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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. MORE (India) congratulated the Chairman of the International Law Commission on his lucid and extremely helpful statement at the 780th meeting when introducing the Commission's report (A/5509). The enlarged Commission had presented the Committee with an excellent set of draft articles (ibid, chap. II) on the law of treaties, which formed a valuable contribution to the codification and progressive development of that branch of international law. It was heartening to note that, whereas the Commission had taken a considerable time to produce part I of the draft articles,[1] consisting of twenty-nine articles on the conclusion, entry into force and registration of treaties, it had been able to produce part II, consisting of twenty-five articles on the invalidity and termination of treaties, much more quickly.

2. The rapid disintegration of colonialism had brought forth many new States on the international scene, and that required a faster pace of work in the field of codification of international law so as to make international law an effective instrument furthering the Purposes and Principles of the Charter of the United Nations. He reserved the right of his Government to transmit comments at a later date. He also stated that the proper place for the detailed examination of the article would be the plenipotentiary conference which might be convened once the work on the law of treaties was completed.

3. Generally speaking, the delegation of India found the draft articles in chapter II of the Commission's report acceptable to its Government, subject to its comments later. The Indian delegation was not very happy with the phraseology of draft article 32, paragraph 2. It felt that it referred to restrictions which were secret since the instrument of full powers issued to a State's representative normally specified, for the information of the other contracting States, any non-secret restrictions on those powers.

4. Draft article 39, concerning treaties containing no provisions regarding their termination, might give rise to difficulties of interpretation and application. As the Commission pointed out in paragraph (3) of the commentary (ibid) the proposal to insert denunciation clauses in the conventions drawn up at the first United Nations Conference on the Law of the Sea[2] had proved highly controversial; the difficulties and doubts felt at that time did not appear to have been entirely disposed of even now, particularly in view of the comment in paragraph (5) that the term "statements of the parties" referred not only to statements forming part of the "travaux préparatoires" of the treaty, but also to subsequent statements.

5. In draft article 40, concerning the termination or suspension of the operation of treaties by agreement, his delegation considered that paragraph 2 conferred an unnecessary privilege on States which drew up treaties but did not become parties to them; it urged the Commission to amend the article so as to make the consent of the parties the only prerequisite for the termination of a multilateral treaty.

6. In draft article 41, paragraph 1, sub-paragraphs (a) and (b) seemed to some extent redundant; his delegation hoped that, when the Commission reconsidered at its sixteenth session whether to keep article 41 in part II or move it to part III, it would also reconsider the wording of the two sub-paragraphs.

7. On the Commission's recommendations and advice concerning the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, his delegation reserved the right to speak when the topic was taken up by the Committee under agenda item 70. However, he wished to thank the Commission for its valuable work as India, along with two other delegations, had sponsored the draft resolution submitted to the seventeenth session of the General Assembly requesting the International Law Commission to study that question further.[3]

8. His delegation noted with satisfaction the progress of work on other questions under study by the Commission (see A/5509, chap. IV) and wished to express its thanks to, and confidence in, those responsible for that work. It also took note of the other decisions and conclusions of the Commission in chapter V of its report.

9. Mr. URIBE (Colombia) felt that no other part of the International Law Commission's work on the law of treaties was of such significance to international peace and harmony as that on the invalidity and termination of treaties.

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

[2] See United Nations publication, Sales No.: 58.V.4, Vol. II, pp. 19, 56 and 58.

[3] See Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 76, document A/C.6/L.508.

10. The draft articles relating to defects of consent were very valuable; the clearly worded provisions on error, coercion and fraud were largely based on established principles of customary law. The distinction drawn between personal coercion of representatives of States, on the one hand, and coercion of the State itself in violation of the principles of the Charter of the United Nations, on the other, marked a step forward in the preservation of freedom of contract, which could be endangered not only by acts of violence against diplomatic representatives but also, and more seriously, by indirect means of coercion incompatible with the sovereign equality of States. The rule on fraud laid down in draft article 33 was a logical corollary of the principle that relations among States must be based on good faith. However, in view of the diversity of meanings attributed in internal law to fraud as a ground for the invalidation of consent, his delegation considered that for purposes of international law the term "fraud" should be given a precise and uniform definition in order to avoid any misinterpretation.

11. As to draft article 39, the principle of pacta sunt servanda had been universally recognized as the foundation of international order, and anything that might affect it would reflect directly on confidence in international relations. The Colombian view was that a right of denunciation or withdrawal was valid only if it was explicit and that, in the absence of a clause embodying that right, the treaty should be presumed to be of indefinite duration. It would be a mistake to adopt a less categorical rule which would allow the unilateral revision of a treaty. To seek the intention of the parties in documents other than the treaty itself was to place treaty-making on an insecure basis. As now worded, the draft article would revive many issues which had already been settled and might impart a quality of impermanency to the decisions made in many future disputes. According to the Declaration of London of 1871 as to the non-alteration of Treaties without consent of Contracting Parties, denunciation or withdrawal was valid only if it was provided for in the treaty or consented to by all the other parties. That precept had been recognized by many writers and adopted as a rule of conduct by many Governments.

