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Summary record of the 1001st meeting

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

Extract from the Yearbook of the International Law Commission:-
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decided that it would examine as a priority topic in 1970 the succession of States in respect of matters other than treaties. The Commission was now able to discuss an important aspect of that topic thanks to the commendable effort made by the Special Rapporteur in submitting a second report despite his heavy official commitments.

34. The Special Rapporteur's approach and conclusions were acceptable in the light of the contemporary situation among States, of the decisions and resolutions of the United Nations and of the basic principles of international law.

35. He agreed with the Special Rapporteur that the political aspects of the topic had so far overshadowed its legal aspects and he approved of the Special Rapporteur's view that the theory of acquired rights could only be studied from the starting point of the basic principles of international law. Foremost among those principles was that of the equality of States; since all States were equal in rights and in obligations, a successor State had the same sovereign rights as the predecessor State, including the sovereign right to dispose of its natural resources.

36. The second relevant principle of international law was that of self-determination, which was not a political principle but a legal principle. That principle had been recognized in the International Covenants on Human Rights [8] and constituted a rule of *jus cogens*. At the Vienna Conference on the Law of Treaties, during the discussion of article 49 of the draft, on coercion of a State by the threat or use of force, and of the amendment to that article of which Afghanistan had been one of the sponsors, he had pointed out that political self-determination was meaningless unless supplemented by economic self-determination.[9] It was precisely for that reason that the Group of 77 States were working for economic self-determination in UNCTAD. In the light of those facts, he supported the Special Rapporteur's rebuttal of the theory of acquired rights.

37. There were many decisions and resolutions of the United Nations which were of special relevance and which showed the approach of contemporary international society to the important issue under discussion. The Special Rapporteur had appropriately referred to the historic Declaration on permanent sovereignty over natural resources, adopted by the General Assembly in its resolution 1803 (XVII), but it was important to remember that that declaration was a complement to the famous Declaration on the granting of independence to colonial countries and peoples, contained in General Assembly resolution 1514 (XV). To those decisions must now be added the very recent Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties adopted by the United Nations Conference on the Law of Treaties and annexed to the Final Act of that Conference [10] and the resolution, relating to that same Declaration, whereby the Conference requested "the Secretary-General of the United Nations to bring the Declaration to the attention of all Member States and other States participating in the Conference, and of the principal organs of the United Nations". Those recent decisions were especially relevant because many of the acquired rights claimed by predecessor States had been procured by coercion, and hence by illegal means.

38. Reference had been made to the question of compensation. Undoubtedly, in many cases, developing countries had agreed to grant compensation, but such decisions had been taken of their own free will. There was no rule of international law which limited national sovereignty or curtailed the principle of self-determination in that respect.

39. He supported the Special Rapporteur's request for documentation, but pointed out that the Secretariat would only be required to supplement material which had already been gathered, since in 1961 a circular had been sent to States Members of the United Nations and a considerable quantity of information had been assembled by the Office of Legal Affairs, some of which existed only in mimeographed form. In addition, the Secretariat had prepared a study on the question of permanent sovereignty over natural resources,[11] which contained much valuable material. Apart from supplying additional information of that kind, the Secretariat could also assist by making available to members of the Commission studies prepared by learned societies, such as the International Law Association, which had discussed the question of State succession at its Conference at Buenos Aires in August 1968.

The meeting rose at 5.55 p.m.

[8] See General Assembly resolution 2200 (XXI).

[9] See *United Nations Conference on the Law of Treaties, First Session, 1968, Official Records*, pp. 269 and 270, paras. 21-26.

[10] A/CONF.39/26.

[11] A/AC.97/5/Rev.2, United Nations publication, Sales No.: 62.V.6.

1001st MEETING

Tuesday, 17 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216)

[Item 2 (*b*) of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's

second report on succession of States in respect of matters other than treaties (A/CN.4/216).

2. Mr. EUSTATHIADES said that it was mainly the effects of territorial changes that were being examined under the heading of State succession and most of the solutions adopted in practice for the problems raised by State succession up to the Second World War had been dictated by particular concrete needs. Similarly, the problems raised by the emergence of new States had been solved in the past, and were still being solved in the post-war period, according to the conditions under which independence had been gained and other factors peculiar to each individual case, so that various difficulties were overcome by special regulation and arrangements. What had to be ascertained was whether, in the absence of such solutions, it was possible to isolate general rules and principles already in force. But what was found was trends, rather than established rules.

