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*TWENTY-SECOND SESSION*
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**SIXTH COMMITTEE, 974th MEETING**

*Wednesday, 18 October 1967, at 10.45 a.m.*

**NEW YORK**

CONTENTS



*Chairman:* Mr. Edvard HAMBRO (Norway).

## AGENDA ITEM 85

Report of the International Law Commission on the work of its nineteenth session (concluded) (A/6709/Rev.1 and Corr.1, A/C.6/L.618, A/C.6/L.620 and Add.1, A/C.6/L.622)

1. The CHAIRMAN invited those delegations which wished to do so to explain their votes on draft resolution A/C.6/L.618 and the amendments to it (A/C.6/L.620 and Add.1, A/C.6/L.622).

2. Mr. ROMARE (Sweden) said that his delegation, like those of the other Nordic countries, would have preferred that a decision on the procedure to be followed for the drafting of a convention on special missions should be postponed until the twenty-third session of the General Assembly, in order to allow Governments more time to study the text of the draft articles submitted by the International Law Commission (A/6709/Rev.1 and Corr.1, chap. II, D). His delegation still had some doubts as to the wisdom of deciding immediately that the Sixth Committee should begin work on a convention in 1968. Nevertheless, since the majority of members had been in favour of the amendment in document A/C.6/L.620 and Add.1, his delegation not wishing to adopt a rigid attitude, had abstained from voting on it, and it had voted in favour of the Iraqi amendment (A/C.6/L.622) and of draft resolution A/C.6/L.618, as amended.

3. Mr. BAL (Belgium) said that, notwithstanding the reservations which he had stated earlier, his delegation had voted in favour of the draft resolution, as amended, because it believed that the General Assembly would endeavour, at its twenty-third session to give all the attention that was necessary to the complex subject of special missions, taking due account of the comments submitted by Governments. He trusted that, at each stage of its work on the preparation of a convention, the Assembly would take appropriate procedural decisions to ensure the production of a satisfactory text.

4. Mr. E. SMITH (Australia) said that he wished to associate himself with the remarks made by the representatives of Sweden and Belgium. His delegation would have preferred the Committee to consider further comments from Governments before deciding on the forum and timing for the preparation of a convention. It had therefore abstained from voting on the amendment in document A/C.6/L.620 and Add.1. Nevertheless, as there seemed to be a clear consensus in favour of deciding at the current session that a convention on special missions should be concluded by the Sixth Committee, his delegation had voted in favour of the draft resolution, as amended.

5. Mr. DARWIN (United Kingdom) said that, since his delegation, for the reasons it had stated earlier, considered that a plenipotentiary conference would be the most suitable forum for the preparation of a convention on special missions, it had abstained from voting on the amendment in document A/C.6/L.620 and Add.1. It had voted in favour of the Iraqi amendment, which rightly emphasized the technical character and technical implications of the subject.

6. It remained for the General Assembly to decide at its twenty-third session how best to deal with the matter. His delegation believed that the draft articles on special missions were too complex to be studied in the Sixth Committee as effectively as they should be, and the working method to be adopted would require very careful consideration. His delegation reserved the right to revert to that point at the twenty-third session, but in deference to the majority view it had voted in favour of the draft resolution as a whole, and it would continue to participate constructively in further discussion of the draft articles and in the eventual formulation of a convention.

7. Mr. DE BRESSON (France) said that, from its study of the question and from the statements which had been made in the Committee, his delegation had concluded that the draft articles on special missions prepared by the International Law Commission still required further, very careful consideration. In its view, it would have been wise either to assign the work of embodying them in a convention to a conference of plenipotentiaries, as had been done in the case of the Vienna Conventions on Diplomatic Relations and on Consular Relations, or to defer a decision on the procedure to be followed until the expression of the views of Governments made it possible to form a better judgement of the problem to be solved. However, for various reasons, many delegations had wanted the Committee to take an immediate decision to assign the task of drafting a convention to the Sixth Committee, and France had not wished to oppose the majority view. His delegation had sup-

ported the Iraqi amendment, which took due account of the need to study the topic in great technical detail. His delegation was concerned that adequate time should be allowed for the preparation of a convention and that, if it proved difficult to complete the work on special missions at the twenty-third session, it should be carried over to a subsequent session of the General Assembly.

