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REPORT ON THE FOURTEENTH SESSION OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

by

Mr. Abdul Hakim Tabibi, Observer for the Commission

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(14 p.)

1. In accordance with the decision taken by the International Law Commission at its twenty-fourth session,[1/] I was asked by the Chairman of the Commission, Mr. Richard D. Kearney, to attend as an Observer for the Commission at the fourteenth session of the Asian-African Legal Consultative Committee during January 1973 at New Delhi.

2. The Asian-African Legal Consultative Committee met for its fourteenth regular session at New Delhi, India, from 10 to 18 January 1973. The most important question discussed among the members and observers was the law of the sea, in preparation for the forthcoming United Nations Conference on the Law of the Sea. Other subjects considered at the session were: Protection and Inviolability of Diplomatic Agents and other Persons entitled to Special Protection under International Law, Organization of Advisory Services in Foreign Offices, Law relating to International Rivers and International Sale of Goods.

3. The following member States of the Committee were represented: Egypt, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Kuwait, Malaysia, Nigeria, Nepal, Philippines, Sierra Leone, Sri Lanka, Thailand. Three countries, namely Burma, Pakistan and Syria, were not represented. Two associate members, Mauritius and the Republic of Korea, were represented. Twelve Asian-African States sent observers and nineteen observers were sent by countries outside Asia and Africa. Observers representing such international organizations as the International Law Commission, the Arab League, UNCITRAL, and UNIDROIT also participated in the meeting.

4. The proceedings were conducted in English, which is the working language of the Committee, but facilities for simultaneous interpretation were provided for French-speaking delegates and observers.

5. H.E. Dr. Nagendra Singh of the Indian delegation was elected President of the session. H.E. Hon. Mr. L.A.M. Brewah, Attorney General and Minister for Justice of Sierra Leone, was elected as Vice President. The session was inaugurated by H.E. Sardar Swaran Singh, the Minister of External Affairs of the Government of India.

6. My statement on behalf of the Commission, in line with the views of

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1/ Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 10 (A/8710/Rev.1) para. 88.

Mr. Kearney, is attached as an annex.

7. The Committee decided to hold its fifteenth session in Tokyo in January 1974, and invited the Commission to send an observer to that session, pursuant to the standing invitation already extended to the Commission.

8. In concluding, I take this opportunity to express my warmest thanks to the Secretariat of the Asian-African Legal Consultative Committee and particularly to its able Secretary-General, Mr. B. Sen, for the warm reception given to me personally and for the warm expressions made during the meeting by the members of the Committee on the achievements of the International Law Commission.

ANNEX

Statement by His Excellency Dr. Abdul Hakim Tabibi,
Observer of the International Law Commission,
at the Fourteenth Session of the
Asian-African Legal Consultative Committee

Mr. President,

1. It is a source of great pleasure for me to represent the International Law Commission before this august body in a great country, to which I am proud to serve as Ambassador and in a city with which we have great historical attachments and under a Chairman, who himself till few weeks ago was my colleague in the Commission and now as an elected Judge of the World Court.

2. I am also happy to represent the International Law Commission at the time that India is celebrating its twenty-fifth Jubilee Anniversary this month and by coincidence the General Assembly this year will observe the twenty-fifth Anniversary of the International Law Commission as well.

3. I believe that it is a good tradition that the International Law Commission and the Asian-African Legal Consultative Committee are in close contact with each other by sending observers to each other's session every year following the same noble task of development of International Law for the betterment of mankind.

4. Every year the President or a member of the Commission come before you to report about its progress of work and in the same manner receive the Chairman or the Secretary-General of your Committee in Geneva for explaining the result of the achievements of this important committee, whose members belong to two important continents of the world and whose impact for codification and development of international law is felt strongly in all international conferences.

