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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) (concluded)

1. Mr. CHHIM KHET (Cambodia) in the exercise of his right of reply, deplored the fact that the representative of Thailand, at the 791st meeting, had appeared to criticize the decision of the International Court of Justice in the case concerning the Temple of Preah Vihear. When Cambodia had submitted its dispute with Thailand to the Court, it had been determined to abide by the Court's decision, whatever it might be. The Court had explained at length in its opinion [1] why it had decided in Cambodia's favour. The members of the Sixth Committee, whose task was to ensure the progressive development of international law, should refrain from making critical remarks concerning the International Court.

2. Mr. WATANAKUN (Thailand), in the exercise of his right to reply, pointed out that in referring to the map in the case concerning the Temple of Preah Vihear, his delegation had had no other intention than to comment on the report of the International Law Commission and to draw the Committee's attention to the fact that in drafting article 34 the greatest care should be exercised in formulating the exception and that the said map did not come within the definition of the word "treaty". His delegation had made no reference to the decision of the International Court of Justice.

3. Mr. SPERDUTI (Italy) commended the International Law Commission upon its work on the law of treaties. The Italian delegation regarded the codification of that branch of law as most important. Relations between States were normally based on international treaties and it was therefore essential that the rules governing the law of treaties should be as clear as possible. At a time when the international community was becoming a true community of peoples, the International Law Commission's decision to prepare a series of draft articles to serve as a basis for a multilateral convention filled a real need. Its work enabled all the new States to participate directly in developing law, thus placing the law of treaties on a wider and sounder basis. During the present session, his delegation would merely make a few preliminary comments on particularly controversial issues.

4. At the seventeenth session (743rd meeting), he had stressed the importance of consent in entering into treaties, for a treaty did not exist between two States except in so far as those States had consented to be bound by its provisions. He had pointed out that the question of consent had two main aspects: first, consent should exist, that is, the will of the State to enter into a treaty should have been formed; then, that will should be expressed on the international plane. In principle, the will of a State could not be validly expressed unless it was in keeping with the rules of law governing the formation of that will. There could be exceptions to that principle, for the requirements of certainty in juridical relations and the very principle of good faith might lead to a situation where a State might be considered to be bound by the statements made by its organs on the international plane, even if those organs were not by themselves competent to form the will of the State. The principle retained its full significance, however, both in theory and practice. On the other hand, it was generally recognized that the formation of the will of a State to enter into a treaty was governed by that State's constitution, so that the conclusion of a treaty did not depend exclusively on rules of international law; it was thus essential that a convention having the effect of codifying the law of treaties should contain very precise provisions regarding the extent to which observance of the constitutional law of the State was necessary to enable the representatives of that State to conclude a treaty validly and regarding any exceptions to that rule.

5. The Italian delegation noted with satisfaction that, in part II of its draft articles (see A/5509, chap. II) the International Law Commission had considered it necessary to take a position on the weight to be given to international law and constitutional law, respectively, in the formation of treaties. That very delicate matter was dealt with in article 31. Although he appreciated the Commission's efforts to reach a satisfactory solution of the question, he could not support the article as it stood.

6. The terminology used was not entirely accurate. It was incorrect to say that, unless the violation of internal law had been manifest, a State could not withdraw the consent expressed by its representative unless the other parties to the treaty so agreed. In the exception provided for, the State could not "withdraw" a consent which had never been given. A statement made by the representative of a State in violation of internal law could not be imputed to the State itself. It might have been difficult to draft a more rigorous wording, but the drafting problem arose un-

[1] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6.

doubtedly from the fact that article 31 was not entirely logical.

7. It belatedly stated, in what seemed to be a contradictory manner, what should have been stated in a somewhat different form earlier in the draft, namely, in the part dealing with the conclusion of treaties, in articles 4, 11 and 12, for example.[2/] His delegation had drawn the Sixth Committee's attention to the matter at the seventeenth session (743rd meeting) when it had been considering the first draft articles.

