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CONTENTS

Chairman: Mr. Edvard HAMBRO (Norway).

AGENDA ITEM 86

Law of treaties (A/6309/Rev.1, A/6827 and Corr.1 and Add.1 and 2, A/C.6/376)

At the Chairman's invitation, Sir Humphrey Waldock, Chairman of the International Law Commission, took a place at the Committee table.

1. Sir Humphrey WALDOCK (Chairman of the International Law Commission)1/ recalled that the report of the International Law Commission on the law of treaties2/ had already been before the Sixth Committee for one year. Apart from the final text of the draft articles, the report contained the commentaries which he himself, as Special Rapporteur on that topic, had prepared for the Commission. The Sixth Committee had also begun a general debate on the draft articles at its twenty-first session, and now had before it the comments (A/6827 and Corr.1 and Add.1 and 2) which seventeen Member States and five international organizations had submitted at the invitation of the General Assembly. He in no way intended to take up seriatim the various criticisms or suggestions of particular States or delegations. That would be too great an undertaking, and besides, the merit of the criticisms and suggestions, as well as of the Commission's proposals, was now a matter left entirely to the judgement of Governments. He would endeavour rather to assist them in understanding the problems encountered and the solutions arrived at by the Commission.

2. Treaties occupied a large place in international law at the present time and for that reason it was particularly important to provide the international community with an adequate and authoritative body of treaty law. It was a field in which divergencies of view abounded, but the Commission had found that the differences were often doctrinal, and with goodwill were capable of being resolved. The Commission's approach to the codification of the law of treaties had therefore been essentially pragmatic and directed to finding practical solutions consistent with the general nature of treaties and the practice of States rather than to settling doctrinal controversies. It was noteworthy that its endeavours in that respect had almost invariably met with success within the Commission.

3. The question of the scope to be given to the draft articles had presented the Commission with several problems. As articles 1-3 indicated, it had decided to confine the draft articles to agreements in written form concluded between States, although the importance of "oral" and "tacit" agreements had not escaped it. Indeed, several provisions in the draft, for example paragraph 5 of article 17, regarding the acceptance of reservations, expressly recognized the operation of "tacit" agreements in the general law of treaties. Nevertheless, the Commission had felt that to attempt to lay down a detailed code for unwritten agreements as well would unduly complicate and expand the draft. The same considerations had led the Commission to omit agreements concluded by insurgents or by international organizations.

4. Nor did the draft articles include detailed provisions concerning State responsibility or State succession in the field of treaties, or the consequences of aggression in connexion with the treaties of an aggressor State. Again, articles 69 and 70 merely made general reservations. In that particular case, the Commission had not only wished to avoid the risk of undue delays but it had been reluctant to encroach upon subjects which formed part of other branches of international law already under separate study.

5. Similarly, it had deliberately excluded two other questions: that of the most-favoured-nation clause which it had decided to study separately, and for which it had recently appointed a Special Rapporteur, and that of the effect on treaties of the outbreak of hostilities, a subject which unfortunately was by no means yet obsolete. Articles 57-60 had a certain relevance in this connexion. The law governing the latter question could not, however be formulated without reference to the provisions of the Charter of the United Nations forbidding the threat or use of force, or in other words, without broaching difficult and delicate questions belonging to another branch of international law.

6. In short, the Commission had limited the scope of the draft articles to the general law governing treaties between States, that is, to the central core of the law of treaties. Once that central core had been codified, it should be easier to expand the codification of the law

1/ The complete text of the statement made by the Chairman of the International Law Commission was circulated as document A/C.6/L.619.

2/ Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), part II, chap. II.

of treaties by additions or adaptations as had happened in the case of diplomatic law.

7. He also wished to mention a difficulty which although it might not loom very large in the final text, had greatly troubled the Commission in the drafting of a number of articles. The point at issue was to determine how far States which had signed a treaty, or taken part in drafting it but were not yet bound by it, might have a legally established right to be consulted about, or notified of, an act affecting that treaty. Although the Commission had, in most contexts, considered that only States which were actually parties to the treaty had that right this was not so in every case. Moreover, it had recognized that non-party States might sometimes be consulted, even where they could not sustain a legally established right to be consulted. That problem was the reason why it had been necessary to distinguish, in draft article 2, between "Negotiating State", "Contracting State", and "Party". If in ordinary parlance, those expressions were capable of being used with differing shades of meaning, they each had a very precise technical meaning in the draft articles.

