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

AGENDA ITEM 69

Report of the International Law Commission on the work of its thirteenth session (A/4843; A/C.6/L.485 and Add.1 and Rev.1, A/C.6/L.486, L.488, L.489) (continued)

1. Mr. SCHWEBEL (United States of America) introduced on behalf of the sponsors the revised draft resolution (A/C.6/L.485/Rev.1) which, he pointed out, included most of the proposals contained in the amendments (A/C.6/L.488) and took into account various stylistic changes which had been suggested during the debate. It appeared from the discussions between the sponsors of the two original draft resolutions (A/C.6/L.485 and Add.1 and A/C.6/L.486) that the new text was generally acceptable, so that the only matter to be settled was the question of the invitations to the proposed conference.

2. In that connexion, referring to the observations made by the representative of Ghana at the 709th meeting, he emphasized that General Assembly resolution 1474 (ES-IV) on the Congo and the other resolutions in which the General Assembly had made appeals to "all States" were irrelevant to the question under discussion. There was a considerable difference between a resolution inviting "all States" to do or refrain from doing something, in accordance with Article 2, paragraph 6, of the Charter, and a resolution which requested the Secretary-General to send specific invitations to a conference to entities whose international standing was questionable.

3. For that and other reasons, the United States delegation and the other sponsors of the revised draft resolution had decided, after due reflection, that they should retain the "States Members" formula used in their original text, in order to avoid imposing upon the Secretary-General the burden of passing upon a serious question at present under consideration in other United Nations bodies. He asked the other delegations not to depart from a formula which, for good reason, the General Assembly had so far thought it advisable to retain.

4. Mr. EL-ERIAN (United Arab Republic) withdrew his delegation's amendment (A/C.6/L.489), because operative paragraph 11 of the revised draft resolution (A/C.6/L.485/Rev.1) fulfilled the same purpose.

5. Mr. ORIBE (Uruguay) wished first of all to pay tribute to the eminent jurists, Mr. Tunkin and Mr. Zourek, to whose efforts the Committee was mainly indebted for the draft articles on consular relations (A/4843, para. 37). Concerning the substance of the draft which was being considered by his Government, the Uruguayan delegation reserved the right to submit its comments at a later date after having received instructions on the matter.

6. He strongly recommended the adoption of the revised draft resolution, of which Uruguay was a co-sponsor, in its existing form.

7. He wished to give more details about the only debatable provision—that contained in operative paragraph 5, which concerned the invitations. That provision fully conformed to the United Nations practice in such cases, recent examples being the Conference on the Law of the Sea and the Conference on Diplomatic Intercourse and Immunities, and there were no precedents for any other procedure. Furthermore, the question was not related to the principle of universality and the formula suggested was sufficiently broad to cover almost all the States which were at present members of the community of nations. It excluded only certain States and Governments concerning which there were serious political problems; it was not the task of the Sixth Committee to solve them. To proceed in any other manner would amount to usurping the functions of other organs of the Assembly, particularly of the Political Committee. Those problems should be considered directly, and with a complete knowledge of the facts, by the competent organs, and it would be inadmissible to seek, by the indirect means of invitations to a conference of a legal and technical nature, to create precedents which would have—or might have—repercussions on far-reaching political problems.

8. Those were the reasons why the Uruguayan delegation would vote for the formula recommended in operative paragraph 5 of the revised draft resolution. It wished to add, in order to dispel certain doubts, that it was normal for States or organizations which were convening an international conference to indicate clearly what States were to be invited, that the decision on that subject was one entirely for their discretion and that the Uruguayan delegation was convinced that, on that point, it had adopted what in the circumstances was the fairest and most reasonable course of action.

9. The sponsors of the revised draft resolution had carefully examined all the amendments and suggestions which had been made and, in a spirit of compromise, had incorporated a number of them; he thanked those responsible for them for having thus helped to improve the original text of the draft resolution.

10. The second question he wished to mention concerned a problem of legal procedure which was of particular importance from the standpoint of the

effectiveness and results of the method of work followed during recent years by the General Assembly and by the International Law Commission in its work on the codification and development of international law.