8. He was raising the question again because he felt that article 31 was in contradiction with certain provisions of part I, section II of the draft. Article 4 established the authority of representatives of a State to negotiate, sign, ratify or accept a treaty in terms which left no doubt that that authority was exclusively within the scope of international law. In the case of treaties which were not subject to ratification, acceptance or approval, article 11 provided that signature established the consent of the signatory State to be bound by the treaty. But such signature was the signature provided for in article 4, where there was no reference to the internal law of the State. It was clear from article 11, as well as from article 12 on ratification, that where ratification was required, it established the consent of the State to be bound by the treaty. Consequently, none of the aforementioned articles, any more than the other articles which made up section II, required compliance with the constitutional laws of the State.

9. Moreover, it became clear that the only conditions to be met before a State could be considered to have given its consent to be bound by an international treaty through the intermediary of an organ competent to represent it were those provided in article 4. It followed that a treaty might be regarded as valid in so far as article 4 was concerned, with respect to the consent given by the representatives of the parties, but invalid in so far as article 31 was concerned, for reasons relating to that consent. Whereas part I of the draft articles gave the impression that it was not necessary, in principle, to act in compliance with constitutional laws for the treaty to be valid, part II stated that those laws should have been complied with in certain cases—cases where they had manifestly been violated.

10. If it was admitted that failure to comply with a provision of internal law relating to the authority to conclude treaties could affect the very existence of the consent given on behalf of a State by an organ of that State, certain conclusions must be drawn. First, the role of constitutional law in the matter should be defined in the part dealing with the authority of the organs of a State to commit that State to be bound by a treaty, and not, merely incidentally, in the section dealing with the invalidity of treaties. Secondly, the rules of constitutional law should be given their proper weight. In article 31 of the draft, they were given far less weight than in many international treaties, and, in particular, in the United Nations Charter, which provided in Article 110 that "The present Charter shall be ratified by the signatory States in accordance with their respective constitutional processes".

11. The Italian delegation endorsed the Commission's recognition, in draft articles 37 and 45, of the existence of the rules of jus cogens. In so doing, the Commission had successfully met the requirements of the progressive development of international law. That category of rules had been challenged in the past only because a contractual idea of international law still prevailed. As a result of the evolution of international law since the establishment of the United Nations and the emergence of a genuine general international law, it could not continue to prevail. The International Law Commission had quite rightly attributed to the rules of jus cogens the importance they deserved in modern treaty law.

12. Finally, the International Law Commission had dealt with some delicate and highly controversial questions such as the doctrine of rebus sic stantibus. With reference to that doctrine, he noted that paragraph 3 of article 51, which simply referred to Article 33 of the United Nations Charter, betrayed the Commission's hesitation. In the opinion of the delegation of Italy, a reference to Article 33 of the United Nations Charter was not enough in article 51 of the Commission's draft, particularly when it was a question of disputes arising from the allegation by a State of a fundamental change of circumstances. Such disputes would be of a legal nature. However, neither Article 33 of the United Nations Charter, nor even Article 36, paragraph 3 of which dealt with legal disputes, provided for compulsory international jurisdiction. The parties to such a dispute would thus find themselves in a deadlock. In other words, in view of the fact that draft article 44 did not consider fundamental change of circumstances as bringing about ipso facto the termination of a treaty and did not consider, either, that such change gave a State the right to denounce a treaty unilaterally, it seemed that in order to evade the provisions of article 44 it would be sufficient to raise objections under the terms of paragraph 2 of article 51, while at the same time refusing to agree to a decision by an international judge on the merits of the case. International law should make the application of such an intrinsically vague notion as that of a fundamental change of circumstances subject to the appropriate procedures, just as, under internal law, the duty of giving a judgement on the termination of a contract for fundamental change of circumstances was entrusted to a competent judge. It would be unwise to adopt the basic rules stated in article 44 unless there was a clause providing for compulsory jurisdiction. The application of the fundamental principle of good faith might perhaps offer a compromise solution. A clause based on that principle might provide that if objections were raised, under the terms of article 51, against a request for termination of a treaty under article 44, and if those objections were not accepted, the party which opposed the giving of a verdict by an impartial authority on the conditions of application of article 44 should thereby be considered as having abandoned any attempt to prove the grounds which it alleged.

