Document:-

A/CN.4/SR.964

Summary record of the 964th meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1968, vol. I

964th MEETING

Friday, 28 June 1968, at 10.5 a.m.

Chairman: Mr. José María RUDA

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

Succession of States and Governments: Succession in respect of Rights and Duties resulting from Sources other than Treaties

(A/CN.4/204)

(Item 1 (*b*) of the agenda)

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's report (A/CN.4/204) and the questionnaire he had submitted.[1]

2. Mr. BARTOŠ, reverting to the question of a general definition of succession of States, said he agreed with the opinion expressed by Mr. Castrén. The succession of States could be taken as an established notion, without it being necessary to define it precisely. But if the Commission decided to adopt a definition, it must not overlook what might be called partial succession, which resulted from the partial dismemberment of a State which continued to exist with a smaller territory. There had been a tendency to neglect that situation during the present debate. The detachment of territory from one State and its attachment to another, and transfers of sovereignty resulting from the correction of a boundary, were still very frequent occurrences, even when the principle of self-determination was respected. Any definition of State succession which did not cover those cases would be incomplete.

3. With regard to the method of work to be followed by the Commission, he noted that all members agreed that the techniques of codification and progressive development of international law should be combined. Not only had that method been adopted in the Commission's previous work, but it was also scientifically justified.

4. Each century had its specific problems, which it solved by applying appropriate rules on State succession. The classification of types of succession would thus make it possible to study the material basis of the changes that had taken place in the rules.

5. In the past, there had been formal changes in sovereignty. But society in the territory concerned had continued to function on more or less the same economic basis as before the transfer. That had been the case when the independent States of Latin America had been established. Similarly, after separating from Great Britain, the former British colonies in North America had maintained their bourgeois society. Today, on the other hand, the process of decolonization was directed not only towards a change in the political system, but also towards the replacement of one economic and social structure by another, so that the inhabitants, whom their former masters had called natives, could become citizens freed from colonial exploitation. Thus it was only natural that transfers of sovereignty in the last century should have been based on the principle of continuity, whereas the present trend was towards a break between the old colonial society and the new society created by the independence of new States.

6. Two views were possible. The former sovereigns had often obliged their colonies to regulate the transfer of sovereignty with a view to continuity, by treaties signed at the time of their emancipation. He considered that the consent given to those treaties by the former colonies was not an expression of the free will of the new States, but the price paid for their independence. The other view of decolonization was to regard it as a new and special phenomenon which tended to restore the right of peoples to independence and freedom. On that view, the retrospective validation of the power of the former sovereign must be regarded as contrary to the rules of the international community; for since the proclamation of the United Nations Charter, Powers which had responsibilities for the administration of non-self-governing territories had a duty to conduct that administration in the interests of the inhabitants of those territories and not in their own interests. Hence the inhabitants should be given the right and the legal means to undo acts performed against their interests.

7. Moreover, even at the time of Napoleon III and the policy of nationalities, the principle of continuity had not been applied strictly, because the policy of nationalities had been regarded as modifying the earlier rules. For example, at the Congress of Berlin, which had followed the defeat of the Ottoman Empire, the rule of division of debts had been abandoned and the new States had been released from the share of the Ottoman debts corresponding to their territories; for the creation of those States had been inspired by the desire for liberation of Balkan territories which were considered too poor to bear the burden of the debts. After the First World War, the Treaty of Versailles had introduced a new element by setting aside the old rules of State succession with respect to the treatment of national minorities. Each period of history had its own characteristics in regard to the establishment of new States and rules on State succession.

8. The approach to the problem of State succession was always adapted to the historical circumstances prevailing at the time. Consequently, the Special Rapporteur had been right to propose that the social and economic basis of the contemporary problems of State succession should be taken into consideration. That did not mean that the old rules should be entirely abandoned: an attempt should be made to reconcile them with the conditions of decolonization. The Commission would thus comply with the recommendations of the General Assembly, which reflected the aspirations of the international community as a whole.