*Mr. Seaton (United Republic of Tanzania), Vice-Chairman, took the Chair.*

8. Mr. GOTLIEB (Canada) said that his delegation had abstained from voting on the amendment in document A/C.6/L.620 and Add.1 because, as a sponsor of draft resolution A/C.6/L.618 and for reasons already stated, it would have preferred that a decision on the procedure to be adopted for the preparation of a convention on special missions should be deferred until the twenty-third session of the General Assembly. His delegation had supported the Iraqi amendment because it improved the draft resolution by making it clear that the Committee would be acting as a kind of conference when drawing up the convention. Since his delegation was not opposed to the Committee's assuming such a task of codification, and also because of its willingness to compromise, it had deferred to the majority view and had voted in favour of the draft resolution as a whole.

9. Mr. VEROSTA (Austria) said that his delegation had already expressed its reservations concerning the present text of the draft articles on special missions. Much detailed work was still required, and he had therefore welcomed the Iraqi amendment. His delegation had abstained from voting on amendment A/C.6/L.620 and Add.1 in order to make its position clear. Nevertheless, in a spirit of compromise, it had voted in favour of the draft resolution, as amended.

## AGENDA ITEM 86

### Law of treaties (continued)* (A/6309/Rev.1, A/6827 and Corr.1 and Add.1 and 2, A/C.6/376, A/C.6/L.619)

10. Mr. ROSENNE (Israel) said that the debates on the law of treaties in the Sixth Committee between 1962 and 1965 had given indications of the general, if provisional, reactions of Governments to the work of the International Law Commission as that work had progressed. The remarks of delegations and the written comments of Governments had been directed to an expert and independent body which was required by its statute and the general conditions under which it worked to take those comments into consideration in preparing its final reports. In the two basic documents (see A/6309/Rev.1, part II, annex) the Secretariat had carefully collated the comments article by article for transmittal to the Commission. The Special Rapporteur, in his fourth,[1] fifth[2] and sixth[3] reports, had been scrupulous in systematically setting forth all those comments and in preparing the Commission's discussions on them, and the Committee could be perfectly satisfied that every single observation on the text as adopted on the first reading had been carefully considered by the Commission before it had submitted its final report to the General Assembly in 1966 (A/6309/Rev.1, part II, chap. II). The consultation with Governments by the independent body preparing the draft which was an essential element of the preparatory stage of codification had therefore been fully carried out in the present instance, as in all others.

11. The debate in the Sixth Committee in 1966, on the other hand, had been primarily concerned with the procedural and organizational aspects of the diplomatic stage of the codification of the law of treaties. Having carefully re-examined that debate in the light of experience of the codification of other topics, his delegation was satisfied that those aspects had been well conceived, and doubted that any far-reaching modifications were required.

12. The debate in the Committee in 1966, the comments submitted by Governments since that time (A/6827 and Corr.1 and Add.1 and 2), and the present debate were directed not to the Commission, but to other Governments and to the international conference of plenipotentiaries itself. That distinction was fundamental. It had become important that as much as possible should be known beforehand of the attitudes likely to be taken both on major questions of principle and on detailed questions of drafting, so that Governments could be as fully prepared as possible for the difficult task that lay ahead.

13. He wished to make three provisional comments on the final text of the draft articles (see A/6309/Rev.1, part II, chap. II). The first related to article 2; while it might appear to be essentially a matter of drafting, it nevertheless had a substantive aspect. It was very important that the scope of the codification should be established clearly, and if possible in one article, or at the most two. The material at present contained in article 1, in the definition of "treaty" in article 2 and in article 3 should be rearranged so as to bring out that aspect more clearly. His delegation was not convinced that all the other definitions contained in article 2 were necessary, at least in their present form, and thought that it would add considerably to the general clarity of the text if some of them were incorporated more closely into the article or articles to which they directly referred. Comparing the first draft with the final text, it had noticed that the Commission had done that in part. For instance, the definition of "depositary" which had appeared in article 1 (g) of the 1962 text[4] had been dropped and its substance had been incorporated in article 71.

