1490th meeting

Friday, 1 November 1974, at 3.30 p.m.

Chairman: Mr. Milan ŠAHOVIĆ (Yugoslavia).

A/C.6/SR.1490

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. VILLAGRAN KRAMER (Guatemala) said that the International Law Commission's report (A/9610 and Add.1-3) showed the complexity of the codification of international law in a changing world beset by conflicts. Those two factors perhaps explained why it was difficult to reflect in a legal instrument situations which were affected or even to a large extent created by economic or political factors. His Government tried each year to define legal norms which were useful in its relations with other States and international organizations.

2. There was no doubt that the Commission encountered problems in the course of its work. While codifying some rules of international law, it must take into account changes which States sought to introduce into the international legal order. It had been said, not without reason, that the development of international law required the participation of the developing countries; currently, their contribution was making itself felt in an increasingly active and dynamic way, and the practical results were evident.

3. The succession of States in respect of treaties and State responsibility were matters of great interest for countries which wished to define legal rules in those areas, taking into account the decolonization process which had begun in the 1950s. But it might be said that the other items on the Commission's agenda were just as important, if not more so.

4. With reference to the succession of States in respect of treaties, the Commission had pursued its study on two points which were closely related in so far as there was a legal bond between a territory and an international treaty. Therefore, that question covered both the succession of

States and the secession of one or several States. The "clean slate" principle held good in either case, so that the consensual element was of capital importance in both cases.

5. In studying boundary régimes, the Commission had not taken into account changes in the situation or the circumstances under which treaties establishing the boundary or boundaries might be signed. There had been cases where countries had been obliged to establish their boundaries under disadvantageous circumstances and, under pressure, to cede part of their territory which they would not otherwise have given up. In the case of both succession and secession, boundaries established by conventions were stable and caused no problems so long as the parties had freely consented thereto.

6. His delegation welcomed the fact that the Commission had excluded from its draft articles dealing with the uniting of States, associations of States having the character of intergovernmental organizations. There was, however, a difference between purely governmental associations and some communities based on economic or economic and political union, which thereby became new subjects of international law. Sometimes the States members of a community were obliged to terminate commitments which might prejudice the relations of the community with third States, so that the community would not be bound by a former régime. In other cases, by separating from a community, a State might or might not succeed to the community with regard to a legal régime relating to a territory or a boundary régime directly affecting the successor State. It would therefore be desirable to harmonize the various points of view on the question.

7. His delegation congratulated the Commission on its work on the draft articles on treaties concluded between States and international organizations or between two or more international organizations. Details should be included in article 6 of the draft (*ibid.*, chap. IV, sect. B) on the exercise of the powers inherent in the nature of international organizations. In view of current trends, it was sometimes difficult to determine whether a multinational public enterprise qualified as an international organization or not. The establishment by States of other subjects of international law also raised a whole series of problems, and among other things it would be appropriate to know whether the legal personality of an organization established within the framework of a regional or subregional economic integration plan should be recognized at the international level or not.

8. It was clear from the Commission's work on the non-navigational uses of international watercourses that it would take into account the unity of hydrographic basins. The Commission should consider to what extent the legal régime it was seeking to establish would apply only to strictly international stretches of watercourses and in what cases that régime would remain applicable when a watercourse ceased to be international in character. If the unity of hydrographic basins was recognized, it seemed that the theory of sovereignty was not fully applicable.

9. He regretted that the Commission had spent less time on the report of the Special Rapporteur on the most-favoured-nation clause than on the report of the Joint Inspection Unit (see A/9795). The most-favoured-nation clause was of great interest to the developing countries. It had given rise to negotiations between States on matters completely alien to trade relations, and the incorporation of clauses providing for exceptions in many treaties proved that there was a tendency to attenuate the effects of the most-favoured-nation clause, or in any case to limit them with as many stipulations as possible. One of the serious problems encountered by the developing countries in their trade relations with the industrial countries depended precisely on the operation of the clause. A study on the matter carried out in Latin America showed how defence mechanisms had been established in recent years, and the way in which the clause was applied within the framework of subregional economic integration plans.

