1542nd meeting

Friday, 17 October 1975, at 10.45 a.m.

Chairman: Mr. Frank X. J. C. NJENGA (Kenya).

A/C.6/SR.1542

AGENDA ITEM 108

Report of the International Law Commission on the work of its twenty-seventh session *(continued)* (A/10010)

AGENDA ITEM 109

Succession of States in respect of treaties: report of the Secretary-General *(continued)* (A/10198 and Add.1-4, A/9610/Rev.1*)

1. Mrs. ULYANOVA (Ukrainian Soviet Socialist Republic) said that State responsibility was related to the guaranteeing of the maintenance of international peace and security. The Sixth Committee had already expressed its view on the interpretation to be given to the meaning and scope of State responsibility *inter alia* in resolution 3315 (XXIX) adopted by the General Assembly on the recommendation of the Sixth Committee. While conscious of the complexity of codifying that question, her delegation was concerned at the slow pace of work and was sorry that the International Law Commission (ILC) had so far adopted only 15 articles (see A/10010, chap. II, sect. B), in other words, only half of part 1 of the plan of the draft. Those articles related to the general theory of responsibility and laid down general principles defining the content and orientation of the draft. ILC would now have to tackle a task that might be even more complex, namely that of expressing those general principles in more precise and detailed terms. Her delegation drew the Committee's attention to paragraph 35 of the report of ILC which stated that it intended to concentrate on determining the rules which governed responsibility, maintaining a strict distinction between that task and that of stating the rules which imposed on States obligations the violations of which might be a source of responsibility. In codifying the question of responsibility, account should be taken of the evolution of the actual concept of responsibility in contemporary international law. Emphasis should therefore be placed on State responsibility in the case of serious violations such as aggression which was a crime against peace and mankind.

2. With regard to the articles which ILC had adopted at its twenty-seventh session, her delegation endorsed the choice it had made in article 10; indeed, in view of modern practice and theory the conduct of State organs should be attributed to the State even when the organ exceeded its competence. As for article 11, it delimited clearly the legal bases of State responsibility. In connexion with article 12, she observed that the State in whose territory another State committed an internationally wrongful act was responsible if it had agreed to or co-operated in the act. Article 13 merited closer study and articles 14 and 15 should be simplified and made more specific.

3. With regard to the draft articles on the succession of States in respect of matters other than treaties (*ibid.*, chap. III, sect. B), her delegation attached particular importance to article X, which had been provisionally adopted, under which a succession of States would not as such affect property, rights and interests owned by a third State.

4. Turning to the draft articles on the most-favoured-nation clause (*ibid.*, chap. IV, sect. B), she noted with satisfaction the important results obtained by ILC, due largely to the Special Rapporteur, who had studied the problem in depth on the basis of an analysis of practice and theory. The most-favoured-nation clause had existed for over a century and had become increasingly important as co-operation among States had grown. In its work, ILC should accord its rightful place to the study of the rules of international law likely to encourage co-operation and eliminate the artificial obstacles to international co-operation inherited from the cold war. Her delegation supported the idea that the most-favoured-nation clause should be one means of putting into practice the principles of the equality of States and non-discrimination. It was pleased that ILC, while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, did not wish to confine its study to the operation of the clause in that field but to extend the study to the operation of the clause in as many fields as possible. During its most recent session, ILC had raised a number of questions which it had not entirely resolved. It had wondered, *inter alia,* whether provisions on national treatment should be included in the draft articles. Her delegation was inclined to support the view of the Special Rapporteur, who deemed it essential to include provisions to that effect, because the two institutions had a number of common features. Moreover, ILC, which had decided to concentrate on formulating articles relating to the most-favoured-nation clause, had been constrained by logical consideration to formulate also two articles relating to national treatment. If it had proposed two set of articles concurrently, one dealing exclusively with the most-favoured-nation clause, the other dealing with both that clause and national treatment, its future work would have been facilitated and Governments would have been able, in their observations, to express their preference for one or other version.

5. A second question facing ILC was whether the most-favoured-nation clause conferred the right to enjoy the benefits granted within customs unions or similar associations of States. In that connexion, her delegation fully shared the view of the Special Rapporteur that the benefits granted within a customs union should not be excluded from the scope of application of the most-favoured-nation clause. Particular attention should be given to two considerations. First, it was clear from an in-depth analysis of the question that no general rule of contemporary international

* *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10.*

law tended to exclude the benefits granted within a customs union from the scope of application of the clause in question. The fact that certain agreements contained one or other exception to the most-favoured-nation clause confirmed the absence from contemporary international law of a rule to that effect; States were entirely free to include in their agreements any provision agreed on between them. Secondly, the inclusion in the draft articles of a clause tending to exclude the benefits granted within a customs union from the scope of application of the most-favoured-nation clause would considerably diminish the draft's value, would go against the trends towards the development of co-operation among States especially States with different economic and social systems, and would not meet the legitimate needs for the development of contemporary international relations.