14. His delegation believed that the principle underlying article 4 was basically sound, but saw considerable difficulties in its practical implications. One Government had suggested that the different international organizations should be requested to establish article by article why the convention should not be applicable to their treaties. While his delegation recognized the importance of clarity in that regard, it was not convinced that that was the best way to

*Resumed from the 971st meeting.

1/ See Yearbook of the International Law Commission, 1965, vol. II, documents A/CN.4/177 and Add.1 and 2.

2/ A/CN.4/183 and Add.1-4.

3/ A/CN.4/186 and Add.1-7.

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

approach the question, and it suggested that the Secretariat, as part of the preparatory work which it was undertaking in accordance with General Assembly resolution 2166 (XXI), paragraph 8, should submit a paper describing in some detail the formal provisions which existed in the different international organizations and which regulated the making of multilateral treaties within each organization or under its auspices. In speaking of "formal provisions", he was referring not only to provisions appearing in the constituent instruments of those organizations themselves but also to resolutions adopted by their various organs. Such a paper would be of considerable assistance to the conference.

15. A great deal of the discussion on article 62 had related to the merits of tying that article in with some system for the compulsory settlement of disputes. In that connexion, his delegation considered that the Commission had probably been right in not going beyond Article 33 of the United Nations Charter in its codification of the law of treaties, and in leaving the question of Article 33 to other bodies, notably the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. However, there was a second aspect of article 62 which seemed to his delegation to be of greater long-term significance. In paragraph (2) of its commentary on the article, the Commission drew attention to the necessity of achieving a perfectly fair balance between what it called the objecting State and the claimant State—terms which might not be quite appropriate to describe the relationship between the two States concerned, but which he would use as a matter of convenience. Nevertheless, the question arose whether, when article 62 was read closely and in direct connexion with the various substantive articles dealing with the invalidity and the termination of treaties, that balance was always fairly maintained. His delegation doubted whether that was so. In some cases, it seemed that the so-called claimant State might actually be placed at a very unfair disadvantage. Article 62, and probably the substantive articles also, needed to be very closely re-examined from that point of view. That aspect had very much troubled the Institute of International Law when it had considered the termination of treaties at its session at Nice in September 1967, and the resolution which it had adopted reflected a certain disquiet on that aspect.

16. With regard to preparatory documentation, his delegation thought that the guide to the draft articles on the law of treaties prepared by the Secretariat (A/C.6/376) was adequate as far as it went, but that the final version to be submitted to the conference should follow the precedent of earlier guides, especially that on the law of the sea,[5] and contain a fuller description of the evolution of the texts themselves, particularly since 1962. His delegation also hoped that the whole text of the guide would be thoroughly checked and completed before it was submitted.

17. It would be extremely useful if the Secretariat could prepare a paper giving a thorough description of the kind of problems which arose and of the texts which had been evolved to meet them, in cases where a series of related conventions dealt broadly with the same topic and were periodically amended and brought up to date. He mentioned as an example the conventions dealing with the protection of industrial property, copyright, and so on, concerning which difficulties had arisen at the Stockholm conference held under the auspices of the United International Bureau for the Protection of Intellectual Property (BIRPI) in June and July 1967. His delegation agreed with the International Law Commission's recommendation in paragraph 60 of its report on the work of its nineteenth session (A/6709/Rev.1 and Corr.1) regarding preparatory documentation for the forthcoming conference on the law of treaties. It hoped that the material in the documents mentioned in that paragraph could be presented in a way which linked it directly with the draft articles on the law of treaties. An up-to-date edition of the volume of the United Nations Legislative Series entitled Laws and Practices concerning the Conclusion of Treaties[6] should also be made available for the conference.

