Document:-
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Summary record of the 1443rd meeting

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

Extract from the Yearbook of the International Law Commission:-
1977, vol. I

38. The real problem was what part an international organization could play in the emergence of a customary rule. It might be argued that international organizations did not play any part, at least so far as rules of general international law were concerned, since the general customary rules applicable to an international organization were recognized by all member States. It might also be argued that, in the process of developing a rule of general customary law, an international organization, as a subject of international law, was entitled to establish by its behaviour that it considered that that rule existed so far as it was concerned.

39. Along with customary rules of general international law, however, it was also possible to envisage customary rules which concerned only international organizations. That was a highly theoretical hypothesis since it presupposed the existence of a customary international law of international organizations, and the least that could be said was that such a law, if it did exist, was of very meagre content.

40. With regard to customary rules of regional international law, the same reasoning could be applied as for customary rules of general international law, with the difference that, according to the decision of the International Court of Justice in the *Asylum* case,[11] the creation of regional customary law required a commitment on the part of all States in the region. The hypothesis of a regional customary law would therefore involve special considerations.

41. Consequently, the Commission should confine itself in the commentary to underlining the extremely modest character of the rule laid down in article 38 and to pointing out that it did not commit the international organization. The United Nations Conference on the Law of Treaties had not sought to commit States on the question of custom, and the Commission itself had always hesitated to tackle the question.

42. Mr. ŠAHOVIĆ said that, so far as he was concerned, the question of the nature of customary rules of general international law did not arise. Article 38 was important because it reflected the solution already adopted by the Vienna Convention in the case of treaties concluded between States, and he proposed that the article be referred to the Drafting Committee.

43. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the question of the method of establishment of rules of customary law for international organizations was extremely interesting and important, but, as had already been said, it had not been found necessary to set out in the Vienna Convention the method by which customary rules of international law were established. Admittedly, something close to a description of that method was to be found in article 53 of the Convention, but it was only part of the definition of *jus cogens*.

44. Consequently, he felt that it was not incumbent on the Commission to set out, for the purposes of the present draft articles, the process by which rules of customary law were established for international organizations. What the Commission was saying in article 38 was that such of those rules as existed—and it was not admitting that any did exist—would apply. His own view was that such rules did exist, and that among them were those of *pacta sunt servanda* and the prohibition of aggression.

45. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to refer article 38 to the Drafting Committee, thereby concluding its study of the reports submitted by the Special Rapporteur.

It was so agreed.

Organization of work

46. The CHAIRMAN suggested that, in view of the stage the Commission had reached in its study of the question of treaties concluded between States and international organizations or between two or more international organizations and of the fact that the Drafting Committee, despite having made considerable progress in that field, was not yet ready to make its report, the meeting of the Commission scheduled for the following day should be replaced by a meeting of the Drafting Committee.

It was so agreed.

47. The CHAIRMAN said that the Special Rapporteur for the question of succession of States in respect of matters other than treaties would be available on 20 and 21 June and that the Commission would therefore devote its meeting on those days to the continued study of that topic.

The meeting rose at 12.15 p.m.

1443rd MEETING

Monday, 20 June 1977, at 3.05 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

NEW ARTICLE (Newly independent States)

1. The CHAIRMAN invited the Special Rapporteur

[11] *I.C.J. Reports*, p. 266.

* Resumed from the 1428th meeting.

to introduce Chapter V of his ninth report (Succession to debts in the case of newly independent States) (A/CN.4/301 and Add.1), as well as his new article to replace articles F, G and H, which read:

Newly independent States

When the successor State is a newly independent State:

1. The debts of the predecessor State to the dependent territory are payable to the newly independent State.

2. The newly independent State shall not assume debts contracted on its behalf or for its account by the predecessor State, unless it is established that the corresponding expenditures actually benefited the formerly dependent territory.

3. In this case, the debts in question shall pass to the newly independent State in an equitable proportion, taking into account the relation between those debts and the property, rights and interests passing to the newly independent State.

