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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; A/C.6/L.594/Rev.1, A/C.6/L.596 and Corr.1 and Add.1, A/C.6/L.597 and Add.1, A/C.6/598)

1. Mr. MOLINA (Venezuela), after congratulating the Commission on the work it had accomplished, said that his delegation would not attempt to analyse the draft articles on the law of treaties in detail at the current time but would limit itself to certain general comments. In his opinion, the Commission had acted wisely in excluding from the scope of the draft articles the topics mentioned in paragraphs 28-34 of its report (see A/6309). Nevertheless, the specific question of the validity of a treaty in the case of the outbreak of hostilities between two or more parties to it called for special attention. For example, the so-called peace and friendship treaties, for which there were sound precedents in Latin America, contained saving clauses relating to the outbreak of hostilities that were aimed generally at ensuring the observance of the obligations contracted through those instruments. That was a question of particular importance in contemporary international law, and the Commission ought to begin a study of it without further delay.

2. Section 2 of Part II of the draft articles, on reservations to multilateral treaties, was intelligently presented but would probably give rise to considerable dispute. Although the so-called Pan-American rule had definitely superseded the traditional "unanimity" system, reservations could still be open to reasonable doubt, as, for example, in the case of a reservation which was considered incompatible with the object and purpose of the treaty (article 16 (c)); the implied authorization of a reservation in the treaty itself (article 17, para. 1); the situation where there was a limited number of negotiating States (article 17, para. 2); and the legal effect of a reservation when there was an objection to it but the parties agreed to continue to be bound by the rest of the treaty (articles 17 and 19).

3. Under article 41, paragraph 3, if a ground for invalidating a treaty related to particular clauses alone, it might only be invoked with respect to those clauses where: (a) the said clauses were separable from the remainder of the treaty with regard to their application; and (b) acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole. That would call for a system of acceptance and rejection; some procedural provision along those lines would be very helpful, and his delegation would attempt to suggest a practical criterion in due course.

4. A treaty could be subject to denunciation or withdrawal, even if it contained no provision to that effect, if it was established that the parties intended to admit the possibility of denunciation or withdrawal (article 53, para. 1). Inasmuch as that introduced a subjective element that was difficult to evaluate, the question required mature reflection.

5. The problem of the termination or suspension of the operation of a treaty as implied from entrance into a subsequent treaty (article 56) also frequently arose among States. In his delegation's view, it should be possible to regard the earlier treaty as supplementing the new one with respect to those matters not covered by the latter.

6. The generally accepted principle of rebus sic stantibus had been definitely confirmed in article 59 of the draft but had been expressed in negative terms. In view of the importance of that principle, it would be better if article 59, paragraph 1, stated positively that the principle could be invoked in certain conditions, i.e., those given in subparagraphs 1 (a) and 1 (b). The negative expression should be retained only in paragraph 2.

7. The Commission was to be commended for having incorporated in its draft the controversial principle of jus cogens (article 50). It was obviously difficult to determine when a given rule should be recognized as having the character of jus cogens, but the Commission had done as much as could have been expected, and now that the principle was firmly established, its future development would depend on the practice and experience of States.

8. With respect to article 75 on the registration and publication of treaties, he criticized the Spanish version of the initial words in that article, which read: "Los tratados celebrados por las partes en los presentes artículos"; those words seemed to give the impression that treaties were being entered into in the draft articles themselves.

9. Lastly, he wondered whether reservations with respect to the draft articles themselves, once they had taken the form of a convention, would be subject to the rule laid down in article 16. Would it be more appropriate to establish a special system of reservations for the convention? His delegation favoured the latter alternative.

10. His delegation held no definite views about the proposed codification conference; in general it was prepared to accept the suggestions made by the Secretary-General in his memorandum (A/C.6/371). It would comment later in the debate on the draft resolutions that had been submitted on that subject.

