1402nd meeting

Monday, 1 October 1973, at 3.25 p.m.

Chairman: Mr. Sergio GONZÁLEZ GÁLVEZ (Mexico).

A/C.6/SR.1402

AGENDA ITEM 89

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

1. Mr. KLAFKOWSKI (Poland) said that on the occasion of the twenty-fifth anniversary of the International Law Commission, he would like to make a few general comments on its role, bearing in mind the review of its programme of work contained in chapter VI of the report (A/9010).

2. First of all, the Commission was to be congratulated on successfully accomplishing the variety of difficult tasks it had been given by the United Nations. Its success could be attributed in large measure to the outstanding qualifications of its members, who represented the major legal systems of the world. As a representative body which focused its attention on practical questions and was concerned with the possible rather than with the ideal, the Commission had done more for the progressive development and codification of international law than any other body that had existed.

3. The Commission had performed its work under the pressure of changes in international relations and rapid scientific progress, which had made States more interdependent than ever before. It had commendably adapted itself to the pace of change and had broken important new ground in various fields of international law. It was to be hoped that in the future the Commission would continue to be forward-looking and not fall a prey to concepts formulated in the past to meet different circumstances.

4. The Secretariat and the Office of Legal Affairs of the United Nations were likewise to be commended for the very useful studies they had made in support of the work of the Commission. Many of those studies had become classics of international law.

5. With regard to the Commission's future programme of work, he noted that much still remained to be done before the entire corpus of international law could be codified. The Secretariat's "Survey of international law"[1] would be of great help to the Commission in examining its long-term programme of work, as would the written observations on that subject submitted to the Commission by Mr. Richard Kearney and Mr. Paul Reuter.[2] Those documents would assist the Commission in selecting topics for future study, having regard to the changes taking place in the world and the evolution of international relations.

6. The draft articles on State responsibility (*ibid.*, para. 58) dealt with a very difficult and important subject. The method of work adopted by the Commission in that regard could lead to fruitful results.

7. Owing to its adoption of the inductive method, the Commission had made progress with the draft articles on succession of States in respect of matters other than treaties (*ibid.*, para. 92). His delegation maintained the views it had expressed on that topic during the discussion in the Sixth Committee at the twenty-seventh session (1320th meeting).

8. The draft articles on the most-favoured-nation clause (see A/9010, para. 123) showed that the Commission was working in the right direction. It had quite correctly emphasized the legal character of the clause and the conditions for its application.

9. The question of treaties concluded between States and international organizations or between two or more international organizations was still at a theoretical stage, although a useful exchange of views had been held.

10. While endorsing the method of work the Commission had followed in dealing with the above-mentioned topics, his delegation had confined itself to preliminary comments at the present stage. His Government would present its views on the various drafts in greater detail when the present articles were elaborated in the form of draft conventions.

11. Mr. BRACKLO (Federal Republic of Germany) recalled that in his speech to the General Assembly on 26 September 1973 (2128th plenary meeting) the Chancellor of the Federal Republic of Germany had placed particular emphasis on the importance his Government attached to the consolidation and further development of international law. It was the firm belief of his people that the development and strengthening of international law was vital for the promotion of peaceful relations and co-operation among nations. Accordingly, his Government supported all efforts to enhance the role of international law. An important means to that end was the promotion of co-operation among all national and international institutions concerned with the study and further development of international law.

12. In the 25 years of its existence, the Commission had distinguished itself both by the outstanding qualifications of its members and by the high standard of its work. He congratulated the Commission on its 25th anniversary and on its remarkable achievements, outstanding examples of which were the Convention on the High Seas and the Vienna Conventions on diplomatic and consular relations.

13. He attributed the success of the Commission's work to the fact that it did not confine itself to recommendations of a general nature but put its findings directly into the form of draft articles. As had been pointed out in the Commission's report throughout the development of codification drafts there had been a continuous interraction between professional expertise and governmental responsibility, between independent

[1] A/CN.4/245.

[2] See A/CN.4/254.

vision and the realities of international life (see A/9010, para.166). Although the Commission's methods might be time-consuming, the advantages were manifest.

