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CONTENTS

Chairman: Mr. José María RUDA (Argentina).

AGENDA ITEM 69

Report of the International Law Commission on the work of its fifteenth session (A/5509)

At the invitation of the Chairman, Mr. Jiménez de Aréchaga, Chairman of the International Law Commission, took a place at the Committee table.

1. Mr. Jiménez DE ARECHAGA (Chairman of the International Law Commission), introducing the report of the International Law Commission (A/5509), said that the most important subject dealt with by the Commission at its fifteenth session was the second report [1] submitted by the Special Rapporteur on the law of treaties on the invalidity and termination of treaties. The Commission had reached conclusions generally acceptable to its members on all the difficult questions raised by that report.

2. On the question of the invalidity of treaties by fraud, error or coercion, the draft adopted by the Commission (see A/5509, chap. II) provided, in accordance with the established opinion of writers, that if a State had been induced to enter into a treaty by the fraudulent conduct of another contracting State, by an error relating to facts forming an essential basis of its consent or by coercion employed against its representatives, it might invoke such fraud, error or coercion as a ground for invalidating the treaty or that part of the treaty affected by such vice of consent. As for coercion exercised against the State as such, the Commission had considered that the clear-cut prohibition of the threat or use of force in Article 2, paragraph 4, of the United Nations Charter, as a rule of general international law of universal application, required a bold revision of the traditional doctrine. It had therefore reached the unanimous conclusion that the invalidity of a treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the United Nations Charter was a principle which was lex lata in contemporary international law.

3. On the question of jus cogens, the traditional doctrine held that in international law almost complete freedom of contract prevailed. The Commission, however, had reached the conclusion that there were in contemporary international law certain fundamental rules of international public order from which States were not permitted to "contract out". But it had not attempted to codify the existing rules of jus cogens on the ground that it might find itself engaged in a prolonged study of matters which really belonged to branches of international law other than the law of treaties, and had confined itself to laying down the provisions in draft articles 37 and 45 under which a treaty would be void if it conflicted with certain peremptory norms of general international law.

4. On the question of the termination of a treaty as a consequence of a material breach thereof, the Commission had given expression in draft article 42 to the basic rule that such a breach of a bilateral treaty, even if it did not per se put an end to the treaty, entitled the other party to invoke the breach as a ground for terminating the treaty or suspending its operation wholly or partly. In the case of mutilateral treaties the application of the maxim inadimplenti non est adimplendum gave rise to some difficulties, since the rights and interests of the other complying parties also had to be considered. The Commission had provided that in the case of a material breach of a multilateral treaty any other party might individually suspend, but not terminate, the operation of the treaty wholly or partly in the relations between itself and the defaulting State. On the other hand, all the parties other than the defaulting State might, if they acted by common agreement, terminate the whole or a part of the treaty. A material breach was defined as an unfounded repudiation of the treaty or the violation of a provision which was essential to the effective execution of any of the objects or purposes of the treaty.

5. The Commission had also considered, in connexion with article draft 44, the much debated question of whether and how a fundamental change in the circumstances existing at the time when the treaty was entered into might provoke its termination. It had avoided using the term rebus sic stantibus in order to divorce the draft article from some historical associations of that doctrine. Serious concern had been expressed in the Commission with regard to the risks to the security of treaties which the doctrine might present, since the circumstances of international life were always changing and it was all too easy to find some basis for alleging that changes had rendered a treaty inapplicable. For those reasons, the Commission had accepted the doctrine of change of circumstances as an objective rule of law applicable only under carefully defined conditions. A change could only be invoked as a ground for terminating the treaty if its effect was to alter a fact or situation constituting an essential basis of the consent of all the parties to the treaty. The change, moreover, must be a fundamental one, the effect of which was "to transform in an essential respect the character of the obligations undertaken in the treaty". The doctrine of draft article 44 was not applicable to a change if the parties had foreseen

[1] A/CN.4/156 and Add.1-3.

it and made provision for its consequences in the treaty itself.

6. Whether an implied right of denunciation existed with respect to those treaties which did not contain express provision regarding their termination or provide for denunciation or withdrawal was a debated point. The prevailing view in the Commission had been that although the omission of any provision in the treaty did not exclude the possibility of implying a right of denunciation, the existence of such a right was not to be inferred from the character of the treaty alone. The intention of the parties—which should govern the matter—was essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case.

