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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. DEWULF (Belgium) observed that under the guidance of its Chairman, Mr. Jiménez de Aréchaga, the International Law Commission had once again done excellent work. The draft articles on the invalidity and determination of treaties (see A/5509, chap. II) did not, however, always present definitions and explanations of the kind essential to the early formulation of specific criteria which could be embodied in a convention or international code. Moreover, the discussions at the present session showed that certain rules, such as those set out in articles 37 and 44, might be subject to somewhat hasty and differing interpretations. It was therefore quite possible that misunderstandings would arise when the time came to determine the Commission's unanimous or majority opinion on certain articles. It was true that the Commission had been extremely cautious, as always, in its commentaries, and that in his statement at the 780th meeting its Chairman had made a very skilful presentation of the positions taken on certain particularly delicate problems such as those of jus cogens or the rebus sic stantibus clause. The Belgian delegation hoped, however, that the Commission would later be able to clarify its thinking on, for example, the question of peremptory norms of general international law or the rebus sic stantibus clause. His Government would draw attention to those difficult points in its written comments. For the present he wished to commend the Commission for not leaving unconsidered certain concepts which, while difficult and at times controversial, were gradually acquiring clearer definition.

2. In addition to the law of treaties, the Commission had considered at its fifteenth session the highly important questions of succession of States and Governments (*ibid.*, annex II), and relations between States and inter-governmental organizations (*ibid.*, chap. IV). As he had observed in the Sixth Committee at the seventeenth session, the problems relating to the rights and obligations of subjects of international

law other than States were practical and immediate. Mr. El-Erian, Special Rapporteur, had recognized their importance in his preliminary study,<sup>1/</sup> in which he had dealt in particular with the responsibility of international organizations in the light of existing doctrine and recent practice. At a time when there was much talk, both in the Committee and in the International Law Commission, of broadening the scope of the concept of international responsibility, it seemed most appropriate to devote attention to the obligations logically resting with organizations which, at the present time, were assuming various functions traditionally reserved to States. It was, for example, essential to provide a clear definition of the criteria governing the responsibility of organizations towards the individual, and to devise special procedures for adequately safeguarding individual rights.

3. His delegation would vote for draft resolution A/C.6/L.529 and Corr.1. In taking that position it was not prejudging the Fifth Committee's eventual decision on the financial implications of holding a winter session of the International Law Commission.

4. Mr. VEROSTA (Austria) congratulated the International Law Commission and its Chairman on the work they had done during the Commission's fifteenth session, especially in preparing the second set of draft articles on the law of treaties (see A/5509, chap. II). Since Governments had two years in which to offer comments on the draft articles, his delegation would merely make at the present session some general and quite tentative observations. Examination of the first two sets of draft articles on the law of treaties had given him the impression that a veritable rebirth of natural law was taking place. He had been pleased to note the reappearance of Grotius' ancient rules governing the behaviour of nations, and to find that they were regarded as an integral part of contemporary international law and had been embodied in a draft instrument on the law of treaties. Natural law could not be disregarded for long. Yet mankind had needed two world wars before it could rediscover the light of reason, a feeling for human dignity, and a sense of justice. The credit for once again setting out the basic rules of international law relating to treaties belonged to a body of jurists representing every part of the world and the most varied cultures.

5. He had followed the Committee's discussions with great interest. Most delegations had taken a favourable view of the draft articles on the invalidity and termination of treaties, and the representatives of some of the major Powers had found them generally acceptable. Nevertheless, he could not help feeling a degree of scepticism. He feared that in their present form the draft articles could not be raised to the status of a convention and that, if examined and recast by an international conference, they would be largely emas-

<sup>1/</sup> A/CN.4/161 and Add.1.

culated. Moreover, the final draft would not be submitted to the General Assembly until 1966 at the very earliest, and it would be another year or two before a conference of plenipotentiaries could be convened. The magnitude of the task might prompt that conference to divide the draft articles into a number of separate conventions. Moreover, it might not assemble for a long time to come, if indeed it ever did, since the controversial articles were numerous. In any event the draft articles would remain a bold contribution to customary international law.

