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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, A/C.6/L.526, A/C.6/L.527) (continued)

1. Mr. PRATT (Israel) commended the International Law Commission on the progress made at its fifteenth session. His delegation regarded the draft articles on invalidity and termination of treaties (A/5509, chap. II) as a contribution to both the progressive development and the codification of the law of treaties, and paid a warm tribute to the Special Rapporteur on the subject for his able and scholarly work. A bold and imaginative approach had been adopted; draft articles 36 and 37, in particular, showed the progressive trend of the Commission's thinking.

2. His delegation was satisfied with the Commission's conclusions on the questions discussed in chapter IV of its report and with the general conclusions reached by the Sub-Committee on State Responsibility (annex I) and the Sub-Committee on the Succession of States and Governments (annex II). It welcomed in particular the appointment of three Special Rapporteurs; the Commission's decision that succession in the matter of treaties should be considered in connexion with the succession of States rather than in the context of the law of treaties (paragraph 58); and the Sub-Committee's recommendation that, within the field of State succession, priority should be given to the problems of succession in relation to treaties (annex II, para. 9). It would be desirable for the Commission to complete its work on State succession in relation to treaties and its work on the law of treaties proper at the same time, so that the General Assembly could deal coherently with the whole topic of treaties when the final reports were before it.

3. It was gratifying to note, in paragraph 76 of the report, that there had been a very considerable improvement in the servicing of the Commission; the Secretariat was to be commended on the factual reports prepared for the Commission's fifteenth session. However, the Secretariat had not yet produced a summary of depositary practice in relation to reservations, which the General Assembly had requested in resolution 1452 B (XIV). Since the Commission would shortly begin the second reading of part I of its draft articles on the law of treaties,[1] his delegation hoped that the summary would be made available at an early date. It would appear from section 3 of the budget estimates for the financial year 1964 (A/5505) that the document was now in preparation.

4. The dispatch of preparatory documents to the members of the Commission by air mail, as suggested in paragraph 78, should expedite the Commission's work; if the cost was not excessive, his delegation would support any reasonable proposal to that end.

5. Mrs. ZGURSKAYA (Ukrainian Soviet Socialist Republic) expressed her delegation's appreciation of the work of the International Law Commission, as described by its Chairman in his illuminating statement at the 780th meeting; that work was a major contribution to the development of friendly international relations and co-operation, the settlement of disputes by peaceful means and the furtherance of economic and social progress. The problem of the validity of treaties was of great theoretical and practical interest, for the customary rules of international law were being absorbed into treaty law at an ever-increasing rate, as witness the first and second United Nations Conferences on the Law of the Sea, held in Geneva in 1958 and 1960, respectively, and the two Conferences held at Vienna—the United Nations Conference on Diplomatic Intercourse and Immunities, held in 1961, and the United Nations Conference on Consular Relations, held in 1963.

6. Codification of the law of treaties would have a beneficial effect on the progressive development of other branches of international law also, particularly the principles of peaceful co-existence; for the main purpose of codification was to make international law an effective means of preserving peace and promoting co-operation among States. Her delegation approved in principle the draft articles submitted by the Commission.

7. An essential requirement of any international treaty was that it should be valid: i.e., strictly in accordance with the generally accepted principles and rules of international law— the equality and free will of the contracting parties, observance of their constitutional processes and the like. A treaty which fell short of that requirement was ipso facto unlawful, unjust and void.

8. The draft articles were based on the central idea that the only valid treaties were those which conformed to the fundamental principles of international law; they closely reflected the view expressed by Sir Gerald Fitzmaurice, in his third report on the law of treaties, that:

"It is essential to the validity of a treaty that it should be in conformity with and not contravene, or

[1] See Official Records of the General Assembly, Seventeenth Session, Supplement No. 9, chap. II.

that its execution should not involve an infraction of of those principles and rules of international law which are in the nature of jus cogens." 2/

That requirement was adequately expressed in draft article 37. It should prove an adequate criterion with which to identify treaties incompatible with the principles of the Charter and with the Declaration on the granting of independence to colonial countries and peoples. (General Assembly resolution 1514 (XV))

9. The existence of unjust, one-sided treaties presented a more serious and more complicated problem than appeared at first glance. Flagrantly unjust treaties, in which one party manifestly received all the benefits while the other party received none at all, were a rarity nowadays; however, there was a danger that newly independent countries might be induced to enter into treaties which, while ostensibly fair and acceptable, were really instruments of exploitation and economic subjugation. In codifying the law of treaties, the Committee and the Commission must make it possible to root out existing unjust treaties and to prevent the adoption of new ones.

10. The first type of unjust treaty to be considered was the so-called treaty of "assistance", designed to secure colonial privileges for a highly developed country in a less developed country. Such treaties frequently gave the former country a large measure of control over the latter country's economy, and the assistance given could be arbitrarily and unilaterally cancelled.