7. Draft article 51 setting out the procedure for invalidating or terminating a treaty was a key provision. The subordination of the substantive rights arising under the draft articles to the procedure prescribed in draft article 51 gave substantial protection against unilateral action or arbitrary assertions. The view adopted by the Commission was that the existence of an accepted ground of invalidity or termination did not release a State from its treaty obligations or allow it to act as judge in its own cause but merely gave rise to a right to invoke the ground with respect to the other interested States. According to draft article 51, a party alleging the nullity of a treaty or a ground for terminating, withdrawing from or suspending the operation of a treaty was bound to notify the other party or parties of its claim. The claimant State might act unilaterally only when there were no objections to the claim or when no reply was received within a specified period. If objection had been raised by any other party, then a dispute arose between the claimant and the opposing State. Some members of the Commission had considered that in such a case the application of the articles should be made subject to the compulsory jurisdiction of the International Court of Justice. However, the opinion which had prevailed was that in the present state of international relations and in view of the lack of support by the majority of States for the compulsory jurisdiction of the Court, it would not be realistic to put forward that solution. The draft article therefore provided in paragraph 3 simply that the parties should seek a solution of the question through the means indicated in Article 33 of the Charter. While that provision, especially if read in conjunction with the preceding paragraph, made it clear that unilateral action or automatic operation of the grounds of invalidity or termination had been excluded, the Commission did not find it possible to go beyond Article 33 of the Charter in specifying the procedural steps to be taken. It should be noted, however, that the means of pacific settlement of disputes to which parties were obliged to resort under Article 33 of the Charter included "judicial settlement" and that Article 36, paragraph 3, of the Charter provided that "legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court".

8. While the law of treaties would continue to be the main topic on its agenda for 1964, the Commission had also taken measures to advance the codification of other topics. It had appointed a Special Rapporteur for the topic of State responsibility and had asked him to give priority to the definition of the general rules governing the international responsibility of States. It had appointed a Special Rapporteur for the topic of the succession of States and Governments and had instructed him to give priority to the rules governing State succession in the matter of treaties. A Special Rapporteur for the topic of special missions had also been appointed and requested to submit by January 1964 draft articles determining the extent and form of application of the relevant rules of the Vienna Convention on Diplomatic Relations, 1961, to ad hoc diplomatic missions.

9. The results of the study requested by the General Assembly in its resolution 1766 (XVII) would be found in chapter III of the report; the summary records of the Commission's discussion on that matter appeared in the annex to document A/5528.

10. Mr. COOMARASWAMY (Ceylon) commended the International Law Commission upon its report and suggested that the full text of its Chairman's introductory remarks should be circulated as a Committee document.

11. In connexion with the Commission's work on the law of treaties (see A/5509, chap. II), the Ceylonese delegation considered that the examination and final adoption of a convention or series of related conventions on the law of treaties should be referred to a conference of plenipotentiaries similar to the United Nations Conferences on the Law of the Sea and on Diplomatic Intercourse and Immunities. The comments of Governments on the draft articles could also be discussed at such a conference. For the time being, therefore, the Committee should confine itself to general observations on the draft articles and reserve as much time as possible during the current session for a full discussion of the important agenda item dealing with principles of international law concerning friendly relations and co-operation among States in accordance with the United Nations Charter. Ceylon was particularly interested in the principle of non-intervention, one of the four basic ideas related to that item.

12. In connexion with chapter IV of the report, his delegation was gratified to note that the Commission was making satisfactory progress on a variety of subjects. The method of appointing sub-committees to define the areas of inquiry was proving successful, and Ceylon endorsed the idea that it was essential to establish co-ordination between the Special Rapporteurs on the law of treaties, State responsibility and the succession of States and governments respectively, in order to avoid overlapping in the codification of those topics.

13. With regard to chapter V of the report, it should be noted that the feasibility of holding a three-week winter session of the Commission at Geneva in January 1964 would have to be decided by the Fifth Committee on the advice of the Advisory Committee on Administrative and Budgetary Questions since no provision had been made for such a session in the budget estimates. The Committee should further note the continuing delay in the reproduction of documents in the Spanish language and in the transmission of preparatory documentation to Member States before Assembly sessions, and should request the Secretariat, so far as possible, to remedy that situation. It should also express concern over the delay in the publication of the Yearbook of the International Law Commission. On the other hand, those problems of documentation were of a general nature and resulted from the lack of funds and personnel. They would ultimately have to be dealt with in the Fifth Committee, and members of the

Committee might well discuss them with their colleagues in that body.

14. The Committee might adopt a draft resolution on the agenda item under discussion taking note of the report of the International Law Commission and expressing appreciation for its work, particularly in respect of the law of treaties. It might recommend that the Commission should continue its work of codification and progressive development of the law of treaties, taking into account the views expressed in the Committee and the comments of Governments, as well as its work on State responsibility, succession of States and Governments, special missions and relations between States and inter-governmental organizations. Finally, it might request the Secretary-General to transmit the records of the Committee's discussions on the item under consideration to the International Law Commission.

15. The CHAIRMAN, after consulting the Secretary of the Committee, announced that the text of the remarks made by the Chairman of the International Law Commission would be circulated as a document of the Committee.[2/]

The meeting rose at 11.20 a.m.

[2/] Subsequently circulated as document A/C.6/L.526.

Litho in U.N. 77601—April 1964—2,075