70. Her delegation supported the proposal that the Commission should be authorized to extend its next session to 14 weeks.

71. Mr. MANSFIELD (New Zealand), speaking in exercise of the right of reply to the representative of France, said that as the question of the legality of French nuclear testing in the Pacific was at the heart of the case which New Zealand had brought against France in the International Court of Justice, he would refrain from any observations on the French representative's comments on that question other than to note that the New Zealand Government did not accept the contentions advanced by France.

72. Mr. SPÁČIL (Czechoslovakia) said that his delegation agreed with much of what had been said by other delegations, particularly the delegations of the socialist countries, concerning the substance of the report of the Commission.

73. Although the discussions encouraged States to solve important international problems, the Commission was not a panacea, nor was it the only body which dealt with the codification of international law. The work of the Commission was generally satisfactory, but it should rationalize its working methods because it was only in the first phase of the adoption of rules of law, which then had to be adopted by the General Assembly and ratified by States. In that connexion, his delegation could not support the proposal that the next session of the Commission should be extended to 14 weeks.

The meeting rose at 6.30 p.m.

1407th meeting

Thursday, 4 October 1973, at 11 a.m.

Chairman: Mr. Sergio GONZÁLEZ GÁLVEZ (Mexico).

A/C.6/SR.1407

AGENDA ITEM 89

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

1. The CHAIRMAN invited the Chairman of the International Law Commission to reply to the comments made by delegations during the general debate on the report of the Commission (A/9010).

2. Mr. CASTAÑEDA (Chairman of the International Law Commission) said that the debate on the Commission's report had given rise to many very constructive and pertinent comments. Delegations had given particular attention to the role the Commission should play in the codification process, which was explained by the machinery described in paragraph 166 of the report, namely, continuous interaction between professional expertise and governmental responsibility, the latter expressing itself primarily through the activities of the Sixth Committee, which should continue to guide the Commission's future work. The late date at which the report had been circulated had inconvenienced a number of delegations, and the representative of Israel had requested that that fact should be brought to the attention of the Commission. The question was in fact an administrative one. An interval of two months between the end of the Commission's session and the beginning of the General Assembly should suffice for publication of the report. It appeared that the majority of members of the Sixth Committee would prefer consideration of the report of the Commission to remain the first item in its order of business because of the overall view offered by the vast range of subjects it dealt with. An effort should therefore be made to ensure that the report was circulated earlier.

3. All speakers recognized the usefulness of the Commission's debate on its future work. Having had only one week to devote to the subject, the Commission had not had much time to deal in depth with the basic elements of its codification work, to assess the results of the 25 years that had passed and to see what topics lent themselves to codification at the present time. Although the Commission had been obliged to draw up short-term work programmes for two or three years, there was need for a complete picture of the longer-term problems.

4. Furthermore, the question arose whether the Commission should content itself with codification in the strict sense of the term, or whether it should participate in the progressive development of international law and, if so, to what extent. The representative of Iraq had said that codification was a work of synthesis, in which older rules were complemented by the progressive development of law. However, it was sometimes not easy to make a clear distinction between those two processes.

5. The representative of Austria had rightly pointed out that the Commission, which had played a leading role in drafting the 1958 Conventions on the law of the sea, had been left aside in the work currently taking place to revise that law, on the ground, allegedly, that the current work was completely different in nature. However, the fact that the members of the Commission were independent would enable them to consider the interests of the international community more effectively than could representatives of States defending national viewpoints. It would therefore be desirable to combine the two approaches and, in general, to see to it that the Commission participated more actively in the process of international law-making; when questions were controversial, the Commission was in a position to submit several variants from which States would be able to make a selection during the discussion at the political level. That was a constructive suggestion which the Commission should act on. The views ex-

pressed by members of the Sixth Committee on the question whether it would be desirable to resort to the possibilities offered by the Commission in relation to the progressive development of international law had in general been constructive. Many delegations had congratulated the Commission on the work it had accomplished during 25 years of existence, but the delegations of Nigeria and the United Republic of Tanzania had wondered whether there were not grounds for questioning its very existence and contemplating other machinery for the codification of international law. It was not appropriate for the Commission to defend itself in the present forum, and other delegations, for example those of Kenya and the United Kingdom, had certainly cast no doubt on its usefulness. One of the arguments advanced by the representative of the United Republic of Tanzania had been the need to increase the participation of the developing countries in the codification process and to take their views more into account. The developing countries were, however, duly represented in the Commission, but it must be borne in mind that their specialized lawyers were few in number, and consequently overburdened with work; the Sixth Committee certainly had an important role to play in that respect. Moreover, the developing countries had in general found all the conventions drafted by the Commission to be acceptable. The "clean slate" rule which they advocated had been used as a basis for the draft on succession of States in respect of matters other than treaties.

