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Chairman: Mr. Manfred LACHS (Poland).

AGENDA ITEM 53

Question of the continuation of the United Nations Tribunal in Libya: report of the Secretary-General (A/2983, A/C.6/L.348, A/C.6/L.352, A/C.6/L.354, A/C.6/L.362) (*continued*)

GENERAL DEBATE (*continued*)

1. Mr. FEKINI (Libya) reaffirmed that the young sovereign State of Libya was anxious to develop its relations with all peace-loving nations, and with Italy in particular, in a spirit of friendship and understanding. Having been a candidate for membership in the United Nations ever since the proclamation of its independence, Libya had already solemnly pledged itself to respect all the obligations laid down in the Charter. Accordingly, his Government was willing that any legal dispute to which it might be a party should be referred to the International Court of Justice, whose competence should be fully respected and strengthened. In expressing those sentiments his Government hoped to serve the common interest and to create an atmosphere favourable to the early conclusion of the agreements with Italy.

2. In his statement at the 460th meeting, the representative of Italy had said that it would be desirable to reach a compromise solution acceptable to both parties. He had expressed the wish that some judicial safeguard should remain until the contemplated agreements had been concluded.

3. The co-operative attitude of the Italian Government was most commendable. In his opinion, there were two possible solutions, both of which would take into account the Italian Government's wishes on the one hand, and on the other, the Libyan Government's conviction that the conclusion of the agreements was imminent and that any further legal disputes between the parties were unlikely.

4. The first solution would be the possibility of recourse to the International Court of Justice. The second would be recourse to other modes of peaceful settlement referred to in the United Nations Charter, in particular

arbitration at the expense of both parties. In order to strengthen the guarantees provided by the second procedure, the *compromis* to be entered into might stipulate that the arbitral body would have the same functions and competence as were specified in article X of General Assembly resolution 388 A (V).

5. The Libyan Government would not, of course, accept either solution unless it were intended to replace the United Nations Tribunal in Libya immediately. It would also be prudent to establish a closing date, say 30 June 1956, for the submission of applications. While it felt that such a time limit was necessary for the purpose of the final settlement of the whole question, the Libyan Government was prepared to waive it if circumstances required.

6. The adoption of either of those two solutions would make it possible to remove the last obstacle to the establishment of completely normal relations between Libya and Italy.

7. Mr. CASARDI (Italy) said that his Government was then considering, in a genuinely co-operative spirit, the second of the two solutions proposed by the representative of Libya. He felt bound to say immediately that he did not think that the establishment of a closing date for the submission of applications would be acceptable. He was expecting to receive definitive instructions from his Government very shortly.

8. The CHAIRMAN, noting that the conclusion of a direct agreement between Italy and Libya was possible, suggested that consideration of the item might be suspended until the Italian Observer was in a position to announce his Government's views.

It was so decided.

Mr. Casardi, Observer of Italy, and Mr. Fekini, Observer of the United Kingdom of Libya, withdrew.

AGENDA ITEM 52

Arbitral procedure: comments of Governments on the draft on arbitral procedure prepared by the International Law Commission (A/2456, para. 57, A/2899 and Corr.1 and A/2899/Add.1 and 2, A/CN.4/92)

GENERAL DEBATE

9. The CHAIRMAN reviewed the discussion of arbitral procedure in the International Law Commission and in the Sixth Committee and referred to comments by Governments. He invited a general debate on the question.

10. Mr. LIANG (Secretary of the Committee) referred to the documents before the Committee and drew attention to specific points.

11. Mr. PEREZ PEROZO (Venezuela) said that the Committee should not spend very much time on the item, as there was no new material except the com-

ments which had been received from certain Governments since the thorough study made by the Committee at the eighth session of the General Assembly.

12. During the debates in 1953, nearly all the articles of the draft prepared by the International Law Commission had been subjected to criticism. It had been said that the draft had blurred the distinction between the notion of international arbitration and that of international judicial settlement and destroyed the principle of flexibility in the arbitral procedure. It had been described as incompatible with the principle of State sovereignty. Those objections, or some of them, appeared in paragraph 28 of the Commission's report on its fifth session (A/2456) and in the comments of Governments.

