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Summary record of the 1444th meeting

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

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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.

taken by the metropolitan Power and not by an autonomous or semi-autonomous organ of the colony.

4. The new text relating to newly independent States proposed by the Special Rapporteur represented a synthesis of the former articles F, G and H, and it was interesting to note that the former article F (A/CN.4/301 and Add.1, para. 364) had been entitled "Non-transferability of debts contracted by the administering Power on behalf and for the account of the dependent territory". That title brought out the basic rule to be applied, namely, that debts were non-transferable unless it was established that the financing thus obtained actually benefited the formerly dependent territory. The concept of "actual benefit" was a complex one; in many cases, investments made in a dependent territory were intended not so much to benefit the people of the territory as to maintain or reinforce the situation of domination. Moreover, such benefits as might accrue to the colony or territory might often be dissipated during the process of decolonization.

5. With regard to paragraph 2 of the new text, it might be more appropriate to refer not to "the corresponding expenditures", a term which might be understood to encompass the investments made in the process of establishing the debt or other collateral expenditures, but to "the application of the debt" or "the allocation of the proceeds of the debt". Such a formulation would bring out more clearly what he believed to be the underlying concept of the provision, namely, that the proceeds of the debt should have been applied to the formerly dependent territory and should therefore have benefited it.

6. Paragraph 3 referred to the need to take account of the relation between the debts passing to the newly independent State and the property, rights and interests passing to that State. He presumed it was intended to refer to the relation between particular debts and the property, rights and interests resulting from those debts rather than the relation between those debts and the property, rights or interests of all kinds passing to the newly independent State. The latter interpretation would mean that the provision would be in contradiction with article 8,[2] which stated that the passing of State property from the predecessor State to the successor State should take place without compensation unless otherwise agreed or decided.

7. Paragraph 4 of the proposed text merely stated that the provisions of paragraphs 1 and 2 should also apply to cases in which the newly independent State was formed from two or more dependent territories or became part of the territory of a pre-existing State. It thus covered the fairly common phenomenon of annexation.

8. He had no difficulty in accepting paragraph 5, which corresponded to former article G. There was no doubt that, in many cases, a predecessor State which furnished a guarantee acted not merely as surety but as principal debtor. It was appropriate that the guarantees given by a former metropolitan Power in respect of a debt assumed by a formerly dependent territory should be maintained, unless the beneficiary of the guarantee agreed to a change of guarantor.

9. He fully subscribed to the restrictions to which paragraph 6 subjected the conclusion of agreements, namely, the capacity of the newly independent State to pay and its right to dispose of its own means of subsistence, to exercise its right to self-determination, and to dispose freely of its natural resources. However, for the purpose of ensuring consistency with article 13, paragraph 6, and with the provisions of the International Covenant on Economic, Social and Cultural Rights,[3] it might be appropriate to insert the words "wealth and" before "natural resources".

10. In conclusion, he said he subscribed to the principle that reparation was payable to peoples who had been subjected to foreign domination. That principle, which was upheld by the non-aligned countries, reflected the ideals of international justice and morality.

11. Mr. SETTE CÂMARA said he agreed with the Special Rapporteur that the Commission should not fail to make specific provision for newly independent States in the part of the draft articles relating to succession to State debts. Provisions relating to such States had already been incorporated in article 13 and in the draft articles on succession of States in respect of treaties.[4] It was argued by some that, since the decolonization process was in its final stages and there would soon be no more territories acceding to independence, the case of newly independent States was of limited interest. However, the situation of such States could not simply be ignored. It was of special relevance in the case of succession in respect of matters other than treaties, where problems relating to the transfer of property might persist for many years after the attainment of independence. The Special Rapporteur had once cited the case of Chad, which had still been dealing with such problems 15 years after it had become an independent State. Moreover, there were still 25 non-self-governing territories being dealt with by the Special Committee of 24.[5] While it was true that the area and population of most of those territories were small, the Commission could not simply brush the problem under the carpet.

