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Chairman: Mr. Gonzalo ORTIZ MARTIN (Costa Rica).

AGENDA ITEM 65

Report of the International Law Commission on the work of its twelfth session (A/4425; A/C.6/L.467) (continued)

1. Mr. PEREIRA (Portugal) agreed whole-heartedly with the delegations—those of Yugoslavia (652nd meeting) and Poland (656th meeting) for example—which had attributed the alarming and indisputable decline of the activities of the Sixth Committee to the more general decline of international law in the United Nations. However, in his opinion, the decline of the rule of law was the inescapable consequence of the distortion of legal rules for political reasons, starting with the United Nations Charter itself.

2. The Charter was a treaty and should, therefore, in the absence of any special provisions, be construed in accordance with the general rules for the interpretation of treaties. To give it a political interpretation was tantamount to amending it outside the rules prescribed and was therefore a violation of the Charter itself.

3. There could be no doubt that the world society had changed radically since the time when the Charter was drafted, and the fact that it should seem necessary to adapt the United Nations to present-day conditions, as the Polish representative had pointed out, merely showed that there was a conflict between the requirements of legal interpretation according to the rules and certain political interests. If some of the provisions of the Charter seemed to bear no relation to the problems of the world of today, the only proper course of action was to amend it in accordance with the procedures laid down in Articles 108 and 109.

4. Political considerations should come into play only during the drafting of a treaty—or an amendment to a treaty—and not at the time of its interpretation. That view emerged clearly, in so far as the Charter was concerned, from the separate opinion of Judge Alvarez in connexion with the Advisory Opinion of the International Court of Justice of 28 May 1948.[1] He had recalled that the Court was only competent to determine legal questions and that, before examining a question, it must decide whether the legal or the political element was dominant therein. On the other hand, on the same occasion, Judge Krylon had asserted[2] that it was impossible to dissociate political and legal considerations; it had persisted in that view since that time and the result had been that, on many occasions, the Charter had been interpreted in a manner contrary to its letter and its spirit. Thus, the "adaptation" of the Charter to the problems of the modern world which some speakers advocated as a remedy for the decline of law was in fact the very cause of the decline.

5. As far as the work of the Sixth Committee was concerned, he recognized that the Committee ought to have been seized of a number of legal questions which were on the agenda of other Committees, but he did not agree that it ought to have been given the draft Declaration on the Right of Asylum (A/4452). In point of fact, only the question of diplomatic asylum was a question of a legal nature; the draft Declaration related purely to territorial asylum, which raised only political problems and therefore came within the competence of the Third Committee.

6. There had been sharp criticism in the Sixth Committee regarding the recruitment of officials of the Secretariat, and in particular of those of the Office of Legal Affairs. The text of Article 101, paragraph 3, of the Charter stated quite unequivocally that such recruitment must be guided by two different types of consideration, the "paramount" consideration being "the necessity of securing the highest standards of efficiency, competence and integrity". The consideration relating to geographical distribution could not be contained within the first, as the representative of Poland had sought to argue.

7. He believed that the high standard of efficiency, competence and integrity displayed by the staff of the Office of Legal Affairs was indisputable. On the other hand, he hoped that efforts would be made to make the geographical distribution of posts in the Office more equitable and more representative of the various world systems of law. Although there were no nationals of Portugal, which possessed many distinguished lawyers, in the Office of Legal Affairs, he would deny that there had been a deliberate attempt to keep out nationals of certain countries or certain regions.

8. Turning lastly to the report of the International Law Commission (A/4425), he was glad to note that Professor Yasseen had been elected to the Commission.

9. In view of the high standard of the draft articles on consular intercourse and immunities, contained in chapter II of the report, the Portuguese delegation would support any resolution taking note of the report

[1] Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948, Individual Opinion by M. Alvarez, section III.

