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CONTENTS

Chairman: Mr. José María RUDA (Argentina).

AGENDA ITEM 69

Report of the International Law Commission on the work of its fifteenth session (A/5509; A/C.6/L.526, A/C.6/L.527, A/C.6/L.529 and Corr.1) (continued)

1. Mr. DADZIE (Ghana) thanked the members of the Sixth Committee for electing him Vice-Chairman, and assured them of his fullest co-operation.

2. Mr. BENADAVA (Chile) said that the Chilean delegation attached the highest importance to the work of the International Law Commission, especially on international treaties, respect for which was one of the foundations of international order. Chapter II of the Commission's report (A/5509) had reached his delegation late, and so it would make its comments at the appropriate time. The draft articles prepared by the Commission contained certain new rules which were not part of positive international law and must be studied most carefully in order to avoid any lacunae.

3. He paid a tribute to the Sub-Committee on State Responsibility and the Sub-Committee on the Succession of States and Governments, which had done extremely useful work; the work on the succession of States, in particular, was of great value to the newly-independent countries.

4. He noted with satisfaction that the Secretariat was considering a winter session in 1964, and hoped that another could be held in 1965. Moreover, he would endorse the hope expressed in paragraph 78 of the report that documents would be sent to members of the Commission by air mail.

5. Mr. ANGUELOV (Bulgaria) congratulated the International Law Commission on the results of its work, and pointed out that the question of the invalidity and termination of treaties was of the highest importance, as treaties were the very foundation of international relations; it was also the question to which the Commission had paid most attention. Part II of the draft articles was still in the preparatory stage, but in a sense that was a matter for congratulation, in view of the continual changes within the community of States resulting from the liberation of a large number of peoples from the colonial yoke, which had produced a wide diversity of forms of State and of international relations. Institutions and international law had to be adapted to the demands and principles of peaceful coexistence among States with different economic and political systems, and the law of treaties must reflect that development. That was a point which should not be lost to sight.

6. With regard to State responsibility, he noted with satisfaction that the Chairman of the Sub-Committee on State Responsibility, Mr. Roberto Ago, had decided to give priority to the definitions of the general rules governing the international responsibility of the State, and that careful attention should be paid to the possible repercussions which developments in international law might have had on responsibility. The debates which would take place in the Sixth Committee on principles of international law concerning friendly relations among States would enable the International Law Commission to prepare, and to make more specific, the rules governing State responsibility for acts threatening peace, international security or the welfare of mankind.

7. The Chairman of the Sub-Committee on the Succession of States and Governments, Mr. Manfred Lachs, had stressed the problems of importance to new States, and had thereby linked that important aspect of the Commission's work with the needs of the contemporary world and the Charter. In that field also the Sixth Committee's work would be of undeniable value for the subsequent work of the International Law Commission.

8. To return to the law of treaties, invalidity and termination of treaties was one of the most delicate questions of international law, for it involved determination of the legal status of treaties with due regard to the principles of international law as a whole and the vital needs of the international community. The problem affected the very foundations of the rule pacta sunt servanda. The need for stability in international relations must be reconciled with the need to adapt legal obligations to the demands of equity in a continually evolving international life. That dual requirement came out particularly clearly in connexion with the provisions governing nullity of treaties for lack of consent or for incompatibility with certain principles of international law.

9. With regard to the imperatives of equity, the Commission had introduced some quite remarkable innovations into the draft articles. Thus, fraud and error had been treated separately, which was not always admitted by the theory of international law on that subject. Moreover, contrary to the classic principle of almost complete freedom to contract, the Commission had reached the conclusion that international law recognized rules having the character of jus cogens, from which individual States were not competent to derogate and derogation from which caused nullity of treaties. The debate in the Sixth Committee on the principles governing friendly relations between States would help to give certainty to

the content of the rules of jus cogens and provide a more satisfactory foundation for article 37.

