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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, A/C.6/L.368) (*continued*)**

**GENERAL DEBATE (*continued*)**

1. The CHAIRMAN noted that the Governments of Italy and Libya had reached an agreement. The Committee, therefore, might return to agenda item 53, which, at its 461st meeting, it had decided to defer.

*At the invitation of the Chairman, Mr. Alberico Casardi, Observer of Italy, and Mr. Mohieddine Fekini, Observer of the United Kingdom of Libya, took seats at the Committee table.*

2. Mr. CASARDI (Italy) said that he was glad to be able to announce that the Italian Government had expressed its agreement to the proposals made by the representative of the Libyan Government. By consenting to a solution which implied a notable departure from its original stand, the Italian Government had sought to pay a tribute to the cordiality of relations between Italy and Libya. That same spirit of understanding had marked the informal conversations which had enabled the two countries to reach full agreement.

3. The solution presented to the General Assembly in the form of a draft resolution proposed by Afghanistan, Chile, Colombia, Egypt, the Netherlands, Syria, the United Kingdom and the United States (A/C.6/L.368) provided for the termination of the Tribunal, provided that its functions, powers and jurisdiction were simultaneously transferred to an Italian-Libyan mixed arbitration commission whose terms of reference would be the same as those of the Tribunal. As was usual in international arbitral bodies, each party would appoint one member of the mixed commission, and the third member would be appointed by the Secretary-General upon joint designation by both parties. The favourable vote of two members would be sufficient for all deliberations of the commission. The commission could thus come into being and perform its functions even in the absence of one of its members. No date was fixed for the expiry of the commission's terms of reference, and the expenses of the commission would be borne by Italy and Libya in equal shares. The United Nations would therefore incur no further expense once the commission had been set up. Although it was very unlikely that the two Governments would have to have recourse to the mixed commission, its existence would be a guarantee of impartiality and would eliminate even the slightest possibility of misunderstanding between Italy and Libya, whose relations had always been excellent.

4. He hoped that the Sixth Committee would accord a favourable reception to the eight-Power draft resolution, which embodied in full the provisions agreed upon between the two parties.

5. Mr. TAMMES (Netherlands) said that he was pleased to note that Italy and Libya had reached full agreement as a result of direct negotiation, because that was the kind of solution for which the Sixth Committee had always hoped.

6. The sponsors of the draft resolution trusted that it conformed to the wishes of the members of the Committee. Some representatives had pointed out during the debate that the United Nations could not continue indefinitely to bear the considerable cost of continuing the Tribunal, although they recognized that the parties should, if the need arose, be able to resort to a competent judicial organ so that full effect might be given to the provisions of General Assembly resolution 388 (V). The draft accordingly provided for the transfer of the Tribunal's functions to an Italian-Libyan mixed arbitration commission, the expenses of which would be borne exclusively by Italy and Libya. The Sixth Committee would not have to determine any terms of reference for the mixed commission, because they would be the same as those granted to the Tribunal under General Assembly resolution 388 A (V).

7. He paid a tribute to the Governments of Italy and Libya for their spirit of understanding which had greatly helped the Sixth Committee in its task and which gave promise of co-operation between the two States in international organizations. A tribute was also due to the Tribunal, which had had to deal with some difficult cases and had admirably carried out the task assigned to it.

8. Mr. FEKINI (United Kingdom of Libya) believed that the Sixth Committee could feel gratified at having arrived at such a satisfactory solution. The Libyan Government, which had always been anxious to satisfy the legitimate interests of the Italian Government, reiterated its acceptance of that solution and wished to thank the members of the Sixth Committee for the spirit of understanding in which they had dealt with the matter.

9. Mr. DARDEN (United States of America) recalled the part played by the General Assembly in the establishment of Libyan independence in 1951 and hoped that in the very near future the United Kingdom of Libya and the Republic of Italy would both become Members of the United Nations.

10. The Tribunal, which had been constituted in 1950 and had been continued in existence in 1953, had performed a necessary function, and the members of the Tribunal were to be commended for having carried out their assigned tasks so well.

11. The United States delegation was especially pleased to be joining with other delegations in sponsoring a joint resolution that would give effect to the arrangements agreed upon by the Governments of Libya and Italy, and it wished to congratulate the representatives of those two Governments on the spirit of conciliation manifested by them. The setting-up of an Italian-Libyan mixed arbitration commission seemed eminently fair, because it gave both States the guarantees necessary for safeguarding their legitimate interests.