4. The provisions of paragraphs 1 and 2 above shall also apply to cases in which the newly independent State is formed from two or more dependent territories, or becomes part of the territory of a State other than the State which was responsible for its international relations.

5. The succession of States does not as such affect the guarantee given by the predecessor State for a debt assumed by the formerly dependent territory.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to the debts in question, otherwise than by the application of paragraphs 2 and 3 above, shall not have the effect of gravely compromising the economy of the newly independent State or retarding its progress, of infringing the right of its people to dispose of their own means of subsistence, or of limiting their right to self-determination and to dispose freely of their natural resources.

2. Mr. BEDJAOUI (Special Rapporteur) said that the new article which he proposed concerned the fate of State debts in the event of State succession involving a newly independent State, in other words, in the event of succession resulting from decolonization.

3. It was first necessary to clarify what was meant by "State debts" in that kind of succession. Prior to attaining independence, a dependent territory was not a State or at any rate was not yet regarded as such. Consequently, it might be expected that the debts which concerned such a territory were mainly its own debts, so-called localized debts. It was necessary to refer to the predecessor State, which in such cases was the administering Power, to ascertain whether the debts it had assumed had been incurred for the needs of the dependent territory or for those of the metropolitan country. In the former case, a number of difficulties generally arose and it was often hard to decide whether the debts belonged to the predecessor State or to the dependent territory. That situation was explained in the section of his ninth report relating to the example of Cuba (A/CN.4/301 and Add.1, paragraph 290).

4. The debt problem which had to be considered for purposes of State succession was complicated for a variety of reasons.

5. In the first place, the dependent territory usually enjoyed a certain financial autonomy, which suggested that it could itself contract loans. The extent of that autonomy, however, and the legal restraints to which it was subject, varied considerably. The autonomy of the will of a dependent territory was not so extensive that the territory's debts could be considered as having been contracted of its own free will. Judicially, the intervention of the political organs of the administering Power could take many forms, including particularly parliamentary authorization.

6. Moreover, under colonial law, executive organs of the dependent territory were regarded as acting on its behalf and within the context of its financial autonomy, whereas in fact they represented the metropolitan Power. Consequently, the question arose whether the debts assumed were debts of the dependent territory or of the predecessor State.

7. Lastly, there was the problem of the status of the dependent territory prior to independence. Sometimes, the political, legal or territorial affiliation of the dependent territory to the metropolitan country had been carried very far, as in the case of the French overseas territories. On the other hand, in a protectorate, the representative of the metropolitan Power was regarded as the minister of foreign affairs of the protectorate. As a consequence, the financial autonomy of the protectorate appeared to be far greater.

8. In many cases, it had been difficult to distinguish between localized debts proper to a dependent territory and State debts assumed by the administering Power. In the case of Cuba, in 1898, it had been necessary to decide whether debts were debts of the colony or of the metropolitan country, or even debts of the metropolitan country contracted for the benefit of the colony. In the case of Madagascar, certain debts had been made subject to a legal régime involving the intervention of the French Parliament, with the result that those debts had been regarded as proper to France. In the case of the Belgian Congo, a distinction had been made between external debt guaranteed or assigned by Belgium and external debt not guaranteed by Belgium.

9. State practice thus showed how difficult it was to make a distinction between the debts of a dependent territory and those of the administering Power. On the one hand, there were the debts contracted by the administering Power through its own central organs, on behalf and for the account of the dependent territory, and, on the other hand, the debts proper to the dependent territory, contracted by a local organ of the territory. Between those two extremes, however, there ranged many forms of intervention by the administering Power. A debt might be contracted by virtue of the parliamentary authorization of the metropolitan country, in which case the dependent territory should not be regarded as the debtor. The same applied when the debt was assumed by the dependent territory but with the guarantee of the administering Power. Thus, where a dependent territory contracted a loan with IBRD, the administering Power, which was bound by a guarantee agreement, was regarded as a principal debtor and not merely as a surety.