6. If it was impossible to convene a conference of plenipotentiaries on the law of treaties in less than ten years or so, the General Assembly should make alternative arrangements, for codification conferences should not be held too rarely. It would be sound practice to hold the interval to a maximum of five years, and the last conference had been the United Nations Conference on Consular Relations, held at Vienna in 1963. The questions of the succession of States and of State responsibility were delicate and highly controversial; that of relations between States and intergovernmental organizations was extremely complex. There remained the question of special missions. Since the International Law Commission had decided to speed up its work on that question, draft articles might be prepared by 1964 or 1965. A conference could then be convened in 1965 or 1966 to codify the rules applying to special missions, thus completing codification of the law governing diplomatic relations between States. His Government would have liked to see the title "Vienna Convention" given to the three instruments of that series. In view of the financial position of the United Nations, however, the Sixth Committee could constitute itself a conference of plenipotentiaries and once again undertake a task of codification.

7. His delegation would vote for draft resolution A/C.6/L.529 and Corr.1.

8. Mr. USTOR (Hungary) observed that the most impressive part of the International Law Commission's report (A/5509) was that dealing with the law of treaties. The codification of that branch of law had been the boldest undertaking on which the Commission had yet embarked. The part played by treaties was of paramount importance in international law. From time immemorial, treaties had been concluded, dissolved and abrogated, and the validity of many had been challenged, yet the rules governing that branch of law were still greatly in need of clarification. Articles 33 to 37 and 44 dealt with highly important, difficult and delicate problems, and the Commission was to be commended for its efforts to solve them in a just and balanced manner.

9. The principle of pacta sunt servanda was essential to the maintenance of friendly relations between States. However, it represented an instance in which rigid insistence on treaty rights, far from promoting friendly relations between States, threatened them. Hence the existence and perpetuation of unequal treaties was intolerable and particularly dangerous to the newly-independent States. He agreed with the Iraqi representative (788th meeting) that all treaties which imposed a disproportionate burden on one of the parties could be regarded as void under certain of the Commission's draft articles on the invalidity and termination of treaties. It would therefore unquestionably be desirable for that problem to be dealt with explicitly in a separate article.

10. He could not share the view of some delegations that article 36 applied only to cases involving the threat or use of force. He agreed with the Indonesian representative that all types of duress must be taken into account, and therefore supported the suggestion of the Iraqi (788th meeting) and Yugoslav representatives (782nd meeting) that the article should be re-drafted to prevent an unduly narrow interpretation.

11. He welcomed the principle enunciated in article 37 that States could not derogate from certain rules by treaty. Similarly, article 45 recognized that international law was not static but dynamic and ever-changing. With regard to articles 37 and 45, he found it impressive that, although the members of the Commission disagreed on the origin of the peremptory rules of international law, they had nevertheless agreed to recognize their existence, and their ideological differences had not prevented them from reaching a solution that met the needs of practice. In connexion with those articles, the representative of Austria had expressed some philosophical ideas that had a certain value from the point of view of natural law but must necessarily be rejected by positivists and even more necessarily by Marxists. One should, on the contrary, welcome the abolition of certain principles of natural law and the increasing adaptation of international law to the realities of international life.

12. The Commission had been right in concluding, in paragraph (6) of its commentary on article 44, that "the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties". The Commission had, moreover, proceeded with wisdom in excluding from the application of the rule treaties fixing boundaries. He reserved his Government's right to return to the matter by way of detailed written comments.

13. With regard to paragraph 53 of the Commission's report, he felt that among questions of state responsibility priority should be given to those connected with grave breaches of international law endangering international peace and security.

14. In conclusion, he congratulated the Commission on the work it had accomplished during its fifteenth session. He supported draft resolution A/C.6/L.529 and Corr.1 and hoped that it would be adopted unanimously.

