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FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Addendum to observations by Governments

Note by the Secretary-General: Observations received from the Governments of Afghanistan, Belgium, Burma, Colombia, Czechoslovakia, Denmark, Ghana, Indonesia, Israel, Mexico, Sweden, the United Kingdom, Venezuela and Yugoslavia have been reproduced in documents A/4796 and Add.1 to 5. The observations received subsequently from the Government of Austria are reproduced in this addendum.

15. AUSTRIA

Transmitted by a note verbale of 23 August 1961 from the Permanent Representative of Austria to the United Nations

[Original text: English]

MEMORANDUM OF THE AUSTRIAN GOVERNMENT

I. General Observations

As a small country Austria has a most practical concern in the rule of law in international relations. All endeavours to strengthen that rule have its fullest support. The Austrian Government follows therefore, with close attention the activity of United Nations organs in respect of the progressive development of international law and its codification and has repeatedly had occasion to express its appreciation of the outstanding work which the International Law Commission performs in that respect.

With the exception of some topics which were referred to it from time to time by the General Assembly, the ILC took the topics which it has hitherto considered or is still considering from a list that it had established at its first session on the basis of a survey of international law submitted by the Secretary-General (A/CN.4/1/Rev.1). At that time the Commission, in accordance with article 18 of its statute, had selected topics for codification. Hence it chose subjects which a relatively uniform and coherent practice of States in accordance with certain long-established rules suited most for that purpose (Cf. the debates in the Commission, 1st-7th meeting, Yearbook of the ILC 1949; and the Commission's first report to the General Assembly, A/CN.4/13, chapter II).

However, since the end of the Second World War the political, economic, and social conditions of the international community have been and still are subject to a rapid and intense change. Many of the more recent sociological developments are not adequately or not at all reflected in universal norms of international law. This is in part due to the peculiar law-making process in the international community which, in the absence of a general convention, requires a continuous and uniform practice during a relatively long period of time. In the opinion of the Austrian Government it is the task of the United Nations to see to it that the greatest possible use is made of international law to ensure that these changes and trends evolve in the sense indicated by the Charter. This may require the adaptation of established principles of international law to the new conditions of international life and, if no norms exist covering a given situation, the creation of principles conforming to those conditions.

The Austrian Government welcomes, therefore, the decision of the General Assembly to place the question entitled "Future work in the field of codification and progressive development of international law" on the provisional agenda of its sixteenth session in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and progressive development of international law. While the survey of 1949, which was made with a view to select subjects suitable for codification, focused on unchanged situations regulated by traditional norms of international law, the new survey is bound to have special regard to the recent sociological developments within the international community. Topics which are

chosen as a result of that survey will in their majority require the progressive development of international law rather than be suited for genuine codification. The choice of such topics must be considered a political decision best taken by the world forum of States which alone can give authority to such an undertaking. This course of action is also supported by article 16 of the ILC's Statute which leaves, as far as progressive development is concerned, the initiative to the General Assembly.

II. Analytical survey

Under the special circumstances just mentioned, only a close examination of the sociological developments, which have occurred in the international community during the last one and a half decades, and of their impact on international law can permit a tenable suggestion of topics for the progressive development of international law and its codification. This examination has led the Austrian Government to the following conclusions:

A. Changes in the organization of the international community.

Since the end of the Second World War the international community has found a new organizational form in the United Nations and its specialized agencies. These organizations are based on new principles which affect international law in many ways, some of which need to be mentioned in this context:

1. The implementation of Charter provisions

The Charter embodies among the purposes and principles of the United Nations a number of new postulates which are not implemented by other Charter provisions. Since they are new, no norms of traditional international law concerning them exist either. Hitherto they were enforced by political decisions, hence their enforcement depended on the strength of the political forces engaged in the actual problem. A sustained effort to promote the growth of international law in accordance with these principles would mean a very substantial contribution both to the development of international law itself and to the consolidation of world peace. The principle of equal rights and self-determination of peoples may be mentioned in this context.

2. Charter provisions affect existing rules of international law.

But the fundamental principles on which the new organizations are based have also tremendous impact on existing norms of international law, especially on those which formed the basic laws of the old community. The major impacts are the following:

a. The Charter forbids the use and threat of force in international relations. In the international community until the Second World War States had a right to have recourse to force as a sanction for the breach of international law. Consequently, the general prohibition of the use of force, as provided for in the Charter, calls for the establishment of another effective yet peaceful procedure to enforce the law. A progressive development of the rules concerning state responsibility, in the broadest sense of the term, might remedy the situation.

b. Charter provisions have derogated a certain number of other traditional rules of international law. Although this may theoretically be established, doubts may exist as to the extent of this derogation. A restatement of the law in such cases would be helpful for clarifying the situation. An example is the right of self-protection which a State could exercise in respect of its nationals living in a foreign country if that country was unable or unwilling to secure the protection. It is evident that under the Charter this right can no longer be exercised by means of force. But without the possibility of implementation the content of the subsisting right may be doubtful and should be redefined.

c. Finally, provisions of the Charter may have had an effect other than abrogation on traditional norms of international law. Some norms, for instance, may have to be modified in order to correspond to the regulations of the Charter. This is especially true for the laws of war and neutrality which reflect the state practice of the Nineteenth Century and do, therefore, not provide for military actions of a world organization of States.