11. The problem had two aspects. On the one hand, there existed, or would exist, a number of conventions relating to important aspects of international law: law of the sea, diplomatic relations; shortly, consular relations; later, perhaps, law of treaties and responsibility of States. Considerable efforts had been made to define the legal principles embodied in such of those conventions as already existed and would certainly also be made for those which were in the course of preparation. On the other hand, there had arisen a serious situation which could not be ignored: the great conventions prepared at diplomatic conferences had been signed, but so far had been ratified only by such a small number of States that it had not been possible to fulfil the conditions, albeit not excessive, required for their entry into force; for the time being, there were no grounds for hoping that they would enter into force in the near future.

12. The reasons for that situation were numerous; they were largely connected with political considerations and with the domestic procedures to which the ratification of such instruments was subject. It was impossible to pass judgement on them without first making a detailed study of the question. The practical results of the situation could, however, be examined immediately.

13. The question most exercising the Uruguayan delegation was that of the exact legal value of the principles of law formulated in the conventions which had been signed but not ratified and which, consequently, were not in force. He was unable to study such a question in detail in the course of his present statement. However, it was possible to imagine two diametrically different arguments on the subject. The first, of a negative character, would be based fundamentally upon considerations of form and procedure. Its reasoning would be as follows: the conventions in question were, strictly speaking, international treaties subject to ratification; as such, their legal value depended on such ratification. A treaty was a complex juridical act, the final stage of which was the deposit of instruments of ratification; so long as such instruments had not been deposited, the treaty remained an incomplete juridical act which, for that reason, had no regulatory value. Under that argument—seemingly confirmed by modern technique in the conclusion of treaties, whereby signature became a mere formality and ratification was the paramount consideration—the conventions concluded under United Nations auspices with a view to the codification and progressive development of international law would be devoid of all legal validity so long as they were not ratified. The same argument had been upheld, generally speaking, by the International Court of Justice in cases where a treaty had been invoked against a State which had signed but not ratified it: the Court had judged that, in the absence of ratification, the State concerned was not bound.

14. That negative argument could be countered by a second, diametrically different argument of a positive nature and based on the subject matter and contents of conventions. It maintained that, once signed, conventions would have an intrinsic legal validity existing independently of ratification and arising from their

contents, i.e., from the general legal standards which were established in them and were the outcome of a scientific process of codification and development.

15. With regard to that second argument, the difficulty began when it came to defining the concept of legal validity. An attempt had been made to relate the conventions in question to the sources of international law, as they emerged from Article 38 of the Statute of the International Court of Justice. In 1948, a memorandum submitted by the Secretary-General concerning the work of codification of the International Law Commission (A/CN.4/1/Rev.1)^{1/} had sought to compare the drafts prepared by the International Law Commission with the writings of "the most highly qualified publicists" in international law (Articles 38, paragraph 1 d, of the Statute of the Court) and to give them similar status.

16. In a certain sense, a convention, even unratified, could be considered as having a validity greater than that of the writings of publicists, for the following reasons: first, it was the collective work of the International Law Commission; secondly, the legal contribution of its authors was supplemented by the political contribution which they made as representatives of States; and finally, the conventions could, at any moment, if they were ratified, cease to be imperfect instruments and pass into the category specified in Article 38, paragraph 1 a, of the Statute of the Court, i.e., become one of the main sources of international law, instead of being a subsidiary source like writings of the great jurists.

17. But in another sense, it might be argued that such conventions were less valid than the writings of the great publicists. The writings envisaged in Article 38, paragraph 1 d, dealt with law which existed and was in force; they did not propose new solutions or reforms of that law. On the other hand, conventions that were signed but not ratified contained not only provisions inserted for the simple purpose of codification, but also provisions which were aimed at the progressive development of international law and which, by formulating new rules, assumed an intrinsically legislative character. They would also have less validity inasmuch as, for purely political reasons, the elaboration of such instruments inevitably involved concessions and compromises which, from the strictly legal standpoint, lessened the quality of the text and the technical value of the solution adopted.

