

Document:-
A/CN.4/SR.977

Summary record of the 977th meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
1968, vol. I

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the question how most-favoured-nation treatment could be accorded to land-locked countries and an article on the subject had been included in the Convention on Transit Trade of Land-Locked States.¹²

68. His answer to the Special Rapporteur's first two questions was in the affirmative, but, as well as studying the legal aspects of the problem, the Special Rapporteur should also touch upon the other aspects referred to in paragraph 16 of his working paper.

69. His answer to question 3 was also in the affirmative, but the Special Rapporteur would need a great deal more material on the experience of international organizations.

70. His answer to question 4 was that it was too early to decide whether the draft articles should form part of the convention on the law of treaties. The Special Rapporteur should be given a free hand in deciding what the articles should contain.

71. His answer to question 6 was that the Special Rapporteur should certainly examine the vast amount of material available in the specialized agencies, particularly in the economic field.

72. Mr. CASTAÑEDA said the Special Rapporteur was to be congratulated on the objectivity and impartiality he had shown in preparing his report.

73. With regard to question 1, the Commission should not concentrate exclusively on the role of the most-favoured-nation clause in international trade. Sound juridical work required that legal rules must be founded on as solid and broad a basis as possible. All aspects should therefore be considered.

74. His answer to question 2 was that, while it was obvious that the Commission did not have to study, for example, the role of the clause in the expansion of international trade, it ought to consider certain fundamental questions relating to the economic, political and other spheres. In paragraph 28 of his working paper, the Special Rapporteur had quoted as an exception to the operation of the clause the interests of developing countries, which was a political and economic consideration. In paragraph 18, he had brought out the interrelation of the clause with various legal principles closely related to political questions. Such aspects were not strictly legal, but they would nevertheless have to be taken into account.

75. His answer to question 3 was in the affirmative but he found it difficult to answer question 4. However, some members who had more experience of the subject had said that the most-favoured-nation clause possessed a certain autonomy and should not therefore be regarded as forming part of the law of treaties. He would support that view, though he considered it would be premature to reach a final decision in the matter.

76. In parts VIII to XIII of the working paper, the Special Rapporteur had referred to the basic features of the problem. Perhaps he might now draw a clearer distinction between the bilateral and multilateral aspects, with the emphasis on the latter. The question of integration should also be pursued further. The Special Rapporteur had been right to mention, in paragraph 29 of his working

paper, the exceptions resulting from treaties, but it would be of interest to go more thoroughly into the role played by the clause in integration.

77. In answer to question 6, he endorsed the Special Rapporteur's proposal, but it should be understood in a wider sense, as Mr. Bartoš had just said, and should take into account the recommendations made in connexion with question 1.

The meeting rose at 1.5 p.m.

977th MEETING

Wednesday, 17 July 1968, at 9.50 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Ago, Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Review of the Commission's programme and methods of work

(A/CN.4/205)

[Item 4 of the agenda]

(resumed from the 974th meeting)

1. The CHAIRMAN invited the Commission to consider Mr. Ago's memorandum on the final stage of the codification of international law (A/CN.4/205).

2. Mr. AGO said that the first part of his memorandum (A/CN.4/205) contained observations on the three stages of the work of codifying international law, namely, the preparation of the draft convention by the Commission, the adoption of the text by a diplomatic conference, and the receipt of ratifications and accessions. It commented mainly on the drawbacks which resulted from States often taking so long to transmit their instruments of ratification or accession. The consequence was a situation of some uncertainty concerning the general international law that was in force, an uncertainty which might present serious dangers in the event, for instance, of a dispute arising between a State that had ratified the convention and a State that had not.

3. The second part of the report dealt with possible remedies for the situation. Ratification was the sovereign prerogative of States; they could not be compelled to ratify a convention or a treaty. Nevertheless, a remedy could probably be found in the rule applied by certain specialized agencies, such as the ILO, WHO and UNESCO, whereby States were required to submit conventions to their constitutional authorities within a given period

¹² See *Official Records of the Trade and Development Board, Second Session, Annexes*, agenda item 6, document TD/B/18.

and to keep the secretariat of the organization informed of the situation. That rule had yielded positive results.

4. The third part of the report considered the possibility of applying that system in the United Nations. The most radical method would obviously be to amend the Charter and introduce rules similar to those already to be found in the constitution of certain specialized agencies. It might not be too difficult to adopt such an amendment, but it would in any case involve a long and complicated procedure.