3. Approaching the question of acquired rights from that angle, he did not think they could be considered as a guiding principle in State succession, either from the point of view of positive law or *de lege ferenda.*

4. The Special Rapporteur had argued at length the case for the rejection of acquired rights. The arguments advanced in paragraphs 7 to 17 of the report, based on the general theory of law and on data from juridical sociology, were the most convincing, because they were more objective than the other arguments in the report. That introduction was enough to convince him, since he had already had serious doubts about the theory of acquired rights as a generally valid guiding principle. From that theoretical and sociological standpoint, he was therefore in agreement with the Special Rapporteur, subject to the question whether the idea should not be regarded as deriving from practices in a particular field, such as private interests.

5. Among the other points advanced by the Special Rapporteur, some were very convincing, others much less so. He did not think so much importance should be attached to General Assembly resolution 1803 (XVII). The principle of the right of every State to dispose of its natural resources was not necessarily linked to the status of successor State or to the effects of State succession in general. Neither that principle, nor the question of compensation, which was dealt with from a particular angle in the resolution, appeared to have any direct bearing on the case for the rejection of acquired rights. Also, it did not seem helpful to invoke the principle of peaceful coexistence in a discussion of acquired rights. Peaceful coexistence implied acceptance of the existence of different social systems some of which permitted nationalization without compensation, while others made it contingent on compensation.

6. On the other hand, four ideas put forward in support of the rejection of acquired rights as a guiding principle of the succession of States seemed fruitful and convincing.

7. First, the Special Rapporteur rightly pointed out that some earlier decisions, including decisions of international tribunals, were based on treaty arrangements and settled particular situations. He (Mr. Eustathiades) thought that such solutions could only indirectly affect the question of the existence of a general principle of respect for acquired rights. Secondly, the concept of acquired rights was too uncertain and controversial for it to be raised to the status of a guiding principle in matters of State succession. Thirdly, it was important to remember that what occurred was a substitution and not a transfer of sovereignty. That was an important aspect of the question, which militated strongly in favour of the denial of acquired rights. Lastly, the concept of equality of States, on which the whole report was based, should not be overlooked.

8. On the latter point, however, the Special Rapporteur was perhaps too much taken up with inter-State relations, and private interests tended to be lost sight of. It would be better to place more emphasis on the concept of substitution of sovereignty, which led up to the principle of the equality of States, instead of making that the guiding principle of the report. The principle of the equality of States did not, however, get rid of the problem. Could not the new State, as a successor State, have additional obligations without that infringing the principle of equality? The Special Rapporteur's comments in paragraphs 22, 23 and 25 showed that the principle of equality was not so important as to justify its dominating the whole report.

9. The great merit of the report was that it showed that, apart from cases of succession which were the subject of a specific settlement or treaty arrangement, there was no general legal rule of respect for acquired rights.

10. However, although the concept of acquired rights was not the key which opened all the doors of State succession, that did not mean that it could not open any of them. That reservation had to be made both in the light of the practice and *de lege ferenda.* It applied particularly, perhaps, to private rights. Paragraph 2 of the report listed public property and public debts, government contracts and concession rights. That list covered the economic and financial aspects of the succession of States; it did not, however, cover private rights. In footnote 14 to paragraph 16, in connexion with the survey to be undertaken by the Secretariat, the Special Rapporteur proposed that the results of the survey should be broken down "according to the nature of the acquired rights involved: private rights, regalian or political public rights, government contracts, concessions". That list was the same as the one in paragraph 2, with the addition of private rights. In paragraphs 36 to 38, the Special Rapporteur contrasted political rights, which were bound up with the exercise of sovereignty, with economic and financial rights, which were not directly linked with the State and sovereignty and could perhaps survive. He would therefore like to know how the idea of acquired rights would be treated in the case of private rights. The consequences of the distinction made by the Special Rapporteur were not clearly brought out in his report.

11. As to the studies which the Secretariat was to be asked to undertake, he did not think an exhaustive bibliography of theoretical studies on State succession

need be prepared, but the Secretariat could draw the Commission's attention mainly to those works from which it could obtain the necessary material and documentation.