12. Mr. VALLAT (United Kingdom) and Mr. SEPULVEDA (Chile) said that they regarded the draft resolution proposed jointly by them and by other delegations as a very satisfactory solution which should be adopted by the Sixth Committee.

13. Mr. CANAL RIVAS (Colombia) said that as his delegation had contemplated submitting a text similar to the draft before the Committee, it had joined the co-sponsors of the draft.

14. Mr. STABELL (Norway) joined in the tribute paid to the representatives of the Italian and Libyan Governments.

15. He said that while the purpose of the draft before the Committee was quite plain, some of its provisions were not quite so clear. For example, as no arrangement was made in operative paragraph 2 for an automatic transfer of the functions, powers and jurisdiction of the Tribunal to the contemplated mixed commission, there was reason to wonder what the legal instrument for such transfer would be. If the General Assembly did not provide for the transfer in the resolution which it adopted, an agreement for that purpose would have to be made between the two parties. The draft said nothing on that subject. If the sponsors intended that there should be an immediate transfer, they should make that clear in operative paragraph 2 by stating that the functions, powers and jurisdiction of the Tribunal "shall be vested in" the mixed arbitration commission.

16. That point should be clarified, because the General Assembly should ensure that the resolution met the wishes of the two Governments and of the members of the Sixth Committee.

17. Mr. SEN (India) regarded the statement by the Norwegian representative as very much to the point. Operative paragraph 2 made the termination of the Tribunal subject to a condition. If the sponsors of the draft intended that there should be an immediate transfer of the Tribunal's functions, powers and jurisdiction, they should make the wording more precise.

18. He proposed that paragraph 2 should read as follows: "Its functions, powers and jurisdiction shall be *ipso facto* vested in an Italian-Libyan Mixed Arbitration Commission". He asked the sponsors whether they could accept that amendment.

19. Mr. CARPIO (Philippines) noted a contradiction between operative paragraphs 1 and 2 of the draft resolution. Paragraph 1 provided that the Tribunal should be terminated on 31 December 1955, whereas paragraph 2 made that termination subject to a condition. The Sixth Committee's intention was to eliminate the financial burden which the Tribunal imposed on the United Nations, but difficulties might arise if the Mixed Arbitration Commission was not constituted. The question might be asked whether, in such case, the Tribunal would continue to exist.

20. He agreed with the Norwegian and Indian representatives that the draft did not effectively ensure the transfer of the Tribunal's powers to the Mixed Arbitration Commission. There would seem to be some difficulty in transferring powers to a commission that had not yet been established.

21. Operative paragraphs 2 and 3 might be replaced by the following provision: "Its functions, powers and jurisdiction, within the terms of references of article X of General Assembly resolution 388 A (V) of 15 December 1950, shall be vested in an Italian-Libyan Mixed Arbitration Commission, constituted as herein-after provided". If that amendment were adopted, the operative part would then constitute a logical entity.

22. The CHAIRMAN proposed that consideration of the item should be suspended so that representatives might consider the question which had been raised.

*It was 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, A/C.6/L.369) (continued)**

#### GENERAL DEBATE (continued)

23. Mr. VALOIS (Canada) explained that, contrary to the impression he might have given by his statement at the previous meeting, the Canadian delegation was not in favour of referring the draft convention back to the International Law Commission for fuller consideration.

24. Mr. BROKENBURR (United States of America) said his delegation wished to renew its expression of appreciation for the valuable work which the International Law Commission had done in the field of arbitral procedure. The excellent commentary by the Secretariat (A/CN.4/92), the observations of Governments and the statements of representatives in the Sixth Committee had also helped to bring out the elements of the problem more clearly.

25. The draft convention was an effort in the progressive development of international law in that it provided that an undertaking to arbitrate would be made subject to judicial enforcement. It was a valuable statement of the goals to be achieved in the field of arbitration and would encourage greater recourse to that method of settling disputes. It seemed also to be true, however, that many States would at present hesitate to become parties to a convention based on the International Law Commission's draft, and there seemed to be no possibility of a compromise solution which

would not deprive the draft of its essential feature, the intervention of the International Court of Justice.

26. The United States delegation believed that there was in fact room in international relations for both the old form of arbitration and the new form sketched in the draft convention. As particular provisions of the draft convention appealed to an increasing number of Governments, they could be incorporated into bilateral or even multilateral agreements, and the time would then have come to consult the International Law Commission again. The first Hague Convention, concluded in 1899, had had only twenty-five signatories, while the 1907 Convention had had forty-five.