10. In that connexion it was necessary to insist upon the importance of article 36 of the draft, which provided that any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations should be void. The Commission had considered that principle lex lata in international law. But international treaties might be considered void on the ground of the old saying ex injuria non oritur jus. His delegation unreservedly supported that notion, which marked a considerable step forward in the development of international law, and greatly hoped that the work would continue along those lines. In particular leonine treaties, which ran counter to the principle of the sovereign equality of States and the widespread phenomenon of the liberation of countries and peoples, must disappear. It was the duty of the International Law Commission to study that question in order to remedy situations of flagrant political and economic inequality.

11. The Commission, in its overriding concern to guarantee the stability of treaties, had in preparing the draft articles tried above all to find solutions which would not endanger established relations. Thus the "classical" circumstances vitiating consent did not, according to the draft, affect any clauses but those to which they applied. But although the principle pacta sunt servanda had been taken fully into account, the Commission was quite rightly subjecting the severability of clauses in treaties to the double condition set forth in article 46, paragraph 2 of the draft.

12. Furthermore the Commission, while admitting in article 44, entitled "Fundamental change of circumstances", the doctrine of rebus sic stantibus, had taken care to limit its application.

13. The Commission had also tried to achieve a balance between the two categories of contradictory requirements already indicated by providing in article 31, relating to provisions of internal law regarding competence to enter into treaties, that only "manifest" violations of those provisions could constitute a clause of nullity. It had therefore rejected both the theory which took into account only the will of the party expressing its consent ("Willenstheorie") and the theory which, regarding stability rather than authenticity, took into account only the interests of the party to which the expression of will was addressed ("Erklärungstheorie"), and had adopted an intermediate solution based on the idea of confidence ("Vertrauenstheorie"), the outward manifestation of will having no effect unless the principle of good faith was respected. His delegation approved that solution, but agreed with earlier comments on the need to specify exactly what should be understood by "manifest violation".

14. The Sixth Committee should study not only the substantive provisions of the draft articles, but also those relating to the procedure to be followed in various cases where the validity or termination of a treaty was in issue. Article 51, which the Chairman of the International Law Commission had himself described at the 780th meeting as a key provision, prescribed a procedure for preventing a State from invoking a cause of nullity or termination of a treaty in order to evade its obligations unilaterally. It should be noted that the Commission had not specified the authorities which would be competent to decide the matter, and had very reasonably confined itself to a reference to Article 33 of the Charter.

15. In conclusion, he pointed out that the Commission had succeeded in preparing a document which was a great deal more than a basis for examination. There was every reason to expect that it would be able to complete to the general satisfaction the important work which it had already begun.

16. He would vote for draft resolution A/C.6/L.529 and Corr.1, which recommended that the Commission should continue its work.

17. Mr. YASSEEN (Iraq) said that the report of the International Law Commission on the work of its fifteenth session was of great importance; the Commission had in the course of the current session given members of the Committee a glimpse of its methods of work with regard to certain items on its agenda and had drawn up a body of articles on the invalidity and termination of treaties which was a most complicated and highly controversial subject. With respect to the future work of the Commission the Iraqi delegation approved the methods suggested by the Sub-Committee on the Succession of States and Governments (see A/5509, annex II) and the Sub-Committee on State Responsibility (ibid. annex I) and was particularly pleased to note the appointment of the new Special Rapporteurs. The Iraqi delegation had studied with great interest the excellent preliminary report on relations between States and inter-governmental organizations[1] and hoped that the examination of that important subject would be continued in the near future.

18. Chapter II which contained the draft articles on the law of treaties constituted the most important element of the Commission's report.

19. The codification of the law of treaties was of particular interest since treaties were a source of law which constantly enriched the international order and ensured its rapid adaptation to the changing realities of international life. It was not merely a question of codifying an important part of international law but also of perfecting the very instrument of codification. The Iraqi delegation was on the whole very satisfied with the rules which the International Law Commission had formulated with respect to the validity and termination of treaties, but certain articles called for comment. Article 31 regarding competence to enter into treaties gave preference to the "internationalist" theory over that known as the "constitutionalist" theory, except in the case of obvious violations of internal law. But international law did not regulate in detail the question of competence to express the consent of the State; many authors maintained that international law left it to the internal law of each State to determine the making of a treaty. The constitutionalist principle should therefore have been the foundation of article 31, while admitting certain exceptions in favour of the internationalist principle, exceptions which were justified by the necessity to respect the good faith of the other party, above all in multilateral treaties where it was difficult to have a detailed knowledge of the internal law of all the contracting parties.

