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Summary record of the 1173rd meeting

Topic:
<multiple topics>

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84. The case referred to in paragraph 2 had nothing to do with the expiry of treaties by the effect of their own provisions; it dealt with termination or amendment by agreement between the predecessor State and the other State party. In that case, the logical assumption was that the treaty between the new State and the other State party would be considered as in force.

85. He had some doubts concerning the case mentioned in paragraph (11) of the Special Rapporteur's commentary, where the predecessor State and the other State party terminated the treaty after the date of succession but before the new State and the other State party had taken any position regarding the continuance in force of the treaty. While accepting the logic of the solution offered by the Special Rapporteur, he personally thought that in the reality of international life it would be easier for the successor State and the other State party to conclude an entirely new treaty than to avail themselves of some legal nexus which had been established, so to speak, merely to resurrect a defunct treaty.

86. He was entirely in favour of the text proposed by the Special Rapporteur and it should now be referred to the Drafting Committee.

87. Mr. REUTER said he agreed with Mr. Ushakov that the wording of article 17 must be improved, but the Special Rapporteur's intention was quite clear and he approved of the substance of the article.

88. What Mr. Sette Câmara had just said was true enough, but article 13 contained only one new element as far as the general law of treaties was concerned, the presumption of retroactivity provided for in paragraph 2. If the Commission accepted that presumption, it could retain article 17, subject to drafting improvements.

The meeting rose at 6 p.m.

1173rd MEETING

Tuesday, 6 June 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen.

Letter of appreciation to Mr. Movchan, former Secretary to the Commission

1. The CHAIRMAN suggested that the Commission might like to send a letter of appreciation to Mr. Movchan, who had served as its Secretary for five years and had recently retired from the United Nations Secretariat in order to return to the Ministry of Foreign Affairs in Moscow. All members would recall the excellent work done by Mr. Movchan, not only in the Commission itself but also at the Vienna Conference on the Law of Treaties and in the Sixth Committee of the General Assembly.

2. Mr. YASSEEN said that he warmly supported the Chairman's suggestion; Mr. Movchan's merits and qualities had been outstanding.

3. Mr. ALCÍVAR said that he heartily supported the Chairman's suggestion. As Director of the Codification Division at Headquarters, Mr. Movchan had made an important contribution to the codification of international law. His services as Secretary to both the Sixth Committee and the Commission had been extremely beneficial to the United Nations.

4. Mr. TSURUOKA said that he too fully supported the Chairman's suggestion. As Chairman of the Commission at its twenty-third session, he had had an opportunity of appreciating the objectivity, efficiency and modesty of Mr. Movchan, who had loyally served the cause of the codification and progressive development of international law.

5. Mr. BARTOŠ said that he could only endorse the Chairman's suggestion. As an expert consultant on two occasions at the General Assembly, he had been impressed by the efficiency with which Mr. Movchan carried out his task as Secretary to the Sixth Committee. Mr. Movchan's modesty was equalled only by the tact with which he succeeded in applying his skill without wounding anyone's feelings. He had always been available to members of the International Law Commission, even between sessions, and had successfully guided its work without taking any of the credit for himself. It was the Commission's duty to acknowledge its debt of gratitude to its former collaborator.

6. Mr. RAMANGASOAVINA said that he wished to join the other members of the Commission in acknowledging Mr. Movchan as a distinguished, competent and discreet jurist who had undoubtedly contributed to the progress and efficiency of the work of the Commission.

7. Sir Humphrey WALDOCK said that he was glad to support everything which had been said by his colleagues in praise of Mr. Movchan. It was only proper that the Commission should formally place on record its own indebtedness to him for his services as its Secretary. When he himself had served as Chairman, he had had particular reason to be thankful to Mr. Movchan for his able assistance as Secretary. Mr. Movchan had also done much to smooth the work of the Vienna Conference on the Law of Treaties.