15. Mr. ULLOA (Peru) said that the draft articles on the law of treaties submitted by the International Law Commission in 1962<sup>2/</sup> and 1963 (A/5509, chap. II) made evident not only the Commission's ability in drafting the articles but also the difficulties of its task. It had at times, in fact, had trouble in striking a balance between concrete reality and doctrine, between ideology and practice. International law should take account of reality not only as a source of inspiration but also to ensure that the practice of States conformed to moral rules.

16. The debate showed once again that the procedure adopted for dealing with the draft articles (*ibid*) was not acceptable, for it meant discussing them prematurely, before Governments had made studies or comments and before their representatives were authorized to take a final position.

17. The Commission stated in its report that international law should free itself, conceptually speaking,

<sup>2/</sup> See Official Records of the General Assembly, Seventeenth Session, Supplement No. 9.

from the tutelage of civil law. Nevertheless, it had retained the concepts of fraud and error, which in his view were not applicable to international law.

18. Certain concepts, because of their implications, would have to be carefully studied by Governments and clarified in subsequent discussions; for example, the validity of commitments entered into by de facto Governments, nullity on grounds of coercion, and the applicability of the doctrine of rebus sic stantibus. It would be necessary to avoid a risk whose existence was demonstrated by history and by facts: that of international unrest as the outcome of domestic agitation. He wondered whether the Commission had considered how the world legal order would be threatened if nebulous concepts which were not defined or limited by historical experience and legal reasoning, which were neither clear nor precise, were written into positive law.

19. Succession presupposed voluntary acceptance, but the former colonies had not been independent States when the treaties had been concluded and, while the metropolitan countries had represented the countries under their domination, they had not been authorized to do so. On the other hand, the doctrine of rebus sic stantibus might be applicable in such situations.

20. There was no problem of State succession between new States and former colonial possessions except in so far as the old American principle of colonial uti possidetis could be applied with respect to frontiers.

21. He wondered why the Commission made no mention in its report of the 1928 Inter-American Convention of Havana, which also dealt with various aspects of the law of treaties.

22. He did not agree that there was such a thing as American international law. There were situations, principles and legal ties of an international nature which in some cases had come into being primarily in America, where the process of codification had advanced steadily and systematically.

23. Mr. ALCIVAR (Ecuador) said that the report of the International Law Commission on the work of its fifteenth session was worthy of the jurists who composed the Commission, not only because of its authority but also because of its keen interpretation of the juridical phenomenon, which it conceived as essentially dynamic. Since the draft articles on the law of treaties, which constituted the main part of the report, had been sent to Governments for their comments, he would merely make a few remarks of limited scope.

24. With regard to the competence of the representative of a State to conclude treaties, the Commission had decided in favour of the internationalistic doctrine; and the application of the relevant article 31 should not present any difficulty in the case of treaties in good and due form, which must meet certain conditions before binding the States. Nevertheless, his delegation would rather the Commission had adopted precise rules of law defining and distinguishing accession, acceptance and approval, in order to prevent interpretations which might have unfortunate consequences. The competence of the representative of a contracting party was most likely to be challenged where the treaty was in simplified form and not subject to ratification, chiefly because, according to the draft code, that type of treaty was defined solely by its form. Although it was almost impossible to define it according to its substance, a

formula might perhaps be found which would more clearly indicate the position of that class of international agreements in international law.

