their way into the emerging body of international law, particularly under the influence of Grotius. Grotius' introduction of the concept of fault into the law of State responsibility had been an attempt to impose moral restraints on the conduct of States. Following the identification of the sovereign's situation under a municipal law, with that of the individual, fault had become a "subjective" concept, or a condition of imputability supplementing the requirement of the commission of an unlawful act. The Commission should be commended for having ensured that article 3 was not prone to criticism from either school of thought, whether "subjective" or "objective".

18. By contrast, the Commission's comments regarding the distinction between "damage" and "injury" was a possible source of confusion. Although, in modern times, injury could mean physical or other damage, not all damage necessarily constituted an injury in law. In international law, as in municipal law, there could sometimes be damage without injury—for instance, in the case of an act of legitimate self-defence. The converse was also true: the violation of a State's borders involved injury, even if there was no damage. It was therefore clear that injury was the consequence of an unlawful act. Whether or not the existence of damage was required depended on the legal norm which declared such an act unlawful. Damage was a question of fact; injury was a question of law. That distinction was one of fundamental importance.

19. With regard to articles 4, 5 and 6, his delegation was in substantial agreement with the Commission's views, subject to a minor reservation regarding the use in the English text of article 6 of the phrase "whether that organ belongs to... other power". His delegation felt that the text might be made clearer and more precise.

20. His delegation was gratified by the progress achieved in the other areas studied by the Commission at its twenty-fifth session. It had noted that the Commission would be continuing its work on those topics for some time, until a solution was reached. In that connexion, his delegation supported in principle the suggestion to the effect that consideration of the topic of the law of the non-navigational uses of international watercourses should begin as soon as possible, provided that the Commission's work on other topics, particularly succession of States in respect of treaties and State responsibility, was not thereby affected. His delegation was aware that shortage of time was a perennial problem, and therefore supported an extension of the Commission's next session.

21. His delegation wished to express its sincere appreciation to all those who had made possible the organization and funding of the International Law Seminar. In 1973, a young official from the Ministry of Foreign Affairs of Thailand had participated in the Seminar and had derived great benefit from it. He hoped that that programme could be continued and would remain one of the most successful activities of the United Nations system in the legal field.

*The meeting rose at 1.15 p.m.*

# 1398th meeting

**Wednesday, 26 September 1973, at 3.25 p.m.**

*Chairman:* Mr. Sergio GONZÁLEZ GÁLVEZ (Mexico).

A/C.6/SR.1398

## AGENDA ITEM 89

### Report of the International Law Commission on the work of its twenty-fifth session *(continued)* (A/9010)

1. Mr. ROSENSTOCK (United States of America) conveyed congratulations to the International Law Commission on its twenty-fifth anniversary. The achievements of the Commission during the past quarter-century had been impressive and had changed the face of international law. In many areas the vaguenesses of customary law had been codified in articles of conventions, and in other areas important new ground had been broken in the progressive development of international law. He expressed appreciation to the Chairman of the Commission for his lucid survey of the Commission's achievements to date and the challenges lying ahead.

2. It was fitting that at that juncture in its work the Commission had been able to take up the review of its long-term programme of work, and it was proper that the excellent "Survey of International Law",[1] prepared by the Secretary-General, had served as a focal point in the discussion. The crowded programme of work which the Commission had undertaken at its twenty-fifth session had prevented it from having time to reach conclusions on its long-term programme. However, it would be advantageous for the Commission to have a general outline of what it wished to accomplish during the next 15 to 20 years. Such an outline would be especially important in determining the resources which the Commission would need to achieve its goals. In view of the continually mounting needs of the international community, it was to be anticipated that the latter's demands upon the Commission and the need to accelerate the codification and progressive development of international law would continue to increase. As far as possible, the Commission and the General Assembly should seek to anticipate both the legal problems to be dealt with in the future and the means by which they might be solved.

3. At its twenty-second, twenty-third and twenty-fourth sessions, the Commission had concentrated almost exclusively on completing its work on the

[1] A/CN.4/245.

draft conventions on representation of States in their relations with international organizations, succession of States in respect of treaties and protection of diplomats. Accordingly, the Commission, at its twenty-fifth session, had dealt with those topics which had been set aside during the previous three years in order to provide comments to the Special Rapporteurs so that they could continue their work. The crowded agenda of the twenty-fifth session had limited the consideration of each topic to such an extent that detailed analysis of them had been deferred.