8. Mr. BEDJAOUI said that he too wished to pay a warm tribute to the merits and modesty of Mr. Movchan.

9. Mr. USTOR said that he wished to subscribe to all that had been said by his colleagues in appreciation of Mr. Movchan. It should also be pointed out that it was under his aegis that the Secretariat had prepared its Survey of International Law (A/CN.4/245) which was recognized as an outstanding achievement of its kind.

10. Mr. REUTER said that he wished to associate himself with the expressions of esteem and appreciation to which they had just listened.

11. Mr. SETTE CÂMARA said that he fully supported the suggestion to send a letter of appreciation to Mr. Movchan.

12. The CHAIRMAN suggested that the Commission send a letter of appreciation to Mr. Movchan and annex to that letter a summary of the observations which had just been made by its members.

It was so agreed.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (*a*) of the agenda]

(resumed from the previous meeting)

ARTICLE 17 (Effect of the termination or amendment of the original treaty) *(continued)*

13. The CHAIRMAN invited the Commission to continue its consideration of article 17 of the Special Rapporteur's draft (A/CN.4/249).

14. Mr. YASSEEN said that where a bilateral treaty was in force between the successor State and the other State party by virtue of a collateral agreement, that was to say, by the effect of the mutual consent of the two parties, it was normal and logical that the new treaty should have a life of its own, independently of the original treaty, and that consequently termination or amendment of the treaty between the predecessor State and the other State party by those States after the succession had no effect on the new treaty between the successor State and the other State party. It might at first sight seem pointless to state so evident a truth in an article, but article 17 was not superfluous.

15. Paragraph 1 was useful as a prelude to paragraph 2, which was more essential because it went beyond the application of the general principles of the law of treaties by proposing a solution based on the fact of succession, that was, the replacement of one sovereignty by another. A provision of that kind was needed in order to safeguard the continuity of the treaty. It was useful to state expressly that, after the date of the succession but before it was clear that the treaty was still in force between the successor State and the other State party, nothing could prejudice the right of the successor State and the other State party to maintain the treaty in force between them. Such continuity, not to say retroactivity, was in the interests of the successor State. Article 17 was therefore useful and he was in favour of retaining it.

16. Mr. RAMANGASOAVINA said that in article 17 it was normal that stress should be laid on the fact that the termination or amendment of the original treaty between the predecessor State and the other State party had no effect on the treaty relations established between the new State and the other State party. In practice, it frequently occurred that the predecessor State, while bequeathing a treaty to the successor State, needed to establish treaty relations on fresh bases in order to take account of the emergence of the new State, for example in matters of air law. It was normal that those relations should be completely independent of the relations between the new State and the other State party.

17. However, the doubts that had been expressed during the discussion on article 13, and on paragraph 1 (*b*) in particular, concerning the presumption of continuity based on the silence or conduct of the successor State, were accentuated by paragraph 1 of article 17, under which, in the absence of any specific expression of will, the silence or conduct of the successor State was interpreted as indicating that it agreed that it was not affected by the termination or amendment of the original treaty.

18. Article 17, which was intended to cover complex situations that were not mere academic hypotheses but reflected existing practice—examples were given in the commentary—was acceptable in principle but he had some reservations about its scope, particularly about the interpretation of the silence of the successor State.

19. Mr. USHAKOV said that article 17 needed redrafting to make the meaning clear. Paragraph 1 provided for the continuance of the treaty between the successor State and the other State party in the event of the termination of the treaty between the predecessor State and the other State party on the one hand, and in the event of amendment of the treaty in force between the predecessor State and the other State party on the other. In the latter case, the question arose as to whether, in the absence of any specific expression of will by the successor State, its silence or conduct should be interpreted as tacit acceptance of the original treaty or of the amended treaty.