12. Paragraphs 249 *et seq.* of the Special Rapporteur's report dealt with a matter of purely historical interest since, although the process of decolonization had not been completed, the process of colonization was a thing of the past. In regard to decolonization, the Special Rapporteur had given an erudite and meticulous account of early cases, mainly involving countries in the Americas. Most of those cases revealed a refusal to assume debts contracted by the metropolitan Power. He had been particularly interested by the passage relating to Brazil, which had declined to assume any part of the Portuguese State debt, even though it had agreed to pay 2 million pounds sterling as part of a package deal designed to liquidate reciprocal claims between itself and Portugal. The contemporary cases of decolonization cited by the Special Rapporteur were somewhat more complicated

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

[3] General Assembly resolution 2200 A (XXI).

[4] See 1416th meeting, foot-note 1.

[5] Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

and often involved contradictory solutions. The Philippines was one of the rare cases in which debts of the predecessor State had been fully accepted. More often than not, however, formerly dependent territories, such as Indonesia, had initially accepted such debts but had subsequently reviewed and repudiated them.

13. He particularly appreciated section F of chapter V, relating to the financial burden of newly independent States. The Special Rapporteur had provided an up-to-date picture of the appalling situation of developing countries, which had been saddled with a growing burden of external debt. Between 1969 and 1973, that debt had more than doubled to a figure of some $119 billion. Although it might be argued that there was little that the Commission could or should do about economic problems, the Special Rapporteur's excursus on that point provided an extremely useful and eloquent background to the provisions of paragraph 6 of the new text proposed to the Commission.

14. In general, he subscribed to the wording and underlying principles of that text, which incorporated the substance of former articles F, G and H. He had no dispute with paragraph 1. Paragraph 2 set forth the criterion of utility and had the virtue of shifting the burden of proof to the predecessor State in establishing that expenditures resulting from a debt had actually benefited the formerly dependent territory. It might be appropriate to include a reference in that paragraph to the application of the debt, as proposed by Mr. Calle y Calle.

15. In paragraph 3, the Special Rapporteur had introduced a new criterion to be applied to the transfer of debts. He wondered whether the concept of an equitable relation between the debts and the property, rights and interests passing to the newly independent State would always be in the interest of such States. Previously, the criteria governing the assumption of debts had been subject to very rigid definitions regarding such matters as the categories of debts which were transferable. If it so happened that, in a particular case of succession, a considerable amount of property, rights and interests was transferred, he did not think that that would give the predecessor State any special grounds for claiming that a corresponding amount of debts should likewise pass to the newly independent State. Non-transferable debts, such as odious debts and subjugation debts, might be involved. He would welcome some clarification from the Special Rapporteur on that point.

16. He also had some doubts as to the desirability of including paragraph 4. Although, of course, the provisions of that paragraph were modelled on those of article 13, paragraphs 4 and 5, there had, in the latter case, been a cogent reason for giving special treatment to cases in which the newly independent State was formed from two or more dependent territories or became part of the territory of a State other than the State responsible for its international relations. He was not sure that it was altogether necessary to make similar provision in the present instance. Moreover, the inclusion in that paragraph of a specific reference to paragraphs 1 and 2 would, through the application of the rule *inclusio unius est exclusio alterius*, lead to the conclusion that other paragraphs of the article did not apply to the cases in question. In his view, such a conclusion would be erroneous. For instance, the provisions of paragraphs 5 and 6 were applicable to succession of any kind.

17. He had no doubt concerning the appropriateness of the rule laid down in paragraph 5. A guarantee could not be affected by the occurrence of a succession of States and the predecessor State remained the major obligor, as had been repeatedly affirmed in the jurisprudence of the World Bank.

18. He regarded paragraph 6 as the key provision of the proposed new article and fully subscribed to its substance. However, he tended to agree with Mr. Dadzie that it would be preferable to use a broader term than "agreements", an expression which restricted the applicability of the paragraph. Moreover, the term "agreement" might be held to cover devolution agreements, which were more in the nature of declarations of intent than of binding treaties.

19. Mr. USHAKOV proposed the following text for the article on newly independent States (A/CN.4/L.254):

> "No State debt of the predecessor State shall pass to the newly independent State unless an agreement between the newly independent State and the predecessor State provides otherwise."