6. He wished to stress the provisional nature of the six articles on State responsibility, which had been adopted on the first reading, and he understood the inability of delegations to make general comments on them. On the other hand, the representative of the United States had pointed out that the Committee's comments on the work now taking place were extremely useful. On the whole, the Committee had approved the point of view advanced by the Special Rapporteur, Mr. Ago, to the effect that a distinction must be made between primary and secondary rules. Several delegations had pointed out the advantages of the inductive method the Commission had adopted as a basis for its work, taking international reality as its starting point. Nevertheless, as the representative of India had said, the search for precedents should not be allowed to result in maintaining the *status quo*, and precedents should not outweigh progressive development. In addition, the representative of Israel had noted that the study of some topics often raised new topics, and that it would be desirable for subjects to be divided up, whereas the representative of Yugoslavia had felt that the way in which the Commission had approached the question of responsibility was the best means of strengthening international law.

7. Many delegations had referred to the question of the responsibility for risk which might arise from lawful activities; that was a topical question which arose specifically in relation to such subjects as nuclear technology, the law of the sea and outer space. The delegations of Australia and New Zealand did not regard nuclear explosions as lawful activities. The Commission had not pronounced itself on that question, which it had in fact not been called upon to analyse. Austria had given an interesting example, that of the nuclear power station situated in Switzerland close to the Austrian frontier. Was that a wrongful activity? The representative of Argentina had mentioned the case of lawful activities which might become wrongful. As Mr. Hambro, a member of the Commission, had said, the dividing line between lawful and wrongful was mobile and difficult to define. The question had been raised whether responsibility for risk came within the field of State responsibility. The Commission had confined its study to responsibility for wrongful acts, since, as the Special Rapporteur, Mr. Ago, had said in his third report,[1] the two aspects were completely different. According to the representative of Thailand, however, the difference between responsibility for a wrongful act and responsibility for risk depended on what elements were stressed and was a difference of degree. The representative of Mongolia, for his part, had felt that responsibility for risk was in fact an exception to the general principle whereby only a wrongful act gave rise to international responsibility. If the act was not wrongful in nature, the possibility of reparations in accordance with the principle of equity could be envisaged, but opinions might differ on that point, as the statement by the representative of Mexico had shown. On the whole, what was called for was not the taking of positions on the question of doctrine, but the adoption of a practical solution. However that might be, the preference of Sixth Committee members had seemed to be for a separate codification dealing with the responsibility which might arise as a result of lawful acts. The question was when it would be possible to undertake that work. Many countries would certainly find an excessively long delay unacceptable. The representative of Spain had suggested that documentation on the subject should be compiled, which would be a first step. Following its usual method, the Commission could appoint a group of three persons to deal broadly with the question and also appoint a special rapporteur.

8. With regard to the various articles, few comments had been made on the substance of article 1. As far as form was concerned, reference had been made to the difficulties posed by the English term "entails". The most appropriate word was unquestionably the French verb *"engage"*, for which, regrettably, there was no satisfactory translation. The representative of Thailand had suggested the English expression "gives rise". However, it should not be forgotten that the draft articles were only provisional in form, and the Special Rapporteur, Mr. Ago, could take account of the Sixth Committee's comments on that point.

9. Many representatives had referred to article 2, which was intended to ensure that a State did not escape international responsibility by claiming that the rules of international law did not apply to it. It was conceivable that a State might invoke its ignorance of those rules or, as in internal criminal law, its youth or status as a minor as factors absolving it from responsibility.

[1] See *Yearbook of the International Law Commission*, 1971, vol. II, part one (United Nations publication, Sales No. E.72.V.6 (Part I)), document A/CN.4/246 and Add. 1-3.