20. Paragraph 2 raised a more serious problem. The Special Rapporteur had explained that he had in mind cases where a treaty in force between the predecessor State and the other State party was not yet in force between the successor State and the other State party but where it was the intention of the two States to maintain it in force. The wording of sub-paragraph (*a*) could thus be amended to replace the idea of "being in force" by the idea of "coming into force", but then it would no longer be possible to refer to article 13, which applied only to treaties in force at the date of succession. In other words, as paragraph 2 was now drafted, it would be even more difficult than in the case of paragraph 1 to interpret the silence or conduct of the successor State, in the cases envisaged in both sub-paragraphs (*a*) and (*b*).

21. It would perhaps be enough to retain paragraph 1 only, expanding it to cover the case of the entry into force, between the successor State and the other State party, of a treaty that had previously been in force between the predecessor State and the other State party.

22. Mr. USTOR said that the title of article 17 contained the words "original treaty"; he wondered whether that was the first time that that term had been used in the draft articles and if so, whether it should be introduced at such a late stage. The Drafting Committee might consider whether it should perhaps be used in the previous articles as well.

23. Both the title and the text of the article contained the words "termination or amendment". He himself would prefer the nomenclature of the Vienna Convention, which referred to the invalidity, termination or suspension

of operation of a treaty. He suggested, therefore, that article 17 should also contain a reference to the suspension of the operation of the treaty.

24. He found it difficult to make up his mind about the effect of the invalidity of the original treaty, a point which had been raised by Mr. Ushakov. Certainly the freedom of the successor State and the other State to enter into treaty relations was a point in favour of extending article 17 to cover the case of invalidity. Since, however, article 13 began with the words "A bilateral treaty in force in respect of the territory of a new State at the date of the succession", that was a point which would have to be considered from the drafting point of view.

25. Lastly, he agreed that it was necessary to find some language to indicate that article 17 also applied to arrangements made under article 16.

26. Mr. REUTER said there were two points. First, it was clear that article 17 would be merely an application of a general principle of the law of treaties if it were not for paragraph 2 of article 13. It was that paragraph which justified the kind of provisions contained in article 17, because it established the continuity to which Mr. Yasseen had referred.

27. Secondly, the drafting of paragraph 2 was obscure. Paragraph 2 dealt with the case where the original treaty had been terminated or amended after the date of succession but before the consent of the parties had been established in accordance with article 13. If that point were explained in the introductory sentence, the meaning of the paragraph would be clear.

28. He understood the misgivings of Mr. Ushakov, but the usefulness of article 17 could easily be demonstrated by a concrete example. Supposing that part of the territory of a State party to a bilateral treaty in force seceded and became independent, in most cases the successor State would continue *de facto* to apply the treaty whereas the predecessor State, quicker to see that the treaty as it existed no longer had the same meaning, would terminate or amend it. If the successor State continued to apply the treaty on a *de facto* basis for a certain period, the conditions mentioned in article 13 would be fulfilled: the conduct of the successor State would have been sufficiently consistent to signify acquiescence in accordance with paragraph 1 (*b*) of article 13. That was the case which paragraph 2 of article 13 was intended to safeguard.

29. It was essential to allow new States as much latitude as possible during the initial period of their existence. They should not be too hastily considered as committed by *de facto* application, nor should they be deprived of the right to benefit from the continuity of certain treaties, as provided in paragraph 2 of article 13. He was therefore in favour of maintaining paragraph 2 of article 17, subject to both the French and English versions being redrafted.

30. Mr. USHAKOV said that there was no question of a *de facto* application of the treaty in paragraph 2 of article 17, since the treaty had been terminated. Not till the actual conduct of the States had established their consent would it begin to be applied again. The case to which Mr. Reuter had referred was therefore the one dealt with in paragraph 1, not paragraph 2.

31. Mr. BEDJAOUI said that article 17 was not open to any fundamental objection, at any rate paragraph 1, which stated an obvious rule deriving from the general principles of the law of treaties.

