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Chairman: Mr. Alberto HERRARTE (Guatemala).

AGENDA ITEM 55

**Report of the International Law Commission on the work
of its eleventh session (A/4169, A/C.6/L.443, 444)
(continued)**

1. Mr. SUAREZ (Chile) said that it was clear from the International Law Commission's report covering the work of its eleventh session (A/4169) that useful progress had been made in the preparation of the drafts on consular intercourse and immunities and the law of treaties. At the present stage, however, the Committee should do no more than recommend that the General Assembly should take note of the report. Accordingly, he was fully prepared to support the joint draft resolution (A/C.6/L.444).

2. He believed that the right of asylum was a matter that should be included in the provisional list of topics of international law selected for codification and he would therefore support the Salvadorian draft resolution (A/C.6/L.443). It was to be hoped that those countries which did not agree that codification of that topic was important would later recognize its significance.

3. Mr. ROSENNE (Israel) said that one of the most important functions of the Sixth Committee was to provide a link between the Members of the United Nations and the technical work of codification and progressive development of international law undertaken by the International Law Commission. The Sixth Committee and the Commission itself had on several occasions discussed the Commission's method of work. His delegation had repeatedly stated that how the Commission conducted its work was not the Sixth Committee's affair, and he maintained that point of view. However, referring to Sir Gerald Fitzmaurice's observations at the 601st meeting, his delegation endorsed what had been said on the question of the Special Rapporteurs. Nevertheless, though recognizing that the Commission had been prevented by circumstances beyond its control from implementing its programme for the current year, he would recommend that it should re-examine its plans and projects in order to ensure that, if a similar situation arose in the future, the flow of completed drafts, if only in provisional form, would not be interrupted.

4. As far as the law of treaties was concerned, his delegation did not fully understand the implications

of chapter II, paragraph 13, of the Commission's report. In his view the law of treaties could only be adequately codified as a whole, and while various branches of the subject might be dealt with by the Commission in parts, it would still not be possible for the Sixth Committee to take final action until the whole text was available. If paragraph 13 meant that the Commission intended to present a series of interim reports on different branches of the law of treaties without prejudice to final action, when the work of codification was complete, his delegation would consider that procedure appropriate. As the law of treaties as a whole was being rapidly modified under the influence of expanding international relations, it would be useful for those engaged in treaty work to have a series of interim codifications of various aspects of the law of treaties produced by the Commission, a body which as a whole was representative of the principal legal systems of the world. Accordingly, his delegation hoped that the Commission would devote a part of all its forthcoming sessions to the topic.

5. Some speakers had referred to the question of the final form that the codified law of treaties should take, with particular reference to the views set forth in paragraph 18 of the report. Doubts had been expressed on the subject, owing to the provisions of Article 38 of the Statute of the International Court of Justice, which laid down what law it was that the Court was to apply in deciding disputes submitted to it. To his delegation it did not seem of any great moment whether a given text fell under the provisions of sub-paragraph (a) or sub-paragraph (b) of Article 38, paragraph 1, of the Court's Statute, and it appeared hardly practical to attempt to classify a text in relation to that article *a priori* and in the abstract. He was not aware that that article had given rise to real difficulties in practice, and it should not therefore be a determining factor when the Commission came to take its final decision. On the other hand it had to be recognized that there was a problem arising out of possible conflict of treaty obligations. Article 103 of the United Nations Charter dealt with one aspect of that problem. As it seemed, however, that the Special Rapporteur on the law of treaties had envisaged that the completed text would deal with the problems of the interpretation of treaty texts, he would no doubt include some material on the interpretation of conflicting treaty obligations. Subject to those observations, his delegation was prepared to support the joint draft resolution.