4. The six articles on State responsibility submitted by the Commission in its report (see A/9010, para. 58) were general in nature, but his delegation believed that they laid a solid foundation for development of more detailed rules in that important field. As stated in the commentaries, the principles set forth in those articles represented rules well established in State practice and supported by numerous decisions of international tribunals.

5. His delegation welcomed the decision of the Commission, in dealing with the topic of succession of States in respect of matters other than treaties, to adopt as a working method a substantial degree of parallelism with the general principles incorporated in the draft articles on succession of States in respect of treaties adopted by the Commission at its previous session. Although it might be necessary, as work on that topic developed, to depart from that working method, there was a sufficient relationship between the two subjects to permit the use of certain common definitions and general principles. The complexities which arose from trying to frame rules for each of the varieties of State succession were formidable. The Commission's decision to limit the current set of articles to succession to State property should have the beneficial effect of expediting the over-all conclusion of the Commission's work in the entire field under study. Concentration on that aspect of the topic first should permit the formulation of rules which could then be adapted to the other types of public property.

6. He also welcomed the Commission's decision to follow, in dealing with the most-favoured-nation clause, the patterns laid down in the Vienna Convention on the Law of Treaties.[2] It would obviously be necessary in specific instances, such as the definition of the term "third State", to depart from the formulae contained in the Vienna Convention, but given the broad acceptance that Convention was receiving—as indicated by repeated references to it in recent decisions of the International Court of Justice—the greater the identity of concept and approach, the greater would be the comprehensibility and over-all acceptability of the draft articles on the most-favoured-nation clause.

7. His delegation was pleased to see that work on the question of treaties concluded between States and international organizations or between two or more international organizations was well under way and that the preparation of a set of draft articles by the Special Rapporteur was currently contemplated. In particular, the statement, in paragraph 131 of the report, that the Special Rapporteur would attempt to prepare "one or more draft articles on the subject of capacity" was, in his delegation's view, a helpful decision. While, in the final analysis, it might be concluded that codified rules regarding the capacity of international organizations to enter into treaty relationships might not be essential or desirable, failure to include such provisions in the draft articles would tend to inhibit States from commenting on that fundamental issue. The submission of articles on the subject should encourage States to express their views. The problems involved might prove to be less complex than might appear at the current stage.

8. The United States was pleased to see that the Commission was taking an active interest in the subject of international watercourses and that there was support for dealing with the legal aspects of the problems of the pollution of watercourses on a priority basis. The United States' experience in those matters with its two great neighbours, Canada and Mexico, had led it to believe that international co-operation was the only adequate solution to problems arising from the joint use of international watercourses and that many of the disputes and difficulties that arose could be avoided, or at least minimized, by the application of legal principles through mechanisms set up for the purpose of solving such problems.

9. He trusted that the special circumstances that had existed at the twenty-fifth session would not recur in 1974 and that the Commission would exert every effort to make significant progress in its work on the priority topics. His delegation was confident that the Commission would continue to produce work at the highest level of professional competence, which had been its hallmark for the past quarter-century, and looked forward to 25 more years of outstanding achievement.

10. Mr. PERSSON (Sweden) expressed appreciation to the Chairman of the Commission for his excellent and thought-provoking introduction of the report. At its twenty-fifth session, the Commission had started drafting articles on three of the items on its agenda, namely State responsibility, succession of States in respect of matters other than treaties and the most-favoured-nation clause, basing its work on the in-depth studies undertaken by the Special Rapporteurs for those topics, as well as by the United Nations Secretariat. In view of the fact that the Commission was in the midst—or perhaps it should be said at the start—of its work on the elaboration of complete texts on the first- and last-mentioned items, his delegation would postpone comment on them until more complete sets of articles had been submitted.

11. From the past reports of the Special Rapporteur for the topic concerning succession of States in respect of matters other than treaties it could be inferred that the Special Rapporteur rejected the theory of acquired rights. The Special Rapporteur also took a very restrictive attitude regarding the assumption by a successor State of part of the public debt contracted by the predecessor State and used in the former dependent territory.