12. The same criticism applied to draft article 44 on fundamental change of circumstances. The doctrine of rebus sic stantibus had not been accepted in positive international law; it was not even unanimously accepted in academic circles. In a rapidly changing world, paragraph 1 of the draft article would merely add another element of instability, even though the expression rebus sic stantibus did not appear in the text. In practice States had shown themselves averse to the doctrine of rebus sic stantibus, which had been invoked more often for political motives than on firm legal grounds.

13. The Commission had based its draft articles on the principle that release from treaty obligations was no automatic process. The procedure to be followed was set out in great detail in draft article 51; it would eliminate some risks to the security of treaties. However, the effect of paragraph 3 of that article would be to re-open closed issues and encourage revisionist ideas on the part of many Governments.

14. In the Americas, the obligation to abide by treaties was embodied in article 10 of the Convention on Treaties adopted by the Sixth International Conference of American States at Havana in 1928, which provided that "No State can relieve itself of the obligations of a treaty or modify its stipulations except by the agreement, secured through peaceful means, of the other contracting parties". The aim of a future world agreement on the law of treaties should be, not to weaken the principle of pacta sunt servanda, but to strengthen it, as the foundation of peace and friendship among nations. What the States Members of the United Nations now desired was the codification of the customary rules which confirmed that principle.

15. His delegation associated itself with the request made by the previous speakers that institutions engaged in scientific research on the subjects covered by the draft articles should participate fully in the review and discussion of the International Law Commission's work.

16. Mr. JACOVIDES (Cyprus) congratulated the International Law Commission upon its constructive report and expressed appreciation to its Chairman for his introductory statement. As to chapters III and IV, he endorsed the alternative solution suggested by the Commission (paragraph 49) for the problem of how to extend participation in general multilateral treaties concluded under the auspices of the League of Nations, and welcomed the appointment of Special Rapporteurs on the questions of State responsibility and the succession of States and Governments. His delegation was glad the Commission had decided to give the question of State succession priority over that of succession of Governments, and to consider succession in the matter of treaties in connexion with the succession of States rather than in the context of the law of treaties. The general rules and practice regarding State succession should be adapted to contemporary developments, and the codified law of State succession should consequently include many provisions relating to the progressive development of international law. He was sure that, under the able guidance of the Special Rapporteurs concerned, satisfactory progress would be made in the preparation of draft articles on special missions and relations between States and inter-governmental organizations.

17. As to the draft articles on the law of treaties, his delegation endorsed the principle laid down in article 31 that failure to comply with a provision of internal law regarding competence to enter into treaties did not invalidate the consent given in due form by the competent organ or representative of a State; however, it was a mistake to weaken that principle by admitting exceptions to it. The exception admitted under the draft article—that consent might be invalidated when the violation of internal law was manifest—presented difficulties both of principle and in practice. There seemed to be no basis in law for the contention that a "manifest" limitation imposed by internal law on a State representative's authority to give consent was effective in international law while a "non-manifest" limitation was not. In practice no clear-cut distinction could be made between "manifest" and "non-manifest" limitation.

18. His delegation particularly welcomed draft articles 36 and 37. The Covenant of the League of Nations, the General Treaty for the Renunciation of War as an Instrument of National Policy (known as the Briand Kellogg Pact); the Charter of the Nürnberg Tribunal; the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East and, most recently, Article 2, paragraph 4, of the Charter of the United Nations made it lex lata in

modern international law that a treaty procured by the illegal threat or use of force was void ab initio. If the State forced into such a treaty wished to revalidate that treaty after regaining a position of legal equality with the offending State, it would have to conclude a new treaty. Article 37 rightly recognized that there were now certain rules of law from which States were not competent to derogate by treaty, and consequently that a treaty was void if any clause in it conflicted with those rules. That principle corresponded to the rule of municipal law that an agreement to commit a crime or one otherwise contrary to public policy was null and void and could not be construed as conferring any rights on the parties. The International Law Commission, by recognizing that principle of jus cogens, had made a very constructive contribution to the progressive development of international law, and had prudently left the full content of article 37 to be worked out by State practice and in the jurisprudence of international tribunals. The article meant that a treaty which contained a provision contemplating, directly or by implication, the threat or use of force against the political independence or territorial integrity of a State would have no validity. The same applied to a treaty containing a provision purporting to confer upon one or more States the right to intervene in the internal affairs of another State. The judgement of the International Court of Justice in the Corfu Channel[4/] case had clearly demonstrated that such intervention was legally inadmissible, as being inconsistent with the basic principles of the independence and sovereign equality of States.

19. Draft article 39 (Treaties containing no provisions regarding their termination), read in conjunction with paragraph (5) of the commentary, made it clear that denunciation or withdrawal was permissible when it appeared from the character of the treaty and from the circumstances of its conclusion or the statements—or subsequent conduct—of the parties that the latter intended to admit the possibility of denunciation or withdrawal. Moreover, his delegation was inclined to share the view expressed by some members of the Commission that in certain types of treaty, such as treaties of alliance, the presumption as to the intentions of the parties was that a right of renunciation or withdrawal after reasonable notice should be implied unless there were indications of a contrary intention.

