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Summary record of the 1445th meeting

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

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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.

chains. It had also been argued, with regard to the debt burden of newly independent States, that the source of all the evil was the measures adopted by OPEC, which had, in fact, represented the first ever independent expression by weaker nations of their inalienable right freely to dispose of their natural resources. If any mention was to be made of the decisions of OPEC, mention must also be made of the historical background to them, such as the fact that for half a century, during which the price of the foreign manufactures and know-how essential to its development had risen steeply, Venezuela had received only 50 United States cents for each barrel of oil it had exported. He was well aware that the Commission was not the proper forum for attacking colonialism or defending OPEC, but neither was it a suitable place for doing the reverse.

4. To be of value, every legal rule had to have a foundation in reality and take account of the circumstances in which it was intended to be applied. If the function of the Commission was really to develop international law, it must not preserve rules derived from the social context of the colonial era but give newly independent States a chance to defend their interests and ensure their continued harmonious economic and social development. Contemporary international law should be based, like domestic law, on social justice, a justice which would be equal for the major Powers and the small States, for the rich nations and the poor nations.

5. The logical outcome of reasoning in that vein would be acceptance of the draft article proposed by Mr. Ushakov,[3] the effect of which would be to apply the clean-slate principle, which had been the position adopted by the Latin American countries when they gained their independence. However, he preferred the consolidated article proposed by the Special Rapporteur, simply because it represented a compromise and a way of advancing gradually. The solution proposed by the Special Rapporteur struck a just mean for it seemed to him that, if a newly independent State had in fact benefited from investment loans contracted on its behalf, it was fair that it should assume an equitable proportion of the corresponding debt of the colonial Power. With that in mind, he considered that it would be appropriate to replace the words "corresponding expenditures" by the words "corresponding investments" in paragraph 2 of the article. Paragraph 6 reflected the philosophy which underlay the whole of the proposal and was itself a reflection of principles which were embodied in the Charter of the United Nations and had become the basis of contemporary international relations. In that paragraph, the word "gravely" should be deleted, since effects in any way detrimental to the economy of a newly independent State would represent an infringement of its sovereignty and were *ipso facto* prohibited.

6. Mr. DADZIE said that colonialism had been condemned by the United Nations and he had been shocked, to say the least, to find that anyone in the present age could hold the views on that evil institution expressed in the article from which Mr. Schwebel had quoted at the previous meeting. He took it that Mr. Schwebel himself did not share those views. Indeed, he had noted that Mr. Schwebel had admitted that he was not himself a student of colonialism and that he had adopted a more or less positive attitude to the new draft article proposed by the Special Rapporteur.

7. The CHAIRMAN said that statements had been made at the previous and current meetings which, to the extent that they had raised the basic issue of the characterization of colonialism, had been of only indirect relevance to the Commission's task. He felt that the Commission could and should rest for the purposes of its work on the principles which had been well established by General Assembly decisions and United Nations practice with respect to colonialism. It was not for the Commission to form any judgment on the issues underlying that subject.

8. Mr. SCHWEBEL said that he appreciated the remarks made by the Chairman and other members of the Commission, especially Mr. Dadzie. He had opened his statement at the previous meeting by expressing his views on the undesirability of colonialism, which was not, he thought, a matter on which the Commission was divided. As he had understood it, the article he had quoted had not expressed views for or against colonialism. It had not been addressed to what the Chairman had termed the "underlying issues". It had simply endeavoured to examine the question whether colonialism had uniformly or generally resulted in "economic exploitation" in the form of abnormal profits for the metropolitan Power or nationals thereof. That was a legitimate question in itself and one which was pertinent to the Commission's work, in so far as questions of a similar nature had been raised during the debate and, to a very large extent, in the Special Rapporteur's report.

9. Having reflected further on the debate, and especially on the cogent criticism directed against paragraph 6 of the consolidated article proposed by the Special Rapporteur, he wished to withdraw his suggestion for the amendment of that paragraph and recommend instead that it be deleted.