32. Paragraph 2 was less readily acceptable. It was linked with paragraph 2 of article 13, which stated a general presumption of continuity that had caused serious misgivings during the discussion. Paragraph 2 of article 17 gave rise to the same misgivings. In his view, the legal link between the treaty and the territory of the successor State gave the latter the right to consider itself as bound if it so declared in one way or another, and nothing more. Paragraph 2 should therefore be redrafted to give the successor State the faculty of being bound by its express or tacit consent, by a formal instrument or by its conduct.

33. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the fundamental purposes of article 17, although it did raise certain problems of drafting, particularly with respect to paragraphs 1 (*b*) and 2 (*b*). Those difficulties arose out of the possibility provided for in article 13, paragraph 1 (*b*), that an agreement might come into force on the basis of a course of action taken by the parties, a possibility which presented some difficulties with respect to timing.

34. He was not sure that it would be possible to eliminate all the difficulties merely by drafting. If, for example, an amendment should be made while the parties were engaged in the course of conduct which established that they were in the process of putting the treaty into force, the only possibility would be to rely on the facts of the case.

35. It was true that paragraph 2 (*b*) provided a slightly more rigid rule since the words "unless the new State and the other State parties shall have so agreed" could be taken to mean an agreement with respect to the amendment, and in the circumstances in which paragraph 2 (*b*) was intended to be applied, that would seem to be a reasonable safeguard. In spite of those difficulties, however, he was prepared to support article 17.

36. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that he would like to dispel the misunderstanding that seemed to exist concerning article 13. There was no question of continuity until after the parties had established an agreement to keep the treaty in force. In that article, paragraph 2 would only become applicable after the parties had established their agreement, either expressly or tacitly, in accordance with the provisions of paragraph 1.

37. The question of proof in article 13 was a difficult one, but it was inherent in the situation and in the problem which had to be solved. It was seldom that proof would be established by the conduct of the parties alone; on one side at least the situation was bound to be fairly clear, as for example in the case of a treaty which had been in force internally in the territory before succession had taken place. In such a case, if there was a continued application of the treaty in respect of the territory,

it might be asked whether that was a provisional arrangement or a conscious continuation of the treaty.

38. Where the application of an existing treaty by one party and certain actions by the other party indicated mutuality, there might be some doubt whether the application was purely provisional; nevertheless, it was the type of case which justified paragraph 2 because the treaty as applied to the successor State's territories before succession would be the one which continued to apply and not an amended version of it.

39. After the predecessor State and the other State had decided to amend the treaty, it would not be unreasonable to say that those actions on their part did not change the situation, even if the decision to continue the treaty by succession was not taken until after the amendment occurred. In such cases, steps might often be taken on a purely practical basis. The predecessor State and the other State might, however, wish to amend the treaty for reasons which were not relevant to the territory of the successor State but were sufficiently cogent among themselves. For those reasons, he considered it plausible to retain paragraph 2 of article 17.

40. He agreed with Mr. Reuter that some clarification was needed of the precise situation in paragraph 2 where there was an amendment after succession but before the new State had agreed to continue the treaty.[1]

41. Mr. Ustor had suggested that a reference to the suspension of the operation of the treaty should be included, in order to keep article 17 in line with the Vienna Convention.[2] He agreed with that suggestion, but thought that any reference to invalidity should be omitted. Theoretically, there might be a challenge to validity after succession, but to go into all those possibilities would lead the Commission too far afield.