20. Mr. TABIBI said that, in his ninth report, the Special Rapporteur had referred to a wealth of precedents and views concerning the very important question of the transferability of various categories of debt. As the Special Rapporteur had rightly observed in paragraph 181 of that report, writers did not spell out their position on each category of debt as clearly as might be wished, and it was apparent that opinion was much divided. However, debts of any type, whether subjugation debts, administrative debts or even debts used for the benefit of the people of a formerly dependent territory, were all subject, in modern times, to the cardinal principle of self-determination, a concept which, as was recognized in the International Covenant on Economic, Social and Cultural Rights, must find an economic as well as a political expression if independence was to have any real meaning. Whatever article the Commission adopted on the subject of succession to debts should meet the test of the principle of self-determination.

21. It was natural that a debt of the predecessor State which had been validly contracted and the proceeds of which had been used for the benefit of the formerly dependent territory should pass to the newly independent State. The Commission must endeavour to protect all the parties concerned, including creditors and predecessor States, which might genuinely have assumed financial obligations for the good of the people of a dependent territory. However, a newly independent State could not be bound by a debt which had not been lawfully contracted or by a debt which, although so contracted, had not benefited the people of the formerly dependent territory. Mr. Dadzie had mentioned at the previous meeting one project which bore out that point. There were many other examples of projects which had been undertaken by colonial Powers, not for the benefit of the people of the dependent territory but for their own glorification or comfort or for the purpose of preserving

colonial rule. For instance, the British in India had built many sumptuous palaces, had incurred the expense of moving their administrative capital to Simla during the summer months, when the temperature had been too high for them to bear, although not for the native Indians, and had built up the defences in the north of the country so as to preserve their dominion over it. Similar examples could be found in the colonial practice of France, Belgium, Portugal and Spain. He fully endorsed the view quoted in paragraph 157 of the Special Rapporteur's report that no people was obligated to pay the price of the chains it had been forced to bear for centuries. That view was also relevant to the situation of newly independent States, which, as Mr. Dadzie and Mr. Francis had observed at the previous meeting, should not be required to assume debts whose purpose or effect had been to keep them under bondage.

22. It was entirely appropriate that specific provision should be made for newly independent States in the matter of succession to debts, since they had already been accorded a separate article (article 13) in relation to succession to property, and been made the subject of a separate part of the draft articles on succession of States in respect of treaties.

23. Paragraph 2 of the proposed new text provided protection for the newly independent State, the predecessor State and creditors alike by laying down the general principle that the newly independent State should not assume debts contracted on its behalf or for its account by the predecessor State, but adding that such debts were to be assumed if it was established that the corresponding expenditures had actually benefited the formerly dependent territory. The balance established in that provision should ensure that prospective creditors exercised great care in determining whether or not to extend a loan and in assessing whether it was to be used for the benefit of the people of a dependent territory.

24. The other essential principle laid down in the proposed new article was that succession to debts should be assessed in relation to the capacity of the newly independent State to pay. To impose a crippling burden of debt on such a State would not only jeopardize its prospects of survival but would be prejudicial to the world economy in general and to the interests of its creditors in particular. The question was a vital and topical one at a time when the developing countries were struggling under an external debt burden of some $200 billion and the question of third-world indebtedness was a crucial issue at the North-South talks in Paris [6] and at other international conferences. Indeed, paragraph 6 was so important that it might well be made the subject of a separate article.

25. He had no objection in principle to the draft article on newly independent States proposed by Mr. Ushakov [7] but wished to reflect further on how it might be combined with the new text proposed by the Special Rapporteur.

26. Mr. EL-ERIAN said he agreed with Mr. Sette Câmara that it was entirely appropriate to include in the draft an article on succession to debts in the case of newly independent States. Special provision had been made for such States during the Commission's consideration of the topic of the most-favoured-nation clause as well as in the draft on succession of States in respect of treaties, and it would therefore be entirely consistent with the methodology applied by the Commission on previous occasions to make similar provision in the present case. Moreover, Mr. Sette Câmara had eloquently refuted the argument that there was no need to make provision for newly independent States on the ground that the era of decolonization was drawing to a close.

