The Work of the International Law Commission in 1968 and 1969

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The work done by the International Law Commission in its two sessions at Geneva, 27 May-2 August 1968, and 2 June-8 August 1969, is described in its Reports to the United Nations General Assembly on these sessions (documents A/7209/Rev. 1 and A/7610/Rev. 1, respectively), being the Commission's 20th and 21st sessions.

It is perhaps convenient to deal with both sessions together, because the following three codification and development topics were considered on each occasion: (1) Relations between States and international (i.e. inter-governmental) organizations; (2) Succession of states and government; (3) The most-favoured-nation clause. In addition, State responsibility was discussed at the 1969 session.

How the Commission dealt with each topic will be treated in turn.

Relations between States and international organizations

This subject had been considered at previous annual sessions, and in 1964 a majority of the Commission had taken the view that priority should be assigned to the study of diplomatic law in its application to relations between States and inter-governmental organizations. In 1968, acting upon a third report by the Special Rapporteur, Mr. Abdullah El-Erian (United Arab Republic), containing a full set of draft articles, with commentaries, on the legal position of representatives of States to international organizations, the Commission adopted 21 draft articles of a provisional nature, governing terminology, the establishment and functions of missions to international organizations, credentials and accreditation, composition and size of the missions, and use of the flag and emblem. These articles were communicated to governments for their observations. Commentaries were attached to each provision.

The Commission decided not to deal with the contrary position of representatives of international organizations accredited to States, mainly because these representatives would, of necessity, be officials of the organization concerned, and therefore their status would normally be covered by the appropriate rules and regulations of the organization. Also, following some differences of opinion among Commission members as to whether the draft text should regulate the position of representatives of States accredited to regional, as distinct from general, international organizations, it was decided to confine the draft to universal international bodies, without prejudice to the rights of States to agree that the draft articles might apply also in the case of regional organizations.

At its 1969 session, the Commission adopted 29 additional draft

articles, with commentaries, governing the questions of facilities, privileges, and immunities of missions to international organizations, the termination of missions or the cessation of functions of representatives, the conduct of missions, and consultations between the sending State, the host State, and the international organization in regard to questions concerning the application of the rules in the draft articles. It was also decided that the final draft should include articles dealing with permanent observers of non-member States to international organizations, and with delegations to sessions of organs of international organizations.

Perusal of the Commission's draft Articles 1-50, as adopted at the two sessions of 1968 and 1969, reveals a commendable achievement in the codification of the practice regarding missions to international organizations. The query must remain, however, whether it is necessary to conclude a draft Convention on this topic, by way of an addition to the corpus of general international law. There are infinite possibilities of variations in the relations between representatives of States, on the one hand, and international organizations on the other hand. At this stage, one cannot help feeling that the eventual fate of the draft articles will be as a set of model rules or desiderata for application, as may be thought fit, by States and by international organizations. One other problem may be mentioned. By what procedure are international organizations themselves to be bound to respect the rules in the draft articles? Are they all to become parties to the Convention, when adopted, and what is to happen if certain organizations decline to accept the Convention? It is not to be denied, however, that the draft articles and the Commission's commentaries are of the utmost value to international lawyers, governments, and diplomatic representatives as an up-to-date, informative account of the status and functions of missions accredited to international organizations.

Succession

Both in 1968 and 1969, the International Law Commission debated the topic of sucession under two separate heads: (a) succession in non-treaty matters; and (b) succession in respect to treaties. The title assigned to sub-topic (a) prior to 1968 was "succession of States in respect of rights and duties resulting from sources other than treaties", but in 1968 the Commission decided to alter this title to "succession in respect of matters other than treaties". It was felt that the word "sources" might lead to some misunderstanding of the Commission's approach to the whole subject of succession.

At its 1968 session, the Commission received the first report on succession in non-treaty matters submitted by the Special Rapporteur, Mr. Mohammed Bedjaoui (document A/CN.4/204). This is an impressive study, enunciating some far-reaching views, particularly so far as concerns the problem of succession in regard to new States. The Special Rapporteur cogently raised a number of points that are frequently overlooked in this context, such as transactions and acts of the predecessor State or of concessionaires prior to the emergence

of the new State, and the difficulties confronting the new State in establishing and consolidating its economic independence and promoting its development. Following discussion of the report, the Commission reached the conclusion "that the problem of new States should be given special attention throughout the study of the topic, without, however, neglecting other causes of succession on that account". Apart from this conclusion, the Commission favoured a process of adoption of a self-contained set of draft articles on succession in non-treaty matters. It also decided that there was no need to draw up a general definition of state succession, or, for the time being, to define the term "succession" itself. This seems sensible, as questions of terminology are best resolved when the drafting of concrete rules has been finalized.

As to future work, it was decided to begin with succession in economic and financial matters, on which the Special Rapporteur would make a report. The Commission had also discussed succession as to treaties, without formulating any conclusions or decisions, other than that the relevant rules would be elaborated according to a technique of combined codification and progressive development, rather than codification only. The debate revealed a wide range of views, and, in the case of one member of the Commission, doubts as to the advisability of a draft Convention on succession in respect to treaties, because of the difficulties which might arise in any endeavour to make such a Convention effective. This member of the Commission expressed these doubts without questioning the method of work for the purposes of study.

