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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) (continued)

1. Mr. GENSER (Canada) said that, although the question of the law of treaties had been on the International Law Commission's agenda since its first session, the Commission had hitherto been unable to come to grips with the problem because the office of Special Rapporteur had changed hands several times. He was therefore glad to note that Sir Humphrey Waldock, the present Special Rapporteur, and the members of the Commission had, through their combined efforts, now produced the first third of a draft convention on the law of treaties (A/5209, chap. II). He agreed with previous speakers that the time had not yet come to comment on the substance of the draft articles before the Committee.

2. Regarding the Commission's future work in the field of codification and progressive development of international law, his delegation felt that priority should be given to the three main topics which would probably occupy the Commission for several years: the law of treaties, State responsibility, and succession of States and Governments. It also approved the Commission's decision to take up at its next session the question of relations between States and inter-governmental organizations and the question of special missions, and applauded the Commission's appointment of a Sub-Committee on State responsibility. It should be clearly understood, however, that the Sub-Committee would confine itself to studying the general aspects of State responsibility and making recommendations to the Commission on the scope and methods of future study.

3. The decisions which the Commission had taken in order to improve its methods of work he found satisfactory. With regard to the "pattern of conferences" (A/5209, para. 83), his delegation considered it desirable that the Commission should meet at a later date than was now planned. Even if its meetings overlapped with the Economic and Social Council's summer session, there was little risk of serious interference with the Council's work, because the conference facilities at Geneva had been augmented. Furthermore, an increase in the length of the Commission's sessions could have only favourable effects on its work. The difficulties caused to it by technical inadequacies and delays in the production of documents, summary records and draft texts showed the need to systematize a "pattern of conferences" under which the Commission's sessions would begin at a later date. The Committee should communicate its views to the Fifth Committee, which would have to consider the question.

4. Miss GUTTERIDGE (United Kingdom) congratulated the International Law Commission on its report (A/5209) which showed that the recent enlargement of the Commission had by no means diminished the high quality of its work. Chapter II of the report was of such interest and importance that detailed discussion of the draft articles on the law of treaties and the accompanying commentaries would be premature, for Governments had not yet had time to study them thoroughly. The United Kingdom Government would submit written comments on the draft articles in due course.

5. She wished nevertheless to make a few general comments, and in particular to commend the Commission for the thorough and scholarly way in which it had tackled questions on which views diverged widely; for example, in articles 18-22, dealing with the question of reservations. The Commission had been much concerned with the practical aspects of the law relating to the conclusion of treaties, and had considered very thoroughly the many problems which constantly arose both during the negotiation of treaties and in the day-to-day work of Foreign Offices.

6. In paragraph (10) of its commentary on article 9, the Commission referred to the problem of the accession of new States to general multilateral treaties, concluded in the past, whose participation clauses were limited to specific categories of States. The Commission had presumably had in mind particularly those treaties concluded under the auspices of the League of Nations, which were limited to its Members. The problem deserved further consideration, and Ghana had made the very practical suggestion [734th meeting] that the Secretariat should provide a list of such treaties.

7. On chapter III of the report, her delegation considered it wholly sound that the Commission should limit its future programme of work to the three main topics under study. Her delegation had already expressed at the previous session the view that if the Commission was to maintain its high standards and build up a solid body of jurisprudence, it should concentrate on a few topics,[1] and was glad to find that the Commission, after careful consideration, had reached the same conclusion.

8. In chapter IV of the report, her delegation noted with interest the establishment of the Sub-Committee

[1] See Official Records of the General Assembly, Sixteenth Session, Sixth Committee, 717th meeting, para. 6.

on State responsibility and the Sub-Committee on the Succession of States and Governments, and it welcomed the appointment of Mr. El-Erian as Special Rapporteur on the important topic of relations between States and inter-governmental organizations.

9. On chapter V of the report, she considered that careful consideration should be given to the question of whether it was realistic to maintain the decision that the Commission's meetings should not overlap with the summer session of the Economic and Social Council. It might be desirable to set a later date for the opening of the Commission's session, especially for those of its members who taught at universities, and possibly also to extend the length of the Commission's annual session, though the financial and administrative aspects of any such decision must be very carefully considered.