6. His delegation felt that, subject to certain clarifications, the draft resolution submitted by El Salvador (A/C.6/L.443) was acceptable. It was, however, somewhat broadly worded and that fact might be a source of confusion. Discussion of the right of asylum had a long history in various United Nations organs, and on 25 March 1959 the Commission on Human Rights had adopted a resolution by which it had decided to undertake at its 1960 session the drafting of a Decla-

ration on the Right of Asylum.^{1/} In the meantime, a revised preliminary draft was being circulated to Governments as well as to interested non-governmental organizations. Some clarification was needed regarding the respective functions of the Commission on Human Rights and the Economic and Social Council on the one hand, and of the International Law Commission and the General Assembly on the other, with regard to the right of asylum.

7. His own delegation's view on the matter was that the function of the Commission on Human Rights was defined by article 14 of the Universal Declaration of Human Rights: that function was to deal with the materialization of the right of asylum as laid down in general terms in the Universal Declaration. Work along those lines might well ultimately lead to the creation of new rules of international law in an area with which international law had little to do hitherto. The International Law Commission, for its part, should confine itself at the present stage to the codification and progressive development of that aspect of the right of asylum which was already regulated, to some extent at least, by international law, namely, the question of diplomatic asylum.

8. Much had been heard regarding certain regional concepts of the right of asylum as developed by the Latin American States. There were other concepts of asylum. In his delegation's view, if asylum was to be satisfactory it must be matched by an adequate system of extradition to ensure that genuine cases of asylum would not be confused with what was mere criminality, and the codification of the law of asylum should take that into account. Since Israel's independence in 1948, the Israel Government had been paying great attention to the establishment of a proper system of extradition designed to safeguard the rights of all concerned. In 1954 a new extradition law had been passed providing that any criminal, regardless of nationality, could be extradited from Israel provided there existed an extradition treaty with the requesting State, and his Government was vigorously pursuing the policy of concluding extradition agreements with the greatest possible number of States. On the other hand extradition, which was under judicial control, would not be granted if the courts were satisfied that its purpose was to try the accused for a political offence, or if the request for extradition was motivated on grounds of religious or racial persecution.

9. Subject to those observations, his delegation was prepared to support the draft resolution contained in document A/C.6/L.443.

10. Mr. PECHOTA (Czechoslovakia) said that the codification of both consular intercourse and immunities and the law of treaties was a complex task, demanding great experience, a sense of political reality and lasting patience. The International Law Commission was therefore entirely correct in appointing special rapporteurs to deal with individual questions.

11. In his opening statement (601st meeting), the Commission's Chairman had said that the Commission had intended to submit a completed draft on consular intercourse and immunities to the General Assembly at its fourteenth session and it had, according to the Chairman, been the Special Rapporteur's absence

during part of the session which had prevented the Commission from so doing. It should, however, be realized that there was nothing unusual in members of the Commission, who were recognized experts in international law, being entrusted with other important tasks connected with international matters, including the work of the International Court of Justice. Mr. Zourek, the Special Rapporteur on consular intercourse and immunities, had been required to act as an *ad hoc* judge at the International Court of Justice during part of the session of the International Law Commission. The Special Rapporteur had, however, returned to Geneva in time to allow the Commission five weeks of discussion on consular intercourse and immunities in his presence. At its tenth session the Commission had decided to devote no more than five weeks of its eleventh session to the question of consular intercourse and immunities (A/3859, paras. 57 and 64). That decision had been taken in view of the similarity of that topic to the subject of diplomatic intercourse and immunities, and it had been hoped that the Special Rapporteur's report could be disposed of summarily in the manner described in chapter V, section I, of the Commission's report covering the work of its tenth session. However, when the Commission had begun its consideration of the subject, it had decided that the method of summary procedure could not be used because the topic had been taken up only in the fifth week of the session and not at the beginning as originally contemplated. The reasons for that decision were difficult to understand, as the Commission could still have devoted the originally scheduled five weeks to discussion of the topic. In addition, the Commission had devoted considerable time in plenary session to details of a purely drafting nature which could well have been entrusted to a drafting sub-committee.

12. However, it was not the intention of his delegation to blame the Commission for that apparent delay in its work, and it still maintained that the Commission should be allowed to decide on such measures as would help it to achieve even better results. His delegation noted the present report of the Commission with satisfaction.

