1487th meeting

Tuesday, 29 October 1974, at 10.55 a.m.

Chairman: Mr. Milan ŠAHOVIĆ (Yugoslavia).

A/C.6/SR.1487

AGENDA ITEM 87

Report of the International Law Commission on the work of its twenty-sixth session *(continued)* (A/9610 and Add.1-3, A/9732, A/C.6/L.979)

1. Mr. SETTE CÂMARA (Brazil) said that the twenty-sixth session of the International Law Commission had been one of the most fruitful periods of its history. The Commission had an impressive record of accomplishment during the quarter century of its existence and those who had spoken at the last session in commemoration of the Commission's twenty-fifth anniversary had rightly praised its achievements. In that connexion, he paid a tribute to the memory of Mrs. Bartoš and welcomed the appointment of Mr. Šahović to the vacant seat.

2. At its twenty-sixth session, the Commission, as could be seen from its report (A/9610 and Add.1-3), had devoted most of its time to the problem of succession of States in respect of treaties and, pursuant to General Assembly resolution 3071 (XXVIII), had completed the second reading of the draft articles on that topic (*ibid.*, chap. II, sect. D). His Government was happy to see that the second reading had not resulted in any radical changes in the previous draft. The Commission had retained the "clean slate" doctrine, which recognized the right of a newly independent State to decide whether it wished to become a party to any treaty by which the predecessor State had been bound. The Commission had also preserved another essential feature of the 1972 draft, namely, the principle of continuity *ipso jure* of treaties in cases of succession relating to territories which had previously enjoyed sovereignty. A new article had been added in part I, article 7 on the non-retroactivity of the draft articles, and the Commission had retained the generally accepted doctrine that devolution agreements were little more than a statement of intentions. A new manifestation of will on the part of the successor State was necessary if pre-existing treaties concluded by the predecessor State were to remain in force. In the new draft, the articles on "dispositive treaties" had been inserted in part I, as the Commission had reached a consensus that such treaties could not be governed by the rules of articles 10 and 11 of the 1972 draft.[1] Boundary treaties were an exception to the "clean slate" rule; the Commission had always regarded those treaties as not being affected by succession. Of course, boundary treaties could be challenged, but on grounds other than the "clean slate" rule. Newly independent States were not, however, bound to accept an inheritance of injustice; they were free to challenge the legality of a controversial territorial treaty by the normal means established in the Charter of the United Nations for the settlement of international disputes. The slight modifications that had been made in the articles in part I had considerably improved the language, the structure and the conciseness of the text, while maintaining the spirit and substance of the original formulation.

3. In part IV, the distinction between dissolution and separation of States had been eliminated and replaced by two hypotheses of separation. Those two cases were dealt with in the commentaries, thus duly covering the concept of dissolution of a State.

4. Part V retained the saving clause that the articles should not prejudge any question arising from the international responsibility of a State or from the outbreak of hostilities between States. The other saving clause, concerning military occupation, had been placed in a separate article.

5. Late in the Commission's session, two proposals had been submitted by its members which, for lack of time, had not been discussed. The first proposal, concerning multilateral treaties of universal character, could be found in foot-note 54 of the report. That proposal was in some ways similar to the suggestion for the exceptional treatment of "law-making treaties", which the Commission had rejected. The concept of a "treaty of universal character", like that of a "law-making treaty", would be very difficult to define. In his delegation's view, every member of the international community had the right to choose whether or not to be a party to a convention of any kind whatsoever. Automatic participation could not be imposed on certain States, and exceptions based on categorization of treaties were invalid. The other proposal not dealt with by the Commission suggested a machinery for the settlement of disputes (foot-note 55 of the report). The Commission had declared its readiness, if so required, to consider the question of the settlement of disputes for the purpose of the draft articles at its next session and to report thereon. His delegation preferred the solution of leaving the problem open for discussion at the time of the final elaboration of the convention by a conference of plenipotentiaries.