18. Those doctrinal efforts to solve the problem of unratified conventions of codification and development led the Uruguayan delegation to two conclusions. First, the moment had perhaps come to re-examine the effectiveness of the codification procedure adopted by the International Law Commission and by the General Assembly, i.e., the system of international conventions subject to ratification and of international conferences convened to draw them up. That system had been fruitful, but, in certain respects, it had given rise to delicate legal and practical problems. Perhaps it could be modified in order to remedy those disadvantages. It was not, in fact, the only system possible. Article 23 of the Statute of the International Law Commission mentioned others which were worthy of study.

19. The second conclusion was more specific and had an eminently practical aim. Experience showed that

^{1/}*Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No.: 48.V.1 (1)).

it was extremely important to distinguish, in conventions, between those provisions which were inserted purely for the purposes of codification and those aimed at creating new rules for the purpose either of reforming the existing law or of regulating situations not covered by the previous law. Such a result could be obtained by a very simple device: each draft convention prepared by the International Law Commission could be accompanied, not only by the commentaries now annexed, but by a list of sources which would follow each article. The Commission would indicate in each case whether it was a codification text in the strict sense or a provision creating new law. Such annotations would be of the greatest value in solving, accurately and reliably, the problem of unratified conventions. The use of such a device in the case of the draft articles on consular relations would greatly facilitate the Sixth Committee's task at the seventeenth session, as well as the work of the contemplated international conference.

20. Mr. TODOROV (Bulgaria) said he was glad to congratulate the Chairman of the International Law Commission on the work which the Commission had done at its thirteenth session, and particularly on chapter II of its report (A/4843) which contained the final draft articles on consular relations. He also thanked the Special Rapporteur whose extensive research on the law of consular relations had enabled such an excellent draft to be produced. That draft was based on existing rules of international law and took account of recent progressive trends in the development of the consular law and of State practice. It constituted a basis for the conclusion of an international convention. The Bulgarian delegation accordingly supported the proposal to convene a conference of plenipotentiaries for that purpose. It seemed unnecessary to include the item again in the agenda of the seventeenth session of the General Assembly. It was not for the Sixth Committee to discuss the draft in detail, article by article; it could employ its time better by studying more important questions. Governments could transmit their comments to the Secretariat before the middle of 1962, and the Secretariat could circulate them. Delegations had had already, at two sessions, occasion to make their general comments; it was therefore pointless to revert to the matter a third time.

21. Regarding invitations to the conference of plenipotentiaries, some delegations had maintained that attendance should be restricted on the ground that that was the practice which the United Nations had always followed, particularly in the case of the Conference on Diplomatic Intercourse and Immunities. For its part, the Bulgarian delegation felt that all States should be invited. The United Nations Charter made provision for universality in the services furnished by the Organization, since its Preamble stated that international machinery should be employed for the promotion of the economic and social advancement of all peoples; and the progressive development of international law and its codification were services provided for in Article 13. The adoption of a restrictive invitation formula would imply recognition of the existence of a codified international law for Members of the United Nations, and of another law for other countries. The proposal to the effect that certain States should be excluded was, therefore, contrary to the purposes of the United Nations and to the spirit and letter of the Charter. Moreover, consular relations between States were basically very broad, since

they affected trade, the economy, culture and science, and, for that reason, some States had consular relations with States with which they maintained no diplomatic relations. The Sixth Committee should endeavour to establish conditions that would make international law as uniform and universal as possible. Those practical and juridical considerations must not be sacrificed for political reasons. Lastly, the General Assembly and the other United Nations organs, including the Economic and Social Council, often addressed appeals or requests to all countries in their resolutions, as, for example, in General Assembly resolutions 1257 (XIII) and 1474 (ES-IV) and in Economic and Social Council resolution 670 (XXV). The formula of universality would underline the idea that the codification of the rules concerning consular relations would contribute to the development of friendly relations among States, irrespective of their different constitutional and juridical systems. In view of all those considerations, his delegation would vote in favour of the six-Power draft resolution (A/C.6/L.486) and the amendments (A/C.6/L.488) to the eight-Power draft resolution.