5. An easier method might be by General Assembly recommendation. That would not impose any legal obligation on Governments, but experience had shown that General Assembly recommendations were often effective in practice, especially if the Organization kept a close watch to see that they were carried out.

6. A third method would be to adopt the system already considered by the League of Nations; under the terms of a General Assembly resolution, States participating in a diplomatic codification conference would be invited, when adopting a convention, to sign an additional protocol whereby they would undertake to submit the convention to their competent constitutional authority by a certain date and to keep the United Nations Secretariat informed of the situation. That method would have the advantage that the protocol would constitute a legal obligation for States. The only drawback would be that States which did not sign the convention would not be under a similar obligation; but the method would also mark an advance since it would draw the attention of all States to the need to avoid delay in coming to a decision.

7. Mr. CASTAÑEDA said that the Commission would soon have been in existence twenty years, which was long enough to assess its achievements and to see what still remained to be done in order to attain one day the distant goal of codifying all public international law. The preliminary discussions in the General Assembly and the Commission, and the limited acceptance by the General Assembly of the Commission's early work had given no hint of the future success of the codification process. It was therefore important to know why certain drafts had not been accepted and to learn the lessons for the guidance of its future work. In the space of a few years, the Commission had completed the codification of diplomatic and consular relations, special missions, the law of the sea and the law of treaties, and would soon have made good progress with State succession and State responsibility.

8. Its successes were due to the quality of the Commission's drafts, the excellent organization of the codification conferences, and the very important part played by a well-trying secretariat, as regards both studies and documentation. Perhaps the very nature of the topics codified had contributed to that success. So far, although they had sometimes had political implications, they had been outside the field of what was called "political law". Among the subjects which the Commission had now set out to codify and which had a more definite political character were State succession and State responsibility. It remained to be seen whether results in that field would be as successful as in others.

9. He declined to believe that subjects with a marked political tinge did not lend themselves to codification. Nor could he accept the criterion that a topic must meet certain conditions traditionally considered as essential before it could be codified. Results proved the contrary. The question of the continental shelf met none of those conditions, and yet the Commission, taking as its sole task the needs of the international community, had succeeded in preparing a convention on the subject which had been widely ratified.¹ It might be claimed that the Commission had obtained better results by trying to meet the international community's present needs instead of considering its past needs.

10. To obtain a complete picture of the situation, mention should also be made of the Commission's failures. Admittedly, rejection by the General Assembly of one of the Commission's drafts did not necessarily mean failure, but it did show that the desired aim had not been achieved. An early example of that type was the report on reservations to multilateral conventions.² The Commission had endorsed the traditional practice of the League of Nations, but that practice was not adapted to the needs of a more heterogeneous society which needed a more flexible formula allowing for more reservations.

11. Another example was the draft on arbitral procedure.³ There again, the Commission had not correctly interpreted the needs of contemporary international society. It had adopted the view current at the beginning of the century that international arbitration was the remedy for all ills, whereas in the post-war society of States at different stages of development, the most effective method of settling disputes was direct negotiation.

12. The fact that the General Assembly had not followed up the Commission's drafts in the field of international penal law could not be regarded as failure. The Draft Declaration on Rights and Duties of States⁴ had offered an excellent basis for a declaration, which would have been extremely helpful for some countries. But unfortunately, in 1950, the big Powers had not been willing to accept a declaration which would have defined their rights and duties precisely. Such a declaration would have benefited the small and medium countries, but at that time the big Powers had been the ones to lay down the law at the United Nations. Times had now changed, however, and perhaps the question of the Declaration on Rights and Duties of States should be reconsidered in a few years' time. If so, there would appear to be no reason why the Commission, with its twenty years' experience, should not undertake the codification of principles with a marked political content.

13. Among the topics for codification selected in 1949, or since added by the General Assembly, there still remained, in addition to State succession and State responsibility, right of asylum and historic waters. Those topics would fully occupy the Commission's time for the

¹ See United Nations, *Treaty Series*, vol. 499, p. 311.

² See *Yearbook of the International Law Commission, 1951*, vol. II, pp. 125-131.

³ See *Yearbook of the International Law Commission, 1953*, vol. II, pp. 201-212. See also the *Yearbook* for 1958, vol. II, pp. 80-88.

⁴ See *Yearbook of the International Law Commission, 1949*, pp. 287 and 288.

next few years, but about 1970, it might be advisable to consider the question of further topics for codification. An idea that had been shared by a majority of the Commission in 1949 might then be taken up, that of selecting future topics for codification within the framework of a comprehensive scheme embracing the entirety of international law.