25. His delegation had studied with great care articles 33, 34, 35 and 36 on failure of consent. It considered the wording of article 33 generally acceptable, agreed with the representative of El Salvador (782nd meeting) that fraud did not necessarily consist in fraudulent conduct but could be constituted by a single fraudulent act, and that the scope of article 33 should be extended accordingly. His delegation did not believe that that failure of consent should be omitted from an instrument codifying the law of treaties merely because it had never been invoked. A codifying instrument should provide for all situations, and it was impossible to allow an exception based on an obsolete legal tradition which had shown its weaknesses in two world wars. The practical scope of the provisions of paragraph 1 of article 34 relating to error was difficult to determine precisely. His delegation believed that the provisions of article 35 should be extended to cover members of the families of representatives of States. Article 36, which mentioned the United Nations Charter, deserved special attention, since all contemporary specialists in the law of treaties stated that prior to the Covenant of the League of Nations a treaty had never been invalidated because its conclusion had been brought about by the threat or use of force. The theory recognizing the use of force was essentially European, since European countries had frequently had to resort to arms to solve problems which had not been solved by law. The Covenant of the League of Nations had for the first time declared war illegal, while allowing Member States to resort to it in certain circumstances. Unfortunately aggression or the use of force without the formalities of war had not been contemplated in the Covenant of the League of Nations. The Commission's commentary also referred to the Briand-Kellogg Pact,<sup>3/</sup> which condemned recourse to war and had served as the foundation for the judgment of the war criminals at Nürnberg. The unhappy experience of the League of Nations had been borne in mind by those who had drafted Article 2, paragraph 4, of the United Nations Charter, prohibiting the threat or use of force. His delegation could never sufficiently emphasize that that prohibition was absolute except in case of self-defence, and that, although in the latter case a State was relieved of liability, the use of force nevertheless remained a violation. Moreover, force could not be used collectively by the United Nations except in certain well-defined circumstances. His reason for repeating all those points was that a considerable number of eminent jurists gave a limited interpretation to Article 2, paragraph 4, of the Charter. Fortunately, the majority of the international law experts maintained that the Charter was indivisible. The delegation of Ecuador was of the opinion that the International Law Commission should take account of the observation made at the 788th meeting by the representative of Iraq who had requested that article 36 should be extended to cover economic and political pressure. He recalled that resort to force had been prohibited in American public law long before the Covenant of the League of Nations and consequently long before the Charter of the United Nations. Wars of conquest and the doctrine of the *fait accompli* had been proscribed

<sup>3/</sup> General Treaty for Renunciation of War as an Instrument of National Policy, signed at Paris, 27 August 1928 (League of Nations, Treaty Series, vol. XCIV, 1929, No. 2137).

by American law ever since the First International Conference of American States, held at Washington, D.C., from 2 October 1889 to 19 April 1890.

26. The delegation of Ecuador approved the initiative of the International Law Commission in including in article 37 a violation of the jus cogens as a cause for voiding a treaty. The doctrine of rebus sic stantibus dealt with in article 44 was at last going to become a part of the positive law of treaties. The delegation of Ecuador did not think that the principle of pacta sunt servanda would be affected by including vitiation of consent, the jus cogens or the principle of rebus sic stantibus as causes of nullity. There was no reason why a treaty which contained flagrant injustices should be considered sacred because of the mere fact that it was a treaty.

27. He congratulated the International Law Commission on its excellent report; the delegation of Ecuador was convinced that the future work of the Commission would have the same revitalizing and progressive character.

28. Mr. KHELLADI (Algeria) said that Algeria was deeply interested in the codification and progressive development of international law for, like all newly independent States, it hoped that the adaptation of international law to modern realities would lead to better protection of its legitimate interests and fruitful co-operation with all States. Algeria had been the victim of the traditional doctrines of international law which had been constituted for the purpose of serving the interests of the colonial Powers and justifying their conquests and unequal treaties.

29. The Algerian delegation thought that treaties and contracts between nations should be founded on the free expression of the will and on the sovereign equality of States. Any action likely to delay the recognition and application of those two principles of international law or to empty them of their purport would lead to the conclusion of unequal treaties and constitute a source of conflict and instability. For that reason the Algerian delegation appreciated at its true value the work done by the International Law Commission and in particular the important tasks which it had carried out at its fifteenth session. Nevertheless, his delegation would restrict itself for the time being to submitting certain observations, for the Algerian Government reserved the right to make known its position in greater detail later.

