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CONTENTS

Chairman: Mr. Constantine EUSTATHIADES (Greece).

AGENDA ITEM 76

Report of the International Law Commission on the work of its fourteenth session (A/5209, A/C.6/L.498) (continued)

1. Mr. BAYONA (Colombia) expressed his delegation's satisfaction at the International Law Commission's decision to consider the validity and duration of treaties at its fifteenth session (A/5209, para. 65). The rules of treaty law were so closely interrelated that Governments would undoubtedly find it easier to analyse the subject after draft articles had been prepared covering all its aspects.

2. The report of the Commission now under consideration included the draft articles on the conclusion, entry into force and registration of treaties (A/5209, chap. II). Reserving the Colombian Government's right to submit in due course such observations as it deemed necessary, his delegation wished to comment briefly on those draft articles.

3. Like other branches of international law, the law of treaties and its technique had been affected by the recent transformations in the international community—the growing number of States, the diversity of matters requiring international regulation, and even the greater speed of events. Within the scope of the Commission's purposes—the codification of existing practice and the formulation of new legal rules adapted to the present state of international society, it had done a comprehensive piece of work.

4. Definition was a very difficult task. Some of the definitions in article 1 were open to the formal objection that they included the words they were intended to define. As for the definition of "treaty" in paragraph 1 (a), although his delegation had noted the interesting arguments put forward in the commentary and considered the limiting effect of paragraph 1 (b) defining a "treaty in simplified form", it still feared the consequences of using the word "treaty" as a generic term, in view of the clear distinction which had been maintained for many years in the domestic law of States between the words "treaty", "convention", "exchange of notes", "agreed minute", and the like. The acts defined in paragraph 1 (d)—signature, ratification, accession, acceptance and approval—should be treated separately in closer accord with the provisions of articles 10-16.

5. His delegation was also concerned about the scope of the words "other subjects of international law" in the definition of the word "treaty" in article 1, para. 1 (a) especially since according to paragraph (8) of the commentary the Commission intended the words to cover "other international entities, such as insurgents which may in some circumstances enter into treaties". In the discussions in the Commission it had been argued that in theory insurgents did not possess jus contrahendi in international law but that, by virtue of custom, treaties concluded by some insurgents had been accepted as valid; and that if insurgents were recognized as subjects of international law, they would acquire the capacity to enter into treaties. His delegation held that such an approach might lead to serious conflicts. As Mr. Amado had said, the capacity to conclude treaties was vested in every sovereign and independent State, because the jus contrahendi was an attribute of independence. If that fundamental principle were adopted, a theory which accepted insurgents as subjects of international law having the capacity to conclude treaties was manifestly deficient. Paragraph (2) of the commentary on draft article 3 referred to "an insurgent community to which a measure of recognition has been accorded": recognition was itself a serious problem which would give rise to differences of view. In any event, as the draft articles from article 4 onwards dealt with the conclusion of treaties by States only there was no need to mention the capacity of "other subjects of international law".

6. Although his delegation agreed that the capacity of subjects other than States to conclude treaties should be clearly specified in the draft articles, it was not satisfied with the wording of articles 1 and 3. It shared the misgivings voiced by the secretary of the Commission concerning the use of terms such as "subjects of international law" which, while proper in theory, might be considered unacceptable by States. The use of the term was not required to establish the Holy See's capacity to conclude treaties; as Mr. Bartos had said at the 669th meeting of the International Law Commission, the international juridical personality of the Holy See, whether considered as the Vatican State or as a spiritual Power, was generally acknowledged. Moreover, in recent practice, the Holy See had certainly been included in the list of States invited by the United Nations to participate in such important conventions as the Conventions on the Law of the Sea[1] and the Vienna Convention on Diplomatic Relations.[2]

7. Another controversial problem was the designation of the States which might participate in treaties. Articles 8, 9 and 13 were based on current practice

[1] United Nations Conference on the Law of the Sea, Official Records, Volume II: Plenary Meetings (United Nations publication, Sales No.: 58.V.4, Vol.II), Annexes, pp. 132-143.

[2] United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Volume II: Annexes (United Nations publication, Sales No.: 62.X.1).

and faithfully reflected the evolution of the law, especially with respect to the part played by international organizations in the conclusion of treaties. Because the second half of article 8, paragraph 1 was in accord with modern procedures, it should be retained. Nevertheless, in determining the participation of States in a treaty, it was essential to consider the purposes of the treaty, its subject matter, and the intention towards the treaty provisions shown by the State wishing to participate. Such circumstances could be determined only by the contracting parties, or by the competent organs of international organizations in accordance with their constituent instruments. In that connexion it was uncertain whether the definition of "general multilateral treaty" in article 1, paragraph 1 (c) would be really useful in applying the rules governing the various categories of treaties. For example, it was not clear whether that definition included an agreement concerning a primary product such as sugar, in which all States had an interest as consumers or producers.