3. Resolutions of the General Assembly

The United Nations has proved to be a world forum where questions of an international character are put to discussion, on which world opinion is shaped and promulgated in a series of resolutions emanating from various organs of the

United Nations. Certain resolutions, especially some of the General Assembly, are of fundamental nature. They set forth new principles for the conduct of international relations, corresponding to the present needs of the international community. Such principles, notwithstanding their fundamental nature, do not have the force of norms of international law, because the resolutions in which they are embodied have only the character of recommendations.

Two procedures can be followed in order that these principles become binding upon all members of the international community. States could agree to give more authority to resolutions of the General Assembly which embody new fundamental principles; or such principles, once resolved by the General Assembly, might become the object of autonomous international conventions the drafts of which could be prepared by the ILC upon request of the General Assembly.

B. The expansion of the world community.

Since the end of the Second World War the international community has not only found a new form of organization, but has also considerably expanded because many of the formerly dependant countries have gained independence. This development gives rise to two principal considerations:

1. The validity of norms of international law.

The present body of rules of international law results mainly from the practice among European and American States and reflects, therefore, the values they obtained in their respective communities. The new members of the international community have not participated in the formation of these norms. It might happen that some of the norms are in conflict with values cherished by the new States, which means that these norms would have another content had the States adhering to these other values participated in their development and formation.

It is certainly a recognized principle of international law that new members of the international community are bound by the body of rules existing in that community at the time of their entrance. But the application of these principles furnishes only a formal solution. The material aspect of the problem might be solved by a review of the norms of international law and their potential conflict with values existent in the society of new Member States to the international community. Evidence of such values could be found in general principles of law deriving from the legal systems of the new States, or in regional state practice

among them. The review will permit the determination of actually conflicting values and will enable the ILC to propose, by way of progressive development, new rules of international law reconciling the conflict.

2. The newly independent countries.

The countries which gained their independence during the last decade became masters of their economic affairs and are faced now with great economic problems which can only be solved by way of co-operation with highly developed and industrialized nations.

State activities to that end have been made the object of a collective scheme embodied in international treaties setting up international organizations whose functions are to give financial and technical assistance to developing countries on a multilateral basis. As between single States economic help is also given on a bilateral basis through economic development agreements. However, private investment in developing countries is more or less left to individual initiative and is accompanied by impeding factors. On the part of the investor it may be attended by the risks of nationalization, confiscation and discrimination. The receiving State, on the other hand, may be anxious not to have foreign capital controlling larger or smaller parts of its economy, especially when there exists some resentment towards a former colonial status.

Under traditional international law, foreign private investment is governed by rules of international law with regard to the treatment of aliens and their property and within the larger context of state responsibility. Under the changed circumstances of today it may be advisable and justified to treat the problem of foreign investment in developing countries as a separate subject for which the ILC may be called to propose, by way of progressive development, protective rules of international law to the satisfaction of both parties to the problem.

To the extent that foreign investment reaches back into the time of the dependent status of new sovereign States, it is also governed by the rules of state succession. New rules should in this respect be developed to meet the special requirements of a new State succeeding to the former régime.

C. New forms of international relations.

The sociological development of the international community has also led to new forms of international relations in respect of which no or only embryonic norms of international law exist. Some of these developments need to be mentioned here.

1. New technological developments

Revolutionary scientific inventions have led to tremendous technological developments which open new perspectives for the future of mankind and have finally even permitted the advance into the universe. But the perspectives will only be happy ones if any other than the peaceful use of these new inventions and of the media to which they give access is prohibited. This applies particularly to the use of nuclear energy and to the use of outer space. Norms of international law to regulate these new types of international relations are imperative. They should, moreover, guarantee all nations, big and small, free access to these means and media.

2. The existence of international organizations as new subjects of international law.

International organizations partake, within the express or implied powers conferred upon them by their statute, in international intercourse. Some aspects of the existence of international organizations as international legal phenomena are covered by international conventions which have been concluded for or by individual organizations. To other aspects of the external relations of international organizations, for which no such conventions exist, the traditional norms of international law can be applied only to a limited degree, because they were created by the practice of States and fit, therefore, the organizational structure of States. Although a new practice is slowly developed by and in respect of international organizations, it is still embryonic and, above all, multiform. To ameliorate the situation traditional norms need to be adjusted, new norms to be created. Regulations are for instance required for: the conclusion of treaties by international organizations; the legal status of permanent missions of Member States to international organizations and of international organizations to Member States, the responsibility of international organizations, et al. The ILC has already been charged with the consideration of some of those questions but has not yet taken it up.