10. In short, it was rare for a debt to be contracted by a dependent territory. Even if the decision-making process originated in a dependent territory, it culminated only within the framework of the laws and regulations of the central Government of the administering Power. That was

why he suggested that the question of the guarantee should be dealt with in the article relating to newly independent States, since the guarantee was one aspect of intervention by the administering Power and could be taken with other forms of intervention in the debt-creation process. By the same token, the guarantee was one of the factors which rendered the debt chargeable to the administering Power. Furthermore, the guarantee of the administering Power actually became of importance to the creditor only after the dependent territory had attained independence. Since that was the point at which it was of maximum value to creditors, it must not be allowed to disappear.

11. With regard to colonial debts, in accordance with practice, both of colonization and decolonization, such debts included both State debts contracted by the administering Power on behalf and for the account of the colony, as well as debts of the colony contracted with the guarantee, parliamentary intervention or executive authorization of the metropolitan country. Incidentally, in the case of colonization, it was the principle of non-transferability of debts that had generally prevailed, as was clear from his report.[1] Where a colonial successor State assumed certain debts, it did so voluntarily and as an act of grace.

12. He had given a number of earlier examples of decolonization practice in his ninth report. What was particularly striking was the refusal, as a matter of principle, to assume the debts of the colonial Power, as when the United States and Brazil had become independent. It was true that the Spanish colonies of Latin America had assumed some of the administering Power's debts when they became independent but that had been a voluntary unilateral act, the price of friendship and peace with Spain. Subsequently, however, when Cuba achieved its independence, a limit had been set to the extent of voluntary acceptance, and thus the principle of refusal to assume the debts of the colonial Power had been strengthened.

13. Contemporary decolonization practice was not uniform. He had given several examples in his report.[2] A noteworthy solution was that applied to the problem of the external debt of the Belgian Congo. There, a distinction had been made between, on the one hand, the debt contracted by Belgium with international financial institutions, expressed in foreign currency, and the debt assigned by Belgium, namely, loans contracted by Belgium, the proceeds of which had been applied for the benefit of the Belgian Congo—Belgium had been made responsible for both categories of debt—and, on the other hand, the external debt not guaranteed by Belgium, which arose out of loans contracted by the administering Power in Belgium and elsewhere on behalf of the Congo. Belgium and the Congo had both refused to assume that debt and a joint fund had therefore had to be established, as an international public agency, to handle the debt. Another interesting case was that of Algeria, which had been the subject of a package deal in the Evian Agreements of 1962.[3] Algeria had agreed to assume the financial obligations of France in Algeria in return for certain undertakings by France in regard to independent Algeria. The dispute that had arisen out of that arrangement had been settled by another package deal in 1966.

14. As for the financial burden of newly independent States, he would again refer the Commission to his ninth report,[4] noting merely that there was no point in preparing a rule which newly independent States would not be in a position to apply by reason of that burden.

15. Of the possible solutions, the simplest would be that adopted by the Allies at the end of the First World War, when the Treaty of Versailles rejected the idea that the colonies of the German Empire should succeed to its debts. Among the reasons taken into account in arriving at that decision was the budgetary weakness of the colonies—a factor traditionally taken into consideration. In addition to the question of financial incapacity, there was the fact that the indigenous population had derived no benefit from investments by Germany, most of which had been made in the exclusive interest of the metropolitan country. That led to the theory of the benefit derived by the colony from such debts in the light of all the special circumstances. That was where the concept of equity came into play in the form of three principles: the proceeds of the debt must have benefited the dependent territory; the newly independent State must have the capacity to pay; and account must be taken of the fact that the formerly colonized peoples were now claiming reparation and compensation for the exploitation they had suffered. The right to development of newly independent States and the duty of the developed countries, including the administering Powers, to assist them were now in fact recognized. The transfer of debts to the successor State would thus be incompatible with those concepts.

