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Chairman: Mr. Erik SUY (Belgium).

AGENDA ITEM 85

Report of the International Law Commission on the work of its twenty-fourth session *(continued)* (A/8710 and Add.1 and 2)

1. Mr. CASTRÉN (Finland) said that he would confine himself to making a few preliminary observations on the two sets of draft articles submitted by the International Law Commission in its report (A/8710 and Add.1. and 2).

2. With regard to the draft articles on succession of States in respect of treaties (see A/8710, Chap. II, sect. C), tribute was due to the Commission, and, more particularly, to Sir Humphrey Waldock, the Special Rapporteur for that topic, on the remarkable work done. In accordance with the mandate given to it by the General Assembly, the Commission had paid particular attention to the practice of newly independent States, without, however, neglecting the other aspects of the problem. The era of decolonization had not yet completely come to a close, and the possibility could not be ruled out of new States being formed in the future by the creation of unions of existing States or by the dissolution of federal or union States. As the Commission noted in paragraph 31 of its report, no general doctrine existed on succession in respect of treaties, and the work of codification had therefore to be based on State practice, which was far from being uniform in every case. In the circumstances, it had been preferable to give the successor State a fairly broad range of options in respect of treaties concluded by the predecessor State, in accordance with the principle of self-determination of peoples and State sovereignty. The Commission had done that by taking as its point of departure in several instances the "clean slate" principle, tempered where necessary and, in particular, in the case of dispositive (real) treaties by the principle of continuity. It should be borne in mind in that connexion that the survival of international rights and obligations in cases of succession of States generally depended also on the attitude adopted by the other party to the treaty, as the Commission had pointed out in several passages in its report. The draft articles also contained some rules which tended to uphold the concept of continuity in treaty relations between States. Article 12, for example, gave the successor State the right to participate, subject to certain reservations, in multilateral treaties in force in respect of the territory for which it had assumed responsibility. Generally speaking, it might be said that the Commission had sought to build on a solid foundation by basing its work on the rules of general treaty law and the provisions of the Vienna Convention on the Law of Treaties of 1969.

3. Some of the draft articles called for more specific comment. Articles 13 and 14, which gave the successor State the right to participate in certain multilateral treaties not yet in force or to ratify, accept or approve a multilateral treaty signed by the predecessor State, were innovations which, at a first reading, seemed acceptable. The rules set forth in article 19 concerning succession to bilateral treaties were pertinent and accorded with State practice, but it would be disirable to specify, in paragraph 2, the exact date on which succession took effect. On the other hand, the raison d'etre of articles 20 and 21, which dealt with the position as between the predecessor and the successor State and the effects of an act of the predecessor State performed after the date of succession on the treaty relations of the successor State was questionable, because those articles were merely statements of fact. Article 27, concerning dissolution of a State, favoured the principle of continuity. While the application of that principle seemed perfectly legitimate in the case of the dissolution of a union of States, the members of which frequently had some degree of international personality, his delegation doubted whether it was acceptable in the case of the dissolution of a union State, where the "clean slate" principle should be applied. Articles 29 and 30, concerning boundary régimes and other territorial régimes were unobjectionable, but the drafting of article 30 could be condensed so as to avoid pointless repetition. The presence of article 31, which restated article 73 of the Vienna Convention on the Law of Treaties did not seem absolutely necessary in an instrument that dealt strictly with the succession of States in respect of treaties.

4. With regard to the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (*ibid.*, chap. III), some Governments, in their comments on the draft articles drawn up by the Commission, had cast doubt on the usefulness of the proposed new international instrument by arguing that the strict implementation of existing agreements and the rules of customary international law should be sufficient. However, the recrudescence in recent years of violent attacks on diplomats and other persons entitled to international protection showed that the present rules were not sufficient and should be strengthened by new, more specific provisions providing, *inter alia*, for closer co-operation between States.

5. His Government was fully aware of the gravity and urgency of the question and hoped that an international convention guaranteeing more effective protection for diplomatic agents and other persons of the same kind would be concluded as quickly as possible.