8. It was not necessary to go thoroughly into the history of that period of debate about reservations which had begun in 1951 in connexion with the Convention on Genocide (General Assembly resolution 260 (III))—a period which some authors had labelled an era of genuine legal anarchy. The issue had been dealt with in the International Court of Justice, the International Law Commission, and the General Assembly; concern had also been aroused in the Latin American area, where rules juridically developed by the continent and generally accepted in the region had been projected outside the region so that they had been converted into universally applicable rules. In that way two great legal currents had been polarized at a given moment. One school of thought had supported the principle of unanimity as a prerequisite to the acceptance of reservations, and the other had defended the flexible procedure, which in substance had been nothing more than the procedure enshrined in the so-called pan-American rule.

9. The draft articles on reservations were almost entirely correct in their interpretation of existing requirements. At present there were two currents of legal thought, the first maintaining the principle of unanimity and the second the more flexible procedure of the pan-American rule. As the distinguished Colombian authority on international law, Mr. Caicedo Castilla, had said, in commenting on the outcome of the third session of the Inter-American Council of Jurists, the application of the pan-American rule by the American nations for the past twenty-five years had not given rise to any difficulties in practice; the rule respected the right of the State to submit reservations and its right to be free of international obligations unless it consented to be bound. It was also the most convenient rule, since it facilitated the conclusion of collective agreements and allowed every State to participate in general treaties without prejudice to its interests. It was, at the present time, the rule most favourable to universality.

10. At the fourth session of the Inter-American Council of Jurists at Santiago in 1959,[3] the Colombian delegation had submitted draft rules governing the deposit in the Pan American Union of inter-American treaties and conventions and the effect of reservations thereto. Those draft rules and the draft resolution submitted by the Panamanian delegation had been the principal working documents and had furnished the basis for resolution X[4] adopted by the session; that resolution had constituted a further ratification by the great majority of American States of the so-called pan-American rule.

11. Because several of the previous speakers had expressed a preference for rules on reservations which favoured the widest possible participation of States in treaties, the statement made at Santiago by the Colombian delegation when it submitted the aforementioned draft rules seemed worth repeating; namely, that it wished to stress that its principal aim was to lay down broad and flexible rules for reservation formulas, without running the grave risk involved in seeking unanimous acceptance of reservations; in that way ratification of conventions by the largest possible number of States would be achieved, and at the same time rules would be laid down to regulate the effects of reservations and of their acceptance and rejection in as clear and precise a form as possible.

12. It was against that background and without overlooking the differences between a regional presentation of the problem and the world consideration of it that his Government would approach the review of the articles on reservations included in the draft submitted by the International Law Commission.

13. His delegation supported the Commission's decisions concerning its future work, and would vote for any resolution designed to improve its working conditions. He congratulated the Commission on the high quality of its work and its very valuable contribution to the codification and development of international law.

14. Mr. QUINTERO (Panama) noted that, in accordance with General Assembly resolution 1686 (XVI), the International Law Commission had agreed to limit its future programme of work to three main topics and four additional topics of more limited scope. The priority of the four minor topics, which had been established by a Committee (A/5209, paras. 59 and 60), was entirely correct. For the three main topics, however, the Commission had apparently felt constrained to follow the order laid down in resolution 1686 (XVI). His delegation believed that the Commission should determine the priority to be given each of the three main topics, and should be free to replace or defer any of them, without reference to the demands of other bodies. Those representatives who had expressed veiled criticism of the Commission's efficiency because it had taken fourteen years to prepare part I of the draft articles on the law of treaties should remember that the Commission's attention had frequently been diverted from the law of treaties during that period by other tasks which it had been required to undertake. The fact that the Commission had felt itself obliged to follow the order of topics laid down in resolution 1686 (XVI) might hinder and delay its work, since the topic of State responsibility, because of its political and economic implications, would be very difficult to handle.

15. The topic of State responsibility was extraordinarily important, but radical differences of opinion had been expressed in the Commission concerning the form which the study of the topic should take, and

3/ Held 24 August—9 September.