16. The first of the three principles of equity could give rise to a lengthy discussion on the question of the benefit that a dependent territory could derive from a debt. It was possible to imagine the case of a colonial loan contracted by France to develop vineyards in Algeria. Since, following Algeria's independence, the vines had had to be uprooted—wine production had exceeded the capacity of the domestic market and it was not easy to find outlets abroad—a debt of that kind could certainly not be regarded as having benefited the population of the former colonial territory. It was quite possible that infrastructures which had been established in a dependent territory with the help of loans and which survived after it had attained independence had been of more significant benefit to the colonizers than to the colonized territory. In some cases, an agricultural or industrial complex had been created for the purpose of binding the economy of the dependent territory to that of the metropolitan country. Loans contracted in such circumstances totally vitiated the idea of benefit. Some industrial or agricultural undertakings had proved extremely difficult to reconvert after a territory had attained independence and had proved more of a burden than a benefit. That was why one should have recourse to principles of equity to clarify the concept of benefit.

[1] See A/CN.4/301 and Add.1, paras. 249 *et seq.*

[2] *Ibid.*, paras. 295 *et seq.*

[3] *Ibid.*, para. 329.

[4] *Ibid.*, paras. 336-353.

17. State practice and case law both took account in general terms of the capacity to pay, and it was therefore all the more imperative to take account of that factor in the case of newly independent States.

18. The right to reparation and compensation, which the former colonized countries claimed, had been demanded at the First Conference of Heads of State or Government of Non-Aligned Countries, held at Belgrade in 1961, and the demand had been repeated at all subsequent conferences up to the last one held at Colombo in 1976. At its sixth special session, held in 1974, the General Assembly had recognized the right of colonized and exploited countries to restitution and compensation for damages to and pillaging of their resources.[5] Further, remedying of injustices brought about by force, which deprived a nation of the natural means necessary for its normal development, was one of the 15 fundamental principles which, according to the Charter of Economic Rights and Duties of States,[6] should govern economic and political relations among States. Article 16 of that Charter provided that States practising domination were responsible to the dependent territories for the restitution of all their natural and other resources and full compensation for the exploitation and depletion of, and damages to, those resources, and that it was the duty of all States to extend assistance to those dependent territories and their populations.

19. With regard to the new article he proposed, paragraph 1 was based on draft article 13.[7] It was important, in cases of succession, that debts of the predecessor State to the dependent territory, contracted before the attainment of independence, should continue to be payable to the latter. Paragraphs 2 and 3, which were to be read together, embodied the principle of the non-transferability of debts contracted by the predecessor State on behalf and for the account of the dependent territory, unless it was established that the latter had benefited from their proceeds. Paragraph 4 related to the special cases of succession where a newly independent State was formed from two or more dependent territories or became part of the territory of a State other than the State which had been responsible for its international relations; that paragraph was also based on draft article 13. Paragraph 5 dealt with the case of the guarantee given by the administering Power for a debt assumed by the dependent territory. Lastly, paragraph 6 dealt with the capacity to pay of newly independent States, bearing in mind their existing debt situation; that provision, too, followed draft article 13.

20. Mr. DADZIE congratulated the Special Rapporteur on his lucid exposition of chapter V of his ninth report in which he had given the Commission the benefit not only of his theoretical studies but also of his practical experience during his country's struggle for independence.

21. He himself knew what harm colonialism had caused his own country, but he had nevertheless been alarmed by the facts and figures which the Special Rapporteur had given in section F of the chapter in question, for they showed how common it was for the havoc created in developing countries by their external debts to persist even long after their accession to independence. There was no need to emphasize how intolerable newly independent States, which started their lives with the disadvantage of having been born of a colonial situation and after a long, and sometimes bloody, struggle for independence, found the burden of their inherited debts. The existence of such debts constituted what was termed "neo-colonialism" and represented a diabolical form of economic strangulation of newly independent nations. The Special Rapporteur had been right in saying, in paragraph 365 of his report, that colonialism was:

> an "act of exploitation" justifying newly independent States not only in repudiating all the debts of the predecessor State but even in claiming compensation from the administering Power for such exploitation,

and he fully agreed with the conclusion which the Special Rapporteur had drawn in the next paragraph that colonialism should constitute an exception to the theory that the successor State was liable for localized State debts. In a colonial situation, the will of the people of the dependent territory was always subjugated to that of the metropolitan Power; justice therefore demanded that it be in principle that Power which assumed—from the moment of independence—the debts relating to the territory.