20. Draft article 40 provided that a treaty might be terminated by agreement of all the parties; paragraph (2) of the commentary made it clear that in some cases the parties might think it sufficient to express their consent through the diplomatic channel.

21. Draft article 44 reflected a new approach to the doctrine of rebus sic stantibus, and his delegation recognized that the application of the principle of fundamental change of circumstances, if properly delimited and regulated, would provide the law of treaties with an essential safety-valve. If the only legal way to terminate or modify a treaty was for the parties to conclude a further agreement, and if one of the parties adamantly opposed any such agreement, an undue burden would be imposed upon the dissatisfied party, which might feel obliged to seek relief outside the law.

22. As the Commission explained in paragraph (1) of the commentary, draft article 45 was a logical corollary of article 37: a new peremptory norm of general international law (jus cogens), whether established by a multilateral treaty or by a new customary rule, was an overriding rule of public order depriving of validity any treaty in conflict with it.

23. Draft article 46, paragraph 1, made it clear that the separability of treaty provisions for the purposes of the operation of the draft articles did not apply to treaties covered by draft article 36 (Coercion of a State by the threat or use of force) or by draft article 37 (Treaties conflicting with jus cogens).

24. Draft article 49 extended the provisions of draft article 4[5/] to evidence of authority to denounce, terminate or withdraw from a treaty or to suspend its operation. His delegation fully agreed with the Commission that the same rules should apply to evidence of authority to perform acts with regard to the nullity of a treaty.

25. His delegation welcomed the Commission's decision (A/5509, para. 69) to be represented at the next session of the Asian-African Legal Consultative Committee, to be held at Cairo in February 1964.

26. Cyprus would be glad to support a draft resolution on the lines proposed by the Ceylonese representative at the 780th meeting.

27. Mr. IONASCU (Romania) said that the work done by the International Law Commission at its fifteenth session represented a valuable contribution to the codification and progressive development of present-day international law and to the maintenance of international peace and security.

28. The problem of State responsibility was of vital importance in international relations. International responsibility was not confined to the legal status of aliens, and the Commission had taken a notable step forward in adopting the programme of work proposed by the Sub-Committee on State Rresponsibility (ibid., chap. IV and annex I). In his delegation's view there was no question but that State responsibility connoted not only the obligation to redress any harm done but also the right to apply sanctions to a State committing a wrongful act. Although it had not, so far, been possible to agree on a basis for the discussion and drafting of a convention on the international responsibility of States, the Commission should be able, by studying the problems mentioned in the Sub-Committee's report, to codify the principles of international law which were generally applicable to the question of State responsibility, while respecting the letter and spirit of the Charter.

29. In the matter of relations between States and inter-governmental organizations, his delegation considered that sovereign and equal States were not only subjects of international law, in their capacity as holders of sovereignty, but also creators of international law. International organizations, despite their importance in the study and solution of the great problems facing mankind, were subjects of international law only to the extent that they needed that status in order to carry out their work; since they did not possess the same characteristics as a sovereign State, there could be no question of their holding the same status in international law.

30. The question of the succession of States and Governments was of particular importance to the newly

4/ Corfu Channel case, Judgement of April 9th, 1949: I.C.J. Reports 1949.

5/ See Official Records of the General Assembly, Seventeenth Session, Supplement No. 9, chap. II.

independent States which had replaced the former colonies, and the Sub-Committee set up by the Commission to study the question had done much valuable work. His delegation considered that succession to contractual obligations should under no circumstances be allowed to prejudice the independence of newly created States, and that no new subject of international law was bound by any treaty which it did not freely accept.

31. As to part II of the draft articles on the law of treaties (see A/5509, chap. II), draft article 31 raised two considerations which were difficult to reconcile. On the one hand, no sovereign State could be expected to abide by a treaty which violated its internal law, and no State had the practical capacity or the legal right to judge whether another State's representative was competent to consent to a treaty or not. On the other hand, States must be able to rely on actions—signature, ratification and the like—performed by the representatives of other States if the system of settling international problems by the conclusion of international agreements was to survive. As his delegation saw it, the only way to resolve the difficulty was to find objective criteria for the cases in which a State was legally justified in contesting its representative's action on its behalf.

32. His delegation concurred in the text of draft article 36 and with the Commission's commentary on that text. It considered that any international treaty concluded in violation of the general principles of present-day international law was ipso facto void and without effect for all the parties. For the same reason, his delegation concurred in the provisions of draft article 37.

33. Some rules had the effect of strengthening the rule of law in international relations, which was based inter alia on the principle of pacta sunt servanda. Draft article 44, however, seemed unlikely to have that effect and, if adopted, might become a serious source of misunderstanding. In any case it was unnecessary, for experience showed that, wherever a party to a treaty had successfully invoked the principle of rebus sic stantibus, that party had been freed of its obligations under the treaty in question by the application of the general principles of international law.

The meeting rose at 12.5 p.m.

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