Document:-

A/CN.4/SR.1397

Summary record of the 1397th meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1976, vol. I

agreement, referred to in connexion with decolonization, could also be applied to economic treaties. Moreover, it was common practice to include in transnational economic contracts a clause providing for their review if economic developments made performance intolerable. The question was a delicate one, but he hoped that international law would make progress on it.

51. He wondered whether articles 14 and 15 applied specifically to newly independent States, for a comparison with articles 12 and 13, and article 17, gave the impression that it was the same rule that applied in all the situations contemplated. Articles 14 and 15 seemed to be very moderate, despite the militant nature of the commentary. At the 1395th meeting, Mr. Tsuruoka, Mr. Martínez Moreno and Mr. Njenga had raised the question of proof in connexion with those articles, asking where the burden of proof lay. In his opinion, the position regarding the burden of proof could be clarified.

52. Mr. Ushakov had referred [16] to article 5, under which the ownership of State property was determined by the internal law of the predecessor State. Obviously, it would be possible to adopt the opposite rule and provide that it was the law of the successor State which determined the régime of ownership of State property. But in that case there would be no succession of States: it would be sufficient to say that the predecessor State lost all its rights, which would amount to stating the full clean slate principle. He was opposed to that approach, since the reason why the successor State was free to establish whatever system of ownership it wished, was because it was a sovereign State, not because it was a decolonized State. In his opinion, the Commission would be making a mistake if it linked that faculty of the State with decolonization, for it would be indirectly diminishing the sovereignty of the successor State. The solution proposed by the Special Rapporteur in article 14 therefore seemed to him to be preferable. The question did not arise in article 15, since the sovereignty of the successor State played no part and it was not even possible to establish the clean slate principle.

53. The difference in wording between the titles of articles 14 and 15 raised a problem of substance. The reason why the Special Rapporteur had used the plural in the title of article 14 was that it might be necessary in order to cover some special cases. A succession of States might involve several newly independent States at the same time, and the property to which the succession related might be situated in only one of those States. For example, when a federation of colonial territories such as French West Africa acceded to independence, it was conceivable that property to which all the States in that group were entitled might be situated in only one of the territories which had become independent. Consequently, it would be dangerous to bring the title of article 14 into line with that of article 15 by using the singular instead of the plural, for that might cause difficulties in the relations between the decolonized countries.

54. Lastly, it was his impression that in articles 14 and 15, the Special Rapporteur had assumed that the origin of the contribution was taken into account in apportioning the property. There was no problem if apportionment of property in kind was possible. But if apportionment in kind was not possible, it was necessary to ensure that compensation was not prohibited by virtue of article 8.

55. Mr. BILGE said he could accept articles 14 and 15; he approved of the principles and the drafting of those articles and congratulated the Special Rapporteur on having arrived at a reasonable and sound solution. He would, however, prefer article 14, paragraph 1 to reflect the restoration of a right, since the right had been suspended and then restored. He would also prefer the principle embodied in article 14, paragraph 13 to be stated in a separate article. Lastly, although he appreciated the Special Rapporteur's feelings concerning decolonization, he thought that in his commentary, he should confine himself to investigating the facts, without making judgments.

The meeting rose at 1 p.m.

1397th MEETING

Thursday, 24 June 1976, at 10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Hambro, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State) [1] (*concluded*)

1. Mr. MARTÍNEZ MORENO said that articles 14 and 15, in their present form, might raise problems where a predecessor State had been replaced by an administering authority under the mandate system or the Trusteeship

[16] See 1394th meeting, para. 41.

[1] For texts, see 1393rd meeting, para. 34.

System. For example, in what was now the Libyan Arab Republic, there had been three separate territories: Fezzan, Cyrenaica and Tripolitania, one of them administered by France and two of them by the United Kingdom. However, the predecessor State in that instance had unquestionably been Italy. Other examples came to mind: for instance, Iraq, Lebanon and Syria had been administered by different European countries under the League of Nations Mandate, but the predecessor State had been the Ottoman Empire.

2. It might be held that the relationship between an administering authority and a successor State was already covered by the definition of "succession of States" contained in the draft. On the other hand, the definition of a "predecessor State" and a "successor State" did not seem to provide a sufficient guarantee of the passing of movable and immovable property of the administering authority which was situated in the territory of the successor State, and that authority was not mentioned either in article 14 or in article 15. Perhaps the Special Rapporteur might consider adding the words "or administering authority" after the words "predecessor State" wherever necessary. A definition of an "administering authority" would not be required, since one was already contained in Article 81 of the Charter of the United Nations.

3. Mr. BEDJAOUI (Special Rapporteur) said he had greatly appreciated the quality of the debate on articles 14 and 15 and the high ideals displayed by the members of the Commission.

4. Before replying to the comments made, he wished to point out to Mr. Bilge, who had criticized the attitude he had adopted in his report and had asked him, particularly in connexion with article 14, paragraph 3, to refrain from making judgements,[2] that the Special Rapporteurs had complete freedom in preparing their reports and hence assumed full responsibility for them. Of course, the same did not apply to the text of the articles and the commentaries to them, for once they were adopted by the Commission they were no longer the personal work of the Special Rapporteur, but the collective work of the Commission. Sir Francis Vallat had rightly said that the role of the Special Rapporteur was both to guide and to follow the Commission. Many members, including Mr. Yasseen, Mr. Reuter, Mr. Ramangasoavina, Mr. Martínez Moreno and Sir Francis Vallat, had emphasized the fact that he had followed the Commission, sometimes even in its inconstancy and despite his personal convictions. And it was not always easy to follow the Commission, precisely because of the abundance and variety of the views of its members. He therefore asked to be allowed to retain, at least in his reports, his freedom of expression and the resultant responsibility.