[2] Ibid., Dissenting Opinion by M. Krylov, section I.

and congratulating the International Law Commission on its work. At the present stage, he would merely note that the decision to be taken in regard to draft article 65 was, in his view, unavoidably linked with the form in which that field of international law would finally be codified. In the view of the Portuguese delegation, the conventional form was essential, because only a convention would have binding authority so far as States were concerned. However, if the final draft was to serve as a model for bilateral conventions, there would be no point in the provisions of article 65. On the other hand, if the draft was to be incorporated in a multilateral convention, the first text of article 65 submitted by the International Law Commission should be adopted.

10. In regard to the draft articles on special missions, contained in chapter III, the Portuguese delegation approved the recommendation to refer them to the United Nations Conference on Diplomatic Intercourse and Immunities to be held at Vienna in 1961; it was not the province of the Sixth Committee to study those texts, which referred simply to the draft articles on diplomatic intercourse and immunities (A/3859, para. 53).

11. In conclusion, the Portuguese delegation reserved the right to comment at a later stage on the draft resolution before the Committee (A/C.6/L.467).

Mr. Rosenne (Israel), Vice-Chairman, took the Chair.

12. Mr. TAMMES (Netherlands), after referring to the historical introduction to Mr. Žourek's first report on consular intercourse and immunities,[3/] recalled that the institution of the consulate had from its earliest days always been concerned with protecting the interests of individuals, and had therefore entailed a restriction of the sovereignty of the State of residence, on a basis of reciprocity. On the other hand, the diplomatic agent was not usually required to assist the nationals of the State which he represented. That basic difference emerged clearly from a comparison of the draft articles relating to diplomatic intercourse and immunities and those relating to consular intercourse and immunities.

13. That distinction could be extended to all the work produced so far by the International Law Commission and could serve as a guide in the choice of further topics of international law for codification. In point of fact, some of the work done so far by the International Law Commission dealt exclusively with relations between States, considered as subjects of international law (the work on the rights and duties of States, the law of treaties, reservations to multilateral conventions, arbitral procedure, diplomatic intercourse, etc.), while other projects placed primary emphasis on the human being represented, from the technical point of view, by a State or even by the community of States. The last category should be deemed to include not only such questions as the elimination of statelessness but also the responsibility of States for injury to aliens and the law of consular intercourse.

14. That balance between the international law of mankind and the international law of States should be maintained in the work of the International Law Commission and of the Sixth Committee as long as it was in keeping with political reality in the world, without any attempts to press one approach at the expense of the other. For example, there was no use in hoping that certain urgent political problems could be solved by drawing up binding rules of international law; paradoxically enough, it was only adequate prior agreement and therefore a lack of urgency that made topics suitable for codification. That was the reason for the slow progress of international law and the rather meagre agenda of the Sixth Committee.

15. It would be well to bear those considerations in mind if there was any question of revising the programme of work of the International Law Commission. He felt that the Sixth Committee ought not to discuss that question until it had heard the views of the International Law Commission itself. In the meantime, the Commission was competent, as it had decided at its first session (A/925, para. 12), to continue its work according to the procedure laid down in articles 19 to 23 of its Statute, without waiting for the General Assembly's decision on the recommendations submitted by the Commission under article 18, paragraph 2. Moreover, its agenda seemed to be quite full already, and it would be very difficult to speed up its work.

16. In any event, the Netherlands delegation hoped that the International Law Commission would retain the authority which it had acquired since its establishment. That meant that the Sixth Committee must abstain from interfering in studies which were not yet ready for submission to the Assembly, but at the same time, the International Law Commission itself must not show signs of indecision—for example, leaving it to Governments to choose between alternative texts as in the case of article 65 of the draft articles on consular intercourse and immunities. It was for the International Law Commission to guide Governments, particularly in matters connected solely with legislative technique. In that connexion, it should be noted that article 65 raised the question of the relation between bilateral conventions and a multilateral convention on the same subject. With the development of international law, the problem of conflicts between various instruments of international law could be expected to arise more and more frequently.