9. With regard to the problem of third States, some jurists maintained that the successor State must do nothing

[1] See 962nd meeting, para. 1.

to harm the interests of third States, because they were neutral in the process of decolonization. In reality, however, third States, or some of them, had been able to benefit from colonial occupation by receiving special favours from the occupying State in return for their connivance or their assistance in consolidating the colonial occupation. For instance, the General Act of the Berlin Conference had proclaimed, on 26 February 1885, the freedom of trade and navigation in the Congo basin.[2] Further, if third States were allowed to retain privileges that were withdrawn from the former colonial Power, the peoples gaining their freedom would be made to suffer the consequences of acts by the colonial Power which had deprived them of that freedom. There again, it might be necessary to draw up special rules: that did not mean that the traditional rules would necessarily be set aside, but they would have to be interpreted in the spirit of the times.

10. Mr. ALBÓNICO, reverting to question 8 of the questionnaire submitted to the Commission, noted that there appeared to be general agreement to give priority to questions of public property and public debts. In that connexion, he wished to suggest the broader and more general title "The influence of the succession of States on economic matters".

11. That title would cover matters not included under the heading of "public property and public debts". One was the matter of concessions; another was that of law-making contracts, which were so common in Latin American practice. Yet another was the matter of contracts of a mixed character concluded by a Government with a foreign company. The purpose of such contracts was to give the State a participation, and sometimes a controlling interest, in an undertaking; the effect was to give the undertaking a national character, while avoiding nationalization in the sense of outright expropriation by the State. On example of that type of operation had been the negotiations successfully conducted by the Government of Chile to acquire 51 per cent of the shares of certain copper mines which had previously been owned by foreign interests.

12. The proposed title would also have the advantage of covering the question of the legal régime of natural resources, which was not clearly covered by the term "public property and public debts". In many countries, natural resources were public property, but in others they could belong to private persons.

13. Moreover, by virtue of the common law concept of incorporation and the French legal concept of *siège social*, companies of a mixed character had the nationality of the country in which they had their registered offices. In those circumstances, it was necessary to consider how the successor State would deal with such companies, as well as with mixed contracts and natural resources. Hence the appropriateness of the broader title.

14. Sir Humphrey WALDOCK said that it would be easier to consider many of the general points raised during the discussion at a later stage, when the Commision had more concrete issues before it.

15. Reference had been made to the problem of partial succession. As he saw it, at least as far as succession with respect to treaties was concerned, partial succession was undoubtedly part of the topic. The intention was to cover all cases of replacement of one sovereignty by another, and the transfer of a piece of territory, however small, would come under that heading.

16. With regard to the change of title suggested by the Special Rapporteur, he would be grateful to him for a more formal definition of the subject-matter, so that suitable English wording could be found for the new title. His own feeling was that "succession in the matter of economic interests" would be preferable to "succession to economic interests".

17. Mr. USTOR, referring to question 8 of the questionnaire, said that the Commission should give the Special Rapporteur ample latitude. It would be logical, however, to begin by stating the simple rule that there was no succession to the legal régime of the predecessor State, because the successor State, like any State, was free to establish its legal régime in a sovereign manner. Reference to that rule had been made by the Special Rapporteur in section VIII of his report.

18. As a matter of convenience, a successor State could, and often did, maintain the whole or part of the legislation of the predecessor State, but in that case it made the legislation its own without any legal duty to do so. The fact that the successor State chose not to repeal all previous legislation outright did not detract from its sovereign right to transform the legal order of the country completely.

19. That rule applied to such questions as nationality and property rights. The power of a State to make laws in its own territory obviously included the power of regulating the property relations of the whole population, including aliens. In the exercise of its right to transform its economic and social system, a State could assail rights which were described in legal literature as acquired or vested rights. It had no obligation under international law to differentiate between vested or acquired rights and other property rights.

20. There was no distinction in international law between the property of nationals and that of aliens; the only question that had arisen in legal literature and State practice was whether a claim for compensation could be made where a new legal régime adversely affected the property of aliens. On that point, the preponderant view, at least in the socialist States, was that when general, non-discriminatory measures were introduced in the public interest, all that an alien could claim as of right was equal treatment with nationals. The theory that there was in international law a general principle of respect for private property rights had been rejected after the First World War, at the time of the Hungarian-Romanian dispute over the agrarian reforms.

21. Where decolonization had taken place, some former colonies had accepted limitations on their sovereignty in respect of property rights, nationality and other matters, but it would be wrong to infer that those special agreements in any way weakened the general rule to which he

[2] See *British and Foreign State Papers*, vol. LXXVI, p. 8.

had referred. Indeed, the question arose whether certain sovereign rights were not inalienable.