8. The question of whether to distinguish between different categories of treaties had been a further source of difficulty, but had not left many traces in the final draft. The drawing of such distinctions was not unattractive in theory, but it was difficult to find any firm basis in treaty practice for drawing such distinctions. Nevertheless, in certain provisions of the draft, particularly paragraph 2 of article 17 dealing with the acceptance of reservations, it had taken account of the distinction between treaties concluded by a limited number of States and multilateral treaties —a distinction of substantial importance in the context of reservations.

9. The Commission did, however, single out two categories of treaties in article 4 for special treatment. Of those two categories the second, namely, treaties "adopted within an international organization" had, in accordance with preferences expressed by Governments, been defined in a more restrictive formula than had originally been proposed, as the commentary on that article made clear. On the other hand, the Secretary-General of the United Nations and the secretariat of the Food and Agriculture Organization of the United Nations had advocated a somewhat broader view of the category in question (see A/6827/Add.1, pp. 10 and 20). In that connexion, the Committee might find it useful to consider the case of an eventual adoption, in a General Assembly resolution, of the projected convention on special missions, which would presumably then be "subject to any relevant rules" of the United Nations. The Vienna Convention on Diplomatic Relations, which the projected convention was intended to supplement, not being adopted within the United Nations, would not, however, be so subject under the existing language of draft article 4.

10. Two questions on which the Commission had failed to arrive at any solution had been omitted from the draft articles. The first—participation in multilateral treaties—had given rise to the same differences of view as had appeared in the General Assembly and at diplomatic conferences, and had been dealt with in a simple explanatory note at the end of the commentary on article 12 (A/6309/Rev.1, part II, chap. II, pp. 32 and 33).

11. As to the second question, that of the temporal element in the interpretation of treaties, the Commission had had difficulty in defining the relation between the principle that a juridical act must be interpreted in accordance with the law and the facts contemporary with it and the effects on a treaty of an evolution in the general rules of international law. The Commission had considered that the intention of the parties had a major influence, and that the correct application of the temporal element would normally be indicated by interpretation of the treaty in good faith. Moreover, certain members had felt that the problem called for a close study of the whole question of relations between treaties and customary law. The Commission had left the temporal element subject to the general rule of interpretation mentioned in article 27 and, in particular, to the provision requiring good faith in interpretation.

12. In connexion with part V of the draft, concerning the invalidity, termination and suspension of the operation of treaties, the Commission had considered whether on grounds of logic the provisions regarding invalidity should be placed immediately after those concerning the conclusion of treaties. Policy and practical considerations were thought by the Commission to outweigh any theoretical arguments in favour of that arrangement. It seemed desirable to make it clear that, although the articles setting out grounds of invalidity, termination and suspension were several in number, the normal situation was one in which a treaty concluded in accordance with the provisions of part II was valid and subject to the rule pacta sunt servanda. From that point of view there was advantage in first setting out the law regarding conclusion, entry into force, observance, application, interpretation and amendment before touching upon grounds of nullity or termination which, as it were, brought down a treaty. Secondly, it was more convenient to group together in the same part general provisions relating equally to the application of grounds of invalidity, termination and suspension.

13. Certain provisions, notably those concerning lack of competence under internal law, conflicted with the norms of jus cogens, breach of a treaty, supervening impossibility of concluding a treaty, fundamental change of circumstances and the termination or suspension of the operation of a treaty, presented difficulties which would certainly attract the attention of Governments at the time the prospective convention was prepared. The Commission had been fully aware of the dangers to the security of treaties inherent in the principles of law concerned with the grounds of invalidity, termination and suspension of the operation of treaties. But since those principles already existed, the Commission felt that it should codify them with as much precision as possible so as to limit the scope for their abuse. It had prefaced the articles in question by four general provisions limiting their application. In addition, recognizing the difficulty involved in making several of those articles entirely precise, notably the jus cogens articles, the Commission had surrounded them with procedural checks set forth in