5. The new look, which this Committee has given to the development of international law has been admitted by all including the International Law Commission. The study of your effort which was made in the field of the law of treaties by your Committee was instrumental in the success of the Vienna Conference on the Law of Treaty and I am sure that the discussion of this session and preparatory work which has been accomplished so far by your Committee in the field of the law of the sea as well as diplomatic protection will be

the Peace and Security of mankind. This is a clear balance sheet in favour of the Commission, in whose work in the last twenty-five years more than sixty elected jurists from forty-three countries have participated and many of its members including three members of the present Commission including our President have been elected as Judges of the International Court of Justice and perhaps now one-half of the Court Judges are former members of the Commission.

8. It was with this background that the International Law Commission met last year in Geneva from 2 May to 7 July of 1972 and discussed various topics.

9. The agenda that faced the International Law Commission at the first meeting of the twenty-fourth session on 2 May 1972 was a formidable one. The twenty-third session in 1971, despite an extension to fourteen weeks in place of the usual ten, has been able to complete work on the draft articles on the topic Relations of States with International Organizations" only by concentrating on that subject to the substantial exclusion of other topics.

10. As a consequence the Commission had not made any real progress on the other active subjects before it, which included State Succession in respect of treaties and in respect of matters other than treaties, as divided between two Special Rapporteurs, State responsibility, the most-favoured-nation clause, and treaty law of international organisations. In addition, the Commission had before it another piece of unfinished business, the review of its long-term program of work in light of the wide-ranging and thoughtful "Survey of International Law" which had been prepared in 1971 by the United Nations Secretariat at the Commission's request.

11. Despite this formidable array of unfinished endeavours, the Commission in its 1971 Report advised the General Assembly that, if requested to do so, it would, during the course of its 1972 session, prepare a set of draft articles to provide greater protection to diplomatic agents and other persons entitled to special protection under international law against such crimes as murder, kidnapping, and grievous assaults.

12. The question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law was also added to the pending list of active topics. The list was completed by the question of what priority the Commission should give to the law of the non-navigational uses of international watercourses, a subject which had been referred to it in 1971 by General Assembly Resolution 2780, a subject of interest to this Committee.

13. The Special Rapporteurs for the two aspects of State succession, for State responsibility and for the most-favoured-nation clause all had draft articles waiting for discussion by the Commission, and there was also a preliminary paper on treaties and international organisations for consideration. In addition Mr. Kearney, this year's Chairman of the Commission, had prepared a set of draft articles on the protection of diplomatic agents and other specially protected persons, which he had circulated to members prior to the session.

14. Two special circumstances, however, permitted almost immediate agreement on the program of work. The possibility had developed that the Special Rapporteur for Succession of States to Treaties might not be with the Commission for future session. This meant that every effort had to be made to complete the first reading of the draft articles on this subject. Otherwise, the extensive preparatory work and discussions that had gone on during the past five years might well go down the drain.

15. The second circumstance was that some members of the Commission had offered to deal with the protection of diplomats during its 1972 session. It is true that in making its proposal in the 1971 Report, the Commission had anticipated the problem, and some discussion had taken place regarding the establishment of a small working group to produce the set of draft articles.

16. The general debate on protection of diplomats revealed a greater variance of views on the subject. First, there was some objection to the narrowness of the topic, coupled with a proposal that terrorist activities in general be taken up. Other objections were directed to the proposed method of work on the ground that the need for urgent action was not sufficient to justify abandonment of the Commission's time-tested practice of appointing a Special Rapporteur who would be able to make a thorough-going investigation of the subject. These objections were expressed principally by members who were concerned with upholding the theory of "political crimes" and the principle of territorial asylum.

17. Some members raised doubts regarding the utility of producing draft articles. In view of the manifold obstacles to curbing terrorist activities, they thought it unlikely that the incidence of violent crimes directed against diplomatic agents as such could be substantially reduced through the medium of an international agreement.

18. A majority of members favoured an effort by the Commission to produce during the twenty-fourth session a set of draft articles limited to persons entitled to special protection under international law and recognised that a working group afforded the only feasible means to achieve this result.

19. As a result the working group produced a set of twelve draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons. These articles were reviewed at Commission meetings from 21 to 27 June. Discussion centered largely upon the fact that the articles did not preserve the principle of territorial asylum for offences prescribed under the articles.