13. Consequently, the existing text of the draft would have to be thoroughly revised. But how useful would such a revision be if ultimately one simply reverted to the accepted ideas and to familiar rules?

14. In paragraph 18 of its report (A/2456), the Commission admitted that it had in some respects exceeded the bounds of existing law. The attempt to modernize arbitral procedure was perhaps praiseworthy, but surely the first question was how far States were prepared to go in that direction.

15. His delegation could not accept the draft as it stood. Not only was the draft open to the criticisms he had mentioned, but it also failed to deal with certain important questions, including, for example, the effect of the draft on existing obligations, such as the reciprocal obligations of the American States, and on the admissibility of reservations. In that connexion, he recalled that at the eighth session Mr. François, Chairman of the International Law Commission at the time, had told the Sixth Committee (387th meeting) that reservations should not be admissible.

16. He discussed the various courses open to the Committee for dealing with the item. Clearly it could not discuss the draft, article by article, as that would be an excessively complicated and lengthy process. Nor could the question be referred back to the International Law Commission, for the latter had said all it had to say on the subject. A conference of plenipotentiaries was likewise not practicable, since the Governments, which had shown little interest, would first have to be consulted. Lastly, there was little point in setting up a special committee, because in the present case its debates would merely be a duplication.

17. There was yet another course which his delegation might be prepared to support. What he had in mind was that the Assembly should take note of the International Law Commission's draft, with an acknowledgement of gratitude for the work done, as an important contribution to the greater effectiveness of arbitral procedure. At the same time the Assembly would transmit the draft, with the comments of Governments and the records of the debate in Committee, to the States, in the hope that they would extract and use as models in their arbitration conventions whatever provisions of the draft they considered suitable. In that way the draft would retain its value as a document which should be taken into account at a more advanced stage of international co-operation; and furthermore the draft might be useful, in the manner indicated, to States which approved the entire text or parts thereof.

18. Mr. ROBINSON (Israel) said that at the eighth session of the General Assembly the Committee had discussed a draft on arbitral procedure and had decided

to submit it to Governments for further comment. Altogether seventeen Governments had sent in written comments (A/2456, annex I, and A/2899 and Add.1 and 2). Thirty-one delegations had stated their views on the International Law Commission's draft during the debate in the Sixth Committee in 1953. Only a few delegations had then taken a definite position for or against the draft, but the representatives as a whole had shown little enthusiasm for the Commission's text.

19. A careful analysis of the written and oral comments showed that there were four schools of thought among the Member States.

20. First, a few States were ready to accept the text more or less as it stood. A second group comprised States which were prepared to accept the text with certain drafting changes, the basic principles remaining unaffected. Forty such amendments had been proposed.

21. A third group of States accepted the fundamental principles of the draft, but preferred, so far as the parties were concerned, that its application should be confined to disputes between States and, so far as subject matter was concerned, to justiciable disputes. Some States had said that matters within the domestic jurisdiction should be expressly excluded and that the undertaking to arbitrate should be optional and applicable to future disputes only. By contrast, the Rapporteur and the International Law Commission, influenced, no doubt, by the normal practice in domestic law of making procedural provisions retroactive, had intended that the draft should take effect retroactively. That group also included those States which accepted the draft generally but were reluctant to accept the provisions eliminating the finality of the award, or which, while accepting the function of the International Court of Justice as a stand-by substitute for the autonomy of the parties, objected to its consideration of the merits of the case.

22. Before the draft could become a convention, a preamble and final clauses would have to be added. The latter should deal specifically with reservations, declarations by non-member States in accordance with the Security Council resolution of 15 October 1946,¹ the relationship between the draft and existing bilateral and multilateral treaties providing for international arbitration, and lastly reciprocity.

23. A fourth category of States opposed the fundamental principles of the draft, particularly the practical elimination of the principle of the autonomy of the parties and the attribution of far-reaching powers to the International Court of Justice or its President.