12. With regard to part II of the report, he noted that the Special Rapporteur had linked the question of equal treatment of nationals and foreigners with the discussion of acquired rights. It was, of course, sound legal practice to put a precise problem in its more general context. The Special Rapporteur did not accept that aliens could be treated more favourably than nationals. Opinions were divided on that point; but even assuming that it could be shown that equality of treatment as between nationals and aliens was already a rule of general international law, that was no answer to the question whether, as a successor, a State could or could not have increased obligations to aliens, in accordance with data from the practice. Consequently, he thought that, in discussing succession, the question of equality between nationals and aliens should not be overstressed.

13. The view expressed in paragraph 74 regarding the public policy of the successor State was open to question. Public policy was not exempt from all control by an international body, as had been shown in connexion with the application of the European Convention on Human Rights.

14. Finally, in paragraphs 36 to 38, 50, 57 to 59 and 151 to 156, the Special Rapporteur very rightly moved forward into the field of international responsibility. The ideas expressed in those paragraphs deserved to be gone into more thoroughly, especially on the basis of precedents from both the most recent and the older international practice. Starting from the rejection of the principle of acquired rights, the Special Rapporteur noted that the actions of the successor State were subject to the same rules as those of any other State. But its obligations could have repercussions on the conduct of the successor State as such. In expressing that idea in the conclusion of his report, the Special Rapporteur had no doubt intended to give it the importance which he (Mr. Eustathiades) hoped to see assigned to it in subsequent work.

15. In his outstanding study, the Special Rapporteur had perhaps laid too much emphasis on decolonization. Admittedly that phenomenon had brought out some very important new ideas, but they were not the only ones to be taken into consideration in the matter of the succession of States.

16. A specific study should be made of the problems raised by the creation of new States apart from decolonization. Moreover, the Commission could not overlook partial territorial changes, for which it might perhaps be possible to find solutions different from those that would be adopted for radical territorial changes resulting in the creation of new States.

17. Mr. KEARNEY said that, at that stage, he would only make some preliminary comments on the approach adopted, and the methods used, by the Special Rapporteur in his second report; he hoped to have an opportunity of dealing with the substance at a later meeting. His present remarks should not be interpreted as indicating any lack of appreciation of the ability and conscientiousness shown by the Special Rapporteur in preparing his extensive and thought-provoking report, which contained considerable substantive documentation and was an undeniable achievement on the part of a man with important and absorbing official duties.

18. The report undoubtedly suffered from technical imperfections in that it adopted a rather unsystematic approach to the identification and citation of quotations, sources and authorities. In paragraph 40 for example, reference was made to a statement by Gaston Jèze, but no indication was given of the source. Again, in paragraph 42, an idea was mentioned and the report then continued: "This idea first appeared in the case of the debts of the Boer Republics of 30 November 1900", without any indication as to when and where the case had been heard, where the opinion on the case could be found or where in that opinion the idea appeared.

19. Paragraph 54 purported to describe the "Anglo-American system of the act of State", but did not cite any authority in support of the description. He (Mr. Kearney) could safely assert from his own knowledge that, as far as the United States was concerned, the description was erroneous.

20. He would not have mentioned those imperfections had there not been another and more serious weakness in the report. On a number of matters of which he had some personal knowledge, the position taken in the report did not coincide with his understanding of the legal and historical situation. One example was the decision of 23 March 1964 by the Supreme Court of the United States in the *Banco Nacional de Cuba versus Sabbatino* case, mentioned in paragraph 55, for which no citation was given and which the Special Rapporteur had interpreted as "rejecting the doctrine of act of State whenever the measure taken by the foreign State was a violation of an international convention or of the common rules generally accepted in international law".

21. In fact, a careful reading of that decision (376 U.S. 398) showed that the United States Supreme Court had held exactly the opposite doctrine. The Supreme Court had quoted an earlier case (*Underhill versus Hernandez*, 168 U.S. 250) as containing the classic United States statement of the "act of State" doctrine: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." [1] The Supreme Court had then reached the following decision: ". . . we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other

[1] *The American Journal of International Law*, vol. 58 (1964), p. 785.

unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." [2] The Supreme Court had thus upheld the doctrine that courts in the United States should not rely upon a claim of violation of international law in order to pass judgement on the validity of the act of a foreign Government taken in respect of property within the territory of the foreign State and subject to its jurisdiction. The interpretation of the Supreme Court decision given in the report was therefore erroneous.