4/ Resolution X—Reservations to Multilateral Treaties, Final Act of the Fourth Meeting of the Inter-American Council of Jurists, (Washington Pan American Union, 1959), p. 29.

those differences would increase as the study proceeded. According to the traditional concept, the topic of State responsibility was limited to responsibility for damages caused to aliens. The other approach dealt with much more complex and vital considerations. However, some of the novel aspects of the topic were not entirely clear and had not been understood or accepted by certain groups of publicists. Thus it was not possible at present to systematize and codify the new aspects of the topic. He did not agree, however, that the Commission should therefore confine its work to the codification of traditional principles and practice. That would merely give a false impression of the real nature of the problem and would sanctify norms that impeded the natural development of many peoples and nations. He therefore believed that the Commission should postpone the final study of State responsibility and give priority to other less controversial topics, such as succession of States and Governments.

16. With respect to that topic, the report indicated some initial differences among the members of the Commission. Some members considered that the succession of States and of Governments comprised two distinct questions, while others considered that it was not always easy to draw a distinction between the two. In his delegation's view, the confusion between the two questions arose mainly from the confusion which some publicists had sought to establish between the concepts of State and of Government. In the nineteenth century and at the beginning of the present century some European authors had contended that, although there was a basic theoretical distinction between State and Government, in practice the two entities were indistinguishable. For those theorists the State was only a group of men holding power in a political society. In his view, that conception of the State was dangerous. The contemporary State was not only a sovereign legal entity and a political and territorial society, but also a remarkably popular organization in the sense that the people were the essential element in it and necessarily played a fundamental part in its administration. The Government was only the instrument through which the State regularly acted.

17. To reach a just and correct solution of the problem of succession of States and Governments, it was essential that a proper approach should be made to the distinction between the two concepts. It would be unfortunate if provisions which ought to be carefully distinguished and separated were confused. However, the competence of the members of the Commission undoubtedly guaranteed that the problem would be treated correctly. The topic was vitally important because of the large number of new States and because of the new forms of government which had been established in recent years.

18. The four additional topics did not raise as many difficulties as the three main topics, and his delegation hoped that they would be settled without intense and prolonged controversy.

19. Turning to the draft articles on the law of treaties (A/5209, chap. II), he expressed approval of the division of the subject into three parts and the subdivision of part I into five sections. Although academically the juxtaposition of the mechanical and procedural function of correcting errors and the very important functions of depositaries was unfortunate, the arrangement was justified by the practical consideration that in certain cases the depositary played a part in the correction of errors. The Commission's decision to prepare draft articles capable of serving as a basis for a multilateral convention was also commendable.

20. Some of the definitions in article 1 were circular. Moreover, in paragraph 1 (d) "signature" was mistakenly defined, like "ratification", "accession", "acceptance" and "approval", as an "act... whereby a State establishes on the international plane its consent to be bound by a treaty". Notwithstanding the qualifying sentence which followed the definition, he disapproved of the inclusion of "signature" among the acts whereby a State expressed its consent to be bound: in contemporary international law ratification, not signature, expressed the consent of the State. In any event, signature as authentication would be the rule; consent by signature would be the rare exception. Several judicial decisions supported that view. "Acceptance", "approval" and "accession" were merely forms of ratification.

21. The Commission had not succeeded in distinguishing between "treaty in simplified form" and "formal treaty". However, it had wisely not adopted the proposition of Charles Rousseau and other text-writers that the existence or absence of ratification was the sole valid legal criterion by which formal treaties and treaties in simplified form could be distinguished. The Commission should prepare a revised version of article 1 establishing a distinction between the two forms of treaties.

22. The drafting of the two future groups of draft articles on the law of treaties would be an extremely arduous task, primarily because of the survival of traditional concepts of international law which sprang from or promoted war, aggression, exploitation and robbery. The traditional school glorified the principle pacta sunt servanda without reservation, and depreciated the rebus sic stantibus clause. In his delegation's view, contemporary international law should not unconditionally sanctify anachronistic propositions; on the contrary, it should replace them with more just and equitable principles. Freely-concluded treaties establishing equitable and just relations should be scrupulously observed; but treaties which were the product of coercion and bad faith ought not to be clothed in sanctity. Nor was it tolerable to attribute perpetual validity to monstrous instruments called treaties, which had been imposed by great Powers on weak countries suffering from internal disturbances. Contemporary international law would fall into disrepute if it admitted the unconditional validity of instruments of that type, which could have been established only in an era of unrestrained colonialism now approaching its end.

23. Similarly, another obsolete concept of traditional international law was the validity of treaties obtained by extortion or violence, especially violence or the threat of violence in its most brutal form—war. In that connexion the Commission would have to take into account not only the realities of contemporary society but also existing legal provisions such as the United Nations Charter, which condemned the threat or use of force against the territorial integrity or political independence of any State.

