

Statement by the Canadian Ambassador for Disarmament  
J. Alan Beesley, Q.C., in the First Committee,  
November 29, 1982  
in explanation of vote on draft resolution L.54  
concerning investigation of alleged breaches  
of the 1925 Geneva Protocol

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Mr. Chairman,

I had not intended to intervene today on this resolution, but in the light of the number of delegations who have expressed reservations concerning it, I should like to offer the following comments in support of the resolution.

There appear to be two categories of criticism of the resolution, one consisting of allegations that it comprises some kind of sinister attempt to undermine the 1925 Geneva Protocol on the Prohibition of the Use of Poisonous Gases and Bacteriological Warfare, and the other consisting of expressions of legal scruples or concerns. With respect to the first category of objection, I would say only that this is the first time to my knowledge that it has been alleged that measures intended to implement or enforce a treaty thereby undermine it. There is no logic to this allegation unless, of course, there is opposition to the enforcement of the convention. Inability or unwillingness to enforce any convention could, conceivably weaken it, but I hope and trust that that is not the issue being argued here. On this aspect of the question, the Canadian position was outlined very adequately by the distinguished representative of Norway and I need to do no more than associate myself with his excellent statement. I propose therefore to address solely the legal issues, since it is clear that some delegations sincerely entertain honest legal doubts concerning the resolution.

It is well known that in the field of arms control and disarmament -- and indeed other fields such as human rights -- the legislative process on the international plane is extremely slow and difficult. Nevertheless, it has proven possible from time to time to achieve major breakthroughs and the 1925 Geneva Protocol is one of the most important examples. Whatever the problems entailed in the international legislative approach to significant law-making treaties, however, it is in their implementation and enforcement that the most serious problems are encountered. The link between the legislative and enforcement phases, particularly in the field of arms control, is, of course nearly always verification. It is for this reason that

the importance of verification measures has for many years been a major theme of the Canadian approach to all arms control and disarmament issues. Members of this Committee are well aware of this, and I need not develop the point further. Nevertheless, I wish to underline that verification can prove the essential key to effective arms control measures, and thus to international security, which leads in turn to the possibility of genuine disarmament measures.

Turning now from the general to the specific, I should like to emphasize that what is being proposed under this resolution is a series of measures intended to lead towards the implementation of the 1925 Protocol. Surely such measures are to be welcomed by all states. I have already indicated that I do not comprehend the suggestion that they would thereby undermine the Protocol. I welcome, however, the strong statement in support of the consensus approach to arms control measures just made by the distinguished representative of the USSR, and urge him to apply that approach to this resolution. It is no secret that the Canadian Delegation has argued throughout these First Committee proceedings that we must return to the consensus approach if we are to be taken seriously.

I should like to turn now to the legal status of the 1925 "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva, 17 June 1925". The 1925 Protocol has long been accepted as one of the most important "law-making treaties" in existence. It was clearly so intended at the time of its conclusion, as indicated by its precise terms. The third preamble of the Protocol reads as follows: "To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;". It is disturbing therefore to hear it suggested, even by implication, that the Protocol is simply another convention binding only on the parties and therefore subject to further development only by the parties. The Protocol's provisions have long since come to be accepted as a classic example of "jus cogens", as the term is used in the Law of Treaties Convention, that is to say, a "peremptory norm of general international law" or, in other words, "a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted". This is a point to which I shall return. It should be noted also that the Geneva Protocol is specifically aimed at the prohibition of the use of poisonous gas and bacteriological methods of warfare and the resolution now under consideration addresses itself directly to this question of use.

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I should now like to address the question as to whether or not this resolution raises matters beyond the competence of the UN and, in particular, the Secretary-General. May I begin by reminding delegates that the UN has long since become seized of this subject. I refer, for example, to resolutions 2162B (XXI); 2454 A (XXIII); and resolution 2603 A (XXIV). Whether or not all delegations agree with the stipulations contained in those resolutions, it is undeniable that the UN General Assembly already has dealt directly with the 1925 Protocol. I shall quote only one passage from several possible examples to illustrate this point. It will be recalled that the third preamble of the 1925 Geneva Protocol made clear that it was intended to lay down peremptory norms of general international law. I now wish to quote from a General Assembly resolution indicating the extent to which this lofty objective has been achieved, at least in the view of the 24th General Assembly. The Fifth preamble of resolution 2603 A (XXIV) reads as follows:

"Recognizing therefore, in the light of all the above circumstances, that the Geneva Protocol embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments."

