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CONTENTS

Chairman: Mr. César A. QUINTERO (Panama).

AGENDA ITEM 70

Future work in the field of the codification and progressive development of international law (A/4796 and Add.1-8; A/C.6/L.491 and Corr.1 and 2) (continued)

1. Mr. RUDA (Argentina) said that his delegation had given particular attention to the item under discussion, which it considered one of the most important subjects on the agenda of the sixteenth session of the General Assembly. At the present time, which was characterized by rapid changes in political situations, accelerated technological growth and the advent of new concepts in many cultural fields, it was essential, in his delegation's opinion, to review the past, to analyse the present situation and to seek out future trends in the field of international law. Historical considerations had also impelled his delegation to give careful attention to the item under discussion, for the Argentine Republic had adopted a firm national policy of strict compliance with the law in its relations with other States. It had settled all its border conflicts by resort to arbitration and had complied with the resulting arbitral awards. Moreover, Argentina had consistently contributed to the advancement of international law, through such important additions as the Drago and Calvo doctrines, and had supported codification in the Americas beginning with the Second Conference of American States in 1901-1902.

2. On the basis of General Assembly resolution 1505 (XV), he proposed first to consider the whole field of international law. The usual nineteenth century textbook had been divided into two parts: the first had treated such topics as the definition of international law, the sources of international law, the concept of sovereignty, etc.; the second part had dealt with the laws of war. That format disclosed an approach that had been basic to all nineteenth century theory, treaties and international practice: the assumption that the will of the State was paramount and that, consequently, the right to make war was unlimited. War, whether aggressive or not, had been legal and recognized as a valid instrument of international policy; the only limitations had been those timid efforts to mitigate the horrible effects of war which had found expression in The Hague Conventions. Because starting a war had been an entirely legal act, the victor had exercised no restraint in imposing his demands on the vanquished. In that connexion, he recalled that, in 1869, at the close of a war with a neighbouring country, Argentina had formulated the rule that victory created no rights—a rule which had subsequently been incorporated in article 5 (e) of the Charter of the Organization of American States. The existence of a decentralized community of States had prevented the formation of any basic international organization, and the Concert of Europe had filled the vacuum by assuming tutelage of the world. In short, a century ago, the outlook for the development of international law had been exceedingly bad, and the legal regulation of international relations had been at a very primitive stage.

3. In the middle of the nineteenth century, however, a number of political, social and technological processess had begun to give content and vigour to international law and to transform its theoretical foundations. Those processes, which had accelerated in the twentieth century, had brought about greater interdependence of States, astounding advances in communications, rapid and more effective dissemination of ideas and propaganda, the phenomenon which Ortega y Gasset called "the rebellion of the masses" in the social field, and profound respect, even though it might be merely formal, for the concept of democracy in political ideas. The colonial system was disintegrating at an ever-increasing pace and developing countries were requesting financial and technical assistance from the more developed countries to raise their levels of living. Lastly, weapons and means of combat were so destructive that people lived under the constant threat of the extermination of mankind.

4. The international law of the past century naturally could not meet those new circumstances and demands; the concept of the absolute separation of States had had to yield to the concept of interdependence. Indeed, Quincy Wright had likened the recent evolution in international law to the revolution in ideas which had taken place in the sixteenth century, when Machiavelli, Erasmus and Vitoria had introduced new concepts.

5. In view of that complex process, his delegation had reviewed the developments in international law to determine the areas of progress and the new rules that had been established. Its first conclusion was that international law had ceased to be a law regulating the relations of States exclusively, and was beginning to deal with relations between individuals, international organizations and States. The status of the United Nations as an entity capable of acquiring rights and assuming obligations in international law had been recognized in the advisory opinion of the International Court of Justice on the reparation for injuries suffered in the service of the United Nations,[1] and the status of other inter-governmental international organizations had been recognized in practice through the

[1] See I.C.J. Reports, 1949, p. 174.

conclusion of agreements between such agencies and States.