5. Mr. Bilge had nonetheless recognized that a reasonable and sound solution had been reached in articles 14 and 15; Mr. Yasseen had emphasized the moderate and non-revolutionary nature of those articles; and Mr. Reuter had spoken of a "militant" report but of "moderate" articles.[3] He was glad to hear it said that his articles were very moderate and that they should be given more "muscle"—for example, as Mr. Bilge had said,[4] in the direction of a "restoration" of the rights of the newly independent State over its property. He was, of course, quite willing to follow the Commission in that way.

6. On the whole, the members of the Commission had found that articles 14 and 15 were necessary, that his approach was sound and that the solutions proposed were acceptable, or even moderate; and they had suggested that the articles should be referred to the Drafting Committee. Some of them, however, had expressed doubts about the field of application of the two articles; the meaning of "property proper to the dependent territory"; the nature and treatment of devolution agreements; the advisability of stating, in article 14, paragraph 3, the principle of the sovereignty of newly independent States over their wealth; the presumption of the right of ownership of the newly independent State; and property considered *in concreto*, especially the problem of archives. They had also made some comments on the drafting.

7. As to the field of application of articles 14 and 15—in other words, the cases of State succession covered by those two articles—Mr. Ushakov, Mr. Quentin-Baxter, Mr. Tammes, Mr. Njenga, Sir Francis Vallat (and, to some extent, Mr. Kearney and Mr. Castañeda), had considered that the scope of those articles should not be restricted. Mr. Ushakov thought that the category of newly independent States should include not only the Non-Self-Governing Territories covered by Chapter XI of the Charter, but also Trust Territories coming under Chapter XII, that was to say, all dependent territories.[5] He fully endorsed that point of view, which had helped him to gain a better understanding of the meaning and the scope of the question raised by Mr. Ushakov after the oral presentation of articles 14 and 15. For he had feared that Mr. Ushakov wished to restrict the scope of articles 14 and 15 to such an extent that separate articles would be devoted to Trust Territories and protectorates. But he was now reassured, for he saw that Mr. Ushakov had merely wished to point out that articles 14 and 15 applied to all dependent territories and not only to Non-Self-Governing Territories. Mr. Ushakov's comment had been prompted by a passage in the report which wrongly gave the impression that articles 14 and 15 were confined to cases of Non-Self-Governing Territories.[6] He thanked Mr. Ushakov for his pertinent remark and assured him that the wording of that passage of his report would be amended accordingly. In referring to Non-Self-Governing Territories, however, he had mainly sought to show that the administering Power and the dependent territory differed with respect to their people, territory and sovereignty, as Mr. Castañeda had pointed out.[7] In the case of a protectorate, it was clear—and had always been acknowledged—that sovereignty did not appertain to the protecting Power. That was why he had chosen, for pur-

---

See 1396th meeting, para. 55.

Ibid., para. 51.

Ibid., para. 55.

See 1394th meeting, para. 39.

A/CN.4/292, chap. III, paras. 2 and 3 of the commentary to article 14.

See 1396th meeting, para. 14.

poses of demonstration, the case of Non-Self-Governing Territories, which might seem less obvious.

8. Articles 14 and 15 were thus applicable to all newly independent States, whether they had previously been Non-Self-Governing Territories, Trust Territories or protectorates. He was willing to speak of "dependent territories", as Mr. Ushakov wished; but as Mr. Martínez Moreno had observed,[8] "Non-Self-Governing Territories" had become a generic term currently used to designate all territories which had not yet acceded to independence.

9. At the present meeting Mr. Martínez Moreno had referred to the problem of determining the predecessor State when, between the colonial administration and the country's accession to independence, there had been a fairly long period of administration by, for example, an organ of the United Nations; he had mentioned the case of the former Italian colonies administered by the United Nations. There had been no problem in the case of Libya, for an agreement had been concluded under United Nations auspices between Libya and the former administering Power, namely, Italy. In the case of Syria and Lebanon, on the other hand, the Ottoman Empire had been the predecessor State when Ottoman colonization had given place to the mandate of the United Kingdom and France. But when Syria and Lebanon had gained their independence, in 1941 and 1943 respectively, France had been the predecessor State. The problem mentioned by Mr. Martínez Moreno might arise on the accession to independence of Namibia, which was theoretically under United Nations administration, following the revocation of South Africa's mandate.

10. Mr. Ushakov had also proposed that the field of application of articles 14 and 15 should include enclaves and any dependent territory which achieved decolonization by integration with a neighbouring State. On that point too, he now understood Mr. Ushakov's position better. During the discussion of articles 12 and 13—in which the case in question had, in his opinion, been wrongly included—he had believed that Mr. Ushakov wished to split up articles 12 and 13 and devote two other separate articles to the case of decolonization through integration of a dependent territory with a neighbouring State. But as he now understood it, the point had been simply to distinguish that case from the case covered by articles 12 and 13, namely succession in respect of part of territory, to which it bore no relation, and to assimilate it to the case of decolonization resulting in newly independent States, covered by articles 14 and 15. If that was what Mr. Ushakov had in mind, he fully agreed with him. It should be remembered that it was not he himself, but the Commission that had wished to place the case in question on the same footing as succession in respect of part of territory. He would therefore be very glad if the Commission now agreed to assimilate it to the case of succession involving newly independent States. The Drafting Committee would certainly find a formula by which articles 14 and 15 could cover both the case of newly independent States and the case of territories which were decolonized by merging with a neighbouring State.