13. In his statement to the Committee at its 601st meeting, the Commission's Chairman had said that the urgency of the task of completing a draft on consular intercourse and immunities was all the greater because of the understandable desire of the Sixth Committee to consider the subject along with the closely related subject of diplomatic intercourse and immunities. As the International Law Commission had mentioned no such relationship in its report, his delegation interpreted that reference as a personal expression of opinion by the Chairman of the Commission. The report of the Sixth Committee to the thirteenth session of the General Assembly (A/4007, paras. 27 and 33) had made it clear that a majority of representatives felt that the subject of diplomatic intercourse and immunities was ripe for codification and that the draft prepared by the Commission provided a suitable basis for a convention, while a minority of delegations believed that final consideration of that draft should await the completion of drafts on other closely related subjects, including consular intercourse and immunities. His delegation assumed that the view of the majority in the Sixth Committee as adopted by the General Assembly and expressed in resolution 1288 (XIII) was the view that should prevail.

^{1/} See Official Records of the Economic and Social Council, Twenty-eighth Session, Supplement No. 8, chap. III, para. 74.

14. The Czechoslovak delegation held that diplomatic intercourse and immunities and consular intercourse and immunities were two separate subjects. Indeed, they had been considered for several years as separate items by the International Law Commission. A demand for joint consideration of the two questions would mean postponing further work on the codification of diplomatic law for several years, since the draft on consular intercourse and immunities might well not be submitted to the General Assembly before 1961, even if work proceeded smoothly. In addition, consular intercourse and immunities was a more complex question which would undoubtedly give rise to a large number of differences. Accordingly, a longer period might well be required for its consideration both by the International Law Commission and the General Assembly.

15. In conclusion, he wished to commend the International Law Commission on its work and he was fully prepared to support the joint draft resolution (A/C.6/L.444).

16. Mr. CHARDIET (Cuba) said that, since the drafts on the law of treaties and on consular intercourse and immunities were incomplete, for the reasons explained by the Commission's Chairman, it would be both premature and unreasonable for the Sixth Committee to begin any detailed analysis of individual articles. The better course would be to wait for the Commission to finish the draft and for Governments to communicate their observations. So far as the law of treaties was concerned, however, his delegation could already say that it accepted the reasons mentioned by the Special Rapporteur for giving the final work the form of a code. Not only would the text have to contain abstract rules and general principles, but the very idea of giving a set of rules on the law of treaties the form of a convention seemed paradoxical.

17. His delegation had already voiced its approval of the Salvadorian proposal at the 602nd meeting, for it believed that a codification of the principles governing the right of asylum was truly necessary. The Cuban delegation also believed that, whatever obstacles had to be overcome in dealing with that controversial subject, understanding and harmony would prevail. At the 604th meeting the Italian representative had rightly said that the rules on that subject could never be rigid and imperative. But neither should they be so general and flexible as to leave each State free to interpret them according to its own views. The fact that the rules could not be obligatory was even unfortunate, for the community of nations should be vested with sufficient coercive power to be able to punish States which violated international conventions and trampled on the law of nations.

18. The basic problem was to give a clear definition of a political offence in order to distinguish it from ordinary crimes. For that purpose an analysis of the nature was not enough to render an offence truly itself sufficient; the motives and purpose behind the offender's action were even more important. For as had been stressed by Jiménez de Azúa, the mere fact that the offender's motive was of a political or social nature was not enough to render an offence truly political. Such an offence also had to be designed as a contribution to the establishment of a progressive political or social régime. To be classified as "evolutive" an offence had to be a step along the "road to perfection". Consequently, wrongful acts inspired by

regressive designs could not properly be classified as political and social offences, and asylum should never be extended to criminals who had committed abominable acts solely in order to retain power. That was why the International Law Commission should, at the very outset, clarify the exact nature of a political offence. Otherwise, the determination of the nature of an offence would continue to depend on the State granting political asylum, which, as experience had shown, often extended it without justification. His delegation had the utmost faith in the International Law Commission's ability to discharge its task properly.