6. Moreover, noting that ILC wished to continue studying the most-favoured-nation clause and the different levels of economic development, her delegation pointed out that the foundation of draft articles designed to solve that question should be based on a proper understanding of the objective needs of the development of economic relations and of the interests of the developing countries.

7. Turning to the question of treaties concluded between States and international organizations or between two or more international organizations, she drew attention to the preliminary nature of her observations, since the preparation of the draft articles was only in its very early stages. It appeared from chapter V of the report, devoted to that question, that ILC had decided to adhere as much as possible to the Vienna Convention on the Law of Treaties, but that in its future work it would have to base itself on a more detailed analysis of the fundamental differences between the juridical nature of States and that of international organizations. That question had become a separate topic for codification because considerable differences had been noted at the legal level between treaties concluded between States and those concluded between international organizations. It was not possible to brush aside the difficulties to which ILC had drawn attention, (particularly the article relating to full powers and powers), by simply changing the terminology used. Codification of that topic necessitated a search for solutions based on a more detailed analysis of the very nature of international organizations. Account should also be taken of practice, which was characterized specifically by the strengthening of the role of international organizations in international relations, the increase in the number of such organizations and the diversification of their nature.

8. The consideration of the report of ILC by the Sixth Committee was an important element in the contribution of the General Assembly to the codification of international law. In order to evaluate the progress achieved by ILC, it was important to analyse the results it had obtained on a given subject of codification and compare them with the task of codification with which it had been entrusted at a given moment. Such an approach to problems would make it possible to reach more correct solutions better adapted to reality.

9. She observed that ILC had devoted some time during its preceding session to consideration of its programme of work. There was no doubt that codification was a difficult task which required in-depth study of a number of questions and that the members of ILC must demonstrate the highest professional ability, but it was nevertheless true that ILC should improve its methods of work in order to utilize its capabilities to the full. It should not dissipate its efforts. By focusing its attention on a more limited number of problems, it would be able to solve them fairly rapidly so that they would not lose their topicality, as was the case with the succession of States in respect of treaties. In view of the fact that each year ILC postponed the consideration of certain questions which it had not had time to take up, her delegation proposed that it should confine itself to consideration of the topics for which there were already draft articles, namely State responsibility, the succession of States in respect of matters other than treaties, the most-favoured-nation clause and the question of treaties concluded between States and international organizations or between two or more international organizations. Taking those observations into account, her delegation was in favour of approving the report of ILC.

10. Mr. LUGOE (United Republic of Tanzania) said that in the Sixth Committee at the twenty-ninth session (1496th meeting), his delegation had commented on the slow pace that had characterized the work of ILC. Although law should meet the needs of the moment, ILC seemed to tend to put more emphasis on scholarly expositions rather than on the search for legal solutions to the problems currently confronting the international community. For instance, the study on the succession of States, with which ILC had been concerned for some time, had finally resulted in a draft convention only at the end of the period of decolonization. That raised the question of the usefulness of ILC or, at least, emphasized the need to re-examine its methods of work. The usefulness of an organ depended on its ability to produce certain results when they were needed. In the case of ILC, it would be noted also that organs had had to be created to deal with issues which would normally have been within its competence. His delegation, however, was gratified to note that ILC now recognized the need to speed up its work, as was shown by the number of topics it had considered in 1975.

11. After having explained that because of the stage which the work of ILC had reached the views of his delegation on the report under consideration must be only tentative, he said that his delegation supported the general principle formulated with regard to State responsibility. The principle set out in article 12 of the draft articles on that topic should be clarified. In fact, international relations contained many examples of confused situations on which that article could throw light. In many cases, powerful nations had committed acts in the territory of other States which were detrimental to third States and had subsequently denied their responsibility by invoking the fact that such acts had not been committed in their own territory. It was therefore important to proclaim in no uncertain terms that a State was responsibile for its own acts even if those acts had been committed in the territory of another State. Not only would such a provision help to protect the rights of sovereign States, in particular those of small nations, but it would show those who were given to such clandestine activities against other States that they were unquestionably responsible for the conduct of their organs.