11. Another type of unjust treaty was that concerning the provision of military assistance and the granting of military bases. Military personnel stationed in a foreign country under some treaties of that type enjoyed virtually unlimited privileges and immunities, while the host country virtually surrendered all sovereignty over the bases. The more powerful party could violate the terms of the treaty as it saw fit; the weaker party had no redress. The bases existed, not for legitimate purposes of defence against aggression, but to maintain colonialist interests in the areas concerned.

12. A third type of unjust treaty often imposed on newly independent countries was that which their former masters forced them to sign as the price of their freedom. A typical example was the Evian Agreement of 18 March 1962 between France and Algeria, which Mr. Ben Bella, the President of Algeria, had recently criticized. In another treaty of the same type, a newly independent country had been obliged to leave the control of its mineral wealth to the former metropolitan Power. A frequent feature of such treaties was the retention by such a Power of financial and commercial control over newly independent countries which remained in its currency area.

13. The world would never be free from the danger of another war until all forms of unjust relations between States had been eliminated. Unjust treaties conflicted with the affirmation by the United Nations, in the Preamble to the Charter, of faith in the equal rights of nations large and small, and with the purpose, defined in Article 1, paragraph 2, of developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Article 103 provided that, in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the former should prevail. Draft article 37 seemed to her delegation completely in accordance with that principle. Unjust treaties designed as instruments of colonial oppression and exploitation also conflicted with the Declaration on the granting of independence to colonial countries and peoples and with General Assembly resolutions 523 (VI), 626 (VII), 1314 (XIII) and 1515 (XV).

14. The question of State responsibility required extensive study, as was borne out by the adoption of General Assembly resolutions 95 (I), 1765 (XVII) and others. The Commission should examine, in particular, the responsibility of States for serious violations of international law, such as aggression; obstruction of the attainment of independence by colonial countries and peoples; violation of the sovereign rights of States; war propaganda and violation of a people's right to control their natural resources. Any such violation of international law flouted the obligation to preserve world peace and struck at the very foundations of the peaceful co-existence of peoples.

15. The Commission and the competent Sub-Committee still had a great deal of work to do on the succession of States and Governments, which was a matter of great urgency in a period marked by the emergence of many new States as the result of the struggle for liberation. Her delegation was confident that the Special Rapporteur on relations between States and inter-governmental organizations would complete his task successfully. It welcomed the Commission's decision to draw up rules applicable to special missions, and agreed with the Commission that they should be based, mutatis mutandis, on the provisions of the Vienna Convention on Diplomatic Relations, 1961.

16. Mr. GOMEZ ROBLEDO (Mexico) said that it was not the Sixth Committee's function to review per longum et latum the texts drafted by the International Law Commission, for in each case the decision rested with Governments. However, the draft articles now before the Committee introduced such far-reaching changes in the law of treaties that some comment was called for.

17. Perhaps the greatest merit of the report before the Committee lay in the enlightened and far-sighted introduction of humane considerations into the traditional law of treaties, through the draft articles concerning defects of consent and the application of the doctrine of rebus sic stantibus.

18. As it had been at its inception, international law was becoming once again a jus gentium, governed by the same values—reason and freedom—that ruled domestic law. There was no reason why error, fraud and coercion should not be recognized as having the same effects in international as in private transactions, or why international law should pander to powerful countries by ignoring defects of consent. In an atmosphere of reason and freedom, States and individuals alike must practise coexistence, and the habit of regarding civil law and international law as different in nature and substance must be discarded once and for all. It was to be hoped that the Commission would eventually turn its attention to another form of defect: namely, the injury ("lésion") suffered by one of the parties by entering into a contract in which he received less than he gave. In private law, at least since Roman times, the distinction between foedera aequa and foedera iniqua had been clearly recognized.

2/ See Yearbook of the International Law Commission, 1958 (United Nations publication, Sales No.: 58.V.1), vol. II, p. 26.

19. The doctrine of rebus sic stantibus reflected that distinction, although only with respect to injustice arising after the treaty had been made. The acceptance of that doctrine, with the Commission's prudent reservations, was another merit of the report. Western jurists traditionally regarded the doctrine of rebus sic stantibus as a direct expression of the idea of justice, the essence of which was equality. The application of that doctrine to treaty law, not merely as a theory but as an effective right, was therefore a special source of satisfaction to the Latin American nations, which had been responsible for the inclusion of the word "justice" in Article 2, paragraph 3, of the Charter.

20. The promising innovations introduced by the draft articles would undoubtedly arouse misgivings among those who maintained that security came before justice; but the only true security was that based on justice, as the Second World War had shown.