22. Mr. DE LUNA (Spain) expressed thanks to Mr. Tunkin, Chairman of the International Law Commission for the clear, concise and convincing way in which he had introduced the report of the International Law Commission at the 700th meeting. Mr. Tunkin had modestly stressed the collective aspect of the Commission's work. The Commission had, for the third time, drawn up an instrument that could be converted into a multilateral convention on a subject which was far from easy and was lacking in sure holds; it was well known that there were very few binding rules in the field of consular relations, and that those relations were for the most part regulated by bilateral agreements. Mr. Tunkin did honour to the line of Russian jurists who had maintained tradition under the communist system and had produced a great number of excellent joint works such as dictionaries and encyclopædias. In the field of diplomatic and consular law with which the Sixth Committee was concerned, the work of Sabanin, although it dated back to 1930, contained a number of interesting ideas.

23. He did not intend to discuss the draft articles in detail. In his opinion, it would be pointless to include the question of consular relations in the agenda of the seventeenth session. It would be better for each representative to use his influence with his Government with a view to each country submitting all its comments in writing before the spring of 1963. Moreover, the revised draft resolution was contradictory, since it recommended both the convening of an international conference and the inclusion in the agenda of the seventeenth session of the very item with which the conference was to deal.

24. His delegation had been pleased to note that the International Law Commission, in preparing the draft articles, had used as a basis customary international law, practice as expressed in international agreements and new standards calculated to advance international law. Domestic legislation had no binding force at the international level and showed, at the most, that nations recognized certain general principles of international law. Where several bilateral treaties contained analogous clauses, the latter had been inserted either because it was felt that they were not binding since they were not part of general international law, or else because there was a desire to confirm and clarify them. The International Law Commission

had therefore been very wise to state unequivocally that its draft contained rules "de lege ferenda" for submission to the States which would meet at the future conference. It should continue boldly along that path, subject only to the prudence which would prevent it from proposing anything that the great majority of States were not in a position to accept.

25. Today, the international political situation called for new international legal regulations. That evolution must be gradual, however, if the international legal structure was not to be destroyed. The International Law Commission had succeeded in interpreting the transformation in the status of consuls, which had developed with the evolution of industry and trade and with the increase in the number of States. One consequence of that increase was that, theoretically, States should maintain embassies and consulates in at least 103 capitals, with all the vast cost involved, particularly for the new States. The International Law Commission had therefore provided that diplomats might perform the functions of consuls and vice versa, while not eliminating the fundamental distinction between diplomatic agents and consular officials. His delegation shared the Brazilian and Ghanaian delegations' approval of that approach. It also considered that the same person might serve as a consular agent to several States; it did not share the view of the Czechoslovak representative (705th meeting, para. 23) —whose country did not recognize honorary consuls— that the provisions concerning honorary consuls should be embodied in a separate protocol. In fact, the appointment of an honorary consul was the best method for a State, which could not afford a heavy burden on its budget, to ensure the protection of its nationals' interests abroad. His delegation also could not share the Turkish delegation's view (702nd meeting, para. 6) that article 5 (i) of the draft, according to which consuls might represent nationals of the sending State before courts of law, should be deleted; nor could it agree with the Norwegian Government (A/4843, annex I, section 11, comments to article 4) that representation before the courts should be limited to the field of decedents' estates. The provision in question was helpful to small countries with limited economic resources.

26. He shared the opinion of the Indonesian representative (702nd meeting, para. 23) that the expression "consular agents", used in the draft articles, was confusing; while that expression was current in North America and in France, in the texts and consular practices of many countries it corresponded to the concept of "diplomatic agents"; in other words, it had a generic meaning. It might, perhaps, be replaced by an expression such as "assistant consuls".