14. The question of how the codification process could be expedited had been dealt with in Mr. Ago's memorandum. Clearly, the inertia or bad administrative practices of Governments had become a serious obstacle to the application of international law. The question was whether Governments would agree to pressure being exerted on them to expedite ratification only, of course, in respect of a relatively restricted category of conventions. It had to be borne in mind that the object of ILO conventions was to lay down rules of conduct which were nothing more than the practical application of the aims of the organization already accepted by its members. The field of application of those conventions was relatively narrow, whereas United Nations conventions had a wider scope and might have a certain political character. But the adoption of the practice followed in the case of ILO conventions was advocated by Mr. Ago only for codification conventions, so that there seemed to be no reason why Governments should object to the application by the United Nations of a system they had already accepted in a specialized agency.

15. The system proposed by Mr. Ago should apply only in cases where a State was not definitely opposed to a convention. Furthermore, States should not be compelled to give reasons for not ratifying a convention; if they were placed in that embarrassing situation, they would not sign conventions.

16. Of the various methods proposed by Mr. Ago, the first, amendment of the United Nations Charter, must be rejected, because it would create too many difficulties.

17. The idea of a General Assembly recommendation of a general character did not seem a very good one, because States tended to take very little notice of Assembly recommendations of a general character. Action by the General Assembly had been effective when it had had a specific object.

18. The best method would probably be a specific agreement at a conference to adopt a protocol of signature. The forthcoming conference on special missions might provide a suitable opportunity to put that proposal into practice. The subject of the conference lent itself to such treatment, and as the conference would be the General Assembly itself, the system would have the value of a general precedent, having been established by the United Nations and not just by a conference.

19. Mr. AMADO said that Mr. Castañeda had been right to mention the case of the Convention on the Continental Shelf in his excellent retrospective analysis. That case had shown that when States wanted to make progress in a particular matter, they paid little heed to custom, precedent or international practice.

20. He had always been against the idea of a draft code about which some members of the Commission had been very enthusiastic. The Commission was a dynamic body

whose task it was to stimulate the progress of international law by offering States the possibility of reaching agreement on the texts of drafts. That meant that its efforts must be directed to ensuring that its work did not remain a dead letter. In his view, the efforts should be directed towards codification and, above all, towards the progressive development of international law.

21. Mr. Ago's memorandum showed clearly that a number of conventions had not yet been ratified by many States. The reason for that was often to be found in the unwieldiness of administrative machinery and in an outdated mentality, but for a State problems of ratification were something almost sacred and to tamper with ratification was to tamper with an essential element of political and parliamentary life.

22. It was legitimate and natural that the Commission should be concerned over the fate of its drafts, and it was quite right that it should examine all the possible means of promoting the ratification of conventions. But if other important bodies had failed in their efforts to get the Charter amended, it was hardly likely that the International Law Commission would be successful.

23. The Commission could approach States, but States did not like being given advice and were guided first and foremost by their own interests. Any suggestion as to what action they ought to take might cause offence.

24. Mr. ALBÓNICO said that Mr. Ago's proposals had the great merit of attacking the outmoded concept that the State had a sort of sacred right in the matter of ratification. A State undoubtedly had discretionary power to ratify, or not to ratify, a political or military treaty which it had signed, although it was undoubtedly inconsistent to sign a treaty and subsequently fail to ratify it. But that proposition no longer held true in the case of treaties of a purely legal character, or even of economic treaties. Such treaties were only adopted after an exhaustive study by competent specialized bodies and expressed the common legal conviction of all the peoples of the world.

25. He therefore supported the solution put forward in the last paragraph of Mr. Ago's memorandum. He would describe the proposed instrument as an independent additional protocol to distinguish it from the protocol of signature envisaged in paragraphs 34 and 35. That would be the ideal solution, since it would make it possible to attach the independent additional protocol to some treaties but not to others.

26. Since he had to leave Geneva very shortly, he wished to take the opportunity to make a suggestion with regard to another item of the agenda, the organization of the Commission's future work. The Commission must first complete its work on the four current topics of relations between States and intergovernmental organizations, succession of States and Governments, State responsibility, and the most-favoured-nation clause, and then endeavour to deal with the remaining topics on the list drawn up in 1949.