24. Mr. NEDBAILO (Ukrainian Soviet Socialist Republic) said that the International Law Commission had done useful work at its fourteenth session. Its Chairman had rightly pointed out (740th meeting) that it had paid particular attention to the link between international law and contemporary life, and to the need

to alter the rules of law to meet the requirements of the modern era, especially peaceful coexistence between States with different social and economic systems. The session had also been particularly significant because of the importance of the topic of the law of treaties. Modern international law was in essence treaty law, and treaties were always the result of some form of negotiation, which in turn was the most effective means of settling disputes peacefully.

25. Nevertheless, that was not the only important aspect of treaty-making. Treaties defined the rights and obligations of States and represented the concerted will of States to establish and amend the rules and principles governing international relations. Multilateral treaties were therefore the best method and form for renewing and perfecting the norms of international law. The Brazilian representative had rightly said that the codification of the law of treaties far exceeded the bounds of the significance and role of the treaty itself, and affected the progressive development of many other branches of international law. It was quite obvious, however, that a treaty fulfilled its role as an instrument of peace only if it coincided with the basic principles of modern international law. States concluding treaties must take those basic principles into account; to ignore the requirements of the Charter for maintaining friendly relations and co-operation among nations could only lead to the conclusion of treaties having no real legal force. Unfortunately certain inequitable treaties still existed in the practice of some countries.

26. The Sixth Committee's discussion of the Commission's reports at the fifteenth and sixteenth sessions of the General Assembly had helped the Commission to produce some draft articles on the law of treaties (A/5209, chap. II) and to decide to change its approach to the study of State responsibility. Nevertheless, much of the work on those two topics still remained to be done, and the Sixth Committee's current discussion would facilitate the Commission's task. Thus he believed that the Commission could not ignore the existence of inequitable treaties; it should disclose the form taken by such treaties and study methods of abolishing them, particularly because of the threat to peace and to friendly international relations which they undoubtedly represented. Its study might eventually take the form of articles designed to secure the principles of free will and equal rights in international relations.

27. The problem was more complex than it seemed at first sight, since in modern times inequitable treaties were not only those which established an open inequality between the rights and obligations of the parties. Treaties which were formally equitable might, for example, damage the economically weaker State and result in its economic subjugation to another. Thus agreements under which foreign companies acquired rights over the natural resources of a country and paid the rightful owners an infinitesimal proportion of the profits hampered all efforts to accelerate the development of the less-developed countries and were therefore intolerable. Furthermore, certain apparently equitable treaties imposed political disadvantages on one party, such as the establishment of military bases on its territory. Many new States were anxious to rid themselves of the military basis of the former metropolitan State but could not do so because of an inequitable treaty. Accordingly it was not enough for a treaty to be formally correct, and the Commission might enumerate in one or more draft articles the indications of inequity which would render a treaty invalid.

28. A special danger of inequitable agreements was that they constituted a form of neo-colonialism. Now that colonialism was everywhere retreating before national liberation movements, the former metropolitan States were trying to retain the advantages they had enjoyed by perpetuating their hold on newly-independent States through inequitable agreements. In doing so they were hampering the full realization of the self-determination of nations and the consolidation of the sovereignty of new States. The United Nations was therefore fully justified in condemning the practice, declaring legal any attempts by States to free themselves of unjust obligations and calling upon all States to refrain from concluding inequitable treaties. The Commission's task was to pay special attention to criteria for the validity of treaties, which would fully comply with the principle of equal rights and free will in treaty relations. The quality of the draft articles already prepared, and the statement of principle in the last sentence of paragraph 17 of the report (A/5209), gave grounds for hope that the Commission would take its responsibilities in that connexion seriously.

29. It was gratifying to note that the Commission seemed to have set aside the narrow approach to State responsibility prevailing at the fifteenth session of the General Assembly, limiting it to the responsibility of a State for damages caused in its territory to the person or property of an alien. The Ukrainian delegation considered that the broader approach arising from the general principles of international law on the maintenance of international peace and security should embrace State responsibility for breaches of world peace; for planning, preparing, declaring and conducting aggressive and colonial wars; for war propaganda; and for acts of aggression.

30. The question of the succession of States and Governments was also urgent, since it was linked with the abolition of colonialism and the creation of new States. The Commission should study the opinions and practice of new States in the matter, paying particular attention to their views on the right to administer their natural resources, on their management of their assets abroad, and on the inequitable treaties which had been imposed on them. The whole topic should be considered from the point of view of the need to provide stronger safeguards for the sovereignty of States.