12. The rule set forth in article 15 concerning the attribution to the State of the act of an insurrectional movement was based on the theory of continuity. In his delegation's view, ILC should also take account of the history of insurrectional movements and of the fact that when they were victorious they generally made a declaration concerning the responsibilities which they were prepared to assume. Moreover, ILC should establish a clear distinction between insurrectional movements and liberation movements, which could not be equated. The legitimacy of the struggle of the liberation movements derived from the provisions of the Charter of the United Nations. It should be absolutely clear that States which denied their population the right to self-determination were responsible to third States for the acts of their national liberation movements. In that connexion, ILC must also take account of the history of the national liberation movements; it would be noted that in most cases they operated from the territory of third States. Those States had frequently been threatened with retaliation and other similar acts allegedly authorized by classical international law. In view of the primacy of the legal rules set out in the Charter, it seemed that a third State which supported a people fighting to exercise its right to self-determination in accordance with the Charter incurred no responsibility with regard to colonial or racist régimes which denied that right to their people. A successful liberation movement should also not be held responsible for acts committed during its struggle. A provision to that effect should be included in the draft articles.

13. His delegation was conscious of the progress achieved by ILC in the study on the succession of States in respect of matters other than treaties, but it did not understand why its work should be confined to property situated in the territory of the successor State. In the case of the succession of States in respect of treaties, it had noted that the principle enunciated by ILC was that of a "clean-slate" with exceptions in respect of treaties relating to boundaries and other treaties relating to the rights of third States to use the territor . In that connexion, it was important to take into account the fact that when such treaties had been concluded by the predecessor State, the latter had not always had the authority to confer such rights of utilization on third States. That had been the case, for example, when the powers of sovereignty of a colonial Territory had been entrusted to an administering Power. There had been cases where treaties had been concluded by an administering Power overstepping its mandate. His delegation therefore believed that before such treaties could be considered as being succeeded to, it was essential to be certain of their validity.

14. The two main questions raised by the draft articles on the succession of States in respect of treaties were of a political nature and were outside the strictly legal mandate of ILC. It would be in keeping with past practice to convene a diplomatic conference but, in view of the difficulties of personnel and resources facing the small countries, his delegation would be in favour of the proposal being considered by the Sixth Committee.

15. Mrs. HERNANDEZ CARMONA (Cuba) thanked the Chairman of ILC for his excellent introduction of its report. Owing to lack of time, she would confine her comments to the two priority questions studied in the report, namely State responsibility and the succession of States in respect of matters other than treaties.

16. With regard to State responsibility, it had been agreed at the twenty-ninth session that for the time being the scope of the draft articles should be limited to responsibility for internationally wrongful acts (General Assembly resolution 3315 (XXIX)). ILC had therefore confined itself to establishing a general notion of responsibility, that term denoting the set of new legal relationships that might follow from an internationally wrongful act, regardless of the sector to which the rule violated, either by the act or by omission attributable to the State under international law, might belong. It was still not very clear what position ILC would take in future on that question: it could stick to the general formulas accepted to date or it could define more specifically various types of violations of international obligations of a civil, administrative and criminal nature. Her delegation believed that it was not sufficient to affirm that any internationally wrongful act entailed the international responsibility of the State; it was essential to give an objective definition of acts which generated international responsibility, since to confine oneself to enunciating a general principle was tantamount in fact to leaving to the interpreter of the law the discretionary power to decide whether an act characterized as wrongful by one of the parties entailed the international responsibility of the State in question. It was important therefore to define in the draft articles at least the categories of violations of which the universal conscience disapproved most strongly, for example those which endangered international peace and security, and to provide the necessary remedies. Among the other serious violations, mention might be made of aggression, whether of a military, political or economic nature, and, in connexion with economic aggression, it was important to place particular emphasis on economic blockade and the plundering of the natural resources of a dependent Territory. Emphasis should also be placed on violations of human rights, racial discrimination and the brutal exploitation of foreign workers. Her delegation was convinced that international responsibility was one of the areas in which the progressive development of international law had a particularly important role to play.

17. With regard to article 8, which provided for the attribution to the State of the conduct of persons acting in fact on behalf of the State, her delegation thought that subparagraph *(a)* was positive, but was concerned at its ill-defined scope. Would it be sufficient to establish that a person had acted on behalf of a State for his acts to be considered as an act of that State? For example, there was a real link between certain States and transnational corporations which made it necessary to consider the activities of those corporations beyond national boundaries as a source of responsibility for the imperialist State which protected and supported them by making available to them the forms of pressure which it possessed. Subparagraph *(b)* of article 8 went too far. In fact, the persons to whom it referred were not properly speaking officials of the State but persons exercising elements of governmental authority under exceptional circumstances which were not defined. Under that rule, in the event of an aggression, the State which was the victim would become responsible for the acts of the authorities imposed on it by the aggressor State.