6. In the field of human rights, international law had invaded areas it could never have entered a century ago; the ultimate result of that process would be full international protection of the rights of the individual in the political, civil, social and economic fields. On the basis of Article 1, paragraph 3, and Article 55 of the United Nations Charter, the Universal Declaration of Human Rights had been drawn up, and the Third Committee of the General Assembly had been preparing draft international covenants on human rights. In Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms had been signed in 1950, and the European Commission of Human Rights and the European Court of Human Rights had been established. In America, the Inter-American Council of Jurists had drawn up a draft convention on human rights, which would be submitted for approval to the next Inter-American Conference. Thus, individuals were being gradually provided with new forums for the protection of their rights.

7. International law had also begun to regulate problems resulting from technological advances. Rules relating to international air traffic had been established and the legal aspects of travel in outer space were about to be studied. A specialized agency had been set up to consider problems arising from the peaceful uses of atomic energy. International agreements had laid down obligations in respect of radio transmissions.

8. In economic, financial and tax matters, there was an avalanche of bilateral and multilateral treaties regulating specific subjects and an elaborate complex of international economic organizations such as the European Common Market, the General Agreement on Tariffs and Trade, the Organisation for Economic Co-operation and Development and the Latin American Free-Trade Association. In view of the wide gamut of international agreements, some authors, such as Philip C. Jessup, were beginning to speak of a third branch of international law dealing with the area between public and private international law.

9. The birth of vast numbers of international organizations, and particularly of the League of Nations and the United Nations, had also led to the rapid development of a system of rules governing important aspects of international political relations. Professor Brierly had suggested that all those new rules might be the beginning of a constitution for the international community.

10. However, it was probably in the legal conception of war that the greatest advance had been made. Up to 1914, war had been a legitimate means of international policy. With the Covenant of the League of Nations and the Briand-Kellogg Pact, the international community had taken the initial steps towards outlawing war. Now, in the United Nations Charter, the use of force had for the first time been centralized in an international organization. The centralization of force in the United Nations was similar to the centralization of power within States: in domestic law, the State had a monopoly right to use force except in the case of legitimate defence; in the international field, the United Nations alone could use force, except for each Member State's "inherent" right of individual or collective self-defence (Article 51 of the Charter). The right of collective self-defence permitted States to aid a country that was the object of aggression. Just as in domestic law the citizen had a duty to assist the police, so under Article 43 of the Charter all Members undertook to make available to the Security Council armed forces, assistance and facilities necessary for the purpose of maintaining international peace and security. The greatest achievement of contemporary international law was thus the outlawing of war. The traditional division of international law into the rules of peace and the rules of war had ceased to exist; today, the only valid distinction was that between the legal and the illegal use of force.

11. The Argentine delegation believed that, in the last fifty years, international law had not remained static or unaffected by the changing realities of international life. On the contrary, international law had expanded its scope; its institutions had been perfected and it had acquired the characteristics of a developed legal system. In the process of perfecting its institutions, international law had rid itself of out-moded concepts, which had reflected the profound influence that certain civil law institutions drawn from Roman law had exerted on public international law.

12. Finally, his delegation would refer to some instances in which rules had not been fully developed or in which there were practically no compulsory international rules. First, there was the principle of self-determination of peoples established in Article 1, paragraph 2, of the Charter. His Government considered that that principle should be studied in the light of all the limitations on its exercise which arose from other principles, such as the territorial integrity of the State, or from specific circumstances concerning disputed territory. The General Assembly was at present discussing the item entitled "The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples". In connexion with that matter, he would like to have it clearly understood that, in his Government's view, the principle of self-determination could not be applied indiscriminately to situations in which a territory had been taken by force from an independent State and the de facto situation had not been validated by a subsequent international agreement, especially if the existing population had been dispersed and colonists of the occupying Power had settled in the territory.