27. The new draft article brought out, perhaps even more forcefully than the previous articles, the need to balance contradictory interests and to reconcile considerations relating to international stability with considerations of justice, and provided an excellent solution to that predicament. The principle of *pacta sunt servanda* was, of course, a pillar of the Commission's work. However, the stability of the international community should also be seen in the light of broader considerations. Article 55 of the Charter of the United Nations provided for the promotion of economic and social progress and development with a view to the creation of conditions of stability and well-being which were necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples. Thus, the founding fathers of the United Nations had viewed peace as an organic concept involving the creation of conditions conducive to the security and stability of the international community.

28. The preparation of an article on newly independent States was not only consistent with the Commission's previous practice but was consonant with recent efforts to bring about the introduction of a new international economic order and to tackle the problems of development in general. The Commission could not but take cognizance of such developments and reflect them in the legal norms which it was endeavouring to elaborate.

29. The question had been raised whether, in the matter of State succession to debts, there existed positive rules of international law which the Commission could codify or whether it would not, rather, be a matter of progressive development in that area. He agreed that a considerable element of progressive development would be involved in the work of the Commission but, in his opinion, the important question was not so much whether there was an existing body of law but what was the best law that could be applied. One concept of positive international law which already existed in the area of succession of States was that, in the event of a succession involving part of a State, the newly independent State thus formed was accountable only for obligations which had been contracted with particular reference to it or which had conferred particular benefits on it. In the case of newly independent States which had formerly been colonies, another element was involved, namely, the fact that in many cases such States had formerly been mandate or trust territories, the administration of which had been committed by the League of Nations or the United Nations to the administering Power acting on behalf of the international community. That consideration was particularly important in examining the balance which

[6] Conference on International Economic Co-operation.

[7] See para. 19 above.

had been struck by the Special Rapporteur in paragraph 3 of his text.

30. Paragraph 6 was, in his view, fully in accordance with Article 103 of the Charter, which stipulated that, in the event of a conflict between the obligations of the Members of the United Nations under that instrument and their obligations under any other international agreement, their obligations under the Charter would prevail. The right of a people to dispose of its own means of subsistence and the right to self-determination were principles embodied in the Charter. Such principles were peremptory norms of international law with which States must comply.

31. The new article proposed by Mr. Ushakov appeared clear, but he had not yet had time to study its implications.

32. Mr. SCHWEBEL said that the central point in chapter V of the Special Rapporteur's last report, namely, that the question of the passage of the debts of a predecessor State to a newly independent State should be governed by equitable considerations, was compelling and one with which all members of the Commission could no doubt agree. It was, indeed, a reflection of the central theme of the preceding articles, and it could therefore be asked whether there was a need for a separate article on newly independent States at the present stage. He was not sure that there was, but he could see the force of the reference by Mr. Sette Câmara and Mr. El-Erian to the fact that newly independent States had been given special attention in other codification drafts and in article 13 of the present set of articles. Members of the Commission would also agree that colonialism was not the way to run the world and was not conducive to either human dignity or self or mutual respect. There was assuredly force in the Special Rapporteur's contention that colonialism had lent itself to economic exploitation, which suggested that the subject of colonial debts should be approached with caution. Mr. Tabibi had already said that each debt would have to be examined individually to see if it was just and should be paid.

33. It could not be said, however, that at all times all colonial situations had been or were economically exploitative. The Special Rapporteur himself had in substance allowed that, as Mr. Quentin-Baxter had also pointed out at the 1443rd meeting, the record of international practice with respect to succession to State debts was very mixed—as indeed was the record of colonialism itself. Consequently, it was difficult to say, as a matter of law, that the colonial relationship was necessarily economically exploitative and that, as had been suggested during the Commission's debate, debts should therefore be repudiated by the successor State or borne by the predecessor State. It was also difficult to maintain that the general rule should be that reparation should be made for relationships under colonialism or indeed that, because of the existence of colonialism, the developed countries had a duty to aid the developing nations. The pattern of historical fact was far subtler than those asseverations suggested.