11. Mr. FLITAN (Romania) commended the International Law Commission on its excellent reports (A/6309), which embodied the results of many years' work, and paid a special tribute to its Chairman, to Sir Humphrey Waldock, Special Rapporteur on the law of treaties, and to Mr. Milan Bartoš, Special Rapporteur on special missions. In his view, detailed consideration of the draft articles on the law of treaties would be inappropriate at the current stage, but the Committee could profitably discuss certain important problems and questions of principle raised by the draft because its deliberations would constitute a useful source of documentation for Governments and the proposed diplomatic conference.

12. In revising its original draft the Commission had deleted a number of provisions of an expository or explanatory nature. Prompted by its desire to prepare a legal instrument that would be acceptable to the greatest possible number of States, it had also bypassed certain controversial matters, despite the fact that the latter often involved questions of principle concerning the regulation of conventional relations between States. In view of the complexity of the material to be codified, prudence was, of course, essential; but it might be wondered whether the Commission had not in some respects carried caution to an extreme. The codification of international law should not be confined to the formulation and co-ordination of existing norms but should make an effective contribution to progressive development. That principle, which had guided all the Commission's work on codification and had been reaffirmed at previous codification conferences, was of particular importance in the case of treaty law. In the light of those considerations he proposed to comment on a number of points that his delegation felt were of special significance.

13. First, the proposed convention should establish the principle of the universality of general multilateral treaties and state explicitly that all States had the right to participate in such treaties. As stated in the commentary on draft article 12, that principle had been fully discussed by the Commission in connexion with articles 8 and 9 of the original draft, and it was regrettable that those articles had been eliminated from the final draft, for universality was essential to the development of international co-operation based on respect for the sovereignty and equality of States.

14. Second, in draft article 49, which derived from the basic legal principle prohibiting the threat or use of force in international relations, the definition of the term "force" should specifically include not only armed force but all other types of coercion, including economic and political pressure. With regard to coercion generally, it was obvious that treaties were valid only if States concluded them freely and in good faith. However, the imperialist States had in the past imposed unequal treaties on other countries through various types of pressure, and some of those States were still pursuing that policy, particularly with regard to the newly independent States, with a view to maintaining colonial domination in one form or another, in defiance of the principles of the Charter and the General Assembly resolutions on the abolition of colonialism. Accordingly, article 49 should explicitly cover all types of pressure, including economic and political pressure.

15. Third, he wished to refer to the question of reservations to multilateral treaties. The Commission, successfully resisting all attempts to impose the traditional doctrine in that regard, had concluded that the solution best adapted to the present needs of the world community was that which would ensure that the maximum number of States participated, whether completely or partially, in multilateral treaties. However, the Commission had apparently been reluctant to draw all the conclusions implicit in that solution, for draft article 17, subparagraph 4 (b) stated that an objection by another contracting State to a reservation precluded the entry into force of the treaty as between the objecting and reserving States unless a contrary intention was expressed by the objecting State. In his delegation's view, the cause of international co-operation would best be served by stipulating that the treaty would enter into force between the objecting and reserving States, unless the former expressed a contrary intention. Such a provision would also be more logical.

16. Fourth, his delegation believed that the preamble to the proposed convention should set forth the principles that should govern international relations. In its view, the basic concept on which such relations must be founded was the right of every State to direct its own affairs, free from all foreign interference. His country's policy in that regard had been defined by the Minister for Foreign Affairs, who, speaking before the General Assembly at its 1442nd plenary meeting on 14 October 1966, had stated that the principles of national independence and sovereignty, equality of rights and non-interference in the domestic affairs of other States were the only rational and universally acceptable basis for the development of relations between States, the strengthening of mutual trust and respect between all peoples and the consolidation of peace.

17. Lastly, his delegation supported the Commission's recommendation concerning the convening of a diplomatic conference and wished to thank the Secretary-General for his memorandum on the procedural and organizational problems involved (A/C.6/371). The draft articles constituted a suitable basis for discussion at the conference; the articles adopted should be embodied in a single convention. His delegation would prefer a one-session conference working through a single committee of the whole. Governments must be given time to study the draft articles thoroughly, and the conference, therefore, should not

be held before 1968. The law of treaties was not confined to certain limited areas of international relations, as had been the case at previous codification conferences; if an effective convention on a subject of such universal interest was to be concluded, all States must participate in its preparation, and his delegation therefore supported the amendment submitted by Czechoslovakia, Poland and the USSR (A/C.6/L.598) to the eight-Power draft resolution (A/C.6/L.596 and Corr.1 and Add.1).