14. Before turning to the substance of the report, he thanked the Chairman of the Commission for his introduction of the report and his comprehensive review and appraisal of the Commission's activities. He was also grateful for having recalled, on the occasion of the admission of the two German States to the United Nations, the contribution which the German nation had made to international law.

15. Although the topics already under consideration would keep the Commission occupied for some time, his delegation agreed with the suggestion made by its Chairman (1396th meeting, para. 20) that some thought should be given also to the more general question whether the division of labour which had evolved between *ad hoc* bodies and other entities on the one hand and the Commission on the other was appropriate and whether it might be possible to use the experience, technical competence and creative potential of the Commission in connexion with topics that were new or had new aspects. A preliminary answer to that question would be forthcoming when a decision was taken on the list of topics to be included in its long-term programme of work. Some of the proposed topics, such as the law relating to the environment and the law relating to economic development, were among the typically new areas of international law.

16. His Government supported the resolution adopted by the General Assembly in 1972 on priority to be given to the topic of the law of the non-navigational uses of international watercourses (resolution 2926 (XXVII)). The results obtained on that topic might eventually prove useful for the codification and progressive development of environmental law in other areas.

17. Considerable progress had been made with the codification projects on which the Commission was now working. However, because of the provisional character of the results thus far achieved and because his Government had not yet been able to complete an in-depth study of the draft articles, his remarks would be of a general nature.

18. The efforts made over many years to codify the rules on State responsibility had shown that it was particularly difficult to produce results in that field which would be generally acceptable to the international community. It was gratifying, however, that despite the difficulties the subject had been tackled, and his delegation favoured continuing that work. It was of fundamental importance to establish general principles concerning internationally wrongful acts on the basis of traditional contractual as well as customary law; that was especially important in view of the new areas in which such wrongful acts could be committed, namely, the environment and outer space.

19. The Commission had wisely decided to apply an inductive method in its work on the topic of State responsibility. The clear-cut wording of the initial articles showed that the Commission was moving in the right direction. Article 4 in particular impressed his delegation as having far-reaching importance, inasmuch as human rights and fundamental freedoms were increasingly being protected by both customary and contractual international law.

20. Particular credit should be given to the Special Rapporteur for his part in concentrating and speeding up the work on the topic of State responsibility.

21. Together with the draft articles on succession of States in respect of treaties, the articles on succession of States in respect of matters other than treaties constituted a remarkable piece of work in another difficult field of codification. Despite the difficulties posed by the varied nature of State practice and the important doctrinal questions involved, the Commission had endeavoured to work out sensible rules which were intended to provide stability in international relations. His Government would follow with keen interest the further work on both sets of draft articles and would in due time also comment on the first set, which had been submitted to Governments the previous year. The draft articles on State succession would be of particular interest to newly-emerging States and might, in addition, have some bearing on the problem of divided nations, a matter of particular concern to his delegation. It was, however, to be noted that the problems of divided nations, and in particular the problem of the German nation, which was now living in two States, were of a very special character and extremely complex. International legal practice on State succession in general did not throw much light on the legal questions involved.

22. His delegation commended the results achieved thus far on the most-favoured-nation clause and the question of treaties concluded between States and international organizations or between two or more international organizations. Treaties concluded by international organizations had been left unregulated in the Vienna Convention on the Law of Treaties of 1969 because they differed in many respects from treaties concluded between States, especially in connexion with treaty-making power, defects calculated to prevent the effective conclusion of a treaty, and the procedure for its conclusion. Moreover, it was doubtful whether the established principle that treaties between States should apply only *inter partes* could be applied as such to treaties concluded with international organizations. On the whole, his delegation felt that the subject, important though it might be, was not particularly urgent. It should, however, be pursued further, taking into account the developing treaty practice of international organizations.

23. His delegation noted with satisfaction that the United Nations Office at Geneva had again organized an International Law Seminar on the occasion of the Commission's twenty-fifth session. His Government offered an annual scholarship for one participant, and it hoped that the programme would be continued.

24. Mr. LA (Sudan) paid a tribute to the Commission for the valuable work accomplished at its twenty-fifth session and for the outstanding contribution it had made over the last 25 years to the progressive development and codification of international law. His delegation hoped that the need for accelerating the process of codification and progressive development would

become more widely recognized as States came more fully to appreciate the increasingly important role that international law played in international relations.

