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CONTENTS

Chairman: Mr. Vratislav PĚCHOTA (Czechoslovakia).

AGENDA ITEM 84

Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session (continued) (A/6309 and Add.1, A/6348 and Corr.1, A/C.6/371)

1. Mr. SANMUGANATHAN (Ceylon) said that the internal laws of the modern State provided its members with a variety of legal instruments for the regulation of life within that community: the contract; the conveyance or assignment of immovable property, which might be made for valuable consideration or might be a gift or an exchange; the gratuitous promise clothed in a particular form; the charter or Private Act of Parliament creating a corporation; legislation which might be constituent, such as a written constitution, or might be declaratory of existing law or create new law or codify existing law with comparatively unimportant changes. On the other hand, in international law only one instrument, the treaty, existed for carrying out the legal transactions of all kinds required by international society. Thus, if international society wished to enact a fundamental, organic constitutional law, such as the Charter of the United Nations was intended to be, and in large measure was in fact, it employed the treaty. If two States wished to put on record their adherence to the principle of the three-mile limit of territorial waters, as in the first article of the Anglo-American Convention of 1924, respecting the regulation of liquor traffic, they used the treaty. If one State wished to sell its possessions to another, as, for example, Denmark sold its West Indian possessions to the United States in 1916, it does so by treaty. Again, if the great European Powers were engaged upon one of their periodic resettlements and determined upon certain permanent dispositions to which they wished to give the force of the "public law of Europe", they had to do it by treaty. And, if there was a desire to create an international organization, such as the International Union for the Protection of Literary and Artistic Works, which closely resembles the corporation of the private law, it was done by treaty.

2. No one would suggest that all the differing private law transactions were governed by rules of universal or even of general applicability; yet that appeared to be the underlying assumption of international lawyers in dealing with treaties. The International Law Commission had succeeded to a high degree in systematizing the law of treaties in terms applicable to most international agreements and had thereby earned the gratitude of all members of the Sixth Committee. His delegation wished to express its thanks to the Commission and to its four Special Rapporteurs, the late Mr. J. L. Brierley and Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock; to do so was not to minimize the importance of earlier or contemporary efforts such as the Havana Convention on Treaties of 1928, the Harvard Draft Convention on the Law of Treaties[1] and the American Law Institute Draft.[2]

3. Although the Committee would have an opportunity to examine the draft articles on the law of treaties (see A/6309) again in 1967, his delegation wished to make a few general observations on the subject. First, it was sorry to find that unlike the American Law Institute, for instance, which places no limitation on the scope of its draft by reason of the form of the agreement, the International Law Commission, for a variety of reasons, not all of which in his delegation's view were well founded, had excluded from its draft both oral international agreements and agreements to which an international organization was a party. It was true that in international practice agreements were usually in written form; on the other hand, agreements with international organizations were of particular importance to the developing countries. To the extent then that the International Law Commission's draft appeared to be dominated by the traditional scope and arrangement of international law, his delegation wished to place on record its disappointment.

4. Second, his delegation regretted that even though the Commission consisted of persons chosen purely for their professional competence, it had been unable to reconcile, in a spirit of compromise, certain differences of doctrine, for example on the questions of participation in general multilateral treaties and of indirect or economic coercion. If a body of specialists had been unable to agree on a formulation in those important areas, it was hardly likely that a conference of representatives of governments would be able to do much better. His delegation was convinced

1/ American Journal of International Law, vol.29, No. 34, Supplement (October, 1935).

2/ Official Draft of the Restatement of the Foreign Relations Law of the United States (St. Paul, Minn., American Law Institute Publishers, 1965).

that the exclusion of some States from participation in general multilateral treaties, by direct or indirect means, was not only inconsistent with the very nature of such treaties but injurious to the progress of international law. He emphasized the importance of active participation by new nations in the re-examination and reformulation of the basic principles of international law. A rethinking of those principles in the light of the diversity of the political, religious and cultural elements making up those nations would produce a result which would have at least great psychological importance. The new States would no longer be able to plead that they had been forced to accede to a system of international law developed without their participation by those who had been their political and economic masters.