6. As had already been pointed out, however, the draft articles submitted by the Commission in chapter III of its

report raised some thorny problems, which could not be resolved without thorough consideration. For example, the definition in article 1 of "internationally protected persons" should be reconsidered; it was questionable whether such protection should be extended to all members of special missions and to officials of all regional international organizations. Similarly, it might be inappropriate to bring all forms of complicity in the crimes mentioned in article 2, paragraph 1, within the scope of the draft articles. The concepts of political crime, the right to asylum and extradition also required more thorough study. It might also be felt that article 9, concerning limitation, went too far in stipulating that the period should in all cases be, in each State party, that fixed for the most serious crimes under its internal law. Article 12, concerning the settlement of disputes, consisted of two alternatives. His delegation, which was in favour of inserting a provision of that nature, would like to have the two alternatives combined, so that the parties would be obliged, in all cases, to have recourse to the conciliation procedure provided for in alternative A but, if that failed to produce the desired result, each would have the option of instituting arbitration procedures. In its present form, alternative B would have very limited scope, because it permitted States to make reservations in respect of the provisions it contained.

7. Since the Commission had succeeded in preparing a carefully drafted set of articles on a serious and urgent question which had been debated at length by various United Nations bodies, his delegation proposed that the text should be transmitted to all Member States for comment and that a second reading by the Commission should be waived in that exceptional case and a decision taken to convene a conference of plenipotentiaries in 1973 for the conclusion of a convention.

8. Mr. ZOTIADIS (Greece) noted that the larger part of the report of the Commission, to which its Chairman had given a very scholarly introduction, was devoted to the question of succession of States in respect of treaties and draft articles thereon. The Special Rapporteur for that complex and controversial question, Sir Humphrey Waldock, and the Commission as a whole deserved the highest commendation. Succession of States was an as yet under-developed area, which was governed largely by State practice and was not yet fully crystallized in modern international law. The Commission had proposed appropriate solutions in that field, where the "clean slate" principle did not always seem to harmonize with the principle of continuity of treaty rights and obligations. Apart from their theoretical importance, the new rules proposed by the Commission on the basis of the United Nations Charter, the general principles of international law and the Vienna Convention on the Law of Treaties had considerable practical value, as the 31 draft articles took into account the realities of international life. In view of the accession to independence of a large number of new States, the Commission had rightly considered the problem of succession of States in relation to the right to self-determination and to all the other rights corollary to sovereignty.

9. International law was based to a large extent on the freedom of contractual undertakings. His delegation welcomed the fact that the Commission, on the basis of that principle of international law, had advocated, in part III of the draft articles, solutions based on the "clean slate" principle. The continuity of treaty rights and obligations was, however, wisely protected in the Commission's draft articles by the fact that a bilateral treaty could remain in force provided that the new State concerned expressed a wish to that effect, by the possibility of the provisional application of treaties and by the relevant provisions adopted for instances of a union of two or more States. In the solutions proposed by the Commission, the "clean slate" principle was taken as being equally valid with regard to multilateral treaties, as was indicated in article 12. In that respect he wondered whether, in regard to multilateral treaties of a law-making character concluded under the auspices of the United Nations, an exception to the "clean slate" principle might not be in the interest both of the new State and of the international community as a whole. Most of the treaties and conventions of a law-making character had been drafted in full harmony with the principles of the Charter and might be regarded to a large extent as codifications of customary law. Furthermore, it was most important for the maintenance of international peace and security and for the strengthening of the rule of law to recognize the applicability of law-making conventions, especially those containing provisions of a *jus cogens* character. Articles 29 and 30 concerning boundary régimes and other territorial régimes should be retained, since they reflected possitive international law in that matter.

10. The frequent attacks on diplomats and the unlawful seizure of aircraft and other acts of political terrorism constituted a new international phenomenon which the United Nations must deal with. The Commission had acted speedily in preparing draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, based on the concept of the inviolability of diplomatic agents and the responsibility of States with respect to them. His delegation was very satisified with the draft articles, for they would facilitate the early completion of the codification of diplomatic law. They quite correctly provided an opportunity for all States parties to assert their jurisdiction with respect to attacks on diplomats. The universal recognition of such attacks as crimes *in foro domestico* made it possible to regard them as international crimes and met the double criminality requirement for purposes of extradition proceedings. Furthermore, the responsibility of States to afford protection to diplomats and the recognition of the function of a diplomat as an organ of international relations made it impossible for attacks on diplomats to be regarded as political crimes and, accordingly, they could not involve the right of asylum.