25. The Chairman of the Commission in his statement at the 1396th meeting had drawn attention to a number of factors which had arisen in recent years and which had had a strong impact on international law, and to the increasingly keen interest the Commission was taking in them. Among those factors, his delegation would like to stress the importance of the law of international economic co-operation. The pressing needs of the least developed countries were a matter of particular concern to his delegation; it was to be hoped that the Commission would include consideration of that important topic in its programme of work.

26. He noted with appreciation the stress laid on the fact that the most-favoured-nation clause should not be applied in such a way as to lead to discrimination against the developing countries, and he shared the view that sufficient and urgent attention should be given to the problem of the non-navigational uses of international watercourses.

27. He was glad to note the considerable progress made at the Commission's previous session in codifying several important topics of international law, but would refrain from commenting on the draft articles until his Government had had an opportunity to examine them more thoroughly. The codification and progressive development of international law was of the utmost importance, since there was no long-term alternative to a policy of coexistence among States within the framework of international law. In view of its importance, the task should be pursued with greater energy. Accordingly, his delegation supported the Commission's request for a session of 14 weeks in 1974.

28. Mr. WANG (Canada) said that the report of the Commission contained a thoughtful appraisal of trends in international life which had had an impact on its work and the international law-making process as a whole. It touched on such questions as the influence of the many new States which had emerged from colonial status during the Commission's 25 years of existence; the increasing number of international organizations which contributed to international-law-making activities; and the tempo of technological change. Impatience with the laborious nature of the process of codification and development of international law was understandable, and the interest of all Member States in pursuing it had been heightened by technological developments and consequent recognition of the interdependence of States. Although the Commission had completed work on only seven of the 14 topics on the priority list of subjects for codification adopted in 1949,[3] that did not fully reflect its impressive contribution to the development of international law; five other major topics were well in hand, and work on succession of States in respect of treaties was nearing completion. His delegation believed that the Commission had responded to the needs of the international community in a pragmatic and constructive way and was confident that it would continue to do so. Even in areas of international law where it did not succeed in developing agreed rules, or where its recommendations had not been adopted by Member States, e.g. the draft declaration on rights and duties of States and the question of defining aggression, the Commission's work had often helped to clarify issues and prepare the way for efforts by Governments in other bodies.

29. The practice of taking decisions by consensus had helped to ensure the broadest possible acceptance of the Commission's recommendations. Another important advantage, noted in paragraph 166 of the report, was the continuous interaction, throughout the development of a codification draft, between professional expertise and government responsibility.

30. The Chairman of the Commission had spoken persuasively of the desirability of setting in motion the mechanisms for future codification of new topics. The Canadian delegation believed that environmental law was an area of international law to which it would be useful and timely for the Commission to direct its attention. All were aware of the present inadequacies of international environmental law, and the need for early developments in that area had been underlined at the United Nations Conference on the Human Environment, held at Stockholm in 1972. It had been proposed that the task could be most appropriately entrusted to the Commission, which clearly had a major role to play in that and every area of international law. Indeed, the Commission had had before it legal considerations relating directly to international problems —for example, the question of State responsibility as it related to environmental damage, embodied in the Declaration on the Human Environment. That and other aspects of the Commission's work might be more closely linked to the relationship between States in situations giving rise to incidents involving transnational or extra-territorial pollution.

31. Equally important with the development of the law in the theoretical sense was its development through its application to specific environmental problems in an operational sense. He had in mind the elaboration of specific conventions such as the recent Dumping Convention signed in London in which further expression was given to the duty of States to protect and preserve the marine environment. The establishment of such a duty provided a precedent for its more general application to other environmental problems. That aspect of the development of international law was one in which the Canadian delegation would expect the United Nations Environment Programme to play a leading role as being in a position to identify environmental problem areas and to stimulate action in the form of international conventions.

32. It would be a mistake to give responsibility for the development of environmental law to one body to the exclusion of another. Both the Commission and the Programme could make an important contribution to the endeavour, as could other bodies within the United Nations system—for example, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. Thus, while he very much favoured the Commission's considering the development of legal means and techniques for the

[3] See *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, para. 16.

protection of the environment, he was equally in favour of activities by other bodies with the same object. He hoped that that broad approach would help to develop a comprehensive and meaningful body of law or the environment.