27. Next, however, he would suggest an additional topic the study of which was particularly urgent, namely, the legal principles of reciprocal assistance between States in economic matters. That topic had become particularly

important since the Second World War. The work of the Economic and Social Council of the United Nations, the Marshall Plan, the organization in Europe of three economic communities, the progress made towards economic integration in Central America, the establishment of a Latin American free trade area, and the late President Kennedy's Alliance for Progress, were all expressions of the duty of States to render assistance to one another in economic matters. The first and second sessions of the United Nations Conference on Trade and Development, at Geneva in 1964 and at New Delhi in 1968, pointed in the same direction. The time had now come to consider the question whether there was a legal obligation on the richly endowed countries to render assistance to those countries which needed it and if so, what was the scope of that obligation. Simultaneously, the parallel question should be considered of the corresponding obligations of States and peoples whom it was intended to help, particularly the obligation to carry out the structural changes which were essential if they were to benefit from the assistance of the wealthier countries.

28. The CHAIRMAN said that the Commission was concentrating at present on the examination of Mr. Ago's memorandum. Since Mr. Albónico would be leaving Geneva very shortly, he would consider that he had made his comments on item 6 in advance.

29. Mr. BARTOŠ said that the problem was whether there was any non-contractual legislation binding on all States in international law. The question had been raised at the Dumbarton Oaks and San Francisco Conferences, which had rejected the idea, and it had been withdrawn from the agenda of the Sixth Committee at the first part of the first session of the General Assembly in London.

30. The United Nations Charter contained several provisions concerning international law. It was stated in the Preamble that respect for the obligations arising from treaties and other sources of international law should be maintained; in Article 1 (1), that the settlement of disputes should be carried out in conformity with the principles of justice and international law; in Article 13 (1), that the General Assembly should encourage the progressive development of international law and its codification; in Article 62 (3), that the Economic and Social Council might prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence; and in Article 62 (4), that the Council might call international conferences on the codification of international law.

31. Furthermore, the Statute of the International Law Commission did not provide that rules drafted by the Commission should be unconditionally binding on States Members of the United Nations. Ratification problems had been left outside the Commission's province; it had been accepted that they came under the general rules of international law.

32. Mr. Castañeda had emphasized that only a small number of States had ratified certain codifying conventions, while Mr. Amado had pointed out that although the conventions had been adopted and signed by a large number of Member States, Governments had shown little inclination to ratify them. There was often a difference

between the instructions sent by States to their representatives and the later attitude of Governments, which had always followed one policy over the preparation of sources of international law and another over their final acceptance. The same applied to General Assembly resolutions and recommendations, which States recognized as possessing a moral, but not a binding force.

33. Although the International Law Commission prepared conventions, it should be remembered that it did not have a monopoly of the codification of international law within the United Nations; some codification was also done by other United Nations bodies, such as conferences convened by the Economic and Social Council and certain technical or political bodies.

34. Some conventions had been adopted and signed by a large number of Member States but had entered into force after ratification by only a very small number of States. For example, the Convention on the International Right of Correction⁵ had been signed by seven States and had entered into force although it had been ratified by only three States.

35. Again, a humanitarian convention like the International Convention for the Suppression of the Traffic in Women and Children⁶ had not been ratified by one European State because, having at that time possessions in North Africa, it had agreed to ratify it only subject to the application of the colonial clause, and since the United Nations had been unwilling to accept that conditional ratification, the State concerned had not ratified the Convention on the ground that it did not wish to encroach on the prerogatives of a protectorate. Problems which at first glance seemed to be technical or humanitarian often turned out to be political problems created by internal or regional disagreements or by a change of Government.

36. Mr. Ago had suggested that the United Nations Charter should be amended, mentioning in support of his argument the increase in the membership of the Security Council and the Economic and Social Council. But the question of increasing the membership of the two Councils had been discussed at length in the General Assembly and a number of African and Asian countries had almost gone so far as to threaten that they would no longer participate in the work of the Assembly or the Councils unless the number of non-permanent members of the two Councils were increased. The briefness of the lapse of time between adoption and ratification of that amendment should not be used as an argument, because the problem was of an acutely political nature and ratification was already certain when the amendment was put to the vote.

37. What should be taken into account was the fact that Member States had always opposed other proposals to amend the Charter or the Statute of the International Court. He did not believe that States would accept such a limitation of their sovereign will. It was true that certain specialized agencies, such as the International Civil Aviation Organization and the International Telecommunication Union, made recommendations which States were obliged to accept, not under penalty of exclusion but because of

⁵ See United Nations, *Treaty Series*, vol. 435, p. 191.