42. Mr. Sette Câmara had said that paragraph 2 referred to treaties which terminated by their own force; that was clearly correct and the point should be taken care of by the Drafting Committee.[3]

43. On the question of proof, he agreed that there were serious difficulties, but those difficulties were inherent in much of the law of treaties. There were many articles in treaties in which it would be necessary to take account of an agreement or intention which would only appear from the treaty or would be otherwise established, as for example, by tacit agreement or by the interpretation of certain actions of the parties. The difficulty of establishing proof was no reason for not tackling the problem in the present case, since, as Mr. Reuter had said, *de facto* application of a treaty was typical of new States.[4]

44. There appeared to be general agreement that paragraph 1 could stand. The paragraph was useful because misunderstandings could arise from the notion that all rights were derived from the predecessor State and that, accordingly, anything done by that State had implications for its successor. The purpose of paragraph 1 was to make it clear that that was not the case; as Mr. Yasseen had said, the treaty between the successor State and the other State started on a new life of its own and the predecessor State became a stranger to it.[5]

45. Although members might have certain reservations concerning article 17, there seemed to be sufficient general agreement to justify sending it to the Drafting Committee.

46. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 17 to the Drafting Committee.

It was so agreed.[6]

ARTICLE 18

47. *Article 18*

Former protected States, trusteeships and other dependencies

1. Where the succession has occurred in respect of a former protected State, trusteeship, or other dependent territory, the rules set out in the present draft articles apply subject to the provisions of paragraph (2).

2. Unless terminated or suspended in conformity with its own provisions or with the general rules of international law:

(*a*) A treaty to which a State was a party prior to its becoming a protected State continues in force with respect to that State;

(*b*) A treaty to which a State, when a protected State, became a party in its own name and by its own will continues in force with respect to that State after its attainment of independence.[7]

48. The CHAIRMAN invited the Special Rapporteur to introduce article 18 of his draft (A/CN.4/256).

49. Sir Humphrey WALDOCK (Special Rapporteur), said that article 18 was the first article in part III, which would deal with particular categories of succession and thus cover a series of problems not yet encountered in the draft.

50. For the purposes of part III, it was necessary to consider whether any special rules had to be framed to deal with those particular categories of succession constituted by dependent territories, unions of States, dissolutions of unions and dismemberment. Dependent territories themselves comprised protected States, mandates and trusteeships, colonies and associated territories.

51. In paragraph (1) of the commentary (A/CN.4/256), he had indicated that, having regard to the progressive disappearance of dependent territories and of the modern law regarding self-determination enshrined in the Charter, it might be argued that the omission of provisions concerning dependent territories would be both justifiable and preferable. There were, however, certain arguments in favour of including an article dealing specifically with the question raised by particular types of dependent territories. The first was that the process of emancipation of dependent territories was not yet absolutely complete; there were still a few situations which called for regulation. Another consideration was that it could be relevant historically to determine the law in existence at the

[1] See para. 27 above.

[2] See para. 23 above.

[3] See 1172nd meeting, para. 84.

[4] See para. 29 above.

[5] See para. 14 above.

[6] For resumption of the discussion, see 1196th meeting, para. 13.

[7] For commentary, see document A/CN.4/256.

moment of independence in order to ascertain whether at that time a treaty was in force. Moreover, the differences between the various types of dependencies were discussed in all the literature and it might therefore be desirable to cover that aspect of the topic of succession in the present draft, however briefly.

52. Article 18 itself was very much a provisional article, the purpose of which was to place before the Commission certain matters for discussion.

53. Paragraph 1 stated the general principle that the rules on new States applied to former dependent territories. A great deal was to be found in legal literature on trusteeships, mandates and colonies. Many writers had noted that the emergence of colonies to independence had often been an evolutionary process and had thought that the existence of an embryo State during the colonial period should have some effect on the law of succession. His own conclusion, however, was that no special rules were called for, except possibly those laid down in paragraph 2 with regard to protected States.

54. Paragraph 2 (*a*) covered the case of a treaty to which a State had been a party prior to its becoming a protected State. Paragraph 2 (*b*) dealt with the case of a treaty to which a protected State became a party in its own name and which continued in force by the will of that State after independence.

55. His commentaries dealt at length with the State practice and judicial precedents relating to protected States, mandates and trusteeships and colonies. There was also the case of associated States, a label which was used to cover a variety of different situations.