11. The draft articles did not impair in any way the principle of *non-refoulement;* article 6 embodied the principle *aut dedere aut judicare*. The Commission had been right also to offer States the option of prosecution or extradition, as in the Montreal and The Hague Conventions on the hijacking of aircraft. The recognition of attacks on diplomats as international crimes and the establishment of universal jurisdiction over them would constitute real

progress, although it might theroretically be argued that, in the interest of respect for the rule of law, it would have been still better to have provided for the mandatory punishment of the offender by any State into whose jurisidction he might come. The expeditious preparation of a convention on that subject would help to prevent loss of human life and incidents which might threaten international peace and security.

12. Mr. MORENO-SALCEDO (Philippines) said that the topics dealt with in the Commission's report were so important and substantive that Governments should be given time to study the report in depth before stating their views on it.

13. At the present stage, his delegation would confine itself to a few preliminary remarks concerning the definition of "internationally protected person" which was the subject of article 1 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons. In the commentary on that article the Commission stated that since there was no broadly accepted rule of international law on the subject, it had decided against extending the special protection accorded to heads of State or Government to persons of cabinet rank or equivalent status. In his delegation's view, ministers for foreign affairs and members of their families should enjoy the same protection as was accorded to heads of State or Government.

14. The raison d'etre of the protection enjoyed by diplomatic agents had always been the need to ensure the means whereby States might communicate with each other and avoid war by strengthening their mutual relations. Because of the difficulty of transportation and the inadequacy of means of communication, relations between heads of State used to be maintained almost exclusively through their ambassadors. That was no longer the case. Heads of State now conducted foreign relations through their foreign ministers who were, *de facto* and *de jure*, the administrative heads of their countries' diplomatic services. Furthermore, it was becoming increasingly common for a minister for foreign affairs to perform in person, on behalf of his head of State, the traditional functions of diplomatic agents abroad, including the functions of representation and negotiation; that tendency was likely to become even more widespread in future. It was now not uncommon for a minister for foreign affairs to spend as much time abroad as in his ministry. In the circumstances, foreign ministers should enjoy the same international protection as was proposed to be accorded to heads of State or Government.

15. International law was the product of tradition and treaties. The Commission had taken care, in preparing the draft articles on internationally protected persons, to base its recommendations on universally accepted rules of international law. His delegation considered that the draft articles under discussion should be innovative and responsive to the needs of the international community, for what was important in a law or treaty was not whether it had a history but whether it solved present and future problems. That was why his delegation, while reserving the right to speak again on the substance of the Commission's report, hoped that it would be possible to include ministers for foreign affairs among the persons enjoying full international protection.

16. Mr. KLAFKOWSKI (Poland) congratulated the Chairman of the Commission, Mr. Kearney, on his very clear and detailed presentation of the Commission's report, which contained two sets of draft articles of the highest juridical standard. His delegation would confine itself at the moment to a few general remarks and reserved the right to make its position known in writing. It wished to associate itself with the well-deserved words of praise addressed to Sir Humphrey Waldock, Special Rapporteur for succession in respect of treaties. The starting-point of the draft articles was very clear, namely, the definition of the expression "succession of States", which denoted simply the replacement of one State by another in the responsibility for the international relations of a territory, thus excluding all questions of rights and obligations as a legal incident of that substitution.

17. Mr. Yasseen, a member of the Commission, had remarked that theorists sought ideal law, while politicians wanted practicable law. The draft articles of the Commission constituted practicable law; they were almost above criticism from the point of view of juridical science and they marked the meeting-point, determined with great care, of the diverse concepts and tendencies of the modern world. It seemed that the eminent experts who worked in the Commission were concerned above all to formulate practicable law and that they had understood the need for an international law which gave equal treatment to all groups.

18. He stressed the importance of the relationship between the succession of States in respect of treaties and the general law of treaties, which was explained clearly in paragraphs 31 and 32 of the report. The Commission had put forward a great number of new ideas which might serve as the technical basis for the codified international law. His delegation also wished to draw attention to the commentaries on the uniting, dissolution and separation of States contained in part IV of the draft articles. Those were problems of the future, and modern international law would have to deal with them.