⁶ *Op.cit.*, vol. 53, p. 39.

the risk of cutting themselves off from relationships of a practical nature with the other member States of those international organizations. In his view, the situation in the United Nations was entirely different.

38. The subjects entrusted to the International Law Commission for study were chosen by the General Assembly because the international community felt they needed to be codified. But codification sometimes gave rise to difficulties because it created a rift between States which ratified a convention and States which refused to. It was an undeniable fact that there were a great many codifying conventions prepared by the League of Nations or the United Nations, including conventions which were essential to the international community, which had not yet been ratified by a sufficient number of States, particularly by representative States, and that the repeated efforts of the United Nations to secure their ratification had been in vain.

39. On several occasions the problem of ratification had been placed on the agenda of the Sixth Committee, which had submitted it to the General Assembly, where resolutions had been adopted unanimously, but, despite every effort, results were still very meagre. That was why it was difficult to make progress in the field of codification, because States were not compelled to ratify conventions and could not be subjected to a time-limit.

40. Great Powers like the Soviet Union, the United States and the United Kingdom, had sometimes conducted intensive propaganda to secure the ratification of political conventions, such as the Treaty on the Non-Proliferation of Nuclear Weapons.⁷ That was a useful and necessary measure for mankind, but there were other conventions which at first sight were highly technical where ratification was just as important. The number of ratifications received to a convention often influenced States which had not yet ratified. To take one example, for several years the number of ratifications to the Conventions on the law of the sea remained at thirteen States, whereas fifteen ratifications were necessary for their entry into force. But once the fifteen had been obtained, several more States had hastened to ratify.

41. A fresh effort should be made to ensure that conventions prepared or drafted by the International Law Commission were accepted by a sufficient number of States for them to be applied by the international community as a whole. The Commission had a right to watch over the fate of the drafts it prepared, and was in duty bound to draw the matter to the attention of the General Assembly, through the Sixth Committee, by mentioning it in its report.

42. Mr. TAMMES said that Mr. Ago was to be commended for setting out alternative courses for action which would certainly be worth trying, as for example, the International Labour Organisation's system for encouraging the prompt ratification of labour conventions. The acceptance by States of an obligation to bring signed conventions before the appropriate authorities within a fixed period for ratification and to report on circumstances preventing or delaying such action might help to overcome the kind of inertia described in paragraphs 11 and 12

⁷ For the text of this Treaty, see annex to General Assembly resolution 2373 (XXII).

of the report. One of the reasons for delay was the fact that political machinery was overburdened. For example, in his own country the Ministry of Justice felt bound to wait until all the relevant national laws had been brought into line with international legislation, because of the direct legislative effect on its citizens that ratification might produce.

43. The distinction between the progressive development and codification of law was of immediate relevance to the proposal made by Mr. Ago. It was one thing to subscribe to carefully formulated rules already binding as customary international law, and another to put pressure on States to accept new legislative obligations, particularly in the humanitarian field.

44. The method of reporting on causes of inaction as provided for in article 19, paragraph 5 (e), of the ILO Constitution could help to spur Governments to ratify so as to avoid the censure of public opinion.

45. As far as the alternative courses of action were concerned, he preferred General Assembly recommendations, and it would be interesting to know what effect its resolution 2081 (XX) had had in securing ratification of the human rights conventions. Since the General Assembly had acquired the status of a quasi-international legislature, it was to be hoped that in future Member States voting for its resolutions would not ignore the moral obligation to put conventions requiring ratification before their appropriate authorities for that purpose.

46. Mr. CASTRÉN said that the methods proposed by Mr. Ago might prove reasonably effective, but, in the last analysis, everything depended on the States themselves and on the Governments which represented them. The principal task of the Commission, under its Statute, was to prepare drafts on topics of international law; and the Commission could, after completing its work on a topic, recommend to the General Assembly which measures should be taken in connexion with the draft. But once the Commission had made its final proposals, it was for States to decide whether the work of codification should be continued and if so, how.

47. It was true that the wording of paragraph 1 of article 1 of the Commission's Statute was rather broad, but it was clear from paragraph 2 and, more particularly, from the various articles of chapter II, that the competence of the Commission was confined to the first stage of codification. He did not think, therefore, that it was appropriate for the Commission to make official proposals for accelerating the process of ratification of codifying conventions. To achieve the result desired by Mr. Ago, it would be sufficient for the Commission to draw the General Assembly's attention to the problem by stating in its report that the question had been discussed by the Commission on the basis of Mr. Ago's memorandum, which was an official United Nations document. The views expressed in the Commission's summary records, which would be published in due course, could also be taken into consideration by States.

