United Nations
GENERAL ASSEMBLY
FOURTEENTH SESSION
Official Records

SIXTH COMMITTEE, 606th MEETING

Monday, 5 October 1959, at 3.20 p.m.

NEW YORK

CONTENTS

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 and Add.1, A/C.6/L.445) (continued)

1. Mr. LIANG (Secretary of the Committee) drew the Committee's attention to the report of the second session of the Asian-African Legal Consultative Committee, held at Cairo from 1 October to 13 October 1958, copies of which he had just received from the secretary of that Committee and had circulated to members. That document contained the final report of the Committee on Functions, Privileges and Immunities of Diplomatic Envoys or Agents, which would be of interest to the Sixth Committee in connexion with the subject of diplomatic intercourse and immunities.

2. Mr. Maxwell COHEN (Canada) said that he wished to deal with four questions: first, certain general problems arising out of the history and operations of the International Law Commission; secondly, the report of the Commission covering the work of its eleventh session (A/4169); thirdly, the Salvadorian draft resolution (A/C.6/L.443); and fourthly, some general comments on the work and significance of the Sixth Committee itself.

3. With respect to the Commission's work, he felt that the delays in completing the draft on consular intercourse and immunities and the recent discussion in the Committee suggested certain ways in which that work might be accelerated. For example, there appeared to be nothing in the Commission's Statute to prevent the employment of outside rapporteurs who were not members of the Commission. Indeed, part B, articles 18 to 23, dealing with codification, made no reference whatever to the appointment of rapporteurs or to any requirement that rapporteurs, if appointed, should be limited to members of the Commission. It was true that in part A, dealing with the progressive development of international law, article 16 (a) said that the Commission should appoint one of its members to be rapporteur, but even that language would probably not prevent the Commission from appointing persons to assist the rapporteur in his research or to provide interim associate rapporteurs whenever other duties made it impossible for the regular rapporteur to complete his assignment. A second method of expediting the Commission's work might be to divide the Commission into chambers so that two or more projects could be considered at the same time rather than seriatim, as was necessarily the case at present, when the Commission operated as a committee of the whole. He realized that that proposal had been discussed before and that there had been some reluctance to divide the Commission's membership in a way that would prevent any of its members from sharing in the Commission's studies and recommendations. That difficulty, however, might be overcome by having the work of each chamber submitted to the Commission as a whole, whose corporate sense would in most cases lead to a general attitude of critical approval of the work of any one of its two chambers.

4. With regard to the Commission's report, his delegation shared the view that it would not be desirable to discuss in detail the substantive questions raised by the articles in chapters II and III. The subject of consular intercourse and immunities, in particular, should not be discussed by the Committee until the complete draft was before it. He would go even further and suggest that that draft, when completed, should be discussed together with the draft on diplomatic intercourse and immunities, since it was no longer possible, in view of the present practice of many States, to make a sharp distinction between those two fields. Indeed, there would be many advantages, of both an intellectual and technical nature, if those two drafts could also be discussed at the same time as the subject of ad hoc diplomacy and any studies which might result from the Salvadorian draft resolution respecting the right of asylum.

5. Concerning the question of the final form to be taken by the codification of the law of treaties, he hoped that the Committee would preserve an open mind on the question of code versus convention. There might well be a third possibility, namely, that of expressing the purely formal articles on negotiation, authentication, signing and the like in the form of a multilateral convention, while inserting the articles dealing with the meaning and interpretation of treaties, and possibly questions of validity, in a declaratory code. In view of the functional differences between those two categories of articles, such a division might prove more advantageous than a rigid insistence on either a declaratory code of principles on the one hand or a detailed multilateral convention on the other. In that connexion, he had been surprised to hear the Hungarian representative make statements (602nd meeting) which seemed to imply that the most desirable form of international law was that based upon the positive consent of States expressed in the form of a binding treaty. It was his understanding that a large part of the private law of Hungary, until recently at least, had been based upon a combination of mediaeval Roman law, customary Hungarian law and individual statutes and that although an attempt had been made early in the century to codify that law, the proposed code had not, to his knowledge, been adopted. If codification could present such difficulties for a municipal legal order having all the advantages of direct law-creating agencies, surely

customary law was a desirable source to be retained in the much more fluid and loosely organized international legal order. No one who had lived with both the common law and the civil law—and his country was fortunate to have both systems—could fail to accept the proposition that there was a flexibility and dynamism in "common" or "customary" law which could create a living, mature body of rules and a successful legal order.