18. Mr. ALCIVAR (Ecuador) said that the final draft articles on the law of treaties (see A/6309) constituted not only a valuable work of legal science but an important contribution to the codification and progressive development of international law. In many respects they broke the old moulds of traditional law to make way for new principles consonant with the reality of the times, which demanded a more equitable legal order for the international community. He paid a tribute to the successive Special Rapporteurs on the law of treaties and supported the suggestion that Sir Humphrey Waldock should be invited to attend the conference that would prepare a convention on the law of treaties.

19. Because of the difficulty in finding a practical formula which would make it possible to differentiate treaties stricto sensu from the treaties in simplified form mentioned in the 1962 draft—which did not need ratification in order to enter into force—that distinction had been abandoned in the present draft. Now, draft article 11 set out the general rule that ratification was not necessary to render a treaty binding unless the need for ratification was established expressly in the treaty itself or the intention to require ratification was deduced by any of the means set out in that draft article. His delegation not only found it difficult to co-ordinate that provision with draft article 6, subparagraph 2 (c), whereby representatives accredited by States to an international conference or to an organ of an international organization were empowered only to adopt the text of a treaty, but it was concerned about the wide reach of the rule. It understood, moreover, that the broad definition of the word "treaty" in draft article 2, subparagraph 1 (a), would create serious problems of internal law for many different kinds of international agreements on administrative questions usually entrusted to the executive power, which would need troublesome constitutional procedures in order to come into force. In any event, his delegation thought that it would be possible to find legal expressions which would harmonize the objectives being sought.

20. His delegation strongly reaffirmed the views which it had expressed at the twentieth session of the General Assembly concerning the rule pacta sunt servanda (A/CN.4/182, chap. II). That rule of customary law remained in force as a guarantee that contractual obligations would be carried out, but its effects were limited by the peremptory legal norms of the United Nations Charter. Good faith was a condition sine qua non in the conclusion of international treaties and indivisible: if it were lacking in the act that created the obligations it could not be partially invoked in order to demand their fulfilment; lack of good faith compromised the honour of States, and honour was not divisible.

21. Under draft article 23, only treaties in force were binding upon the parties, and whether a treaty was in force depended not only on formal requirements but on the substantive question of the treaty's legal validity. Consequently, the Commission had tied draft article 23 to Article 2, paragraph 2 of the Charter, which established that the obligations that Members should fulfil in good faith were those assumed by them in accordance with the Charter. The prohibition of the threat or use of force, respect for the territorial integrity and political independence of States, the principle of the self-determination of peoples, the sovereign equality of States, the prohibition of intervention in matters which were essentially within the domestic jurisdiction of States, respect for human rights and for fundamental freedoms—all those were peremptory rules of international public policy embodied in the Charter to which there could be no exceptions and which had acquired the character of jus cogens and the status of constitutional precepts. The rule pacta sunt servanda could not redeem an international treaty that violated the legal norms of the United Nations Charter.

22. Draft article 47 dealt with the corruption of a representative of the State, which was in reality a form of fraud, and his delegation considered that the introduction of that new draft article would clarify the concept of defective consent. His delegation had serious doubts, however, about the application of the rule allegans contraria non audiendus est, contained in draft article 42, to error and fraud. Defects vitiating consent made the treaty void ab initio, and that nullity could not be remedied.

23. His delegation was particularly interested in draft article 49 on the coercion of a State by the threat or use of force. Before the Covenant of the League of Nations, the use of force had not been formally proscribed. From the justum bellum of the scholastics to the justus hostis of the modern era the legality of war had been accepted; as late as 1904, Hall in the fifth edition of A Treatise on International Law had said that international law had no choice but to accept war, without regard to the justice of its origin. The two Hague Conferences had succeeded in regulating jus in bello, but the institution of jus ad bellum had remained intact until the Treaty of Versailles.