[2] See United Nations Conference on the Law of Treaties, 1968 and 1969, *Official Records* (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/27, p. 287.

12. It was stated in paragraph 71 of document A/9010 that the Special Rapporteur's sixth report[3] revised and supplemented the draft articles submitted earlier in the light, *inter alia*, of the provisional draft on succession of States in respect of treaties adopted by the Commission in 1972.[4] In its draft articles on succession of States in respect of treaties the Commission in article 11 had embraced the "clean slate" doctrine, asserting in the commentary to that article that the evidence of State practice supported the traditional view that a newly independent State was not under any general obligation to take over the treaties of its predecessor previously applied in respect of its territory. His Government was, however, not convinced that State practice was consistent enough to form the basis of firm and clear customary law in that matter. The Commission itself, in its commentaries, had stated that conflicting views had been expressed and followed in practice. That was true with respect to both bilateral and multilateral treaties. With respect to general multilateral treaties, in particular, the "clean slate" doctrine was, in the Commission's draft, coupled with a right of the successor State to adhere to such a treaty, that right being derived from the notion that the predecessor State had established a legal nexus of a certain degree between the treaty and the territory. In the commentary to article 19, the Commission also pointed out, with respect to bilateral treaties, that for practical reasons many such treaties, in particular those relating to air transport, trade agreements and similar important subjects, were continued between the successor State and the other party as a matter of course. In his Government's view, both those facts pointed in the direction of a need for continuity in treaty relations rather than for a "clean slate".

13. The "clean slate" doctrine was also said by the Commission to be confirmed by the principle of self-determination. His Government was of the opinion that the right of self-determination could be fully preserved by a draft based on the principle of continuity of treaty relations instead of the "clean slate" principle, provided that it was combined with an express and fully safeguarded right for the successor State to denounce undesirable treaties of the predecessor State. Such a combination of continuity and right of denunciation would contribute to stability and clarity in treaty relations between all States concerned, without jeopardizing reasonable freedom of action on the part of the successor State. It might also be asked why the principle of self-determination should require a "clean slate" for States emerging by separation (article 28) but not for States created by uniting of States or dissolution of a State.

14. His Government had been led to conclude that there was a case for contending that in the field of State succession in respect of treaties State practice was largely ambiguous and undecided and that general principles, such as the principle of self-determination of peoples, did not give sure guidance. The task of the international community should be to elaborate rules in which practical considerations were given precedence, in the general interest, instead of relying on general principles or rules of international law whose existence and content might be controversial, to say the least. From the practical point of view, the "clean slate" doctrine was apt to cause serious inconvenience. Its application would result in great uncertainty as to the treaty relations of the new State and, consequently, uncertainty also within the international community as a whole.

15. For the reasons he had given, his Government considered that it might be worth while attempting to create a system or model based not on the "clean slate" doctrine but on the opposite principle that a new State continued to be bound by treaties concluded by the predecessor State, coupled with an extensive right of the new State to denounce undesirable treaties. Exceptions to the rule of continuity might be made for certain kinds of treaties, such as those of a strongly political character.

16. The Commission itself seemed to be aware of the unsettled situation which would be created by applying the "clean slate" doctrine, inasmuch as it suggested, in draft articles 22 to 24, supplementary rules for the provisional application of treaties of the predecessor State.

17. In its forthcoming observations on the draft articles on succession of States in respect of treaties, his Government would suggest that the Commission should consider drafting an alternative text based on the principle of continuity of treaty relations along the lines he had mentioned, so that Governments would be offered an opportunity to judge two sets of draft articles on their respective merits before the international community took a decision in favour of one of the possible solutions to that problem. His delegation hoped that his comments on the Commission's preoccupation with the "clean slate" doctrine would be taken into consideration not only in the course of future drafting of provisions on succession of States in respect of treaties but also by the Commission and its Special Rapporteur in their forthcoming studies of problems connected with the succession of States in respect of matters other than treaties, such as public property, economic and financial acquired rights and public debts.

18. The question of the legal consequences of succession of States was, as a whole, one of the most controversial fields of international law. State practice was inconsistent and obscure and the doctrine was confusing owing to an abundance of conflicting views. On the one hand, that state of affairs was precisely the reason why the work undertaken by the Commission was so important. On the other hand, the lack of clear rules of customary law meant that the task to be accomplished was not so much one of codification as of progressive development of the law. In other words, it was mainly a legislative task where abstract principles and juridical logic were less important than common sense and a will to conciliate conflicting interests and to maintain friendly and orderly relations within the international community.