34. While the United States had never been a colonial power on a large scale, and he neither had the personal experience of colonialism of some members of the Commission nor was a student of colonialism, it seemed to him from the breadth of the Special Rapporteur's report and the tenor of the debate that it could be of help to refer to a somewhat different view of the situation. He had in mind in that respect an article by a current United States Under-Secretary of State for Economic Affairs, which had appeared in a recent issue of the periodical *Foreign Policy*.[8]

35. The author of that article approached the questions of the allegedly exploitative nature of colonialism and of the possible need for reparation, from the viewpoint of an economist, by asking whether the profits which had been made from economic relationships during colonial rule had been normal or abnormal. His conclusion was that:

> It is quite possible, ...—indeed, in many cases quite likely—that close contact with former colonial powers, and more generally economic contact with Western countries, has left the former colonies and other dependencies economically better off than they would otherwise be. Existing poverty in Africa, Asia, and Latin America should not blind us to the all but universal poverty that existed in these areas before the European powers established themselves overseas, which in much of Africa was less than a century ago. The introduction of modern legal and commercial systems, of capital, and of modern technology has helped a number of these countries to rise above the grinding poverty of the past. That much poverty remains is not in question. That economic poverty exists, directly or indirectly, *because of* past colonial rule is highly doubtful.
>
> Moreover, in those instances in which living standards seem to have declined, it is usually due to rapid population growth that has worsened the land/man ratio to the point at which subsistence agriculture becomes more difficult. This population growth in turn was due in part to improved health, sanitation, and transportation systems introduced by or with the help of the European powers. The population of the island of Java, for instance, increased by a factor of nearly 14 in the period from 1815 to 1960, from 4.5 million persons to 63 million. (Great Britain's population increased five- to sixfold during the same period.) Actions by Europeans to improve health and food distribution were not at the time and are not today generally regarded as "wrongs" or injustices. Who is responsible for the poverty that results from a larger but healthier population? Is reparation called for? And when population growth is the culprit, will reparation help? Or will it paradoxically only provide the basis for claims to yet larger rectification payments in the future?[9]

36. On the question whether economic exploitation, in the sense of the earning of abnormal profits, had actually occurred, the article continued:

> We have many anecdotes, but relatively little systematic information. But what there is at least casts doubt on the generality of economic exploitation either in the colonial past or in the post-colonial present.
>
> The economic difficulties of the British East India Company over the years are well known. It had to be bailed out by the English Government on numerous occasions, and ultimately was taken over. After a careful review of the economic role of Britain and France in sub-Saharan Africa, an area generally subject to strong European influence later than many other parts of the world, D. K. Fieldhouse concludes:

[8] R. N. Cooper, "A new international economic order for mutual gain", *Foreign Policy* (New York), No. 26 (Spring, 1977), pp. 66-120. (At the time the article was written, the author was Professor of Economics at Yale University.)

[9] *Ibid.*, pp. 86-87.

"Least impressive is the accusation that, due to favorable conditions produced by colonialism, metropolitan investment in colonial Africa obtained "superprofit". There is insufficient data to prove or disprove this generally; but there is no reason to think that over a long period profits of capital in Africa were higher than those in Europe or elsewhere, though profits in extractive industries (such as wild rubber) might be very large for short periods.[18]"

[18] David K. Fieldhouse. "The economic exploitation of Africa: some British and French comparisons", in Professor Gifford and William Roger Louis, eds., *France and Britain in Africa* (New Haven, Yale University Press, 1971), p. 637.

A detailed study of British home and overseas investment in the period from 1870 to 1913 suggests that overseas investment, both debt and equity, yielded about one and one-half percentage points more than home investment, and that differential risk cannot fully account for the gap. But a breakdown of these investments into various categories reveals that *colonial* investment generally yielded about the same as or even less than domestic investment. The higher average for overseas investment is wholly explained by British investment in Latin America and in the United States, especially in railways. Neither of these areas was under British governance, and any line of argument that places Latin America under exploitative domination by Britain must also include the United States or else explain why returns on British investment in the United States were similar to those in Latin America during this period.

There is no doubt that many private fortunes were made in connection with the extension of European imperialism. Less often recorded are the many fortunes that were lost during the same period. We live in an uncertain world that gives rise to many ups and downs, but for the purposes under discussion an overall, summary view is necessary. One plausible view is that many Europeans gained as a result of overseas expansion, but that the expense was borne in large part by other Europeans (including the tax-paying public, which had to finance the armies and navies that were occasionally engaged in the process). Some of the gains represented the social (global) gains from new trading opportunities. But at the present stage of historical knowledge, these must remain open questions.[10]

The author's conclusions were tentative, but raised questions which it was not easy to dismiss.

