Document:-

A/CN.4/SR.1006

Summary record of the 1006th meeting

Topic:

Other topics

Extract from the Yearbook of the International Law Commission:-

1969, **vol. I**

However, the concept was retained for purposes of criticism and in expositive works. It was then used to cover what were sometimes called servitudes, a term which he did not favour. Servitudes sometimes derived from treaties, sometimes from customs or usage by which they had been established between two States. An example was military bases on foreign territory. The concept also covered the matters mentioned in paragraph 2 of the report. The question of those alleged acquired rights did not lend itself to a uniform approach. In the case of a new State born of decolonization, the answer was that the new State assumed no obligations of that kind. But it was doubtful whether the answer should be the same for other types of succession, for example, when several States merged, when a State was partitioned, or when part of the territory of one State was transferred to another. In those cases, public property and public debts, servitudes and so on, clearly had to be safeguarded.

48. In short, alleged acquired rights should be studied only with respect to States and differently according to the kind of situation. The Special Rapporteur might well give the Commission some further clarification, at least if that was the wish of members of the Commission and of the Special Rapporteur himself.

49. Mr. EUSTATHIADES said he wished to make a suggestion which might help the Commission to overcome the difficulties with which it was confronted. The concept of acquired rights could be set aside as a general principle and considered only in those fields where acquired rights were respected. The controversy was not so much over the existence or non-existence of acquired rights in general as over continuity or non-continuity of the obligations of the successor State according to the field considered. The Commission might ask the Special Rapporteur to ascertain in what matters there was continuity in the traditional and the new practice, and in what matters there was not. To place the problem in the context of the existence of acquired rights in general could only lead to misunderstandings and, although he himself did not believe in the existence of a general principle of respect for acquired rights, it would be very difficult for him to reply to the questionnaire if the questions remained in their present form.

50. Mr. BEDJAOUI (Special Rapporteur) said that the discussion seemed to have got into a blind alley. He himself would have liked all the members of the Commission to have given their views on that problem of capital importance, but some members wanted him to take it up again first, in order to simplify the issues and clarify the discussion. He would, however, agree to summarize, as well and as fully as he could, at the next meeting, the valuable contributions to the debate made by members of the Commission. That would also make things easier for those members who had been unable to hear them.

51. Mr. BARTOŠ said that there were two theories to be considered: did legal relationships continue in the situations contemplated or did they not? Jurists had been studying the question for a long time and it could not be said that either theory had prevailed. Some countries with a bourgeois social system had not always accepted the continuity theory, whereas some socialist countries had done so in certain cases. The answer depended more on the needs of the country concerned in each case than on its social system in general. Consequently, the Special Rapporteur could not be expected to provide a clear-cut reply. To ask for one would place him in an awkward position. All he could do was to take both theories into account in his study.

52. Mr. EUSTATHIADES said that his suggestion was not intended as support for any particular view; it was merely a method for work. Instead of basing his study on the concept of acquired rights considered as a general principle, the Special Rapporteur could try to determine what cases of continuity or non-continuity were to be found in the classical practice and in the new practice.

The meeting rose at 1.5 p.m.

1006th MEETING

Monday, 23 June 1969, at 10.10 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, 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.4/209; A/CN.4/216/Rev.1)

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

1. Mr. BEDJAOUI (Special Rapporteur) said he wished to make a few comments, some general and some particular, on the various statements that had been heard, to summarize the opinions that had been expressed concerning the basis of acquired rights, and to say a few words about the dividing line between that subject and the subjects of State responsibility and decolonization.

2. The discussion had shown that there were several ways of looking at the matter. Some members of the Commission thought that the question of acquired rights should not be studied at all, either because, like Mr. Ushakov, they considered that acquired rights did not exist, or because they thought that the question belonged not to the succession of States, but to the international responsibility of States. Others, like Mr. Reuter, had expressed the opinion that the matter

should not, as the Special Rapporteur wished, be studied exclusively from the decolonization angle, and that decolonization problems should even be dropped altogether in order to reduce the Commission's workload. Lastly, some speakers wished the Commission to take the theory of unjustified enrichment as the basis for acquired rights.

3. One notable conclusion was that the problem of acquired rights could not be viewed from a single standpoint. Some speakers had urged that a distinction should be made between different types of succession, that acquired rights should not be rejected outright, and that it was necessary to pick out the cases in which the theory was applicable: for example, partial territorial changes, merger and integration. Others thought that acquired rights did not exist, but that the concept might be used with caution in certain kinds of succession of States.