21. Mexico's support for the principles he had mentioned was not a screen for political designs; it had no intention of repudiating the obligations which it had freely assumed in international treaties.

22. It was gratifying to note that progress was now being made in the codification of State responsibility, which had been on the Commission's agenda for many years. Although the smaller Powers no longer suffered so severely as in the past from the abuse of so-called diplomatic protection, it was still necessary to reach general agreement on the facts and situations which gave rise to State responsibility, for such agreement would make for greater confidence and flexibility in international relations.

23. Mr. PLIMPTON (United States of America) joined with previous speakers in commending the International Law Commission on a major contribution to the codification and development of the law of treaties. He wished to state the preliminary views of his Government on the Commission's articles on invalidity and termination of treaties.

24. Draft article 30 had the merit of stating a formal presumption which might otherwise be disregarded for reason over and above those specified in other draft articles. However, by stating expressly what was normally assumed, it seemed to imply that every aspect of treaty law would be covered by whatever convention or conventions might be adopted on the subject. If the convention or conventions could be simplified to state only those aspects of the law of treaties which required statement, article 30 might well be omitted.

25. The provisions of draft article 31, on internal law regarding competence to enter into treaties, were sensible, and it was to be hoped that they would become self-enforcing in the course of time. The should encourage States to recognize the need for precision in meeting the requirements of their internal law. A State which invoked them to justify the withdrawal of its consent to be bound by a treaty, alleging manifest violation of its internal law, might find that in subsequent negotiations, even with different States, it would be required to give assurances that the requirements of its internal law had been fully satisfied.

26. When draft article 4, paragraph 3, had first been discussed, his delegation had objected to the use of mandatory language, pointing out that circumstances might make it clear that a given individual or mission was fully authorized to negotiate, draw up or authenticate a treaty. Consistently with that position, his delegation now suggested that draft article 32, paragraph 1, should be amended to read as follows:

> "1. If the representative of a State, who cannot be considered under the provisions of article 4 or in the light of the attending circumstances as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes, without authority, an act purporting to express its consent, the act of such representative may be considered by the parties to be without any legal effect, unless it is afterward confirmed, either expressly or impliedly, by his State."

The only tenable meaning of paragraph 2 of that article could be made clearer by adding the words "prior to his expressing the consent" at the end of the paragraph.

27. In draft articles 33 and 34, dealing with fraud and error, respectively as grounds for invalidating consent to be bound by a treaty, it was important to set a time-limit on the exercise of the remedies. In drafting article 33, the Commission had obviously been hampered by the absence of State practice; in a simplified convention, the article might well be omitted.

28. In draft article 35, paragraph 1, he suggested that the words "shall be without any legal effect" should be replaced by the words: "may be treated by the State whose representatives were coerced as being without any legal effect". As amended, that provision would, firstly, prevent the State which had applied the coercion from invoking that coercion as grounds for considering the treaty invalid. Secondly, it would leave the injured State the option of ignoring the coercion if it saw fit to keep the treaty in force. Lastly, it would prevent third States from interfering if the parties directly involved were satisfied to maintain the treaty.

29. The adoption of draft article 36 would, if agreed upon, constitute an important advance in the rule of law among nations. The provision should be restricted to cases of the threat or use of physical force, which was the subject of article 2, paragraph 4, of the Charter. However, the idea that it was illegal to threaten or use physical force in violation of territorial integrity or political independence, or in any other manner inconsistent with the purposes of the United Nations, had been accepted only upon the entry into force of the Charter. If article 36 was applied retroactively, the validity of many treaties, notably peace treaties, would be thrown into question. The Commission should therefore consider whether the proposed rule should have effect from 1945 or, alternatively, from the date of conclusion of a convention on the law of treaties embodying that rule.

30. Draft article 37 would also do much to advance the rule of international law and should be supported.

31. The rules laid down in draft article 38, on the other hand, appeared self-evident and might well be omitted from a simplified convention. If the majority wished to maintain the article, however, his delegation would have no objection to the present wording, since it overcame any alleged presumption that a treaty might be denounced unilaterally where there was no provision for denunciation.

32. Draft article 39 wisely specified the cases in which a party to a treaty containing no provision for

denunciation could denounce or withdraw from it unilaterally. Draft article 40, paragraph 1, stated an established principle of international law concerning the termination of treaties by agreement. Paragraph 2 of that draft article, on the other hand, broke new ground. It would permit the parties to a multilateral treaty to terminate it by agreement, without regard to any of the provisions in the treaty regarding termination, if after the expiry of a specified number of years they did not find it feasible to continue applying it. It might prove difficult to agree upon the appropriate number of years, and he therefore suggested that the final clause in paragraph 2 should be amended to read: "however, after the expiry of... years, or such other period as the treaty may provide, the agreement only of the States parties to the treaty shall be necessary".