27. The Committee could for the moment decide to have the documents bearing on the question published in an appropriate form. In 1953, at the eighth session, the New Zealand representative had already foreseen that, even after re-examination of the matter, many States would hesitate to become parties to a convention based on the revised text and that it might be necessary to publish the documents for the benefit of Governments (Sixth Committee, 387th meeting). The Secretariat might publish in a volume similar to document A/CN.4/92 that part of the International Law Commission's report on its fifth session (A/2456) which dealt with arbitral procedure, the text of the revised draft convention, the written comments sent by Governments to the International Law Commission or made in response to General Assembly resolution 797 (VIII), the summary records of the proceedings in the Sixth Committee at the eighth and tenth sessions, the Committee's reports and the resolution ultimately adopted by the General Assembly.

28. The Cuban representative had very clearly outlined, at the 462nd meeting, the situation which now faced the Committee. For the reasons he had given, the United States delegation had joined with the delegations of Cuba and Colombia in submitting the draft resolution contained in document A/C.6/L.369, which was an appropriate step on the road towards the peaceful settlement of all international differences. If the situation warranted it, the International Law Commission might itself return to the subject and submit further proposals without necessarily being invited to do so by the General Assembly. It was also not impossible that at a future date a substantial number of States might desire to convene a conference of plenipotentiaries to draft one or more arbitral conventions. In the meantime, however, the solution put forward in the three-Power draft resolution seemed the best possible.

29. Mr. AMADO (Brazil) noted that little progress had been made since 1953. Only fourteen States had submitted comments on the draft convention prepared by the International Law Commission. Five of those fourteen States had declared against the idea of the draft, six had suggested substantial amendments which would tend to weaken the movement towards a judicial system, and only two had directly favoured the draft.

30. As a member of the International Law Commission, he had stoutly defended the fundamental principles of arbitration against the perfectionist zeal of some members who, in their enthusiasm for academic systematization had completely departed from the centuries-old practices of States. He had even submitted an express reservation which was referred to in the Commission's report on the work of its fifth session (A/2456, footnote 4).

31. He had again opposed the draft in the Committee at its eighth session, and, when explaining his vote for resolution 797 (VIII) (388th meeting, para. 38 ff.), he had categorically reaffirmed his opposition to the draft put forward by the International Law Commission.

32. That departure from his usual spirit of compromise had been prompted by the very great importance attached to arbitration by the Brazilian Government. Thanks to arbitration Brazil had succeeded in solving all its frontier questions by peaceful means, thus fixing its territorial limits while respecting the rights and interests of neighbouring States. Brazil had such faith in that method of achieving the peaceful solution of international dispute that recourse to arbitration had been made compulsory in the Brazilian Constitution. Brazil always associated the idea of arbitration with the integrity of its frontiers and the observance of law in its relations with other States. For that reason, it harboured the most serious doubts about a draft convention which would distort an institution that had contributed so much to peace and understanding among nations.

33. While expressing his appreciation of the conscientiousness shown by the members of the International Law Commission, he wished once again to stress that they had, in a spirit of academic research, built up an entire judicial system of the most rigid kind to replace an institution which by its flexibility and optional character was adapted to the needs of a still imperfect legal order. In that way, they had prepared a draft which was far removed from reality and from the practice of States, and which in the, fortunately very unlikely, event that it was adopted, would involve the abandonment of an extremely valuable method of settling disputes.

34. Before submitting his objections in detail, he wished to make an important general observation. In all judicial proceedings, whether national or international, the parties were always afforded the opportunity of following the case and intervening in defence of their interests. It was inconceivable that such important disputes as those which were traditionally settled, in South America, for example, by arbitration should be taken out of the hands of the parties concerned merely because they might be suitable for settlement by arbitration. That would be placing excessive faith in the infallibility of arbitrators. Under the quasi-judicial procedure conceived by the International Law Commission, the parties would drop out of the proceedings as soon as the machinery of pseudo-arbitration had been set in motion, and would be deprived of any opportunity to intervene. Thus, the proceedings would be entirely independent of their will and the judge, or arbitrator, would be omnipotent. The result would be arbitrary justice instead of arbitral justice.

35. It did not seem possible to adapt the draft convention to the practice of States merely by amending it. If arbitration was to be given its proper place as an instrument of international law, the entire set of principles on which the draft convention was based would have to be completely revised.