4. The fact of wishing to exclude decolonization from the scope of the Commission's study amounted to recognizing the special character of the problem.

5. He had listened with great interest to the argument of Mr. Tammes who, relying on O'Connell, had said that to maintain the antithesis between the treatment of aliens and that of nationals was to run counter to a sound development and would be contrary to the interests of new States; it would, in fact, have the paradoxical result that public international law would disclaim all interest in acquired rights in one instance, but concern itself with them in another, merely because sovereignty over a piece of territory had changed hands.[1] But if one accepted the modern doctrine of non-discrimination between aliens and nationals, in other words, equal treatment for everybody in regard to acquired rights, it was rather paradoxical to impose a special obligation in the matter on the successor State. For when the predecessor State had exercised sovereignty over the territory, no problem of acquired rights had arisen at the international level, at least so far as nationals of that State were concerned; but if a succession occurred, those nationals became aliens and automatically obtained recognition of their acquired rights by the successor State, which was not the author of those rights, whereas so long as they had been nationals of the predecessor State, which had granted the rights, they had had no possibility of claiming against it. He had also noted the views of Mr. Bartoš, who had emphasized the precariousness of the theory of acquired rights and had shown that investors were so conscious of the risks that they took out insurance.

6. Opinions were also very much divided on the question of the basis of acquired rights.

7. With regard to the treaty basis, he had thought it necessary to state in his report (A/CN.4/216/Rev.1) that those treaties which admitted acquired rights were not free from ambiguity, since it was open to question whether they confirmed an existing principle of acquired rights or merely provided an exception by treaty to the general rule of non-recognition of acquired rights. The ambiguity was all the greater because not all treaties respected acquired rights. Moreover, as Mr. Ustor had pointed out, it was questionable whether the mere repetition of a practice without legal foundation was sufficient to establish a customary rule. Mr. Castrén thought it was. Mr. Eustathiades, like the Special Rapporteur, took the opposite view. Mr. Ustor had further emphasized that treaties often showed more signs of political expediency than of legal rigour.

8. Apart from treaty foundations, another basis of acquired rights might be the transfer of obligations by transfer of sovereignty; but members of the Commission had agreed with him in recognizing that there was not a transfer, but a substitution of sovereignty.

9. The existence of an international obligation must also be rejected as a basis, because the existence of an international obligation outside the legal order of the successor State had not been proved.

10. In the memorandum on the duty to compensate for the nationalization of foreign property, which he had submitted to the Commission in 1963, Mr. Jiménez de Aréchaga had put forward some excellent arguments for rejecting the legal basis of acquired rights.[2]

11. As a possible basis, at least in the opinion of Mr. Reuter, there remained respect for human rights, good faith between States and unjustified enrichment. The criterion of respect for human rights was very difficult to apply in practice, since human rights were interpreted in different countries from an individual or from a collective standpoint and there might be a conflict between the two concepts. The Commission might, however, take human rights as the basis for one of the provisions of the future convention on the succession of States, but, as Mr. Ustor had said, there was no uniformity in the treatment of the right to property, and some States considered that a limitation of that right was more consistent with the needs of the general good and of development.

12. The criterion of good faith had been abandoned by Mr. Reuter himself, who in any case had only suggested it with some hesitation.

13. As for the criterion of unjustified enrichment, which had been discussed at length, it was not a legal basis at all. Mr. Reuter had recognized that it was vague and imprecise. Moreover it was at most a tendency, rather than a rule of international law. In any event, it was a criterion difficult to apply, because it had first to be proved that there had been enrichment. The abolition of acquired rights could mean a loss for their owner without necessarily enriching the State which abolished them. What had to be considered was the actual enrichment of the successor State and not the actual loss suffered by the former owner, still less his loss of earnings. It also had to be proved that the enrichment was "unjustified"—a concept which was extremely difficult to define. Lastly, unjustified enrichment was at most a principle of municipal law. Even admitting that the theory was common to all legal systems, the existence of a common rule was not suffi-

[1] See 1003rd meeting, para. 16.