17. Mr. KHELIL (Tunisia) said that, like almost all the speakers who had preceded him, he found it inconceivable that, at a time of intense international activity, when legal problems consequently arose more frequently and in more acute forms, the Sixth Committee should be reduced to considering only three items of relatively minor importance. However, his delegation did not attribute responsibility for that decline to the International Law Commission or to the Office of Legal Affairs, for, among other factors, political obstacles and the lack of diligence shown by certain Governments in transmitting their observations on a particular problem to the Secretariat slowed down the work of the International Law Commission and, consequently, of the Sixth Committee. The possibilities of fruitful co-operation between the Organization's legal organs must be safeguarded. To that end, the members of the Sixth Committee should give up any nationalist, regionalist or partisan conceptions of the problems discussed in the Committee, approach the study of the questions placed before

3/ Yearbook of the International Law Commission, 1957, vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), document A/CN.4/108, paras. 1-65.

them in a spirit of intellectual co-operation and find solutions consistent with respect for the various legal systems. In order to revitalize the Sixth Committee, its members were in duty bound to express their concern to those who had prepared its agenda and to co-operate with the Office of Legal Affairs.

18. In connexion with the International Law Commission's report on the work of its twelfth session, his delegation could not but congratulate the Commission on the constructive work it had accomplished. The Commission had always succeeded in overcoming the difficulties which arose in any work of codification or progressive development of international law. After preparing a set of draft articles on diplomatic intercourse and immunities, it had prepared another set on consular intercourse and immunities. The two drafts had several points in common. The diplomat and the consul had a special status, since both were persons who represented their State abroad. They enjoyed facilities and privileges in the countries in which they resided and also had duties towards those countries. A codification of the rules governing that special status would be of value only if it was definitively embodied in a general multilateral convention adopted by the various countries.

19. In the consular field, codification was doubly useful. First, by standardizing the rules governing consular intercourse, it would improve the spirit in which such intercourse was carried on: it would eliminate the misunderstandings which might arise from interpretation of the conventions concluded between Governments and would have the additional advantage of enlarging the system of bilateral reciprocity and transforming it into multilateral reciprocity, thus reducing the applicability of the concept of most-favoured-nation treatment. Moreover, by subscribing to a general convention on consular intercourse and immunities, the States would undertake to give up any idea of discrimination against others. His Government attached especial importance to the proper balance of rights and duties, which had been well brought out by the Commission in the draft articles. Secondly, codification would meet an immediate and practical need felt by the countries which had just entered the international community. Those countries often encountered difficulties in deciding on the treatment to be accorded to the consular missions which they received. In the absence of traditional usage, they usually followed the system of the country on which they had been dependent; although that solution allowed them to profit by the experience of others, it also caused them to inherit any defects in the system concerned.

20. His delegation regretted that the Commission had had to deal hastily with the question of ad hoc diplomacy and had not submitted it to Governments in accordance with the usual procedure. It drew the Committee's attention to article 2 of the draft articles on special missions, which was the essence of the text, and reserved the right to revert to it later.

21. Mr. KUMA (Ghana), emphasizing the importance of strengthening international law, said that all the States represented in the United Nations recognized international law, but all did not respect it, or at least some of them respected it only to the extent that it did not conflict with their interests. No one would claim that the Sixth Committee should not take the interests of States into consideration, but it should avoid introducing any elements of the cold war into its discussions. It should debate the problems of international law in complete objectivity if it did not wish its work to remain a dead letter.

22. His delegation considered that the geographical distribution of the staff of the Office of Legal Affairs was unsatisfactory and not in conformity with Article 101, paragraph 3, of the Charter. The twenty-five African States Members of the United Nations were not represented in it and Latin America had only one post, although it was well known that Latin America produced some very eminent jurists. It was therefore unfortunate that reference had been made to "competence" to justify that state of affairs. It had also been said that the staff must demonstrate "integrity", but no one doubted the integrity of the members of the International Court of Justice, who represented different geographical regions and national groups. It was therefore imperative that the Secretary-General should revise the composition of the Office of Legal Affairs, even if that meant increasing the number of staff from twenty-five to thirty-five. It was also necessary to change the composition of the International Court of Justice and the International Law Commission in order to take the interests of the new African States into account. The Legal Committee should be the last to regard a revision of the Charter as sacrilege.