10. The CHAIRMAN, speaking as a member of the Commission, said that most of the comments he had had in mind had already been made by other speakers. He congratulated the Special Rapporteur on the very thorough, extensive and balanced nature of his report and, broadly speaking, of his draft article.

11. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion on his new article relating to newly independent States, said he agreed with Mr. Francis, Mr. Sette Câmara and Mr. El-Erian, who, unlike Mr. Schwebel, considered that the Commission's work of codification in that instance was justified, even though most colonized countries had attained independence. Two considerations militated in favour of such codification. First, there still remained not only small dependent territories, which would perhaps one day become "mini-States", but also more extensive territories, such as the zones under Spanish domination in the northern part of Morocco, Puerto Rico, and Bermuda, as well as large territories such as Namibia, Rhodesia and the Western Sahara. Then, the provisions drafted by the Commission could be useful both in future cases of independence and

[3] 1444th meeting, para. 19.

in recent cases of independence, such as Angola, Mozambique and Guinea-Bissau, and even in earlier cases of independence. That was particularly true in the case of State debts. The debt problem, and more particularly debt servicing, which sometimes spanned years or decades, exemplified the type of matter covered by succession which persisted long after the attainment of independence. It was admittedly late in the day to deal with such matters, but not too late. It would have been better to codify the matter in 1960, for example, when General Assembly resolution 1514 (XV), containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, had been adopted.

12. He appealed to members of the Commission to show a spirit of generosity regarding the formulation of the article, even if for the rich countries such generosity no longer amounted to much in practical terms. At a time when an endeavour was being made to create a new international economic order, when a law of development and a right of development were being evolved, when the concept of international solidarity was starting to inject new vigour into public international law, and when aid was gradually coming to be regarded as an international duty, the Commission could not hang back; it must be seen to be generous. As Mr. Quentin-Baxter had observed at the 1443rd meeting, the article must reflect existing United Nations doctrine. In those circumstances, there could be no question of deleting paragraph 6, as Mr. Schwebel proposed. A provision should be drawn up to take account of reality as reflected by the discussions in UNCTAD, the General Assembly and the Conference on International Economic Co-operation, all of which had envisaged the possibility of the cancellation of debts contracted by newly independent States in their sovereign capacity after decolonization. There was therefore, *a fortiori*, no question of requiring newly independent States to be answerable for previous debts which had been contracted during the colonial era and at the behest of the colonial Power and which, moreover, had not always benefited those countries at the time they were colonized.

13. Pending settlement of the third world's debt problem by cancellation of the debt, the rich creditor countries were financing the servicing of that debt by granting loans to some debtors to enable them to repay earlier loans. In short, therefore, it was not even generosity that was needed but a spirit of realism. The staggering increase in the third world's indebtedness was simply the consequence of an unjust world economic system, which, accompanied as it was by deteriorating terms of trade, constituted a new, modern form of slavery. Indeed, the Special Rapporteur had mentioned a French author who had advised the Government of Sri Lanka to refuse to pay its debts because of the scandalously low prices paid for its tea exports. Again, it was at President Pompidou's initiative that the debts of 14 French-speaking African countries to France had been cancelled. They had not been debts of successor States, but their cancellation was none the less indicative of a certain trend.

14. The article was based on two principles: lack of capacity to pay and lack of benefit from the proceeds of the debt. Since it was the colonial Powers themselves which had laid down those principles, and not the newly independent States, they could not reject them now. In particular, the Allies had upheld those principles in the case of the German colonies, in the Treaty of Versailles in 1919. In regard to incapacity to pay, as stated in paragraph 381 of his report, it was the United States which had set the example after the First World War. The reasoning of the United States Government in the case referred to was entirely in keeping with the spirit of paragraph 6 of his proposed new article. He was therefore surprised that Mr. Schwebel called for the deletion of a provision which referred to principles also upheld by the United States in the Cuba case in 1898.