13. As to the application of the general principles of State responsibility, his delegation felt that the nuclear tests of highly radio-active bombs in the atmosphere certainly engaged the responsibility of the State, because they might contaminate vast areas of the planet outside the territory of the State conducting the tests. The Argentine position was not based merely on recent developments; in 1959, a provision prohibiting nuclear explosions in the Antarctic had been inserted in the Antarctic Treaty, article V, paragraph 1, on the initiative of the Argentine delegation. It was thus only natural that a joint statement by the Foreign Ministers of Argentina and Brazil, dated 15 November 1961, had deplored the recent nuclear tests in the atmosphere and had characterized them as crimes against humanity.

14. His Government also considered that, in view of the grave international tensions now prevailing and the obligation, under Article 33 of the Charter, of parties to any dispute to seek a solution by peaceful means, it was essential to attempt, by both codification and progressive development, to establish a complete legal system of methods for securing the peaceful

solution of international disputes and to create additional means of ensuring peace through the rule of law.

15. The Argentine Government also considered that a vigorous effort should be made to ensure international protection of human rights by establishing procedures which, while respecting State sovereignty, would grant the individual the safeguards necessary to the full enjoyment of his rights.

16. Turning next to the work done by the International Law Commission, he recalled the ineffectual efforts of the League of Nations to promote the codification of international law and the warning issued by Sir Cecil Hurst against the disastrous consequences that might result from a second failure; the work of the International Law Commission should be viewed in the light of that unpromising background. Of the fourteen topics it had selected (A/925, para. 16), the Commission had completed work on six; its studies on the law of the sea and on diplomatic intercourse and immunities had led to the conclusion of international conventions, and a conference on consular relations would soon been convened. The Commission had also devoted much of its time to subjects referred to it by the General Assembly. In view of the limited time available for its meetings, the Commission had thus accomplished a vast amount of work. His Government was grateful to the Commission, not only for the number of topics it had considered, but, more especially, for the high sense of responsibility it had demonstrated in its work and the quality of the reports and drafts it had submitted. In its work, the Commission had achieved a fair balance between progressive development and codification. His Government accordingly considered the establishment of the Commission one of the greatest achievements of the United Nations and hoped that the Commission's activities would continue to receive the support of Member States. It also wished to pay a deserved tribute to the eminent jurists who had been members of the Commission and to the Secretariat which had assisted it in its work.

17. Turning to the list of future topics for codification, he suggested that the following requirements should be met: first, only topics that were not more properly dealt with by the existing inter-governmental bodies should be considered by the International Law Commission, so as to avoid unnecessary duplication; secondly, topics should be of universal legal application and not confined to local issues or to concepts arising exclusively out of political or ideological conflicts. Indeed, if the Commission's work was to continue to command the respect it deserved, that body should be as far removed as possible from such conflicts and be maintained exclusively as a forum for international co-operation. From the technical standpoint, topics must have attained the necessary maturity to be dealt with objectively, preference being given to those whose codification was in progress and which were the subject of extensive international practice. Preference should similarly be given to matters that could be settled by international agreement in the form of binding legal instruments, as had been the case with the law of the sea and diplomatic relations and immunities. In general, as the Government of Denmark had pointed out in its comments (A/4796/Add.1, section 8), progressive evolution should be combined with the preservation of indispensable elements of stability in international relations. Lastly, the number of topics referred to the Commission should be kept to a minimum so as to ensure a high standard of work.

18. For those reasons, Argentina believed that, if the Sixth Committee decided to recommend new topics for consideration by the International Law Commission, it should bear in mind the need to complete the work that had already been initiated on the law of treaties, the international responsibility of States and the general law of State responsibility. Study of those topics should be completed because considerable work had been done on them, because rules governing them were essential for the conduct of everyday international legal affairs and because a considerable body of international practice and standards had been built up around them. Later, the Commission could take up the study of State succession, which had assumed particular importance with the accession to independence of former colonies and Trust Territories. Furthermore, his delegation was anxiously awaiting the report that was to be prepared by the Secretary-General on the legal problems relating to the utilization and use of international rivers under General Assembly resolution 1401 (XIV). The subject was of special interest to Argentina which was embarking on an intensive programme of economic development; it might usefully be studied by the Commission, since the industrial use of international rivers made it necessary to safeguard the rights of individuals and of third persons prior to investment.