19. In view of the increasing frequency of attacks on diplomats, it was impossible to over-emphasize the urgency and gravity of the matters dealt with in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons. The Commission had recognized that the question of crimes committed against such persons was but one of the aspects of a wider question, the commission of acts of terrorism. As the report stated, the 12 draft articles, which constituted virtually a code on the subject, were an essential step in the process of formulation of legal rules to effectuate international co-operation in the prevention and suppression of terrorism.

20. Mr. YÁÑEZ-BARNUEVO (Spain) noted that on 21 November 1972 the Commission would mark its twenty-

fifth anniversary. It was in part due to the work of that body, which was described in the United Nations publication entitled *The Work of the International Law Commission*,[1] that it had been possible for international law to progress more in 25 years than during the whole of the preceding period of human history. The success achieved by the Commission was due both to its technical nature, since it was composed of jurists who sat in their individual capacity, and to its democratic methods of work, which were based on the rule of the majority and involved the participation of all States at the various stages of its codification activities. His delegation therefore congratulated the Chairman and all the members of the Commission and paid tribute to the effective collaboration of the Secretariat.

21. The Commission's report on the work of its twenty-fourth session reflected the efforts made to complete the preparation of two sets of draft articles, in respect of which the Spanish Government would subsequently give its views in written comments. His delegation would confine itself, for the time being, to making a few preliminary remarks based on a first reading of the provisions of the draft articles.

22. Succession of States in respect of treaties had been described as the kernel of the succession of States. Following upon the Vienna Convention on the Law of Treaties, the Commission's draft articles constituted a link between the law of treaties and that of the succession of States. The task of codification was more difficult in a particularly uncertain legal field, and Sir Humphrey Waldock, the Special Rapporteur, was therefore to be congratulated on the masterly work done.

23. The draft articles on their subject, which were based on international practice, were remarkable from the technical standpoint. The comprehensive commentaries were an indication of the many elements which had been taken into account. In principle, his delegation approved of the fundamental options which had been adopted and under which *(a)* the concept "succession of States" meant the replacement of one State by another in the responsibility for the international relations of a territory, without prejudice to the legal relationships resulting therefrom, *(b)* the draft was closely linked with the Vienna Convention on the Law of Treaties, which Spain had ratified, and *(c)* the draft reaffirmed the primacy of the principles of the Charter and, in particular, that of self-determination, from which flowed the "clean slate" principle, properly interpreted and tempered by provisions which promoted the continuity of treaty relations without, however, making such continuity mandatory, due account being taken of the interest of new States as well as of those of the international community.

24. The following remarks could be made with regard to the provisions of the draft as suggestions for the consideration of them. First of all, the concept of identity or continuity of the State, as a concept opposed to that of succession, appeared only in article 28, relating to the continuation of treaties in respect of the remaining part of the territory of a State from which another part had separated in order to form a separate State. The Commission could consider the possibility of examining the idea of the continuity of the State in a more general context.

25. A second problem to which the Commission should give more detailed consideration was that of the different categories of multilateral treaties in the context of the succession of States. Article 12, paragraph 3, and article 13, paragraph 3, recognized the existence of a few multilateral treaties of limited participation without designating them by that name, which led to the somewhat involved wording of articles 14, paragraph 1 *(a)* and *(b)*; 22, paragraph 2; 24, paragraph 1 *(c)*; 25, subparagraphs *(b)* and *(c)*; and 26, paragraph 2 *(c)*. Furthermore it would be appropriate, as the representative of the Netherlands had suggested (1317th meeting), to specify a category of "general" multilateral treaties which, in the view of the Spanish delegation, were those "which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole", to use the wording of the first paragraph of the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties.[2] It would also be necessary to take account of the problem raised by the Australian representative (1319th meeting) with regard to article 12, which made no provision for the case where some States parties to a multilateral treaty approved a notification of succession while others were opposed to it. A possible solution to those problems, which were interdependent, might be to affirm the existence of three categories of multilateral treaties: those of limited participation, the normal and the general. With regard to treaties in the first category, the consent of all the parties to the treaty would be required in order for the succession to occur. As far as the second category was concerned, the treaty would remain in force between the new State notifying its succession and all the other States parties which were not opposed to such notification. With regard to the last category of treaties, it might be stipulated that no objection to notifications of succession of new States to general multilateral treaties would be admissible, in view of the normative character and universal application of such treaties.