23. Draft article 41 would be superfluous if treaties were drafted with care and attention, and might well be omitted from a simplified convention.

34. The principle laid down in draft article 42, paragraph 1, was sound and should be crystallized as a rule of conventional law. Paragraph 2, however, appeared to some extent to disregard the varied nature of multilateral treaties. It could be applied to a law-making treaty on such a subject as disarmament, whose observance by all parties was essential to its effectiveness, but his delegation doubted that the paragraph should apply equally to a multilateral treaty like the Vienna Convention on Consular Relations, 1963, which was essentially bilateral in application. For example, if one State refused to accord to a second State its right under the aforementioned Convention, a third State should not have the right to treat the Convention as suspended or no longer in force between itself and the first State. It was to be hoped that the Commission and Governments would give the question careful study. The termination or suspension of multilateral treaties should be governed by the rule applicable to bilateral treaties: an injured party should not be required to continue to accord rights illegally denied to it by the offending party. Accordingly, sub-paragraph 2 (a) should be amended to read:

> "(a) Any other party, whose rights or obligations are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;"

and the opening words of sub-paragraph 2 (b) should be amended to read:

> "(b) The other parties whose rights or obligations are adversely affected by the breach, either:".

35. Draft article 43 might be desirable as far as it went, but it failed to provide for cases in which certain provisions of the treaty had been executed, while others remained executory. For example, a State might conclude a bilateral treaty ceding land to another State on condition that the latter would forever maintain and permit the use of a navigable channel in the river running through that land. If, in the course of nature, the river became permanently impassable, the question arose whether the second State should continue to enjoy the benefits of the cession of land while the first State was deprived of its rights under the treaty. He therefore suggested the addition of a fourth paragraph reading as follows:

> "4. The State invoking the impossibility of performance as a ground for terminating the treaty or suspending the operation of a treaty may be required to compensate the other State or States concerned for benefits the invoking State received under executed provisions that were the bases for its performance of the provisions that remained executory while the treaty continued to be operative."

36. His delegation opposed the adoption of draft article 44, at any rate in its present form. In the absence of accepted law, his delegation did not believe that the much-debated principle of rebus sic stantibus was capable of codification. It would have unquestionable value if it was adequately qualified and circumscribed so as to guard against the abuse of subjective interpretation. It would be acceptable if it was applied with the agreement of the parties to a treaty, so as to give rise to a novation of the treaty. Failing that, it would be acceptable if an international court or arbitral body was entrusted with making a binding, impartial determination of its applicability to a particular treaty.

37. His delegation felt that draft article 45 would require considerable further study. It was a difficult matter to determine when a new rule of international law had become sufficiently established to be regarded as a peremptory norm. On the other hand, the provisions of draft article 47 were essential in order to prevent abuses of certain rights laid down in other articles, and helped to extablish the principle that a party to a treaty was not permitted to benefit from its own inconsistencies. Draft article 48 stated an important rule, but considerable study would be needed to determine whether, and to what extent, that rule was appropriate for inclusion in a general convention on the law of treaties. Draft article 49 served a useful purpose of clarification.

38. Draft article 50, paragraph 1, correctly stated the principles and procedure normally applied to the giving of notice. With regard to paragraph 2, however, the reason for specifying a period of notice was to allow the parties time to adjust to the new situation created by termination of the treaty. His delegation consequently suggested that paragraph 2 should be amended to read as follows:

> "2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect, except in a case in which the notice would have caused the treaty to terminate with respect to all parties. Where the notice would cause the treaty to terminate with respect to all parties, the notice of withdrawal will not be effective if objected to by the other party in the case of a bilateral treaty, or if objected to by one-third of the other parties in the case of a multilateral treaty."

39. The Commission itself acknowledged that draft article 51 was a key article. Some of the grounds under which treaties might be considered invalid or terminated could imperil the security of treaties if a party was free to invoke them arbitrarily over the objections of other parties. His delegation regretted that, while the Commission had specifically stated in its commentary that it did not dispute the value of recourse to the International Court of Justice as a means of settling disputes arising under the draft articles, it had not found it possible to adopt a rule making such recourse compulsory. The United [illegible]es was not convinced that the provisions of articl[illegible]1 would provide all the safeguards which might be required; it hoped that the matter would receive further consideration.

40. His delegation had taken note of the general conclusions drawn in the report by the Chairman of the Sub-Committee on State Responsibility, as set forth in paragraph 52 of the Commission's report. However, it continued to regard the question of State responsibility for injuries to aliens and their property as the central focus of State responsibility, and it thought that the Commission would be unwise to give any appearance of treating that question as a somewhat secondary matter.

The meeting rose at 12.5 p.m.

Litho in U.N. 77601—April 1964—2,075