20. Articles 33 and 34 dealing respectively with fraud and error were logically necessary in a body of rules relating to the validity of treaties. Questions

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[1] A/CN.4/161 and Add.1.

of the vitiation of consent must of course be included among the causes of nullity and the fact that fraud was very rare and error not frequent was no reason for failing to declare that they vitiated consent. He agreed with the representative of El Salvador (782nd meeting) that fraud did not necessarily constitute fraudulent conduct but might arise from one fraudulent act only.

21. The Iraqi delegation approved the principle adopted by the International Law Commission on the subject of coercion (articles 35 and 36) but noted an omission. Although the Commission had clearly explained the position of positive international law with regard to the coercion of the person of the representatives of the State, it did not take fully into account the tendency of contemporary international law with respect to coercion exercised against a State. Under the influence of the United Nations Charter threat or the use of force had been condemned as an instrument of national policy. It was therefore generally recognized that recourse to threats or force to impose a treaty constituted a cause of nullity and that was already lex lata. It was not sufficient when codifying the law of treaties merely to express that reality. The technicalities of a treaty, which was an agreement of wills, in the opinion of his delegation called for the free expression of such wills. If the coercion exercised against the person of the representative of the State could be carried out by any act or threat why could the coercion exercised against the State itself be carried out only by threat or the use of force? Coercion was not necessarily a manifestation of physical force. If a restricted interpretation of the expression "threat or use of force" was adopted, many forms of real coercion would not come under article 36 and treaties which had been imposed by force would remain valid, for example treaties imposed by political or economic pressure. An article the purpose of which was to put treaties on a healthier basis and to guarantee the freedom of the parties, must therefore declare as cause of nullity every and any form of coercion, whether a threat or the use of force or any other unlawful pressure, economic or political, likely to compel the consent of a State. Pressures which might pass unperceived were more to be feared nowadays than threats or the use of physical force which could be easily denounced. Further, by clearly defining the rules relating to the vitiation of consent and coercion the risks of unequal treaties were reduced. Thus without fraud, without error, and without coercion there would scarcely be any unequal treaties except between States having unequal international juridical status; and here again vitiation of consent or coercion might often be noted. The Iraqi delegation therefore hoped that the International Law Commission would review article 36 bearing in mind the requirements of contemporary international life.

22. Article 37 of the draft concerning treaties conflicting with a peremptory norm of general international law (jus cogens) was a fundamental matter. It emphasized an obvious truth but the International Law Commission could not fail to include it in a chapter on the invalidity of treaties. The notion of jus cogens, by no means new, raised the question of the hierarchy of the rules of international law. In internal law that question was solved according to a formal rule, but that did not apply in international law where the fact that a rule was conventional or customary did not determine its value. It was necessary, therefore, to adopt a material standard which would show the substance of the rule, its necessity and its importance. There was here great need of prudence, but the notion of jus cogens was indisputable and it was difficult to admit that the rules of jus cogens could coexist with other rules that contradicted them. Consequently, the birth of a new imperative would have the effect of nullifying all pre-existing incompatible rules. In that respect article 45 was quite justified. It should be noted that the notion of jus cogens derived from positive law and not from natural law; it was not a matter of immutable and permanent norms but of a rule that had a particular value at a particular moment. Article 37 emphasized that positive and relative character by foreseeing the possibility of modifying a peremptory norm by a new norm of the same character.

23. With regard to article 44 which dealt with the question of a fundamental change of circumstances, it had to be recognized that the doctrine of rebus sic stantibus, to which it referred, existed in positive international law. The almost total absence of case-law in the matter was not a sufficient ground for denying its existence. It was frequently stated that the parties against whom that principle was formulated claimed in general that the change was not real or that it was sufficient to justify a revision of the treaty or its termination. Nevertheless, although it did exist, the doctrine of rebus sic stantibus, like many customary principles, lacked precision and the Commission had attempted to set aside that disadvantage. It was a principle which tended to adapt law to facts; indeed, treaties did not always have a contractual character but were frequently legislative and created in many cases objective and general situations which it was necessary to adapt to the realities of life.