19. With regard to the Commission's methods of work, the Commission itself should acquaint the Assembly with its views on the subject before any changes were made. With the imminent increase in its membership, the Commission's work would necessarily be somewhat slowed down. At the same time, the Sixth Committee should be wary of recommending new topics for study, since the Commission should take all the time necessary to complete consideration of each topic in order to maintain the high quality of its work. In fact, the Argentine delegation considered that the rate of one report yearly on specific items was quite satisfactory.

20. Mr. GAMBOA (Philippines) expressed his gratification that the deliberations in the Sixth Committee had thus far been on such a high level, for the subject under discussion was one of paramount significance; to speak of the future work in the field of the codification and progressive development of international law was virtually to speak of the future of international law itself, and the decisions made in the current debate would considerably affect the future evolution of the law of nations.

21. Law, considered in the juristic sense, was, as Pollock had pointed out, an elusive concept, the definition of which differed according to the particular aspect being considered and the school of jurisprudence to which the writer belonged. In that respect, the analytical or imperative school, represented by authors such as Austin or Holland, which held that law was a rule imposed on society by a sovereign authority, contrasted sharply with the historical or customary school, which held, as Savigny had said, that law was the result of unconscious development, that it existed in the common consciousness of the people and that it underwent a continuous evolution. Such a law, its advocates held, was better fitted to meet changing needs than the one dependent on authoritarian statutory reform. On the other hand, their adversaries pointed out that some customs were based

on the interests of a strong minority and that some rules were the result of conscious and deliberate effort. The difference between the two schools had been graphically characterized by Allen as that between an artificial system based on omnipotent authority and one based on spontaneous growth.

22. The sociological school of jurisprudence, led by Jhering and Pound, considered law not from the point of view of its origin or manner of creation but from that of its purpose, holding that law was a means to an end, namely, the adjustment of the conflicting interests in society so as to secure the maximum satisfaction of wants with the minimum of friction.

23. Those considerations, although perhaps somewhat digressive, had been prompted by the very broad scope of General Assembly resolution 1505 (XV) enjoining the Sixth Committee "to study and survey the whole field of international law". The definitions of international law were nevertheless less varied than those required in municipal law. International law was generally accepted as being a body of rules and principles regulating the relations among States, the sources of which were to be sought directly in international treaties or conventions, international custom and general principles of law recognized by civilized nations, and subsidiarily in judicial decisions and the teaching of publicists. Some authorities, however, held more extreme views, for Westlake enumerated only two sources, custom and reason, whereas Calvo mentioned as many as eleven.

24. The Philippine authors Salonga and Yap held that the prime functions of public international law should be, firstly, to eliminate force as a means of solving conflicts and, secondly, to provide a basis for the orderly management of international relations—both functions being reflected in the United Nations Charter. The Philippine delegation considered that the primary purpose of international law was the maintenance of order and regularity in international society. Law and order were complementary, as several learned authors had pointed out. On the other hand, law and justice were unfortunately often contrasted; without order, justice would be illusory and peace ephemeral.

25. International law governed the relations between States; but since those relations were essentially fluid, and because of its customary basis, international law must, of necessity, always be in a state of flux. So vital a concept as the law of nations should not be paralysed; the aim should be, rather, to encourage its progression, side by side with its codification. That objective had been explicitly stated in resolution 1505 (XV).

26. The Philippines, whose own legal system was largely statutory, was a fervent proponent of the discriminate codification of carefully selected topics of international law. But advocates of codification were not limited to countries having statutory law. Indeed, some 150 years ago, the English philosopher and jurist Jeremy Bentham had made an enthusiastic, if unsuccessful, attempt to codify the common law in England. He had even proposed his plan to the Czar of Russia and to the President of the United States, pointing out that any remnants of unwritten law could suffice to corrupt the relevant statutory law beyond redemption.