11. Again, in order not to restrict the field of application of articles 14 and 15, some members of the Commission—Mr. Tammes, Mr. Quentin-Baxter, Mr. Njenga and Sir Francis Vallat—had asked him to assimilate to the case of newly independent States the case contemplated in article 33, paragraph 3, of the draft articles on succession of States in respect of treaties, in which "a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State".[9] Mr. Kearney had asked the Commission to adopt a more modest approach. The problem that arose was, in fact, that of the right of peoples to self-determination. After being applied to dependent territories, might not that principle also apply in future to States which were already old? He had no wish to take sides in the matter and would simply refer, as Mr. Castañeda had done,[10] to the specificity of decolonization situations. He would prefer to bring all decolonization situations under articles 14 and 15 and to leave aside the case covered by article 33, paragraph 3, of the draft on succession of States in respect of treaties. If the Commission really wished to cover that case, it could devote a separate article to it.

12. Mr. Ushakov had asked whether it would not be advisable to include States consisting of more than one former dependent territory in the category of newly independent States.[11] He fully approved of that suggestion and thought that the text of articles 14 and 15 and the commentary thereto would have to be recast accordingly. Although he had allowed himself to consider, in connexion with the uniting of States dealt with in article 16 the case of an independent State formed by the uniting of more than one dependent territory, he was willing to transfer that part of his report to the section dealing with newly independent States.

13. He was in no way opposed to extending the field of application of articles 14 and 15. He was in favour of bringing under a single heading—that of newly independent States—all decolonization situations: dependent territories and not only Non-Self-Governing Territories, States formed from more than one dependent territory, and territories decolonized through integration with a neighbouring State. The Drafting Committee would review the text of articles 14 and 15 in the light of those considerations.

14. Some members of the Commission, such as Mr. Ushakov, Mr. Tsuruoka and Sir Francis Vallat, had asked whether the expression "newly independent State" should not be defined either in article 3 [12] or within the framework of articles 14 and 15. Others, like Mr. Njenga

[8] See 1395th meeting, para. 35.

[9] See *Yearbook... 1974*, vol. II (Part One), p. 260, document A/9610/Rev.1, chap. II, sect. D.

[10] See 1396th meeting, para. 14.

[11] See 1394th meeting, para. 39.

[12] For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

and Mr. Castañeda, thought that a definition was not necessary, since the category of newly independent States was easily identifiable. If the intention was to refer to newly independent States properly so called, a definition could easily be given for purposes of the present articles. But if it was intended to include, under the heading of newly independent States, all decolonization situations —enclaves, territories integrating with a neighbouring State, composite dependent territories and, especially, the case of separation provided for in paragraph 3 of article 33 of the draft on succession of States in respect of treaties—it would be difficult to find an appropriate definition.

15. The question of property belonging to the dependent territory had been raised by Mr. Ushakov [13] and reverted to by Sir Francis Vallat, Mr. Thiam and Mr. Castañeda. They had all agreed with him, and with the Commission as a whole, that such property should remain in the ownership of the newly independent State. As Mr. Hambro had pointed out at the 1394th meeting it should not be said that the property "passed" to the successor State, but rather that it "remained" the property of the dependent territory which had become independent. But according to Mr. Ushakov, although article 14 did not say that the property passed, it did not say that it remained either: hence that article might deprive the successor State of property belonging to it, because "State property" was defined in article 5 by reference to the law of the predecessor State, not by reference to the law of the dependent territory. He agreed with Mr. Ushakov's analysis of the situation, but not with the conclusion he drew from it. In his own commentary, he had clearly indicated the fate of property belonging to the dependent territory, but as Mr. Ushakov had said, the commentary would disappear and only the rule would remain.

16. The definition of State property given in article 5 did not satisfy him any more than it did Mr. Ushakov. In his third report, he had discussed at great length the question of the law applicable for determining the property affected by a succession of States.[14] He had shown, by specific examples, that reference to the internal law of the predecessor State alone was insufficient and that in the practice of States reference was also sometimes made to the law of the successor State and to the local law of the territory to which the succession of States related. With regard to application of the law of the successor State, he had cited, in particular, the case of the *British Protestant Mission hospitals in Madagascar;* the case of "*habous property*" *in Algeria;* the case of the *Central Rhodopé forests* between Greece and Bulgaria; the case of *enti pubblici in Libya;* the case of the *property of the Order of St. Maurice and St. Lazarus on the Little St. Bernard Pass;* the definition of property by the restored Polish State by reference to the law of the successor State; the *Peter Pázmany University* case; the *Chorzów factory* case; and the case of *German settlers in Upper Silesia.*

17. He had also discussed the application of the local law of the territory to which the succession of States related.[15] The definition of public property proposed in his draft article 1 was much broader than the definition of State property given in article 5 because, at the time, he had intended to codify the treatment of all public property and had needed a definition broad enough to cover not only State property, but also provincial and communal property, the property of public institutions, etc. But as he had ultimately confined himself to State property, he had accepted without difficulty the definition proposed by the Drafting Committee, which had become article 5.

18. The problem raised by Mr. Ushakov concerning the determination of property by the local legislation of the territory did not arise only in regard to articles 14 and 15, but also in regard to articles 12 and 13, in the case of a succession in respect of part of territory. Obviously, in the case of a minor frontier rectification, no problem arose. But if, for example, the Canton of Geneva decided, by an act of self-determination, to become part of France, how would the property belonging to Geneva be determined? Should it be by reference to the internal law of the predecessor State, which was Swiss Federal law, or by reference to the law of the territory, which was the cantonal law of Geneva?

