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CONTENTS

	Page
Agenda item 56:	
Report of the International Law Commission on the work of its tenth session (continued)	
Consideration of chapter III: Diplomatic intercourse and immunities (continued)	103

Chairman: Mr. Jorge CASTAÑEDA (Mexico).

AGENDA ITEM 56

Report of the International Law Commission on the work of its tenth session (A/3859) (continued)**CONSIDERATION OF CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/C.6/L.427 AND CORR.1) (continued)**

1. Mr. ROSENNE (Israel) said that since his Government's Inter-Ministerial Committee had only now commenced studying the draft articles on diplomatic intercourse and immunities (A/3859, para. 53), he obviously could not enter into any commitments regarding the adoption of the changes in domestic legislation which those articles or a convention might require. Furthermore, the statement appearing in volume VII of the *United Nations Legislative Series* ^{1/} was the only comment on the substance that he could make at that stage. He was nevertheless able to express general support for the main features of the draft, which appeared to be on the whole a sound restatement of the principles of law governing the topic, and he congratulated the Special Rapporteur, the Commission and the Secretariat for their contribution to the clarification of that branch of the law.

2. The Commission in its report (*ibid.*, para. 50) asked the General Assembly to recommend the draft articles with a view to the conclusion of a convention. Assuming that the Commission had a multilateral convention in mind, he pointed out that the draft articles were not in the form of a draft convention, since they included neither a preamble nor final clauses, an omission which was causing his Government some difficulties. That was admittedly the general practice of the International Law Commission, but that practice had in the past been subjected—apparently with good reason, considering the manifold difficulties to which it gave rise—to severe criticism. The handling of the final clauses at the United Nations Conference on the Law of the Sea at Geneva showed the justice of that criticism. Citing a new work by Mr. Jenks, ^{2/} he recalled that it had been contended that the United Nations

had introduced no major developments in legislative technique, and that, although the Office of Legal Affairs had issued a handbook of final clauses for multipartite instruments (ST/LEG/6), it was necessary to continue the efforts to improve the technique of the multipartite instrument as an effective international legislative device.

3. The absence from the draft of certain essential parts of any draft convention had several substantive consequences. It was difficult to see how legal effect could be given to the fundamental principle of reciprocity, a fact which complicated considerably the task of States in their analysis of the draft from the domestic point of view. Article 45 was equivocal: the Commission had not given guidance on the substantive issue of whether the provision for compulsory judicial settlement was essential to the general economy of the draft or whether it was an optional addendum. The Israel delegation favoured the jurisdiction of the International Court of Justice in principle, but it recognized that another point of view did exist. There was much to be said for the solution reached at Geneva, which made a differentiation in keeping with political realities.

4. The problem of reservations, which would also influence and be influenced by the problem of reciprocity, also had important political implications. The question of reservations had caused considerable difficulty at the Geneva Conference, and there was reason to fear that the absence of a reservations article would complicate the domestic examination of the draft articles. He reminded the Committee that the International Law Commission, in its report on the work of its third session (A/1858, para. 33), had recommended that organs of the United Nations should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to reservations, and that the General Assembly had adopted that recommendation in its resolution 598 (VI).

5. With reference to the action to be taken on the draft articles, he thought that the Sixth Committee was not really in a position to reach final conclusions, because the question of diplomatic intercourse and immunities was interrelated with the question of "ad hoc diplomacy" and that of consular intercourse and immunities, the study of which was not equally advanced.

6. After having given the impression that it considered the question of *ad hoc* diplomacy and that of diplomatic intercourse and immunities to be interdependent (A/3623, para. 13)—a view which apparently was shared later by the Special Rapporteur (A/CN.4/116, para. 2)—the International Law Commission appeared now to have postponed examination of the matter indefinitely (A/3859, para. 51). But the absence of recommendations on *ad hoc* diplomacy made impossible a comprehensive and systematic treatment of the topic of diplomatic intercourse and immunities.

^{1/} *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (United Nations publications, Sales No.: 58.V.3), pp. 174 ff.

^{2/} C. Wilfred Jenks, *The Common Law of Mankind* (London, Stevens and Sons, 1958), p. 189.