23. His delegation congratulated the International Law Commission on its report covering the work of its twelfth session. The draft articles on consular intercourse and immunities had been sent to Governments for comment, and it would be helpful if members of the Committee—who would be called upon to advise their Governments in the matter—reached as large a measure of agreement as possible on those provisions there and then. A codification of the kind proposed would help to reinforce international law, and he hoped that in time States would gradually abandon the exaggerated notion of sovereignty and recognize the binding force of international law, which would by no means diminish their genuine sovereignty. It would accordingly be a mistake to allow bilateral treaties to override the general rule set forth in a convention accepted by all Governments. Article 65 of the draft gave States too much latitude by allowing reservations of that kind. With regard to articles 32, 36, 45 and 46, it should be specified whether those exceptions were to be regarded as rights or privileges. In article 42, paragraph 1, the word "liable" should be replaced by the word "competent". It was probable that acceptance of the draft articles would require Member States to amend their domestic legislation, but that would testify to the supremacy of international law.

24. With regard to the inadequacy of the Sixth Committee's programme of work, which many delegations had deplored, he thought that there was no reason to fight shy of consideration of the legal aspects of political or quasi-political, economic or social questions. Any other approach would be defeatist and demoralizing. Moreover, it would be a grave disservice to the Committee and the entire Organization to reject or accept the inclusion of a proposed agenda item on grounds springing not from the substance of the question but from the sponsorship of the proposal.

25. He suggested that the Office of Legal Affairs and the International Law Commission should from time to time draw the Sixth Committee's attention to topics and law reforms which might form the subject of recommendations to the General Assembly. In addition, the Office of Legal Affairs might send a more urgent appeal to Governments and various legal bodies to submit suggestions and drafts. Those measures would help remedy the Sixth Committee's ills.

26. His delegation reserved the right to speak later on the draft resolution (A/C.6/L.467), which it had submitted together with seven other delegations.

27. It supported the suggestion that the draft articles on special missions should be referred to the Vienna Conference (A/4425, para. 36), and was glad to note the International Law Commission's decision (ibid., para. 43) to send an observer to the fourth session of the Asian-African Legal Consultative Committee.

28. Mr. VASCONSELLOS (Paraguay) said that, while there had been no deliberate attempt to minimize the role of the Sixth Committee, its activities had undeniably decreased. The errors in the allocation of items to Committees had been made by the delegations in the General Committee and had not been remedied in time by the General Assembly. It had been said that other Committees were dealing with items of a strictly legal nature; but those matters also had political, economic and social aspects. It was impossible to review, as had been suggested, all the items on the General Assembly's agenda and identify those of a legal nature; but the Sixth Committee might ask the General Assembly, in allocating items for consideration, to bear its existence in mind. It might be appropriate, in that connexion, to request the co-operation of the Secretary-General through the Office of Legal Affairs. Close ties should also be maintained with the International Law Commission, since it was through that body's work that one of the objectives of the United Nations could be achieved. It was not for the Sixth Committee to give it directives or ask it to intensify its work, but the Committee could tell the Commission what priority it would be best to give to questions submitted to it for study. Certain problems, like freedom of navigation of international rivers and the right of asylum, would have to be settled on the basis of international conventions.

29. His delegation had great faith in the law and in legal institutions. But the development of legal institutions was a slow process, contingent upon highly complex factors. All the same, there could be no doubt that those institutions were advancing satisfactorily. Only faith in justice and law would save mankind from annihilation. It was the responsibility of jurists to instil that faith into persons active in political life.