19. Mr. HU (China) said that, despite all the delays and frustrations, the progress achieved by the Commission at its eleventh session remained very impressive and deserved commendation. Both the sets of draft articles in the report (A/4169, chaps. II and III) being incomplete, however, he felt that only general remarks were called for.

20. So far as the law of treaties was concerned, the Special Rapporteur believed that the final text should take the form of a code. The arguments advanced in support of that view were clear and forceful, and his delegation's first reaction was certainly favourable. His delegation felt, however, that no firm stand should be taken on that point at such an early stage. It would be better to wait until the draft had been completed and Governments had been given an opportunity to study it.

21. The Chinese delegation was somewhat disappointed by the Commission's inability to complete the draft articles on consular intercourse and immunities. It adhered to the belief that the question of diplomatic intercourse and immunities and that of consular intercourse and immunities were closely interrelated and should be taken up at the same time, or at least with the possibility of cross-reference. His delegation also believed that the draft articles on *ad hoc* diplomacy could well be made an integral part of the convention on diplomatic intercourse and immunities. If a complete draft on those two subjects could be prepared in good time, the Committee's discussions would still be greatly facilitated.

22. With reference to the draft resolution submitted by El Salvador (A/C.6/L.443), he recalled that, at the General Assembly's thirteenth session, the Chinese delegation had expressed its regret at the Commission's failure to include provisions on the right of asylum in the draft articles on diplomatic intercourse and immunities (572nd meeting, para. 19). It would therefore naturally support the Salvadorian proposal.

23. Mr. COCKE (United States of America) said that the United States delegation fully agreed with the Chairman of the International Law Commission that the report before the Committee did not require detailed substantive discussion. But the comments of several representatives on paragraph 18 of the report (A/4169), dealing with the type of instrument in which the codification of the law of treaties should be embodied, had raised basic questions which required comment.

24. The Commission's function, as stated in article 1 of its Statute, was the promotion of the progressive development of international law and its codification. The distinction between those two terms, as expressed by article 15, was based on the extent to which the

subject under consideration was regulated by well-developed rules of international law. Whether there existed a sufficient body of State practice, precedent and doctrine on any given subject to warrant considering that subject ripe for codification involved a complex assessment of the state of the law. Even where codification was decided upon, the Commission was still required, under article 23 of its Statute, to recommend the type of instrument in which that codification should be embodied. His delegation recognized the complexity inherent in any such recommendation, and was confident that the matter would be thoroughly considered before any recommendation was made regarding the codification of the law of treaties, just as the past practice of the Commission indicated that careful study had preceded other recommendations of that nature.

25. His delegation would not express a final view on the provisional conclusion set forth by the Special Rapporteur in paragraph 18 of the report. However, it considered the Special Rapporteur's comments highly persuasive.

26. In connexion with paragraph 18, several representatives had stressed that the final basis of all international law was the consent of States. That consent could be manifested, of course, by practice as well as by formal agreements. Where the practice of States overwhelmingly recognized the existence of a rule of international law, a State was not free to follow a conflicting course of action. That was the essence of the concept of customary international law.

27. It had been suggested that one of the dangers inherent in the practice of submitting in the form of a convention codifications on topics well-established in customary international law was that the binding nature of that law might thus be made uncertain with regard to States which did not become parties to the convention or became parties only with reservations. The avoidance of that danger might not be the decisive factor in each case, but it should be disregarded by the Commission in making its recommendation under article 23 of its Statute or by the General Assembly in deciding whether to follow that recommendation.

28. With regard to the draft resolution submitted by El Salvador, it was gratifying that the sponsor, while indicating a desire for expedition, had left it to the Commission to determine when that question should be taken up. That decision had undoubtedly been made in contemplation of the work currently being done on the question of the right of asylum by the Commission on Human Rights. A comprehensive declaration on the subject was now under consideration by that body, and his delegation assumed that the International Law Commission, in planning its study of the item, would take that fact into account.