24. Before taking a decision on the future of the draft, the Committee should consider two questions of substance. The first concerned the very nature of the draft. It had been hailed as a watertight instrument, the implication being that once such a convention had been accepted, there would be no further evasions of the duty to arbitrate, such as had occurred in the *Hungarian Optants* case in the 'thirties and the *human rights* case in connexion with the 1945 peace treaties. That claim was only partly based on the expanded powers of the arbitral tribunal, for example, those laid down in articles 5, 7, 8, 10, 11, 12, 16 and 23. The efficacy of those provisions was not open to question, but the most striking feature of the draft was that decisions by the President of the International Court or by the Court itself, both judicial and extra-judicial

¹ See *Official Records of the General Assembly, Second Session, Supplement No. 2*, para. 1225 ff.

functions being vested in them by the draft, replaced the autonomy of the parties. Hence the complete effectiveness of the draft depended on whether the International Court of Justice or its President felt themselves absolutely bound to accept the competence attributed to them by the draft. There was no evidence that the Court had been consulted on that point and very probably the Court would not have entertained such a request.

25. The draft gave the Court numerous powers. Under certain conditions it could decide on the arbitrability of a dispute on the application of either party (art. 2, para. 1) and prescribe provisional measures (art. 2, para. 2). It could decide on the question of the disqualification of the sole arbitrator on the application of either party (art. 8, para. 2). In certain cases, a dispute concerning the meaning and scope of an award of an arbitral tribunal might be referred to the International Court at the request of either party (art. 28, para. 2). In certain circumstances an application for the revision of an award could be made to the Court by either party, the implication being that the Court would also be empowered to rule on substance (art. 29, para. 4). On the application of either party the Court could declare the nullity of an award and decide whether the application had the effect of staying execution (art. 31). He was not convinced that, in the six cases mentioned, the competence vested in the Court by those clauses was consistent with chapter II of its Statute or with the procedure provided for in Heading II of the Rules of the Court. Referring to a number of provisions of the Statute and the Rules of the Court, he said it was problematical whether they could be automatically applied to the articles of the draft. As long as the six provisions he had cited had not been examined by the Court, it would be impossible to make such an assertion.

26. According to the terms of the draft convention, the President of the International Court of Justice was empowered in certain cases, at the request of one party, to make the necessary appointments to the arbitral tribunal, to determine, under certain conditions, its composition and to fill vacancies in the tribunal if withdrawal took place without the tribunal's consent. According to usage, it was customary to consult the President of the Court before any functions were conferred on him by international treaty. But there was no evidence that the International Law Commission had consulted the Court. It was rather surprising that the draft did not make any provision for the contingency that the Court or its President might say that they had no jurisdiction to hear the dispute or that they could not assume extra-judicial functions, a contingency provided for, for example, in articles XXXIV and XXXV of the American Treaty of Pacific Settlement (Pact of Bogotá).

27. The Committee should ask itself, secondly, whether the draft was likely to promote recourse to international arbitration, in keeping with the implied provisions of Article 33 of the United Nations Charter and with the explicit terms of Assembly resolution 171 C (II), paragraph 2. While it was probably impossible to draw a definite conclusion on that point, there might be a real danger that the draft would have the opposite effect. The International Law Commission had wished to ensure the effectiveness of arbitral procedure. In its desire to achieve its purpose it had not considered other measures, less radical, no doubt, but which would have a better chance of being adopted.

28. Having considered those two questions, the Sixth Committee could then take a decision in the light of the evidence. There would be no point at all in consulting Governments a third time, for the second inquiry had yielded but meagre results. Nor should the draft be studied article by article, for experience had shown that process to be long and even harmful.

29. He regretted that his delegation would be unable to support the proposal made by the Commission at its fifth session that the General Assembly should recommend the draft to Members with a view to the conclusion of a convention on arbitral procedure (A/2456, para. 55). States would be reluctant to undertake in advance to apply such an arbitral procedure whenever arbitration was resorted to for the settlement of a dispute between two States, without knowing the nature or the scope of the dispute or the identity of the opposing party. The fact that only four States had ratified the General Act for the pacific settlement of international disputes, as revised in 1949, should serve as a warning. Furthermore, not even in the International Law Commission had the draft convention been adopted unanimously; at its fifth session two of its members had voted against the draft as a whole and a third had voted against certain parts of it. Obviously, if it were submitted to Governments for adoption, the draft as a whole, or parts thereof, would be severely criticized. Instead of having a homogeneous text by which they could be guided when faced with the need to enter into arbitration obligations under bilateral or regional instruments, Governments would receive, if the convention method were employed, merely a composite text lacking the advantage of general acceptance.