18. The conference on the law of treaties would be the most difficult of the codification conferences undertaken by the United Nations or by any other international organization. As stated by the Belgian Government in its comments on the draft articles (see A/6827, p. 4), the Commission had succeeded in extracting from the very general and extremely complex material of the law of treaties a set of clear abstract principles which appeared to be generally acceptable to most States; yet it was in that very fact that his delegation saw the challenge which the forthcoming diplomatic conference would present to contemporary diplomacy. The mission of the conference would be to attempt to reconcile legitimate interests, and the function of diplomacy would be, not to adhere to obsolete formulae which stood in the way of finding acceptable compromises, but to use imagination, ingenuity and resourcefulness. Such a conference, adequately prepared on all levels, with large participation, inspired by respect for existing law and by a spirit of compromise in regard to non-regulated aspects, exercising wisdom and imagination, would be a success and would contribute to the establishment of the rule of law in the international community. However, unless the legal expert was motivated by political considerations, authorized to put aside academic ideas and meet the other point of view in a spirit of compromise, no possible result could be achieved.

19. Mr. ALVAREZ TABIO (Cuba) said that the draft articles on the law of treaties submitted by the International Law Commission would constitute a very valuable basis for consideration by a conference of plenipotentiaries. He wished to comment on some aspects of those articles which were of particular interest to his Government.

20. In general, the draft articles had been carefully drawn up, and they set out systematically all the necessary elements for the progressive development and codification of the law of treaties, following the lines laid down by experience and doctrine. Regarding

[5] Ibid., Eleventh Session, Annexes, agenda item 53, document A/C.6/L.378.

[6] ST/LEG/SER.B/3 (United Nations publication, Sales No.: 52.V.4)

past experience, it should be remembered that established usages and practices reflected to an overwhelming degree a long tradition that had served the purposes of the dominant Powers, which had tried to impart to stipulations imposed on small and weak States by severe and unjust pressure the status of universally accepted rules. That was why article 49, declaring a treaty void if its conclusion had been procured by the threat or use of force in violation of the principles of the Charter of the United Nations, was exceptionally important. Before the First World War, positive international law had disregarded coercion employed against States for the purpose of extracting their consent. With the advent of the United Nations Charter, however, the principle that a treaty procured by the use of force was void ab initio had been vigorously established. That fundamental principle had met with resistance in practice, particularly in respect of the definition of the forms of coercion. It had been contended, for example, that the word "force" in Article 2 (4) of the Charter meant only armed force and did not cover other forms of coercion, such as political or economic pressure. In his delegation's view, that restrictive interpretation was incompatible with the spirit of the Charter; in particular, any measure aimed at strangling a country's economy should be expressly included in the idea of coercion. In that connexion, he recalled that the forty States represented at the Second Conference of Heads of State or Government of Non-Aligned Countries at Cairo in 1964 had condemned the application of political and economic pressure and had asserted that the word "force" as used in the Charter included such pressure. Political and economic pressure must be condemned if international relations and international law were to be placed on a solid foundation.

21. His delegation considered that the extension of the modern principle prohibiting the threat or use of force to treaties which, although concluded before the establishment of that principle, had not ceased to have consequences at the time of its establishment, did not involve or imply retroactive application, particularly in view of the fact that the prohibition of the threat or use of force was a rule of jus cogens whose emergence, according to article 61, deprived any existing treaty which was in conflict with it of validity. Despite the many difficulties involved in identifying rules of jus cogens, no one denied that the clauses of the Charter prohibiting the use of force were in themselves a clear example of a rule of international law having the character of jus cogens. The wording of article 61 was clear and forceful; in his delegation's opinion, however, the article should contain an express statement that any treaties which had been concluded or were to be concluded and which were in conflict with the principles of the Charter should become void and should terminate. His delegation endorsed the Commission's statement, in its commentary (1) on article 50, that the view that there was no rule of international law from which States could not at their own free will contract out had become increasingly difficult to sustain.