27. The process of codification clarified the law on a given subject and rendered it more accessible. As had been said, it set the legal house in order. On the other hand, it tended to paralyse the natural growth of the law, whereas customary law was flexible in both genesis and application and reflected the changing needs of a changing society.

28. It followed that, in dealing with the progressive development of international law, the Sixth Committee would do well to examine recent changes in that body of principles. As Quincy Wright had pointed out, the first change had taken place in the concept of war, which, even in the nineteenth century, had been a recognized legal condition which permitted hostile groups to carry on an armed conflict, with all third-party States bound to treat both sides alike, but had now become a matter of concern to all States, as evinced by Article 1, paragraph 1, of the United Nations Charter. Other striking changes included the recognition of the individual as a subject, not merely an object, of international law; the recognition of the public interest of the world society in many transactions; and the establishment of the juridical personality of international organizations.

29. Turning to the new specific topics the enumeration of which had been entrusted to the Sixth Committee, he pointed out that the aggregate of those topics already listed, including those chosen by the International Law Commission, exceeded fifty, in other words, enough to keep the Commission occupied for several generations. Obviously, it would be impossible and undesirable for the Commission to attempt a deal with them simultaneously. Instead, a careful selection would have to be made and priorities allotted according to importance and urgency. The consensus of opinion seemed to give preference to the law of treaties. The Philippine delegation agreed with that view and would state its preference regarding other topics when all speakers had been heard.

30. In conclusion, he stressed that the task of the Commission was to systematize the existing law, fill in gaps, bring it up to date and otherwise improve it. In its codification work, the Commission should not gain time at the expense of quality, yet the work must not be allowed to lag. Codification confined to the traditional rules of international law would be tantamount to a mere restatement of the existing law in systematic form. Modifications to take changed conditions into account would constitute only amendments to the international law in force. But if the Commission introduced new rules or principles, it would be contributing to international legislation.

31. In the course of previous statements, two schools of thought had emerged, some representatives considering that codification should be restricted to matters which were already ripe for it, avoiding political or controversial issues, while others would explore even virgin areas, including potential sources of controversy. The Philippine delegation hoped that the Committee, composed as it was of jurists with a high sense of objectivity, would be successful in achieving a wide measure of agreement.

32. Mr. MUSTAFA (Pakistan) said that, at the present decisive stage in man's history, it was essential to evolve a code of conduct for all nations based upon a rule of law. Hide-bound doctrines could no longer provide a satisfactory guide in dealing with new problems that had arisen and future efforts in the field of international law must relate specifically to the existing historical situation. Mankind had now entered upon an era of interdependence and co-operation, which meant that the progressive development of

international law and its codification should be oriented towards the prospect of an integrated international community, of which the United Nations would be the guardian. In laying the juridical foundations of that international community, the Charter of the United Nations must, of necessity, be the point of reference.

33. A number of interesting views had been expressed by Governments in their comments on the Commission's future work. In particular, Denmark had wisely suggested that efforts towards the progressive evolution of international law should be combined with the preservation of indispensable elements of stability in international relations (A/4796/Add.1, section 8). Yugoslavia had pointed out that the role of international law should be to ensure that the new trends in world affairs evolved in the sense indicated by the United Nations Charter (A/4796, section 7, para. 1). The United Kingdom had rightly suggested that the International Law Commission should be disturbed as little as possible in its work of codification and the progressive development of international law (ibid., section 6). It appeared from the working paper prepared by the Secretariat (A/C.6/L.491 and Corr.1 and 2) that, although there was some difference of opinion regarding the selection of topics and priorities, there was a general consensus that the subjects already under consideration should be completed first and that priority should be given to the law of treaties and to State responsibility. It seemed to his delegation that, in the matter of legal planning, each scheme had to be viewed in the light of the circumstances in which it would be applied; it should thus be judged by the twin criteria of desirability and practicability. In fact, a scheme that did not meet those two basic requirements was unlikely ever to become really effective.