[2] See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 241 and 242, paras. 31-40.

cient to prove the existence of an identical rule of public international law, and still less to establish such a rule. The theory of unjustified enrichment might, indeed, be retained because it had been invoked in a number of arbitral awards, as Mr. Jiménez de Aréchaga had pointed out in paragraphs 49 and 50 of his memorandum, but there had also been contrary decisions, as was indicated in paragraph 46.

14. There was one form of succession in which the criterion of unjustified enrichment must in any case be excluded; namely, decolonization. As he had stated in paragraphs 128-132 of his report, it was necessary, first of all, to prove that the successor State had been enriched, that the enrichment had taken place at the expense of the claimant, and that the enrichment was unjustified. That was open to doubt in many instances, especially in the case of rights acquired during the "suspect period" and, as Mr. Castrén had stressed, of rights acquired with the intention of injuring the successor State.

15. It was therefore impossible to speak of unjustified enrichment in the case of decolonization. Even though decolonization might be accompanied by a measure of unjustified enrichment, all peoples had a right, as Mr. Tammes had pointed out, to a fair share of wealth and to conditions of economic and social progress, as was proclaimed in Article 55 of the Charter. It had even been suggested in the Economic and Social Council that a development charter should be drawn up confirming that right. The notion of equity in the distribution of wealth had been recognized by the International Court of Justice in its judgement of 20 February 1969 in the *North Sea Continental Shelf cases*.[3] If the Court had acknowledged the possibility of correcting geographical inequalities, there was even more reason for correcting historical inequalities. In any case, there would be a psychological difficulty in applying the theory of unjustified enrichment to decolonization; it would require detailed accounting of all colonial acts and would open the way to painful litigation, which would lead to sullen assessments of the past instead of helping the cause of future good relations between the predecessor and the successor States. Moreover, practical difficulties would make the situation impossible, because in the former colonies all the wealth had belonged to private persons and the successor State would have to buy back the whole colony.

16. Finally, the criterion of unjustified enrichment was impracticable, particularly with respect to decolonization. It might perhaps be applicable, with great caution, to other forms of succession, provided that it was clearly identified as a tendency, not as the categorical and imperative affirmation of a rule of international law.

17. With regard to the question 5 of the questionnaire [4] concerning the boundary between the subject under discussion and the international responsibility of States, it was necessary to know in what form the problem of protecting the acquired rights of aliens arose in cases of succession of States. Mr. Reuter had raised the question whether the Commission wished to study at the same time or separately the problems raised by a succession of States and the problems of the same type which arose in a new or an old State, independently of any succession. He thought that those problems should be studied, but only in connexion with new States. Sir Humphrey Waldock thought that, to be logical, the problems of acquired rights should be studied either in connexion with the succession of States, or in connexion with the responsibility of States, or as a separate subject. Mr. Eustathiades had asked whether the successor State had greater obligations towards aliens and whether that question was related to the succession of States. Mr. Castrén held that the treatment of aliens did not form part of the succession of States. Opinions agreed on one point: the problem of private acquired rights should not be studied, either because it belonged to the responsibility of States and not to succession, or, as Mr. Ushakov believed, because there was no principle of respect for so-called acquired rights. In that connexion, he drew attention to paragraph 113 of his report, where it was shown that the acquired rights of aliens were not always trifling, as Mr. Castrén had suggested.

18. Acquired rights were not, it was true, a problem peculiar to the succession of States, but he had chosen to study that problem for several reasons. First, he had not dealt with the rights which the successor State had freely granted as the new sovereign, but only those which it had inherited from the predecessor State and which were therefore rooted in the succession. Secondly, it was open to question whether the problem arose in the same way and in exactly the same terms in a succession of States as it did in connexion with international responsibility. He was not sure that acquired rights ought not to be treated differently in the case of a succession of States. The attitude of the successor State might differ according to whether the rights were inherited or freely granted and the juridical grounds themselves might be different in the two cases. Again, the question arose at what moment a State ceased to be "new" and how long the process of decolonization lasted. Independence was not decolonization, which sometimes did not follow till a long time, possibly one or two generations, later. Lastly, the dividing line between succession of States and international responsibility was clear in the case of acquired rights of aliens: succession of States was concerned only with the existence or non-existence of an international obligation, whereas the question of sanctions belonged to the subject-matter of responsibility; and in his report he had dealt only with acquired rights that were rooted in the succession, leaving aside the question of their violation, which was a matter of State responsibility. He would not hesitate to limit the scope of the topic if it were certain that the problem of private acquired rights arose in exactly the same way in a succession of States as it did in the case of State responsibility.