6. Chapter III of the report dealt with the problem of State responsibility. The progress on that topic had been limited to articles 7, 8 and 9. Considering the complexity and importance of the topic, the Commission was proceeding at a reasonable pace, and his delegation was pleased with the results that had been achieved.

7. Considerable progress had been made on the question of treaties concluded between States and international organizations or between two or more international organizations. The Commission had approved articles 1-6 proposed by the Special Rapporteur with no substantial difficulty. In article 6, the Special Rapporteur had taken a

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

pragmatic approach to the problem of the capacity of international organizations to conclude treaties, which was an indisputable reality of international life. The text merely recognized the capacity of international organizations and did not attempt to attribute such a capacity to them. His delegation endorsed the decisions taken on the topic and hoped that a draft convention could be prepared in the near future.

8. He traced the history of the preparatory work underlying chapter V of the Commission's report and the report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses annexed to that chapter. In its report, the Sub-Committee had included questions to Member States so as to enable the Commission to draw up the general lines of a working plan. The first set of questions dealt with the concept of international watercourses and the appropriate scope of a definition of an international watercourse, since there were doubts whether such a definition would also encompass international lakes and canals. Moreover, the questionnaire explored the meaning that should be attributed to the geographical concept of "drainage basin" in the definition of watercourses. It was a well-known fact that the concept of "drainage basin" had been given some prominence in recent research in law, but none of the many treaties dealing with the problem of non-navigational uses of rivers made any reference to a "drainage basin". The concept of "drainage basin" was important for studies regarding economic development, which were bound to take into account the system of waters forming a basin as a geographical reality. However, the inclusion of the several types of waters within the whole system forming such a basin would raise enormous difficulties in the field of law. Moreover, water was now envisaged as a natural resource, and if the uses of underground water extending from the territory of one country to the territory of a neighbouring country sharing the same basin were to be made subject to international legal rules, it could lead to an analogy for the treatment of other underground liquid national resources, such as oil, with all the problems that entailed.

9. The second set of questions drawn up by the Sub-Committee requested the views of Governments on the different uses of fresh water. Those questions were very comprehensive. The Sub-Committee also requested the opinion of Governments on whether the future study should consider flood control and erosion and whether the relationship between navigational uses and other uses should be taken into account. His delegation considered that flood control and erosion were important aspects of "fluvial law" and could not therefore be excluded from the future study. Similarly, a study of the possible concurrence and conflict of norms and principles intended to regulate navigation with rules on other uses should not be disregarded. He supported the inclusion of questions to Governments on the possibility of giving priority to the problem of water pollution in view of the world-wide outcry against the growing problems of river pollution. With reference to the final question dealing with the need for special technical, scientific and economic assistance in future studies, no Government would question the fact that the lawyers of the Commission required competent and permanent advice from specialized organs and individual experts in dealing with problems in which technical aspects were of paramount importance. The establishment of a committee of experts to provide the Commission with technical advice, as suggested by the Sub-Committee, could be the best solution since it would eventually comprise members specialized in each of the technical fields. Summing up, his delegation was gratified that the work of the Commission on the non-navigational uses of watercourses had made a sound and objective start. However, progress towards codification in that field should be made with care since there existed a satisfactory body of bilateral and multilateral relations based on conventional law.

10. His delegation was satisfied to note that the Commission had, in its co-operation with other bodies, heard statements by representatives of regional organs entrusted with the study and development of the Law of Nations. That useful practice permitted a better mutual knowledge and an exchange of views among jurists working for the common goal of promoting the rule of law in relations between States.

11. He regarded chapter VI of the Commission's report as an amply convincing reply to the findings of the Joint Inspection Unit (see A/9795) on the methods and organization of work of the Commission. He regretted that the Unit had chosen the year in which the Commission was commemorating its twenty-fifth anniversary to circulate a document full of unfounded criticisms. Moreover, the authors of the study had not tried to obtain the advice of members of the Commission or senior members of the Secretariat who participated in the work of the Commission so as to have a sound basis for an analysis of the current methods of work of the Commission before venturing to offer an opinion.