22. It would be dangerous to carry the principle of pacta sunt servanda to the extreme of sacrificing the higher ideals of international justice for the sake of the security of treaties which brought privileges for a few only and insecurity for others. Pacta sunt servanda was not an absolute principle; on the contrary, it was modified by the so-called rebus sic stantibus clause, which was receiving constantly increasing emphasis. The definition of pacta sunt servanda in article 23 was simple and clear, but should be made more precise. The words "every treaty in force" should be interpreted to mean that the treaty had been freely entered into and did not conflict with fundamental principles of international law, and that the consent of the parties had not been procured by fraud or coercion. The principle of pacta sunt servanda was indissolubly linked with the fundamental norms of general public international law. Without the additional safeguard afforded by the higher principles of jus cogens, the application of the pacta sunt servanda rule might lead to absurdity. The objective of every treaty should be to strengthen the international legal order, not to destroy it. For those reasons, the provision prepared by the Commission should be elaborated somewhat further, so as to reflect more accurately other principles recognized in the draft articles. The main point was to prevent agreements from being concluded in unequal conditions, or with abuse and discrimination. The meaning of the words "in force" should be clarified, particularly in the sense that a new rule of jus cogens automatically deprived a treaty incompatible with it of any force. Moreover, the principle of fidelity to the agreement had its limits in good faith, which implied not only that the parties must abstain from acts which might frustrate the performance of the agreement but also that there must be equality of consideration. To impose obligations involving a derisory quid pro quo was contrary to good faith. Good faith mitigated the harshness of an agreement when its performance became excessively burdensome. Similarly, the agreement should be deemed to be breached when its true underlying purpose conflicted with the essential norms of international law, even though its apparent purpose was legitimate. An example of that kind of agreement was a treaty which used a legal formality to conceal a perpetual military occupation.

23. Article 53, which dealt with the question of a treaty containing no provision regarding termination, was incomplete in that it made the permanent nature of agreements dependent on the intention of the parties, without recognizing exceptions of an objective character. The draft article implicitly denied the existence of any kinds of treaties which per se were limited in time. A legal order which was to make a positive contribution to the progressive development of international law must repudiate the old unjust practice of treaties of indefinite duration, which the great Powers were wont to impose on small nations in order to subject them to their oppressive rule. Perpetual treaties were unreasonable and unnatural. According to article 53, a treaty was not subject to denunciation or withdrawal unless it was established that that had been the intention of the parties; under that vague and imprecise wording, the character of a treaty could not exempt it from perpetuity. However, it was not the intention of the parties, but the nature of the agreement, which gave it its character as a

treaty of limited duration. Consequently, his delegation preferred, as being more complete, the original wording of article 39 in the 1963 text,[7] which expressly stated the possible exceptions to the general rule, based on the character of the treaty, the circumstances of its conclusion or the statements of the parties. That version harmoniously combined the objective and subjective elements that played a decisive role in determining whether or not a treaty was necessarily of limited duration. On the other hand, it should be stressed that in practice it was difficult for a perpetual treaty to exist, since it could always be terminated under the rebus sic stantibus clause implicit in treaties of indefinite duration. Recent history showed how fundamentally circumstances could change within a relatively short time. His delegation considered that the acceptance of the rebus sic stantibus clause as an objective rule of international law would promote equity and justice without decreasing the security of treaties. Moreover, his delegation did not favour the statement of that rule in negative terms.

24. Article 5, which dealt with the important question of the capacity of States to conclude treaties, should delve further into the meaning of the word "State" in that context. Only States which enjoyed full internal and external sovereignty could possess a capacity to conclude treaties. A treaty concluded between parties, one of which enjoyed only limited and formal sovereignty, should be deemed to be void under the law of treaties, since the party that was in an inferior position legally lacked capacity to be bound. There could be mutual consent only when both parties enjoyed full contractual freedom.

*The meeting rose at 11.45 a.m.*

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[7] See Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, chap. II, B.

Litho in U.N. 77601—January 1968—2,050