19. If, as Mr. Reuter advocated, the Commission did not study the problems arising out of decolonization,

[3] *I.C.J. Reports, 1969*, pp. 49 and 50.

[4] See 1003rd meeting, para. 1.

it would have practically nothing left to study but the "wars of succession" of the distant past. There were also, of course, new phenomena, such as mergers and integrations, but those were voluntary acts which did not affect acquired rights. It was in cases involving conflict, such as secession—and decolonization was a form of secession—that the jurist was useful and there might be a need for law. Moreover, decolonization was a lengthy process, which was not completed simply by accession to independence. It raised problems of change of structures which could not be dealt with properly or fully in a different framework, such as that of responsibility. That was why he had decided to extend the topic to cover decolonization.

20. Mr. CASTAÑEDA congratulated the Special Rapporteur not only on the amount of work he had done and the learning he had shown, but also on having succeeded in presenting all the points of view and all the doctrines very fully in the light of his own political and legal ideas. In a subject such as the succession of States, there could be no question of dissociating purely legal considerations from the political ideas on which they rested, unless one recognized as legal only what derived from a practice followed in an obsolete historical context, and qualified any projection into the future pejoratively as a political solution.

21. The Special Rapporteur had done well to make a frontal attack on the notion of acquired rights itself. In the theory of the non-retroactivity of laws, that notion designated what the new law could not destroy, as opposed to a mere expectation in law. The Special Rapporteur had very aptly placed it in that context in his report (para. 11).

22. But outside that context the term itself was misleading. The Special Rapporteur had rightly cited Duguit (para. 7); any right owned by a subject was an acquired right. But the expression gave an idea of permanence which was false, for neither internal law nor international law guaranteed the enjoyment of legal situations *ne varietur*. The Special Rapporteur had shown, both by his analysis of the effect of the precedents and by his irrefutable logical and legal arguments, that there was no international norm by virtue of which the mere fact of a change of sovereignty would create, as such, the obligation to respect rights acquired under former legislation. As was stated in paragraph 148 of the report "If the predecessor State can free itself from rights which it has itself created, why should those rights be binding upon the successor, which had nothing to do with their creation?" The succession introduced nothing new in the way of rights or obligations. The successor was bound only by the general obligations of any State, as the Special Rapporteur explained in a key paragraph of his report (para. 156).

23. The problem therefore belonged to the sphere of State responsibility. The question was what rules were in force concerning the obligation to respect the rights of aliens in general. He would not examine the various aspects of that question in detail, but would confine himself to a few comments.

24. No one could deny that to adopt the notion of a "minimum international standard" was tantamount to agreeing that aliens could have more extensive or better protected rights than nationals.

25. Everyone was familiar with the precedents, but a question of that kind could only be decided on the basis of general rules of international law, such as the rule of the sovereign equality of States. All the precedents quoted to justify the existence of more extensive rights for aliens were valueless if they were anterior to the United Nations Charter, which confirmed that rule. That meant that the scope of the "minimum standard" rule must be assessed subject to the more general rule of the sovereign equality of States.

26. Similarly, the affirmation of the principle of the permanent sovereignty of every people over its natural resources had not left the content of the "minimum standard" unaffected.

27. More generally, juridico-political factors such as those two principles were more relevant for establishing the existence or non-existence and the scope of certain legal rules relating to the responsibility of States than the almost ritual invocation of old precedents from a world very different from the present one.

28. As had already been said, in matters of that kind moral considerations could not be disregarded completely in appraising juridical situations. In that connexion the theory of the community of fortunes enunciated by the great Argentine jurist Podestá Costa was of interest. According to that theory, an alien who invested in a foreign country associated himself with that country for better or for worse. He expected to make a bigger profit than he would by investing in his own country. In most cases, that was possible because of the country's relative economic under-development. But economic under-development was almost always accompanied by greater political instability, and that involved risks for the alien. He could not claim the advantages without also accepting the disadvantages. Profits and risks were the same for aliens and nationals. The rights of aliens and of nationals must therefore be equal in everything, including, for example, nationalization and compensation.

29. There was no particular ideological stamp attached to any of that. It was hardly a Marxist theory. At most, it was the point of view of every developing country. And for the citizens of those countries, it was not theory but reality; the history of Mexico was proof of that.