36. The judicial character animating the International Law Commission's draft was apparent in the very first two articles, dealing with the undertaking to arbitrate. Article 2 conferred very extensive powers on the International Court of Justice and at once revealed the authors' deliberate confusion of arbitration and judicial settlement, a confusion aimed at ensuring that

the judicial body's decision would prevail over the will of the parties.

37. Chapter II of the draft convention which embodied the principle of intervention by the International Court of Justice, seriously threatened the principle of the free choice of arbitrators and tended to transform arbitration into a compulsory and coercive judicial procedure. The provisions relating to the *compromis* in chapter III show that the tendency of the draft to favour judicial arrangements was carried to the extreme. The *compromis* was the most important part of the machinery of arbitration and was the paramount expression of the will of the parties. Without the *compromis* in the traditional sense of the word there could be no arbitration. Article 10 of the draft offered a whole series of arrangements to supplement the will of the parties. It imposed certain rights and obligations on the parties even where they had had no part in drawing up the *compromis*.

38. Chapter IV contained a particularly dangerous provision: article 11 provided that "the tribunal . . . is the judge of its own competence". In arbitral procedure the parties, and the parties alone, had the power to define the competence of the tribunal in the *compromis*. The tribunal was bound to adjudicate within the limits of its competence as so defined. The draft went even further: article 12 provided that in the absence of agreement between the parties concerning the law to be applied, the tribunal was to be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice. But in arbitration it was the parties who should determine by agreement the law to be applied. Nevertheless, since that clause of the Statute merely listed the usual sources of international law, article 12 was one of the few articles of the draft that might possibly be retained, if slightly amended. It would suffice to say that Article 38 of the Statute of the International Court of Justice would apply if the parties did not stipulate otherwise. The rigid and coercive nature of the draft was apparent in article 20, which allowed judgement by default.

39. Chapter V dealt with the "award". Article 26 affirmed the binding force of the award, which, according to the text, must be carried out in good faith. Obviously, at the present stage in the development of international law, that provision could be nothing more than a *desideratum*. With regard to Article 28 it should be borne in mind that in arbitration the tribunal ceased to exist with the rendering of the award. That being the case, how could the tribunal interpret its decisions? Chapters VI and VII of the draft were at variance with the basic and universally accepted principle of the finality of the arbitral award. In that connexion, he recalled that he had said in the Sixth Committee in 1953, at the eighth session (A/C.6/SR.388), that the principle of the revision of arbitral awards and of the annulment of awards by the International Court of Justice threatened to destroy the system of arbitration (388th meeting, paras. 39 to 41).

40. The task of the International Law Commission should have been one of codification, but it had in fact engaged in creative work of an arbitrary nature, without taking into consideration the practice of States.

41. A text consisting of purely theoretical provisions could hardly be regarded as a model. His delegation would prefer to see the Assembly merely take note of the Commission's work, while congratulating it on its efforts. Nevertheless, as the last sentence of the draft

resolution before the Committee (A/C.6/L.369) did not wholly rule out criticism, he had no serious objection to that text.

42. Mr. MOROZOV (Union of Soviet Socialist Republics, considered that the joint draft resolution (A/C.6/L.369) could not, as it stood, be put to the vote immediately after the general debate. Operative paragraph 2 implied that the Committee was expressing an opinion on the draft convention on arbitral procedure as a whole. There was thus a preliminary question to be settled: whether the draft convention should be commended to Member States as a guide. The draft contained certain valuable provisions but others threatened the future of arbitration. Before taking a decision on the joint draft resolution, therefore, the Committee should consider the draft convention article by article; his delegation would determine its position on the basis of that consideration. In the event of a negative reply to that preliminary question a way would have to be found to bring consideration of the draft convention to an end.

43. He asked the members of the Committee to reflect on his observations and reserved the right to speak again if the joint draft resolution remained before the Committee.

44. Mr. GARCIA AMADOR (Cuba) wished to dispel any doubts that the Soviet Union representative's statement might have created, by pointing out that it was not the purpose of the joint draft resolution to ask the Committee to undertake a detailed study of the draft convention on arbitral procedure. Paragraph 2 should be interpreted in the light of the second paragraph of the preamble. The joint draft resolution sought to make the International Law Commission's text a guide for the use of States and did not propose that they should adopt the text in its entirety.