7. There was also a close affinity, if not legal at least pragmatic, between the question of diplomatic intercourse and immunities and that of consular intercourse and immunities. Both had the same dual quality of belonging simultaneously to the sphere of international and domestic law. Their treatment should therefore be co-ordinated. It was doubtful whether the cause of international law would be advanced by the adoption of a procedure which would compel legislative bodies and administrative organs throughout the world to take up closely interrelated topics time and time again. Before taking a final procedural decision, the Sixth Committee should be acquainted with at least the first draft on consular intercourse and immunities, in order that it might deal systematically with the three interrelated topics of diplomatic intercourse and immunities, ad hoc diplomacy and consular intercourse and immunities.

8. It would therefore be wiser to defer taking any final decision, even on the question of the desirability of drafting a convention. He was not implying that the Israel delegation was opposed in principle to the recommendation of the International Law Commission, but it doubted whether there was sufficient material before the Sixth Committee to enable it to take a final decision forthwith.

9. It was absolutely essential that at least 50 per cent of the Member States should participate in the final phase; otherwise, there would be no adequate basis for an effective codification of that complex branch of international law, with its important impact on the law and life of every country. States members of the specialized agencies which were not members of the United Nations should also be invited to participate in that final phase, just as they had been invited to the Geneva Conference.

10. In view of the budgetary difficulties which participation in international conferences imposed upon countries like Israel, only a single conference should be contemplated to deal with the three questions he had mentioned. The date set for such a conference should leave the International Law Commission time to draw up the preambles and final clauses and to complete its work on ad hoc diplomacy and consular intercourse and immunities. The General Assembly too should be allowed sufficient time to reach final decisions on the relevant recommendations of the International Law Commission.

11. With respect to the organ which should complete the text of the convention or conventions, the idea that the Sixth Committee should assume the responsibility was attractive from the budgetary and administrative point of view, but the procedure would run into a number of obstacles: such a solution would make piecemeal treatment of the three topics unavoidable; the rules of procedure of the General Assembly (A/3660) did not permit the participation of non-member States on a footing of complete equality with Member States; the agenda of the Sixth Committee would have to be such as to allow the Committee to devote itself to the work, and that could not be foreseen; the Sixth Committee would be acting contrary to its own recommendations (See annex I of the rules of procedure) and to General Assembly resolution 362 (IV); and, lastly, a number of countries might find it inconvenient to include the necessary experts in their delegations. For all those reasons, it did not seem

either possible or desirable for the Sixth Committee to assume the responsibility for completing the texts, and the proper solution would be to convene a diplomatic conference for the purpose.

12. With regard to paragraph 52 of the report, his delegation did not consider that the important question of the relations between States and international organizations could be left on the basis that, as regards most of the organizations, it was already governed by special conventions. The problem arose precisely in the sphere which was not governed by existing conventions but by the applicable principles of customary international law. Referring to the advisory opinion of the International Court of Justice on Reparation for Injuries Suffered in the Service of the United Nations ^{3/} and General Assembly resolution 365 (IV), he pointed out that the implications of recognizing the international personality of the United Nations and its capacity to bring an international claim had not been fully worked out. For instance, from the experience of his Government it appeared that there existed no adequate machinery for the examination and settlement of small claims arising out of injuries suffered by private individuals in accidents involving United Nations staff, despite the Convention on the Privileges and Immunities of the United Nations. The International Law Commission obviously could not decide any of the concrete issues which he had in mind, but it would be proper for the Commission to consider the question as a whole.

13. Mr. LIANG (Secretary of the Committee) in reply to certain comments of the representative of Israel, wished to offer some explanation of the criteria applied by the International Law Commission in deciding whether or not final clauses should be inserted in its drafts.

14. The statute of the Commission provided for codification and progressive development as two different processes. In dealing with any given subject, the Commission endeavoured to distinguish between provisions which represented codification and those constituting progressive development. Where it considered that one of its drafts belonged to the latter category, it gave such a draft the form of a draft convention with final clauses; it had done so, for example, in the case of the draft on the reduction of future statelessness.

15. The Commission had not inserted final clauses in its draft on diplomatic intercourse and immunities because it considered that draft to be a work of codification, and because it did not know to what extent States would be willing to use it for the purpose of concluding a convention. That was also the reason why it had recommended to the Assembly the solution provided for in article 23, paragraph 1 (c), of its statute, in preference to the solution in paragraph 1 (d), which it had chosen in submitting its draft articles concerning the law of the sea (A/3159, para.33). It was true that some of the texts, namely the one relating to fishing and the one relating to conservation of the living resources of the high seas, had contained final clauses, but that was because those clauses formed an integral part of the draft and constituted a means for ensuring the implementation of the substantive provisions. He pointed out in that connexion that it was decided to draw up a convention on diplomatic inter-

^{3/} I.C.J. Reports 1949, p. 174.

course and immunities, it would be necessary to avoid the unfortunate error made by the United Nations Conference on the Law of the Sea in entrusting the task of working out the final clauses, including the clauses relating to reservations, to a drafting committee established at a late stage of the work. A task of such a delicate character should be undertaken sufficiently early to ensure satisfactory results.