30. The nationalization of alien property, and compensation and its conditions, were the matters which raised most problems in connexion with the succession of States. The Commission would certainly have to study those problems from a strictly legal standpoint. However, he had the impression that they were becoming more and more closely linked with the question of international economic co-operation. In fact, in most of the cases in which those problems had arisen recently, they had been settled by treaty arrangements based less on a legal division of responsibilities than on certain conditions peculiar to the economic deve-

lopment of developing countries. For example, when carrying out an agrarian reform, it was at least as relevant and important to know whether the compensation terms would permit the country to carry out the reform successfully or prevent it from doing so, as to know whether they fulfilled certain conditions laid down, at least according to some, by international law.

31. In the future, all those matters would increasingly become part of that great chapter of international law which was being slowly but surely worked out, and which might be called the law of international economic co-operation.

32. Mr. RUDA said that the importance of the Special Rapporteur's second report was shown by the quality of the discussion to which it had given rise.

33. The Special Rapporteur's first report, submitted to the Commission at its previous session, had ended with a chapter on acquired rights [5] which contained in outline many of the ideas now expounded in his second report. In that first report, the Special Rapporteur had suggested that the Commission should set aside the question of acquired rights for the time being, at least until it had considered the question of public debts and public property.[6]

34. At the previous session, the members of the Commission had replied to a questionnaire submitted by the Special Rapporteur which did not contain any item on acquired rights.[7] The Commission had then decided to begin consideration of what was now item 2 (*b*) of the agenda by dealing with State succession in economic and financial matters. The Special Rapporteur, however, had decided to embark boldly on a study of the question of acquired rights, explaining that that question was "more general in nature and arises in connexion with virtually all aspects of State succession in economic and financial matters" (A/CN.4/216/Rev.1, para. 3) and had accordingly introduced the term "acquired rights" into the very title of his second report.

35. From the point of view of method, he had doubts about the advisability of the approach adopted by the Special Rapporteur. Perhaps it would have been preferable to study the whole subject of State succession in economic and financial matters before reaching any final conclusions on the question of acquired rights. Undoubtedly, that question would have to be examined in connexion with economic and financial rights, because the doctrine of acquired rights was traditionally applied to rights having a monetary value, as had been pointed out by a recent writer on the subject.[8] The doctrine, however, could best be considered in the light of any decisions of draft articles which the Commission might adopt on specific questions relating to economic and financial rights. If that course were adopted, it might even be possible for the Commission to avoid discussing the doctrine altogether and to leave it to others to draw their own conclusions from its decisions on concrete issues.

36. On the substance of the report, he was in agreement with most of the ideas expressed. He concurred with the Special Rapporteur's view that "nothing should be imposed on the successor State that would not be imposed on any other State" (para. 22), although he himself would qualify that statement by adding "in the same or similar circumstances". He also agreed that the principle of the equality of States made it necessary "to refrain from imposing more obligations on the successor State than on the predecessor State" where respect for the same rights was concerned (para. 24). Like the Special Rapporteur, he believed that a foreign State could not assert "any right to inquire into action taken by the successor State" with respect to "rights of individuals which it had no part in creating" (para. 48) and that a successor State which amended its own laws was "entitled to respect its legislation only to the extent that to do so is not contrary to the *public interest*" (para. 53). One of the first articles of the Argentine civil code laid down that no one could invoke acquired rights against a law enacted in the public interest; that rule, he thought, constituted a general principle of law.

37. He also adhered firmly to the view that "it should be within the exclusive competence of the State to determine the juridical régime of the persons and property in its territory" (para. 68) so that it could carry out such nationalization as it deemed appropriate; only where a measure was "directed against a class of persons because of their foreign nationality" could it be described as illegal on the basis of other rules of public international law (paras. 67 and 71).

38. As a fellow citizen of Calvo and Podestá Costa, he firmly believed that an alien could not have more extensive rights than a national and that " the maximum that may be claimed for a foreigner is civil equality with nationals" (para. 64).

39. He would not dwell any longer on the points on which he agreed with the Special Rapporteur; he must now express some of his doubts. The crux of the problem, as he saw it, was whether the successor State was, or was not, under an obligation to respect the legal bonds created by the predecessor State. In principle, a new sovereign independent State would seem to have the right to establish a new legal régime for property and persons in its territory. Should such a change of legal régime affect aliens, he did not believe that the case would be any different from that of a similar change made in a State which had been sovereign and independent for many years. The problem of international responsibility would arise in the same manner for a new State as for an old one. He therefore believed that it might perhaps be premature to consider the problem of acquired rights in the present context before it had been examined in the context of State responsibility.