22. The Special Rapporteur's misunderstanding of the United States doctrine in the matter was not vital to any major position taken by him. What was important was that the same kind of misunderstanding could be found in other parts of the report, which showed that it was necessary to check the legal decisions mentioned and the various aspects of State practice cited in order to determine whether the report accurately and completely reflected the ruling in the case mentioned, the legal situation described, or the views of the author referred to.

23. A striking example was the statement in paragraph 19 that "the acquired rights of individuals, even in constitutional texts, will be called in question", to which there was a footnote which purported to describe the position in United States constitutional law. The footnote said: "Acquired rights have often had to be suppressed without compensation in cases where this was justified in the public interest." In fact, it was the clear position in United States constitutional law, and in particular under the Fifth Amendment to the United States Constitution, that the State had the right to expropriate property for a public purpose, but had the duty to make "prompt, adequate and effective compensation" for any property thus expropriated.

24. The footnote supported that erroneous description with a reference to an article on "Problems of International Law in the Mexican Constitution", which could hardly be relevant to a discussion of United States constitutional law, and then went on to refer to problems raised by the abolition of "private telegraphic enterprises . . . and pool halls" adding that "the best-known example is that of the abolition of the manufacture and sale of alcoholic beverages during the famous period of prohibition". In fact, neither private telegraphic enterprises nor pool halls had ever been abolished in the United States, the country to which the passage would seem to refer, to judge from the reference to prohibition. Incidentally, prohibition in the United States had resulted from the Eighteenth Amendment to the Constitution which, of course, had to be given equal weight with the Fifth Amendment.

25. Examples of that kind showed that the report would require careful checking and analysis, for which the absence of adequate source references was a substantial handicap. That was what had led him to confine his present statement to strictly preliminary remarks.

26. In the case of certain substantive passages of the report for which the necessary materials were readily available, he had checked the accuracy and completeness of the statements made. For instance, in paragraph 97, certain statements made in connexion with the British annexation of Upper Burma were mentioned in support of the contention, in paragraph 91, that the "imperial Powers of the nineteenth century which, in their colonial policies, vigorously denied the existence of any rule affording protection to acquired rights . . . have felt able, in connexion with the reverse modern phenomenon of decolonization, to demand the application of the same 'traditional rules'...". The information about the annexation of Burma had in fact been taken from a book on State succession, but the passage quoted in the Special Rapporteur's second report was cited out of context and was, moreover, taken from a letter by one colonial official to another—which could scarcely be said to establish what the Government of the United Kingdom regarded as constituting international law. Moreover, reference to the correspondence quoted in the book showed that a higher ranking colonial official had specifically referred to the relevant rule of international law in the following terms: "I find that international law authorities say pretty broadly and clearly: A power which succeeds another power in sovereignty over a State should fulfil the fiscal obligations and discharge the public debts of the State contracted previously".[3]

27. The next passage in the book clearly showed that the position taken by the British authorities in Burma had not been accepted by the United Kingdom Government as correct, since it read: "That the Colonial Office did not attach great importance to this policy as affording a precedent is clear from a reference made by it to the Law Officers in 1900. The department admitted that Upper Burma was 'an uncivilized country, and it was possible that in dealing with such a State rules more favourable to the succeeding Government could be applied than to the case where two civilized States have been incorporated in Her Majesty's Dominions.' The Law Officers did not comment on this distinction, but reported that a successor State takes over such legal liabilities as have been incurred by the previously existing Government".[4]

28. Since, moreover, that position had been taken by the United Kingdom Government in 1900, it could hardly be said, as was argued in paragraph 91, to have been influenced by any process of decolonization.

29. There was a similar misunderstanding in the passage in paragraph 97, where the Special Rapporteur stated that "Great Britain refused to recognize acquired rights 'because of the absolute character of the [Burmese] monarchy, and the risks ordinarily incidental to a contract with a person irresponsible in law' ". The passage in the book from which that phrase was taken showed that the reference was to the rejection by the United Kingdom of contract claims against the King of Burma in his personal capacity. "Likewise, all claims in respect of contracts made with the King in his

[2] *Ibid.*, p. 792.

[3] D. P. O'Connell, State Succession in Municipal Law and International Law, 1967, vol. I: *Internal Relations*, p. 359.

[4] *Op. cit.*, p. 360.

personal capacity were rejected because of the absolute character of the monarchy, and the risks ordinarily incidental to a contract with a person irresponsible in law."[5] It was clear that the rejection of such personal claims against the former sovereign did not in any way amount to a refusal by the Government of the United Kingdom to recognize acquired rights. The statement made in the report thus failed to reflect accurately what was admittedly a rather complicated legal situation.