12. The report of the Unit had struck a jarring note amid the warm admiration expressed for the Commission's work of codification over 25 years at the twenty-eighth session of the General Assembly (2151st plenary meeting) by, among others, the Secretary-General, the President of the International Court of Justice and representatives of all the regional groups. Criticisms had been made in the sense that the current situation of the members of the Commission was far from being what the high quality of their work deserved, and the then Chairman of the Commission had made some suggestions for improving methods of work. However, the report of the Unit had ignored the results of the Commission's work, which was generally commended by the United Nations. The authors of the report failed to understand the special status of the Commission and, starting with an incorrect sample, made a series of false analogies with routine expert committees which worked for the achievement of certain specific goals. The report brushed aside the permanent character of the Commission, the indispensable continuity of its work, and the fact that its members were elected in a personal capacity and therefore could not be replaced by alternates and advisers. In view of the complex task of formulating rules of law which required investigation, drafting and an evaluation of Government opinion, the Commission could not organize its work on the basis of the suggestions made by the Unit. If it did so, it was doubtful that the goals of Article 13 of the Charter would be attained. It would be unwise to try to change the current methods of work for the Commission, which were based on a carefully established and proven

balance of continuous interaction of scientific expertise and governmental responsibility.

13. A curious analogy had been drawn between the Commission and the United Nations Commission on International Trade Law (UNCITRAL) both by the Unit in its report and by the Chairman of the Unit in a letter circulated as document A/C.6/L.979. The main difference between the Commission and UNCITRAL was that the latter was a body composed of representatives of States who were not elected in a personal capacity and could therefore be replaced by alternates at any time. Furthermore, concerning the relationship between the Commission and the International Court of Justice, it was difficult to point out that 15 judges of the Court had been former members of the Commission and currently 7 of the Court's judges were former members of the Commission. The report of the Unit had been drawn up not only without proper consultations but without enough information on the real role of the Commission in the United Nations and/or its accomplishments in accordance with Article 13 of the Charter, the resolutions of the General Assembly and the Statute of the Commission.

14. In view of the Commission's heavy agenda, which included some urgent topics, his delegation supported the recommendation to extend the Commission's annual session from 10 to 12 weeks. The General Assembly would thus be assured of much greater progress in the codification and progressive development of international law.

15. Mr. IGUCHI (Japan) said that his delegation supported the recommendation of the Commission that the General Assembly should invite Member States to submit their written comments on the Commission's final draft articles on succession of States in respect of treaties.

16. The difficult nature of the topic of succession of States in respect of treaties was borne out by paragraph 51 of the Commission's report. The difficulty was inherent in the complexity of the subject, in which there was an interplay of fundamental rules and principles of international law, such as the principle of consent and good faith, the principle of equality of States–whether a predecessor State or a successor State–and the principle of self-determination. The principle of equality of States should be fully taken into consideration in formulating rules on succession of States in respect of treaties, and also due respect should be paid for the interest of all States concerned to the principle of continuity of treaty relations, which promoted stability in international society.

17. He had been interested to note references in the Commission's report to treaty precedents where Japan had been one of the parties concerned. His Government had made a practice of respecting the stability and continuity of treaty relations but had also been willing to enter into negotiations on new agreements when those were desired by the newly emerging States. Since the practices of States were diverse and sometimes equivocal, work in the field of succession of States in respect of treaties had to be more in the nature of a progressive development of international law rather than a codification of existing practice. Careful deliberation was necessary to ensure that the outcome would not prejudice existing treaty relations among States. He therefore endorsed article 7, which confirmed the general rule of treaty law concerning non-retroactivity as defined in article 28 of the Vienna Convention on the Law of Treaties.[2] His delegation did not share the view that article 7 could deprive the draft articles on succession of States in respect of treaties of any practical meaning because almost every dependent territory would be independent before the articles entered into force. If a set of draft articles could be formulated which were just, reasonable and equitable and, therefore, generally acceptable, they would become an effective and useful guide for the international community even before their entry into force. A departure from the general rule of treaty law concerning non-retroactivity might plunge treaty relations in the international community into chaos. Moreover, the draft articles prepared by the Commission would serve as a useful basis for further consideration on the subject, especially in view of the Commission's interesting approach in attempting to draw a distinction between the case of a newly independent State, where the "clean slate" principle would apply–even in the case of the so-called law-making general multilateral treaties–and the cases of uniting and separation, where the principle of continuity would apply. However, he noted that the "clean slate" principle had a certain flexibility, as was clear from articles 19 and 29.