10. Mr. AMADO (Brazil) considered that the report of the International Law Commission covering the work of its fourteenth session (A/5209) was one more demonstration of the high quality of the Commission's studies, and of its anxiety to be objective and at the same time to satisfy present-day requirements. It should not be forgotten, however, that the Commission's function was necessarily limited to stating existing international law and suggesting forms of words acceptable to States, which alone could judge them.

11. The Commission had acted wisely in devoting most of its meetings to the law of treaties. That topic was of practical interest to all States, old and new, and its study would undoubtedly foster progress in other branches of international law, because the conventional method was coming into increasingly general use. Moreover, the conclusion of well-thought out agreements should reduce the sources of friction and tension between States. A world which was evolving fast, both nationally and internationally, needed judicious and realistic codification of the law of treaties. It was gratifying, therefore, that the study of that topic had been entrusted to men of high attainments. The preparatory work done by Mr. Brierly, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice had been very useful, and Sir Humphrey Waldock's first report (A/CN.4/144 and Add.1) was equally significant. His Government might decide in due course to comment on the draft articles on the conclusion, entry into force and registration of treaties (A/5209, chap. II); in the meantime he would take up a few points from them.

12. The general arrangement of the draft articles had been simplified by discarding the artificial and largely useless notion of a plurilateral treaty and by condensing article 3. As originally drafted, article 3 had invited copious controversy about the established limitations of the jus contrahendi and the repercussions of problems of constitutional law relating, for example, to the capacity of belligerents already recognized as such, and to specific unions of States such as the European Common Market. It was fortunate, therefore, that article 3 as now worded merely recognized the capacity of States to conclude treaties, which was an attribute inherent in their sovereignty.

13. Great progress had been made in the study of reservations. As early as 1951 two main schools of thought had emerged within the Commission: that of the States which favoured the doctrine of unanimity, and that of the devotees of the "flexible" system. His own position, like that of many other jurists, had been much modified by the advisory opinion delivered by the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[2/] Obviously, in an era when a hundred States might be involved in the negotiations concerning a general multilateral treaty, the opportunity to formulate reservations might make it more widely acceptable, especially in view of their political, economic and social differences. He was therefore gratified that the Commission had endorsed the opinion on that point held by the Special Rapporteur, whose progressive views he shared.

14. On the choice of the two-thirds rule to determine the majority necessary for the adoption of the text of a treaty (article 6 of the draft articles), the Brazilian delegation agreed with the Commission's conclusions, but doubted whether the same rule ought to govern the preliminary vote on the voting procedure to be followed in adopting the provisions of the treaty. It realized that the Commission was anxious to avoid long procedural delays, but considered that for the adoption of the text of a treaty the two-thirds rule should be merely a suggestion which the participants in an international conference could either accept or reject. There was no doubt that the rule would invariably be observed, not only because that was the recent tendency but also because it was the rule which best fitted the international situation. If, however, it were compulsorily applied to procedural decisions on the choice of a final rule, it might appear as a constraint placed upon States in international negotiations which were primarily political and consequently should not be subjected to any complex or rigid rule which might make them unduly formal. Furthermore, in practice the absence of the rule did not appear to have raised any great difficulty in decision of the procedural question.

15. In his opinion, the expression "a small group of States" in article 20, paragraph 3, relating to the effect of reservations, which also appeared in other articles of the draft, was too vague. How many States would in fact constitute such a small group? Moreover, the concept "small group" might include other factors than the number of participants: for example, the nature of the relations between the States, or the region to which they belonged. So vague a formula could only lead to difficulties.

16. Furthermore, the Brazilian delegation was not in favour of maintaining the words "and governed by international law" at the end of article 1, paragraph 1 (a), which defined the word "treaty". It had been pointed out that the purpose of those words was to exclude from the definition agreements regulated by private international law. Nevertheless, though regulated by the municipal law of the contracting parties, such instruments were genuine treaties and therefore governed by international law. Moreover, they were registered by the United Nations and published in the Treaty Series. The deletion of the words "and governed by international law" would make the definition clearer without affecting the substance.

17. With regard to chapter III of the report, he expressed the view that, in connexion both with the topics mentioned in General Assembly resolution 1686 (XVI), paragraph 3 (a), and with the programme of future work of the Commission, of whose Committee of eight members he had been chairman, the course

2/ Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15.

adopted by the Commission best met the requirements of the codification and progressive development of international law and accorded with the spirit of previous recommendations by the General Assembly.