15. The acute problem of the debt burden for under-developed countries had been referred to by Mr. Francis (1443rd meeting), Mr. Calle y Calle, Mr. Sette Câmara and Mr. Tabibi (1444th meeting), who considered that paragraph 6 was of fundamental importance and would even introduce the notion of incapacity to pay not only in paragraph 6, where it was linked to the question of agreements between the predecessor State and the successor State, but throughout the article as a whole and particularly in paragraph 3. Mr. Tabibi considered that the content of paragraph 6 was sufficiently important for it to form a separate article. Other members of the Commission, such as Mr. Quentin-Baxter (1443rd meeting) and Mr. El-Erian (1444th meeting), had pointed out that the ideas underlying paragraph 6 had their origin in United Nations doctrine.

16. The questions of the debt burden and of capacity to pay were related to the general question of development, which, according to article 55 of the United Nations Charter, was an international problem *par excellence*. Development had become a collective responsibility of the entire international community. Moreover, the Charter of Economic Rights and Duties of States [4] stated that "the responsibility for the development of every country rests primarily upon itself but that concomitant and effective international co-operation is an essential factor for the full achievement of its own development goals". An excessive debt burden would therefore be incompatible with international co-operation for development. Development was the prerequisite for international peace but the arms race was swallowing up vast sums which would certainly be put to better use if they were allocated to peaceful development. That economic aspect of peace had been underlined by the participants at the Fourth Conference of Heads of State or Government of Non-Aligned Countries (Algiers, 1973), who had readily discerned the relationship between their economic backwardness and the political and economic domination from which they suffered. As President Salvador Allende had declared, "The dialectic relationship is all too clear: imperialism exists because underdevelopment exists; underdevelopment exists because imperialism exists". Pope Paul VI had stated in an encyclical that "Development is the new name for peace". Further, at its sixth special session in 1974, the General Assembly had adopted the Declaration on the Establishment of a New International Economic Order,[5] which, in a manner, was to

[4] General Assembly resolution 3281 (XXIX).

[5] General Assembly resolution 3201 (S-VI).

the economic sovereignty of States what the United Nations Charter was to their political sovereignty.

17. As for the principle of the benefit derived by the newly independent State from the allocation of the proceeds of the debt, he would stress the context of colonial exploitation which obtained in the case of certain economic, social and cultural undertakings. Those undertakings had been designed primarily to promote the well-being and prosperity of the colonial Power, thereby undermining the concept of benefit. If the dependent people did benefit from them, it was only indirectly. After independence, some installations had proved difficult to use or reconvert. At the 1443rd meeting, Mr. Quentin-Baxter had mentioned the case where a large amount of property left behind by the colonial Power was of no benefit to the newly independent State, not because of the colonial context but simply because the colonial Power, being richer, owned installations in the colony which represented a level of economic or other power which the newly independent State had not attained. It should certainly not be inferred that decolonization was itself a set-back, since that would be tantamount to saying, as Mr. Schwebel had claimed, that the colonial peoples had enjoyed better living conditions in the time of the administering Power. The fact remained that it was difficult to reconvert certain property, such as military bases or sophisticated launching pads, which the administering Power left behind in the dependent territory. That had been the case with a military base equipped with anti-atomic underground installations and an atomic bomb testing site in Algeria. Clearly, the transfer of such property, if it had been created by debts, should not involve the newly independent State in the assumption of those debts, since it had derived no benefit from them at all.

18. Mr. Quentin-Baxter had said that, while he regarded the principles on which the article was based as relevant, he did not understand their place in that provision. In reply, he would explain that he had referred to principles of equity, bearing in mind three considerations. In its decision in the *North Sea Continental Shelf* case (1969), the International Court of Justice had invited States to interpret the content of equitable principles by reference to the factual situations and considerations applicable in each case.[6] In the case of newly independent States, those considerations followed a logical sequence. It had first to be shown that the newly independent State had benefited from the proceeds of the debt. If it had so benefited, then it had to be capable of paying off the debt. Even on that assumption, it was then necessary to take account of colonial exploitation; the newly independent countries would only be persuaded to abandon their claim for compensation if they were freed of their colonial debts. The draft article under consideration was based entirely on those three considerations. For an immediate appreciation of its content, the Commission might simply refer to the draft text proposed by Mr. Ushakov,[7] which was so well phrased and concise that it required no further explanation.