24. The first attempt to make the use of force illegal was to be found in Articles 10-15 of the Covenant of the League of Nations, which had established a system for the prevention of war. Despite the gaps resulting from the application of Article 12 and from the restrictive interpretation which, for political rather than legal reasons, was given to the word "war", the Covenant had represented the start of the process of prohibiting force as a means of solving international disputes and the birth of the "modern law" to which the Commission had referred in its commentary on draft article 49.

25. In the Briand-Kellogg Pact, which had been the second step in the process, the contracting states had condemned recourse to war for the solution of international controversies and had renounced it as an

instrument of national policy in their relations with one another. Unfortunately, that instrument had not been provided with the machinery that would make it effective. Both the Covenant and the Briand-Kellogg Pact had been created to preserve the peace but had lacked the power to impose it. The obligations assumed in the Briand-Kellogg Pact were still in force, and their violation had been one of the principal charges at the Nuremberg trials.

26. Unlike the League of Nations, the United Nations had been formed and had acquired legal personality in a Charter, the provisions of which had been transformed into constitutional precepts that were binding throughout the world. The League had been merely an association composed of States which were its members, but the United Nations was the international community legally organized.

27. Article 2, paragraph 4, was unquestionably the main principle of the Charter, on which the system of international security rested. Under that provision war and the threat or use of force in general were prohibited absolutely and without any exception. Although Article 51 of the Charter recognized the right of self-defence and Chapter VII established the measures which the Organization could take with respect to threats to the peace, breaches of the peace, and acts of aggression, those provisions did not constitute exceptions to the principle of the prohibition of the threat or use of force. Self-defence, which had been drawn from penal law, exempted the offender from liability and must have that meaning in the Charter, because, furthermore, there must be a relation between the scale of the armed attack and the means used in defence. The measures contemplated in Chapter VII were inherent in the authority which the United Nations exercised over the Members of the international community.

28. Despite the clear wording of Article 2, paragraph 4, of the Charter, efforts had been made to give it a narrow construction based on the phrase "against the territorial integrity or political independence of any State". It had been contended that the threat or use of force was prohibited only if it was directed against the territorial integrity or political independence of a State. If that view was adopted, the "protective landings" of classical international law—defended even now by certain writers who considered them a contribution to the purposes of the United Nations, especially with respect to human rights—would continue to be lawful. However, the proponents of that interpretation forgot the final phrase of that paragraph of the Article: "or in any other manner inconsistent with the Purposes of the United Nations". The Committee dealing with that wording at San Francisco had said that the unilateral use of force or similar coercive measures was not authorized or allowed, and that consequently the use of force was only lawful to support the Organization's decisions. Any use of force which was not a collective measure was prohibited by the Charter.

29. Under draft article 49, nullity arose not only because the conclusion of the treaty had been procured by the threat or use of force but because of the violation of the principles of the Charter. Those principles were binding on Members of the United Nations, and even on non-members under Article 2, paragraph 6. It was entirely logical that treaties that violated those principles should be void.

30. Article 103 of the Charter was applicable to four distinct cases: (1) treaties concluded between States Members of the United Nations before the Charter had come into force; (2) treaties concluded between States Members of the United Nations since the Charter had come into force; (3) treaties concluded between States Members and States non-members of the United Nations before the Charter had come into force, and (4) treaties concluded between States Members and States non-members of the United Nations since the Charter had come into force. Article 103 did not make any change in the rule governing the first case. Traditionally, when there had been a conflict between two incompatible treaties with identical parties, international law had applied the rule lex posterior derogat priori. Therefore, the authors of the text of the Charter had unanimously maintained that even if Article 103 had not been included in the Charter the obligations under the Charter would have prevailed over those entered into by Members before the Charter came into force. The same principle had been included in Article 20, paragraph 1, of the Covenant of the League.