6. With respect to the Salvadorian draft resolution (A/C.6/L.443), he wished to reserve his delegation's final position; as he had already indicated, there were reasons why the right of asylum might best be discussed in conjunction with consular intercourse and immunities, diplomatic intercourse and immunities and ad hoc diplomacy. If that draft resolution were adopted, he hoped that the Commission would seek to benefit by the results of the discussion of that subject in the Commission on Human Rights and in the Third Committee.

7. Lastly, he turned to the work and significance of the Sixth Committee itself. After reviewing in detail the Committee's agendas for the past ten sessions, he expressed regret at the fact that the number of items on its annual agendas appeared to be steadily declining and that many topics which were of peculiarly legal importance were handled exclusively by other committees. As the United Nations became more mature as an Organization, it was to be hoped that it would resort increasingly to legal procedures. A step in that direction would be the employment of joint committee studies whenever the subject-matter before other committees involved some legal element of importance. The day may still be far distant when the rule of law automatically governed the behaviour of States, but more rapid progress towards that ideal could be made if Member States would be willing to risk more law in their affairs rather than less.

8. Mr. de la GUARDIA (Argentina) said that his delegation would vote in favour of the proposal in the joint draft resolution (A/C.6/L.444 and Add.1) that the General Assembly should take note of the International Law Commission's report (A/4169) and express appreciation of its work.

9. With respect to the final form to be taken by a codification of the law of treaties, he agreed fully with the view expressed in paragraph 18 of the report that much of the law relating to treaties was not suitable for framing in the form of a convention containing a strict statement of obligation. Difficulties would also arise if some States failed to sign or ratify such a convention, or subsequently denounced it. On the other hand, the legal validity of a code which had not obtained the consent of States might be questioned. It might be asked whether the validity it would have would be that of customary law. Although codification work by the International Law Commission on subjects belonging essentially to customary law, such as the law of the sea and diplomatic intercourse and immunities, had already taken and might in the future take the form of binding conventions, it had proved impossible to transform a subject of conventional international law, arbitral procedure, into a convention and it had remained a statement of doctrine without legal binding force. The representative of Nicaragua had referred (603rd meeting, para. 20) to the Bustamante Code, but that Code derived its force from a convention signed at the Havana Conference in 1928 by fifteen Latin American countries, and the countries which, like Argentina, had not ratified it were not bound by it.

10. With regard to the Salvadorian draft resolution (A/C.6/L.443), it should be noted that the question of territorial asylum was already under study in the Commission on Human Rights. The right of diplomatic asylum for its part was something peculiar to Latin America, where there existed a body of practice, of custom, in the matter and various conventions on the subject were in force. The subject had been referred to at the recent meeting, in August 1959, of the Inter-American Council of Jurists at Santiago, Chile, and would undoubtedly come up again at the next Inter-American Conference at Quito. While it was true that some countries which did not recognize the right of asylum had occasionally granted it, such precedents had not been sufficient to constitute a practice such as existed in Latin America. The representative of Italy had expressed doubt (604th meeting) whether the matter was ready for consideration on a world-wide scale, and it seemed reasonable that before being codified, the law on the subject should be recognized by many States which did not recognize it at present. Under articles 15 and 20 of its Statute, the International Law Commission was required, in its work of codification, to take account of the extent of agreement on each point in the practice of all States and not simply a regional group of States.