[3] A/CN.4/267.

[4] See *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 10*, chap. II, sect. C.

19. He announced that his Government would, as in previous years, grant a scholarship for a student participating in the session of the International Law Seminar to be held in connexion with the Commission's 1974 session.

20. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) noted with satisfaction that the Commission had now completed 25 years of existence. While the Commission's work during that period was characterized by both achievements and shortcomings, he wished to draw attention to its positive contribution to the development of international law within the framework of the United Nations. Yet the Commission was faced with weighty tasks involving great responsibility: it must react in a speedy and effective manner to the new phenomena of international life and should, in its decisions, help to strengthen the principles of the Charter and the progressive development of contemporary international law.

21. Turning to the topic of State responsibility, he noted that the six draft articles (see A/9010, para. 58) were not entirely clear in their current form and that many aspects of the topic remained undefined.

22. Article 1 correctly reflected the principle of the responsibility of the State for any act, but did not establish any specific elements of a wrongful act. In article 3 an attempt was made to define such a "wrongful act"; yet although the second element in that article —conduct which "constitutes a breach of an international obligation of the State"—was more or less concrete, the first element—"conduct consisting of an action or omission ... attributable to the State under international law"—was extremely abstract and not entirely comprehensible.

23. Article 2 to some extent repeated the provision in article 1, since it also referred to the responsibility of a State for an internationally wrongful act committed by it. However, the wording was such that it prejudged the possibility that every State might be "held to have committed an internationally wrongful act", although the sense of the article was that a State which committed such an act incurred international responsibility.

24. The heading of article 5 was not entirely clear it was well known that the conduct of the organs of a State was determined by the State itself, and that any organ could act only on behalf of its State. However, the heading of the article gave the impression that the conduct of the organs of a State was being attributed to that State. It would be better to amend the heading to read "Actions of any organ of a State within the framework of that State".

25. Similarly, the heading of article 6 should be clarified, since, in the Russian text, the word for "irrelevance" had a pejorative sense with regard to the organ itself. It would be more correct to head the article "The position of any organ within the framework of the State".

26. The Commission's future work on that question should reflect the responsibility of States for such crimes as aggression, the use of armed force to suppress national liberation movements, the refusal to grant independence to colonial peoples and racial discrimination. It should include the types and forms of State responsibility, including, above all, responsibility for crimes against peace, war crimes and crimes against humanity; the Charter of the United Nations, the resolutions of the General Assembly and other international documents already embodied provisions on such matters. In that connexion account should be taken first of all of the classification of responsibility based on the nature of sanctions and the problem of applying them.

27. The legal consequences of a breach of the principles of international law were diverse, and could affect not only the State that violated international law but also the State that suffered as a result of such action, other States and, in certain cases, international organizations. All those and other questions should be reflected in the document on the responsibility of States. State responsibility was one of the fundamental issues of contemporary international law, and the Commission should accordingly accelerate its work on that topic.

28. With regard to the succession of States in respect of matters other than treaties, he noted that the eight articles adopted by the Commission at its twenty-fifth session (*ibid.*, para. 92) dealt only with individual problems of such succession. Much remained to be done, and in its future work the Commission should consider the specific field covered by the succession of States in respect of matters other than treaties, and should reflect it in concrete categories of succession.

29. Turning to the question of the most-favoured-nation clause, he said that the Special Rapporteur had achieved definite success in his work on that topic. By its very nature, the principle of the most-favoured-nation clause was a specific and most effective method of implementing the principle of the equality of States as applicable to international trade and economic relations. The important progressive significance of that principle lay in the fact that it was designed to eliminate discrimination and precluded action that damaged the commercial interests of other countries. His delegation considered that those important aspects should be clearly reflected in the draft articles. It was also necessary to define the scope of application of that principle.

30. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, the principal issue involved was the need to utilize fully the provisions of the Vienna Convention on the Law of Treaties. However, it was clear from the meetings of the Commission that there were substantial divergences of view on that question. In many cases, no solution had been found to problems embracing the whole complex of the subjects being studied, particularly questions concerning agreements concluded by subsidiary organs and most aspects of the representation of international organizations in the conclusion of treaties. For example, there were substantial differences of view concerning the question of the capacity of international organizations to conclude international treaties. Some members of the Commission considered that what was involved was the capacity inherent in

all international organizations; others felt that that question did not fall within the scope of the report; yet others felt that the draft articles should contain one or even several provisions on that question.

31. It was clear that the question was still at the study stage and the search for methods of solving the problem was continuing. It would be desirable for that stage to be completed as soon as possible, so that the Commission could proceed to the preparation of draft articles on the basis of the reports of international organizations, the comments of Governments and the proposals formulated in the Commission and the Sixth Committee.

32. With regard to the Commission's programme of work, he noted that various attempts had been made to formulate a programme in the light of the review of the former programme; however, there was, as yet, no general programme, but merely proposals relative to individual topics. In his delegation's view, the programme was not entirely in keeping with General Assembly resolution 2926 (XXVII), in which first place was given to the question of State responsibility. His delegation did not understand why the Commission had relegated that question to second place, while the remaining programme conformed to the recommendations of the General Assembly. The Commission also proposed to consider additional questions, for example, the law of the non-navigational uses of international watercourses, unilateral acts, the treatment of aliens and responsibility for damage resulting from acts not prohibited under international law. Individual members of the Commission had expressed their support for the consideration of legal questions concerning the environment, economic development, and other questions.

33. The Commission should, in his delegation's view, draw up a final list of subjects for inclusion in the long-term programme in the light of the "Survey of International Law" prepared by the Secretariat in 1971. The Commission should plan its work in such a way as to conclude its work on those topics which were already being prepared or perfected, and should identify for further consideration the most topical questions of contemporary international law needing to be elaborated. Questions that were linked or of a similar nature should be considered together or in parallel, so that the Commission could speed up its work.

34. Reference was made in the Commission's report to the need felt by members of the Commission to request a 14-week session in 1974, in other words, a period almost half as long again as the twenty-fifth session. In his delegation's view, that request should not be granted, given the financial situation of the United Nations. Another approach was needed, namely that of increasing the number of meetings, holding meetings in a more organized manner and preparing reports at a more highly-skilled level on specific topics proposed for the Commission's consideration.

***Election of the Vice Chairmen and the Rapporteur (continued)****

35. The CHAIRMAN said that the President of the General Assembly had formally requested that the Sixth Committee not take any decision concerning the election of its Vice-Chairmen and Rapporteur before 5 p.m., because consultations were being held with a view to finding a solution to the problem. Since the hour was early, he suggested that it might be best to postpone the solution of the question until the Committee's next meeting, when it could be taken up as the first item on the agenda. If the consultations produced no agreement, it would be necessary to put the matter to a vote; that would be the second time in the entire history of the Sixth Committee that such a vote had been necessary.

36. If he heard no objection, he would take it that the Committee agreed to postpone the election of its Vice-Chairmen and Rapporteur until the following day.

*It was so decided.*

*The meeting rose at 4.15 p.m.*

* Resumed from the 1395th meeting.

# 1399th meeting

**Thursday, 27 September 1973, at 3.30 p.m.**

*Chairman:* Mr. Sergio GONZÁLEZ GÁLVEZ (Mexico).

A/C.6/SR.1399

***Election of the Vice-Chairmen and the Rapporteur** (concluded)*

1. The CHAIRMAN announced that during informal consultations it had not been possible to reach agreement on two candidates for the posts of Vice-Chairmen. Accordingly, the Committee would regrettably have no alternative but to take a vote. In the circumstances, the best procedure would be for delegations to refrain from making public nominations. In that way, the name of an unsuccessful candidate would not appear in the record. On the other hand, delegations were free to make nominations if they felt it more appropriate.

2. Mr. STEEL (United Kingdom) endorsed the Chairman's desire to avoid competition between candidates, and agreed that the outcome of elections should not be construed as reflecting in any way on a candidate's personal qualifications. Unfortunately, his delegation, speaking on behalf of the group of Western European and other States, considered that the procedure suggested by the Chairman would be unsuitable and would not do justice to the issues which the Committee would shortly be called upon to consider. On the other hand,