31. The second case gave rise to the application of the rule lex prior derogat posteriori, which was the opposite of the traditional rule of international law. In that case, Article 103 clearly brought out the constitutional character of the Charter. Professor Kelsen had attributed the nullity of such subsequent treaties to Articles 108 and 109, which provided for amendments to the Charter. A similar principle had been included in Article 20, paragraph 1, of the Covenant.

32. It was the third case that radically changed the precepts of international law by disregarding the principle pacta tertiis nec nocent nec prosunt. Many publicists, such as Ross, had been distressed by that revolutionary formula; others, such as Jiménez de Aréchaga, had welcomed it. The reason for the change, as stated in the proceedings of Committee IV at the San Francisco Conference, was that when obligations under treaties concluded with non-member States and obligations of Members under the Charter conflicted the latter should prevail.

33. In the fourth case, the rule lex prior derogat posteriori applied.

34. He concluded that any treaty imposed by the threat or use of force, before or after the Charter had come into force, was absolutely void ab initio, for the defect vitiating consent violated the constitutional principles of the Charter.

35. His delegation supported the proposal that the preamble to the convention on the law of treaties should stress the rule pacta sunt servanda and urged that it should also stress other basic principles, including those concerning the use of force and violation of the norms of jus cogens as causes of the nullity of treaties. The preamble not only served to interpret the document but was, to some extent, a source of legal obligations. There were in the world many agreements which had despoiled weak countries

of territory or imposed economic burdens on them. Those unjust instruments—the fruits of force—could not endure. The ancient rule that no one ought to enrich himself at another's expense was still valid.

36. Mr. KOITA (Mali) congratulated the International Law Commission on the draft articles on the law of treaties (see A/6309), which would constitute a solid basis for a general convention reflecting modern trends in international law. As previous speakers had pointed out, the progressive development of international law, which was of great importance to all States, was of particular interest to the newly independent States. The law of treaties must be based on the sovereign equality of States, in order to guarantee that their inalienable rights would be respected. In a world constantly menaced by nuclear catastrophe, where the interdependence of peoples was a reality and the coexistence of different social and economic systems a necessity, where the strong threatened the weak and colonialism and imperialism sought to stifle the voice of the peoples who were fighting for freedom, it would be unrealistic to try to maintain a static system of international law opposed to the evolution of legal phenomena. His delegation therefore considered that the proposed convention on the law of treaties should be designed to further the cause of peace and loyal co-operation between all States, irrespective of their political, social and economic systems. In its view, participation in general multilateral treaties should be open to all States without discrimination.

37. In view of the emergence of new States as a result of the decolonization process, his delegation regretted that the Commission had been unable to complete its consideration of such important topics as special missions, relations between States and intergovernmental organizations, responsibility of States and the succession of States and Governments. It was to be hoped that the Commission would conclude its work on those questions at its next session and propose specific solutions.

38. His delegation also hoped that the Commission and the proposed conference of plenipotentiaries would devote special attention to the most-favoured-nation clause, which was of great importance in both bilateral and multilateral treaties, especially those of an economic nature and of particular interest to the developing countries.

39. His delegation agreed with the Algerian representative's suggestion (908th meeting) that in draft article 49 the concept of the threat or use of force should be widened to include economic and other forms of pressure.

40. With regard to the application of treaties to the entire territory of each party (draft article 25), his delegation wished to draw attention to the case of colonial Powers that forced subject peoples to sign treaties designed to defend the selfish interests of the metropolitan country. The colonized peoples would declare those treaties void as soon as they attained their independence, and his delegation hoped that it would be possible to achieve general and complete decolonization before the conference of plenipotentiaries convened.

41. He wished to thank the European Office of the United Nations for having organized the Seminar on International Law; he hoped that many more such seminars would be held for the benefit of the developing countries.

42. He also wished to thank the Secretary-General for his excellent memorandum on the proposed conference (A/C.6/371); his delegation has as yet no fixed views on the conference arrangements, but believed that all States should be invited if the conference was to further the interests of the world community as a whole.

43. Mr. YASSEEN (Chairman of the International Law Commission) said that the general debate on the Commission's reports (A/6309) had again brought out the value of the system of progressive development and codification of international law established by the United Nations. The success of that system had been largely due to the International Law Commission's method of work, which ensured highly effective co-operation between it and the General Assembly at all stages of its work.