19. Mr. Ushakov agreed with him in considering that property belonging to the territory remained the property of the newly independent State, but he feared that such property might be lost to the newly independent State because it was not covered by the definition of State property given in article 5; he believed, in fact, that since the property was not mentioned in article 5, it would not be affected by the succession of States and hence would not pass to the newly independent State. He (the Special Rapporteur) did not share that view. For although property not affected by the succession did remain in the ownership of the predecessor State, it was on condition that it had belonged to that State before the succession. But that condition was not fulfilled in the case under consideration, because the property in question had belonged to the dependent territory itself. Moreover, article 5 gave a general definition, so there were many constituents of a succession of States which it did not provide for; yet it would not occur to anyone to conclude that those constituents should remain in the ownership of the predecessor State. For example, because article 5 did not deal with the private property of individuals, must it be concluded that such private property became the property of the predecessor State? Before the succession of States, the predecessor State did not own the property of the dependent territory any more than it owned the private property of individuals, and the occurrence of a succession of States could not logically confer on it a right of ownership which it had never possessed. What was more, the draft articles related exclusively to succession to *State property*, which meant the State property of the predecessor State. So how would it be possible to deal, in articles 14 and 15, with property

[13] See 1394th meeting, para. 42.

[14] See *Yearbook... 1970*, vol. II, pp. 133 to 143, document A/CN.4/226, part II, commentary to article 1.

[15] *Ibid.*, p. 137, paras. 14-16 of the commentary to article 1.

belonging to a territory which was not yet a State and which, according to Mr. Ushakov, could not conclude an agreement susceptible of being recognized as valid under international law. If the territory was still dependent it was not a State, and if it was not a State it could not have State property.

20. Nevertheless, Mr. Ushakov had been right to stress that any possible misunderstanding must be prevented, by removing all ambiguity. In the case of a succession involving a newly independent State, there were two bodies of property of unequal size: the immense body of property of the dependent territory, and the smaller body of property of the predecessor State, used for the administration of the territory. What the succession was concerned with was not the body of property belonging to the dependent territory, which in any case remained the property of the newly independent State, but the property with which the predecessor State had administered the territory. In Algeria, for example, a town hall, a stadium or a school had been property belonging to the dependent territory, built and managed with funds belonging to the Algerian territory, whereas a barracks, a military base, a law-court or a prison had been the property of the French State, built and managed by that State. The question to be decided, in the event of a succession of States, was whether the latter class of property should pass to the newly independent State. Article 14, paragraph 1, answered that question in the affirmative by laying down, as an absolute principle, that "the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State". The branch of international law relating to succession of States was concerned with the fate of the State affected by the succession, which was impoverished thereby or suffered a territorial, patrimonial, financial, monetary or other loss. That, and that alone, was what a succession of States amounted to. It concerned the predecessor State and the determination of its fate, and that of its property, debts, treaties, etc.

21. Sir Francis Vallat considered that if the predecessor State had contributed to the creation of property belonging to the territory, there should be an equitable apportionment of that property. He himself did not share that view: as he saw it, property belonging to the dependent territory remained the property of the territory which had become independent, and there was no occasion for equitable apportionment even if the predecessor State had contributed to that property.

22. The question arose whether the definition of State property given in article 5 should be amended. He did not think that course would be necessary in regard to the property of colonial territories; but perhaps the definition would have to be reviewed one day in the context of the whole draft, to see whether it could be improved. Should a separate article on the lines of article X (Absence of effect of a succession of States on third State property) be devoted to the question of property belonging to the territory? Article X had only been included to reassure the Commission and because the property in question was State property, which was not the case of property belonging to the dependent territory. If the question of that property was dealt with in a separate article on the lines of article X or in a separate paragraph of article 14, the Commission might be criticized for going outside the subject. But the most important consideration was that if a special provision was devoted to property of the territory in the context of succession relating to newly independent States, parallel or identical provisions would have to be included for all the other types of succession of States. Otherwise, the existence of a special provision for newly independent States alone might be wrongly interpreted as meaning that, in the case of other types of succession of States, the territory to which the succession related lost the property belonging to it. He was therefore personally opposed to the insertion of a separate article, or of a special paragraph in article 14 or elsewhere, dealing with property belonging to the territory. He had already stressed in his previous reports that a succession of States did not affect the territory's right of ownership of its own property, and that at the most, that property would, as from the date of the succession, be governed by the legal order of the successor State. With regard to property belonging to a newly independent State, moreover, Mr. Thiam [16] had reminded the Commission that administering Powers had often taken for themselves property belonging to the territory or to tribal communities. On that point, he had cited in his third report the judgment rendered by the Court of Appeal of French West Africa on 8 February 1907 in the case of *Daour Diop* et al. v. *French State*.[17] The successor State should claim such property as property of the predecessor State which had to pass to it.

23. The problem of devolution agreements, which had been mentioned by Mr. Ushakov, Mr. Thiam, Mr. Ramangasoavina, Mr. Njenga, Mr. Reuter and Mr. Castañeda, was a difficult one which had always caused him concern, and to which he had drawn the Commission's attention in his first report in 1968. The fact that colonialism had begun with false treaties and ended with false treaties confirmed, even in that sphere, its illegitimate, if not illegal, character. The "glass bead treaties" by which the colonial Powers had taken over Africa in the nineteenth century had provided for the occupation of a territory in exchange for a few trinkets or fire-arms. Those treaties nevertheless represented some progress compared with the sixteenth century, when possession had been taken of territories and continents merely by papal bulls, and with the eighteenth century, when, as J.-J. Rousseau had said, "His Catholic Majesty had only to take possession of the whole universe at one stroke".[18] In most cases, the European contracting party had no status as a plenipotentiary: he was often an individual—an explorer, a merchant, or a representative of a private trading company. In addition, the indigenous party was obliged to cede rights of which it apparently had no conception. For instance, the German companies in east Africa had

[16] See 1395th meeting, para. 16.

[17] See *Yearbook... 1970*, vol. II, p. 138, document A/CN.4/226, foot-note 21.

[18] *Du contrat social ou Principes du droit politique*, BK.1, chap. IX, [translation by the Secretariat].

inserted a clause providing that the Sultan of Zanzibar "ceded all the rights which constituted the notion of sovereignty as understood in German law". The sovereignty of the inhabitants of the territory had thus been recognized only for a moment—for as long as the colonizing State needed to alienate it by one of those devolution treaties which had opened the way for colonialism.