18. In conclusion, his delegation was glad to note that the quality of the Commission's work had not been adversely affected by the increase in its membership. The establishment of two Sub-Committees to carry out preparatory work on State responsibility and on the succession of States and Governments, and also the appointment of a Special Rapporteur on the relations between States and inter-governmental organizations, had been wise steps. His delegation agreed to the suggestion (A/5209, para. 83) regarding the opening date for the Commission's next session.

19. Mr. BERNSTEIN (Chile) congratulated the Commission on the work it had done during its fourteenth session, and was glad to note that it had completed the first part of the draft articles on the law of treaties, on which it had been working for thirteen years.

20. With regard to the form in which the law of treaties should be laid down, the Commission had opted in 1959 for a general code, but in 1961, it had decided rather to formulate articles to be incorporated in a multilateral convention. Although the arguments in favour of either form were equally convincing, the Chilean delegation would prefer the first, for reasons which he would explain. It was preferable that the procedural rules governing treaties should precisely not take the form of an international treaty, but should be independent and constitute a code approved by the General Assembly as a model; especially since the rules and abstract principles which constituted the law of treaties were better listed in a code and were not always obligatory, as they would be if they were part of a special treaty. Furthermore, whereas the new Member States should certainly participate in drawing up the rules, it was not essential for them that the rules should appear in the form of a treaty or be drawn up by an international conference. They would have ample opportunity to explain their views to the General Assembly when it approved the rules drawn up by the Commission. That method would have the additional advantage of accelerating the adoption of rules on that highly important subject, as, once the Commission's work ended, the debate in the General Assembly would be the last stage in the process of codification. If, however, the rules were to be discussed first in the General Assembly and then by an international conference convened to conclude a treaty, far more time would be required, and the treaty would also have to be approved by the various parliaments and then ratified. Hence, if the rules took the form of a treaty, six to ten years would go by before they were generally accepted.

21. There was a further argument, a practical one, in favour of a code which, though peculiar to Chile, might also apply to other countries. The political Constitution of Chile adopted in 1925 reproduced the provisions of the previous Constitution of 1833 governing the approval of international treaties, which laid down that treaties signed by the executive must be submitted to the National Congress for approval before ratification. The increasing number of international agreements which had to be put into effect rapidly had made it difficult to apply those provisions in practice, since the approval of treaties by both Houses of the Congress took some time. The executive had maintained that certain administrative agreements need not be approved by the Congress; and at present a compromise was being sought which would reconcile that proposition with the Constitution. If, however, the Commission's rules took the form of a convention, that convention must logically include the Commission's very wide definition of the word "treaty" in article 1, paragraph 1 (a) of the draft articles (A/5209, para. 23). In approving the convention, the Congress would necessarily be obliged to approve that definition, which would become the law of the land after ratification by the executive. Thus all future administrative agreements would in Chile have to be approved by the Congress, with all the delay that would result. Other countries might well experience the same difficulty. That practical disadvantage might be avoided if the Commission's rules of procedure were assembled in a code which could be used as a guide but would not take the form of a convention. He emphasized that his observations related only to the rules and procedure embodied in the first part of the draft, and that the second and third parts might be suitable for a convention. When the Commission had completed the draft articles, it would be possible to decide which rules should be included in a code and which in an international treaty.

22. In regard to the Commission's future work, the Chilean delegation did not consider that the Commission should confine itself, when considering State responsibility, to damages caused to aliens; as in modern international law State responsibility for actions which might endanger international peace—such as aggression, the denial of national independence, or violation of the provisions of the Charter—was equally great. State responsibility could not be confined to the treatment of aliens; it was equally important, for example, in connexion with the defence of human rights and the removal of discrimination based upon race, political opinions, or sex.

23. The Chilean delegation considered that succession of States and succession of Governments were two different problems which should be studied separately. The Commission should not, however, give priority to the first, since the need for codification of both was equally urgent.

24. His delegation hoped that the Secretariat would take steps to remedy the inconvenience pointed out in paragraph 84 of the Commission's report (A/5209); and that future reports would be published in all the official languages in time to enable Governments to study them before the opening of the General Assembly session.

25. The CHAIRMAN announced that the list of speakers on that agenda item would be closed at the end of the week.

The meeting rose at 6.10 p.m.

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