44. He was gratified to note that the Commission's reports had met with a generally favourable reception in the Committee and that the consensus seemed to be in favour of the recommendations in those reports. All members had agreed that the draft articles constituted a good basis of discussion with a view to the conclusion of a convention on the law of treaties, although some had expressed doubts concerning certain provisions, such as those dealing with elements vitiating consent, jus cogens and rebus sic stantibus. He did not consider it his duty to answer those objections at the present time; inasmuch as the Commission's attitude was set out very clearly in the report, he merely wished to recall that the Commission had always tried to find the best possible solution for a given problem within the limits imposed by the realities of international life. It was not, he emphasized, interested in creating fine theoretical structures that would be mere abstractions. On the other hand, it had thought it inadvisable to make the normative evolution of the international legal order dependent on its institutional evolution. The difficulty of applying certain principles, such as the supremacy of rules of jus cogens, had not kept it from declaring that such principles existed and from drawing the necessary corollaries from them.

45. Some members had criticized the Commission for limiting the scope of the draft articles to treaties concluded between States; others had complained that those articles did not contain provisions concerning the succession of States in respect of treaties. In his own view, the Commission's decision in that respect was completely justified, for both practical and technical reasons. After all, the law of treaties touched on many problems in the international legal order, and if the Commission had tried to deal with all of them, it would have needed a great deal of time. The question of the succession of States, in particular, was certainly a very important one at the present time, but since the law of treaties touched on only one of its aspects, it would be better, in his opinion, to wait until the Commission could deal with the topic as an integral whole. Codification called for pain-

staking, long and detailed studies, and if lasting results were to be achieved, no attempt should be made to hasten it.

46. He was glad to note that there appeared to be a consensus in favour of discussing the draft articles in the Sixth Committee at its next session; such a discussion would greatly facilitate the task of the conference by bringing out in advance the positions of the various Governments. He also noted with satisfaction that the Committee was in favour of inviting Sir Humphrey Waldock, the Commission's Special Rapporteur, to attend the conference. In conclusion, he thanked the Committee for the warm tributes that it had paid to him personally.

47. The CHAIRMAN announced that the representative of Uruguay had decided to withdraw his draft resolution (A/C.6/L.594, Rev.1) and become one of the sponsors of the draft resolution contained in document A/C.6/L.597.

48. Mr. WERSHOF (Canada) thanked the representative of Uruguay for the spirit of co-operation that he had shown in withdrawing his draft resolution and joining the sponsors of the draft resolution contained in document A/C.6/L.597. The latter draft resolution should not be confused with the draft resolution in document A/C.6/L.596, also co-sponsored by his delegation, which dealt exclusively with that part of the Commission's reports concerning the law of treaties. The draft resolution in document A/C.6/L.597 dealt with the other parts of the Commission's reports and followed the traditional pattern for such resolutions.

49. In connexion with operative paragraph 4 (a) of the last mentioned draft resolution, he drew attention to paragraph 71 of the Commission's report (see A/6309), in which the Commission had decided to request Member States to forward their comments on the subject of special missions as soon as possible and, in any case, before 1 March 1967. The Legal Counsel had informed him that as the Secretariat had already sent out circulars to that effect to Governments, it was unnecessary to mention that deadline in operative paragraph 4 (a), but he suggested that the Rapporteur should refer to it in his report.

50. With regard to operative paragraph 4 (b), he noted that most members had expressed the wish that the Commission should give higher priority to the question of the succession of States and Governments. He was confident that the Commission would take that wish into account when planning its organization of work.

51. Since the draft resolution in document A/C.6/L.597 was one of a traditional and non-controversial kind, he hoped that it would meet with unanimous approval.

52. Mr. ROSENNE (Israel) suggested that the sponsors of the draft resolutions in documents A/C.6/L.596 and L.597 should agree on separate titles for their respective texts in order to avoid any possibility of confusion.

The meeting rose at 1.10 p.m.

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