22. It had been argued that a sovereign State which could surrender the whole of its sovereignty by freely deciding to merge with another State could also surrender part of its sovereign rights. The question arose, however, whether that proposition was true for a former colony. The resolutions of the General Assembly concerning the abolition of colonialism were not mere recommendations; they were the expression of a new rule of international law adopted by the overwhelming majority of the family of nations. Colonialism was therefore contrary to international law and it was an international wrong to subject a people to colonial rule.

23. The legal position he had described affected devolution treaties. If a devolution treaty so limited the sovereignty of a new State that the relationship between it and the former metropolitan State did not substantially differ from the previous colonial relationship, it might well be contended that the treaty violated the rule of international law which prohibited colonialism in all its forms and manifestations and that it was therefore void or voidable. The fact that it might not be easy in each individual case to determine whether a devolution treaty exceeded the permissible limits did not detract from the value of the principle. That problem called to mind the case of the attempted Customs union between Austria and Germany, which had been referred to the Permanent Court of International Justice;[3] the union would have violated a provision of the Treaty of Saint-Germain-en-Laye which forbade Austria to relinquish its independence. That prohibition now constituted a rule of international law which precluded the establishment of a disguised colonial relationship.

24. Mr. CASTAÑEDA said he was not certain, at that stage, whether the various types of State succession distinguished by the Special Rapporteur gave rise to different legal régimes. There were certainly substantial and legally significant political differences between those types, but the Commission could not decide whether to envisage a specific régime of State succession by decolonization until its work was further advanced.

25. The distinction between dismemberment, decolonization and integration or merger was generally correct, but the dividing line was not absolutely precise and there were exceptions. The distinction did not involve legal categories, or even a methodological division of the study, but it was a valid working hypothesis, since it reflected reality.

26. The differences which the Special Rapporteur had noted between traditional succession and succession resulting from decolonization were highly significant. In the first case, the homogeneity of the living standards and civilization and the great similarity of the legal systems of the countries concerned were bound to lead to the principle of continuity and stability. In the second case, more or less the opposite applied, which explained why rupture and change were indispensable. The essential aim of decolonization was to modify the political, economic and social objectives of the territory concerned. Hence, in that context, the principle of respect for acquired rights and the notion of unjustified enrichment took on a special significance, which gave decolonization its characteristic features.

27. It remained to be seen whether the special character of State succession resulting from decolonization should be reflected in specific rules. Only at a later stage would it be possible to decide how specific the rules needed to be. In any case, so far as method was concerned, it would be better to give prominence to the post-war solution of each problem than to treat the problems of the new States in isolation. The rules to be proposed should be based on the most significant cases, examined in the light of the United Nations Charter and the contemporary needs of the international community.

28. That in no way implied that the older precedents had lost all their force; on that point, Sir Humphrey Waldock had produced some convincing arguments in the introduction to his report on succession of States and Governments in respect of treaties (A/CN.4/202). As Mr. Bartoš had just pointed out, each era introduced new elements: the period following the First World War had given prominence to a new idea about the treatment of minorities. But the elements peculiar to each era were not merely juxtaposed; they were also sifted. Among the precedents of earlier periods, those which conflicted with the spirit of the new age lost their force. That would now be true of precedents which conflicted with principles of the Charter, such as the principle of the sovereign equality of States. The rules of the past had to be adapted to contemporary needs.

29. The Special Rapporteur had said that he had had no intention of producing a decolonization charter. The General Assembly could have drafted such a charter to complement the Declaration on the granting of independence to colonial countries and peoples,[4] in order to institutionalize accession to independence and subject it to uniform rules. The United Nations had been following that course towards the end of the fifties, but the Congo crisis had upset its plans. Consequently, the Special Rapporteur now had to build up a system from contradictory precedents.

30. The solutions applied in Latin America at the beginning of the nineteenth century provided little usable material. There had been practically no real negotiations between predecessor States and successor States. Mexico, for example, had not been recognized by Spain until thirty years after its independence. During that time, the rupture had been more complete than it was for the present new States, whose independence had nearly always been proclaimed in agreement with the former metropolitan Power, a fact which had been conducive to continuity. Mr. Bartoš had shown, too, that, unlike what had happened in recent cases, the independence of the Latin American countries and the former North American colonies had not been accompanied by a breaking up of the former social structures. It was very difficult to generalize.

31. With regard to the choice of the subject to be studied at the next session, public property and public debts seemed a little too limited, but it was to be feared that the

[3] *P.C.I.J., Series A/B*, No. 41.