11. It was, however, encouraging that many representatives of non-Latin American countries in the Committee had expressed their support of the draft resolution, so that a positive result could be expected. Accordingly, the Argentine delegation would also vote in its favour.

12. Mr. GLASER (Romania) said that as neither of the drafts on which the International Law Commission had started work at its eleventh session had been completed, it would be premature to express any final views on them. Indeed, the Commission might yet alter their content and might also see fit to change its interpretation of some of their provisions after drafting the remainder of the texts.

13. The Canadian representative had appealed to all Member States to be "willing to risk more law in their affairs rather than less", and elsewhere in his speech had said that there were good reasons for considering the draft on consular intercourse and immunities in conjunction with that on diplomatic intercourse and immunities. Such an attitude was highly inconsistent, and would not make for the speedy development of international law. The General Assembly, in resolution 1288 (XIII), had already decided to consider the question of diplomatic intercourse and immunities separately from consular intercourse and immunities. To take up the Canadian representative's suggestion would amount to reversing a decision already taken, and indeed, any reference to diplomatic intercourse and immunities at the present stage of discussion was irrelevant, as the subject would be dealt with as the third item on the Sixth Committee's agenda.

14. Without prejudice to its final decision regarding the form that the draft articles on the law of treaties and consular intercourse and immunities should take, his delegation would express its preference for codification with a view to embodiment in a convention. Codification could mean the preparation in precise terms of law of rules already established; it might

also include new elements, thereby making for the progressive development of international law. In fact, codification had always involved an element of innovation and necessarily led to certain changes in international law by the establishment of new rules. That was true of international law in general and of the law of treaties in particular.

15. There were many spheres of international law in which States did not agree on matters of principle. For example, as regards the conclusion of treaties, it had been widely acknowledged that there were no unanimously recognized rules regarding reservations to multilateral conventions, either as regards the States entitled to make objections to reservations, or as regards the juridical effect of those objections when some of the signatory States accepted the reservations and others did not.

16. There were also wide divergencies, as the representative of the Ukrainian SSR had rightly pointed out (605th meeting), regarding the qualifications of States to conclude international treaties. In his view any State, by virtue of its sovereignty, was entitled to conclude international treaties; but according to the draft articles on the law of treaties it seemed that there might be cases in which some States were not entitled to do so.

17. The validity of treaties was also a question of great importance. A "diktat" was by its form a treaty, but was it binding upon the State which had been forced to sign it? In international law a convention whose aim was contrary to the imperative rules of law was null and void ob turpem causam. What then was the validity of a treaty whose purpose was unlawful, contrary for instance to the principle of non-aggression or the right of self-determination? Authors and governments held extremely divergent positions on the subject, although in his view it was clear from Article 103 of the United Nations Charter that such treaties were null and void.

18. Another important question was whether treaties could affect States that were not parties to them. In that connexion, as Professor Hoyt had noted, a Secretary of State of the United States had declared on behalf of his Government that although the 1901 treaty between the United States and the United Kingdom concerning the Panama Canal provided that the Canal should be open and free to ships of all flags, other States not parties to the treaty had no rights under it. He was unable to agree with such an assertion. Many other examples could be given of questions on which there was no agreement at present between States.

19. Some maintained that international law was, as Brierly had said, like a cake with different slices and that only some of those slices were suitable for embodiment in international conventions. That meant that some subjects could not be codified and must remain as part of customary law. That view was, however, being disproved daily as an increasing number of rules of international law and matters which had in the past been regulated by custom were being incorporated in international conventions, dealing as much with general matters of international law as with special matters. Accordingly, general matters were just as suitable for codification and progressive development as special matters, despite Sir Gerald Fitzmaurice's assertion to the contrary. His delegation believed that all international law was suitable for codification and embodiment in international conventions. Indeed Article 38 of the Statute of the International Court of Justice implied that it was possible to regulate matters of general international law by means of conventions. That was in his delegation's view the proper interpretation of the reference to general conventions in the text of the Article.