31. Mr. JACOVIDES (Cyprus) paid tribute to the work done by the International Law Commission at its fourteenth session, and observed that the report (A/5209) effectively refuted the pessimistic arguments of those who had doubted the wisdom of enlarging the Commission's membership. With regard to chapter II of the report, his delegation welcomed the progress made in codifying the law of treaties, and was glad to note that the Commission had sought not only to codify the modern rules of international law, but also to inject elements of its progressive development into the articles. With regard to the presentation of the draft, his delegation had no objection to the division of the articles into three parts if the method were provisional; it believed, however, that when all the drafts were completed they should be amalgamated into a single convention. It hoped that the Special Rapporteur would

continue his excellent work so as to ensure its continuity.

32. With regard to articles 8 and 9, general multilateral treaties, because of their legislative character, should be open to universal participation, so as to ensure the universal application of their provisions. Since law-making treaties, like other treaties, were subject to the limitation that they were not binding on States not parties to them, no State should be excluded from participation. Of course that statement was subject to the existing rule that the problem of participation in general multilateral treaties was quite distinct from that of the recognition of States. The application of article 9, paragraph 1, to doubtful cases had the advantage of relieving the Secretary-General or any other depositary from having to take delicate and perhaps controversial political decisions. He had also been glad to see that the Commission had paid attention to the problem of the accession of new States to existing general multilateral conventions containing clauses which limited participation to certain categories of States. It was to be hoped that the Secretariat would soon be able to provide information relevant to the solution of that problem, either through the draft articles or by means of the procedures indicated in paragraph (10) of the commentary to article 9.

33. State responsibility had acquired increasing significance and had come to include such matters as aggression, denial of national independence, the use or threat of force and intervention. It must be admitted, however, that State responsibility for damage caused to aliens remained an important aspect of the subject, and was relatively fully developed and illustrated through many arbitrations, treaties and other sources of international law. Accordingly, since the Commission was not a political body, that aspect of the topic would present fewer difficulties than the others which, though highly important, had not yet been fully elaborated in terms of "lawyers' law". In those circumstances his delegation welcomed the establishment of a Sub-Committee to do preliminary work on the topic (A/5209, para. 47).

34. His delegation was glad that the topic of the succession of States and Governments had been included in the Commission's programme of work, because of its practical importance since so many new States had come into existence. He had no strong views on whether the succession of States and of Governments should be considered together or separately; that was a matter for the Sub-Committee on the topic (A/5209, para. 54) to decide. Nevertheless, if consideration of the two aspects together was likely to cause much delay, it would be better to divide the topic and give priority to the succession of States.

35. The Committee on the future programme of work had been wise to recommend that the Commission should limit its programme to the seven topics set forth in paragraph 60 of the report, and the Commission had been wise to appoint Mr. El-Erian Special Rapporteur on relations between States and intergovernmental organizations (A/5209, para. 75). It was also satisfactory to see that the Commission would be represented by observers at forthcoming sessions of the Asian-African Legal Consultative Committee and of the Inter-American Council of Jurists (A/5209, para. 81), particularly since the former body had on its provisional agenda the important subjects of State responsibility, the law of treaties, and the legality of atomic tests.

36. Mr. OKANY (Nigeria) said that the International Law Commission's report (A/5209) was of special importance to his delegation, not only because of its content but because it was the first report of the Commission prepared with the participation and co-operation of African scholars. The participation of the new countries of Africa in all United Nations organs should be maintained and encouraged. At the sixteenth session some representatives had expressed the fear that a membership of twenty-five would make the Commission unwieldy and ineffective, while others had thought that Africa could not produce scholars of international repute who could contribute to the Commission's work. The Nigerian delegation, which had not shared those misgivings, was glad to see that the quality of the report completely refuted any argument against increased membership.

37. The importance of the codification of the law of treaties could not be over-emphasized now that the international community was expanding, and the rules of international law on treaties should be made easily accessible. The use of the word "treaty" as a generic term covering all forms of international agreement was quite satisfactory. Some members of the Commission had made reservations to the draft articles on the law of treaties (A/5209, chap. II); it was to be hoped that those differences of opinion would be reconsidered, in the light of the comments made by Governments, before a final draft was prepared.

38. The Nigerian delegation agreed that all aspects of State responsibility should be examined in relation to recent developments in international life. Of course the Commission should begin by considering the theoretical rules governing the responsibility of States; but it should also deal with the controversial aspects which made codification so necessary. His delegation was also glad that the problem of succession of States and governments would be studied, for it had become particularly important since so many new countries had attained independence; it could, however, arise in other connexions also.

39. His delegation noted with satisfaction that the Commission was co-operating with other international legal bodies, and hoped in particular that liaison with the Asian-African Legal Consultative Committee and the Inter-American Council of Jurists would be maintained.

The meeting rose at 12.40 p.m.

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