20. A number of members argued strongly that when these prescribed offences constituted "political crimes" a right of asylum should be maintained. A majority of the Commission, however, adhered to the position that the nature of these offences was such that they could not and should not be considered "political crimes".

21. On the basis of the discussion, the working group made a number of revisions in the draft articles. After further debate, the revised articles were adopted for submission to the General Assembly and to governments for comment. In outlining the considerations that led to the adoption of the articles the Commission pointed out that:

> ..... attacks against diplomatic agents and other persons entitled to special protection under international law not only gravely disrupt the very mechanism designed to effectuate international co-operation for the safeguarding of peace, the strengthening of international security and the promotion of the general welfare of nations but also prevent the carrying out and fulfillment of the purposes and the principles of the Charter of the United Nations .....

The Commission then went on to state:

> Specifically, the draft seeks to ensure that safe-havens will no longer be available to a person as to whom there are grounds to believe that he has committed serious offences against internationally protected persons .....

These internationally protected persons have been broadly defined in article 1 of the draft articles. A head of state or a head of government and companying family members are included whenever they are in a foreign state. The Commission makes clear in its commentary that "whenever" includes all types of foreign visits whether "official, unofficial or private". The Commission considered that this broad requirement for protection was called for under customary international law but that the law had not yet reached the point of requiring similar protection for all persons of cabinet rank, even though the law was

moving in that direction.

22. In defining other "internationally protected persons", the Commission considered whether to be specific by referring to categories of persons accorded inviolability or protection by various international instruments, such as Articles 29 or 37 of the Vienna Convention on Diplomatic Relations and Article 40 of the Vienna Convention on Consular Relations, or to adopt a general formula. The decision was in favour of a general formula as affording the broadest coverage.

23. In article 2 the basic acts prescribed are likewise set forth in broad language and in two broad categories: (a) a violent attack upon the person or liberty of an internationally-protected person and (b) a violent attack upon his official premises or private accommodation that is likely to to endanger his person or liberty. Article 2 requires each State Party to make "the intentional commission, regardless of motive ..." of such attacks "... a crime under its internal law, whether the commission of the crime occurs within or outside of its territory."

24. Possibly the most important feature of article 2 is the requirement that the described offences be made crimes punishable under the law of a each State Party regardless of where the crime is committed.

25. Article 6 requires that a State Party which has found an alleged offender in its territory shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

26. Article 7 contains a serious of provisions intended to simplify the requirements for extradition among states party in respect of crimes covered by the draft articles.

27. Articles 6 and 7 are quite similar to the provisions adopted in the Hague and Montreal Conventions to combat aerial hijacking and other offences against the safety of civil aviation.

28. The draft articles call for a series of notifications beginning in article 4 with a "wanted fugitive" notification to all States Party if the state in which an article 2 crime has been committed believes an alleged offender has fled its jurisdiction, followed by the notification that the fugitive has

been found under article 5, and completed in article 11 by a requirement that the state party in which proceedings against an alleged offender are carried out shall advise the Secretary-General of the United Nations as to the results of the proceedings for transmission to the other states party.

29. Also scattered through the articles are a series of provisions to safeguard the rights of the "alleged offender", the first of which is the definition of the term, requiring "grounds to believe that he has committed one or more of .... the article 2 crimes. Under article 5 an alleged offender is entitled upon apprehension to communicate immediately with the nearest appropriate representative of his State of nationality and to be visited by a representative of that State. Article 8 is concerned solely with this problem and requires that the alleged offender ...."be guaranteed fair treatment at all stages of the proceedings"...

30. The set of draft articles concludes with alternative choices of machinery to settle disputes arising out of the application or interpretation of the articles. These draft articles were considered by the last General Assembly and it was decided that a convention on the line of the International Law Commission draft should be concluded during the forthcoming session of the General Assembly.