5. Third, in his delegation's view the draft did not deal adequately with the problem of treaty-making capacity. It might, indeed, be doubted that international law contained any objective criteria of international personality or treaty-making capacity. Sometimes participation in international agreements was the only test that could be applied to determine whether the parties had such personality or capacity or, indeed, "statehood". For example, India had been regarded as an international entity possessed of treaty-making capacity long before independence, because of the practice, beginning with the Treaty of Versailles in 1919, of India's becoming a separate party to international agreements. The older British dominions, Southern Rhodesia, and the Commonwealth of the Philippines before its independence had all developed their treaty-making capacity through the very process of entering into international agreements. Once the dominant or sovereign entity to which a political subdivision was subordinate consented to the latter's treaty-making capacity, the capacity existed whenever another entity was willing and able to conclude with that subdivision an agreement to be governed by international law. The very exercise of treaty-making capacity by a subordinate entity endowed it with legal personality under international law. It made little sense, therefore, to make the possession of legal personality a prerequisite to the conclusion of treaties, as draft article 5 purported to do. There was, therefore, need to clarify and redefine the scope of the law of treaties as far as it concerned the classes of entities that might enter into treaties.

6. The International Law Commission had rightly recognized that not all agreements between States necessarily came within the scope of the law of treaties, and the clarifying phrase "governed by international law" in draft article 2, subparagraph 1 (a), was therefore desirable. It was regrettable, however, that no test was suggested for determining whether or not a particular agreement was governed by international law. Unfortunately, the Commission had not explained why the criterion of the intention of the parties had not been used. A reference to the "manifested" intention of the parties, in consonance with the prevailing doctrine in the law of contracts, might have ensured the necessary objectivity.

7. His delegation was pleased to note that the International Law Commission had explicitly affirmed that a treaty was void if it conflicted with a peremptory norm of international law. Articles 50 and 61 represented a bold attack on difficult problems connected with the very structure of international society, and the application of the concept of jus cogens embodied in those provisions would substantially further the rule of law in international relations. At the same time, his delegation doubted whether that concept had been formulated in such a way that it could be usefully applied in practice. The Commission's failure to define jus cogens was unfortunate, since no mechanism of compulsory jurisdiction existed as yet in international law.

8. His delegation supported the proposed convening of a diplomatic conference making possible a satisfactory formulation of the law of treaties. In view of the problems that still remained to be solved, the arrangements for the next stages of the work took on added importance. His delegation shared the Canadian delegation's view that it was essential that the diplomatic stages of the codification should not be carried out under unnecessary time pressures. At the same time, the arrangements for the duration and place of the conference should not be such as to make participation in it prohibitively expensive. With regard to the date of the conference, he appreciated the reasons given in the memorandum by the Secretary-General (A/C.6/371), but he hoped that the delay required for the preparation of the conference would not cause a loss of momentum and a flagging of the present interest in the conclusion of a convention on the law of treaties. In any event, decisions regarding organizational and procedural problems should be taken as early as possible, perhaps before the conference was convened, in order that the conference itself might not need to spend precious time on problems unrelated to the main objective.

9. His delegation agreed generally with the views of the International Law Commission in regard to the organization of its work for the future, although it hoped that priority would be given to the subject of State succession. His delegation also congratulated the European Office of the United Nations on having organized the Seminar on International Law, and it noted with pleasure that the Seminar had included several participants from developing countries. It expressed its gratitude to the Governments of Israel and Sweden for the scholarships they had offered, and it hoped that other Governments would follow their example.

10. Mr. STANKEVICH (Byelorussian Soviet Socialist Republic) was gratified that the work of codifying the law of treaties was about to end in the conclusion of an international convention that would help to eliminate unjust agreements obtained by force, by fraud or by various forms of coercion, including economic pressure. People struggling for law and justice had to remain aware of the ever increasing threat of nuclear war hanging over the entire world and over all that the genius of man had accomplished throughout the centuries. The codifiers, too, had to keep that threat in mind. The catastrophe of war could still be prevented. The law of treaties must occupy a worthy place among the instruments of peace. The authority of law depended not so much on its form as on its

content and the implementation of that content. He thought that the pressure of public opinion was the greatest influence upon those who continued openly to violate the principles of international law.

11. His delegation regretted, however, that the priority given to the law of treaties had prevented the International Law Commission from completing its draft articles on special missions, whose status it was essential to codify in view of their growing importance in relations between Governments.[3] It therefore called on the Commission to continue its efforts to complete that work, if possible, in time for the General Assembly to deal with it at its twenty-second session, omitting the question of the privileges and immunities of representatives to congresses and conferences, but including the question of so-called high-level special missions, in order not to have to devote a separate text to that category of missions. It commended the Commission for having requested the views of Governments on those draft articles. He thought that articles 1, 7, 13 and 18 (A/CN.4/188 and Add. 1-2) could benefit from some revision and improvement of their texts.