40. Those remarks were particularly relevant to the case of compensation as a result of nationalization, for which he did not think there was any well-defined

[5] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/204, paras. 138-153.

[6] *Ibid.*, para. 75.

[7] *Op. cit.*, 1968, vol. I, pp. 111 and 112.

[8] D. P. O'Connell, *State Succession in Municipal Law and International Law, 1967*, vol. I, p. 245.

rule, although certain clear trends seemed to have emerged in recent years.

41. He also had doubts about the question, dealt with in various places in the Special Rapporteur's second report, of the status of property and persons between the date of gaining independence and the date on which a change of régime or structure was introduced. The Special Rapporteur had pointed out that the "successor State has not been established *ex nihilo*" and that it "cannot disengage itself from pre-existing rules and situations, or at least it cannot do so immediately and for ever" (para. 23). But he had also said: "There are, however, factual considerations which induce it to renew previous situations, not because it lacks the legal power to annul or change them, but because it does not wish to do so for reasons of expediency . . ." (para. 77).

42. It was his view that, bearing in mind the need for order in any society, there could be no automatic extinction of all existing rights and obligations at the time of succession and that, so long as no change of régime had been introduced by the successor State, that State had the obligation to respect them. If and when it decided to introduce a change of régime, that change might or might not give rise to questions of State responsibility.

43. He also had doubts about public debts contracted by the predecessor State in the direct interest of the territory of the successor State, such as a loan raised in order to carry out public works. The question arose whether, in such a case, the successor State might not be regarded as a debtor even though it had not itself originally borrowed the funds.

44. An even more serious question was the possible obligation to respect pre-existing rights in cases of merger or integration. Those cases were likely to occur in the future and it was desirable that they should be carefully examined.

45. The Special Raporteur had undoubtedly had good reasons for placing the emphasis on State succession in cases of decolonization, but the other cases of State succession should also be examined, and a wider and more general approach should be adopted for that purpose.

46. He believed that he had now replied in general terms to questions 1 to 6 of the Special Rapporteur's questionnaire. As to question 7, he preferred the second alternative, namely, that the Commission should instruct the Special Rapporteur to submit draft articles on a more particular aspect of succession in economic and financial matters.

47. With regard to question 8, he supported the idea of publishing the replies of Governments to an inquiry concerning certain aspects of the practice followed in State succession. He did not favour the suggestion that the Secretariat should be asked to compile a bibliography and a summary of works concerning State succession; that was a task for the members of the Commission. In any case, the expected cost was so high that the scheme would meet with strong resistance in the financial organs of the General Assembly. Lastly, he supported the suggestion that the Secretariat be requested to prepare an analysis of the decisions of international courts, especially as the expected cost was small.

48. Mr. YASSEEN said he admired the fine work of synthesis accomplished by the Special Rapporteur, whose views he largely shared. Work of that kind was essential, in order to find bases, if possible, for the codification and progressive development of the topic of State succession.

49. State succession covered a number of situations. If they were to be analysed by types, the circumstances in which the succession occurred could not be overlooked; for those circumstances could justify rupture or provide the basis for some continuity, and it was on them that the solution of the problems depended. State succession in cases of decolonization was important, but it did not exhaust the subject. Other circumstances might lead to a succession of States, in particullar, the constitution of international unions or federations, and secession. Because of the differences between those cases, it was impossible to derive from a single one of them all the principles governing State succession as a whole.

50. The question of acquired rights was one of the most confused and controversial in both internal and international law. It could not provide the key to the general theory of State succession, even though it could help to solve certain problems which might otherwise remain unsolved. Thus a frontal approach to the question of acquired rights was perhaps not without disadvantages.

51. The Special Rapporteur was right in maintaining that in State succession there was a substitution, not a transfer of sovereignty. The existence of an obligation to respect acquired rights was not essential to justify the rules to be applied to State succession. However, he felt that in certain cases there must be continuity of the legal situations.

