" should be replaced by the words "dans des matières".

56. Sir Francis VALLAT said that the English version of the title was ambiguous, for it did not indicate whether the subject was treated exhaustively or not. The best course would be to retain the text in its existing form, at least in the English version.

57. Mr. SUCHARITKUL agreed with Sir Francis Vallat. At an earlier session he had pointed out, in connexion with the definition of State debts, that the Commission was dealing solely with financial obligations.[14] Consequently, the Commission had not dealt exhaustively with every kind of State debt, let alone with all the other matters that might be affected by State succession.

58. Mr. RIPHAGEN (Chairman of the Drafting Committee), speaking as a member of the Commission, said that the French version of the title of the draft was not at all ambiguous, whereas the English version was. To introduce that ambiguity in the French version, the Commission should make the change suggested by Mr. Reuter.

59. Mr. BARBOZA said that fortunately the Spanish version was as ambiguous as the English. The French version should therefore be brought into line with the Spanish and English versions.

60. The CHAIRMAN said that the Commission as a whole seemed to agree that, in the French version of the title of the draft articles, the words "dans les matières" should be replaced by the words "dans des matières", and that it should be left to the Drafting Committee to explain the reasons for the change.

The title of the draft articles, as amended in the French version, was adopted.

Article 1 was adopted.

61. The CHAIRMAN proposed that the Commission should decide to submit articles 1 to 23 and articles A and C of the draft articles on succession of States in respect of matters other than treaties to the General Assembly for transmission to Member States for their comments.

It was so decided.

62. Mr. USHAKOV wondered whether the Commission should await the views of Governments on articles A and C before continuing the preparation of provisions on State archives.

63. The CHAIRMAN, supported by Mr. YANKOV, observed that the Commission could not predict the outcome of the matter in the General Assembly. It must await instructions on whether or not to continue the preparation of articles on State archives.

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

[Item 2 of the agenda]

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

ARTICLE 31 (*Force majeure*) *and*

ARTICLE 32 (Fortuitous event)[15] (*continued*)

64. Sir Francis VALLAT suggested that the Commission should leave aside the titles of articles 31 and 32 for the time being and consider the principles enunciated in those articles. In that way, it would be possible to devise titles that were more in accord with the content of the articles. In common law systems, for example, the term "*force majeure*" was employed with a somewhat special meaning: it referred to specific events, sometimes called "acts of God", as well as to others such as lightning, thunder, storm, pestilence, earthquake and war, and the point at issue was usually the actual consequences of the *force majeure*. Article 31, however, was concerned with further matters, such as absolute impossibility—although it was questionable whether the word "impossibility" required the qualifying adjective—and cases in which some choice was open to the organ of the State. Article 32 dealt with the situation in which it was impossible for the author of the conduct attributable to the State to realize that its conduct was not in conformity with the international obligation. It might therefore be fruitful for the Commission to concentrate first on the substance of the articles.

65. Mr AGO said that the Commission should, as always, concentrate its attention on the substance and principles to be defined in the text of the articles, and treat titles as a matter of secondary importance. As Sir

[14] See *Yearbook... 1977*, vol. 1, pp. 30 and 31, 1421st meeting, paras. 24–26.

[15] For texts, see 1569th meeting, para. 1.

Francis Vallat had indicated, there were cases in which it was genuinely impossible to perform an international obligation. Although the expression "absolute impossibility" might not appear to be very satisfactory, it demonstrated clearly that there were occasions when it was materially impossible to comply with an international obligation. It was especially to situations of that kind to that the continental law systems applied the term "*force majeure*". Anglo-Saxon lawyers were undboutedly faced with a difficulty, since they preferred to use the French term "*force majeure*" rather than *vis major*. For them, the concept of *force majeure* evoked primarily "acts of God", which covered only natural events, whereas the concept of *force majeure* also covered situations resulting from human action.

66. In short, Sir Francis Vallat was right to suggest that the Commission should confine its attention to the following three questions. Where it was "materially impossible" to adopt the conduct required by an international obligation, did that preclude the wrongfulness of conduct not in conformity with that obligation? Where a State organ that should have adopted a particular course of conduct failed to do so because it was in distress and could at most choose between the conduct required of it and the conduct it adopted, but where it could not reasonably be expected to have adopted the conduct required of it because that would amount to self-destruction, did that preclude the wrongfulness of the organ's conduct? Where an external and unforeseen event made it impossible for an organ to realize that its conduct was in breach of an international obligation, did that preclude the wrongfulness of the conduct?

67. Referring to his oral presentation of articles 31 and 32 at the previous meeting, he wished to thank the Secretariat for its valuable assistance in providing him with materials on *force majeure* and fortuitous event. The Secretariat study entitled "State responsibility—'*force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctorine"[16] had not only helped him greatly in preparing his report but would also be appreciated as an authoritative work of great academic value.

The meeting rose at 1 p.m.

[16] *Yearbook... 1978*, vol. II (Part One), document A/CN.4/315.

1571st MEETING

Wednesday, 18 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

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

[Item 2 of the agenda]

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

ARTICLE 31 (*Force majeure*) *and*

ARTICLE 32 (Fortuitous event)[1] (*continued*)

1. Mr. RIPHAGEN said that articles 31 and 32 submitted by Mr. Ago formed an excellent basis for discussion. The Commission could not ignore the special circumstances provided for in those articles if it wished to take account of the concept of justice, which was not only universal and permanent, but also concrete, as indicated by the maxim *jus in causa positum*. Nevertheless, there were inherent difficulties in treating the subject-matter of *force majeure* and fortuitous event within the framework of the draft, which was at a very high level of abstraction, for two reasons: first, because the draft dealt with the legal relationship between States, which were themselves abstractions; secondly, because it dealt with the responsibility of States irrespective of the content of the obligation whose non-performance entailed that responsibility, as could be seen from articles 1 and 16,[2] and irrespective of the content, forms and degree of responsibility—matters that would be treated later, in part II of the draft.

2. With regard to the first level of abstraction, articles 31 and 32 were concerned with the situation in which the author of the conduct attributable to the State was placed, in other words, the situation of the individual through whom the State was considered to act; account also had to be taken of the situation of the individuals through whom the State suffered, as was shown by the last phrase of article 31, paragraph 2. As to the second level of abstraction, an effort had to be made to resolve the problem without drawing any distinction between the two sides of the legal relationship between States, namely, the content of the obligation of one State and the content of the right of the other. It was in that context that the Commission faced the difficult task of dealing with the impact of the unforeseeable.

3. The problem involved an abstract obligation of one State with a corresponding abstract right of another State, and vice versa—which touched on the content of the so-called primary rule. On the other hand, the Commission also had to deal with responsibility,

[1] For texts, see 1569th meeting, para. 1.

[2] See 1532nd meeting, foot-note 2.