18. With regard to the definition of a "newly independent State" in article 2, paragraph 1 (f), he questioned the accuracy of the statement in paragraph (7) of the Commission's commentary on article 2, that the characteristics of the various historical types of dependent Territories–colonies, trusteeships, mandates, protectorates, etc.–did not today justify differences in treatment from the standpoint of the general rules governing succession of States in respect of treaties. In many instances, the process of accession to full independence was gradual, and before they achieved full independence dependent Territories might enjoy a certain degree of autonomy, a limited international status and limited responsibilities for their own international relations, and they might well be fully consulted in advance on whether they concurred in the conclusion of international agreements applicable to them. His delegation's concern was that if the "clean slate" principle was adopted, disregarding different stages of dependency, and the legal nexus was denied between dependencies and treaties in the conclusion or application of which the dependencies had freely concurred, a formula might be obtained which would lead to contradictory results and deny the self-determination of the dependencies prior to full independence. Such contradictions became more evident if the local authorities were entitled to provide–and had provided–local domestic legislation and budgetary appropriation for the implementation of such treaties. Therefore, the types of dependent Territories, the circumstances of the conclusion or application of treaties, and the nature of the treaties were relevant factors in determining the effect of the succession.

19. Although it was very difficult to define precisely which treaty rights and obligations would be inherited automatically, it might be worth-while to attempt to find

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.

appropriate criteria to define the continuing rights and obligations of newly independent States for the sake of legal stability. Careful study should also be given to the difference between multilateral and bilateral treaties. In paragraph (8) of the commentary to article 23, the comment was made that the Commission was aware that State practice showed a tendency towards continuity in the case of certain categories of bilateral treaties, although it was also pointed out in paragraph (2) of that commentary that "If in the case of many multilateral treaties [the] legal nexus appears to generate an actual right for the newly independent State to establish itself as a party or a contracting State, this does not appear to be so in the case of bilateral treaties."

20. With regard to articles 11 and 12, his delegation agreed that succession of States as such did not affect boundary and other territorial régimes established by treaties because they were matters relating to the legal situations resulting from the dispositive effects of treaties. On the other hand, consideration should be given to the fact that treaties with dispositive effects were not necessarily confined to those relating to boundary and other territorial régimes. Consequently, it had to be borne in mind that, once it was decided that boundary and other territorial régimes were matters relating to a legal situation established by the dispositive effects of treaties, that would inevitably provide certain guidelines for future discussions on succession of States in respect of matters other than treaties.

21. With regard to the effects of a notification of succession as provided in article 22, there had been a constructive development on the question of the retroactivity of multilateral treaties. However, his delegation considered that more study was necessary before taking the legal position that the treaty was considered suspended unless or until it was applied provisionally by agreement; the method of provisional application and its termination required careful study. In that connexion, he noted in article 23 that, unlike multilateral treaties, bilateral treaties applied in the relations between the newly independent State and the other State party as from the date of the succession of States unless a different intention appeared from their agreement or was otherwise established.