[6] *I.C.J. Reports 1969*, pp. 46-50.

[7] 1444th meeting, para. 19.

19. His own view, however, was that it would be advisable to add a paragraph to make it clear that agreements between the newly independent State and the predecessor State must not be leonine. The predecessor State must not take advantage of the weakness of the new State which had just attained independence. The real problem now facing newly independent States was the restrictions which such agreements placed on them. In order to comply with those agreements, many countries were continuing to pay their old debts by incurring new debts. That did not mean, as Mr. Sucharitkul feared,[8] that the newly independent State should be deprived of its sovereign right to conclude an agreement. On the contrary, it should be protected, bearing in mind that devolution agreements had sometimes been concluded even before the attainment of independence. Further, it was necessary to demythify the concept of the sovereign equality of States, which was just a piece of hypocrisy on the part of international law. Sovereignty, to be complete, must be accompanied by economic independence.

20. Apart from the position taken by Mr. Sucharitkul, there were two trends of opinion among members of the Commission on the question of agreements between the predecessor State and the successor State. On the one hand, Mr. Ushakov had declined to discuss agreements of that kind, either their validity or their possible leonine character; no doubt he considered that the question fell within the law of treaties. But the Vienna Convention [9] was completed by a declaration on the prohibition of coercion in the conclusion of treaties.[10] Mr. Ushakov's position did not seem to him to be in keeping with draft article 13 [11] on newly independent States and State property, under which the predecessor State could retain property only with the consent of the successor State. Agreements not concluded in accordance with article 13 would be regarded as void *ab initio*. Under Mr. Ushakov's proposal, on the other hand, the successor State could assume heavy debts or even debts not owed, provided there was an agreement, however dubious. There was thus a lack of symmetry between the two provisions.

21. Mr. Dadzie and Mr. Francis (1443rd meeting) and Mr. Calle y Calle and Mr. Sette Câmara (1444th meeting), on the contrary, considered that the principle of capacity to pay should be reflected in the article as a whole. Some of those members would prefer not to mention the agreement in paragraph 6 so that its provisions would cover all situations, even where there was no agreement, while others would like to see the notion of capacity to pay, if referred to in paragraph 6, introduced in paragraph 3. Mr. Quentin-Baxter had taken an intermediate position (1443rd meeting), underlining the residual nature of the rules being drawn up by the Commission; its task was to encourage the parties to conclude an agreement, failing which they would have to rely on those rules.

[8] *Ibid.*, para. 51.

[9] See 1417th meeting, foot-note 4.

[10] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex.

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

In the circumstances, the Commission was promoting agreement between the parties within certain limits only. The free will of the predecessor State and the successor State was subordinate to their respect for an inviolable principle, namely, the self-determination of peoples. It was the same situation as in article 13.

22. Taking the various paragraphs of his proposed new article in turn, he said that all members of the Commission had recognized the principle laid down in paragraph 1 as self-evident. Mr. Quentin-Baxter had even considered that a mention in the commentary would suffice. The principle stated in paragraph 5 had also been regarded as self-evident. Mr. Sette Câmara was of the opinion that the guarantee should be maintained, Mr. Calle y Calle that it was covered by the definition of State debt, which referred to a financial obligation, and Mr. Quentin-Baxter that the guarantee should be mentioned only in the commentary. Paragraphs 2, 3 and 6 were of basic importance and had already been discussed at length. Mr. Calle y Calle had, however, pointed out [12] that paragraph 3 could be interpreted in two ways: as referring either to an over-all balance of general liabilities and general assets, or to a direct relationship between property and a debt resulting directly from the property. If the second interpretation was correct, it came close to conflicting with the articles relating to property, particularly article 8, which stipulated that property passed without compensation. Also, the application of equitable principles precluded any systematic correlation of property and a debt. The first interpretation, which to a certain extent involved a package deal, should therefore apply. Lastly, Mr. Sette Câmara and Mr. Calle y Calle had expressed doubts regarding the application of paragraph 1 to the two cases of succession referred to in paragraph 4. On reflection, he was inclined to share their concern.