24. The devolution agreements concluded in modern times had different defects, but they were just as defective as the former ones. He was not, however, inclined to share Mr. Ushakov's views about them, for although he considered those treaties to be open to criticism and voidable, it was less because they were agreements between two States, one of which did not yet exist, as Mr. Ushakov had said,[19] than because they were leonine agreements, heavily weighted against the newly independent State. Mr. Martínez Moreno had pointed out that there was a growing tendency to consider the nation, rather than the State, as a subject of international law.[20] Sovereignty, which was an historical product of relations of interdependence among human beings, gave the subjugated people in process of forming a State the capacity, now recognized by international law, to acquire the status of a subject of international law. According to General Assembly resolution 1514 (XV), every people, even if at some stage in its history it had not been politically independent, possessed the attributes of sovereignty, which was inherent in its existence as a people and could be extinguished only if it was destroyed. The sovereign authority of the State could only be the resultant of the political forces scattered throughout society. To an increasing extent, it was peoples which were becoming the subjects of contemporary international law. Moreover, the objective and final beneficiary of international legal rules was the individual, the primary and most basic component of the people.

25. He therefore believed, unlike Mr. Ushakov, that the capacity of the parties to devolution agreements did not raise any problem—especially as it was necessary to facilitate the access of dependent territories to independence by granting them the broadest possible power to conclude treaties. In 1962, some people had still been discussing the legal nature of the Evian Agreements, by which his country had acceded to independence, although two years previously the Soviet Union had recognized the Provisional Government of the Algerian Republic and its full capacity to conclude treaties. Thus the difficulty did not relate to the capacity of one of the parties to the devolution agreement, but rather to the specific content of that agreement. If the content of an agreement was irreproachable in regard to the right of peoples to dispose of their wealth and property, could one dare to condemn it because it had been concluded by a State which as yet had only potential existence? That would be excessively formalistic. Moreover, there were not only devolution agreements concluded before independence; there were also devolution agreements concluded after independence, when the problem of the capacity of the parties did not arise. The reason why devolution agreements had been excluded in article 8 of the draft on succession of States in respect of treaties, to which Mr. Ushakov had referred, was not that the capacity of one of the contracting parties was inadequate, but that the Commission had considered that such agreements could not be invoked against third States.

26. Devolution agreements must therefore be judged according to their contents. Such agreements did not observe, or only seldom observed, the rules of State succession. In fact, they laid down new conditions for the independence of States. For example, the newly independent State could become independent only if it agreed not to claim certain property, to assume certain debts, to extend certain laws or to respect a certain treaty of the administering Power. There lay the basic difference from the other types of succession, in which the independence of the will of the contracting parties must be recognized. In the case of devolution agreements, freedom to conclude an agreement led to conditions being imposed on the actual independence of a State. The restrictive content of such agreements established a "probation" system, with conditional independence for newly independent States. The problem of their validity must therefore be posed in terms of their contents.

27. When Iraq had acceded to independence in 1932, the League of Nations had set five very stringent conditions for the independence of a State. The State had to have an established Government and an effective administration for its essential services; it had to be able to maintain its territorial integrity and political independence, to ensure safety and public order, to have sufficient financial resources to meet its normal needs, and to ensure regular administration of justice. It might be questioned whether many European States fulfilled those conditions themselves. In fact, contemporary devolution agreements laid down similar new conditions for newly independent States—hence the inadmissibility of such agreements and their incompatibility with the right of peoples to self-determination. It was in the commentary rather than in the text itself of article 14 that he had expressed his views on that subject.

28. Mr. Reuter had proposed two solutions to save what might be useful in devolution agreements.[21] He had proposed applying to economic agreements the *rebus sic stantibus* clause, whose *raison d'être* had originally been essentially political, so that the agreement could be amended if economic developments made it too difficult to implement. He had also proposed saying that all devolution agreements could be revised after two years in order to ensure that they had been concluded on an equitable basis. He (the Special Rapporteur) considered that those two proposals were good, but that they could not solve the basic problem; for their application assumed that the economic and political pressure exerted by the dominant State had previously been reduced so that, after a few years, the newly independent State would be strong enough to ask for revision of the agreement. The two proposals thus appeared to regard a problem which

[19] See 1394th meeting, para. 43.

[20] See 1395th meeting, para. 31.

[21] See 1396th meeting, paras. 47-50.

remained to be solved as being solved already, namely, that of economic and political coercion. On the other hand, to declare the agreements void *ab initio* protected the successor State in advance and served as a warning to the predecessor State, as Mr. Castañeda had rightly observed.

29. With regard to the principle of the permanent sovereignty of the newly independent State over its wealth and natural resources, set out in article 14, paragraph 3, he wished first of all to defend himself against Mr. Hambro's accusation of "conceptualism" (*Begrijffsjurisprudenz*). He was not advancing a new theory, but a new idea of sovereignty which was developing of itself and gaining ground every day. It should be borne in mind that the sovereignty of the State was not expressed only by its political elements, but also, and to an increasing extent, by its economic elements. Mr. Reuter had said that the economic sovereignty of States was only a hope which had not yet been translated into legal rules.[22] But a new international economic order was being established as a result of such important events as the Fourth Conference of Heads of State and Government of Non-Aligned Countries (Algiers, September 1973); the sixth special session of the General Assembly (April-May 1974), which had been devoted to the establishment of a new international economic order; the adoption, in December 1974 of the Charter of Economic Rights and Duties of States;[23] the Conference of Sovereigns and Heads of State of the OPEC Member Countries (Algiers, March 1975); the seventh special session of the General Assembly (September, 1975) on development and international economic co-operation; the Conference on International Co-operation (North-South Conference) (December 1975); and the fourth session of UNCTAD, held at Nairobi in May 1976. Those meetings had not produced only aspirations and words, but concrete efforts which would gradually lead to new legal rules. For one could not accept political decolonization and rejects its inevitable consequence—the recovery by the newly independent State of its wealth and resources.

