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Summary record of the 615th meeting

Topic:
Programme of work

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615th MEETING

Wednesday, 21 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Planning of future work of the Commission (A/CN.4/138) (*continued*)

[Agenda item 6]

1. The CHAIRMAN invited continued debate on item 6 of the agenda, with special reference to General Assembly resolution 1505 (XV).

2. Mr. EDMONDS said that such subjects as State responsibility and the law of treaties, with which the Commission had already begun to deal, should be kept on its agenda, as Mr. Erim had said (614th meeting, para. 62). On the other hand, he saw considerable merit in Mr. François's argument (*ibid.*, para. 61) that either the Commission should undertake more restricted topics or that its sessions should be prolonged. Because the Drafting Committee's draft texts were submitted to the plenary Commission late in each session, it was impossible to discuss them as thoroughly as they deserved. He realised that the prolongation of the Commission's sessions would run into serious difficulties, but thought that, if at least part of the Drafting Committee's drafts could be submitted earlier, the Commission would have more time to consider them and produce more careful thought out instruments.

3. Mr. YASSEEN said that, having been present at the Sixth Committee's discussion of the text which had become General Assembly resolution 1505 (XV), he wished to clarify some points and to dispel certain doubts. He did not think that the resolution needed any defence. The Assembly's competence in the matter of the progressive development of international law and its codification was based on Article 13(a) of the Charter; it had not abdicated that competence in establishing the Commission, which was its creature. It had the right to propose to the Commission subjects to be considered, and had exercised the right on a number of occasions, and to suggest a programme of work. That in no way impaired the competence or prestige of the Commission. Nor did anyone challenge the Commission's right to choose subjects to be considered or codified, and no representative in the Sixth Committee had doubted the Commission's competence in that respect.

4. The object of the sponsors of the resolution had been that the Assembly should take an active part in the codification and progressive development of international law. Admittedly, the Commission had a programme; but it had not been useless for the Assembly to express its opinion on the matter. For whereas the choice of subjects had a technical aspect, it also had an eminently political aspect which was influenced by a number of factors. Nobody had argued that the Commission was not qualified to weigh those factors; it had merely been stressed that the Assembly and, more particularly, the Sixth Committee, which consisted of jurists who were at the same time representatives of governments, were highly qualified to do so. The Sixth Committee had at all times been mindful of the idea, so admirably expressed by Mr. Amado, that international law was the work not of professors but of statesmen. Even from the point of expediency one could not challenge the right of the jurists who represented States in the Assembly to " survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law " (General Assembly resolution 1505 (XV), operative paragraph 1).

5. The Sixth Committee's debate on that question had been most useful and had evidenced the great interest which many States took in the progressive development of international law and its codification. It should perhaps be mentioned that in the course of the debate several representative had stated that the draft resolution did not imply the slightest criticism of the Commission, and the Sixth Committee had gone out of its way in the resolution itself to express its satisfaction with the Commission's work. The relevant provision had not been opposed by any delegation. The Assembly resolution in question provided for a reasonable and helpful method of work. The second draft resolution which had been submitted by twenty-four States [1] had met with particular favour in the Sixth Committee and had been adopted unanimously. That draft had differed from the first in that it omitted the provision concerning the appointment of a special committee whose function would have been simply that of making preliminary studies to facilitate the Assembly's task.

6. In conclusion he thought that the resolution reflected the common concern of all states to promote the codification and progressive development of international law and was to be heartily welcomed.

7. Mr. HSU said that he, too, had attended the debates in the Sixth Committee which had culminated in the adoption of General Assembly resolution 1505 (XV); he regarded that text as a concession to certain criticisms of the Commission's work made during the debate. As some representatives had pointed out, the resolution was, in a manner of speaking, a reflection on the methods used by the International Law Commission; nevertheless, the Sixth Committee had been relatively considerate, and had not included in the resolution any recommendation for the establishment of a special committee: operative paragraph 1 simply stated that the question should be placed on the provisional agenda of the sixteenth session of the General Assembly. It was noteworthy that few, if any, governments had as yet submitted any views or suggestions on the question

[1] Afghanistan, Argentina, Brazil, Canada, Ceylon, Colombia, Denmark, Ethiopia, Ghana, Indonesia, Iran, Iraq, Lebanon, Liberia, Mexico, Morocco, Netherlands, Pakistan, Thailand, Tunisia, Turkey, United Arab Republic, Venezuela, Yugoslavia.

to the Secretary-General in response to operative paragraph 2.