22. Concerning the question of multilateral treaties of universal character, his delegation was of the opinion that the application of the principle of continuity to such treaties should be studied carefully in the light of the fact that the distinction between "law-making" and other treaties might not be easy to make. With regard to the question of the settlement of disputes, his delegation wished to emphasize the importance of including a provision which established certain compulsory procedures for settlement, because the rules on succession of States in respect of treaties were bound to be complex and difficulties might well arise in applying them.

23. He expressed the hope that at its next session the Commission would study two questions which it had lacked time to study fully at its twenty-sixth session, namely, multilateral treaties of universal character and settlement of disputes. After those studies had been completed, a plenipotentiary conference should be held for the conclusion of a convention on succession of States in respect of treaties.

24. The Commission had prepared three provisional draft articles, 7-9, on State responsibility (see A/9610, chap. III, sect. B). The texts were well drafted and contained definite improvements, but it was premature to make overall comments on each article. He noted that the Commission had decided to include in its general programme of work for its next session the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts. However, as his delegation stated at the previous session of the General Assembly (1403rd meeting), it was still premature to start drafting general rules on State responsibility for ultra-hazardous activities. Hitherto the problem had been solved by means of special international conventions and national laws in each particular field, and general international law in that area was still in the process of development. Careful study of international practice was therefore necessary before the Commission started to codify rules on that subject.

25. The Commission had prepared six provisional draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations. It was a sound approach to consider the Vienna Convention on the Law of Treaties as the framework for the Commission's treatment of the subject.

26. His delegation supported the Commission's intention to give priority to the topic of State responsibility at its next session. It was to be hoped that substantial progress would be made in the study of succession of States in respect of matters other than treaties. The international community had need of the codification and progressive development of international law, and the Commission's role was all the more important in the current world, where relations of every kind among States were continually expanding. His delegation was therefore prepared to support the Commission's request to introduce the practice of a 12-week session, in the same spirit which had prompted it to endorse at the twenty-eighth session of the General Assembly a proposal for a 14-week session.

27. Mr. BROMS (Finland) said that his delegation had noted with satisfaction the measures which the International Law Commission had taken at its twenty-sixth session to begin its work on the law of non-navigational uses of international watercourses, pursuant to General Assembly resolution 3071 (XXVIII). His delegation also appreciated the important supplementary report[3] prepared by the Secretary-General on legal problems relating to that subject.

28. At its last session, the Commission had set up a Sub-Committee to prepare the item for its consideration. In its report (see A/9610, chap V, annex), which was adopted by the Commission, the Sub-Committee had proposed that before the Commission took up the substantive work of the item, States should be requested to comment on certain

3 A/CN.4/274.

basic questions. That proposal was very useful, because it was important for the Commission to be aware of all points of view relating to the complex questions concerning international waters.

29. It was a well-known fact that some significant drafts, recommendations and rules relating to certain parts of the law of international watercourses, which had been prepared by competent international bodies, consisted of texts which could be used as a basis for codification, and that had been one of the reasons which had moved his Government to take the initiative that had led to the adoption of General Assembly resolution 2669 (XXV). That resolution noted that measures had been taken and valuable work carried out by several international organs, both governmental and non-governmental, in order to further the development and codification of the law of international watercourses and recommended that the Commission should take up the study of the matter. The Commission should therefore start by studying the existing texts, irrespective of the nature of the body that had prepared them, in order to avoid repeating studies already competently made by other organs. The answers to some of the questions currently under consideration by the sub-committee could be found by studying the existing texts.

30. The first question considered by the Sub-Committee was that of the meaning and scope that should be given to the term "international watercourses", which had been used in resolution 3071 (XXVIII) because it had been regarded as broad enough to cover all the problems that had to be considered and yet not too technical in nature. Its scope was wider than that of "international rivers", because it also covered lakes, but it might be regarded as a synonym for "international drainage basin" provided that the underground waters covered by the latter term were excluded. A study of the same terminological problem by the Economic Commission for Europe[4] had led to the acceptance of the expression "rivers and lakes of common interest". The term chosen should cover the range of problems relating to international watercourses which needed legal regulation. Two main factors had international legal relevance: the term should be understood as indicating that a watercourse or system of rivers and lakes (the hydrographic basin) was divided between two or more States and that the basin possessed a hydrographic coherence irrespective of political borders. Owing to that coherence, there was an interdependence of legal relevance between the various parts of the watercourse or basin belonging to different States, which concerned not only the different uses of the watercourse and its water but also problems of pollution. There was therefore no need to make a distinction concerning the scope of the definition with regard to the legal effects of fresh water uses, on the one hand, and of fresh water pollution, on the other.