31. The greater portion of the twenty-fourth session was devoted to the 31 articles on succession of States in respect of treaties. So, the Commission considered and finalized the final work of Sir Humphrey Waldock during the last session because of his candidature to the International Court of Justice and we could say that Sir Humphrey by submitting his last scholarly contribution as Rapporteur after the work on the law of treaties has served indeed the community of nations as a true scholar and a great jurist. I say this and I bow to him; although my own personal view as an Asian Jurist does not coincide with him on some articles of the draft and my views are in the records of the Commission as well as the General Assembly.

32. Article 1 on scope provides that the articles "apply to the effects of succession of States in respect of treaties between States". This formulation has a restriction additional to the assertion of the Vienna Convention that it "applies to treaties between States" thus excluding subjects of international law other than States. Article 1 of the articles on Succession not only excludes succession of subjects of international law other than States, but also excludes succession of governments.

33. Article 2 states the meanings of terms, some of which, such as "ratification", "acceptance" and "approval", "reservation", "contracting State", and "party" have identical definitions in the Vienna Convention on the law of treaties.

34. Article 7, the first rule dealing with problems arising specifically in a succession context, declares that a devolution agreement cannot of itself transfer treaty rights and obligations to the successor State and that the draft articles govern the consequences of a succession of States with regard to treaty rights and obligations. The article could be regarded as a specific application of article 34 of the Vienna Convention.

35. Article 8 deals with a situation similar to Article 7, the case of a successor State that makes a unilateral declaration that it proposes to continue the predecessor State's treaties in force. The same rule as in article 7 is laid down for this situation.

36. Article 10 on transfer of territory, constituting the whole of Part II, states one of the principles in the field of succession that is universally accepted. Where territory is transferred from one State to another the successor State's treaties begin to apply and the predecessor State's treaties cease to apply upon the date of the succession, a principle generally characterized as "the moving treaty frontiers rule".

37. The series of articles on newly-independent States begins by laying down in article 11 which, at first glance, appears to be a broadly formulated expression of the "clean slate rule" to the effect that "subject to the provisions of the present articles ...." such a State is"not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that ...."the treaty applied to its territory prior to independence. In its introduction to the draft articles, however, the Commission has made clear that "the so-called clean slate principle .... is very far from normally bringing about a total rupture in the treaty relations of a territory which emerges as a newly independent State."

38. A series of articles on multilateral treaties (articles 12 through 18) specifies a variety of legal consequences that survive the fact of a succession. Article 12 lays down the basic principle that the newly-independent State has the right to become a party to a multilateral convention applying in its territory prior to the convention by a notification of succession.

39. The general rule regarding succession to bilateral treaties in article 19 is substantially different from that formulated for multilateral treaties. It is only in this treaty area, which is from the colonial times and sometimes contrary to self-determination of the people of Asia-Africa and Latin America which requires careful consideration of this Committee. While the legal nexus remains an essential, it here applies, for obvious reasons, only to treaties in force in the successor's territory on the date of succession. There is no option. It is necessary that both sides expressly agree to keep the treaty in force. However, the possibility is held out that "... by reason of their conduct they are to be considered as having so agreed".

40. The extent to which newly-independent States, upon attaining their independence, issued declarations maintaining all or part of the treaties previously applicable to their territories in effect on a provisional basis, usually subject to a requirement of reciprocity and until the expiration of a stated time period, and the complexity of the consequences of their declarations led the Commission to decide that separate articles were needed to deal with provisional application.

41. The final rule specifically dealing with newly-independent States takes up the complications that arise when the State, as was true of Nigeria or Malaysia, is composed of two or more territories that had differing treaty regimes before independence. The article requires that any treaty continued in force under article 12 through 21 should be applicable to the entire territory of the new State, unless restricted to its original area of applicability by the party or parties whose agreement is required or because the broader application would be incompatible with the treaty's object or purpose or, in permutation of the doctrine of rebus sic stantibus, combining the territories radically changes the conditions for executing the treaty.