8. Thirteen years previously, the Secretariat had made a special study of the whole field of international law from the point of view of its codification, and the General Assembly had recommended a list of topics for the Commission to work on (A/925). In his opinion, that study was still valid; but it might be a good idea if a small committee reviewed the enumeration and decided which of the topics not yet discussed should receive priority. A notable omission from the original list was, however, the international law of war. Some might think that since war had been outlawed, it should not be endowed with the dignity of a code; it would be naïve, however, to assume that human nature had changed and that no more wars would take place simply because the concept had been outlawed. Indeed, the United Nations itself had gone to war against North Korea in 1950. Over the past three or four hundred years, a great deal of attention had been paid to the subject, and there would be no lack of precedents and rules for codification.

9. The Commission had acquired a great deal of experience in the thirteen years of its existence. One of the greatest difficulties it had encountered was that of the quinquennial change of membership and the consequent anxiety as to whether or not topics entrusted to certain Special Rapporteurs might have to be shelved. Mr. François had even gone so far as to express the view that the Commission should not undertake to deal with topics which it could not complete in five years (614th meeting, para. 61). But in that case, when would the Commission be able to deal with important and vast topics? Perhaps individual special rapporteurs might be replaced by a small body of experts, not necessarily members of the Commission. That solution would, of course, involve a revision of the Commission's Statute, but the General Assembly might agree to make the amendment. In that way, much of the preliminary work could be done outside the Commission and the area for government observations would be reduced. Moreover, members of the Commission were prone to speak at some length for the record; if part of the preliminary work were done beforehand, lengthy debate would no longer be necessary. He was sure that the method of entrusting certain topics to bodies of special rapporteurs would help to remove the causes for much of the criticism that had been levelled at the Commission in the Sixth Committee.

10. Mr. BARTOŠ, commenting on the relations between the General Assembly and the Commission, said that the Commission was a subsidiary body of the Assembly and that, under the Charter, the codification and progressive development of international law was a prerogative of the General Assembly, which was entitled to take the initiative in the matter. Nor was that hierarchical subordination the only consideration; the Commission provided the technical basis for the consideration of topics at the political level. Mr. Yasseen had rightly pointed out that the selection of topics for codification was both a political and a technical question; the political aspect was the establishment of priorities to meet the needs of the international community, while the technical aspect was to ascertain whether certain topics were ripe for codification and for progressive development. Accordingly, the Sixth Committee and the International Law Commission should work hand in hand.

11. The Sixth Committee seemed to believe that the Commission was unduly conservative in its approach and that it laid down academic rules, rather than codifying customary rules of international law. The Commission had also been criticized for not paying enough attention to developing the principles of the Charter into rules of international law. He thought there was some ground for that criticism, which should be borne in mind when considering the future work of the Commission. It was essential that the Commission should be realistic in its choice of subjects. For example, when the third and fourth drafts of the Convention on Fishing and Conservation of the Living Resources of the High Seas had been prepared, the question of fisheries had had to be settled not in accordance with established legal principles, but in the light of the need to safeguard certain interests. The Commission would make progress by accepting institutions which might not be confirmed in theory but which were necessary in practice. It should not balk at considering questions which might be of less importance to some countries than to others, such as the succession of States and the legal status of new States. The General Assembly had in effect asked the Commission very politely to take a more realistic view of its work. The criticisms made in the Sixth Committee should be accepted, particularly since the Assembly had made no categorical demands on the Commission. The Assembly's requests should be studied closely, and a somewhat different approach adopted, so that sooner or later the Commission would be able to deal with the kind of topic suggested in resolution 1505 (XV).

12. The Commission had selected only a few topics from a relatively long list. Of course, it could hardly have done otherwise, in view of the short time at its disposal every year. He agreed with Mr. François that in principle it was unwise to undertake subjects which would take more than five years to deal with, but did not think that that rule should be applied strictly. It was conceivable that a topic might be handed on to a group of new members, even if the work done by the special rapporteur concerned could not all be used.