29. Mr. NEDBAILO (Ukrainian Soviet Socialist Republic) said that the International Law Commission should be commended for the valuable work it had done in recent years. One of its major achievements was the preparation of the draft articles on diplomatic intercourse and immunities. In that connexion, the Ukrainian delegation agreed with the representative of Czechoslovakia that those draft articles should be considered separately, and not in conjunction with subjects such as the draft articles on consular intercourse and immunities and *ad hoc* diplomacy, consideration of which was less far advanced.

30. Completion of the work on the draft articles on diplomatic intercourse and immunities either at a diplomatic conference or by the Sixth Committee, would be an important achievement on the part of the United Nations, which would serve as a useful precedent for other similar instruments and guide the International Law Commission in its work, especially with regard to consular intercourse and immunities and *ad hoc* diplomacy. The Commission could not consider the results of its work to be final because international law was created by the States themselves. The Commission was therefore very much interested in the reaction of States to the instruments it produced. However, in the case of the draft articles on diplomatic intercourse and immunities, the views of States could only be made known in the appropriate international body appointed to consider them in final form. Hence, it was essential that the work on the draft articles should be completed as early as possible and that could only be done if they were considered separately. Moreover, the General Assembly itself, in resolution 1288 (XIII), had referred to the "early conclusion" of a convention on diplomatic intercourse and immunities. The only question remaining was whether it should be concluded at an international conference or in the Sixth Committee. That decision should not be delayed pending completion of other instruments.

31. With regard to the other matters dealt with in the report of the International Law Commission, in particular the draft articles on the law of treaties and on consular intercourse and immunities, no final position could be taken since the Commission's work had not been completed. However, a few comments might be made to guide the Commission in its future consideration of those topics. For instance, article 2 of the proposed code on the law of treaties was somewhat confusing because it referred to an international agreement as being an agreement concluded between two or more States, or other subjects of international law, possessed of treaty-making capacity. It was explained in the commentary that the expression "treaty-making capacity" qualified the term "States" as well as the phrase "other subjects of international law", which seemed to give the impression that some States might not be possessed of treaty-making capacity. While that might be true of international organizations, it was not true of States which, by virtue of their sovereignty, had the right to conclude treaties. The point should be clarified, particularly since the Commission admitted in the report that it had not been fully discussed, and there were conflicting views within the Commission itself.

32. It appeared that even those who recognized the abstract right of States to enter into international agreements restricted that right to multilateral treaties. Others felt that the restriction was unwarranted. The Ukrainian delegation believed that the document on the law of treaties should make it clear that every State had the inalienable right to conclude treaties. A clear statement to that effect would confirm the principle that international relations must be based on the sovereignty and equality of States. That sovereignty was at the very root of international relations.

33. In connexion with its future programme of work, the Commission would do well to revert to the methods adopted at its tenth session (A/3859, chap. V) on the basis of the report of the Special Rapporteur, Mr. Zourek. Those methods had proved successful and

would enable the Commission to expedite its work in the future.

34. In conclusion, the Ukrainian delegation would be glad to vote in favour of the joint draft resolution on the report of the International Law Commission (A/C.6/L.444).

35. Mr. NUGROHO (Indonesia) recalled that, at the thirteenth session, the Indonesian delegation had expressed the hope at the 576th meeting of the Sixth Committee that the International Law Commission would complete its work on the draft articles on consular intercourse and immunities at its eleventh session, so that the Sixth Committee might have the full text available when discussing the closely related subject of diplomatic intercourse and immunities. He fully appreciated, however, the difficulties which the Commission had faced. Accordingly, his delegation agreed that the Committee should refrain from discussing the substance of the report and confine itself to taking note of the progress made, as formally proposed in the joint draft resolution.