13. The delegation of Italy would vote for draft resolution A/C.6/L.529 and Corr.1.

14. Mr. AMADO (Brazil) said that he was glad to observe that the members of the Sixth Committee were unanimous in recognizing the importance of the study of the law of treaties and generally approved the work carried out by the International Law Commission. Some differences of views in the observations on the details of the articles which were to be transmitted by Governments was, of course, to be expected. The International Law Commission had dis-

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

played considerable boldness in its determination to adapt its draft to the requirements of the present-day world, to sweep away prejudices, and to overcome the obstacles which always stood in the way of the efforts of innovators. The breadth of vision of the Commission and of its Special Rapporteur, Sir Humphrey Waldock, was to be praised in that respect. The Commission's courageous determination was particularly evident in the provisions of article 37 regarding treaties conflicting with a peremptory norm of general international law. Whatever doctrinal divergencies there might be on the subject of the existence of rules of jus cogens in international law, the evolution of international society since the Second World War showed that it was essential to recognize the peremptory nature of certain rules the soundness of which was generally accepted. As the representative of Iraq had so rightly said at the 788th meeting, the notion of jus cogens raised the question of the hierarchy of the sources of international law. In internal law, that question was solved in accordance with a formal criterion, but in international law, where the weight of a rule was not determined by whether it had been established by treaty or by custom, a positive criterion had to be found. He thought therefore, like the representative of Iraq, that it was logical that the appearance of a new peremptory norm should have the effect of rendering void all pre-existing norms which were incompatible with it. States could not derogate from such peremptory norms by the conclusion of treaties amongst themselves without harming international law and order. The Chairman of the International Law Commission had thus been right, in introducing the Commission's report at the 780th meeting to quote, as examples of rules of international public order, the prohibition of the threat or use of force contained in Article 2, paragraph 4 of the United Nations Charter. It was also worth noting that the International Law Commission had very wisely limited itself to merely stating the principle, leaving it to State practice and to the jurisprudence of international tribunals to develop the content of the rule.

15. The provisions of article 36, under which any treaty whose conclusion had been procured by the threat or use of force was void, likewise represented an important step forward. The Commission, referring to the Covenant of the League of Nations, to the clear-cut prohibition in Article 2, paragraph 4 of the Charter of the United Nations and to the practice of the United Nations itself, had concluded, in paragraph (1) of its commentary on article 36, that the invalidity of a treaty procured by the illegal threat or use of force was a principle which was lex lata in present-day international law.

16. With respect to articles 33 and 34, dealing with vitiation of consent, he wished to stress how difficult it was in international law to give a generally satisfactory definition of fraud, the search for the intention of which called for great psychological subtlety. In practice, however, it appeared that there was no recorded instance of a State claiming to denounce a treaty on the ground that it had been induced to enter into it by the fraud of the other party. Similarly, the notion of error, which was so important in matters of contracts, lost much of its force in contemporary international law, particularly as treaties were now frequently formulated at international conferences in which a large number of countries took part. Giving approval to provisions which would raise more difficulties in practice than they would solve should therefore be avoided.

17. It was possible that some Governments would find it impossible to approve articles the application of which, in view of the fact that compulsory jurisdiction did not yet exist in international law, seemed to them to endanger the stability of treaties. Thus the Commission had found itself faced with a double problem: it had had to innovate considerably in order to adapt international law to the changes undergone by the international community, while at the same time it had had to make sure that such efforts to adapt international law did not compromise the normal operation of international relations. In order to obtain positive results, he considered that it was necessary to retain such traditional rules as had to be maintained in order to ensure the stability of treaties and, in doing that, the Commission should not display any less courage than it had shown in taking into account the progress which had taken place in international life. It was obvious that leonine treaties would have to be eliminated, and once the possibility of contracting vitiated agreements had been reduced, the international community would no longer have any reason not to strengthen the principle of respect for the validity of treaties.

18. The Brazilian delegation fully approved the decision taken by the International Law Commission in respect of the studies on State responsibility, the succession of States and Governments, special missions, and relations between States and inter-governmental organizations, particularly the appointment of Special Rapporteurs for those questions. Finally, the Brazilian delegation would vote for draft resolution A/C.6/L.529 and Corr.1.