52. To take first the cases other than decolonization, it was to be noted that succession allowed many legal situations to subsist. But the existence of such situations was one thing, and the attitude of the State and the extent of its power over them were another. The notion of acquired rights had never meant that the successor State was not entitled to alter those situations. In the last paragraph of his report, the Special Rapporteur had written that "the competence of the successor State is clearly not unlimited". He himself would go further and say that the successor State certainly had the power to alter existing legal situations, but it must not exercise that power in an arbitrary fashion.

53. The problem, therefore, was not whether the State had or did not have that power, but whether it had to justify its negative attitude towards such situations in some way or other. Mr. Castrén had aptly cited three cases in which the State was entirely free to modify existing legal situations: [9] when it was

[9] See 1001st meeting, paras. 42 *et seq.*

necessitated by a change of structure; when such situations were incompatible with public order; and when such situations had been created in bad faith by the predecessor State during the period described by the Special Rapporteur as "suspect".

54. The notion of a "minimum standard" also required some clarification. It had been accepted at a time when a distinction had been made between civilized and uncivilized countries. With the disappearance of that distinction, a State could not today be asked to respect a "minimum standard" unless it was a standard based on existing rules of positive law, perhaps on human rights, for example. A State could be required to respect human rights if they were part of positive law for that State.

55. The principle of equality of treatment as between aliens and nationals had been wrongly invoked. A State could always accord more rights to its nationals than to aliens. In fact, most States did so. Hence that argument could not be used against the "minimum standard" theory. The State did not incur any responsibility by adopting a less favourable attitude towards aliens than towards its own nationals. But there could be a difference in the efficacy of the two sets of rights. An alien's rights might be protected by diplomatic means, whereas generally speaking there was no effective international protection of a national against his own State.

56. In any event, the recognition of acquired rights for certain persons never entailed a limitation of the sovereignty of the State with respect to such rights. There might perhaps be a case, especially in decolonization for recognizing an intermediate category between aliens and national: the category of nationals of the predecessor State, in regard to whom the successor State would have more freedom of action than in regard to nationals of third States.

57. On the question of State succession in the case of decolonization, he was largely in agreement with the Special Rapporteur, subject to a few shades of emphasis. It was difficult to maintain that, in decolonization, the successor State retained absolute freedom; but it was possible to safeguard the rights and sovereignty of the successor State and to avoid obstacles to its development by other methods, which could be fairly generally accepted.

58. There was no denying that, in decolonization, as in any other type of succession, the successor State was free under the rules of its own legal order to adopt a negative attitude towards certain juridical situations. But it was not certain that it could always do so without paying compensation. Of course, he recognized the force of all the examples quoted by the Special Rapporteur. But in order to redress the wrongs suffered by colonized peoples, all that was needed was to calculate the compensation in an appropriate manner. With some concessions, it would be reasonable, when deciding whether the concession holders were entitled to compensation, to calculate how much the concession had yielded as a going concern. The result would nearly always be quite fair. For example, there would be no injustice in refusing compensation if, during its life, the concession had produced exorbitant profits for its holders at the expense of the country.

59. It was difficult at that stage to answer the Special Rapporteur's questionnaire more precisely with regard to acquired rights and the reconciliation of their maintenance or denial with certain principles of international law. In his view, if the right in question was protected by international law, it must be respected, for the State must comply with the rules of international law even in its own legislation. The question was, therefore, whether a rule of international law existed to support the alleged acquired right.

60. His reply to question 7 was that it would be preferable for the Special Rapporteur to prepare draft articles on a more particular aspect of succession in economic and financial matters. It was neither necessary nor possible to examine all the aspects of State succession on the basis of the notion of acquired rights.

61. With regard to question 8, on the tasks and inquiries to be entrusted to the Secretariat, he would recommend the utmost caution. The Secretariat should not be asked to do anything which would entail making an assessment or expressing an opinion. It should not be assigned a task which was the responsibility of the Commission itself. It could be asked to describe its own experience, to send States a questionnaire on the practice they followed, and possibly to make a list of works and precedents. But apart from all considerations of expense, for reasons of principle, the Secretariat must not be asked to summarize such works or to analyse the precedents, because it could not do that without making an evaluation.