37. On the subject of reparations, the author began by saying that, to be free from "exploitation", economic transactions must be undertaken voluntarily and must not give rise to persistently abnormal profits. He accepted that, if it was established that there had been "exploitation", that might be said to provide the basis for claims to reparation, but the question then arose:

... how far back does one go in history? And for distant past wrongs, who must make the payments and who is entitled to receive them?

In the seventh to tenth centuries the Muslim Arabs conquered and confiscated many Christian (and non-Christian) lands by sword, clearly a non-voluntary or coercive transaction. Does that give rise to a current claim for reparation? In the sixteenth century, Spain plundered the New World, and as a result many Spaniards lived lavishly at home. Members of the same families settled in Central and South America, often being the ancestors of today's leading families there. Does that give rise to a legitimate claim by Latin-American countries on contemporary Spain?

The West African slave trade flourished during the seventeenth and eighteenth centuries. While some of the slaves may have been kidnapped by European slave traders, most where purchased from powerful tribal chieftains, and competition among the European slave buyers was fierce. Is there a basis for rectification claims by American blacks on contemporary West African countries, where the descendants of those chieftains who enslaved others and received payment for them still reside? [11]

38. He continued with a final example:

In the late eighteenth century, the powerful Barbary State of Algeria captured American seamen and held them for ransom, clearly an exploitative transaction, since it involved coercion. Should the United States lay a claim for reparations on Algeria? Or is there a moral statute of limitations on claims for rectification, and if so, how far back does it go?

concerning which he added in a foot-note that:

Over protest, the young United States paid Algeria $624,500 in 1796 to ransom over 100 American seamen who had been captured in the open Atlantic in what was clearly a predatory manner. At a compound rate of interest of 6 per cent, which is what the United States had to pay on foreign loans at that time—including one to help pay the ransom—that sum would amount to $23 billion in 1976.[12]

Clearly, no such claim was being advanced, but the fact that the calculation could be made—and plausibly so—should induce caution in those who nowadays thought themselves entitled to claim reparation. The subject of claims for reparation was one which did not easily admit of serious analysis or discussion, and still less of rational political and economic settlement.

39. Turning to the Special Rapporteur's ninth report (A/CN.4/301 and Add.1), he said that it was inaccurate, and contrary to a decision of the General Assembly, to refer to Puerto Rico as a still dependent territory, as the Special Rapporteur had done in paragraph 247. The Special Rapporteur had overstated his case in his references, in paragraph 269 and in foot-note 221, to the relationship between the United States and Cuba, for, while it was true that the United States had exercised a measure of domination over Cuba for some years, that could not be equated with Spanish colonial rule over the island. He did not believe that Jefferson would have agreed with the Special Rapporteur's contention, in paragraph 291 of the report, that the real goal of the United States War of Independence had been financial autonomy.

40. With regard to the Special Rapporteur's eloquent discussion of the serious debt burden of newly independent States (*ibid.*, chap. V, sect. F), he found it extraordinary that no mention had been made among the sources of that burden of the policy of the OPEC cartel. In referring, in paragraph 349, to the Programme of Action on the Establishment of a New International Economic Order (General Assembly resolution 3202 (S-VI)), the Special Rapporteur had failed to mention the reservations to that programme entered by many States. Nor, in his references to the Charter of the Economic Rights and Duties of States,[13] had the Special Rapporteur mentioned that the corresponding General Assembly resolution (resolution 3281 (XXIX)) had been the subject of both negative votes and abstentions. His own view was that, contrary to what the Special Rapporteur had claimed, that Charter did not commit or

[10] *Ibid.*, pp. 87-89.

[11] *Ibid.*, pp. 82-83.

[12] *Ibid.*, p. 83.

[13] 1443rd meeting, para. 18.

engage States which had voted for it or, *a fortiori*, those which had voted against it.