30. He himself was not interested in past actions by the United Kingdom in Burma, or in discussing them. He was, however, concerned that when a report urged the Commission to take certain positions partly on the strength of precedents allegedly established by those actions, the reporting of them should be complete and accurate.

31. In his argument, the Special Rapporteur had relied heavily on General Assembly resolution 1803 (XVII), on permanent sovereignty over natural resources. For example, in paragraph 135, he had said that in one of the preambular paragraphs of that resolution, "the right to compensation in the case of succession by decolonization was excluded", and had added: "The United Nations thus showed its awareness of the special nature of succession in the case of newly independent States and indicated the course to be followed in the work of codification and progressive development of international law, with a view to arriving at a positive law of non-compensation". Again, in paragraph 110, he had described that resolution as "the charter of combat of the poor against the rich"; that was certainly pejorative language to use in what purported to be a balanced and non-partisan report on the international law of State succession.

32. The Special Rapporteur referred to operative paragraph 4 of General Assembly resolution 1803 (XVII), which provided that in cases of nationalization, expropriation or requisitioning, "the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law". The Special Rapporteur questioned whether the new State was bound to pay such compensation and in paragraph 111 said: "It is significant that in this well-known resolution one of the preambular paragraphs ... makes a reservation in the case of successor States 'in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule'". Yet the fifth paragraph of the preamble to the resolution read: "*Considering* that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule,". Contrary to what the report asserted, that clear and unambiguous language obviously did not make any reservation in the case of successor States. And the history of the paragraph showed that the Special Rapporteur's interpretation was patently erroneous, since when the text had been discussed in the Second Committee, the Algerian delegation had proposed a paragraph reading: "*Considering* that the obligations of international law cannot apply to alleged rights acquired before the accession to full national sovereignty of formerly colonized countries and that, consequently, such alleged acquired rights must be subject to review as between equally sovereign States,".[6] If that proposal had been accepted, there would have been some justification for the conclusion reached by the Special Rapporteur, but it had in fact been withdrawn and the fifth paragraph of the preamble had been adopted as it now stood. The lack of any reference in the report to a series of events which had a direct bearing on that paragraph must be regarded as a serious defect.

33. He therefore questioned whether the report could be viewed as an impartial analysis of existing international law regarding State succession, or as containing suggestions presented in as neutral a fashion as possible for the resolution of whatever conflicts might exist in that law. On the contrary, the report contained a number of rhetorical statements which were far from impartial. For example, paragraph 9 contained the sentence: "However, the jurist has perhaps better things to do than to engage in a rearguard action that leaves him supporting acquired rights when practice has definitively condemned them". In paragraph 10, the Special Rapporteur said: "Sociology demolishes the concept of acquired rights, for it teaches us that no social group and no State can indefinitely retain its privileges, which are constantly called in question". In paragraph 15, he said: "Today, the elements of the problem seem to have been reversed and if there is anything which threatens to 'open the way to flagrant iniquities', it is surely the maintenance of acquired rights, or even of unconscionable privileges which jeopardize the general interest of an entire community". In paragraph 16, he said: "As a second, supplementary approach, it may be questioned whether the recognition of acquired rights, in a treaty expresses a customary rule of international law or constitutes a departure from a general principle of non-recognition of those rights". In paragraph 17 he said: "Treaties, for example, are nothing more than the outcome of compromises dictated by considerations which distort all the general, or allegedly general, principles of succession". Those examples were sufficient to establish that the report before the Commission was not an impartial analysis of a series of legal problems, but an advocate's brief intended to present arguments in support of a particular point of view and to refute the arguments in support of any other point of view.

34. Furthermore, the position taken by the Special Rapporteur was not based on any legal theory, but on a particular economic and political theory, as was strikingly revealed by the following sentence in paragraph 153 of his conclusion: "This position would, in

[5] *Op. cit.*, pp. 358 and 359.