45. Mr. MAURTUA (Peru) thought that the Soviet Union representative's observations were well-founded and that the Committee should decide what provisions of the draft convention were acceptable. The Committee could not ask Member States to be guided by a draft until it had studied the draft thoroughly itself. However, the draft did not merit consideration either as a work of codification or as an example of the progressive development of international law. He therefore agreed with the USSR representative that the Committee had to decide a preliminary question before taking a decision on the joint draft resolution.

46. Mr. CANAL RIVAS (Colombia) expressed surprise at the Peruvian representative's remark, in the light of the statement that had been made by the Cuban representative, and confirmed that the joint draft resolution imposed no obligation on Governments, but merely asked them to be guided by the International Law Commission's draft convention.

47. Mr. BIHIN (Belgium) recalled that his Government had already commented on the draft on arbitral procedure prepared by the International Law Commission, both in writing—on the text drafted by the Commission at its fourth session (A/2456, Annex I, section 2) and on the text drafted at its fifth session (A/2899, section 2)—and orally, at the eighth session of the General Assembly. His delegation considered that the International Law Commission had erred in preparing a draft which was concerned with both arbitration and international judicial settlement, which attempted both to codify existing law and to develop international law by laying down rules to ensure that

arbitral procedure would always culminate in an award, and which introduced a new element into arbitration: the compulsory nature of certain procedural provisions.

48. The draft prepared by the International Law Commission at its fifth session (A/2456, para. 57) was preferable to that which it had prepared at its fourth session (A/2163, para. 24), but the improvements that it made did not remove the Belgian Government's misgivings to which he had just referred. To justify the goal that it had set itself, the International Law Commission had referred, in paragraph 15 of its report covering the work of its fifth session (A/2456), to the provisions of its Statute and to Article 13 of the United Nations Charter. He thought that since its task was to prepare an international convention, the International Law Commission's prime concern should have been to prepare a work of practical value and to confine itself to codifying existing law. A convention had to be signed, ratified and applied by the largest possible number of States, and codification alone was a sufficiently onerous task, as it involved clarifying texts, giving binding force to existing custom, stating precisely the rules in use, and eliminating discrepancies. Acting with the best of intentions, the International Law Commission had done violence to the law, which, in such cases, protected itself very effectively by refusing to accept rules that did not correspond to its particular stage of development, just as nations protected themselves by refusing to commit themselves, or even by failing to implement conventions that they had signed.

49. As the draft convention formed a single whole, of which the elements relating to codification could hardly be isolated, the Committee could only accept it or reject it. He wished to draw attention to certain observations contained in the International Law Commission's report covering the work of its fifth session. In paragraph 16, the Committee claimed that it was maintaining in full force the principle that the arbitrators chosen should be freely selected by the parties, but it added immediately: or, at least, that the parties should have an opportunity of a free choice of arbitrators. Article 3 of the draft contained a whole series of compulsory

provisions that made it possible for one party to impose its will upon the other, so that one wondered what remained of the free choice of arbitrators, especially as it was precisely to the settlement of important points that those provisions applied. The same was true with regard to the arbitrability of disputes, the competence of the tribunal, the law to be applied, the proper procedure for revision and annulment, and, especially, the *compromis*. His conclusion was that the International Law Commission seemed to have been more concerned with the future development of international law than with the codification of existing law.

50. At the present stage the General Assembly could, as the International Law Commission proposed in paragraph 55 of its report, "recommend the draft to Members with a view to the conclusion of a convention", but for the reasons that he had stated he could not support that course. Nor did he believe that the General Assembly could usefully refer the draft to a conference of plenipotentiaries; any such conference would be compelled to note that very few elements of the draft were free from controversy. The solution proposed in the joint draft resolution (A/C.6/L.369) was not what the General Assembly and the International Law Commission had had in mind, and it would sanction the purely academic nature of the Commission's work. His delegation still hesitated to support the joint draft resolution.

51. He drew the Secretariat's attention to certain discrepancies between the English and the French texts of the joint draft resolution. The word "*recommande*" in paragraph 2 of the operative part was stronger than the English word "commends" and the phrase "*réviseront les dispositions*" should read "*réviseront des dispositions*".

52. Mr. MOROZOV (Union of Soviet Socialist Republics) asked that the Russian text of the joint draft resolution should be carefully checked.

53. The CHAIRMAN said that the Secretariat would take into account the observations of the Belgian and Soviet Union representatives.

The meeting rose at 1.5 p.m.