41. In paragraph 353, the Special Rapporteur advanced a vigorous argument in favour of generalized debt relief. There were no doubt arguments both for and against that solution to the debt burdens of the developing countries, but the subject was one for the Conference on International Economic Co-operation and similar bodies rather than the Commission.

42. In view of the comments he had already made and of the doubts expressed by many members of the Commission concerning the subject of odious debts, he was unable to accept the conclusions which the Special Rapporteur drew with regard to that topic in paragraph 366.

43. The Special Rapporteur had been right in citing references to Turkey's financial difficulties in the award of the Permanent Court of Arbitration in the case discussed in paragraph 382, but it might have been helpful if he had indicated that the substantive ruling of the Court had obliged Turkey to make payments.

44. The words which the Special Rapporteur had omitted from his quotation from article 1, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights [14] (*ibid.*, para. 387), namely, "based upon the principle of mutual benefit, and international law", were also pertinent to the work of the Commission and should have been included.

45. The consolidated article proposed by the Special Rapporteur was fundamentally on the right track. He had no problem with paragraph 1. The substance of paragraph 2 was sound, but he would propose that the provision be reworded to read:

> "The newly independent State shall assume debts contracted on its behalf or for its account by the predecessor State in so far as the corresponding expenditures actually benefited the formerly dependent territory."

46. He also agreed with the substance of paragraph 3, which he found well drafted and plausible. He shared the opinion of Mr. Sette Câmara [15] that paragraph 4 was acceptable with respect to substance but perhaps unnecessary. He found paragraph 5 perfectly acceptable. He agreed with the substance of paragraph 6, but felt that the text should be redrafted in a simpler fashion to read:

> "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 run counter to equitable considerations."

47. The draft article proposed by Mr. Ushakov [16] certainly had the virtue of simplicity and terseness, but it did not take into account the variety of situations which could exist in real life, such as the possibility, acknowledged by the Special Rapporteur, that debts might well have been incurred for the benefit of the former colonial territory and should therefore be maintained. There was a need for residual guidance in the absence of the type of agreement to which the article referred. Furthermore, even when such an agreement was in prospect, its conclusion could take time, and it would clearly be of assistance if the rules laid down by the Commission gave guidance for the interim period.

48. Mr. SUCHARITKUL said that, while the substance of the new article proposed by the Special Rapporteur was acceptable to him, it gave rise to several questions.

49. First, its provisions necessarily implied the existence of a decolonization process since there were no longer any *terrae nullius*. It mattered little whether the dependent territory in question had been a mandated or trust territory, or whether it had been a protectorate or colony. In each case, the legal consequences of State succession were the same so far as State debts were concerned. The predecessor State, for its part, was either a colonizing Power or an administering Power or again, under paragraph 4 of the article, the State responsible for the international relations of the dependent territory. He was not entirely convinced that the legal consequences of State succession for State debts were the same in all cases of decolonization. India, for instance, had been recognized as having international legal personality at the League of Nations, while Burma had twice attained independence, once during and once after the Second World War. The effect of the narrow definition of the term "newly independent State", as given in article 3 (*f*), was to exclude from the scope of the draft articles the cases of secondary succession which had occurred in the contemporary world. Examples were the cases of Singapore, which had seceded from Malaysia, Bangladesh, which had seceded from Pakistan, and Viet Nam, which had been unified. Why should the legal consequences of such cases of succession not be the same as those affecting a newly independent State, within the meaning given to that term in the draft?

50. Secondly, he understood the concern that had led the Special Rapporteur to guarantee the protection of newly independent States but, while he endorsed the content of paragraphs 1 and 5, on the one hand, and paragraphs 2 and 3, on the other, he wondered to what extent it was possible to define the scope of that protection. The criteria laid down in paragraphs 2 and 3 were undoubtedly recognized criteria but they were very difficult to apply. Not only the criterion of actual benefit but also that of equitable proportion implied a subjective assessment. In paragraph 6, the Special Rapporteur had sought to introduce peremptory norms that were perhaps closer to *jus cogens*.

51. Thirdly, the protection which the Special Rapporteur sought to provide for newly independent States might sometimes be prejudicial to them. He was thinking of the freedom of the newly independent State and its faculty, as a sovereign State, to express its will freely, particularly when contracting financial obligations, and he wondered whether it was appropriate to restrict that freedom on the ground of protecting the interests of the newly independent State.