18. Her delegation also had reservations regarding the attribution to the State of the conduct of organs acting outside their competence. The State did not have to assume international responsibility for acts of that nature since the victim, even if he were an alien, had the right of access to local remedies. The international responsibility of the State was entailed only with regard to damage and harm caused to aliens by acts contrary to the provisions of the treaties in force. Despite the attitude adopted by ILC in its report, her delegation continued to think that the provisions of article 10 were unacceptable. In the present-day international community, there were still relationships of subordination which meant that decolonialized countries were constantly obliged to submit to the interference of imperialist powers in their internal affairs. Furthermore, her delegation did not think that the State should protect the rights of aliens better than those of its own nationals. She approved the position on the matter adopted by ILC which was proposing to codify in the draft articles the rules governing responsibility of States for internationally wrongful acts in general, and not only in certain particular sectors such as responsibility for acts harmful to the person or property of aliens. It was not the task of the United Nations to provide special guarantees for foreign investors but to establish machinery to reinforce the sovereignty and independent development of peoples. International law could not be identified with the practices of capital-exporting countries.

19. Turning to the question of succession of States in respect of matters other than treaties, she referred to the Special Rapporteur's second report entitled "Economic and financial acquired rights and State succession",[1] which dealt with the problem of public property and public debts, concession rights and government contracts, in the light of the right of peoples to dispose of their natural resources. Nevertheless some members of ILC had considered that the topic of acquired rights was extremely controversial and that its study prematurely could only delay the work of ILC on the topic as a whole. Her delegation did not share that view; it was a problem which arose in connexion with all aspects of State succession and consideration of it could therefore not be indefinitely deferred. The articles approved to date by ILC did not present major difficulties. Article 9, which established the general principle of the passing of State property, nevertheless required some commentary. ILC had evaded the issue of State property situated outside the territory to which the succession related and had not attempted to establish rules on that subject. Furthermore, the use of the word "decided" in the reservation to which the general rule stated in article 9 was subject was rather surprising. Article 11 relating to the passing of debts owed to the State supplemented article 9, ILC having felt that the criterion of the physical situation of State property set forth in article 9 could scarcely be applied in most cases of debts owed to the State. For a debt to pass to the successor State it was sufficient that at least one of the following two conditions should be satisfied: that the debt should be owed to the predecessor State by virtue of its sovereignty over the territory to which the succession of States related, or that it should be owed by virtue of the activity of the predecessor State in such territory. Her delegation endorsed the reservations expressed by those who considered that the rule stated in article 11 would make more difficult the negotiation between a predecessor State and a successor State of an agreement concerning the passing of debts owed to the State that was based on other principles. That brought out the difference between the way in which the great imperialist Powers and the third world countries regarded international law.

20. Her delegation wished to stress the close link between succession of States in respect of treaties and succession in respect of matters other than treaties; it was in favour of a single convention in which both aspects of the succession of States would be codified on the basis of the same principles.

21. Mr. BULL (Liberia) expressed his respect and admiration for the invaluable contribution that ILC had made since its establishment to the codification and progressive development of international law. He congratulated the Chairman of ILC on his lucid introduction of the report under consideration and said that Liberia was becoming increasingly aware of the effect which international law might have upon the political and economic well-being and development of third world countries.

22. His delegation recognized the need to develop rules of international law relating to State responsibility, which could form the basis for concluding a convention on the subject. In general, the draft articles already approved appeared to be satisfactory, but ILC could define more closely the general principle stated in article 3, whereby conduct constituting a breach of an international obligation of the State was considered as an internationally wrongful act. It was undoubtedly difficult to draw up detailed rules in an area in which delicate problems, particularly of a political nature, arose. Although the Liberian Government had always asserted the right to prescribe what acts it would be liable for to private persons, it recognized that in order to promote international peace and stability, there was a need for some intervention in that area of State sovereignty. The principle of unrestricted and vicarious international responsibility of the State for the conduct of its organs when they were acting under its authority and within their competence was sound and in conformity with legal norms universally recognized in the internal laws of most modern States. His delegation also agreed with the exception to that principle, which releated to the acts of persons not acting on behalf of the State either *de facto* or *de jure*. However, a State would be held responsible for the conduct of private persons when they had been legally entrusted with the exercise of governmental authority. That rule should also be applicable to foreign envoys. With regard to article 15, he would confine himself to observing that the act of an insurrectional movement which became the new Government of a State should not be considered as an act of that State. Such a provision would be in harmony with the principle of decolonization, especially where all peaceful means of removing the colonial yoke had failed.