20. Some maintained that it would be dangerous to conclude conventions on matters of general international law because it might be held that States which did not sign such instruments were not bound by them. Practice had shown, however, that general principles of international law could be successfully embodied in treaties, and in that connexion the provisions of Article 2, paragraph 6, of the Charter should be borne in mind. Moreover, if rules of conduct included in an international convention were drafted in such a way as to satisfy the legitimate interests of States, even States which were not signatories to that convention would certainly recognize and respect those rules. There was also a real danger in failing to conclude formal conventions, duly signed and ratified, for in the case of codes or declarations States could contend that the rules they contained had no binding force.

21. If it was finally agreed that the draft articles on the law of treaties should be embodied in a convention, they would have to be drafted in a somewhat different form from those at present submitted to the Committee. There would, however, be ample opportunity for redrafting them at a later stage.

22. His delegation wished to express its appreciation of the Commission's work and was fully prepared to support the joint draft resolution (A/C.6/L.444 and Add.1).

23. Mr. BHADRAVADI (Thailand) said that, in view of the purely interim character of the Commission's report, he agreed with the sponsors of the joint draft resolution that the General Assembly should only take note thereof and express its appreciation of the Commission's work. A special tribute was also due to the Commission's Chairman, for his account of the difficulties under which the Commission had had to work. In that connexion, he agreed that more time should be allowed to Governments for the submission of their comments on first drafts. For texts of that nature requiring careful study, two years was certainly not too long a period.

24. With reference to the Salvadorian draft resolution, he said that Thailand accepted the principle of codification for international as well as internal laws. His delegation accordingly accepted the Salvadorian proposal in principle, confident that every aspect of the question would be duly studied by the Commission.

25. Mr. SARAIVA GUERREIRO (Brazil) said that while it was not pleasant for the Committee and the General Assembly to have their programme of work somewhat disturbed, the Commission's inability to complete its draft on consular intercourse and immunities need not prove too serious. That work of codification was admittedly desirable, but it could hardly be regarded as very urgent. In fact, even the Commission's proposal to make up for lost time by allowing States only one year for the submission of their comments seemed unnecessary. The Brazilian delegation nevertheless believed that the questions of diplomatic intercourse and immunities and consular intercourse and immunities, although clearly interrelated, could be dealt with separately. Consistency in

terminology could be assured without examining the two texts at one time, and perhaps it might even be preferable to finalize the text on diplomatic immunities before proceeding to final consideration of the text on consular law.

26. The preparation of the drafts on the law of treaties, which was the second substantive matter raised in the Commission's report, was a long-term task of fundamental importance. It would occupy the Commission's time for several years and, if it was to serve any useful purpose, the final product would have to be as nearly perfect as possible. The rules governing the conclusion and effect of treaties were, in a way, the cornerstone of positive international law. By defining international custom they represented, so to speak, a constitution of international society, and had at least as vital a bearing on the legal relationships between subjects of international law as the rules governing the structure of the United Nations. By their very nature, therefore, they should be among the least controversial and most stable of international standards. But a distinction should be drawn between principles the observance of which was indispensable to the creation of any conventional bond between States and the more technical and procedural rules which permitted of greater flexibility. The draft articles before the Committee tended to juxtapose those two sets of rules, which perhaps explained why they read more like a textbook for students and practitioners than like an international treaty. Such a comprehensive and didactic manner of presenting the material had indeed been the Special Rapporteur's express aim, the Commission's provisional intention being that the text should not serve as the basis for one or more conventions.

27. The reason advanced against a convention was that criticisms voiced during its preparation and the eventual non-adherence of many States might weaken the force of the rules embodied in it. But it was precisely and need for universality and binding force which seemed to militate against a general code adopted by a General Assembly resolution. Furthermore, the adoption of any such code would have to be preceded by a discussion every bit as detailed as during the preparation of a convention at a diplomatic conference; and the psychological effects of a resolution approved against the wishes of a substantial minority would be as undesirable as the failure of some States to ratify one or more multilateral instruments.