10. He congratulated the Commission on the significant report it had submitted to the Committee.

11. Mr. ZEMANEK (Austria) stressed the quality of the Commission's report, which demonstrated the competence of its members and the efficiency of their methods of work. As stated in its written observations submitted in 1973 (see A/9610, annex I), his Government fully agreed with the structure of the draft articles on succession of States in respect of treaties (see A/9610, chap. II, sect. D) and their underlying principles. It would make known its position on individual articles at the conference of plenipotentiaries which should be convened by the General Assembly. For the time being, he would touch only upon the new elements in the draft.

12. At the twenty-sixth session of the Commission (see the report, foot-notes 54 and 55), two proposals had been made which had not been incorporated in the draft. One of them was the addition of article 12 *bis* concerning multilateral treaties of universal character. His delegation considered that that proposal seemed to derive from a misconception of the nature of a notification of succession; in fact, the latter was always retroactive to the date of independence. There was therefore no hiatus and article 12 *bis* was not necessary. If some States none the less felt that the text of the draft should be clarified on that point, they could put forward amendments at the conference of plenipotentiaries.

13. With reference to the other proposal, article 32, entitled "Settlement of Disputes", which it was also proposed should be added to the draft, experience showed that the formulation of such a provision usually required negotiation, and it would be better dealt with by the diplomatic conference.

14. He recalled that his Government, in its written observations submitted in 1973, had disagreed with the provisions of paragraph 2 of draft article 19–article 15 of the 1972 draft[1]–concerning the reservations which a newly independent State could formulate when making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty. However, in view of the reasons given by the Commission in paragraph 20 of its commentary on that article, it would reassess its position.

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

15. In 1974, the Commission had undertaken a first reading of two other sets of draft articles. Three articles had been added to the draft on State responsibility (see A/9610, chap. III, sect. B) they were based on concepts which his Government supported. Moreover, articles 1-6 of the draft articles on treaties concluded between States and international organizations or between international organizations had been adopted (*ibid.*, chap. IV, sect. B), and his Government again supported the way in which the Commission had approached the subject. The Commission should, however, decide whether it could continue to base its work on the pattern of the Vienna Convention on the Law of Treaties. Given the general and provisional nature of those articles, they did not for the moment call for detailed comment, with the possible exception of article 6, concerning the capacity of international organizations to conclude treaties. To say that "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization" might suggest that an organization might extend its treaty-making capacity at will by adopting or developing through practice rules to that effect. It was his Government's understanding, however, that the power of an international organization to determine its capacity to conclude treaties was limited by the object and purpose of the organization as set forth in its constituent instrument.

16. The Commission had also taken up the topic of the law of the non-navigational uses of international watercourses. The report of the Sub-Committee set up study that topic (*ibid.*, chap. V, annex) contained a number of important questions which would be put to States. As a riparian State of one of the great European rivers, the Danube, Austria would study those questions with great care. His delegation wished to note at the outset that the "Helsinki Rules" on the uses of international rivers, adopted by the International Law Association in 1966,[2] did not always provide equitable solutions to the very complex problems which arose in that sphere. Moreover, his delegation, while recognizing the seriousness of the problem of the pollution of international watercourses, considered that it should not be taken up in the initial stage, as State practice in that respect was scarce. It would be better to study other uses first and to deduce from that study the underlying principles which could then be applied to pollution as well.

17. His delegation regretted the controversy which had developed over the report of the Joint Inspection Unit. The different viewpoints of the Commission and the Unit could easily have been reconciled if the latter had been willing to enter into a dialogue.