56. He would be glad if members would discuss the general question whether it was necessary to include in the draft separate provisions on the various types of dependent territories.

57. Mr. EL-ERIAN said the Special Rapporteur had provided the Commission with a very scholarly statement of the different categories of what had been termed "not fully sovereign States". Personally, he had some doubts as to the advisability of including in the draft an article dealing with those categories of States or territories. His views were similar to those he had expressed in 1962 [8] when the Commission had discussed article 3 (Capacity to become a party to treaties) of the Special Rapporteur's first report on the law of treaties. In that article, the Special Rapporteur had included a paragraph 3 dealing with the capacity to enter into treaties affecting a dependent State.[9] That paragraph, however, had been omitted from the article adopted by the Commission (Capacity to conclude treaties).[10]

58. The view he had himself expressed was that, with the attainment of independence by so many countries in Asia and Africa, dependent status, and the restrictions on the capacity of dependent States to conclude treaties, were fast becoming obsolete; since the Commission was engaged in preparing drafts primarily intended to serve as a guide for the future of international relations, it ought not to deal with situations which belonged almost exclusively to the past. Those considerations were even more valid now, some ten years later, and he therefore did not consider it at all advisable to include in the draft any provisions dealing with mandates or protectorates, which at the present day hardly existed at all.

59. From the point of view of terminology, he would urge that in no case should language be used which was at variance with the terminology of the Charter. The Charter recognized only three categories of entities: sovereign States, trust territories—dealt with in Chapter XII of the Charter, and "non-self-governing territories"—dealt with in Chapter XI of the Charter. The use of any other terms should be carefully avoided.

60. Mr. TAMMES said that his study of the extensive commentary to article 18 had convinced him that a provision on protected States would even now have some value, since it would cover a case of succession which was not covered by any of the cases already dealt with. In the case of protected States, certain problems arose connected with the different stages of dependence or independence experienced by a State which had retained its personality in international law despite its protected status. The only way of dealing with the legal consequences of that type of situation was to include an article on the lines of article 18.

61. Although the nineteenth century type of protectorate was certain to have died out by the time the present draft became an international instrument, an article on the lines of article 18 would still be useful for dealing with special situations inherited from the past. The International Court of Justice had recently had occasion to deal with problems of that nature and could very well have to do so again in the future. It would be very helpful to provide an authoritative statement of the law applicable to succession with respect to dependent territories in order to help to resolve various controversial issues, even if the future international instrument on State succession might not be strictly applicable.

62. He believed that the solutions embodied in article 18 were sound; they would serve to promote continuity of treaties and they did not conflict in any way with existing State practice, though it was true that formerly protected States had often preferred to become parties to treaties by way of accession or by notifying succession as new States.

63. In paragraph 2 (*b*), the phrase "by its own will" was particularly important because it opened the possibility for the formerly protected State of rejecting the continuance in force of the treaty imposed by the protecting power.

64. He agreed with the Special Rapporteur that cases of associated States could be left to be covered by the provisions on new States in part II, particularly since in those cases no period of full independence had preceded the period of dependence.

65. Mr. SETTE CÂMARA said that, since the process of decolonization was now in its last stages, there were very few cases left of trust territories or other dependent

[8] See *Yearbook of the International Law Commission, 1962*, vol. I, pp. 70-71, para. 90.

[9] *Ibid.*, vol. II, p. 36.

[10] *Ibid.*, p. 164.

territories, and by the time the present draft became an international instrument, such cases would have become a historical curiosity. The codifier, like the legislator, should focus his attention on the future, not on the past.

66. He realized, however, the need to avoid leaving any gaps or loopholes in the draft by omitting to cover certain situations, and he noted with appreciation that the Special Rapporteur had drafted the provisions of article 18 in the past tense.

67. Perhaps the whole problem could be solved by moving article 18 to the end of the draft, so that it would then become part of the final general provisions and serve to cover certain situations which were in the process of extinction.