[6] See *Official Records of the General Assembly, Seventeenth Session, Annexes*, vol. I, agenda items 12, 34, 35, 36, 37, 39 and 84, document A/5344 and Add.1, paras. 75 and 80.

any case, imprison the newly independent countries in the vicious circle of poverty: they cannot nationalize because they are poor, and they remain poor because they cannot nationalize". That statement, he submitted, was pure Marxist mythology, since there was no evidence whatsoever that States remained poor because they could not nationalize. On the contrary, the available evidence tended to support the view that States which nationalized remained poor much longer than States which did not. It would be interesting to know whether the Special Rapporteur could produce any statistical evidence in support of his statement.

35. He did not wish to criticize the method chosen by the Special Rapporteur to deal with such a highly controversial subject as State succession, which, as the latter had said, was as much political in character as legal. Nevertheless, he disagreed profoundly with a number of the Special Rapporteur's conclusions and, in particular, he considered that the legal precedents and principles cited by him were far from unassailable. He was sure the Special Rapporteur realized that disagreement was inevitable concerning the interpretation of judicial decisions, the meaning of historical events and the practice of States. The best plan, therefore, might be to agree to disagree about the past and to concentrate on agreeing for the future. In doing so, it might be wise to abandon the search for categorical statements about acquired rights and to revert to the original plan of dealing with different aspects of succession, such as public debts and the like, which were of great practical importance for developing States and former colonies.

36. The CHAIRMAN said he would be grateful if members of the Commission would kindly not refer to the personal opinions of the Special Rapporteur when discussing his report.

37. Mr. CASTRÉN congratulated the Special Rapporteur on his remarkable and very interesting report on succession of States in respect of matters other than treaties, and on the very clear explanations he had given of it at the previous meeting. He agreed with him that the problem of acquired rights lay at the root of the economic and financial problems raised by the succession of States and that it should therefore be examined thoroughly before studying special aspects.

38. However, the Special Rapporteur had arrived at a negative result: he went so far as to reject the very idea of acquired rights and, in the event of their termination, granted the owners no right to compensation by the successor State, particularly in the case of decolonization. Some of his arguments carried weight, but it was difficult to subscribe to his conclusions without reservation. He might be reproached for being too categorical and for generally considering only the interests of the successor State, which, according to him, was not required to respect the acquired rights even of third States and their nationals, even in cases where such rights had been lawfully granted by the former régime without any intention of harming its successor.

39. It might also be held against the Special Rapporteur that he had devoted nearly the whole of his second report to decolonization; that was certainly a very important matter, as the Commission had unanimously recognized at its previous session, but the Commission had also stressed the need to study all cases of succession of States, including transfers of part of a territory and the constitution or dissolution of unions of States, so that it could derive from them general rules which would also be applicable *mutatis mutandis* to the States which had become independent after the Second World War. There were great differences between those States, both in economic resources and in the way in which they had gained independence. Moreover, to give only one example, if concession rights had been granted by the predecessor State only a short time before independence and the heavy investments they had led to had not yet been amortized, it was neither just nor equitable that such rights should be ceded to the successor State without any compensation. It was true that the idea of acquired rights was not very precise, that such rights were not absolute, and that it was consequently permissible to restrict or even to abrogate them under certain conditions. But it was impossible to accept their pure and simple termination.

40. At the present time, the expression "acquired rights" was generally understood to mean rights deriving from human activities or from certain legal titles such as inheritance, concessions, patents, monopolies and various other privileges which belonged to both private and public law. The protection of acquired rights under international law was particularly important in cases of territorial change, which raised the problem of the treatment of aliens and their legal status. According to a very widely held opinion, a successor State must, like its predecessor and all other States, respect a certain minimum of aliens' rights, which included various acquired rights such as the right to private property. Some lawyers, like the Special Rapporteur, had adopted an entirely negative attitude to the whole idea of acquired rights, alleging that it was not a general principle applicable to the various branches of the law. They claimed that the successor State had the right to abrogate, even without compensation, acquired rights which had originated or been granted in its territory at a time when that territory was under the sovereignty of the predecessor State. Against that opinion it had been argued that the notion of acquired rights was often accepted in international practice, in particular in treaties, in the judgements of national and international courts and in arbitral awards, so it appeared that international law had need of that notion in spite of its lack of precision.

41. Most writers considered that acquired rights, in particular the rights of aliens, could not be terminated unless there were special grounds, one of the principal duties of the State and the government being to protect the right to private property and other private rights of a similar nature. Territorial change was a political fact which should not affect private patrimonial rights of a non-political character; furthermore, States should also respect rights based on the legal order of a third State.