[4] General Assembly resolution 1514 (XV).

subject of all economic relations between predecessor and successor States would be too large. He suggested that the Special Rapporteur should deal with everything relating to the transfer of property in the public domain, both assets and liabilities.

32. Mr. EUSTATHIADES congratulated the Special Rapporteur on his valuable contribution to the analysis of the new elements and trends in State succession.

33. On question 1 of the questionnaire, he shared the general preference for the new title of the subject.

34. As to question 2, he did not see the need for a general definition of State succession, especially as the precise scope of the two drafts was not yet defined. Each of the two Special Rapporteurs could, if he saw fit, take various dominant ideas as the starting point for his work, but that could not constitute a definition. Moreover, that question was connected with question 5.

35. With regard to question 3, he thought the Commission should combine codification and the progressive development of international law, making use of the comments by Governments.

36. As to question 4, the form of the work, he would exclude the idea of a dissertation or commentary. He rather hesitated between a preliminary draft convention and a book of rules whose ultimate destination would not be specified, but was inclined to prefer the former.

37. Question 5, the origins and types of State succession, seemed mainly of theoretical interest. The exposition of that subject in section IV of the report was brilliant and provided a most penetrating legal and sociological analysis. The differences indicated did exist, but it was difficult to see how they could affect the formulation of rules codifying the topic of State succession. Many ideas could doubtless be derived from the proposed classification, but it would be difficult to use as a basis for the Commission's work. For example, the merging of States was a contemporary case, and the various forms of federalism would also be worth studying.

38. As to question 6, in French, the expression "*nouveaux Etats*" might perhaps be preferable to "*Etats nouveaux*", for it would be less conducive to discussion of the question whether past, present or future cases were envisaged. The expression "*nouveaux Etats*" would more clearly denote the present new States—those which had recently gained independence. The appearance of new States was an old phenomenon, but it was the recent appearance of new States that made it necessary to consider succession in a new light.

39. From the practical point of view, the topic of State succession had obviously increased in interest by reason of the recent emergence of new States in a particular political climate. The question of succession affected not only bilateral relations between predecessor and successor States, but also third States, nationals of third States and the international community as a whole.

40. Of the three courses proposed in question 6, he could accept the first if it was not quite so strongly qualified by the words "mainly with reference to the specific problems of the new States". It would not be in the interests of the new States themselves for the Commission to formulate rules peculiar to their circumstances, though they would benefit by the adoption of rules taking account of their specific problems and their views on the subjects which concerned them. Of course, it would be wrong to think that because decolonization was nearly completed, the Commission should give it no further attention. Decolonization comprised two stages: the acquisition of independence and the consolidation of independence. And for the consolidation stage it was not impossible that succession rules aiming at continuity, not at breaking all links with the past, might appear advisable for certain aspects. Moreover, just as the laws of war applied long after the end of a war, so the rules of State succession would apply long after decolonization.

41. It would therefore be wrong to attribute too much importance from the outset, as a matter of principle, to the differences between the traditional rules of State succession and the rules applicable to the new States created by decolonization. As the Special Rapporteur had rightly pointed out in section VIII of his report, some continuity was essential in legislation and in pending court proceedings. Moreover, even in the traditional cases of State succession, the legal system of the predecessor State had been maintained only in principle; provision had been made for a transitional period. Some of the problems of the present new States, although they had their special features, resembled those of earlier cases of succession and called for similar solutions.

42. The future draft convention would probably contain a clause specifying that the rules it stated did not invalidate special arrangements. Past and recent practice offered many examples of such arrangements, so that a clause of that kind would be very important.

43. On question 7, the judicial settlement of disputes, he agreed with the Special Rapporteur: that question need not be decided for the time being. It went a little beyond the competence of the Commission and would normally be a matter for a conference convened to examine a draft convention.

44. As to question 8, the order of priority or choice of subjects, he regretted that he could not support the idea which seemed to be emerging from the discussion that the subject should be succession to economic resources. He feared it might be bad tactics to start with the newest and most difficult problem. Logically, the first subject to be studied should be the one closest to traditional law, in other words territorial questions, which were dealt with in section IX of the report, followed by the problems of succession to the legal régime of the predecessor State, which was discussed in section VIII. Even if that suggestion was not adopted, problems relating to property and natural resources should not be dealt with in the final draft before the subjects to which the more general principles of succession applied, irrespective of the order in which the Commission took up the various questions.