48. The Commission could hardly take an official initiative, though the question might, as Mr. Castañeda had suggested, be linked to a specific topic which had been

studied by the Commission and submitted to the General Assembly, such as the draft on special missions.

49. Mr. KEARNEY said that Mr. Ago had done useful service in bringing an important matter to the attention of the Commission. Clearly some effort was needed to maintain the interest of Governments in ratifying law-making conventions, but he was not certain that the situation was as unsatisfactory as Mr. Ago had suggested, and perhaps not enough information was available for drawing conclusions. Figures were given in paragraph 8 of the memorandum of the number of ratifications deposited to certain international conventions, but the significant fact was whether that number included ratifications by States with a major interest in the subject of the convention.

50. One reason why the United States Government had not ratified the Convention on Diplomatic Relations was that, although the Senate had given its consent to ratification, United States legislation on diplomatic relations dated back to 1798 and had to be brought up to date. That legislation was originally considered not in the committees concerned with foreign relations but in the Judiciary Committees, which had a great deal of work connected with constitutional rights and criminal problems and thus were inclined to postpone taking up legislation that was a little outside their customary agenda. Similar reasons for delay in ratification might occur in other countries.

51. The United States Government had taken no action regarding the Convention on Consular Relations because it was in process of negotiating bilateral treaties on the subject and was interested in a number of problems that were not covered in that Convention.

52. He was pessimistic about the chances of obtaining an amendment to the Charter, and doubted whether States would be sufficiently interested. However, a protocol of signature attached to conventions might offer an effective solution. He did not expect that anything very effective would result from mandatory reporting. Perhaps the whole question should be approached in an *ad hoc* way which might produce results.

53. Sir Humphrey WALDOCK said that, while agreeing generally with Mr. Ago's valuable proposals, he thought it important that the Commission should not do anything that might weaken the effect of codifying conventions.

54. He disagreed with the statement in paragraph 7 of Mr. Ago's memorandum that "if, after the stages of drafting and adopting codification conventions have been successfully accomplished, there is a failure at the stage of final acceptance, the only practical effect of this lame result may be to make the situation in regard to the law in force still more vague and uncertain, whereas the intention was to re-establish certainty". He did not believe that that was the effect of non-ratification, for which there might be many causes, and it would be wrong for the Commission to endorse the statement.

55. Codification conventions which had passed through the crucible of the Commission and received final endorsement at large conferences of legal advisers acquired a persuasive authority throughout the world and found their way into legal thinking and text books, sometimes

even at the drafting stage. They might be applied by States even before ratification, though that process was important as a testimony of the solidity of the legal rules contained in the convention. Once enough ratifications had been obtained to bring the convention into force, the absence of positive opposition to a convention of that kind was of great significance.

56. The memorandum usefully set out various possible ways of trying to overcome the problem, but he doubted whether amendment of the Charter was practicable at the present time. The idea of a protocol of signature could have a psychological effect and was preferable to a special provision within the treaty itself, since that might inhibit the adoption of the text at the diplomatic conference, which was such a significant stage in the acceptance of a convention. It was most important that any solution adopted should not make more difficult the achieving of a consensus at the diplomatic conference.

57. It was certainly not outside the Commission's competence to concern itself with codifying conventions, but it would probably have to be cautious in advocating a particular line of approach. The system of regular reporting, such as existed in the specialized agencies and the Council of Europe, certainly offered many advantages, and should be considered. He hoped that the Commission's recommendations, for inclusion in its report to the General Assembly, would lead to some initiative being taken in the matter of ratification.

58. Mr. TABIBI said that the discussion to which Mr. Ago's valuable memorandum had led would draw the attention of the General Assembly to an important question which deserved close study by all Member States.

59. He agreed on the desirability of devising a system to speed up the process of ratification of codification conventions; it was, however, for States to find the proper solution. The fact that the whole process of codification was inherently slow largely explained the delay in the ratification of conventions. At every stage of the codification process, a State would inevitably weigh very carefully its decisions in order not to commit itself to a rule which might later prove to be contrary to its best interests; and that caution was naturally all the more apparent at the stage when a State gave its official consent to be bound by ratifying a convention.