article 62, which specifically imposed upon States the express obligation, in the event of a dispute, to seek a peaceful solution in keeping with Article 33 of the Charter. Some members of the Commission, including its Special Rapporteur, would also have liked to have strengthened further the procedure prescribed in article 62. But, in the present climate of international opinion regarding the compulsory settlement of disputes, the Commission did not feel that a procedure going beyond that of article 62 would meet with general acceptance. As it now stood, article 62 at least subjected the denunciation of a treaty upon whatever ground to regular procedures, and thus provided some check upon the purely unilateral denunciations which had so often occurred in the past. When every effort had been made to impose the Commission's formulation of the substantive provisions of part V and to tighten the safeguards, the interests of the security of treaties did seem to lie in bringing such principles as those of fundamental change of circumstances and jus cogens as far as possible under the control of legal criteria and legal procedures authoritatively laid down in a general convention.

14. The Commission, if merely a body of experts, was representative of the regions, ideologies and legal systems of the world and had been able, in the circumstances, to conciliate different points of view to a quite large extent. It might therefore be hoped that the draft articles could serve as a sound basis for the work of the conference and pave the way for the first codification of the general law of treaties.

15. The CHAIRMAN said that if no member of the Committee was prepared to speak on the Law of Treaties, the Committee would take up the report of the International Law Commission on the work of its nineteenth session.

AGENDA ITEM 85

Report of the International Law Commission on the work of its nineteenth session (continued) (A/6709/Rev.1 and Corr.1; A/C.6/L.617)

16. Mr. HERRERA IBARGÜEN (Guatemala) said he would have liked to submit a draft resolution on Chapter II of the International Law Commission's report (A/6709/Rev.1 and Corr.1), concerning special missions, but that he had not done so in view of the distinctly different opinions still being expressed regarding the procedure which should be adopted to conclude a convention on the matter. Some representatives recommended a meeting of plenipotentiaries for that purpose, whereas others, including Guatemala, would prefer to have the convention drawn up within the General Assembly itself. In consequence, the delegation of Guatemala, along with those of Colombia and Ecuador, had confined itself to submitting a draft resolution (A/C.6/L.617) which, while it did not gloss over the question of special missions, dealt primarily with chapters I and III of the Commission's report. He read out the major provisions of the draft resolution and expressed the hope that it would receive general support. Sub-paragraph (d) of operative paragraph 4 of the draft resolution, concerning the topic of State responsibility, had been added, not with a view to giving special priority to the topic, but because it had been felt that it merited consideration as soon as possible.

Organization of the work of the Committee

17. The CHAIRMAN suggested that the Committee devote its morning meetings on Wednesday, 11 October, Thursday, 12 October and Friday, 13 October to a discussion of the Law of Treaties, and its afternoon meetings on Monday, 9 October, Tuesday, 10 October, Wednesday, 11 October, and Thursday, 12 October to the continuation of the examination of the Commission's Report on the work of its nineteenth session.

18. Mr. KOZHEVNIKOV (Union of Soviet Socialist Republics) was afraid that that procedure, far from facilitating the work of the Committee, was likely to complicate and delay it. While he did not wish to submit a formal proposal to that effect, his delegation preferred to examine the agenda items in order, and to complete discussion of the Commission's Report before going on to the law of Treaties.

19. Mr. YASSEEN (Iraq) appreciated the Soviet Union representative's concern for efficiency, but felt that practical considerations justified a departure from normal practice in the case in point. While it was true that the Sixth Committee usually examined questions referred to it one by one, the procedure suggested by the Chairman was the only one which would enable the Committee to benefit, in its consideration of the Law of Treaties, from the experience acquired by Sir Humphrey Waldock as Chairman of the International Law Commission and as Special Rapporteur responsible on that question.

20. He believed, moreover, that the general debate on the Law of Treaties should not be restricted, but should pave the way for a meeting of plenipotentiaries and enable the delegations to raise very specific problems and engage in an exchange of views that might prove most valuable.

21. The CHAIRMAN said that that was exactly what he had in mind, and that the Committee members might, but without submitting amendments to the draft articles on the Law of Treaties, discuss its various provisions in detail. His suggestion was that the Committee, in order to take advantage of the presence of Sir Humphrey Waldock, who was due to leave New York shortly, should adopt the procedure he had outlined.

It was so decided.

The meeting rose at 12.05 p.m.

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