In the view of some delegations, the wording of article 2 was too complicated and would give rise to difficulties. Admittedly, the formulation which had been chosen was not perhaps a model of clarity, but it had been necessary to avoid referring to "capacity" or to a "State capable of committing" in order to avert any possibility of confusion with concepts of internal law. The representatives of Greece, Israel and Kenya, in particular, had questioned the usefulness of that article. While the Commission would study their comments carefully, it could nevertheless be observed that there was not necessarily any link between the legal equality of States and the fact that they could all be held equally responsible. It was therefore necessary to have an article specifically laying down the rule on that matter.

10. With regard to the definition of the elements of an internationally wrongful act of a State contained in article 3 of the draft articles, several delegations had raised the question whether or not damage was an element in international responsibility, in addition to the objective and subjective elements. Legal theory was divided on that point. The Commission had observed that writers interpreted the concept of "damage" in different ways. For instance, it was acknowledged that, in the case of damage to the property or person of aliens, damage was an element in responsibility. On the other hand, it was hard to accept that concept in other cases such as the mere violation of a country's air space. In reality, a distinction had to to be drawn between damage and injury *(injuria)*. Mr. Ago cited the example of certain conventions on human rights. If a State party to such a convention violated one of its provisions, the States parties as a whole sustained an injury, even if the act of the State concerned had caused no quantifiable damage. Moreover, some writers on international law believed that any breach of an obligation under international law involved injury. On that point, the representatives of India and Romania, among others, had drawn attention to the existence of particularly serious offences such as crimes against humanity or against peace, which should constitute a separate category and be the subject of special fines. The representative of Romania had also referred to a new source of responsibility—in addition to the violation of a treaty or a convention—namely, the breach of an international obligation such as those imposed by certain particularly important United Nations resolutions. The Commission would take account of that idea, which had also been mentioned by the representative of Iraq.

11. The representative of the United Republic of Tanzania had rightly observed that the full scope of the rule laid down in article 4 could be realized only if the relevant basic provisions reflected more accurately the realities of the modern world and took account of the existence of the very large number of new developing States.

12. Almost all the delegations which had spoken on the question of succession of States in respect of matters other than treaties had expressed support for the Commission's decision to begin by studying State property before going on to consider public debts. However, the draft articles were highly provisional in nature. As the representative of Spain had pointed out, the method used differed from that adopted by the Commission in its consideration of succession of States in respect of treaties. As far as the latter topic was concerned, there way only a single type of source material: treaties. For that reason, it had been possible to adopt a classification according to the origin of succession. In the case of succession in respect of matters other than treaties, however, the diversity of sources and subjects had led the Commission to make out a classification by subject: public property, public debts, nationalism and so forth. Thus, the adoption of different methods was justified by the differing nature of the subjects dealt with.

13. While noting the eminent qualities of the report on the question of the most-favoured-nation clause, delegations had observed that the Commission had made little progress in codifying that subject. The Commission would take account of the widely expressed concern that, in considering exceptions to the most-favoured-nation clause, exceptions which were of interest to the developing countries should be recognized. The possibility of granting those countries generalized and non-reciprocal preferences should be envisaged.

14. As for the future work of the Commission, almost all delegations had stated that the topic of the law of the non-navigational uses of international watercourses was ripe for consideration and might lend itself to codification. However, certain delegations had expressed a contrary view, recommending that the Commission should wait until the supplementary report to be submitted by the Secretariat was available.

15. Few delegations had referred to the problem of unilateral acts. However, the Australian representative had made the point that the process by which States endeavoured to evolve new legal norms by their unilateral acts and through the support or acquiescence of a number of other States, was inevitable if the existing machinery for changing the law was inadequate. The Australian representative had cited the unilateral acts of a number of States in relation to aspects of the law of the sea which had not kept abreast of the just claims of States and where the existing machinery was especially cumbersome.

16. In accordance with the request made by the representatives of Spain and Mexico, among others, the Commission would consider the possibility of codifying the topic of the treatment of aliens.

17. A number of delegations, including the Austrian delegation, had requested the Commission to consider the question of the law relating to the environment. That was a relatively new field in which the situation currently appeared to be confused. Furthermore, the questions arising from it were extremely varied, ranging from the problems of the sea to those of outer space. It had been suggested that the Commission should be entrusted with the task of co-ordinating the various attempts to devise rules governing that subject and that it should be requested to define some basic principles capable of guiding future codification efforts.