23. Mr. Schwebel, while endorsing the broad lines of the proposed draft article, had expressed some strong criticisms about matters that only diverted the Commission from its aims and function.[13] It was not possible for him (the Special Rapporteur) to remain indifferent to that criticism, since it was tantamount to a justification of colonialism, the consequences of which were still being felt by 2,500 million human beings.

24. In his report, he had refrained from expressing any value judgment that might be offensive to any colonial Power; he had confined himself to stating the facts and drawing the necessary conclusions from the normative point of view. His comments were not intended as a condemnation or a pardon, but as an instructive account of the human adventure which taught a lesson for the present and future. It should not be forgotten that, historically, imperialism was a part of that human adventure and that it was not peculiar to any one country, race or age.

25. In the first place, the acts of piracy on the high seas during the eighteenth and nineteenth centuries, to which Mr. Schwebel had referred, had been perpetrated not by Algerians but by Ottoman imperialism, which had colonized Algeria and part of the Mediterranean basin; moreover, he would remind the Commission that piracy had existed throughout the ages and had been practised particularly by nationals of the Western countries, whose acts of piracy had been portrayed in many successful American films through the talents of American film actors.

26. He would have hoped that Mr. Schwebel, mindful of the forthcoming anniversary of the independence of the United States, had shown, if not generosity, at least a little more justice towards the colonized peoples, instead of delivering an antiquated and anachronistic eulogy on the benefits of colonialism while sheltering behind the authority of a Yale professor.

27. With regard to the evils of colonialism, of which Mr. Schwebel said he had no direct experience, he would simply quote the historian Ki-Zerbo, President of the Association of African Historians and member of the UNESCO Executive Board, who, to the question "Without colonialism, would you have been a great historian?", had replied: "Who knows? If colonial exploitation had not broken my ancestors and my people, perhaps I would have been not only a historian but the son and grandson of a historian."

28. As the citizen of a freedom-loving nation, Mr. Schwebel should realize that the independence of peoples was not to be measured by the yardstick of economic benefits and was not for sale. It was sought after for its own sake and could not be surrendered in return for a state of well-being which, in any event, the colonial system had never brought about and which, because of its very nature, it never would. That was the nub of the problem. Even if the peoples of the third world, who had been freed from the chains of bondage, were less happy now, they did not regret having broken their chains. And it was absurd to argue that they were less happy because they were independent when it was the iniquitous system of international economic relations that was the cause of all their ills. The mechanisms of the world economy, which until now had been directed not towards but against the third world, would have to be dismantled and analysed. The third world was condemned to hand over an ever-increasing quantity of its production of energy and raw materials in order to obtain from the industrialized countries the same product, manufactured with its own raw materials, its own power and sometimes even its own emigrant labour and its own technicians, who had been trained and had then stayed on in the rich countries which attracted the "brain drain". That new slavery of modern times, in which the third world had to work more and more to buy the same tractor or the same machine, while the developed countries worked less and less to obtain the same quantity of oil or ore, was in fact only the tip of the iceberg. The present pattern of world trade, which was responsible for the widening gap caused by the rise in the price of manufactured goods and the fall in the price of primary products, was a reflection of that aspect of the situation.

29. Apart from that aspect, however, there was the whole question of the existing inequality, which was institutionalized in a law and in international relations that had been so devised and organized over the years as to

[12] 1444th meeting, para. 6.

[13] 1444th meeting, paras. 32 *et seq.*

make the backwardness of third world States a prerequisite for the progress of the industrialized States. The implacable law of deteriorating terms of trade was the source of the ills of the third world and it was traditional public international law which had permitted and promoted that state of affairs. An international system should therefore be gradually introduced in which the continued enrichment of the rich countries would no longer be paid for by the progressive impoverishment of the poor countries. That was the aim of the new international economic order.