52. Lastly, the question arose of the fate of creditor third States and creditor third international organizations.

[14] General Assembly resolution 2200 A (XXI).

[15] See para. 16 above.

[16] See para. 19 above.

Should provision be made for maintaining debts to third parties or for apportioning them equitably between the successor State and the predecessor State?

53. The Drafting Committee should endeavour, bearing those problems in mind, to reconcile all the interests involved, even the most conflicting, and introduce a little flexibility into the text.

54. The article proposed by Mr. Ushakov was acceptable to him, but as a main provision that would in no way affect the more detailed provisions proposed by the Special Rapporteur.

55. Mr. VEROSTA said that two schools of thought had emerged from the discussion, both of them based on the principle of voluntarism. Certain members of the Commission, some of whom had witnessed the fight for freedom from colonialism, had sometimes exaggerated the importance of the protection of newly independent States. Others had taken the view that, while admittedly colonialism was reprehensible, it had none the less had a positive side, and that certain predecessor States now found themselves in the unenviable situation of creditor States who stood to suffer considerable losses. In his view, it was not for the Commission to sit in judgment on the past; its tasks was to contribute to the progressive development of international law and its codification. As Mr. El-Erian had emphasized,[17] the Commission should concern itself with the stability of international relations and peaceful co-existence among States. The article proposed by Mr. Ushakov was of no real help in that respect since it merely spelt out the clean-state principle. That principle was not unqualified, however, even when a new State came into being, since something of the earlier situation always remained.

56. For that reason, the Special Rapporteur had been right in endeavouring to formulate, if not rules, at least some valuable guidelines for the package deal which generally resulted. It was not possible to develop the clean-slate principle as a principle of general application and to remain silent on the question of the debts of the predecessor State to the dependent territory, to which reference was made in paragraph 1 of the article proposed by the Special Rapporteur. The same applied to the matters dealt with in paragraphs 2 and 3, where guidelines for a package deal were required. Admittedly, it might be difficult to apply those provisions but the twin criteria of actual benefit and equitable proportion should form the basis of any package deal. Since paragraphs 2 and 3 embodied the same idea, the Drafting Committee might consider combining those paragraphs. About paragraph 4 he had the same doubts as had already been expressed by other members of the Commission, particularly Mr. Sette Câmara. Paragraph 5, however, was particularly important for the package deal: the guarantees of the predecessor State should not be disregarded. He also endorsed paragraph 6 in principle, but the Drafting Committee could perhaps shorten it.

The meeting rose at 1 p.m.

[17] See para. 27 above.

1445th MEETING

Wednesday, 22 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, 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 (*concluded*)

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

1. Mr. DÍAZ GONZÁLEZ said that those members of the Commission who had followed or been personally involved in the United Nations activities in support of decolonization, which were among the Organization's most positive achievements, could only agree with what the Special Rapporteur had stated in chapter V of his ninth report (A/CN.4/301 and Add.1), including the examples of decolonization he had cited by way of justification for the article he now proposed.

2. It could not be claimed that there were good and bad colonial Powers; wherever it occurred, colonialism was the same and meant exploitation of natural resources, use of a territory for military purposes, or aggression against the local population. The fact that control over a territory passed from one colonial Power to another in no way constituted a guarantee for that territory that it would be more justly ruled, but was simply proof that the second colonial Power was militarily or economically stronger than the first. There was a need for certain States to give real effect to their legislation for, if in their law they proclaimed the principle of equality of all mankind, they practised discrimination within and beyond their frontiers. It was no coincidence that the politically dominant classes in such States were also economically dominant for they had made and continued to make very substantial investments in their country's colonial territories.

3. It had been argued in the Commission that compensation for the effects of colonialism should include payments by the formerly dependent territory to the taxpayers of the colonial Power in respect of the latters' financial contribution in support of their country's policy of oppression; that would be equivalent to applying to the people of the newly independent State the reverse of the Chicherin dictum [2] by requiring it to pay the price of its

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

[2] See A/CN.4/301 and Add.1, para. 157.