42. Among the special grounds which could properly be invoked by the successor State for modifying or abrogating acquired rights, legal theory, which was

divided on the subject, recognized the fact that a right had been granted in order to injure the successor State, the fact that rights granted by the predecessor State were not in keeping with the new public and social order and the legal concepts deriving from them and, lastly, the general interest. Those three exceptions, the effect of which was very far-reaching, allowed the successor State wide freedom of action.

43. With regard to concessions, some considered that they should be safeguarded, while others thought that the successor State could terminate them on payment of compensation. It seemed to him that the three special grounds he had mentioned should also apply in that case; compensation should depend on the circumstances, the amount should be equitable and payment prompt, in convertible, not depreciated, currency.

44. Although the principle of acquired rights had often been violated, general practice was still inclined to accept it, subject to the conditions he had mentioned. A favourable trend in that direction had appeared in the measures taken for the organization of peace after the First World War and in some of those taken after the Second World War. The States which had become independent at that time had generally recognized the principle of respect for acquired rights, at least in their relations with the predecessor State, and the Universal Declaration of Human Rights, in article 17, paragraph 2, prohibited arbitrary deprivation of private property. The Permanent Court of International Justice had also pronounced in that sense when it had been asked to state its attitude to acquired rights in general.

45. He could not agree that practice had definitively condemned acquired rights, as the Special Rapporteur stated in paragraph 9 of his report, for those rights were still respected in a number of countries. The Special Rapporteur appeared to have overemphasized the sovereignty of the successor State and to have drawn conclusions from it that went too far. He (Mr. Castrén) recognized that there was not a transfer but a substitution of sovereignty (paragraph 29), but the successor State, which was bound by the rules of general international law protecting the acquired rights of aliens, nevertheless did not possess the right to regulate conditions in its territory as it saw fit. That restriction on the sovereignty of the successor State did not conflict with the principle of equality of States frequently invoked by the Special Rapporteur, since other States were also required to respect the rights of aliens. Nor was it merely a question of municipal law, as the Special Rapporteur affirmed in paragraphs 33 and 45 of his report. He (Mr. Castrén) would revert to the question of succession to the public debts of the predecessor State and to the principle of unjustified enrichment as a basis for that succession, which the Special Rapporteur appeared to have condemned in paragraphs 39 to 43, 128 and 133 of his report. He subscribed to the principles stated in paragraph 46 concerning administrative contracts, the protection envisaged being adequate.

46. Several times in his report, for instance at the end of paragraph 50, the Special Rapporteur seemed to have forgotten the independent rules of general international law when trying to prove that the successor State was not bound by the obligations of the predecessor State to aliens, because it had had no part in creating those obligations. With regard to diplomatic protection, he (Mr. Castrén) did not accept the argument put forward by the Special Rapporteur in paragraphs 57 and 59 of his report, where he maintained that a State forced to accord better treatment to aliens than it accorded to its own nationals would ultimately be subjected to the capitulations régime. Nor could he agree that the régime known as an "international minimum standard" was comparable to the capitulations régime, which was obsolete and incompatible with sovereignty, or that it introduced the municipal law of the foreign country into the territory of the successor State, as the Special Rapporteur maintained in paragraph 63. As the name implied, it was an international régime and the only objection that could be made to it was that its limits were not precisely defined.

47. He thought the Special Rapporteur exaggerated the importance of political considerations when he examined, in paragraphs 76 to 79, the reasons for which States had hitherto respected acquired rights in their mutual relations. It was a legitimate assumption that, when their vital interests were not at stake, States tried to observe the rules of international law. The Special Rapporteur criticized the Powers which had practised the *tabula rasa* principle in regard to acquired rights, but the opinions he himself advanced were often on the same lines. To say, as he did in paragraph 108 of his report, that decolonization and the renewal of acquired rights were antinomical, was an exaggeration and a generalization that was difficult to accept. As to paragraphs 110 and 111, where the question of acquired rights was examined in the light of General Assembly resolution 1803 (XVII), he (Mr. Castrén) referred members of the Commission to what Mr. Tammes had said on the subject at the Commission's last session.[7]

48. With regard to paragraph 117, if, as the Special Rapporteur proposed, newly independent States were to be allowed to repudiate those undertakings which in the long run appeared to them likely to hinder their economic development, it must be asked who was to judge their claims and how the interests of the other party to the treaty were to be protected. In paragraph 120, the Special Rapporteur appeared to reject even moral considerations and equity as justification for the payment of compensation. In view of the diversity of cases, it would be better to fix the amount of compensation according to the circumstances. That comment also applied to paragraphs 125 to 127 of the report. As to recourse to global settlements and the substitution of co-operation for compensation, there was no reason why those methods should not be adopted, provided that the general rule was applied in the event of disagreement.