42. Article 26 deals with the uniting of existing States into one State, a new topic which is more complicated than the combining of territories. The commentary goes into the question of what the act of uniting means and points out that the essential end-product is a State and consequently that such partial or "hybrid" mergers as the European Economic Community or Benelux do not meet the requirement. While anticipating the possibility of a substantial number of such unifications in the future, the Commission found the 1958 union of Egypt and Syria and that of Tanzania in 1964 as the major modern examples.

43. The reverse of the coin is found in article 27 on dissolution of States. Treaties in force in the original State remain in effect in each State emerging from the dissolution unless the treaty originally applied only to a particular part of the territory of the predecessor State. If that specific territory has become a State, then the treaty applies only in that State. The same qualifications are made as are laid down in articles 25 and 26.

44. Article 28 deals with two distinct problems and might well have been two separate articles. The first problem is a general one: What is the treaty position of a State a part of the territory of which has become a separate State? Paragraph 1 of the article provides that treaties in force prior to the separation continue to apply in the diminished territory unless the parties agree otherwise or if the treaty was intended to apply only to the lost territory or the loss of territory gives rise to a radical transformation of the treaty rights and obligations. The formulation raises no problem. Paragraph 2, however, deals with the successor State and provides that it should be treated as a newly independent State so that the rules of articles 12 through 21 will be applied. This formulation raises questions, particularly as modern state practice is limited to the separation of Singapore from Malaysia and the Irish Free State from the United Kingdom.

45. Part V deals with boundary regimes or other regimes established by a treaty. Article 29 lays down the simple and direct requirement that:

"A succession of states shall not as such affect:

(a) A boundary established by a treaty; or

(b) Obligations and rights established by a treaty and relating to the regime of a boundary."

46. In its commentary the Commission discusses at length the question whether the rule should be framed in terms of succession to the treaty or to the boundary settlement as it exists in itself, consequent upon the operation of the treaty provisions. Article 62 of the Vienna Convention bars use of the rebus sic stantibus principle as "a ground for terminating or withdrawing from a treaty .... if the treaty establishes a boundary...." The Commission considered that this formulation was not a barrier to a broader concept in the case of succession, because what is involved is not a challenge to the continuing validity of a treaty but "... the obligations and rights which devolve upon a successor State". The article was consequently formulated upon the understanding that the successor State succeeded to the boundary itself and to the regime of that boundary, which would include "ancillary provisions intended to form a continuing part of the boundary regime".

47. Article 30 applies the basic rule of article 29 to other territorial regimes established by treaty. It is a considerably more complicated article, however, as such territorial regimes may give rise to rights for the successor States and obligations on the part of another State, or obligations for the successor State and rights for another State.

48. Both articles 29 and 30 are limited strictly to the effects of a succession of States and have no bearing upon whether a boundary or territorial regime is subject to attack upon other legal grounds particularly the right of self-determination or the rule of rebus sic stantibus, and my own views on these two articles differ from the views of the Special Rapporteur and the same will be found in the records of the Commission and the General Assembly.

49. The set of articles concludes with a provision that they do not prejudge any questions regarding military occupation, international responsibility of States, or hostilities between States.

50. One additional action of the Commission should be mentioned. The subject of uses of international watercourses was referred to the Commission by the General Assembly at its twenty-sixth session. In view of the complexity and urgency of the problems involved in the pollution of such watercourses, the Commission requested the Secretariat to concentrate on preparing studies in this field.

51. In addition, the Commission held a memorial lecture for the memory of one of its eldest members, Gilberto Amado, who passed away two years ago, and invited one of the Judges of the International Court of Justice, Judge Eduardo Jiménez de Aréchaga, a former member of the International Law Commission, to deliver a lecture which will be printed and sent to the Secretariat of the Committee very soon.

52. The International Law Seminar, as usual, was also held in Geneva with participation of young jurists from all parts of the world and provided an opportunity for an exchange of views between members of the Commission and young jurists. The Commission was indeed happy to receive Mr. B. Sen as representative of the Committee and heard his scholarly report. The Commission is looking forward at its next session in Geneva to receive your representative once more to benefit from his observations and report.