18. There had been some divergence of opinion regarding the Commission's request for an extension of its sessions. Several representatives had proposed a variety of solutions aimed at enabling the Commission

to function more effectively; it had, for instance, been suggested that the Commission should make better use of the time available to it during its sessions and should meet more often. In fact, the conditions under which the members of the Commission worked ruled out such a procedure. Members attended sessions in an individual capacity, without alternates or advisers, and consequently had to be present at every meeting. Moreover, most of the Commission's work consisted of drafting, a task which required careful preparation and lengthy consideration. In addition, the Commission had various bodies such as the working groups, the Drafting Committee and the Bureau which usually met in the afternoon. The Commission could be estimated to hold an average of six to seven meetings per week, a figure which compared very favourably with the frequency of meetings of the Sixth Committee, for example. If it was desired that the Commission should meet more often, that could be done only by extending its annual session.

19. Certain delegations had expressed concern at the fate of the drafts prepared by the Commission after the conventions to which they gave rise were open for ratification. That appeared to be the stage at which instruments of codification encountered the greatest difficulties. Where a State's reluctance was founded on matters of substance, that State was the sole judge. In some instances, however, there were no objections of that kind, and the Commission had already posed the question whether States could not be induced to ratify such instruments more rapidly. It appeared that delays were often caused by poor co-ordination between the various State organs. Mr. Ago had considered that question; his duties with the International Labour Organization had enabled him to see that agency's ratification procedures in operation. Mr. Ago had proposed that consideration should be given to the possibility of instituting a similar procedure for codification conventions. While that was certainly a delicate matter, its importance made it worthy of consideration. He welcomed the Spanish representative's proposal that the draft resolution to be submitted by the Sixth Committee to the General Assembly following its consideration of the Commission's report should include a paragraph requesting the Assembly, on the occasion of the Commission's twenty-fifth anniversary, to appeal to States to consider ratifying the conventions arising out of the Commission's work as soon as possible.

20. Mr. RUTLEDGE (Chief Editor), speaking at the invitation of the Chairman, said he wished to clarify certain points regarding the timing of the distribution of the Commission's report, which had been the subject of observations by several representatives. First, he wished to dispel any feeling that might exist that the technical services had failed to exert sufficient efforts to distribute the report on time. Both the Geneva services and the Headquarters services had endeavoured to produce the report speedily, and the substantive unit concerned had followed the progress of the work diligently. He then gave details of the dates on which, following the conclusion of the Commission's session on 13 July, the various stages of production of the report had been completed: establishment of the master text, the additional translation and revision required at Geneva, the typing of the stencils at Geneva and their dispatch to New York and the reproduction at New York of the report, which ran to approximately 200 pages in each of the four working languages. The report had been ready for distribution in one of the working languages by 31 August, but had not been completed in all four languages until 6 September; under the "simultaneous distribution rule", all versions had had to be distributed on the same date, and that had been done on 7 September. He had reviewed the way in which that work had been performed, bearing in mind also the other obligations which the Geneva and Headquarters services had been called upon to fulfil during the period in question, and had concluded that it might have been possible to save a few days but not to achieve a substantial acceleration in the distribution of the report. Moreover, he wished to assure the members of the Sixth Committee that the Commission's report would, in future years, continue to receive the same attention, but he could not encourage them to believe that the time needed to process the report could be reduced substantially.

21. Reference had been made to the fact that, in the past, an advance edition of the report had been issued in Geneva in the Commission's documentation series; that had, in fact, been the case, but the practice had been abandoned since, for technical reasons, the production of that version of the report had delayed the final publication of the report in New York for the Assembly.

22. Mr. ROSENNE (Israel) thanked the Chief Editor for his explanations, and said he felt that he was expressing a general feeling, in calling attention to the high technical quality of the legal publications of the United Nations. The Sixth Committee was certainly not the appropriate body in which to consider technical problems of publication and distribution, but the comments which had been made in that respect reflected a problem of substance. The representative of Kenya was to be commended for having been the first to raise it at the current session, and the Commission should try to find a solution satisfactory to all in future. However that might be, the recently concluded general debate seemed to indicate that the Sixth Committee wished in general to continue to consider the Commission's report at the beginning of the session each year.

23. Mr. BAILEY (Australia) stressed that his comments on the distribution of the report under consideration had not been criticisms of the units responsible for its publication. However, in the light of the explanations given by the Chief Editor, if it was not possible in the future to advance the distribution date of the Commission's report, the Committee would have to envisage deferring its consideration of it.