30. It would even appear inadvisable to convene an international conference for the adoption of the convention, and a resolution of the General Assembly adopting the draft by a slim majority could only weaken its effect.

31. The best course would be to refer the draft back to the International Law Commission, which, in the light of the debates in the Sixth Committee and the amendments proposed, could make some improvements in the text.

32. In addition, the Secretariat should be requested to prepare a different commentary from the one it had already submitted to the General Assembly (A/CN.4/92). The latter reviewed the history of each of the articles, starting with previous attempts to codify the law of arbitral procedure and justifying the International Law Commission's innovations. While the commentary was of incontestable value, it could scarcely be regarded as a statement of the reasons that had led to the Commission's adoption of the final version. In the new commentary the Secretariat should give particular attention to the objections raised by Governments or by representatives to a particular article and to the reasons that had led the Commission to retain the previous version or to adopt a new one. Each of the articles had already been examined at least four times, either in Professor Scelle's first (A/CN.4/18) or second (A/CN.4/46) report, in the first draft, submitted to the General Assembly at its seventh session (A/2163, para. 24), or in the second draft, submitted to the Assembly's eighth session (A/2456, para. 57). The Secretariat could prepare an article-by-article commentary, preceded by a statement of the basic ideas underlying the draft. It would be particularly useful if the commentary could include a selective

bibliography relating to the particular problems raised during the discussion of each of the articles. There should also be an index at the end of the volume. The new commentary, when published, would become a very valuable reference work for Foreign Offices, legal scholars and lawyers. In producing that work, the International Law Commission and the Secretariat would know that they had made a useful contribution to the cause of international law and its codification.

33. Speaking on a point of order, Mr. CARPIO (Philippines) emphasized the importance of the Israel representative's statement. The Committee could not reach a satisfactory solution of the problem until it had made a very careful study of all the questions raised in that brilliant exposé of the situation. It would be helpful, therefore, if the members of the Committee could have the full text of the Israel representative's statement. He wondered whether the Secretariat could arrange for it to be distributed in the near future.

34. Mr. STAVROPOULOS (the Legal Counsel) said that the Secretariat could not do so without departing from the usual procedure.

35. Mr. ROBINSON (Israel) said that, in order to comply with the Philippine representative's request, he would have his statement mimeographed.

36. Mr. TAMMES (Netherlands) wished to make some preliminary remarks on the action to be taken by the Committee on the draft convention prepared by the International Law Commission. That was a preliminary point, for if the Committee decided to consider the text as a model and not as the draft of a convention that would be binding on the parties, some controversial questions, such as the problem of the final clauses and of the distinction between mandatory and optional provisions, would lose their urgency.

37. His delegation thought that the Committee should endeavour to have the draft convention accepted as a model of arbitral procedure. The General Assembly could recommend that Member States should be guided by the procedure laid down in the draft when they were about to conclude *ad hoc* or general bilateral or multilateral agreements. His Government had expounded its reasons for favouring that solution in its written comments (A/2899/Add.1) but he would like to offer some additional arguments on the point.

38. First, some Governments had accused the Commission of a tendency towards perfectionism. They felt that that aim was not justified either by the present stage of development of international law or by the practice of international arbitration. Some preferred the traditional concept of arbitration to the notion of judicial arbitration, which, incidentally, was no new concept. If, therefore, the draft was to become a convention, so many reservations would be attached to the text that the essential purpose to which the Commission's work had been directed would not be achieved. Hence it would be better to maintain the original text intact, with the few improvements that might be made in the light of the comments of Governments and of the present discussion. The text would then have a stimulating effect on the development of means for the pacific settlement of international disputes.