28. Since a final decision on that point was not required immediately, the Brazilian delegation believed that the Sixth Committee should withhold judgement until it had received the final draft on the law of treaties as a whole. Possibly the most flexible and generally acceptable solution might then prove to be the separation of the material into two instruments: one containing the principles which a vast majority of States accepted as essential to the existence of conventional relationships, the other containing provisions more in the nature of regulations, regarding which differences of view might be possible. The first would thus be a constitutional text, the second more of a practical manual.

29. In conclusion, the Brazilian delegation had certain doubts regarding the Salvadorian proposal on the right of asylum, fearing that it might adversely affect Latin America's own interests. A world body could hardly approach that problem in the same spirit as prevailed in the Latin American region. Bearing in mind, however, the support already voiced for that proposal by several Latin American delegations, the Brazilian delegation would vote in its favour.

30. Mr. SALAMANCA (Bolivia) said that since the Commission's report was incomplete, it would be premature for the Sixth Committee to discuss its substance.

31. At its eleventh session the Commission had reviewed all the work accomplished at its first ten sessions. That review clearly showed that of all the texts presented by the Commission in final form, only the one on the law of the sea had led to the signing of international conventions. The reason seemed to be that many of the topics discussed by the Commission had never been likely to yield concrete results. Among those could be listed the formulation of the Nürnberg Principles, the question of international criminal jurisdiction, the Draft Code of Offences against the Peace and Security of Mankind, the question of defining aggression and the Draft Convention on the Elimination of Future Statelessness.

32. The results of the United Nations Conference on the Law of the Sea nevertheless showed that, despite certain tensions in international relations, it was still possible to find material suitable for codification. Every State should consequently strive to facilitate the Commission's work by proposing codifiable topics. The Commission would then be able, while working on complex and difficult subjects such as State responsibility and the law of treaties, to entrust one or more of its members with the simultaneous study of more readily codifiable material. In suggesting that, he was in no way seeking to belittle the importance of the topics currently under study, but it seemed that some of them, such as the two he had mentioned, would still require several years' work. The only items on which immediate results might be obtained were diplomatic and consular intercourse and immunities.

33. The Commission's recent experience also showed that it was necessary to have several projects pending at the same time in order that the Commission might present texts to the Assembly regularly, even if a special rapporteur on a priority topic was unavoidably absent. The Commission, Governments and the General Assembly would thus be able to ensure constant progress with codification work.

34. One topic of considerable interest, to which the International Law Association had drawn attention in 1956 and in 1958 and which had also been extensively studied by various inter-American and specialized bodies, was that of the use and exploitation of international or inter-State waterways. Believing in the importance of that subject and also of the related one of navigation on such waterways, his delegation would formally submit a draft resolution (A/C.6/L.445), calling for the codification of the relevant principles by the International Law Commission and requesting the Secretary-General to compile, classify and analyse the necessary material. The Commission would, of course, be free to treat the two subjects either jointly or separately.

35. So far as the Salvadorian proposal was concerned, the Bolivian Government had always recognized the great regional importance of the right of diplomatic territorial asylum. It was not certain, however, whether the topic could be codified in universally acceptable terms. As the institution was recognized

by Latin American conventions and practice, there was indeed little likelihood of its being either improved or clarified by codification. On the other hand, in other areas of the world, political considerations might place the problem in a different perspective.

36. Despite those doubts, if the Committee should wish to include the question of the right of asylum in the Commission's programme of work, the Bolivian delegation would not oppose such inclusion.

37. Mr. ESCOBAR (Colombia) said that the Committee had before it certain articles designed to form part of a code on the law of treaties. For various reasons, however, which it was not necessary for the Committee to analyse, those articles did not represent a finished work. Moreover, it was not even possible to envisage the finished product, since various points which came to mind would only be studied by the International Law Commission at a later stage. He hoped, however, that the Commission would prepare the final draft in such a manner that it could be considered as a single text, on which States might take up clear positions.