30. His delegation paid tribute to the serious and comprehensive work done by the International Law Commission. The consular institution was a very old one, going back to the beginning of the Christian era, but the first attempts at codification had started only in the last century—at the hand, initially, of individuals, then of institutions of international law, and finally of States. In 1928, the Latin American countries had concluded the Convention on Consular Agents, composed of twenty-five articles and based on a draft prepared by the International Commission of Jurists.

31. In view of the provisional nature of the draft articles submitted by the International Law Commission, he would confine himself to a number of general observations.

32. It seemed that, as matters stood at present, consular functions had been considerably reduced in favour of diplomatic missions. Modern diplomacy was oriented towards the strengthening of friendship between peoples through the establishment of closer economic and cultural ties, with the result that diplomatic missions were absorbing some of the functions which were traditionally consular. Many European and American countries maintained their consular activities as a branch of their diplomatic representations. "Diplomatic consuls" were enjoying privileges and immunities which in general had not been accorded to consuls; that should be taken into account in determining the status of the consular institution.

33. He drew the attention of representatives to the functions which the draft assigned to consuls and observed that they stemmed from treaties and conventions which were in some respects unsuited to modern times. It might be asked, for instance, whether a European consul sent to the United States could protect the interest of 100,000 of his compatriots residing, temporarily or permanently, in that country. As travel was being facilitated by ever faster means of transport, it would be unrealistic to think that a consul would be able to ensure the protection of such a considerable number of his compatriots. A country's laws, moreover, applied to all its inhabitants without exception, whether they were nationals or aliens. It might be asked whether the consul was able to offer protection better than that afforded by the law, or how far a foreign jurisdiction should be allowed to encroach on the domestic jurisdiction. Those were questions of which the draft articles must take account, if the transformations of the age were not to be disregarded.

34. With regard to the draft articles on special missions, his delegation endorsed the recommendation of the International Law Commission that the draft be referred to the Conference to be held at Vienna in 1961.

35. The Committee had before it a draft resolution (A/C.6/L.467) which reflected the thoughts of most delegations. He considered that it should provide for more than the preparation of a new list of topics of international law for codification, and reserved the right to revert to the matter at the appropriate time.

36. Mr. SHARP (New Zealand) said that, at a time when people everywhere were watching anxiously to see whether the United Nations could resist tensions dividing the world, it was the responsibility of the representatives of all States, old and new, to see that law was made the basis of international life. Unlike those who held that the established principles of international law had been developed by the older Powers to the detriment of the newer nations, and that the latter must therefore sweep them away, his delegation considered that international law was an indispensable safeguard for those nations. Indeed, the concept of sovereign independence, like that of the equality of States, was a concept of international law.

Further, all States, whatever the philosophical system underlying their domestic law, accepted and applied the principles of international law almost automatically.

37. The difficulties which arose usually stemmed from divergences of interests between States, which might lead them to challenge the interpretation of the law or maintain that new circumstances had arisen for which the existing law did not provide. There was certainly a need to codify the existing law in order to give it greater certainty, and to develop new law to take account of changing needs. But the answer did not always lie in legislation of that kind; there was also a need for all States to reaffirm their willingness to abide by the international obligations they had assumed under instruments which were, moreover, often interpreted and applied very liberally. The draft articles on consular intercourse and immunities, which reflected the natural evolution of international law, testified to the desirability of encouraging the codification and progressive development of international law. While reserving his delegation's right to present its final views on the draft at a later stage, he wished to pay a tribute to the International Law Commission for the high quality of its work. He would merely mention that some of the articles applying to honorary consuls might have to be drafted a little more precisely. Also, he accepted the Commission's recommendation for reference of the draft articles on special missions to the Vienna Conference, although that involved a minor departure from the procedure generally followed.