39. In recent years the question of arbitral procedure had been the subject of considerable study by the International Law Commission, the Secretariat—which had prepared an excellent commentary—Governments and, lastly, jurists. The articles on arbitral procedure had thus gone through a long and careful process of

preparation and had almost reached the point where they could serve as a model in arbitration questions. Accordingly, the best thing would be to ask the Commission to examine its draft convention once again, taking into consideration the comments of Governments and the discussion in the Sixth Committee. If that were done, there could be no doubt that the final form of the draft convention would have a lasting and salutary effect on the development of arbitral procedure.

40. In his delegation's view, the draft would not produce that salutary effect unless it preserved its original characteristics. In its report on its fourth session, the Commission had already distinguished between traditional arbitration and judicial arbitration, the latter concept having prevailed in the draft adopted. The position that the Commission had finally taken in the matter was the fruit of much work and should therefore be maintained. If the Commission had dealt only with traditional arbitration, its work would have been mere codification. The practice of international arbitration, however, as reflected in thousands of arrangements of compromissary clauses and arbitration treaties, had been widely divergent, in view of the differing needs of the various cases in point. General principles, such as the one codified by the Commission in article 11 of the draft convention, were rare. The true function of the International Law Commission in that very technical aspect of the development of international law was to fill in the gaps that had appeared in the course of the history of arbitration. It would be for States to decide in future whether or not they wished to take advantage of the solutions provided by the Commission's draft.

41. In the past, two types of obstacles had sometimes impeded the fulfilment of the understanding to arbitrate. First, because of certain difficulties, the parties could not always bring the procedure followed to its conclusion. Secondly, there was always the possibility that one of the parties might challenge the arbitral award, on grounds of which it considered itself the sole judge. In that connexion, the collaboration of the International Court of Justice could be of the greatest value. There was no justification for the doubts expressed by some Governments on that subject, for the Court's functions would be very limited and would not divest the arbitral award of its essential features. The function of the Court would be to act as a catalytic agent and it would not decide upon the substance of the dispute. It was in order to make the nature of the Court's powers more clear that his Government had proposed the amendment to article 2 (A/2899/Add.1, second part), which concerned the preliminary decision of the Court on the existence of a dispute or on its arbitral character, a decision whose sole purpose was to overcome initial procedural difficulties. The proposed amendment was designed to show clearly that the decision of the Court would not prejudice the powers of the arbitrators to pronounce on their own competence by virtue of article 11 or the power of the Court to decide, by virtue of article 31, that the arbitrators had unlawfully assumed that competence.

42. Thus the International Court of Justice would not in any sense play the role usually assigned to a court of appeals. It would not be called upon to re-examine all the legal aspects of the question. It would take cognizance only of the charges enumerated in article 30 of the draft convention; in any case, the cases provided for in that article were rare. Hence, the Court's role in respect of arbitral procedure would be,

from every point of view, a secondary one. It would, however, help to give effect to the promise to resort to arbitration, in accordance with the original will of the parties. Moreover, if the Court declared an award invalid, the dispute would be submitted to a new arbitral tribunal. For those reasons, his delegation thought that the principles of effectiveness and continuity, which the present draft endeavoured to incorporate, did not in any way affect the true nature of arbitration.

43. Nevertheless, some Governments had expressed the fear that the principle of effectiveness might impair the important principle that an arbitral award should be final. In particular, the Governments of the United Kingdom (A/2456, annex I, section 9) and Canada (A/2899, section 4), had entertained misgivings about the wisdom of articles 29-32 of the draft convention, dealing with the revision and the annulment of awards. His delegation considered that the parties should be free to decide, if they so wished, that the principle of the finality of awards should prevail. In its own com-

ments on the draft convention, which appeared in the report on its fifth session (A/2456), the Commission had not excluded that possibility. Furthermore, if the draft convention was considered only as a model, the problem would no longer arise.

44. The same could be said of the auxiliary function of the Court in the case of revision on the ground of the discovery of facts previously unknown. The principle of revision had been generally accepted since the Hague Conventions and had been recognized in the Statute of the International Court of Justice and in the Pact of Bogotá (1948). Article 29, paragraph 4, was designed to give effect to that principle. In its comments on article 29 (A/2899/Add.1, second part), his Government had merely suggested a few purely technical improvements.

45. Those were the preliminary remarks which his delegation wished to make at the present stage of the debate.

The meeting rose at 1 p.m.