22. Subject to drafting comments, he agreed entirely with the text of the new article proposed by the Special Rapporteur, which he considered could be referred to the Drafting Committee forthwith. However, the construction in Mozambique of the Cabora Bassa dam and other elements of infrastructure had shown that, in its attempts to strengthen its own position, a metropolitan Power could persist in creating debts in relation to a dependent territory, even when the struggle for the latter's freedom was already under way. It would be unjust to require a newly independent State to succeed to such debts, and he therefore proposed the addition at the end of paragraph 2 of the article of the words "and were also incurred at its request".

23. Moreover, the Special Rapporteur had shown, by examples such as that of the vineyards planted in Algeria, that projects undertaken by a metropolitan Power in a dependent territory were not always of benefit to that territory once it became independent. Indeed, the newly independent State could find itself the owner of a "white elephant", the upkeep of which drained its budget. Consequently, he hoped that the Drafting Committee would also consider the addition to the draft article of a provision to the effect that maintenance charges in respect of such developments should be borne by the metropolitan Power. Finally, some means must be found of ensuring that any agreements of the type referred to in paragraph 6 which might be concluded—and his own feeling was that none should be—would not prove beneficial to the predecessor State.

24. Mr. FRANCIS said that it was clear, after reading the information on the financial burden of former colonial territories that had already attained nationhood, which the Special Rapporteur had given in chapter V, section F, of his report, that, although it was not primarily

[5] General Assembly resolution 3201 (S-VI), para. 4 (*f*).

[6] General Assembly resolution 3281 (XXIX).

[7] See 1416th meeting, foot-note 2.

responsible for determining the circumstances in which such territories should attain independence, the Commission must ensure, as far as it was able, that those which had yet to gain their freedom were given a better start. It was true that, provided their succession to the debts of the predecessor State was governed by reasonable rules, some of the territories still under colonial domination would have a chance of becoming viable independent entities, owing to their geographical location or natural resources. Others, however, would inevitably join the category of "mini-States", and the Commission would be failing them if it did not lay down ground rules for their accession to independence, free from the type of burdens which had weighed on others. Consequently, he agreed entirely with the proposals made by the Special Rapporteur in his consolidated draft article.

25. However, it might be that even the passage to the newly independent State, in accordance with paragraph 3 of that article, of debts which, as stated in paragraph 2, had "actually benefited the formerly dependent territory" would not constitute an equitable solution. Account must in fact also be taken of the newly independent State's capacity to pay. The Special Rapporteur seemed to be of the same opinion for, while he had stated in the second sentence of paragraph 383 of his report that "the ... problem is first to decide whether the newly independent State must be made legally responsible for ... a debt before deciding whether it can assume it financially", he had added that "... the two questions must be linked if practical and just solutions are to be found to situations in which prevention is better than cure". Furthermore, he had suggested, in paragraph 384, that "in the case of newly independent States, one might probably go so far as to *affirm the existence of an almost undeniable assumption of incapacity to pay*", in view of their extremely low *per capita* income. None the less, the article proposed by the Special Rapporteur contained only an oblique reference in paragraph 6 to the financial capacity of the newly independent State. He therefore considered that the criteria for the determination of the "equitable proportion" mentioned in paragraph 3 of the article should be supplemented by an explicit reference in the same paragraph to the capacity of the newly independent State to pay.