62. Mr. ROSENNE said that question 8 of the Special Rapporteur's brief questionnaire raised a series of questions of principle. In general, the task of the Secretariat should be limited to collecting material and presenting factual data regarding aspects particularly within its own cognizance, or which it was in a particularly good position to obtain. The Secretariat should not, however, attempt to assess the juridical value of the material or set forth any conclusions to be drawn from it; that was the duty of the Commission. In connexion with the "wide-ranging survey by the Secretariat" referred to in footnote 14 of the Special Rapporteur's report, he would like to point out that he had received from New York the text of the Secretariat's *note verbale* of 27 July 1962, which stated that "it would be appreciated if governments would also transmit, in addition to the materials mentioned in the note of 21 June 1962, copies of diplomatic correspondence relating to succession as it affects the new States referred to . . .". The original *note verbale* of 21 June 1962 had referred to various materials "which relate to the process of succession as it affects States which have attained their independence since the Second World War". The material thus obtained was now available to the Commission in the United Nations Legislative Series, and he believed it was the Commission's duty, with appropriate guidance from the Special Rapporteur, to make its own deductions and analyses; as a matter of principle, the Secretariat should not be

asked to undertake that kind of evaluation of State practice.

63. In addition, he doubted whether much more information would be forthcoming—at least not quickly. In a report submitted to the General Assembly in 1960, the Secretary-General had written: "Optimism as to the rapidity of the transmission from governments of the material ... ought to be tempered with some substantial measure of caution... . Past experience has shown... that it is questionable whether all governments will provide the necessary information . . .".[10] He was sure that all members recalled the famous and caustic observation of the French Government in 1950 to the effect that it could not work through "several tons of its archives" in order to answer questions emanating from the Commission.[11]

64. The Special Rapporteur's proposal that the Secretariat should undertake an evaluation of jurisprudence was open to the same objection: it invited the Secretary-General to undertake a task which was essentially the special responsibility of members of the Commission. The digest of decisions furnished by the Secretariat [12] contained adequate data for the Commission's researches, but it should be brought up to date along the lines indicated at the seventh meeting of the Sub-Committee in 1963.[13]

65. The proposed bibliography might be useful, but only on condition that it was compiled by the Library services in conjuction with the Codification Division, and that no attempt was made to evaluate the items listed.

66. He suggested that the Secretariat should also be asked to prepare a short note on the interaction between the present topic and General Assembly resolution 1803 (XVII), on permanent sovereignty over natural resources, the other resolutions mentioned in footnote 76 of the Special Rapporteur's report and subsequent resolutions, with particular reference to discussions in the General Assembly. General Assembly resolution 1803 (XVII) was dealt with as far as State responsibility was concerned in the summary prepared by the Secretariat of the discussions in various United Nations organs and the resulting decisions,[14] while subsequent developments in connexion with the same topic were covered in document A/CN.4/209. A parallel document was now needed for the topic of State succession.

Organization of Work

67. The CHAIRMAN said that an estimate of the cost of implementing the Special Rapporteur's suggestions had just been circulated. In his view, that document should be discussed at a closed meeting. Since the issue was clearly presented, perhaps the meeting could be held even if the Special Rapporteur was absent. The officers of the Commission would decide that point.

The meeting rose at 6 p.m.

1007th MEETING

Tuesday, 24 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ingacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Appointment of a Drafting Committee

1. The CHAIRMAN said that the officers of the Commission wished the Drafting Committee to start work without delay, so that the Commission could begin to examine the draft articles on permanent missions to international organizations. He suggested that the Drafting Committee should consist of the following: Chairman: Mr. Castañeda; members: Mr. Ago, Mr. Bastoš, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor and Sir Humphrey Waldock.

It was so agreed.

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]

(resumed from the previous meeting)

2. Mr. ROSENNE said he wished to join with other speakers in expressing great appreciation of the work accomplished by the Special Rapporteur. His frank, hard-hitting and superficially uncompromising report, or brief, as it had been called, amplifying points contained in his first report [1], squarely pointed up the non-jural context in which the matter would have to be discussed. He (Mr. Rosenne) was rather disappointed, however, that the Special Rapporteur had not phrased his questionnaire in such a way as to bring into clearer focus the legal issues on which he wished to have the views of members of the Commission. As a result, the

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[10] See *Official Records of the General Assembly, Fifteenth Session, Annexes*, agenda item 66, document A/4406, para. 18.

[11] See *Yearbook of the International Law Commission, 1950*, vol. II, p. 206.

[12] *Op. cit.*, 1962, vol. II, p. 131.

[13] *Op. cit.*, 1962, vol. II, p. 277.

[14] *Op. cit.*, 1964, vol. II, p. 125

[1] *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/204.