68. Mr. RAMANGASOAVINA said that the various situations covered by article 18 were all related to the decolonization process, and territories which were not yet independent should be considered as being on the way to becoming so, in accordance with the principles proclaimed by the United Nations.

69. It seemed unnecessary to devote a special article to dependent territories, since, as soon as they became independent, they would have the status of a new State within the meaning of the draft, like any former colony which had acceded to independence.

70. The case envisaged in paragraph 2 (*a*), of an independent State becoming a protected State, was rather contrary to the current trend. It was, of course, conceivable that a State might agree with another State to form a single entity or to be merged in a pre-existing entity, but that case would fall under fusion of States or integration into a whole.

71. Article 18 was therefore unnecessary because it seemed to duplicate other provisions of the draft.

72. Mr. REUTER said he recognized the value of the article proposed by the Special Rapporteur, but for two reasons he could not recommend it.

73. First, the preceding articles were sufficient to deal with the cases covered by article 18. Those articles had clearly been based on the practice of decolonization, and the rules they laid down, particularly the application of the "clean state" principle, were equally appropriate to dependent territories. It might perhaps have been more logical to treat cases of decolonization separately from other cases of succession of States, as Mr. Ushakov had suggested,[11] but that would have needed some fine theoretical distinctions.

74. Secondly, it would be inappropriate for the Commission to propose an article deliberately dealing with certain colonial situations. When it had prepared its draft on the law of treaties, the Commission had decided to disregard purely colonial questions.

75. As far as protectorates were concerned, it was noteworthy that not one had been established on a satisfactory legal basis.

76. If further problems arose in regard to dependent territories, they could be solved in accordance with general theory, particularly the theory of representation. There were still some systems which were not described as protectorates but in which responsibility for the external affairs of a State was partly assumed by another State. Such situations raised delicate questions of representation, which should be examined when the Commission came to consider unions of States. It would therefore be preferable to look ahead and not to deal specifically with problems peculiar to dependent territories.

77. The position which he had adopted nevertheless caused him one regret, in that he did not like having to lump together ordinary cases of colonialism with mandates and trusteeships. The more open to criticism the colonialist system may have been, the more detailed attention deserved to be given to the trusteeship arrangements made under United Nations supervision.

78. Moreover, there were in existence instruments providing for the possibility of placing territories under United Nations supervision, thereby raising a potential problem which should not be overlooked. Some conventions drawn up by the Intergovernmental Maritime Consultative Organization, for instance, provided that the United Nations might become a party to them on behalf of territories which it represented.[12] That question, however, should not be considered under succession of States, since it was more precisely a case of succession of an international organization to a State. A similar situation would arise if, in accordance with the suggestion made by the Government of the United States of America at the International Court of Justice, the United Nations were to enter into commitments on behalf of Namibia.[13] Problems of succession would arise the day Namibia became an independent State.

79. Mr. ALCÍVAR said that he appreciated that the Special Rapporteur had submitted article 18 only as a tentative article and in order to obtain the views of members.

80. His first reaction was to reject it. There was now a new international legal order, and the international community was governed by the constitutional provisions of the Charter of the United Nations. The Charter recognized only three types of entities: sovereign States, non-self-governing territories and trust territories.

81. Article 77 (1) of the Charter specified that trust territories included territories held under League of Nations mandate, former colonies of enemy States detached from them as a result of the Second World War, and territories voluntarily placed under the trusteeship system. In accordance with the Charter, all such territories were administered by the administering authorities on behalf of the United Nations and with the aim of leading them towards self-government.

82. Colonies as such had disappeared with the adoption of the Charter. The term "colony" had no legal meaning

[11] See 1154th meeting, para. 30.

[12] See, for example, *International Convention for the Safety of Life at Sea, 1960*, article XIII, in United Nations *Treaty Series*, vol. 536, p. 50.