30. With regard to Puerto Rico, it was not he but the international community which had decided to treat Puerto Rico as a dependent territory. He should not therefore be reproved, as Mr. Schwebel had reproved him, for disregarding General Assembly resolution 748 (VIII) of 27 November 1953, which at the time had considered that Puerto Rico had achieved a new constitutional status and that consequently Chapter XI of the United Nations Charter could no longer be applied to it. The blame should rather be laid at the door of the United Nations, which thereafter had repeatedly passed other resolutions to the contrary, demanding Puerto Rico's independence. But to do that, it was necessary to be consistent in one's reasoning. Mr. Schwebel, however, accorded to resolution 748 (VIII) full and unqualified legal force, and then cast doubt on the normative value of General Assembly resolutions by questioning the legal scope of resolution 3281 (XXIX), by which the General Assembly had adopted the Charter of Economic Rights and Duties of States. The resolution on Puerto Rico had been adopted in 1953, at a time when the United Nations did not represent all the peoples of the world, whereas the resolution containing the Charter of Economic Rights and Duties of States, had been adopted in 1974 by a much wider international community. Moreover, in 1953, the United States had enjoyed an automatic majority in the United Nations owing to its amenable clientele; the industrialized world, which had reigned unhindered over the United Nations for nearly two decades, regarded that automatic majority as normal and just because, in its opinion, it was the expression of the same democracy by number which it now rejected.

31. An attitude which consisted of sometimes recognizing and sometimes rejecting the one or the other United Nations resolution was not very logical. To block the democratic machinery of the General Assembly, some countries, having lost their old automatic majority, had recourse to the consensus technique, which enabled them to obtain the maximum number of concessions in compromise texts that diminished the scope and content of the resolutions adopted. Not satisfied with that, they then had recourse to the reservations technique, whereby they could regard themselves as not affected by those resolutions. It was that attitude which prevented the early emergence of a new international legal order. Those tactics were however, doomed to failure because the United Nations Charter, as an organic instrument, had already evolved considerably owing to the glosses put on it. The General Assembly had given it a dynamic and evolving content, in keeping with the needs of the international community, and had made of it a living charter which matched the aspirations of a world in the throes of change. The repeated resolutions of the United Nations were making the law of tomorrow by a process of accretion, as Professor Verdross had shown in his study *Die Quellen des Völkerrechts*.[14]

32. Mr. Schwebel had charged OPEC with contributing to the impoverishment of third world countries. The industrialized countries, however, had never done anything for the most deprived countries. At the Meeting of the Sovereigns and Heads of State of OPEC Member Countries, held at Algiers in March 1975, the OPEC countries had announced in a declaration of solidarity, which had not been reported at all in the Western press, that they were prepared to provide the most deprived countries with oil at cost price on condition that the rich countries, on their side, made the necessary effort to change the international economic order.

33. If the third world invoked the right to reparation, to which Mr. Schwebel had referred, they did so above all to underline the developed countries' duty to aid the poor countries. Indeed, according to Mr. Robert McNamara, a compatriot of Mr. Schwebel, the North/South economic division was a seismic crack, which went deep into the sociological crust of the earth and could cause violent tremors, for, if the rich nations did not manage to fill that crack, nobody would be safe in the end, no matter how large their stockpile of weapons.

34. As a result of the action of the non-aligned countries, the concept of planetary development had assumed added force and relevance. Europe had made history throughout the world for 2,000 years with its soldiers, merchants and missionaries and had dominated the planet in the name of its law, but the time had now come to share out the power and the riches more fairly, within States as well as among them.

35. In the same way as the great majority of countries in the world, international law was also a 'developing' law. Its normative development would probably be more rapid than its institutional development, and the first would perhaps be instrumental in bringing about the second. That law would probably no longer be the reflection of relations based on domination, inequality or hegemony. It would also probably not be a law based on egalitarian relations but rather a body of rules in which an increasingly important place would be reserved for relations based on equity. Equity would increasingly be the guiding principle in the development and observance of norms which would provide for corrective or compensatory inequality to enable the backward States of the third world to catch up with the rest of the world. International law had a new function, described by a compatriot of Mr. Schwebel, Ambassador Arthur Goldberg, as being to help to abolish discrimination, to ensure respect for human rights, to feed the hungry, to teach the ignorant and to free the oppressed. In accordance with the wishes of the developing countries, international law must organize no longer the sharing of the world but a world based on the principle of sharing.