33. Canada welcomed the beginning of concrete work on State responsibility. The topic covered areas of particular sensitivity in the relations between States, and the draft articles approved, even though very general, were a useful first step. His delegation supported the Commission's resolve to make substantial progress at its 1974 session.

34. As a country with important international watercourses it was natural that Canada should have a special interest in future work on the topic of law of non-navigational uses of such watercourses. Its long experience with the United States of solving problems and developing mutual benefits should be regarded as an important source of State practice and judicial precedent. In addition to experience gained under the Convention concerning the Boundary Waters Between the United States and Canada (1909), Canada and the United States were attacking the problem of pollution in the Great Lakes under a comprehensive bilateral treaty—the Great Lakes Water Quality Agreement of 15 April 1972. A joint marine pollution contingency plan had also been put into effect for the Great Lakes system. While problems of pollution of international watercourses were both urgent and complex, it might be different for the General Assembly at its current session to decide what priority and direction work on the topic might take in relation to other topics in the Commission's programme of work. His delegation was awaiting publication of the Secretariat's study on legal problems relating to non-navigational uses of international watercourses pursuant to resolution 2669 (XXV). Many Governments, including his own, had not yet seen the advance report[4].

35. The Canadian delegation supported the Commission's proposals for the organization of its future work, involving a 14-week session in 1974. As a number of members of the Commission had governmental as well as academic responsibilities, a longer session would not necessarily mean more sustained participation by all members. His delegation would, however, have no objection to a longer period for 1974, provided that the arrangement was carefully reviewed by the Commission and the Sixth Committee to determine the practice for 1975. Whatever the length of the session, it was important to avoid the situation where a report bearing a date in July was not available to Member States until just before the opening of the General Assembly session. If the Commission's report was to be the first item on the Sixth Committee's agenda, it would be unrealistic to expect Governments to prepare detailed comments in the short time available. A 14-week session in 1974 would mean that the Commission would conclude its work on 9 August, and it would therefore seem necessary to abandon the Sixth Committee's long-standing practice of taking up the Commission's report as the first item on its agenda. One solution would be to issue the provisional version of the report as a series of addenda, each dealing with one or more specific topics and circulated to Governments in advance of the report as a whole.

36. Mr. BAJA (Philippines) welcomed the delegations of the German Democratic Republic, the Federal Republic of Germany and the Commonwealth of the Bahamas to the Sixth Committee.

37. The Philippine delegation, while appreciating the reasons which had led the Commission to limit the study of the concept of State responsibility in the draft articles contained in that report to the responsibility of States for "internationally wrongful acts", felt that a study of State responsibility associated with certain activities not prohibited by international law, and therefore not easily included within the meaning of "internationally wrongful acts" as defined in article 3, was just as urgent and necessary. Such activities were increasing, and there would be great practical value in a simultaneous but separate study of that aspect of State responsibility. Such a study would also be in keeping with the Commission's objective of not only discerning but also developing rules of international law.

38. As the Commission had stated, the international responsibility of the State resulted from the breach of any international obligation. States should be under a general international obligation to refrain from certain activities which, though not as yet prohibited by rules of international law, might nevertheless be a source of international responsibility because they conflicted with the established rights of other States. The normal rules of human responsibility, both contractual and delictual, should generally apply also to State responsibility. The concept of State responsibility was ultimately concerned with the incidence and consequences of the violation of an international obligation, in particular the payment of compensation for loss or damage caused. The distinction between the task of determining rules which governed State responsibility and that of defining rules imposing on States obligations whose violation might be a source of responsibility would, in that context, become extremely fine.