19. Mr. ITURRALDE (Bolivia) spoke of the importance of the report of the International Law Commission (A/5509), which gave an accurate idea of the present state of international law by affirming its universal principles which were recognized and respected by what had come to be called the civilized nations. Among the most important articles in part II of the Commission's draft was article 31, under the terms of which a treaty signed by a representative possessing all the necessary powers for that purpose was of absolute validity. That article could be contrasted with article 15 of part I [3] regarding formal treaties which required ratification by a legislative body and the existence of a document attesting ratification. In such a case, a representative who had signed a treaty of that type could not claim that the treaty was valid if constitutional requirements had not been respected. An example was the ratification by the United States Senate of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water. In many countries, any obligations contracted had to be validated by the legislature. In the case of simplified forms of treaties, however, the act of a State's plenipotentiary was sufficient to establish that State's consent. In present-day international relations, a large number of multilateral treaties were merely signed by a plenipotentiary. Likewise, a Minister for Foreign Affairs could commit his country to an agreement by an exchange of Notes which would constitute an agreement having binding force. The Bolivian delegation was therefore happy to note that, under article 31, consent expressed by the representative of a State was considered to be valid,

[3] Ibid.

it being clearly understood that there was a distinction between formal treaties and treaties of simplified form.

20. Draft article 36 stated a juridical principle. But while the principle that it laid down was accepted in theory, it was not accepted in the practice of international law. On the other hand, it was generally accepted in internal law, and the Commission had been well advised to incorporate it into international law. Draft article 36 was applicable not only to treaties which might be concluded in the future but, according to the commentary, to all treaties without exception, since a treaty procured by the threat or use of force in violation of the principles of the Charter should be regarded as void ab initio. The Commission had not enumerated all possible forms of coercion, since it had felt that the scope of the Charter was sufficiently broad. That fact should be stressed, because it showed that draft article 36 laid down an already accepted principle while taking into consideration present world conditions.

21. Draft article 44 sanctioned the doctrine of rebus sic stantibus, but did not allow it a very broad scope. In fact, that doctrine did not apply only to a change of circumstances existing at the time when the treaty had been entered into; it also applied to imposed treaties which for the very reason that they had been imposed caused a change of circumstances in the sense that they created situations jeopardizing friendly relations among States. Some representatives had said that the doctrine of pacta sunt servanda was diametrically opposed to the doctrine of rebus sic stantibus, but that was not so, since the doctrine of pacta sunt servanda obviously could not apply to treaties which did not meet the conditions of draft article 36. A treaty which had been concluded in the absence of threats or vice of consent should be respected. The doctrine of rebus sic stantibus gave practical expression to the idea of justice. Accordingly, it had its place in the law of treaties, where it became a principle of positive law. He recalled that it was the Latin American States which had demanded that the word "justice" should be inserted in Article 2, paragraph 3 of the Charter and in the Preamble. He shared the opinion of the Brazilian representative, who had declared categorically that unjust treaties should be proscribed in international relations. The doctrine of pacta sunt servanda then would no longer have to distinguish between equal and unequal treaties.

22. His delegation considered that the draft articles introduced some new ideas into international law. It commended the Commission for the excellent work done. It would support draft resolution A/C.6/L.529 and Corr.1 unconditionally.

23. Mr. AL-RASHID (Kuwait) said that, as his delegation was participating for the first time in the work of the Sixth Committee, it wished to assure the Committee that it would contribute to the best of its ability to that work. His Government had always followed with great interest the work of the Sixth Committee and the International Law Commission and had always appreciated their efforts to codify and develop international law with a view to making it a more effective instrument for the maintenance of international peace and security and promoting the rule of law in international relations. His delegation would support draft resolution A/C.6/L.529 and Corr.1.