24. Article 51 was of capital importance for it reconciled the principle that no person could be judge and party in his own case with the fact that no general compulsory court was provided, an omission which was explained by the relatively undeveloped condition of the international system in comparison with the internal system. The international rules lacked precision and many of them were disputed. For that reason States were reluctant in general to commit themselves in advance to have recourse to a court when they did not know exactly what rules would be applied to them. It would be dangerous to make the development of international rules and their codification depend on the acceptance of a compulsory jurisdiction. That would be harmful at the time of codification and indirectly to the expansion of compulsory jurisdiction in the international sphere. Article 51 took into account the realities of international life by referring with regard to the solution of international disputes to the means indicated in Article 33 of the Charter.

25. The Iraqi delegation would support draft resolution A/C.6/L.529 and Corr.1 and reserved the right to submit later its observations on the question of a wider participation in the multilateral treaties concluded under the auspices of the League of Nations.

26. Mr. CASH (Argentina) said that the Chairman of the International Law Commission and the Special Rapporteur were to be congratulated on the excellent work the Commission had accomplished at its fifteenth session, with special reference to the law of treaties. In view of the nature of the Commission and the tasks that were entrusted to it, that body was called upon to combine experience with a dynamic approach; in other words, to recognize the value of established custom

and to accept, with all due caution, the new principles that were already in existence theoretically. As the draft articles on the law of treaties had to be submitted to Governments, the Argentine delegation would make only a few general comments and would reserve the right to speak in greater detail in due course. The articles submitted by the International Law Commission embodied some new criteria which might have important practical results. It was therefore imperative that the draft should be worded in very specific terms and that delegations should interpret it with great objectivity. Treaties should form the foundation of juridical order and should not provide a source of discord, a fact which showed once again what a delicate task the Committee faced in analysing the law of treaties. For that reason the Argentine delegation would refrain from passing judgement on the draft prepared by the International Law Commission. It would like, however, to recall its traditional attachment to the principle pacta sunt servanda, which lay at the root of harmony among peoples, a position which in no way obstructed consideration of and support for, any new principle of international law which after careful analysis might serve co-operation between nations.

27. The Argentine delegation found itself obliged to request once again that documents of such importance as the report of the International Law Commission should be sent to Governments in time. With regard to the winter session that the Commission was proposing to hold (see A/5509, para. 72) his delegation did not think that that idea should be considered. The Secretary-General had drawn attention, in document A/C.6/L.527, to the heavy programme of conferences proposed for 1964. Moreover, it was unlikely that the report of the Special Rapporteur on Special Missions would be circulated in all the working languages in time for the session to produce good results.

28. The Argentine delegation attached particular importance to the question of relations between States and inter-governmental organizations, a field in which there had been enough development in practice to make it a subject for serious study. Such questions as the international personality of inter-governmental organizations, their treaty-making capacity, their international responsibility and the privileges and immunities of international civil servants were worthy of thorough study.

29. He would vote in favour of draft resolution A/C.6/L.529 and Corr.1 and he whole-heartedly endorsed paragraph 6 of the text.

30. Sir Kenneth BAILEY (Australia) supported draft resolution A/C.6/L.529 and Corr.1. He associated himself with the delegations which had paid a tribute to the International Law Commission and its Chairman for the work accomplished at its fifteenth session, at which distinct progress had been made in the codification and progressive development of international law. He offered his congratulations and good wishes to the Special Rapporteurs, particularly Mr. El-Erian, who had been entrusted with the study of a question so poorly covered in practice and in jurisprudence. Despite the reservations that some members of the Sixth Committee had expressed, he thought that the work done in Sub-Committee was producing excellent results.

31. Turning to the draft articles on invalidity and termination of treaties, he congratulated Sir Humphrey Waldock, the Special Rapporteur, who had maintained the high tradition established by his predecessors. Certain aspects of the law of treaties for which there were as yet few illustrations in the practice of States had given rise to some criticism. In his delegation's opinion, great caution should be exercised in proceeding by analogy with private law, for the similarity between the law of contracts and the law of treaties lay more in the form than in the obligations entered into. Moreover, in private law the obligations were more easily acceptable, for there were courts that were competent to interpret them.