60. It had been rightly pointed out by Mr. Kearney that all States did not have the same interest in the various multilateral conventions. On one point, however, he wished to correct the impression which might have been created by Mr. Kearney's remarks; the 1965 Convention on Transit Trade of Land-locked States⁸ had attracted great interest among transit States, which would be affected by its provisions just as much as the land-locked States themselves.

61. Many of the new States of Asia and Africa did not possess sufficient specialists in the highly technical subjects which often formed the substance of multilateral conventions and their Governments and parliaments were naturally wary of entering into agreements until they were

⁸ See *Official Records of the Trade and Development Board, Second Session, Annexes*, agenda item 6, document TD/B/18.

satisfied that they had fully understood all their implications.

62. Language difficulties also helped to delay the process of ratification. The countries of Latin America had one advantage in that Spanish was a working language of the United Nations, but in most Asian countries a multilateral treaty had to be translated from English or French into the language of the country before it could be submitted for ratification, and it was extremely difficult to find persons able to translate technical documents and explain them to parliament.

63. The most important question, however, was that of priorities. The developing countries had to face staggering day-to-day problems of economic and social development. It was not easy for the Governments and parliaments of those countries to put aside those preoccupations in order to attend to the ratification of multilateral conventions.

64. In some countries, there were also special political reasons for the delay in ratifying certain conventions. He could quote as an example the case of one land-locked State whose Government was reluctant to submit the 1965 Convention on Transit Trade of Land-locked States to its parliament for ratification, because it was afraid it would be criticized for having entered into a bilateral agreement with a State of transit which accorded fewer facilities than those laid down in the 1965 Convention.

65. To turn to the practical proposals put forward by Mr. Ago, he agreed that in the present circumstances it would not be timely to envisage the procedure of amending the Charter. The amendments which had increased the membership of the Economic and Social Council and the Security Council had been a special case; they had been adopted in response to an urgent political need, and there had therefore been an unusually strong incentive to ratify them.

66. The idea of a protocol of signature seemed a useful one, but care should be taken not to impose a rigid time-limit for ratification, since the result might well be detrimental. A State which was interested in a multilateral convention but which had been unable to ratify it within a specified time-limit because of some internal difficulty might get the impression that it had lost the opportunity of acceding to the convention.

67. He would suggest, first, that the Commission mention the matter in its report on the present session, so as to attract the attention of the General Assembly to it, and secondly, that the Secretary-General be requested to include an additional item in the agenda of the General Assembly, for consideration by the Sixth Committee, entitled "Status of Multilateral Conventions". That item should be included in the agenda for every successive Assembly session, so that the Office of Legal Affairs would then submit an annual statement showing which countries had not yet ratified the various multilateral conventions. That statement would draw the attention of the representatives of States in the Sixth Committee to the conventions which their countries might still ratify.

68. The Office of Legal Affairs could also take another useful step to promote the ratification of multilateral conventions. In some countries, the problem of ratification was examined by the Ministry of Justice or by some other

legal authority rather than by the legal adviser of the Foreign Ministry. Accordingly, those who would be ultimately responsible for giving an opinion on the question of ratification were often not immediately informed of the adoption of a convention. He therefore suggested that inquiries be made through the permanent representatives of the countries concerned as to who were the authorities responsible for advising the Government, so that with the co-operation of each Member State concerned, it should then be possible to forward copies of multilateral conventions to the permanent mission for transmission to the competent legal authorities at home, as well as to the Ministry of Foreign Affairs.

69. Since the problem of the ratification of multilateral conventions concerned the specialized agencies as well as the United Nations, it would also be appropriate for the Administrative Committee on Co-ordination to make arrangements for periodic reports on the status of multilateral conventions.

70. Finally, the Chairman of the Commission would have an opportunity to speak on the subject to the General Assembly, at which he would represent the Commission.

71. Mr. YASSEEN said that the problem raised in Mr. Ago's memorandum should be defined in terms of the incontrovertible principle that ratification was a prerogative of sovereign States. He did not think that the memorandum sought to impose on States the obligation to ratify conventions.

72. The problem did not arise in connexion with all conventions and treaties, but only with those of general interest to the international community as a whole. Thus it did not arise with bilateral or multilateral treaties on questions of particular interest to certain States, but only with general treaties concerning international practice, especially questions of the development of international law, in other words its codification and its progressive development, which was a task entrusted not only to the Commission but also to other United Nations bodies.

73. The scope of the problem should be precisely defined. It was a demonstrable fact that codification involved two stages, first the scientific preparation of a draft, and then the adoption of a convention by a conference of plenipotentiaries. But once the text was adopted, ratification tended to be a very slow process, and so delayed the entry into force of codifying conventions.