39. Turning to the draft articles themselves, he said that the principle in article 1 that every internationally wrongful act of a State entailed the international responsibility of that State was fundamental. However, he agreed with the Thailand representative's view that a more positive verb than "entails" (see 1397th meeting, para. 15) might be used. A State was and should be responsible for an internationally wrongful act which it committed. A similar comment would apply to article 2. There should be no dispute that an act could be characterized as internationally wrongful only on the basis of international law. The second sentence of article 4 appeared unnecessary. The principle in article 5 should be clearly recognized as leaving the determination of what are organs of the State to the internal law of that State. Once it was established that a particular body or agency had the status of a State organ under internal law, the general rule must be that all acts and activities of such a body were undertaken in that capacity, and responsibility for them should automatically and in the first instance attach to the State. The criterion for determining responsibility in a given situation should be whether there had been a breach of duty by a State

[4] A/CN.4/270.

organ, the extent of imputability varying only according to the particular duty, the nature of the breach and other considerations. In the conditions of international life which involved relations between highly complex communities, acting through a variety of institutions and agencies, the concept of *ultra vires* acts should no longer apply once a particular body or agency was considered a State organ by the internal law of the State in question. The crucial factor should be the determination that a particular body had the status of a State organ under the internal law of the State. That would offer a better basis for maintaining good standards in international relations and effectively upholding the principle of reparation, which ultimately was the sphere of responsibility itself. Indeed, that might be the reason why article 6 established that the conduct of a State organ should be considered as an act of the State under international law whatever the power to which it was subordinate, whether its functions were international or internal, and whether it held a superior or subordinate position in the structure of the State.

40. As to succession of States in respect of matters other than treaties, the Philippine delegation supported the priority given by the Commission to the study of public property and public debts and to economic and financial acquired rights. The relevance and timeliness of that priority study were borne out by contemporary international problems. Article 5 on State property left the determination of State property to internal law. His delegation took that to mean that the determination was subject to claims of third parties and other States. It took note of the Commission's commentary to the effect that the successor State received any State property as it was into its own juridical order. The views of the Philippine Government on succession in respect of treaties applied generally also to succession in respect of matters other than treaties.

41. His delegation welcomed the Commission's study of the most-favoured-nation clause as complementary to, and an aspect of, the law of treaties. It also welcomed the Commission's intention to devote special attention to the question of ways in which the needs of developing countries for preference in the form of exceptions to the most-favoured-nation clause in the field of international trade could be given expression in legal rules. The Commission's study of the relationship between the most-favoured-nation clause and the principle of non-discrimination and of the operation of the clause in trade relations between States of different levels of economic development should also contribute immeasurably to the progressive development of international law.

42. In its study of the question of treaties concluded between States and international organizations, or between two or more such organizations, the Commission had decided to include the question of the capacity of representation of international organizations in the conclusion of treaties. That question was closely linked to the international personality of the international organization and should therefore be subject to definitive principles. It seemed advisable to leave the question of determining the capacity of representation of an international organization to the charter of that organization.

43. He congratulated the Commission on its twenty-fifth anniversary and acknowledged its invaluable contribution to the codification and development of international law. The Philippine delegation supported the Commission's programme of work for its forthcoming session and the priorities it had established. The observations of the representatives of Canada and the Netherlands (1400th meeting) on the Commission's methods of work were sound. The Philippine delegation wished to emphasize the value of international seminars and memorial lectures to developing countries.

The meeting rose at 4.45 p.m.

1403rd meeting

Tuesday, 2 October 1973, at 10.55 a.m.

Chairman: Mr. Sergio GONZÁLEZ GÁLVEZ (Mexico).

A/C.6/SR.1403

AGENDA ITEM 89

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

1. The CHAIRMAN requested delegations to indicate in their statements the substantive points which they wished included in the final draft resolution on the report of the International Law Commission (A/9010).

2. He asked the chairmen of the regional groups to undertake consultations regarding the constitution of the drafting committee on the question of the protection of diplomatic agents; it might be composed of a maximum of 15 members, who had still to be selected. There remained the question of selecting a chairman for that committee. He would be prepared to suggest several names at the following meeting so that the Committee would have a positive choice.

3. Mr. ALKEN (Denmark) welcomed to the Sixth Committee the delegations of the Federal Republic of Germany, the German Democratic Republic and the Commonwealth of the Bahamas.

4. The Commission had accomplished work of inestimable value since its establishment, but it would be well-advised to concentrate its efforts on completing one convention at a time. He therefore welcomed the Commission's intention, stated in paragraph 178 of its report, to give priority at its twenty-sixth session to the second reading of the draft articles on succession of States in respect of treaties and thereafter to aim at