12. With regard to the law of treaties, he thought it best, without losing sight of the importance of the problems raised by the holding of a conference of plenipotentiaries, to speak once more on the substance of the draft articles, in order to arrive at a consensus. Although not entirely satisfied with the text of certain articles, he approved of them on the whole as a basis for the future convention. It was now for the Committee to give the enterprise fresh impetus by endeavouring not to decide the fate of the actual text of the draft articles—that would be the task of the diplomatic conference—but to adopt recommendations regarding certain basic principles of the law of treaties on which agreement had not yet been reached.

13. The first of those principles was the universality of general multilateral treaties, which should be open to signature by all States, in the interests both of the international community and of the States parties to them. Any other course of action was inconceivable, not only because it would discriminate against entire peoples, but because general multilateral treaties were concerned with interests common to all States. It was natural, therefore, that States that had not originally taken part in the drafting and conclusion of such a treaty should have the opportunity of acceding to it if they wished to do so.

14. He welcomed the fact that the draft articles embodied the principles of sovereign equality of States, the right of peoples to self-determination, the prohibition of the threat or use of force and good faith. The principle of good faith was an essential element of the basic norm pacta sunt servanda, which the Commission had rightly reaffirmed in article 23 in the following terms: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". The importance of good faith emerged also from article 27, paragraph 1. It was worth reaffirming that principle since the Western Powers persisted in demonstrating bad faith in their interpretation of the Potsdam Agreements by indulging the activities of West German revanchists.

15. The Commission pointed out correctly in article 25 that the application of a treaty extended only to the entire territory of each party. It was in the light of that article that the persistence of certain States in applying treaties that they had concluded to territories which did not belong to them should be judged: West Germany, for example, to the Western Zone of Berlin and certain colonial Powers to their colonial territories.

16. Part V of the draft article, dealing with the invalidity and termination of treaties and their resulting consequences, would inevitably help to strengthen friendly relations among nations and improve the international climate, as it would prevent the conclusion of agreements which were void ab initio. He thought, however, that it should have been imperative to state explicitly in the articles of part V that void treaties were invalid from the very moment of their conclusion, instead of merely referring to it in the commentary. That would have made it possible to avoid the conclusion of treaties by which certain States illegally exploited the resources of other countries.

17. The Byelorussian SSR, which had not forgotten the massacres and pillage it had suffered during the Second World War, considered article 70 of the draft articles, concerning aggressor States, to be a positive contribution to the development of international law. It was not enough, however, for international law to make it possible to determine the responsibility of aggressor States; it should also make it possible for persons who prepared wars of aggression to be condemned.

18. His delegation would submit its comments on certain of the draft articles to the diplomatic conference. With regard to the organization of that conference, it thought that the venue should be chosen in the light of the financial implications and the convenience of participants, that it would be better to plan for one session only, preferably in 1968, and that thorough preparations should be made in the interim. Lastly, it was essential that all States without exception should be invited to the conference.

19. Mr. ENGO (Cameroon) said that the law of treaties was a matter of particular interest to countries which, like his own, had just emerged from colonialism into independence and had found themselves bound by a number of treaties and conventions that had been concluded previously without their consent and had had and were still having adverse effects on their political and economic structure. It was therefore time for a clear statement to be made of the recognized international law governing treaties. The present international situation, of course, did little to facilitate that task, and particular commendation was accordingly due to the eminent jurists on the International Law Commission, particularly its Special Rapporteur and its Chairman, for the draft articles they had produced. His delegation regretted only that the draft was incomplete and, in particular, that it contained no provisions on State succession, a question of the greatest concern to the

[3] See Official Records of the General Assembly, Twentieth Session, Supplement No. 9, pp. 12-39.

effects of treaties to which they had not consented. On attaining sovereignty, those peoples would be compelled to denounce such treaties, a consequence that followed, moreover, from article 30, which provided that a treaty did not create either obligations or rights for a third State without its consent.

35. With regard to the International Law Commission's future work, his delegation hoped that the question of State succession would be included in the agenda for the next session.

36. His delegation would study the suggestions made by other members of the Sixth Committee concerning the organization of the proposed conference and would state its views later, taking into account the information contained in the Secretary-General's memorandum. In any case, it considered that participation in the conference should be open not only to States Members of the United Nations but to all States.

The meeting rose at 12.30 p.m.

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