24. The CHAIRMAN observed that the work of the Sixth Committee had reached the stage where, in accordance with usual practice, consideration of the Commission's report would be suspended and resumed when the draft resolution thereon had been prepared.

AGENDA ITEM 90

Draft convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (A/8710/Rev.1, chap. III; A/9127 and Add.1, A/C.6/421, A/C.6/L.898)

25. The CHAIRMAN drew the attention of the Committee to the documents before it for its consideration of agenda item 90, and in particular to the note by the Secretariat on the methods of work and procedures followed by the Sixth Committee in the preparation of the Convention on Special Missions (A/C.6/L.898). Those methods and procedures had, in essence, been the following: the Committee had not held a general debate but had considered the draft convention on special missions article by article and had established a drafting committee. A drafting committee was already envisaged for the draft convention under consideration; it would consist of 15 delegations, which had already been designated, and would be presided over by a representative whose name would be suggested by the Chairman at the conclusion of the consultations taking place. In order to enable the drafting committee to focus its entire attention on the main task of drawing up the substantive articles of the draft, two or three delegations might also be designated to prepare its preamble and the Chairman himself might be instructed to prepare its final clauses, with the assistance of the Office of Legal Affairs. If there was no objection, he would take it that the Committee adopted that method of work.

It was so decided.

26. The CHAIRMAN recalled that the Committee had before it a request from Switzerland (see A/C.6/421), which desired to participate, without the right to vote, in the work of the Committee on the draft convention under consideration. It should be recalled, in that regard, that the Committee had previously agreed unanimously, at its 1039th meeting, that Switzerland should participate, without the right to vote, in its consideration of the question of special missions. Switzerland had thus been able to play an active part in the deliberations of the Committee on that question and had even submitted an amendment (A/C.6/L.766).[2] The Committee would have to take a decision on the latest request by Switzerland when the consultations among the various regional groups on the subject had been concluded.

The meeting rose at 1 p.m.

[2] See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda item 87, document A/7799, para. 179.

1408th meeting

Thursday, 4 October 1973, at 3.45 p.m.

Chairman: Mr. Sergio GONZÁLEZ GÁLVEZ (Mexico).

A/C.6/SR.1408

Organization of work

1. The CHAIRMAN, referring to the programme of work (A/C.6/420) adopted by the Committee at its 1396th meeting, said that although consultations on item 91 were still in progress there appeared to be considerable support for the view that the conference of plenipotentiaries to which this item referred should be held not in 1974 but in 1975. Consultations were continuing with a view to accelerating consideration of the item. The officers of the Committee were unable to set a firm date for taking up item 92, because it was not yet known when the Chairman of the United Nations Commission on International Trade Law would be able to introduce the report of the work of that body's sixth session. With regard to item 93, it had been specifically proposed that the United Nations Conference on Prescription (Limitation) in the International Sale of Goods should be held in New York from 17 June to 12 July 1974 (see A/9017, para. 138), in other words, immediately following the Commission's seventh session. The Committee had to decide whether it could agree to those dates.

2. In regard to item 90, all geographical groups had endorsed the suggestion that there be established a drafting committee, composed of 15 members and a chairman, on the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons set forth in chapter III of document A/8710/Rev.1. Given the complexity of the topic, the Committee should allow time for consultations. He recalled that, in the case of the Convention on Special Missions, the Committee had begun consideration of the draft by examining article 2, leaving article 1 on the definition of terms until the last. He did not think that precedent should be followed in the current case, because article 2 of the draft articles on the prevention and punishment of crimes against diplomatic agents was the most controversial of the text. Accordingly, it would be wiser to begin with article 1; since it was less controversial, discussion of it should promote the expression and crystallization of views. He had not come to any decision regarding deadlines for the submission of amendments. He felt that delegations should be free to submit amendments at any time until consideration of an article began, at which point it would be well to establish a deadline. He hoped that delegations would appreciate that during the first reading it would be necessary to take some decisions by voting. A drafting committee could not be expected to reconcile diametrically opposing views, and a vote in the Sixth Committee itself was thus the only course.

3. He had asked the Chairmen of regional groups to undertake consultations regarding the terms of Switzerland's participation in the debate on the item and if possible to complete them by the following day. He