26. Thirdly, the exception to the continuity of a treaty in cases where a succession radically changed the conditions for the operation of the treaty was satisfactorily provided for in articles 25, subparagraph *(a)*; 26, paragraph 1*(b)*; 27, paragraph 2*(b)*; and 28, paragraph 1*(b)*, which dealt respectively with newly independent States formed from two or more territories, the uniting of States, the dissolution of a State and the separation of part of a State. The Commission might examine the possibility of extending that provision to articles 10, 12, paragraph 2, and 13, para-

[1] United Nations publication, Sales No. 67.V.4.

[2] See United Nations Conference on the Law of Treaties, 1968 and 1969, *Official Records* (United Nations publication, Sales No. E.70.V.5), A/CONF.39/26, annex, p. 285.

graph 2, in the cases of transfer of territory and of newly independent States.

27. Fourthly, the Commission might study the effect of the succession of States in respect of treaties which had already been the subject of an authentic interpretation either expressly or as the result of practical application, as provided for in article 31, paragraph 3, of the Vienna Convention on the Law of Treaties.[3] The draft merely touched lightly on that question when it referred, in article 4, to "any relevant rules" of an international organization in connexion with the effects of the succession of States with regard to the constitutent instrument and the treaties adopted within that organization. In the view of his delegation, it was appropriate to consider that a State succeeded to a treaty in accordance with the interpretation which had been given by the parties, unless the State accompanied its notification of succession with express reservations or an interpretative statement on the points in question and with the exception of the case of limited participation treaties.

28. Fifthly, with regard to articles 29 and 30, concerning territorial régimes, the Spanish delegation, without challenging the fundamental considerations on which the Commission had based itself, felt that the latter should give that delicate problem more detailed study and elaborate on its conclusions, which were now drafted in a purely negative form. Those articles should be considered within the context of the draft as a whole and, in particular, article 6, which restricted its field of application to cases of succession of States "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".

29. With regard to the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, the Commission should be congratulated on discharging so quickly and so well the mandate which had been entrusted to it. The draft articles which it had prepared on the subject (see A/8710, Chap. III, sec. B) showed clearly that it could act rapidly in response to urgent problems. The aim was to guarantee the rule of the inviolability of certain persons, which was consecrated by customary international law and embodied in various general multilateral treaties. The Commission had based the wording of the draft articles on international conventions relating to acts committed against the safety of international civil aviation, which had the same aim of ensuring the protection of the means which various States had for communicating among themselves. It was from that dual standpoint that the structure and limitations of the draft should be regarded. Spain, which was a party to the Vienna Conventions on Diplomatic Relations and on Consular Relations, and the Tokyo, The Hague and the Montreal Conventions on unlawful acts against international civil aviation, was quite prepared to give favourable consideration to the draft, and it supported in particular the guiding principle of international co-operation, although it was aware that the draft did not solve all the legal and political problems which the question entailed.

30. With regard to the Commission's programme of future work, his delegation felt, as did the Commission itself, that the two sets of draft articles should be the subject of comments by States before the Commission resumed its consideration of them, taking into account the suggestions made, possibly at its twenty-fifth session in the case of the draft articles on the protection of diplomatic agents, and at its twenty-sixth session in the case of the draft articles on succession of States in respect of treaties, for which Governments should be allowed adequate time. It was still too early to take a position on the question of the procedure for the adoption of final instruments. The Commission should, as it proposed, concentrate at its twenty-fifth session on the question of State responsibility and on the other items on its programme. He was surprised to note that the Commission had given no consideration, at its twenty-fourth session, to the question of its long-term programme of work, which had, however, been included in its agenda and in respect of which a very useful document, the "Survey of International Law,"[4] had been prepared by the Secretary-General. His delegation firmly hoped that the Commission would submit its preliminary comments on the subject to the twenty-eighth session of the General Assembly so that countries which so wished could state their positions in the matter.

The meeting rose at 11.55 a.m.

[3] *Ibid.*, A/CONF.39/27, p. 287.

[4] A/CN.4/245.