I hope this reassures other delegations, as it does my own, not only as to the legal status of the Protocol as a major law making treaty, but also as to the propriety of action by the United Nations concerning it. It is much too late to argue that it would be ultra vires for the United Nations to concern itself with the Protocol.

I wonder, indeed, if there is a more clear-cut case of a law-making treaty laying down peremptory norms of international law binding upon all states. It follows that if all states are bound by the principles reflected in the Protocol, all states have an interest - a legal interest - in its application, its implementation and thus its enforcement.

For these and other reasons I am troubled that articles 39 to 41 of the Vienna Law of Treaties Convention have been invoked as the basis for criticizing this resolution. The Law of Treaties Convention is, of course, the United Nations Constitution on the Law of Treaties, and it is a fundamental rule of treaty law that treaties normally bind only the parties to a treaty. There are, however, exceptions or, more properly, apparent exceptions and the 1925 Protocol represents precisely the kind of "exception" to which I refer.

I have pointed out that it is generally accepted that the provisions of the 1925 Protocol have become accepted as peremptory norms of international law. It is therefore appropriate to note that Article 38 of the Law of Treaties Convention provides as follows:

"Article 38

Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

Another fundamental provision of treaty law having direct application to the 1925 Protocol is article 43 of the law of Treaties Convention, which provides as follows:

"Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

Once again, I find it very difficult to understand how a resolution specifically addressed to the fulfilment and implementation of obligations embodied in a law-making treaty thereby undermines the treaty.

I should like to refer now to Article 53 of the Law of Treaties Convention, which also has direct relevance to one of the legal issues under discussion, namely whether we are dealing here with jus cogens. Article 53 provides as follows:

"Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion,

it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

If there is still any delegation which seriously entertains fears or concerns that provisions aimed at the implementation of the 1925 Protocol would thereby impair its status or the status of the peremptory norms for which it is the primary source, Article 64 of the Law of Treaties Convention should reassure them. It provides as follows:

"Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

Mr. Chairman, I must apologize for having delivered what amounts to a lengthy "off the cuff" legal opinion, but as a delegate who has twice been Legal Adviser to his Foreign Ministry, I felt impelled to make these comments not so much in order to respond to allegations made by some few delegations, but to address seriously and sincerely the legal reservations honestly held by a number of other delegations.

Mr. Chairman, I have outlined the widely held view and the underlying reasons why the 1925 Protocol is a "law-making treaty", laying down principles which have come to be accepted as "jus cogens", that is to say, "peremptory norms of customary law". I should however take the opportunity to make clear the distinction between that treaty and another very recent example of a major law-making treaty which codifies various pre-existing principles of customary law but also creates a series of whole new chapters of international law. It is being argued in some quarters that some of the new legal principles embodied in that other Convention constitute "instant" customary law, whereas other equally novel and far-reaching provisions are merely conventional law, binding only on parties to the Convention. The Canadian delegation does not accept such a highly selective approach to international law, whereby a state can proclaim novel and radical principles

which it likes and supports as rules of law binding on all states while rejecting other new principles as purely conventional law not binding on non-parties. In time, the whole of that other Convention will undoubtedly attain the same status as the 1925 Geneva Protocol, but these two major law-making treaties are not yet on the same legal footing, although it is the earnest hope of the Canadian delegation that they soon will be.

Before concluding, I should like to refer to the statement of the distinguished representative of the USSR quoting from a report in the New York Times: datelined November 24, purporting to pass judgement on the United Nations team of experts investigating allegations of use of chemical weapons. I welcome this opportunity to make clear, Mr. Chairman, that the views reported in that article are not shared by the Canadian delegation. More specifically, I should like to disassociate the Canadian delegation completely from the personal views reported in that article. While I have great respect for the New York Times, I do not consider that it should be treated as a judicial authority ranking in importance with the 1925 Geneva Protocol nor the Geneva Law of Treaties Convention.

Thank you, Mr. Chairman