36. Mr. QUENTIN-BAXTER said that the Special Rapporteur's summing up of the discussion had made

[14] Freiburg im Breisgau, Rombach, 1973.

him realize that he might not have made himself entirely clear in his statement on the consolidated draft article relating to newly independent States.[15] He had said that, in his view, paragraphs 2, 3 and 6 and the three principles embodied therein were central to the article. He had also expressed some doubt as to whether the principle laid down in paragraph 6 should be related only to the conclusion of agreements rather than established as a basic principle in its own right.

37. In amplification of that point, he wished to emphasize the breadth of the notion of capacity to pay. In one sense, it was simply a reflection of the basic United Nations principles which should serve as guide-posts in the Commission's work. One such principle was the concept of sovereignty over natural resources, a notion that, at first sight, seemed almost tautological since it amounted to an assertion that a people owned its own property and that sovereign States had sovereignty in their own territory. What, in his view, that principle really entailed could be illustrated by drawing a parallel from domestic law. On the whole, it was believed that an individual should pay his debts but that belief was never carried to the point of insisting that the individual must starve himself to death in order to satisfy his creditors. The first priority was to keep the debtor alive and in reasonably good health. Similarly, the principle of sovereignty over natural resources meant that a State was not to be deprived in a covert manner of its overt authority to order its own affairs by elevating the question of indebtedness to a higher plane than that of the freedom of will of the State itself. However, the principle of capacity to pay could also be said to derive, in the present context, from virtually all State practice in the matter of succession to debts. Authorities such as Professor O'Connell, Professor Feilchenfeld and many others bore out that point. The principle of capacity to pay thus derived from traditional sources and from United Nations practice alike.

38. The other point which he had wished to make was that, in considering the question whether certain expenditures had benefited a dependent territory, it was not necessary to confine oneself to situations in which the colonial Power might be thought to have incurred expenditures in its own interests rather than in those of the territory concerned. It might simply be that the territory did not have resources of its own to maintain the structure of government that even the metropolitan Power thought necessary and appropriate to modern conditions of life. He had had partly in mind the very small States in the Pacific which had formerly been administered by New Zealand and had continued to be associated with it following their attainment of independence, States which had been able to maintain their system of government solely because of the continuation of subventions from New Zealand. A still more striking case was that of Papua New Guinea, a country with an extensive and very difficult terrain, which, after acceding to independence, had been able to sustain its apparatus of government only with massive assistance from Australia, the former metropolitan Power. If the view had been taken that subventions to Papua New Guinea must stop at the point when it attained independence or, still more, that the structure of government should become a burden on the newly independent State, then even that structure would have been wholly beyond the immediate resources of the new country to support. Consequently, there was a certain degree of overlapping between the two notions of capacity to pay and the benefit to a formerly dependent territory of expenditures incurred by the predecessor State, even though each was a completely valid concept in its own right.

[15] 1443rd meeting, paras. 32 *et seq.*

39. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer to the Drafting Committee articles F, G and H,[16] as well as the consolidated text proposed by the Special Rapporteur.[17] Those provisions would be considered by the Drafting Committee in the light of the comments made in the Commission and, in particular, of the text of the article proposed by Mr. Ushakov.[18]

It was so agreed.[19]

The meeting rose at 1 p.m.

[16] A/CN.4/301 and Add.1, chap. V, sect. H.

[17] 1443rd meeting, para. 1.

[18] 1444th meeting, para. 19.

[19] For the consideration of the text proposed by the Drafting Committee, see 1449th meeting, paras. 4-54, and 1450th meeting, paras. 1-6.

1446th MEETING

Friday, 24 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, 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. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/285,[1] A/CN.4/290 and Add.1,[2] A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Drafting Committee for the first five articles (articles

* Resumed from the 1442nd meeting.

[1] *Yearbook ... 1975*, vol. II, p. 25.

[2] *Yearbook ... 1976*, vol. II (Part One), p. 137.