26. Mr. QUENTIN-BAXTER said that, although the case of newly independent States presented certain special peculiarities, it also exhibited some important characteristics which were common to the cases of the separation of part or parts of the territory of a State and the dissolution of a State. Consequently, the position which the Commission decided to adopt on the article under consideration would have an immensely important bearing on the whole set of provisions relating to State debts and on the draft articles as a whole.

27. That being the case, he considered it permissible to address himself to the question whether there existed a rule of international law relating to succession to State debts. In raising that basic question, the Special Rapporteur had made reference to the varied and sometimes conflicting opinions of many major authorities. It was true that the provisions which the Commission was envisaging and those which had been tentatively adopted in the case of succession to State property did have the character of residual rules. The Commission had endeavoured to promote agreement between the parties concerned rather than encourage them to rely on the rules laid down in the draft articles in default of an agreement. If, however, the rules relating to succession of States were eventually adopted at an international conference and subscribed to by States, they would have a considerable normative effect. Thereafter, sovereign States which negotiated concerning the incidents of a succession of States would do so in the knowledge that there was a point of reference. Moreover, the very fact of adopting positive provisions of the kind contemplated would involve taking a position on the basic question raised by the Special Rapporteur and asserting that there were indeed rules of international law relating to succession to State debts. Thus, the course of action upon which the Commission embarked at the present juncture would be a matter of the greatest moment. The rules which it adopted were unlikely to be accepted by the international community unless it could show that they were of unquestionable use in assuring the stability of relationships between States.

28. Although the task ahead was a difficult one, the Commission should nevertheless take heart from the measure of success it had already achieved in evolving rules concerning succession to State property, which displayed a certain degree of parallelism with those pertaining to succession to debts. It was unlikely that general agreement could be obtained for a set of articles which seemingly confirmed and reinforced the rights of States in regard to succession to property if those articles did not also take account of obligations which, in some cases, were correlative to property rights. Moreover, it was a basic proposition that, more often than not, new States needed capital investment, and the Commission must avoid formulating rules which would discourage a metropolitan Power or international organizations of a financial character from making the necessary loans. Both those factors favoured the adoption of a positive set of rules dealing with succession to State debts.

29. He would further maintain that it was possible to draw more positive inferences from the admittedly conflicting State practice in the matter of succession to debts than had been done by the Special Rapporteur. It was of course true that, in the great majority of cases in which succession to debt had been accepted, there had been an element of an act of grace or a general settlement of which the debt agreement formed only one part. It might therefore be argued that such settlements, being non-principled, afforded little basis for the formulation of general rules. Clearly, the rules to be devised by the Commission would contain an element of progressive development which might, in the present instance, outweigh that of codification. It did, however, seem to him that, even if acceptance of succession to debts involved an act of grace or formed part of a non-principled settlement, such settlements, as in the case of the law relating to State responsibility towards aliens, had considerable value as precedents. To draw a parallel from domestic law, the parties to a civil dispute might agree on a settlement without prejudice to their appraisal of the general legal principles involved. However, the very fact that

such settlements existed provided the best possible evidence of a sentiment that the party offering the settlement had a legal duty to fulfil, even though in a particular case that duty might be hard to determine precisely.

30. In the case of newly independent States and other kinds of succession, much of the practice cited by the Special Rapporteur revealed indications of the recognition of a rule, imperfect though it might be, concerning succession to State debts. Naturally, no rules that the Commission might devise could provide automatic solutions to the very complex and specific problems raised by State succession. However, in that field the Commission was following the modern trend, witnessed in other areas of international law, particularly in the practice of the United Nations, of setting legal standards that might provide an element of objectivity and a point of reference which would facilitate the attainment of solutions in complex individual cases.