18. Mr. ALVAREZ TABIO (Cuba) said he recognized the importance of the work done by the Commission and considered that the draft articles on the succession of States in respect of treaties constituted a useful basis for the further consideration of the problem. As a whole the draft articles had been worked out carefully, taking into account both past experience and the current situation. It should not be forgotten that the established practice originated mainly from the traditions of the colonial Powers which had tried to make all countries accept the rules which they had imposed through pressure on small and weak States. Hence the importance of article 13, which provided that "Nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty." That provision was closely related to article 52 of the Vienna Convention on the Law of Treaties,[3] under which "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations". Before the First World War, international law had not taken into account such acts of coercion exercised by one State over another to extort its consent. However, with the coming of the Charter of the United Nations the invalidity *ab initio* of any treaty whose conclusion had been procured through the use of force was enshrined as a principle of international law. In the opinion of his delegation the interpretation of the term "force" should not be restricted because, besides armed force, economic or political pressures constituted acts of coercion, as the Conference of Heads of State or Government of Non-Aligned Countries held at Cairo in 1964 had declared.

19. Turning to the draft itself, he noted that its principal merit was that it had taken into consideration the consequences deriving from the principles established in the Charter, in particular that of self-determination. The Commission had reached the conclusion, set forth in article 15, that a new independent State was exempt from any obligations in respect of treaties concluded by the predecessor State. According to article 16, the "clean slate" principle applied to all treaties, both bilateral and multilateral, with the exception of cases of treaties concerning boundary régimes and other territorial problems as envisaged in articles 11 and 12.

20. His delegation considered that the provisions of article 12 should be made clearer, because they could be interpreted to cover an infinite range of supposedly territorial treaties. Concerning transfer agreements, they clearly had no legal value unless they represented the freely expressed will of the successor State. Conventions of that type had sometimes been imposed by coercion and such a situation naturally invalidated the transfer agreement.

21. With regard to the meaning and scope of some of the terms used in the draft articles, his delegation did not share the idea that the concept "succession of States" meant "the replacement of one State by another in the responsibility for the international relations of territory", as stated in article 2, paragraph 1 *(b)*; the term "responsibility" had a special connotation in international law and it was not simply a matter of "international relations of territory" but of relations affecting sovereignty over a particular territory. Since the people of a given territory was called on to exercise its sovereignty and its right to self-determination, it was for that people to say whether or not it wished to assume the responsibilities deriving from the pre-existing conventional relations, which involved both rights and obligations.

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

3 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.

22. Concerning the expression "newly independent State", paragraph (6) of the commentary to article 2 in the Commission's report indicated that it signified a State which had arisen from a succession of States in a territory which immediately before the date of the succession of States had been a dependent territory for the international relations of which the predecessor State had been responsible. But the Commission, after studying the various historical types of dependent territories, such as colonies, trusteeships, mandates and protectorates, had excluded the categories of associated States from the concept of a newly independent State. However, the terms of free association often concealed what was purely and simply integration. Moreover, in order to achieve the progressive development of international law, it was necessary to include the new forms of colonialism in the concept of dependent territories. Liberation from neo-colonialism and the installation of a new régime which was fully independent both politically and economically also involved a succession of States.

23. Similarly, his delegation could not share the opinion expressed in paragraph 66 of the Commission's report on the subject of social revolution. A revolution which completely transformed the economic and social structure and which entailed the transfer of political power to the exploited classes did not involve a mere change of government alone but the birth of a new type of State. That was not a theoretical problem but a real problem and a phenomenon which had appeared with the Great October Revolution of 1917, the point of departure for profound transformations in the development of mankind and in the concept of a State and in law.

24. If the future convention was not to cover either the new forms of colonialism, or cases of social revolution, and if in accordance with article 7 it was to provide for the application of the principle of non-retroactivity, one could ask what purpose it would serve. It was clear that the draft articles did not correspond to the interests of either the new States which had emerged from the decolonization process or of those which would liberate themselves from new forms of colonialism in the future. His delegation reserved the right to make more detailed comments on the question.

25. Turning to the question of State responsibility, he considered it preferable to postpone the detailed consideration of that question but nevertheless wished to refer to article 8 on the attribution to the State of the conduct of persons acting in fact on behalf of the State. That article should be made clearer, particularly with regard to the case envisaged in subparagraph *(b)*. Indeed, any person who assumed power by force, against the will of the people and by abolishing all existing legal institutions, was simply usurping power, and his acts were unjustifiable. His delegation therefore had serious reservations about that rule, as it could not agree that such actions should be considered as acts of the State under international law.