3. New participants in international relations.

To a limited degree international relations are apart from States, organizations of States, and a few traditional subjects of international law, also carried out by some other forms of human groupings, such as minorities, international non-governmental organizations, and a few international industrial enterprises. Some of them have to a varying degree been made the subject of limited international rights under international instruments; others have entered with States or organizations of States into relations which were not governed by the municipal law of some country. Traditional international law has developed no general rules to govern ~~kkxx~~ their status or relations. But a progressive development of international law which aims at a body of rules truly reflecting the present state of international relations must take the existence of these various groupings into account in drafting the rules.

III. Suggestions

The foregoing survey furnishes the raw material for further consideration. No immediate inference can be drawn from it. When new phenomena have already led to the creation of corresponding norms of international law, these norms must not necessarily be susceptible of codification. Nor does the absence of norms of international law dealing with situations resulting from recent sociological developments imply that their creation by way of progressive development is, for the time being, necessary or even possible. Sometimes the evolution of facts may not have reached the stage where all potential consequences can be judged and States might, therefore, hesitate to commit themselves as long as sufficient data are not available. It should moreover be noted that the elaboration of norms of international law with regard to some subjects mentioned in the survey, like the peaceful use of nuclear energy or outer space, has already been entrusted to other organs of the United Nations or to specialized agencies. Such subjects are not further considered in this context. Neither are those which, although their treatment might satisfy theoretical interests, do not correspond to an urgent practical need. The following suggestions are, therefore, the result of a selective process in which the urgency of a solution and considerations as to the possibility of its implementation have been the guiding principles. It need not be stated that no negative judgement on other problems is thereby implied.

The examination proved that many of the subjects which most urgently need treatment, are affected by recent sociological developments. It might, therefore, be useful to consider the method which should be employed by the ILC in dealing with topics suggested as a result of the survey. The Statute of the ILC distinguishes between the codification and the progressive development of international law. The difficulty of drawing a clear-cut distinction between the two terms was already emphasized in the report of the Committee on the Progressive Development of International Law and its Codification, in which the substance of Article 15 of the ILC's Statute was first conceived. /General Assembly (II), Sixth Committee, pp. 173-182, annex 1 (A/331)/. The question whether the two functions were mutually exclusive was much discussed in this Commission as well as later in the ILC itself. After several years of practical application, the ILC formulated its views in the introduction to the law of the sea, contained in its report to the eleventh session of the General Assembly /General Assembly (XI), Supplement No. 9 (A/3159), paras. 25 and 26/. The Commission felt that in the domain of the law of the sea at least - but apparently also in others - the two methods were interrelated. In this cumulation of functions the tendency was, however, mainly in favour of codification. Roughly sketched the Commission in dealing with matters which were of a fundamental nature did not more than codify the existing law. Only in other respects it formulated provisions de lege ferenda of what it considered to be desirable developments in the respective fields. Yet it must be acknowledged that this method was appropriate for the subjects on which the Commission has hitherto produced drafts, and will continue to do so for many of the topics to be treated in the future.

Some, however, will require a different method. Article 15 of the ILC's Statute defines progressive development of international law "as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". This provision envisages cases in which new sociological developments make the creation of new norms of international law necessary. Its application is, however, not limited to cases where no norms or only embryonic norms of international law exist; it applies also to situations where existing rules of international law correspond no longer to the social reality, since the international law in the matter is then, obviously, not sufficiently

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developed. In dealing with topics of that kind, the ILC might also have to emulate its functions of codification and of progressive development of international law, but with greater emphasis on progressive development. Its work in this respect need not always lead to a draft of detailed rules; it will sometimes suffice for the Commission to propose some fundamental rules or principles as a general guide for States and international organizations.

The same considerations will apply to some of the topics which the ILC has already taken up but on which it has not yet finished its work. The five topics remaining on the list should be reconsidered in the course of the survey to be undertaken by the General Assembly and should, according to the urgency of their treatment, be incorporated in the new list.

On the basis of the foregoing considerations, the Austrian Government makes the following suggestions for topics to be referred to the ILC for the progressive development of international law and its codification. The order of the following list of topics does not reflect the degree of urgency in which the various topics should be treated:

(1) State responsibility in its broadest sense (already contained in the present list of topics, but treated in a more limited way);

(2) The laws of war and neutrality;

(3) The principle of self-determination of peoples;

(4) The validity of norms of international law with regard to the entrance of new members in the international community;

(5) The law of state succession with regard to the special requirements of a newly independent State;

(6) The law of treaties in respect of international organizations (already considered in the ILC, but postponed to a later date);

(7) Relations between States and international organizations (referred to the ILC by General Assembly resolution 1289 (XIII), but not yet taken up by it);

(8) The responsibility of international organizations.