31. Most of the State practice in the matter related to debts contracted at the level of internal law at a time when the international community had been formed by a limited number of States which, at any rate among themselves, had applied strict rules of responsibility towards aliens. The diffidence of those States in accepting obligations by succession had had something to do with the rigour of the rules relating to State responsibility once those obligations had been accepted. The modern tendency was to view the question of responsibility towards aliens in the light of various other cardinal considerations affecting the sovereignty and viability of States. It was quite proper that the draft articles under consideration, as well as the draft convention on succession of States in respect of treaties, should be governed and inspired by the United Nations doctrine of self-determination. In the case of the draft articles concerning the passing of State property and of the new article, account had also, quite rightly, been taken of the principle of sovereignty over natural resources.

32. As to the text of the proposed new article, paragraph 4 was a natural and proper extension of the provisions relating to succession to State property, applying as it did the rules relating to an ordinary case of self-determination to the case in which two or more dependent territories joined to form a newly independent State.

33. He did, however, have some doubts regarding paragraphs 1 and 5. In neither case did he disagree with the sentiment expressed, but he wondered whether provisions of that kind had a place in the draft articles. The case envisaged in paragraph 1 could in practice take several different forms. The dependent territory might be a separate entity under the internal law of the metropolitan State and might therefore have the capacity, for instance, to purchase bonds issued by that State. To his mind, there could not be the slightest doubt that such bonds, which represented an investment by the dependent territory in its own name and in its own right, should continue to belong to it after the occurrence of the succession of States. In the case of the draft articles on property, the Commission had not thought it necessary to deal with property acquired in the name of the dependent territory prior to the succession of States. It would be unthinkable that there could be any change of ownership in such circumstances. If any doubt remained that the debts of the predecessor State to the dependent territory were payable to the newly independent State, that doubt might best be dispelled in the commentary rather than in a provision which, in his view, was somewhat out of place in the articles relating to succession to debt,

34. With regard to paragraph 5, it was very important that the question of guarantees should not be treated lightly and the examples of the practice of IBRD cited by the Special Rapporteur were extremely apposite. It might well be a common practice for a creditor to request and to receive from a metropolitan State a guarantee in respect of money advanced primarily or even exclusively for use in a dependent territory of that State. If, however, the Commission was to deal specifically with the question of guarantees, it would be faced with the task of formulating another set of somewhat difficult definitions. A guarantee could involve anything from a collateral obligation, perhaps based more on good faith than on a direct property right, to the assumption of the role of main debtor. If, as the World Bank tended to demand, a predecessor State assumed that role, the Commission would not add to the clarity of the draft articles by suggesting that that State's obligation was in some way affected by the fact that the obligation was in the nature of a guarantee.

35. The rules which the Commission devised regarding the transfer of debts must be self-explanatory. To the extent that, following the act of self-determination, the newly independent State and the predecessor State chose by agreement to vary the arrangements relating to debt, they would, for their own security, need to have the agreement of the creditor to their action. Independently of the draft articles, however, the effect of the draft convention on succession of States in respect of treaties would continue to obtain. There was no reason to suppose that a bilateral treaty between the metropolitan Power and a financial institution would be terminated simply because a succession of States occurred. Any guarantee derived its force from the provisions of the draft convention, which, in the case in point, reflected a rule of customary international law. Thus, it did not seem to him that the very important principle embodied in paragraph 5 gained from being stated in its present context. There again, if any doubt was thought to exist on that point, it could most appropriately be laid to rest in the commentary to the draft articles.

36. In his view, paragraphs 2, 3 and 6 constituted the very heart of the new article envisaged and contained the very essence of the doctrines relating to succession to debt, which the Commission must consider. There could be no doubt that the relation between the debts contracted on behalf of the newly independent State by the predecessor State and the property rights and interests passing to the newly independent State must occupy a prominent place in the formulation finally devised by the Commission. Where property was burdened with an obligation which related directly to the value of the property and to the activity of a State in the territory which formed the subject of the succession of States, there must be at least a *prima facie* presumption that the property

was accompanied by the obligations that were incidental to it.