27. Research into the origins of the consulate showed that "Europeanism" was sometimes a false concept, but, by simply referring to the Mediterranean and the Middle Ages, one overlooked works of Indian political science such as the *Arthashastra*. The Indian representative had pointed out that the *Ramayana*, thousands of years ago, had included texts relating to international law. In fact, the *Arthashastra* had mentioned emissaries and envoys in general and not consuls in particular, but there had also been a superintendent of trade who had sent agents abroad to study possible foreign markets for imports and exports.

28. The institution of the consul, whatever its relations with that of the Greek *proxenoi* or of *praetor peregrinus romanus*, was not exactly the same as the

two latter. The present concept of the consul was the result of the fusion of a commercial institution of Mediterranean origin, corporate and jurisdictional in character, with an institution of Moslem public law. When the Islamic thrust had crossed North Africa and Asia Minor and had reached India, three irreconcilably antagonistic political and cultural entities had been brought face to face: Islam, Greek Christianity and Roman Christianity. Islam had divided the world into an "area of peace", where it had established its domination, and an "area of war", which had escaped its control. Although for Islam the desire to conquer and convert had persisted, the Jews, Christians and Sadduceans had been able to enjoy some autonomy in the practice of their religion and customs within the framework of Moslem political society, by virtue of treaties called "dimma", which had guaranteed their protection. The members of those ethnic and religious minorities had elected their own authorities and judges, and when the requirements of trade had brought French, Italian and Catalan merchants into contact with those countries, one of the natural consequences had been the intervention of those new States by the appointment of "authorities" called consuls.

29. But the autonomy enjoyed by the Christian minorities in the East would not alone have sufficed to give rise to the institution of consuls without the parallel development, in the Western Mediterranean area, of an institution known as the "consulate", a designation which bore no relation to the similar term used in the Roman political administration. In actual fact, the consuls of the Middle Ages were private agents who were appointed by associations or corporations of shipowners and traders to protect their interests, and who exercised jurisdictional functions. The term "consulate" was thus used simultaneously to define two institutions: first, a corporation of traders and, secondly, a maritime port court set up by the traders themselves. The consulates of the Middle Ages should not be confused with the corporations or associations of the Graeco-Roman period, or with the "frairies", "charités", Hanses and guilds which organized caravans or convoys of traders, since the distinguishing feature of the "consulate" was its function as an independent organization of sedentary traders, designed to protect the economic status of traders as a social class.

30. The consulate, in its capacity as a court, arose out of the need for traders on the shores of the Mediterranean to have a special judiciary procedure that was both expeditious and inexpensive. In England, there also existed marine or port courts. The personality theory had encouraged the growth of the institution, but very soon—since the procedure was so simple and rapid—a number of persons who were not traders voluntarily submitted to the jurisdiction of those courts in commercial cases. The courts in question acquired a competence—no longer *ratione personae*, but *ratione materiae*—which led them to deal with all disputes of a commercial nature.

31. One of the first "maritime" consulates "Consolat de Mar" was established at Perpignan in 1196; others were subsequently set up in the Kingdom of Aragón (at Barcelona in 1347, at Tortosa in 1363, etc.). But the Catalans had not stopped short at establishing consulates in Aragón; they had also established them in foreign ports on the Mediterranean (Messina, Malta, Marseilles, Bougie, Tunis, Alexandria, etc.). By the

end of the fifteenth century, Barcelona had established no less than fifty consulates on the Mediterranean littoral. The modern concept of the consulate had really come into being when the Catalan consuls had been made responsible for defending the interests of the Catalan sailors and traders not only on their own territory but also abroad, and had been sent to the "Ports of the Levant". From the ports, the institution had later spread to the towns inland and subsequently along the route to the Indies, and to America (Mexico (1580-1583), Lima (1613), Buenos Aires (1794)).

32. The code of the maritime consulate which contained "the maritime usage of Barcelona" had been compiled between 1336 and 1348; it was the most exhaustive work on maritime law of the Middle Ages and had exerted considerable influence on European legislation and jurisprudence up to the nineteenth century.