38. The New Zealand delegation believed that the International Law Commission had, since its creation, made an effective contribution towards promoting a more steadfast adherence by States to the principles of international law. Having accepted the long-term nature of the Commission's task, and having left it to organize its own working methods, the Sixth Committee had never had occasion to question the quality of its work. The results achieved in the field of the law of the sea showed that the Committee's confidence had been justified. No one could accuse the International Law Commission of working in an atmosphere of academic isolation, and the Sixth Committee should think very carefully before taking any steps that might alter the character of the Commission's work or plunge it into the controversies which sometimes divided representatives in the Committee. The Commission's work in technical and relatively uncontroversial fields—like, for example, the law of treaties—could greatly contribute to the improvement of day-to-day dealings between States. Without, therefore, suggesting that the Commission should never take up markedly controversial questions, he believed it essential to maintain the independence of that body, the members of which acted in their personal capacities; the Sixth Committee should hesitate to give directives to the Commission, or to interpose itself between the Commission and the Special Rapporteurs. Only when the Commission submitted its final draft to the General Assembly would the Sixth Committee have to determine whether its work adequately reflected the needs and aspirations of the present-day world.

39. Bearing in mind the universality which should characterize the law-making activities of the United Nations, his delegation welcomed the efforts made by the International Law Commission to be represented by an observer at meetings of regional legal bodies. In the same spirit, the claims of one group, in the United Nations itself, should not be pressed to the detriment of the interests of another.

40. Referring to criticism of the Secretariat and the Office of Legal Affairs, he expressed the hope that it would be possible to achieve a better balance in the composition of the staff, without disregarding the paramount consideration set forth in Article 101, paragraph 3, of the Charter. But it was difficult for the Legal Counsel to ensure perfectly balanced geographical representation when the membership of the United Nations was rapidly increasing and the Office of Legal Affairs comprised only about twenty-five professional officers, whose full usefulness depended on the experience that they had acquired. The accusation that the Office of Legal Affairs had sought to impose its point of view on the International Law Commission could not be taken seriously.

41. The United Nations could not discharge its functions unless the independence of the Secretariat was fully preserved. The New Zealand delegation had always defended that independence against all attacks, and hoped that members of the Secretariat would be able to do their work impartially and free from pressure by any one country or group.

42. Mr. MOLINA LANDAETA (Venezuela) said that he would not analyse in detail the draft articles on consular intercourse and immunities, which were being studied by his Government. The codification of a topic governed both by domestic and by international law was a most important undertaking, and he was pleased to see that the rules observed in his country in the matter of consular law were, generally speaking, in line with the draft articles prepared by the International Law Commission. On some points, however, there was divergence; for example, articles 18 and 19 of the draft provided for the combination of consular and diplomatic functions in certain cases, a practice which was not accepted by Venezuela.

43. His Government would express its opinion at a later date on the two variants of article 65 regarding the relationship between the articles of the instrument and bilateral conventions. So far as the final form of the instrument was concerned, he favoured a multilateral convention, which he thought would have more advantages than drawbacks. He supported the suggestion that the draft articles on special missions should be referred to the Vienna Conference.

44. He had taken note of the contents of chapter I of the International Law Commission's report, and welcomed the election of Mr. Jiménez de Aréchaga and Mr. Yasseen. He was pleased to see, from chapter IV (para. 43), that the Commission proposed to send an observer to the fourth session of the Asian-African Legal Consultative Committee to be held at Tokyo in 1961.

45. He disagreed with the interpretation of certain provisions of the Charter under which several speakers had thought that they could raise political questions in the Sixth Committee. He also dissociated himself entirely from the criticism directed at the International Law Commission and the Office of Legal Affairs, for which he had the highest regard. Latin America was not adequately represented in the Office

of Legal Affairs, but that was no reason for questioning the integrity of its officials.

46. His delegation would revert at a later date to the draft resolution (A/C.6/L.467) which, together with other delegations, it had sponsored with a view to furthering the development of international law.

The meeting rose at 5.45 p.m.

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