30. Four questions had been raised in regard to article 14, paragraph 3: was it necessary to state the principle of the economic sovereignty of the newly independent State and, if so, how, where and why should it be stated?

31. Mr. Tsuruoka had said [24] that it was not necessary to state that principle because the Commission had already taken a decision on the question in connexion with draft article 10 (Rights in respect of the authority to grant concessions), which he (the Special Rapporteur) had submitted in his seventh report. The Commission had reserved its position on that draft article and had considered it "unnecessary that the draft articles should affirm the principle of the sovereignty of the successor State over its natural resources, since that principle derives from statehood itself and not from the law of succession of States.[25] Mr. Tsuruoka had therefore taken the view that there would have to be a really compelling reason, if the Commission was to reopen that question. It would be remembered, however, that he (the Special Rapporteur) had himself withdrawn draft article 10 to propose a broader and more up-to-date text, as he had considered that the article was no longer justified in 1975. As a result of the energy crisis in 1973, the system of concessions had, indeed, practically disappeared; besides which, rights in respect of the authority to grant concessions were only one aspect of the permanent sovereignty of the State over its natural wealth.

32. Mr. Tsuruoka had also said that the principle stated in paragraph 3 was not only valid for newly independent States, but for all sovereign States, and had no direct connexion with the law of the succession of States. It was, however, a cause for rejoicing that legal theory was beginning to regard that principle as a principle of public international law. If the principle was valid for all States, it was valid for newly independent States in a succession. That fact should be stressed, in one way or another, at the point when it was most likely to be forgotten—that was to say, at the crucial moment of the birth of States. For as Mr. Thiam had so rightly said,[26] there were States which were weaker than others, whose economic sovereignty might be threatened, and they must be protected. That applied to newly independent States.

33. Mr. Tabibi, Mr. Yasseen, Mr. Castañeda and Mr. Calle y Calle believed that the principle of the economic sovereignty of the State should be enunciated, because it was a principle of *jus cogens*. It certainly constituted a general rule applicable to all States, but its inclusion in article 14 was appropriate and particularly important, as Mr. Sette Câmara had stressed.[27]

34. Mr. Tammes, Mr. Quentin-Baxter and Mr. Njenga had raised the question how that principle should be expressed. They had asked for his views on the subject and had made proposals. Mr. Tammes had inquired [28] how the principle of economic sovereignty could be translated into precise legal terms; he had very aptly observed, as had Mr. Quentin-Baxter, Mr. Yasseen and Mr. Castañeda, that the text of article 14, paragraph 3 did not go as far as the commentary. He (the Special Rapporteur) had in fact proceeded in three stages. First, the opening proviso of article 14 "Unless otherwise agreed or decided" appeared to give precedence to agreement between the parties. Then paragraph 3 called in question any agreement which was incompatible with the sovereignty of a newly independent State over its wealth. Lastly, the commentary went further, by advocating the invalidity of devolution agreements and developing the idea of economic sovereignty. He had thus proceeded with caution: setting aside his personal convictions and avoiding a radical formulation, he had given the Commission the choice of two formulas, one more

[22] *Ibid.*, para. 48.

[23] General Assembly resolution 3281 (XXIX).

[24] See 1395th meeting, para. 10.

[25] *Yearbook... 1975*, vol. II, p. 108, document A/10010/Rev.1, para. 66.

[26] 1395th meeting, para. 15.

[27] 1394th meeting, para. 27.

[28] *Ibid.*, para. 15.

moderate than the other. That was why Mr. Yasseen had thought that the reservation in article 14, paragraph 3 was not a sufficiently effective remedy against agreements or situations which violated the sovereignty of the newly independent State.[29] Mr. Pinto, for his part, considered paragraph 3 too restricted and wished it to be broadened.[30]

35. Those considerations raised the question of the residuary character of the rules proposed in article 14. Were those rules residuary or quasi-peremptory? Mr. Šahović had reverted to that question. He had criticized the opening proviso of article 14, paragraph 1, "Unless otherwise agreed or decided", and had requested that a general article should be drafted, which would specify once and for all the residuary character of the rules proposed.[31] He agreed with Mr. Šahović so far as articles 12 and 13 were concerned, and indeed all the other articles except, precisely, article 14. For it was not a residuary rule that was stated in article 14, since paragraph 3 limited the powers of States and laid down what was almost a rule of *jus cogens*. He believed, like Mr. Castañeda,[32] that devolution agreements were void *ab initio*, because they were incompatible with the principle of self-determination. That was a peremptory rule of *jus cogens* which should appear in paragraph 3.

36. In order to reconcile the contradiction between the residuary character and the quasi-peremptory character of the different rules proposed in article 14, Mr. Njenga had proposed [33] an attractive formula which he himself would favour: it would be sufficient to delete from paragraph 1 of article 14 the usual formula "Unless otherwise agreed or decided", so as not to give importance to devolution agreements. Mr. Tabibi and Mr. Calle y Calle had supported that proposal at the previous meeting, saying that the rule in paragraph 1 should be stated more categorically. Mr. Ushakov had asked what was meant by the words "Unless otherwise ... *decided*" and had expressed the fear that the decision taken might be contrary to the interests of the newly independent State.[34] He himself was in favour of deleting the whole of the opening proviso in paragraph 1, as Mr. Njenga had proposed.