33. The major expansion of consulates occurred in the "Ports of the Levant" as a result of a combination of two factors: first, the need to defend the corporate interests of the traders of a particular country and, secondly, the principle of Moslem public law whereby only religion created the rights and duties of citizenship—the Jewish, Christian or Sadducean minorities acquiring, by means of various privileges and the right to consular protection, a measure of autonomy which formed the basis of the capitulations régime.

34. The establishment of permanent embassies in the sixteenth century and the incorporation of the customary law of "maritime consulates" into national legislations had led to a decline in consular institutions and then to eventual abolition, in 1713, under the Treaty of Utrecht. Only in 1769 had Spain and France signed a convention, with a view to establishing consular relations, which had served as a model for numerous other consular conventions, as the representative of Argentina and Mr. Zourek had pointed out.

35. His purpose in discussing the subject in such detail was to explain the reasons why his Government had decided to invite the United Nations, under the terms of operative paragraph 2 (e) of General Assembly resolution 1202 (XII), to hold the international conference on consular relations at Barcelona in the spring of 1963. He accordingly proposed that Barcelona should be specified in operative paragraph 4 of the revised draft resolution as the place of the conference.

36. Mr. PERERA (Ceylon) said he was gratified to note that the revised draft resolution took account of the joint amendments and of various suggestions which had been made concerning the wording of the original draft. He was prepared to accept the revised text, with the exception of operative paragraph 5, and to withdraw the six-Power draft resolution (A/C.6/L.486). A separate vote would, of course, have to be taken concerning the formula to be used for the invitations to the conference.

37. Mr. STAVROPOULOS (Legal Counsel) wished to give certain explanations in response to the request that had been made by the representative of Sweden (710th meeting, para. 17).

38. Since there were in the world entities whose status was not clear, the Secretary-General would find himself in a difficult position when issuing invitations to the conference on consular relations, if

the "all States" formula were to be adopted without clarification. The Secretary-General would not wish to determine, on his own initiative, whether or not the entities the status of which was unclear were States within the meaning of the resolution. If that formula were to be adopted, the Secretary-General would deem it essential to seek explicit directions from the Sixth Committee and the General Assembly on the complete list of States to be invited.

39. Turning to the question of the procedure for organizing the proposed conference, he said that the secretariat was at present studying the financial implications of holding the conference at Geneva or New York, and that a report would be submitted shortly. If the conference were to be held elsewhere, a further report would be prepared on any additional financial implications.

40. The draft articles on consular relations prepared by the International Law Commission (A/4843, para. 37) were seventy-one in number, whereas the draft articles on diplomatic intercourse and immunities (A/3859 and Corr.1, para. 53) considered at the Vienna Conference had only contained forty-five. The Vienna Conference had established a single Committee of the Whole which had taken some four and a half weeks, at a rate of two meetings a day, to study the draft, article by article. The Conference itself had taken some ten days to consider the work of the Committee of the Whole, so that the Conference had lasted for about seven weeks in all. If the conference on consular relations were to be run on the same lines, it would require some nine weeks in which to complete its work. The work could be expedited by setting up two committees, which could divide it between them and, when the committees were not required to meet concurrently, the participants would have more time to prepare for meetings than they had had at Vienna. He estimated that, if two committees were established, as he intended to recommend, the conference might be able to complete its work in seven weeks provided, of course, that it did not hold a general debate.

41. The Secretariat would undertake the preparation of such documentation as its resources permitted. That documentation would include the rules of procedure of the conference which, subject to the necessary alterations, would be the same as those that had been used successfully at other legal conferences. The Secretariat also hoped to be able to prepare a guide to the draft articles similar to that prepared for the Vienna Conference. Moreover, plans were being made to issue a supplement to the volume in the United Nations Legislative Series on Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities.^{2/} The supplement would cover, in particular, bilateral treaties concluded in the field of consular relations.

42. The Secretariat would give favourable consideration, within the limits imposed by its staff and budgetary resources, to the suggestions which had been made in the Sixth Committee concerning the documentation for the conference, and it would spare no effort to ensure that the conference on consular relations met with the same success as the Vienna Conference.

The meeting rose at 1 p.m.

^{2/}United Nations publication, Sales No.: 58.V.3.