[13] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), vol. I, p. 885.

or standing, and the same was true of such designations as the "Overseas Provinces of Portugal"; the Charter only recognized the existence of "non-self-governing territories" administered on behalf of the international community; it was the duty of the administering powers to lead those territories towards self-government. The process of decolonization constituted the application of the principle of self-determination laid down by international law.

83. A trust territory, or a non-self-governing territory, had two of the elements of the State: a territory and a population. All that was required for it to be a State was the establishment of a government of its own.

84. With regard to the so-called "associated States", he had serious doubts as to whether their status was in conformity with the provisions of the Declaration on the granting of independence to colonial countries and peoples, embodied in General Assembly resolution 1514 (XV)[14] which constituted the Magna Carta of decolonization. Admittedly the concept of "free association" with another State was mentioned in the annex to resolution 1541 (XV),[15] but he seriously doubted whether that concept could be reconciled with the basic provisions of resolution 1514 (XV).

85. He thanked the Special Rapporteur for submitting the problem to the Commission but could not support the retention of article 18.

86. Mr. QUENTIN-BAXTER said it was natural that the rule suggested by state practice should have an emphasis upon the past. It was a question whether that practice was outmoded by the passing of the colonial era. There had, however, been cases concerning protected States before the Permanent Court of International Justice, and it was appropriate that a provision on the subject should be placed before the Commission.

87. He himself was more concerned with the case of the associated State; it received only a brief mention in the commentary because there was little practice, but it might well be the problem of the future. A case in point was that of the Cook Islands, which had established a precedent in the practice of the United Nations. The history of that case required some clarification of the terminological categories mentioned by other speakers in connexion with United Nations practice.

88. In accordance with the Charter, a plebiscite had been held in the Cook Islands, which endorsed their choice to become a State in free association with New Zealand. It was an associated State, not a non-self-governing territory, and still less a colonial territory. A clear decision had been taken by the United Nations General Assembly to release the Cook Islands from any colonial status. The practical implications of its free association with New Zealand were that New Zealand remained responsible for the external affairs of the Cook Islands, and that Cook Islanders retained New Zealand citizenship—thereby extending considerably the area in which they were free to live and work.

89. The Cook Islands were, however, completely self-governing. The New Zealand Parliament could not make laws for the Cook Islands any more than the United Kingdom Parliament could make laws for New Zealand. Though New Zealand exercised the treaty-making power on behalf of the Cook Islands, only the Cook Islands Government and legislature could take the steps necessary to give effect to treaty obligations within the Cook Islands. Thus, the treaty-making power could be exercised only at the behest of the Cook Islands authorities or with their full agreement.

90. The question of the status of the Cook Islands was also of regional importance. A small regional organization had now been established in the South Pacific which comprised Australia, New Zealand, Fiji, Tonga, Western Samoa, Nauru and the Cook Islands. The admission of the Cook Islands was a clear indication of its non-dependent status. No colonial territory could be admitted to the new organization because of its very nature.

91. The status which he had just described was not a legal fiction; it was perfectly real. Cases of that kind could perhaps be covered by means of the provisions on the subject of federations or unions rather than by means of provisions in the part of the draft at present under discussion. He had referred to the matter simply because there had only been a brief mention of associated States in the commentary and he had wished to draw attention to a case which was fully in accord with United Nations practice.

The meeting rose at 1 p.m.

1174th MEETING

Wednesday, 7 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (*a*) of the agenda]

(continued)

ARTICLE 18 (Former protected States, trusteeships and other dependencies) *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of article 18 of the Special Rapporteur's draft (A/CN.4/256).

2. Mr. YASSEEN said that in view of the fact that the rules already approved by the Commission were much more general than had been thought at first sight and

[14] See *Official Records of the General Assembly, Fifteenth Session, Supplement No. 16*, p. 66.

[15] *Ibid.*, p. 29, Principles VI and VII.