31. A second question considered by the Sub-Committee concerned activities which should be included within the term "non-navigational uses". The systematic classification of uses provided by the sub-committee might be applied as a framework for codification. The term "non-navigational uses" was meant to comprise all kinds of uses of international watercourses with the single exception of navigation, which had been excluded because some States could not agree to its inclusion at the present stage. The exclusion of navigation did not, however, mean that all matters relating to it should be ignored by the Commission. The exception concerned only navigation in itself, its freedom and the rights and obligations of flag and riparian States as well as vessels. The fact that a watercourse was used for navigation was one of its characteristics, and the interaction between use for navigation and other uses of the watercourse could not be excluded from the work of codification.

32. His delegation considered that flood-control and erosion problems should be included in the Commission's studies. Flood-control and questions relating to regulation of water-flow of an international watercourse were among the most important of the matters requiring international legal regulation. The International Law Association had already carried out some of the important preparatory work on flood-control at its New York Conference in 1972. Although the work of the Commission should cover all kinds of non-navigational uses, it might already be necessary to consider how far into the technical details of different uses the study should go. The preparation of rules and principles of a general nature would be more useful than a circumstantial examination of all possible details. The Salzburg resolution of the Institute of International Law[5] and the Helsinki Rules adopted by the International Law Association in 1966[6] were examples of the type of provisions the new codification should contain.

33. The Sub-Committee had not considered it wise to accord priority to any specific use. His delegation shared that view in principle, although it might not be feasible to deal with all the complex matters simultaneously. Some parts of the codification might be ready earlier than others. That practical approach should also be adopted with regard to the question of whether the Commission should take up the problem of pollution of international watercourses at the initial stage of its study. His delegation acknowledged the great significance of the problem and the necessity of international legal regulation. However, it was also aware of the work which had been done on the national and international level in the field of pollution. Many attempts had been made by different international organizations to develop and codify rules relating to pollution of international waters, and there were also numerous bilateral and regional treaties on the same subject. The Commission was therefore expected to devote itself to selection and co-ordination with a view to establishing the basic principles and closing the gaps that still existed, e.g. with regard to State responsibility for pollution damages. In view of the many other important questions still requiring international legal regulation, his delegation would not like the problem of pollution to be given preference. The problem might best be studied in connexion with the general principles of the law of international waters.

4 See E/ECE/136 – E/ECE/EP/98 Rev. 1.

5 See *Annuaire de l'Institut de droit international, Salzburg Session, September 1961* (Basel, 1961), vol. 49, t. II, p. 381.

6 See *Integrated River Basin Development* (United Nations publication, Sales No. E.70.II.A.4), annex VII.

34. The last question raised by the Sub-Committee concerned special arrangements for ensuring that the Commission was provided with the necessary technical, scientific and economic expertise. Such expertise was, of course, important, and the establishment of a special committee of experts might be a suitable solution. Its terms of reference and working methods should, however, be carefully considered, because the work to be accomplished by the Commission was of a legal nature and should not be burdened by excessively complicated technical or scientific details.

AGENDA ITEM 86

Report of the Special Committee on the Question of Defining Aggression *(continued)* (A/9619 and Corr.1, A/C.6/L.988, L.990)

35. The CHAIRMAN announced that Morocco wished to be added to the list of sponsors of working paper A/C.6/L.988.

The meeting rose at 12.30 p.m.