16. With reference to the subject of progress in legislative techniques, on which the Israel representative had cited Mr. Jenks, he recalled that, prior to the establishment of the International Law Commission, the Secretariat had submitted to the Committee for the Progressive Development of International Law and its Codification certain proposals (A/AC.10/7) along the very lines suggested by Mr. Jenks. Unfortunately, those proposals had received a very cool reception in that Committee.

17. Mr. ROSENNE (Israel) thanked Mr. Liang for his explanations. He had drawn attention to the absence of final clauses only because the Inter-Ministerial Committee which was responsible, in Israel, for studying the International Law Commission's draft was considering what changes would be necessary in Israeli legislation to permit ratification of the proposed convention, and was anxious to know to what extent reservations would be permitted at the time of ratification. It was clear that any State's ability to accept the Commission's draft would be greatly influenced by the decisions to be reached on the admissibility of reservations.

18. Mr. HSU (China) welcomed the draft articles, which seemed to him to provide a solid basis for the elaboration of a multilateral convention. If no convention were concluded, the draft articles could serve as a model for States.

19. His delegation nevertheless regretted that questions such as diplomatic asylum and the status of the diplomatic corps had not been dealt with, although it realized that the Commission had been unable to do more. It was also a matter of regret that the Commission had dealt only with permanent missions, thus excluding *ad hoc* diplomacy (itinerant envoys, diplomatic conferences and special missions), relations between States and international organizations, and the question of the privileges and immunities of those organizations.

20. In those circumstances, his delegation was gratified that the Commission had requested the Special Rapporteur to study the question of *ad hoc* diplomacy, and it welcomed the French draft resolution (A/C.6/L.427 and Corr.1).

21. It was understandable that the Commission should avoid anything which might give rise to controversy between States, but as long as it kept within its terms of reference there was no need for excessive caution. In some instances, indeed, it could help to reduce international tension by forging ahead.

22. It was also quite natural that the Commission should lean towards conservatism. The natural tendency of a jurist was to restate the existing law rather than to formulate new rules and to reconcile opposing views. But it would be wrong to overlook the fact that the Commission had also been expressly entrusted with those difficult tasks. It was sometimes said that

the law should be left to develop by itself, but the Charter made provision for the development of international law and the General Assembly had entrusted that task to the Commission.

23. Regarding the question of procedure, the General Assembly could take its time. Diplomatic relations and immunities in the narrow sense constituted a highly developed branch of law. What was required was a code in which the law was restated and conflicts reconciled. As to whether the draft should be converted into a convention and, if so, at what time, those were questions which could be tackled by the General Assembly without undue haste.

24. Mr. MONACO (Italy) recalled that, from the outset, the development of international relations had been closely connected with the establishment of permanent diplomatic missions and the recognition of a common set of legal rules protecting the person and property of the diplomat against any possible danger. But the relevant international customs which had formed were the outcome of the progressive development of practice, and consequently the rules currently applied were in no way the final word on the subject. The diplomat's legal status had undergone an even more pronounced change than diplomatic relations themselves, in consequence of the notable growth of legislation on the matter in every State. More and more the diplomat had come to be regarded as subject in principle to the general law, and the immunities which he enjoyed, and which, moreover, were based very often on courtesy or reciprocity, seemed rather to be exceptions to the general principle of the equality of all before the law.

25. It might well be asked whether the time was really opportune for the codification of the rules in force on the subject, as the international community had in the last few years been suffering from growing pains which had brought about a marked development in the network of diplomatic relations. But was it not a fact that the great work of codification of Roman law, which had undoubtedly been successful, had also been undertaken in a transitional period? At all events, the General Assembly had been of the opinion that the codification of diplomatic relations and immunities should be given priority.