In 1969, the Commission had before it a report by the Special Rapporteur on succession in non-treaty matters, bearing the title "Economic and financial acquired rights and state succession" (document A/CN.4/216/Rev. 1). In this study, among other points, the Special Rapporteur cast doubts upon the supposed legal basis for the theory of respect for acquired rights, holding that a successor state was not necessarily bound by acquired rights granted by the predecessor, while he favoured the view that state succession implied a substitution, and not a transfer, of sovereignty. When his report was considered by the Commission, it was found that there was some division of opinion in respect to his views; in particular, some members were prepared to uphold the theory of respect for acquired rights as one recognized in international practice and jurisprudence, and in treaties. There was also controversy upon other points raised by the Special Rapporteur. The upshot was that most members of the Commission felt that the preparation of rules on succession in non-treaty matters should not begin with draft articles on acquired rights, because the doctrine of such acquired rights was highly controversial, and premature study could only delay the Commission's work on the whole subject. Consequently, it was considered by the majority of the Commission that so far as succession in economic and financial matters was concerned, it was preferable to commence with a study of public property and

public debts, which would be the subject of the Special Rapporteur's next report.

Owing to lack of time in the 1969 session, the Commission was unable to enter into any concrete, detailed discussion of the subject of succession in respect to treaties.

The most-favoured-nation clause

At its 1968 session, the Commission had before it a working paper by the Special Rapporteur, Mr. Endre Ustor. Among other things, this paper listed points on which members of the Commission were requested to express their views. After discussion, the Commission reached the conclusion that its study of the most-favoured-nation clause should not be confined to the role of the clause in international trade, but should cover the whole area of the practical application of the clause, regarded as a legal institution of an extensive nature, with impact upon many non-trade matters. This means that the Commission's study could embrace such aspects as rights of establishment, land-holding by aliens, and visa rights, so far as subject to the incidence of the most-favoured-nation clause. The Special Rapporteur was instructed to consult all organizations and interested agencies which might have particular experience in the application of the clause.

In December 1968, subsequent to the Commission's 1968 session, the United Nations General Assembly recommended that the Commission continue its study of the clause. At the 1969 session of the Commission, the Special Rapporteur submitted his first report, containing a history of the clause up to the time of the Second World War, with particular emphasis on the work in that connexion undertaken in, or under the auspices of, the League of Nations. The Special Rapporteur was instructed next to prepare a study based mainly upon the replies from the organizations and interested agencies consulted in conformity with the Commission's decision of 1968, and having regard also to three cases dealt with by the International Court of Justice, having some bearing upon the most-favoured-nation clause, including the *Case concerning the Rights of Nationals of the United States in Morocco.*[1]

State responsibility

This topic has been before the International Law Commission since its inception in 1949, being included in the first list of 14 topics selected for codification. The Commission did not begin to consider the topic, however, until 1955, after which a great deal of work was done, including the presentation of a number of reports by the Special Rapporteur, Mr. Garcia-Amador. Progress by the Commission has been relatively slow, partly because the topic is controversial, partly because of absorption in other tasks.

1 I.C.J. Reports, 1952, p. 176. The other two cases are the *Anglo-Iranian Oil Co. Case* (*Jurisdiction*), I.C.J. Reports, 1952, p. 93, and the *Ambatielos Case* (*Merits: Obligation to Arbitrate*), I.C.J. Reports, 1953, p. 10.

At the 1969 session, the Commission received from Mr. Roberto Ago, as present Special Rapporteur, his first report on State responsibility (document A/CN.4/4/217). This gives quite a full and comprehensive account of work done on the subject in the past. The Commission decided, after considering Mr. Ago's report, that Mr. Ago should prepare a first set of draft articles initially to deal with the conditions under which an act, illegal under international law and engaging a State's responsibility, can be imputed to a State, together with some definition of the nature of the acts or omissions imputable, and an indication of the circumstances which, exceptionally, may prevent imputation. The Special Rapporteur was to report to the Commission on this topic, together with a set of draft articles.

The next part of the study, following consideration of this report and action by the Commission, would be the determination of the consequences of imputing the illegal act to the State, and consequently, the definition of the various forms and degrees of responsibility. A third and final stage contemplated by the Commission was a study of the implementation of state responsibility, and this would be coupled with provision for the settlement of disputes arising out of breaches of the rules laid down as to state responsibility.

At first glance, this seems a highly theoretical approach to the subject of state responsibility, and much will depend on the text of the draft articles to be submitted by the Special Rapporteur. It is to be hoped that the Commission will make some headway, now that it has clarified the scope of its immediate task in codifying the law of state responsibility.

Other matters

The Commission's reports for both years, 1968 and 1969, make reference to its continued co-operation with other bodies working in the field of law restatement, either on an international or on a regional basis, such as the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation, and the Inter-American Juridical Committee. The reports, indeed, continue to serve a useful purpose to international lawyers generally by containing up-to-date summaries of the current or projected activities of these other bodies (see, e.g., paragraphs 95-103 of the report for the year 1969).

To the Commission's report for the year 1968, there is annexed a valuable working paper by the United Nations Secretariat, analysing the past and present programmes of work of the Commission, and giving a detailed account of the methods, procedures, and techniques evolved by the Commission in its work generally, and the preparation of a draft text for submission to the General Assembly, as a basis for the conclusion of an international Convention.