38. Several representatives had spoken of the possibility of embodying the law of treaties either in a code or in multilateral conventions. That issue might be of great academic interest, but in practice there would be nothing strange in approving a code which would present the relevant rules in orderly form and indicate the guiding principles which might later serve to render international law more uniform. Such a procedure seemed particularly appropriate in the case of rules regulating relations between States or between States on the one hand and international organizations on the other. A set of such guiding principles would present no danger whatever, especially if its adoption required the prior approval of the General Assembly. In any event, however, States would be able to submit their views as the preparation of the draft articles progressed.

39. Colombia's international position in the matter of asylum was well known. The Salvadorian representative himself, in submitting his draft resolution on that subject, had referred to a case in which Colombia had been a party. In the democratic American countries, with their respect for habeus corpus and representative republican institutions, the right of asylum had long been a recognized fact. That was because the basis of that right was the desire to give real and effective protection to the rights of the human person, in full accordance with the United Nations Charter. Asylum was not an abstract notion, but an institution supported by doctrine and firmly rooted in the Christian and civilized traditions of the Latin American peoples. Such a guarantee of human life encouraged the community to respect all rights and thus created mutual confidence between its individual members. In such an atmosphere any country resorting to arbitrary action for political considerations would inevitably come to grief.

40. Having always upheld the right of asylum, Colombia naturally welcomed the proposal that the relevant principles and rules of international law should be codified. In that connexion, it should be remembered that the right of asylum was not a regional right. As was proved by its gradual acceptance in countries outside Latin America, it stemmed from the intrinsic nature of the law of nations. The fact that it was not wholly accepted in some of those other countries could never destroy its international character. He therefore hoped that the draft resolution would be approved unanimously, on the clear understanding that what was sought was not a doctrinal definition but a co-ordination of scattered conventions, judicial rulings and authoritative commentaries. The right of asylum would thus be clarified and, consequently, more generally understood.

41. In conclusion, the Colombian delegation also warmly supported the joint draft resolution (A/C.6/L. 444 and Add. 1).

42. Mr. CACHO ZABALZA (Spain) said that he was prepared to support the Salvadorian draft resolution (A/C.6/L.443). It should, however, be made clear that the expression "right of asylum", at least in some countries, included both diplomatic asylum and territorial asylum. He assumed that the Salvadorian draft resolution was concerned with diplomatic asylum, as the Commission on Human Rights had already for some time been considering the question of territorial asylum and had submitted a draft declaration on the subject to Governments for consideration. To avoid duplication of work, it should be made abundantly clear that the Sixth Committee was concerned with the right of diplomatic asylum, although the representative of El Salvador, in introducing his resolution, had referred to both types of asylum. The Salvadorian representative would, he hoped, be prepared to make his position clear in that respect.

43. The need for codification of the principles of diplomatic asylum had long been felt. Various treaties on the matter had been concluded, mainly between Latin American countries, and their provisions would be a valuable precedent in developing work on the subject. Other precedents could be found in technical juridical studies which had been made on the subject. It had also been considered by the Institute of International Law, which had adopted resolutions on the right of asylum at a session held in September 1950. Spanish jurists had taken part in many international meetings where the right of asylum had been discussed and they had, on those occasions, taken the opportunity to state their views, as diplomatic asylum had long been recognized and respected by Spain.

44. Mr. USTOR (Hungary) said that the Canadian representative had wrongly stated that Hungarian private law was still mostly uncodified. That had admittedly been true in the past, the Hungarian legal system having long somewhat resembled the "common law" system. But the situation had recently changed, since a codification of the civil law had obtained parliamentary approval in July 1959 and was expected to enter into force during 1960. In the light of those developments, his earlier statement might not seem as surprising as the Canadian representative had suggested.

The meeting rose at 5.40 p.m.