26. The International Law Commission had been well advised, at the first stage of its work of codification, to deal in its draft only with permanent diplomatic missions. On the other hand, some delegations, and particularly the Government of the United States of America, would have liked the draft to take into account the principle of reciprocity, making the application of certain rules subject thereto. But although the reciprocity clause was admittedly often applied to diplomatic privileges and immunities, it was principally characteristic of bilateral agreements. In a work of codification, in other words in an international multilateral convention, the application of such a clause was very difficult and would result in the fragmentation of the multilateral agreement into a series of bilateral agreements, which would tend to defeat the very purpose sought. Further, it was difficult to envisage an instrument containing both unconditional rules and other provisions which would only be obligatory on a reciprocal basis. Consequently, his delegation felt that such a clause would be superfluous.

27. Regarding article 45 of the draft, which gave the International Court of Justice authority to deal with disputes to which the future convention might give rise, his delegation thought that the provision should be included in a separate protocol, as had been done in the case of the conventions on the law of the sea. States would then be able to ratify the convention without simultaneously committing themselves on that point.

28. As to the substance of the articles, his Government had already stated that in principle it viewed the draft favourably, and in its written observations (A/3859, annex, section 10) had indicated the changes which it would like to see made. He would therefore merely draw the Committee's attention to two individual points. In the first place, he stressed the need to include in the draft an article stating clearly that the diplomatic corps, in a given receiving State, formed a collectivity, which was sometimes required by international usage to carry out certain collective actions of special import. The second point related to article 36, which extended diplomatic privileges and immunities to the administrative and technical staff of a mission, as well as to the members of the family of a diplomatic agent. That provision was contrary to international custom and unacceptable. The privileges should be accorded only to the officials on the diplomatic list. Moreover, article 36 had only been adopted in the Commission by a relatively small majority and would probably give rise to discussion.

29. As to the action which should be taken on the draft, three solutions had been considered. The first suggestion was that the draft should be referred to the fourteenth session, at which time the Sixth Committee would consider it in detail with a view to preparing a convention for signature; that was hardly possible, since it would require considerable time. The second solution would involve recommending the draft to the General Assembly, with a view to the summoning of a special conference of plenipotentiaries in 1959 or 1960. It was to be feared, however, that—as only a few States had thus far had the time and opportunity to make their observations—that conference would prove abortive. In his delegation's view, the best solution would therefore be for the Sixth Committee to continue its consideration of the draft in 1959, and then to send the draft to Governments together with the observations made in the Committee in 1958 and 1959; that would give States time to submit their final observations, after which the calling of an international conference could prove productive. That solution would have the further advantage of allowing the International Law Commission to prepare the draft on consular relations and immunities—which would bring out the relationship between the two subjects—and to draw up the articles on *ad hoc* diplomacy which could be inserted in the present draft. In that way time would be gained and a better balanced codification achieved.

30. He proposed to refer later to the codification of the rules on relations between States and international organizations and the privileges and immunities of those organizations, which was the subject of the draft resolution submitted by France.

31. Mr. RADULSKI (Bulgaria) said that in drafting the articles on diplomatic intercourse and immunities the International Law Commission had adhered faithfully to its mandate; it had, in fact, not only codified

existing international practice but incorporated new elements, thus contributing to the progressive development of international law. Despite certain reservations with regard to it, therefore, the Bulgarian delegation acknowledged the draft's unquestioned merit.

32. In accordance with article 23, paragraph 1 (c), of its statute, the Commission had recommended the draft to the General Assembly with a view to the conclusion of a convention. The first question to be considered, therefore, was whether a convention in that field would be useful. There were a number of arguments in favour of such a convention.

33. In the first place, it was a branch of international law which was of special importance, since diplomatic relations were the normal means of co-operation between States and their development ought, according to the Charter and General Assembly resolution 1236 (XII), to be one of the objectives of the United Nations. It was essential, therefore, that the rules governing the agents responsible for the maintenance of those relations should be precise and generally applicable. But the existing texts, such as the Vienna Regulation of 1815 and the Havana Convention of 1928 were incomplete to a certain extent and inappropriate to contemporary international life. The new practices which had since grown up and the rules applied by virtue of bilateral agreements should be assembled into a single systematic and logical system. Furthermore, the application of old practices to new situations raised difficulties of interpretation, and amounted, at times, to the formation of an entirely new rule. Frequently, also, when a new problem arose it was found that there was no practice applicable to it. It was necessary, therefore, not merely to codify existing practice but also to augment it by means of a written source of law, namely, a convention.