37. Mr. Sette Câmara had said that a safeguard clause was needed to protect newly independent States against leonine agreements.[35] Paragraph 3 of article 14 therefore seemed to him to be useful, and he found its wording in conformity with the language used in the decisions of United Nations bodies from which it had been taken. Other members of the Commission, like Mr. Tsuruoka (1395th meeting) and Mr. Castañeda (1396th meeting), had said that paragraph 3 should be modelled as closely as possible on the international conventions on human rights already in force and, in particular, on article 1, paragraph 2, of the International Convenant on Economic, Social and Cultural Rights.

38. Mr. Quentin-Baxter had some difficulty in accepting paragraph 3,[36] because it stated an obligation conflicting with the sovereignty of States, which were free to conclude whatever agreements they wished. But he was prepared to accept an article or a paragraph which fully respected the principle of self-determination.

39. Sir Francis Vallat had pointed out that economic sovereignty was only one aspect of political and territorial sovereignty.[37] He himself had never denied that: he had always asserted that sovereignty must be defined by reference to all its elements, political and economic.

40. Sir Francis Vallat had also asked what was meant by "permanent" sovereignty.[38] The answer to that question had been given by Mr. Yasseen and Mr. Castañeda and it expressed his personal conviction. Mr. Yasseen had stressed that international law was moving towards protection of the State against itself;[39] Mr. Castañeda had said that it was also necessary to protect the State against the acts of a bad government or a bad representative [40] and had referred to the case of Zaire at the time when there was a danger that the province of Katanga might secede. Thus the permanence of State sovereignty meant that a State must not go so far as to surrender completely its sovereignty over its natural resources.

41. Several members of the Commission had expressed the hope that paragraph 3 of article 14 would be moved, for example, to the beginning of the draft. That arrangement would only emphasize the importance of the provision and he was all in favour of it. Nevertheless, he stressed that the provision in question particularly concerned newly independent States.

42. Despite the arguments based on the notions of independence, sovereignty and economic coercion put forward by some members of the Commission, there was every justification for reiterating the principle set out in article 14, paragraph 3. Mr. Tsuruoka had made the point that permanent sovereignty naturally belonged to all States, not only to newly independent States.[41] Mr. Kearney had observed that economic interdependence was the lot of all States, not only of the newly independent.[42] As to economic coercion, Mr. Reuter considered that even if it had been accepted as a defect in consent by the United Nations Conference on the Law of Treaties, the present situation would not be much different, because the whole world was living under economic coercion.[43] Thus according to those members of the Commission, all States were sovereign, but they were also interdependent and, whether large or small,

[29] See 1395th meeting, para 51.
[30] See 1396th meeting, para. 44.
[31] See 1394th meeting, para. 20.
[32] See 1396th meeting, para. 19.
[33] See 1395th meeting, para. 40.
[34] *Ibid.*, para. 2.
[35] See 1394th meeting, para. 27.
[36] *Ibid.*, paras. 31-32.
[37] See 1396th meeting, para. 2.
[38] *Ibid.*, para. 5.
[39] See 1395th meeting, para. 51.
[40] See 1396th meeting, para. 20.
[41] See 1395th meeting, para. 10.
[42] See 1396th meeting, para. 24.
[43] *Ibid.*, para. 49.

were undergoing economic coercion. For his part, he only wished that the third world countries might be as "sovereign" and as "interdependent" as the great nations of the world, and that they might experience the same "economic coercion" as those nations.

43. In his view, the energy crisis and the economic recession made it necessary to consider economic problems in the aggregate. He distinguished four cardinal points in the new economic and world space, namely, sovereignty, equality, development and solidarity—or interdependence. All those notions were present in classical public international law, but they had undergone qualitative changes. An effort was now being made to give a specific content to such notions as the sovereignty and equality of States. On that point it had been said in certain quarters that the advocates of permanent sovereignty had become intoxicated with that idea. They were reproached for making excessive claims of sovereignty when the world was passing through a period of interdependence. The critics seemed to be asking the States of the third world to renounce their very newly acquired sovereignty. Before their independence, it had been too soon for them to enjoy real sovereignty; now, it was too late. An attempt was being made to confiscate their regained sovereignty by invoking the theory of interdependence.

44. The reasoning of the well-endowed countries was particularly suspect when they invoked the notion of the common heritage of mankind. They claimed that natural resources were necessary to mankind as a whole and did not belong to the countries in which chance had placed them. They asked for a share of what did not belong to them, but refused to share what did belong to them, namely their prosperity. A veritable club of oil consumers had been formed at Washington in 1974, by the establishment of the International Energy Agency. The Western countries were now complaining of the unfair distribution of the resources of the earth, but it had not caused them any concern when they were the sole beneficiaries. They claimed that the mineral deposits of the third-world countries should be made available to all, but refused to give those countries the benefit of their own "intellectual deposits". In fact technology was the very archetype of the common heritage of mankind. At the sixth special session of the General Assembly, certain representatives had supported the theory of limited sovereignty, according to which sovereignty over natural resources was only a trust or limited right of management. The State in whose territory the natural resources were situated would thus be only a trustee for those resources, acting on behalf of the international community. Other representatives, however, had tried to reconcile sovereignty over natural resources with the interests of the international community.

45. Most of the members of the Commission were in favour of the presumption of the right of ownership of the newly independent State, which derived from the general principle of the passing of State property stated in article 9. Mr. Bilge had even expressed the hope that that principle would be more clearly affirmed in article 14, paragraph 1.[44] Mr. Quentin-Baxter had also endorsed that presumption, but he had stressed the need to take into account not only the letter, but also the spirit of the principle of self-determination.[45] Mr. Ushakov believed that in adopting the principle of geographical location of property, the Commission would be running into difficulties. He had suggested adopting the criterion of the link between State property and the activity of the predecessor State in the territory.[46] But that criterion might limit the amount of property which could pass to the newly independent State in accordance with articles 14 and 15. Property belonging to the territory which became independent would pass, but the property appertaining to sovereignty and used by the predecessor State, such as military bases, would not pass.