24. Mr. CHESSON (Liberia) supported draft resolution A/C.6/L.529 and Corr.1. He wished, however, to draw the Committee's attention to operative paragraph 4, sub-paragraph (c), and more especially to the words "with appropriate reference to the views of States which have achieved independence since the Second World War". In his delegation's opinion, that part of the sentence was discriminatory and gave the impression that there were two categories of States in the United Nations. It was also unnecessary, since the General Assembly, at the beginning of the sub-paragraph, had already invited the Commission to take into account the views expressed at the eighteenth session, the report of the Sub-Committee on the Succession of States and Governments and the comments which might be submitted by Governments. The States which had achieved independence since the Second World War would be entirely capable of expressing their views and transmitting them to the Commission through the Secretary-General. His delegation therefore formally proposed that the last part of the sentence in sub-paragraph (c) from the words "with appropriate reference" should be deleted.

25. Mr. COOMARASWAMY (Ceylon) said that the sponsors of the draft resolution had been given short notice of the amendment and that, if the Liberian representative maintained his request that the amendment should be put to the vote, they would ask for time to study it before the vote.

26. Mr. DE LUNA (Spain) wished to explain that the States which had achieved independence since the Second World War, had been expressly mentioned, not in order to discriminate against them, but rather to give them the place of honour, since they were the ones that were coming to grips with the greatest number of succession problems.

27. Mr. PECHOTA (Czechoslovakia) said that paragraph 4, sub-paragraph (c) correctly reflected the discussions in the Committee. He suggested that the Liberian representative should not press his amendment to the vote or should ask for a separate vote on sub-paragraph (c) in its present form.

28. Mr. YASSEEN (Iraq) regretted that he could not support the Liberian amendment. Sub-paragraph (c) took account of a very important fact of our times; the question of succession of States was extremely urgent, because of the emancipation of a very large number of States since the Second World War. The problem now was to regulate the new situations concerning those States, and therefore, it was logical to make special mention of them. His delegation was therefore opposed to any change in sub-paragraph (c).

29. Mr. DADZIE (Ghana) said that the wording of sub-paragraph (c) was not new. Nobody could deny that great changes had occurred in the world since the Second World War. As a matter of fact, States which had not been independent before the Second World War had not participated in the formulation of international law. Sub-paragraph (c) stressed the fact that the newly independent States were now going to take part in that work.

30. Mr. JACOVIDES (Cyprus) pointed out that the wording of sub-paragraph (c) had been taken from General Assembly resolution 1765 (XVII). If the wording were altered now, it might give the impression that the General Assembly had changed its position on the matter. Moreover, it was obviously not through discrimination that the newly independent States had been given a special place in the formulation of the law concerning succession of States and Governments.

31. Mr. TUKUNJOBA (Tanganyika) said that his delegation, after a very thorough consideration of draft resolution A/C.6/L.529 and Corr.1, had decided to vote for it. It took account of the facts and of historical developments. It stated that henceforth the newly independent States should participate in the elaboration of international law. He could not understand the attitude of the Liberian representative and would vote against his amendment.

32. Mr. AMADO (Brazil) noted that the purpose of draft resolution A/C.6/L.529 and Corr.1 was to inform the International Law Commission of the General Assembly's wishes concerning the conduct of its work. It expressly mentioned the newly independent States in order to show the Assembly's respect and concern for them and so that the Commission would pay particular attention of their views. Moreover, paragraph 4, sub-paragraph (b) invited the Commission when it continued its work on State responsibility to give due consideration to the Purposes and Principles of the Charter of the United Nations; in fact, all the previous drafts on State responsibility had been drawn up before the promulgation of the Charter of the United Nations. The Principles of the Charter therefore threw a new light on the question. Consequently, if the last part of the sentence in sub-paragraph (c) was deleted, that sub-paragraph would no longer be in accord with sub-paragraph (b). That phrase, rather than minimizing the importance of the newly independent States, on the contrary stressed the contribution which they could make to the Commission's work.

33. Mr. OLLASSA (Congo, Brazzaville) said that, if any discrimination was to be found in the last part of the sentence in sub-paragraph (c), that discrimination was necessary. It was generally known that the succession of States raised serious questions for the newly independent States and therefore it was natural to mention them specifically in order to facilitate the Commission's work.

34. Mr. CHESSON (Liberia), in a spirit of solidarity, agreed to withdraw his amendment.

35. The CHAIRMAN put draft resolution A/C.6/L.529 and Corr.1 to the vote.

The draft resolution was adopted unanimously.

The meeting rose at 1.15 p.m.

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