45. Mr. TABIBI thought there could be no doubt about the Commission's mandate in the matter of succession of States: both the relevant General Assembly resolutions and the changes which had taken place since the Second World War required the Commission to give special attention to the succession problems of new States.

46. He agreed with Mr. Albónico that State succession in regard to economic questions should be given priority in the choice of subjects for study during the coming year. The emancipation of a country could not be regarded as complete until it had attained economic independence. He preferred the title "State succession in economic questions" to "The influence of the succession of States on economic matters", because the main influence in the economies of newly-independent countries was their struggle for economic self-determination.

47. Much research had been done under United Nations auspices on the subject of economic independence, especially since the establishment of the Commission on Permanent Sovereignty over Natural Resources, and the International Law Commission had a clear mandate to study the succession aspects of that subject. The Commission should not leave that study to some other United Nations body, but should take the present opportunity to clarify the situation. The Special Rapporteur could be asked to prepare the study, or at least the first part of it, in time for the Commission's next session. The question of State responsibility also required a special study.

48. Mr. NAGENDRA SINGH noted that there seemed to be general agreement on all the points in the Special Rapporteur's questionnaire except the specific problems of new States. He agreed with Mr. Kearney that the Commission should not give the impression that it wished to establish a *lex specialis* for the problems of new States, as such special pleading would detract from the value of any codification it undertook.

49. The purpose of codification was to introduce uniformity into international law, not to create rival camps on the issue of succession. It might therefore be better not to mention decolonization, which evoked unpleasant associations for some countries, but to refer to the experience of new States. Whatever approach to codification the Commission adopted, it could not ignore the many cases involving new States. But he did not think it would be appropriate to include a chapter on the succession problems of former colonies among the other aspects of succession, as that would also amount to special pleading. The best approach seemed to be to begin with a study of succession problems relating to public property and public debts, taking into account the extensive experience of new States. He could agree to the economic aspects being codified, but there should be a specific topic under the economic heading. It was essential to be precise.

50. He agreed with Mr. Eustathiades that the Commission should first try to codify rules of succession relating to treaties, for which Sir Humphrey Waldock had already prepared some draft articles, and then take up the question of public property and public debts when the Special Rapporteur had completed his study.

51. Mr. AGO, referring to Mr. Castañeda's remarks on the need to seek precedents in determining the traditional rules on State succession, said that a comprehensive study of Italian diplomatic practice relating to international law was being published in Italy; the volume covering the period 1860-1897 was due to appear towards the end of the year. The practice during that period covered very many questions of State succession which had arisen either in international relations proper or in connexion with internal problems; it was not only in regard to Italy that it was of interest: it reflected Italian relations with many other Powers. Since the subject might be of interest to the two Special Rapporteurs on State succession, he would send them the work as soon as it appeared.

52. The CHAIRMAN, speaking as a member of the Commission, said he agreed that, although the term "succession" was not entirely satisfactory, it would not be appropriate to try to find a substitute at that stage, especially before the Special Rapporteur had completed his study of the succession of States. The term was in any case well established in international law. The Commission could, at least in the meantime, adopt the connotation suggested by Sir Humphrey Waldock and regard succession as a change in the possession of competence to conclude treaties with respect to a given territory. He also agreed that it would not be opportune to study the origins and types of succession at that stage, and that the subject could perhaps be more usefully discussed when the Special Rapporteurs had completed their studies.

53. With regard to the special consideration to be given to the succession problems of new States, he believed that the Commission, when undertaking the codification of rules on that subject, should take into account all past experience of succession problems arising out of decolonization, including that of Latin American countries. The Commission should try to help new States to consolidate their political and economic sovereignty, and could best do so by drawing up a code of rules which reflected the experience of all former colonies.

54. He had at first been inclined to agree with Mr. Eustathiades that territorial questions deserved priority, since territory was of fundamental concern to States. But in view of the guidance given by the General Assembly in its resolutions he thought the Commission should give priority to the economic aspects of succession. He agreed with Sir Humphrey Waldock that the somewhat diffuse subject of economic aspects should be limited to the more specific problems of public property and public debts and asked the Special Rapporteur to word the title of his study accordingly.

The meeting rose at 12.50 p.m.

965th MEETING

Monday, 1 July 1968, at 3.10 p.m.

Chairman: Mr. José María RUDA

Present: Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