30. With regard to the nullity of a treaty concluded as a result of threats or force in violation of the principles of the Charter, the Algerian delegation had difficulty in understanding why certain delegations desired to limit that idea to physical force. Economic pressure could sometimes be more effective in reducing the power of self-determination of a country, above all in the case of a country with single-crop farming or the economy of which depended on the export of one product only. Recognition that economic pressure was a cause of nullity of treaties was by no means a threat to their stability but would increase the confidence in international law of the newly independent States. With regard to the priority to be given to the rules of jus cogens the Algerian delegation fully approved the constructive approach of the International Law Commission. It was difficult to pick out an exact criterion that would permit of the definition of the rules having that character, but the United Nations had already developed a number of imperative norms of morality and public policy in international

affairs, a body of rules which the States in their practice would continue to define and develop. It was on the basis of those norms that the Organization of African Unity would for example seek to have annulled the agreements existing between the racists and colonialist States in South Africa.

31. The Algerian delegation desired in particular to congratulate the International Law Commission on its efforts to define as objectively as possible the notion of the fundamental change of circumstances. Nevertheless, it would suggest the advisability of including in article 39 the possibility of a revision of a treaty as a third possible solution, which would be frequently more practical in the case of certain treaties no longer valid under prevailing conditions.

32. The Algerian delegation took note of the progress made by the Commission and its recommendations with regard to state responsibility (see A/5509, chap. IV) and the succession of States and Governments (*ibid*). The study of the international responsibility of a State should cover all the aspects of the international behaviour of States as it affected the maintenance of peace and collective security. In the case of African States that notion included the responsibility of a State which for example was engaged in the dangerous pursuit of a colonial war, which practised the crime of apartheid or which permitted or facilitated the creation of a new racist State in Rhodesia. Finally, the Algerian delegation approved the International Law Commission's analysis of the question of the succession of States and the place it reserved in its study for the newly independent States.

33. Mr. Jiménez DE ARECHAGA (Chairman of the International Law Commission), taking leave of the Sixth Committee, said that it was not the time to analyse or even to sum up the important questions of substance which the members of the Sixth Committee had examined during the past three weeks, for it was quite understood that their observations had merely been preliminary while awaiting the decisions of Governments. Nevertheless, those observations had shown a thorough knowledge of the delicate questions under study and had been a constructive contribution to the work of codification and progressive development of international law which the Sixth Committee shared with the International Law Commission. Those observations were of the highest interest and would be of great benefit to the International Law Commission when it began the second reading of part II of the draft articles relating to the law of treaties and when drafting part III during the following year. It had been with a degree of interest not unmixed with apprehension that the members of the International Law Commission had waited for the first critical examination of the draft articles relating to the invalidity and termination of treaties, for the members of the Sixth Committee besides being excellent jurists were also the representatives of the interests, aspirations and needs of the States and Governments that would have to make the final decisions. It must be said that the draft articles had on the whole been favourably received and that would encourage the International Law Commission to continue its task along the path it had marked out. The reservations and criticisms that had been made showed a constructive character; most of them could be taken into consideration during the second reading of the draft articles, but the solution to be adopted for the remainder would depend upon States and their wish to commit themselves during the conference of pleni-

potentiaries. He would transmit to the other members of the International Law Commission, and in particular to the Special Rapporteur, all the observations and comments made in the Sixth Committee. Furthermore, he had taken due note of draft resolution A/C.6/L.529 and Corr.1, which seemed to be generally approved and he would transmit to his colleagues the thanks of the General Assembly for the work accomplished by the Commission during its fifteenth session, with particular reference to the law of treaties. The congratulations of the Assembly were of course intended for the International Law Commission as a whole, but he thought that they were due in particular to the Special Rapporteur on the law of treaties and to the Drafting Committee.

34. He expressed to the members of the Sixth Committee the great pleasure he had felt at finding himself once more amongst them and wished them all success in the continuation of their work.

Expression of sympathy with the Governments and peoples of Cuba, Haiti, Trinidad and Tobago, and Italy in connexion with the recent disasters

35. The CHAIRMAN expressed to the Governments and peoples of Cuba, Haiti, Trinidad and Tobago and Italy the deep sympathy of the Sixth Committee in connexion with the recent disasters of which those countries had been the victims.

The meeting rose at 12.55 p.m.