34. His delegation felt that there was reason to hope that such a convention would be ratified, if not by all States, then at least by a very large number of States. In fact, the great majority of the States which had sent observations had expressed the view that the draft could form the basis of a convention. Most of the representatives in the Sixth Committee had expressed the same opinion. Such a convention, if ratified by the majority of States, would help reduce tension by obviating differences of interpretation, and would have a healthy effect on the relations between all States.

35. Indeed, his delegation thought that far from hindering the progressive development of international law in the matter, as some delegations had maintained, the work of codification would tend rather to give it fresh impetus by filling the existing gaps and by facilitating the development of diplomatic relations, on the basis of the equality of States, through bilateral, multilateral or regional agreements.

36. There was a second argument in favour of the conclusion of a convention on diplomatic intercourse and immunities: a convention, whether it was opened for signature by Member States directly by the General Assembly itself, or drafted by a diplomatic conference specially called for the purpose, was one of the most effective means of creating standards in international law and ensuring their application, by taking into consideration the subject matter as well as the rules of international law.

37. Lastly, a large number of Governments had recognized that the Commission's draft constituted a useful basis for the conclusion of such a convention. The Bulgarian delegation shared that view. After giving the matter detailed study, the Commission had stated in its draft the existing usage, leaving out all false interpretations. In setting forth principles it had done so in such a way as to prevent abuse. It had shown discernment in refraining from defining concepts such as those of the "members of the family" or "children" of a diplomatic official, which depended on a number of factors varying from country to country. Rigid and uniform rules in a matter which called for flexibility, and only to a certain extent for formulation, would undoubtedly have made it difficult for a great number of States to ratify the convention.

38. The draft was primarily a work of codification, but it contained a number of elements pertaining to the progressive development of international law. Thus, article 3, paragraph (e), set forth a new rule based on the principles of the United Nations Charter, and the provisions of article 13, paragraph 2, reflected the principle of the equality of States. Similarly, the exemption from social security legislation which formed the subject of article 31 was not universally practised. It was clear that the ratification of the convention based on that draft would necessitate changes in the domestic legislation of a number of countries. Where legislations conflicted, the Commission had tried to find a compromise solution which the majority of States would be able to accept without too much difficulty.

39. At the same time, the Bulgarian delegation had certain preliminary reservations to make on some of the articles in the draft. He would point out, however, that his reservations would not be comprehensive, and the fact that no reference was made to some texts did not mean that his delegation therefore approved them. It could not, for example, accept the provisions of article 7, nor those of article 45. Again, it considered that the classes listed in article 13 could be reduced by two, while paragraph 3 of article 30, which was rather obscure, could be worded more clearly. But those defects did not detract from the essential value of the draft as a basis for the conclusion of a convention.

40. His delegation believed that the Committee should adopt the Commission's recommendation that the draft

articles should be recommended with a view to the conclusion of a convention (see A/3859, para.50). In trying to secure the conclusion of such a convention, the General Assembly had two courses to choose from: either to open a convention for signature by Member States after the Sixth Committee had considered the provisions in detail, as had been done in the matter of genocide, or to convene a conference of plenipotentiaries as it had done on the subject of the law of the sea. A discussion of the text of the convention by the Sixth Committee would, of course, save considerable expenditure, but that, in his delegation's view, would be the only advantage of the first course. A discussion of that kind would require far more time than the Sixth Committee could devote thereto if it wanted to give due attention to other delicate matters on its agenda. The second alternative was preferable, since an international conference which could break up into a number of working groups and could appoint a drafting committee would probably produce a more satisfactory text and one likely to win a larger number of votes.

41. The Bulgarian delegation reserved its right to revert to certain points.

42. Mr. MADEIRA RODRIGUES (Portugal) paid a tribute to the International Law Commission and the Special Rapporteur on their valuable contribution. The draft which had resulted from their efforts offered an excellent basis for discussion, although it contained some provisions which were not wholly acceptable. The Portuguese delegation hoped that a more thorough study, in which it was perfectly willing to participate, would make it possible to formulate a more satisfactory text.

43. As to the question whether that study should take place in the Sixth Committee at the fourteenth session or at a conference of plenipotentiaries, the Portuguese delegation would defer to the view of the majority, but it felt that the Sixth Committee would find it difficult to discuss so long a draft, article by article.

44. The CHAIRMAN declared the list of speakers closed.

The meeting rose at 5.25 p.m.