26. In subparagraph *(a)* of article 8 the Commission had provided for the case of persons acting on behalf of the State. The case of transnational enterprises, which were not content with acting on behalf of the State but seized the machinery of the State for their own interests, illustrated that case. In the context of State monopolistic capitalism, which extended its tentacles over the underdeveloped world, the monopolies were not at the service of the State: it was the State which became a servile tool of the monopolies.

27. With regard to the organization of the Commission's work, his delegation, too, considered that the Commission should accord priority to the questions of State responsibility and the succession of States in matters other than treaties. But as the latter question was closely linked to the succession of States in respect of treaties, his delegation advocated the elaboration of a single convention or at least the establishment of uniform principles.

28. Mr. BRACKLO (Federal Republic of Germany) said that the Commission, in accordance with its established practice, had put the results of its work on the succession of States in respect of treaties into the form of draft articles. However, it had not done so without hesitation, and had first had to determine to what extent a convention on the succession of States would actually be applied in practice. Its doubts on that point had grown with the insertion of article 7 which precluded any retroactive application of the rules set forth in the articles. Nevertheless, his delegation agreed with the insertion of article 7–a provision that expressly precluded the retroactivity of the convention in respect of succession which had occurred before the entry into force of the convention. His delegation was also aware of the consequences arising out of article 28 of the Vienna Convention on the Law of Treaties which set out the principle of non-retroactivity of treaties. As the Commission had recognized in paragraph 62 of its report, participation by successor States would involve delicate problems relating to the method of giving consent to be bound by the convention and the retroactive effect thereof.

29. His delegation shared the view finally taken by the Commission that a convention on the subject had its own value irrespective of the possibility of any practical application. The consolidation of legal rules applicable to the succession of States was an important step forward in reaching international consensus in a most significant field of law. That progress was particularly to be welcomed because the draft articles were not simply an identification of existing rules, but also a progressive development of international law, given the fact that international practice in the field of the succession of States had produced few rules that were consistently applied. And yet the Commission's approach had enabled it to produce a text that could meet with a large measure of approval.

30. Despite its positive appraisal of the draft as a whole, however, his Government had some doubts on certain points. For example, the Commission had felt that the "clean slate" principle, which had been supported by many States, was a proper basis for dealing with the succession problems facing newly independent States. His delegation thought that the principle must be qualified and noted that the only exceptions in the draft concerned boundary and

territorial régimes. Apart from that, the draft did not differentiate between various categories of treaties. His delegation would have preferred to see an obligation of continuity stipulated in the case of certain treaties. In order to prevent too extensive an interpretation of the "clean slate" principle, it might be useful to incorporate a reference to the concept of continuity elsewhere in the draft, possibly in the preamble.

31. Subject to a more thorough examination, his delegation believed that the amendments to the draft submitted to the Sixth Committee were a considerable improvement on the 1972 text. In rewording articles 33 and 34–articles 27 and 28 of the 1972 text–and eliminating the question of the dissolution of States the Commission had rightly been guided by State practice rather than by theoretical concepts. On the other hand, certain terms that were not, strictly speaking, legal terms had been used in the provisions; they might not adequately cover the variety and complexity of future cases.

32. Several delegations had indicated, in connexion with article 33, paragraph 3, that the rules regarding newly independent States would also have to apply in cases where one part of a State had achieved independence in the course of a social revolution. His delegation did not feel that the analogy could be drawn in such general terms. It was an accepted principle of international law that no State could plead even revolutionary changes in its constitution or domestic structure as an excuse for evading treaty obligations.