46. Mr. Yasseen and Mr. Martínez Moreno had suggested replacing the criterion of a "direct and necessary link" by that of a "reasonable link".[47] That solution would be appropriate for articles 12 and 13, but would be disadvantageous to newly independent States in the cases covered by articles 14 and 15. Equity required that the predecessor State should be treated more severely in the case of articles 14 and 15 than in that of articles 12 and 13. Nevertheless, the criterion could not be changed in one case without being changed in the other. With regard to the burden of proof, he considered that it fell on the predecessor State in the case of article 14. All those difficulties had led some members of the Commission to advocate the formulation of a system for the settlement of disputes.

47. Several members of the Commission had proposed drafting a special provision on archives, in view of the importance of that category of State property for the newly independent States. It had also been pointed out that archives could be useful both to the predecessor State and to the successor State. An illustration of that was the case of the Algerian records of births, deaths and marriages, part of which had been taken to France at the time of independence, causing grave difficulties and even tragedies for Algerian citizens until those archives had been restored to Algeria. It would be for the Drafting Committee to try to formulate a provision concerning archives.

48. With regard to the notion of property belonging to the territory, as understood by Mr. Ushakov (who had explained his views to him), it covered not only property which had belonged to the colony, but also property which had belonged to the territory before its colonization, such as archives, works of art and gold, which had passed to the colonizing State. Thus in 1962, when Algeria had become independent, France had taken away the Algerian historical archives known as the Arab, Turkish and Spanish records, which had been the State property of Algeria before its colonization in 1830. On that point, he referred members to his third report.[48] He thought that a formula should be found to cover those two categories of State property.

[44] *Ibid.*, para. 55.

[45] See 1394th meeting, para. 32.

[46] See 1395th meeting, para. 3.

[47] *Ibid.*, para. 27.

[48] See *Yearbook... 1970*, vol. II, p. 159, document A/CN.4/226, part. II, para. 37 of the commentary to article 7.

49. With regard to the drafting of articles 14 and 15, the Drafting Committee should, in particular, try to unify the terminology of paragraphs 1 and 2 of article 14. The expressions "shall exercise a right of ownership", and "property ... shall pass" and the notion of a "right of ownership" all required careful consideration. It seemed that it would be difficult to adopt the concept of a *droit éminent* (eminent domain) to which Mr. Martínez Moreno had referred,[49] because it was not well known except in Spanish, Italian and French law. Lastly, with regard to Mr. Ramangasoavina's remarks concerning the extract from an article in the *New York Times* quoted in his eighth report,[50] he had not intended to attach the same importance to that information, which he had only put in a foot-note, as to the Ordinance of the Comorian Government mentioned in paragraph 19 of the commentary to article 14. He had even taken the precaution of using the conditional mood, in particular in paragraph 20, to report the statements contained in that document, although it was official.

50. The CHAIRMAN, speaking as a member of the Commission, said that he wished to comment on the question of the definition of the expression "newly independent State", which he believed had been first raised during the discussion by Mr. Martínez Moreno, and might be taken up by the Drafting Committee as the Special Rapporteur had indicated. The Commission had given a definition of that expression in article 2, paragraph 1 (*f*), of the draft on succession of States in respect of treaties:

> "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.[51]

51. The suggestion made at the beginning of the meeting by Mr. Martínez Moreno appeared to be linked with the definition of the expression "newly independent State" which would be adopted for purposes of the present draft.

52. Mr. MARTÍNEZ MORENO explained that the object of his suggestion was to obviate any difficulties that might arise in regard to Trust Territories. He had suggested that, where necessary, the reference to the "predecessor State" should be accompanied by a reference to the "administering authority", which was the term used in Article 81 of the Charter in regard to Trust Territories. He did not think it was necessary to define the term "administering authority" because its meaning was already explained in Article 81 of the Charter. Unlike Mr. Njenga, however, he thought the expression "newly independent State" should be defined.

53. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Martínez Moreno's suggestion brought out the importance of including a broad category of territories in the definition of the expression "newly independent State". Article 81 of the Charter was in the chapter dealing with the International Trusteeship System. The Commission should not confine itself to borrowing a term from the Charter, but should work out a formula broad enough to cover all non-independent territories.

54. The Charter itself drew a distinction between the former League of Nations mandates which had passed under the United Nations Trusteeship System, the territories placed under trusteeship since the establishment of the United Nations, and "Non-Self-Governing Territories". As far as the latter were concerned, the Powers responsible for their administration were required to submit information to the United Nations and to lead the peoples of the territories concerned to independence. All those territories, regardless of their status—colonies, protectorates or Trust Territories—were not fully sovereign and independent and should be covered by the definition.

55. The Special Rapporteur had referred to the concept of eminent domain, which was a concept of internal law. In international law, the concept of *dominium*, or territorial sovereignty, was coupled with that of *imperium*, which was the power of a State to exercise supreme authority over its citizens; taken together, those two attributes constituted sovereignty with all its prerogatives.

56. Speaking as Chairman, he thanked the Special Rapporteur for his eloquent and detailed replies to all the numerous questions raised by the members of the Commission regarding articles 14 and 15.

57. If there were no objections, he would take it that the Commission agreed to refer articles 14 and 15 to the Drafting Committee for consideration in the light of the comments and suggestions made.

It was so agreed.[52]

The meeting rose at 1 p.m.

---

[49] See 1395th meeting, para. 26.

[50] *Ibid.*, para. 22.

[51] *Yearbook... 1974*, vol. II (Part One), p. 175, document A/9610/Rev.1, chap. II, sect. D.

[52] For the discussion on the articles proposed by the Drafting Committee, see 1405th meeting, paras. 20-42.

1398th MEETING

Friday, 25 June 1976, at 10 a.m.

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.