74. Nevertheless, once adopted, a general convention principally concerned with the development of international law did have some effect. It was, of course, preferable that it should be ratified and should enter into force in the usual way, but the mere adoption of the text constituted an undeniable advance and could be the starting-point of international custom and practice.

75. He had often mentioned conventions which his own country, Iraq, had not ratified. On the occasion of Mr. Koretsky's visit, Mr. Ago too had referred to unratified conventions and had expressed the opinion that the International Court of Justice should take such conventions into account to the extent that they represented not only codification but also the progressive development of international law.

76. Mr. AMADO said that he could not accept the doctrine just expounded by Mr. Yasseen. In his view, an unratified convention was entirely different from a ratified convention.

77. Mr. YASSEEN said he agreed that an unratified convention was not as effective as a ratified convention. He had simply wished to make the point that, even if unratified, a convention which had gone through the process of codification, been studied by a commission and by a conference of representatives of States and been adopted by a two-thirds majority had a certain value and could be invoked by States even if they had not ratified it.

78. On the question whether positive international law should be modified, extreme prudence was called for. The principle that ratification was a prerogative of sovereign States was so deeply rooted in international thinking that it would be difficult to make an exception to it. To contemplate measures for dispelling administrative inertia might be praiseworthy, but such measures must not bring pressure to bear on States or run counter to their vital interests. The time was not ripe for amending positive international law.

79. A start should be made, as suggested by Mr. Ago, by getting the General Assembly to adopt appropriate resolutions, either general or specific and limited to a particular convention. A general resolution would request the Secretary-General to recommend States to take certain measures, provided the measures were not obligatory, while a special resolution would be adopted at the same time as the general resolution in the case of a convention of capital importance, such as the future convention on the law of treaties.

80. Mr. BARTOŠ said he considered that conventions adopted by a two-thirds majority by conferences of representatives of States had a certain legal force as a source of international law, but could not impose obligations on States which had not ratified them.

81. Mr. RAMANGASOAVINA said that ratification of a convention was a prerogative of the sovereign authority of States. In some States the decision was taken by parliament, in others by the Government or Head of State. The machinery of ratification often worked very slowly, especially when States were not particularly interested in a convention, as Mr. Tabibi had mentioned. Parliaments, especially in the new States, sometimes did not realize the nature of the treaties they were asked to ratify, because they were not always conscious of belonging to the international community. They took little interest in treaties that stated rules of law governing international relations, in comparison with the interest they took in the rules of law governing internal relations. Some States were suspicious of treaties relating to refugees or stateless persons and showed no great concern over the question of the white slave traffic.

82. Among the solutions suggested by Mr. Ago, that of an additional protocol at a diplomatic conference seemed at first sight to be a good idea. However, it must not be forgotten that some States, especially the new States, did not have special representatives at those conferences armed with the necessary power to sign a protocol of that kind. That method then would not work. Admittedly,

the big States had offices to deal specially with international agreements and explain them to parliament, but that did not apply to the new States. The United Nations had resident representatives in the new States, but most of their activities were concerned with economic and cultural questions; they should devote more time to drawing the attention of the Governments of the countries where they were stationed to the importance of ratifying treaties. Treaties were transmitted to the Minister for Foreign Affairs or the Minister of Justice without any indication of their importance. Some ILO, WHO and UNESCO conventions were of a special character, so that the new States felt themselves directly concerned and hastened to ratify them. International conventions, on the other hand, were above their heads, and that explained the delay in ratification.

The meeting rose at 1.15 p.m.

978th MEETING

Thursday, 18 July 1968, at 9.30 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Ago, Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Review of the Commission's programme and methods of work

(A/CN.4/205)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of Mr. Ago's memorandum on the final stage of the codification of international law (A/CN.4/205).

2. Mr. ROSENNE said he was grateful to Mr. Ago for his memorandum and for drawing attention to a matter which was certainly within the Commission's competence by virtue of both Article 13 of the Charter and article 1 of its Statute. There was undoubtedly a problem in regard to the ratification of conventions, but he had some reservations about the facts and conclusions drawn by Mr. Ago. Bare statistics in themselves could be misleading, and it would be interesting to know not merely how many States had ratified certain conventions, but how many had taken part in codification conferences, and how the voting had gone at the final stages on individual articles. He also shared Mr. Bartoš's view that the Commission had no monopoly of codification.