36. Without prejudice to the discussion on the second item on the Committee's agenda, the Indonesian delegation thought that the question of reservations to multilateral conventions fell within the scope of the first section of the draft on the law of treaties, especially the articles dealing with "Elements of the text" and "Authentication of the text". He had been assured by the Commission's Chairman that the Commission would study the possibility of including some provisions on the subject of reservations in the draft code. That assurance was welcome, for the inclusion of the item on the Sixth Committee's agenda, as well as the letter of the Permanent Representative of the USSR to the Secretary-General of 24 September 1959 and the Secretary-General's letter of 27 August 1959, clearly showed that there was some uncertainty regarding the effect of reservations made at the time of signature or ratification of certain instruments. At the same time, the Commission might consider the possibility of studying the closely connected question of the duties of the depositary of instruments of ratification and accession.

37. A welcome feature of the Commission's report was contained in paragraph 45, which showed that the Commission was continuing co-operation with other bodies, especially the Inter-American Council of Jurists and the Asian-African Legal Consultative Committee. The new nations in Asia and Africa were constantly searching for correct expressions of their national aspirations and identities, not only in the political, economic and cultural fields but also in the field of law. It would be most regrettable if, in that search, they were to drift away from the main stream of world juridical practice, or if authorities outside those countries were not to be informed of the new trends in legal doctrine developing among the new nations.

38. Mr. NISOT (Belgium) endorsed the United States representative's view. The International Law Commission should not begin a study of the right of asylum until the Commission on Human Rights had completed its work on the subject.

39. Mr. MOROZOV (Union of Soviet Socialist Republics) said that the debate in the Committee had centred on two main points: the method of work of the International Law Commission, including the manner

in which it should present its recommendations to the General Assembly, and the move to revise a previous decision of the General Assembly and delay the work on the draft articles on diplomatic intercourse and immunities. On the first point, the suggestion had been made in the Commission's report that the codification of the law of treaties should take the form of a code. Some delegations, including that of the United States, had interpreted that to mean that all the Commission's recommendations on any topic should be presented in the form of a code rather than of a draft international convention. That was certainly not the Commission's intention. The Soviet Union, for one, believed that the best way for the Commission to present most of its recommendations was in the form of draft international conventions to be considered in the United Nations or at international conferences. Such a process would contribute to the progressive development of international law and its codification. The United States representative had referred to the danger of reservations being entered to conventions. The real danger lay in a lack of clarity in the drafting of legal texts. Thus, a State which did not wish to accept its obligations under a convention might find it less difficult to do so if the instrument was open to various interpretations. However, that danger was not great enough to warrant replacing conventions by codes in every instance. In the case of the draft articles on arbitral procedure, for instance, many delegations had felt that the Commission had drafted a series of articles that were not based on generally accepted rules of international law. The Commission could not ignore the attitude of the Members of the United Nations to its work. Whichever of the two methods it adopted, its recommendations were subject to the approval of the Members of the United Nations. Adoption of its recommendations implied recognition of its views by at least a majority of the Members. Bearing that fact in mind, it appeared that the best course would be for the Commission to present its recommendations in the form of draft international conventions. That method had been used in the past and should be applied again in the future. However, in certain specific cases it might be better to limit action to the codification of rules already adequately developed in international law. With respect to the law of treaties in particular, it was too early to recommend a specific method of action because there was not enough information to justify a decision at the present stage.

40. While the Soviet Union delegation strongly opposed a reversal of the General Assembly's decision regarding the subject of diplomatic intercourse and immunities, along the lines apparently favoured by some delegations, it took the view that the question should not be discussed immediately but should be deferred until the Committee considered the agenda item on diplomatic intercourse and immunities.

41. The Soviet delegation associated itself with the tributes paid to the Commission on its most valuable work and would be glad to vote in favour of the joint draft resolution expressing appreciation of that work.

42. Mr. PERERA (Ceylon) said that he had been authorized by the Cuban delegation to announce Cuba's co-sponsorship of the joint draft resolution (A/C.6/L.444).

The meeting rose at 12.45 p.m.