49. Lastly, he noted with satisfaction that the Special Rapporteur had tempered his radical opinions to some extent by saying, in paragraph 156, that the competence

[7] See *Yearbook of the International Law Commission, 1968*, vol. I, p. 109, paras. 53 and 56.

of the successor State was not unlimited and that its actions should always be consistent with the rules of conduct that governed any State.

The meeting rose at 1 p.m.

1002nd MEETING

Wednesday, 18 June 1969, at 12.10 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216/Rev.1)

[Item 2 (*b*) of the agenda]
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second report on succession of States in respect of matters other than treaties (A/CN.4/216/Rev.1).

2. Mr. USTOR said that, as a preliminary comment, he would say that the Special Rapporteur's report was a balanced piece of work which gave a full picture of the various tendencies in the practice and theory of State succession. The Special Rapporteur could not be blamed if he had shown an inclination towards one school of thought rather than another; the Commission would have to take a stand on the report and ultimately choose the course it intended to follow.

3. One criticism he had to make was that the Special Rapporteur had not relied sufficiently on the experience of the Soviet Union and the other socialist States, for in general he seemed rather reluctant to draw the only valid conclusions offered by theory and practice. For example, the first sentence of paragraph 8 read: "It will probably never be possible to say who is right in this centuries-old debate—the supporters or the adversaries of acquired rights". But in his opinion—and he assumed that it was also the Special Rapporteur's opinion—both history and law had already settled that argument, and not in favour of the supporters of the concept of acquired rights, a concept which, in the greater part of the world —the socialist States, Latin America and most of Africa and Asia—could hardly be called "venerable", as the Special Rapporteur termed it in paragraph 11.

4. His impression on reading the report was that what it dealt with was not so much the topic of State succession as State responsibility, particularly that part of State responsibility which related to the treatment of aliens in regard to their property rights. The Commission proposed to deal first only with economic and financial acquired rights, and those were clearly rights of aliens, not of nationals; nationals obviously did not come under international law, whereas aliens might have their residence or place of business either in the territory of the State or abroad. In practice, that might raise extremely difficult and complex questions regarding the nationality of natural or legal persons and the related problems of diplomatic protection. The problem of nationality was already difficult enough in the case of one State, but it was even more difficult if the successor State changed its nationality laws.

5. One point he would like to make was that the French equivalent of the term "acquired rights" was "*droits acquis*", which was usually translated as "vested rights" or "vested interests". The Concise Oxford Dictionary defined "vested rights" as rights "possession of which is determinately fixed in a person and is subject to no contingency". But the question then arose whether in any State there could be rights, particularly economic or financial rights, which were subject to no contingency.

6. Even in the days when all the States of the world had had more or less the same economic and financial system, such rights had not existed, either in theory or in practice. Rights of the individual had their source in domestic laws which were changeable and, indeed, did change from time to time. They might also have their source in a constitution, but even the most rigid constitutions were subject to peaceful or revolutionary change, as also were the rights derived from them. Thus, the expression "acquired rights" or "vested rights" was, if it meant a kind of unchangeable, untouchable and unalterable right, a contradiction in terms; the notion of a right, at least in connexion with property, was always relative and subject to changes, not only in the legal system of the State in question, but also in its economic system. In the socialist States, for instance, there had been a complete transformation of the economic system; the means of production were now almost exclusively under State ownership, and individual property rights did not extend beyond certain limits.

7. His view should not be interpreted as a general denial of values of a universal character, such as the human rights of all human beings, in every kind of society, to freedom, dignity and equality. He merely meant that in the sphere of property rights the world was not uniform, and that there were States and societies which believed that a limitation of those rights was conducive to the general welfare of the population and to the development of human society. That raised the question of the property rights of aliens in a State where there had been a change in the laws of property or in the laws governing the economic system as a whole, with or without the phenomenon of State succession, which seemed to revive the old, and for him now obsolete, debate between the advocates of "equal treatment" and the "minimum standard".

8. As a young man, he had been greatly impressed by the Hungarian Optants case, which had been a *cause*