33. The situation in Germany had been mentioned during the discussion of the draft articles. His delegation reminded the Committee of the position it had taken at the previous session (1402nd meeting). The divided States which had appeared after the Second World War were a relatively new phenomenon in international relations. They gave rise to extremely complex and special problems. The development in Germany had by no means yet ended. It was therefore hard to come to general legal conclusions. His delegation believed that definitive solutions could not be derived from existing practice in the field of succession of States or from an international convention of the type envisaged, which would in any case have no retroactive effect.

34. Regarding the two new articles proposed by Mr. Ushakov and by Mr. Kearney which the Commission had been unable to consider for lack of time and which were in foot-notes 54 and 55 of the report, respectively, he reminded the Committee of Mr. Ushakov's suggestion in the Commission that certain multilateral treaties of a universal character should remain binding on newly independent States, as an exception to the "clean slate" principle applicable in all other cases. The treaties involved would be certain categories of treaties of a humanitarian nature and treaties concluded for the purposes of maintaining international peace and security. His delegation could not support that suggestion, because it felt that the criteria proposed by Mr. Ushakov did not permit a clear delimitation of the categories of treaties contemplated and would be a source of uncertainty. Moreover, the proposed text did not contain any clause ensuring the continuation of the treaties in question: it was intended that new States should be free to terminate at short notice any treaty to which they had not originally acceded. There would be certain risks involved in that, because some of the agreements in question were by their nature not subject to denunciation and contained elements of customary international law.

35. His Government had noted with great interest Mr. Kearney's proposal for a mandatory procedure for the settlement of disputes, modelled on the conciliation procedure in article 66 of the Vienna Convention on the Law of Treaties. The draft articles should contain a provision of that nature. His Government welcomed the Commission's offer to consider the question of the settlement of disputes at its twenty-seventh session and to prepare a report. His delegation hoped that the General Assembly would adopt a recommendation to that effect. The most appropriate procedure for the further consideration of the draft articles seemed to be first to invite States to submit their views on the draft articles and subsequently to convene an international conference to elaborate a convention on the basis of the draft articles.

36. His Government was following with interest the progress of work in the field of State responsibility. The definition of principles of international law on wrongful acts would certainly have an effect on certain basic aspects of international life. One such aspect was the protection of human rights–a subject of particular concern to his country. During its discussions, the Commission had contemplated the possibility of making any convention that might be elaborated retroactive. Such a solution could lead to the resumption of long settled international disputes and be a source of legal uncertainty. Moreover, a large number of States would certainly consider the possibility of a retroactive application of the convention as a reason not to ratify it. It would therefore seem desirable that the Commission should add to its draft an article similar to the one included in the draft convention on the succession of States so as to exclude any retroactive application. Similarly, his delegation approved the Commission's decision to consider the liability of States for injurious consequences arising out of the performance of certain activities that were not prohibited by international law. It seemed reasonable to defer consideration of the subject until the Special Rapporteur had also dealt with the concept of injurious consequences in the report he was preparing. There should be identical definitions for that concept in both fields of State responsibility.

37. His delegation welcomed in principle the Commission's endeavours to codify and develop the law of treaties concluded between States and international organizations and between two or more international organizations. There were a number of considerable differences between those two categories of treaties. They included the capacity to conclude treaties, defects which could prevent a treaty from being concluded and the procedures for the conclusion of treaties. There was also the question of the principle embodied in the general law of treaties that

treaties between States applied only *inter partes*. It must be established whether that principle was equally valid for treaties concluded with international organizations "behind" which there were the individual member States. In view of the close relationship between the two subjects, the highest possible degree of homogeneity was required between the Commission's draft convention and the Vienna Convention on the Law of Treaties. Regarding the capacity of international organizations to conclude treaties, his delegation approved the wording of article 6 of the Commission's draft.

38. The study of the law of the non-navigational uses of international watercourses was of practical interest to his country, since it shared a number of waterways with other States. With regard to the question of whether to give priority to the study, his delegation's attitude was flexible. It wished, however, to point out that the increase in the use of water for other than navigational purposes would give rise to increasingly frequent clashes of interest on an international scale. The international community might greatly profit from speedy action on the problem; and his delegation appreciated the Commission's deliberations concerning the organization of work. The recommendation of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses that priority should be given to the question of pollution was justified. However, that should only be procedural priority, since, from the material point of view, the study of uses in general was equally important. Consideration of the aspects of the problem which were not related to pollution should not be delayed.