32. Lastly, he thought that it was necessary for the International Law Commission to hold a winter session and he approved the programme of work the Commission had adopted (see A/5509, paras. 71-75).

33. Mr. WYZNER (Poland) was sure that the comments, both general and detailed, which the members of the Sixth Committee had made on the draft articles on the invalidity and termination of treaties would be of value to the International Law Commission. The Commission had once more succeeded in a difficult task. Its second series of draft articles was an important step towards progressive development of international law and its codification. International treaties were of particular significance as the most widespread legal form for establishing international co-operation. Hence the importance of the Commission's work in this field.

34. The suggestion made by the representative of Ceylon at the 780th meeting, that a conference of plenipotentiaries should be convened to adopt a final text of the law of treaties, deserved attention. A conference attended by the representatives of all the States and international organizations concerned would be the best forum for the discussion and acceptance of a document of such basic value for the rule of law in the world.

35. Of the various articles of the draft, his delegation attributed particular importance to articles 36 and 37. Article 36 might have a wider application, as the representative of Iraq had suggested. It marked, however, an important advance from the state of affairs which had still existed a short time before. It was true that the principle of invalidity of treaties the conclusion of which had been procured by the threat or use of force in violation of the principles of the United Nations Charter was already being recognized; but the small States and former colonial States had been in no position to invoke it. By declaring such a treaty void de jure from the outset, article 36 was providing such States with an objective norm of international law.

36. Article 37 embodied the notion of jus cogens, which was not new, for W. E. Hall had already formulated it in his Treaties on International Law, the first edition of which had been published as early as 1880. In reply to those who had pointed out the absence of any generally-recognized criterion by which to identify the fundamental principles of international law, it was enough to recall, as the representative of Czechoslovakia had done at the 787th meeting, a proposal made in the Sixth Committee that a declaration should be drafted on the fundamental principles of international law, spelling out the broad rules of international co-operation.

37. Article 40, paragraph 2, revealed a rather unusual concept. The generally-accepted practice was that States not bound by the obligations arising out of a

treaty could not usually at the same time acquire rights under it. The provision contemplated by the Commission would de facto put States which wilfully evaded their responsibilities under a treaty, and did not become parties to it, in a more privileged position than States parties. If a provision of that type was considered necessary for some transitional period, that period should be limited to one or two years at most.

38. Commenting on Article 50, paragraph 2, he pointed out that a State which withdrew from a treaty was taking a serious decision which called for consideration, particularly if the treaty had political, economic or legal importance. Moreover, withdrawal, particularly from a bilateral treaty, could be a means of political or economic pressure. Article 50, paragraph 2, which provided that notice to terminate a treaty might be revoked at any time before the date on which it took effect, did not take into account the need for other parties to adapt themselves to the situation created by the withdrawal of one State, the termination of the treaty, or conversely its continuation. For the sake of international co-operation, which was based on treaty-type obligations, the right to revoke a notice should be limited by linking it to the clear consent of the other party. His delegation hoped that the final version of the draft articles on the law of treaties would deal with unequal treaties obtained by pressure or force, or disregarding the principle of the sovereign equality of States, or containing provisions contrary to principles of modern international law, such as the right of all peoples to self-determination, or non-intervention. Such treaties should be declared illegal and void. The principle of pacta sunt servanda could not be invoked to maintain in effect treaties contrary to international law and to the United Nations Charter.

39. His delegation appreciated the work already accomplished and the decisions taken by the Commission on other subjects. It shared the Commission's concern expressed in paragraph 79 of its report, and hoped that steps would be taken to publish the Yearbook of the International Law Commission in future as soon as possible after the end of each annual session.

40. Draft resolution A/C.6/L.529 and Corr.1 rightly followed the precedent set at the seventeenth session, when the Sixth Committee had broken with the tradition of adopting only formal resolutions on the Commission's report. He particularly welcomed the provisions of paragraph 4 (c), and would vote for the draft resolution.

The meeting rose at 12.20 p.m.

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