37. At the same time, he acknowledged the points made by the Special Rapporteur and Mr. Dadzie concerning the question of actual benefit. The Commission should endeavour to formulate a text which would accurately reflect the various considerations involved. It might not even be that a predecessor State acted in an underhand manner or in a way not calculated to advance the welfare of the dependent territory concerned. It might simply be, for instance, that the metropolitan State had adopted an administrative policy not in keeping with the wealth and capacities of the dependent territory or had governed on a scale which was not commensurate with the territory's internal resources. There was no reason why a financial burden assumed in such circumstances should simply be foisted upon a newly independent State. In that case, the question of the actual benefit to the formerly dependent territory of the corresponding expenditures incurred was a matter which should certainly be taken into consideration.

38. As to the concepts embodied in paragraph 6, he had already referred to the question of self-determination and of sovereignty over natural resources. The Special Rapporteur had also spoken about the concept of the capacity of the newly independent State to pay. That was a point which was entirely relevant to succession in general, and not merely to the particular case under consideration. When part of a State separated or a State dissolved into its component parts, there was usually, at the root of the process, a feeling among some of its inhabitants that they were not being treated on an equal footing with the inhabitants of other parts of that State. In such circumstances, questions would invariably arise concerning the extent of the debts owed by the newly independent State.

39. In that regard, he would not place the principle of capacity to pay on a slightly different footing to the factors of the policy of the metropolitan Power and sovereignty over natural resources by relating it only to the conclusion of agreements between the predecessor State and a newly independent State, but would rather suggest that capacity to pay, no less than the actual benefits received or the relationship between property rights and the obligations incidental to them, should be a primary principle in the rules to be adopted by the Commission.

The meeting rose at 6 p.m.

1444th MEETING

Tuesday, 21 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1, A/CN.4/L.254)

[Item 3 of the agenda]

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

NEW ARTICLE (Newly independent States) [1] (*continued*)

1. Mr. CALLE Y CALLE said that, like the Special Rapporteur, he thought that decolonization was not yet a closed book but was still very much of a reality. It emerged clearly from the cases of both early and more recent decolonization which the Special Rapporteur had cited that the basic principle to be applied to debts incurred by a former metropolitan Power was the clean-slate principle. There was no reason for the newly independent State to assume debts contracted on its behalf or for its account by the predecessor State, unless the financing thus obtained had actually benefited the formerly dependent territory. Moreover, certain categories of debts, such as war debts and subjugation debts, were to be repudiated out of hand. The Special Rapporteur had referred, in paragraph 157 of his ninth report (A/CN.4/301 and Add.1), to a statement made in October 1921 by Chicherin, the People's Commissar for Foreign Affairs of Soviet Russia, that no people was obligated to pay the price of the chains it had been forced to bear for centuries. The Special Rapporteur had rightly noted that, although that statement had been made in the special context of the repudiation of "régime debts" following a succession of Governments, it was much more pertinent in the case of the people of one country held in subjugation by the Government of another country. Indeed, it constituted the philosophical and moral basis on which the Commission should approach the question under consideration.

2. The Special Rapporteur had referred in some detail to the case of the former Spanish colonies in Latin America, including the case of Bolivia, which, doubtless in order to conserve the friendship of the metropolitan Power or to obtain credits, had assumed debts of the predecessor State to a surprising extent. A far more typical case, however, was that of Peru, which, on attaining independence, had refused to assume debts contracted for the benefit of the metropolitan Power and had gone to great lengths, including the repulse of a Spanish naval force dispatched to the Pacific in the 1860s, to uphold that principle.

3. Succession to State debts was perhaps the area in which the principle of voluntarism most clearly applied. A party requesting a loan from which it stood to benefit financially manifestly had the will to assume the status of debtor and the obligations accompanying that status. On the other hand, dependent territories, even those enjoying a measure of political and perhaps even financial autonomy, might not always exercise their will. In many cases, as the Special Rapporteur had observed, the effective decision to contract the loan might have been

[1] For text, see 1443rd meeting, para. 1.