23. With regard to succession of States in respect of matters other than treaties, his delegation thought that the articles so far completed were satisfactory.

24. The subject of the most-favoured-nation clause was of particular interest to countries, like Liberia, which were

1 See *Yearbook of the International Law Commission, 1969*, vol. II, document A/CN.4/216/Rev.1, p. 69.

engrossed in economic development. His delegation particularly welcomed the concern of ILC to ensure a more just application of that clause to third world countries. There was no doubt that if the most-favoured-nation clause was applied alike to economically strong and weak nations, it would result in serious disadvantages for the latter. As ILC had stated in paragraph 112 of its report, while States were bound by the duty arising from the principle of non-discrimination, they were nevertheless free to grant special favours to other States. It was precisely with that aim that ILC had drafted article 16, which his delegation considered of particular interest.

25. He stressed the value of the international law seminars which ILC organized annually.

The meeting rose at 12.15 p.m.

1543rd meeting

Monday, 20 October 1975, at 10.45 a.m.

Chairman: Mr. Frank X. J. C. NJENGA (Kenya).

A/C.6/SR.1543

AGENDA ITEM 108

Report of the International Law Commission on the work of its twenty-seventh session *(continued)* (A/10010)

AGENDA ITEM 109

Succession of States in respect of treaties: report of the Secretary-General *(continued)* (A/10198 and Add.1-4, A/9610/Rev.1*)

1. Mr. RASHID (Afghanistan) congratulated the Chairman of the International Law Commission (ILC) on his excellent introduction of its report (A/10010) and said that he would confine himself to commenting on a number of the draft articles prepared by it concerning succession of States in respect of treaties (see A/9610/Rev.1, chap. II, sect. D). It would be useful to repeat the invitation to States to submit their comments and observations on the draft articles, in view of the limited number of observations and comments received thus far.

2. With regard to article 7, his delegation considered that, in the light of the wording of article 6, it was necessary to specify that the draft articles would have no retroactive effect. The inclusion of article 7 might encourage a number of States which would otherwise abstain to accede to the instrument. It was entirely unnecessary to make any reference to the Vienna Convention on the Law of Treaties,[1] which was not accepted by a sufficient number of States. Article 7 should be retained in the position next to article 6.

3. Regarding articles 11 and 12, he recalled that his delegation had already expressed its views at the twenty-eighth session (1406th meeting). He noted that a number of delegations, including those of Madagascar, Somalia and the United Republic of Tanzania, had stated they found it difficult to accept those two articles as currently worded. The categorical statements made in the current version were at variance with the evolution of contemporary international law and might have detrimental consequences for its future. As ILC itself had acknowledged in paragraph (1) of the commentary on article 11, the question of territorial treaties was a most delicate one, since such treaties were important, complex and controversial. The opinions of modern writers on the subject differed widely. His delegation shared the view that the doctrine of *rebus sic stantibus* should apply in the case of territorial treaties whenever a fundamental change in circumstances had occurred. It could be argued that the dissolution of the colonial empires in the first half of the twentieth century had brought about a fundamental change in circumstances with vast juridical implications for State boundaries. According to that line of reasoning, all agreements concerning the territorial possessions and sovereignty of the colonial Power were no longer valid. Some States, in fact, had suffered grave losses not only as a result of colonization but also as a result of decolonization, because it had allegedly not been possible to apply the doctrine of *rebus sic stantibus* with respect to them. ILC had put forward another argument based on article 62, paragraph 2, of the Vienna Convention on the Law of Treaties, to which many States had not acceded. It had also attempted to justify articles 11 and 12 by arguing that the application of the "clear-slate" principle with regard to territorial treaties might create dangerous friction between States instead of becoming an instrument for peaceful development. His delegation, however, believed that relations between neighbouring States, which otherwise might live in concord and mutual respect for each other's sovereignty, were only complicated by such considerations.

4. The question of treaties establishing boundaries from the angle of the principle of self-determination had also been considered by ILC. Its views in that regard were given in paragraph (10) of the commentary on articles 11 and 12, in a quotation from its commentary on what had become article 62 of the Vienna Convention on the Law of Treaties, which stated that the Commission had taken the view that " 'self-determination', as envisaged in the Charter of the United Nations, was an independent principle and that it

* *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10.*

1 See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/27, p. 287.