39. Another question raised by the Sub-Committee concerned co-operation between the Commission and other organizations. His delegation was of the opinion that all duplication of work should be avoided; it had in mind, in particular, the United Nations Environment Programme, the Council of Europe, the International Commission for the Protection of the Rhine against Pollution and other river commissions. Those special international arrangements would have precedence over the regulations to be formulated by the Commission. Practical arrangements concerning the use of international watercourses should be sought at the bilateral and regional levels, while at the universal level the emphasis should be on the formulation of general principles.

40. With regard to the Joint Inspection Unit's report and the unfortunate misunderstanding to which it had given rise, his delegation considered that the Unit deserved the Committee's confidence and support. On the other hand, it was clear that the Unit had not been able to consider the issues concerning the Commission from all angles. The members of the Commission were not Government representatives, and their work could not be measured by the same criteria as the deliberations of other bodies. Thorough research and informal talks were as necessary for the good quality of the Commission's work as plenary meetings. Therefore, when the competent bodies considered the report of the Unit, they should take into account the arguments of the Chairman of the Commission (1484th meeting) as well as the views expressed in the Sixth Committee on the question. His delegation considered that there was a good case for extending the Commission's twenty-seventh session from 10 to 12 weeks, since its programme of work was particularly heavy. However, it did not seem necessary to decide at the current stage whether all future sessions should be extended to 12 weeks.

AGENDA ITEM 93

Review of the role of the International Court of Justice *(continued)** (A/C.6/L.987/Rev.2, L.989)

41. The CHAIRMAN drew the attention of members of the Committee to draft resolution A/C.6/L.987/Rev.2, which was the result of consultations between the sponsors of the initial draft resolution (A/C.6/L.987/Rev.1) and the Mexican and Kenyan delegations, which had sponsored an amendment (A/C.6/L.989) to the initial draft resolution.

42. Mr. GOMEZ ROBLEDO (Mexico), introducing draft resolution A/C.6/L.987/Rev.2 on behalf of the sponsors, observed that the negotiations had made it possible to insert an eighth preambular paragraph in the initial draft resolution which contained the substance of amendment A/C.6/L.989. The Kenyan and Mexican delegations had therefore withdrawn that text and had become sponsors of draft resolution A/C.6/L.987/Rev.2.

43. He thanked the delegation of the Netherlands for having taken the initiative on the initial draft resolution and expressed his gratitude to the members of the Committee for the spirit of co-operation and goodwill they had shown.

44. The CHAIRMAN proposed that draft resolution A/C.6/L.987/Rev.2 should not be put to the vote until the beginning of the following week in order to give the delegations time to study it.

It was so decided.

Letter dated 7 October 1974 from the Chairman of the Second Committee to the President of the General Assembly concerning chapter VI, section A.6, of the report of the Economic and Social Council (continued)** *(A/9603, A/C.6/431)*

45. The CHAIRMAN recalled that at its 1475th meeting, the Committee had decided to set up a small working group to consider the text of a draft agreement between the United Nations and the World Intellectual Property Organization (WIPO), under which WIPO would become a specialized agency of the United Nations. Taking into account the consultations he had held in the meantime with the representatives of the regional groups, the Chairman proposed that the working group should comprise the representatives of the following countries: Austria, Bangladesh, Cameroon, France, Guatemala, India, Jamaica, Japan, Kenya, Netherlands, Poland, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America,

* Resumed from the 1485th meeting.

** Resumed from the 1475th meeting.

and that Mr. Gana (Tunisia), Vice-Chairman of the Sixth Committee, should be appointed Chairman of the working group.

It was so decided.

46. The CHAIRMAN invited the Chairman of the working group to convene it as soon as possible after consultation with the Secretariat.

The meeting rose at 4.50 p.m.