34. In dealing with the question under consideration, two main factors were involved: first, the technical improvement of international law as a legal system—which was outside the realm of pure politics; and, secondly, the problem of an international order upon which international law might safely rest. The latter was a political problem which primarily required a political solution. International law could perhaps hardly aspire to achieve its ideals in international relations until it could encompass within its own sphere a number of matters now considered by many to lie beyond its jurisdiction. At present, States might be somewhat unrealistic to aspire to a particular blueprint of law reform without the corresponding international order to support it or the machinery to enforce it. Only a proper correlation between those blueprints for legal development and the objective pattern for a future world order would make law in a realistic manner. However, the present tense international situation made it imperative to hope that such an order would indeed be established.

35. The function of law was to provide the measure of stability necessary to ensure an orderly conduct of human affairs and, like any other living organism, law had to evolve organically to meet changing political, social, economic and technical needs. As had been pointed out by a number of representatives, various international conventions had contributed to the development of international law and the activities of international organizations, including the International Court of Justice, had wrought profound changes in traditional legal concepts.

36. With regard to the various topics that had not been included in the list prepared by the International Law Commission in 1949 (A/925, para. 16), his delegation believed that the Commission, as a technical body, was itself best suited to select the subjects that were amenable to codification and the progressive development of international law. To force topics upon the Commission for study would serve no useful purpose. On the other hand, the Sixth Committee could analyse and study topics for selection from the legal angle and invite the views and comments of the Commission as to their suitability for codification. Those views should be given due weight in the adoption of any Assembly resolution recommending topics for the progressive development and codification. If a subject proved not to be intrinsically legal at all, it could always be discussed in another appropriate forum of the United Nations. To force a strictly political topic on the International Law Commission would clearly be inappropriate, for, if the General Assembly had intended the Commission to be a political body, it could easily have decided that the Commission should be composed of representatives of States. Indeed, the reference of political issues to the Commission would only render ineffective one of the most valuable juridical institutions in the world.

37. The most urgent and immediate problem of the times, as Sweden had pointed out (A/4796, section 5) was to ensure the settlement of conflicts by peaceful means in conformity with Article 2 of the Charter. Unfortunately, many disputes which lent themselves to settlement by the International Court of Justice and other international judicial bodies were not submitted for such settlement and, as a result, continued to envenom the relations between States and endanger world peace. Serious study must, therefore, be given to means of inducing nations to resort more frequently to judicial and arbitral settlement of their disputes. A study on the subject might indicate ways in which the spread of commercial arbitration could be encouraged to assist in the development of international arbitration as a method of settling differences in general. As the present trend towards economic interdependence became more marked, nations would find it increasingly difficult to accept the disruption that would result from the use of force as an instrument of settlement. Moreover, with recent scientific developments, the world could no longer be ruled by anything but law, for as long as the rule of force prevailed, there would always remain the danger of a war by miscalculation. It was thus necessary to look increasingly for assistance to the International Court of Justice, so that the rule of law might replace the rule of force in the affairs of nations. The "Model Rules on Arbitral Procedure" submitted by the International Law Commission to the General Assembly in 1958 (A/3859, para. 22) was a remarkable piece of technical drafting. It had been objected that those model rules failed to respect the sovereignty of States. It would seem, however, that the sovereignty of States might have to be limited to meet the development of new procedures for the binding settlement of disputes or, for that matter, any other substantive developments in international law. Many dramatic changes had taken place in the world since the adoption in 1958 of General Assembly resolution 1262 (XIII) on the question of arbitral procedure; and that method of peaceful settlement of international disputes deserved the closest consideration, in view of the present precarious world situation. His delegation therefore suggested that the United Nations should review the question of arbitral procedure at the earliest opportunity.