13. On the occasions when the Commission had dealt with such political subjects as the code of offences against the peace and security of mankind (A/1858, para. 59), the declaration on the rights and duties of States (A/925, para. 46) and the definition of aggression (A/1858, para. 53), the General Assembly had received the relevant drafts without any great enthusiasm; it had merely taken note of the Commission's work, recommended that it should be taken as a guide or had set up special committees to work on the subjects concerned. That attitude was different from that taken by the General Assembly at its fifteenth session. On the

one hand, the Assembly seemed to be encouraging the Commission to study political questions, and on the other hand, it did not seem to take the results of that work seriously. The Commission was thus placed in the invidious position of having to familiarize itself with new trends in international law and yet retaining its strictly juridical character. In any case, the Commission in its new composition should begin its work by examining the list of topics which had been drawn up thirteen years previously and which had been added to by the General Assembly. It should then choose at least five topics at a time which were ripe for codification, for example, the recognition of States, the succession of States, questions of relations in respect of technical and economic assistance, and others for which there were certain rules laid down in multilateral conventions, in resolutions of the General Assembly and in the day-to-day application of the Charter.

14. In conclusion, he said that there seemed to be a misunderstanding between the General Assembly and the Commission, attributable to the fact that current political trends were viewed in a more conservative way by the Commission than by the Assembly. It did not appear, however, that the General Assembly really wished the Commission to study more political topics. On the other hand, the Commission should be less reluctant to deal with more difficult questions, which were governed by few rules acceptable to all States. It was the Commission's duty to help other United Nations organs by showing them the correct trend of the development of principles of international law.

15. Mr. PAL said he did not find anything wrong in the resolution of the General Assembly and did not think that the records of the debate in the Sixth Committee disclosed any mistrust of the Commission or any misunderstanding between the Commission and the General Assembly. From the list of topics submitted to the Commission at its first session, it had selected the subjects it could deal with; it had also been obliged to give priority to new topics chosen by the General Assembly. Accordingly, the Commission's inability to deal with all the subjects on its list was not due to any laxity on its part. An account of the work done by the Commission would be found in its 1958 report (A/3859).

16. The Commission's Statute drew a sharp distinction between the progressive development of international law and its codification. Nevertheless, experience had shown that it was difficult to keep the work of codification within the limits laid down in article 16 of the Statute, and that progressive development was often also introduced. The General Assembly had shown no dissatisfaction with that method of operation, but it seemed to feel that State representatives, who knew exactly where the area of the greatest tension lay, were the most competent to select topics for codification.

17. Even the views expressed by the Commission on the present occasion would rather go to support the action taken by the General Assembly. Some members of the Commission opined that the codification or progressive development of law within the competence of the Commission would only comprehend the law reflected in the " generally established practice " and not the law " concerning extremely controversial topics ". The controversial topics, however, were the very matter to be brought under the control of the rules of law if law was to be retained or established as the ordering principle in international relations. If the changes and developments envisaged by the Sixth Committee were real, it would serve no useful purpose to simply reproach those developments as having marred the structure of international society. It was hardly possible to demand back the past conditions so that the world might function once again according to the schedule of the jurists. With those changes there would hardly be any law in the field which would be acceptable as reflected in the " generally established " practice, unless the term " generally " itself was assigned the specific sense of meaning and referring only to a fraction of the present international society. Even with this limited sense there might not have been any generally established practice, as had been asserted by Professor Lauterpacht in dealing with the question of codification. In any case, rules or practices of international law were not an absolute value but were required and brought about by certain circumstances in the development of human society. New developments involving new contacts and new tensions had to be dealt with and had immediately to be dealt with. Even those whose accepted practices were to be presented as " generally established practice " had not been immune from changes. Even amongst themselves their policies, interests, intentions, once coinciding, might have become widely divergent. Even within their narrow range it would be necessary to allow for at least the time lag between the evolution of the legal forms and the changing needs of the society life. Further, the so-called generally accepted norms might be taken as mostly reflecting a factual situation of relative power or weakness. Their perpetuation, instead of providing for stability, was often made to deny the vicissitudes of changing power relations.

18. But the changes and developments had been more far-reaching and comprehensive. The international field had become one of the focal points of political crisis of modern times. The social centre of gravity was now almost entirely in the field of political institutions. If the members of the Commission failed to adapt their juristic imagination to realities of the world in which political organization had actually superimposed itself on economic processes, then indeed they would have to proclaim the end of international law. Unless international law was adjusted to those developments, the result would be a sweeping idolizing of power, with all its chaotic consequences. The matter, however, was certainly not solely or even mainly juridical questions in the sense of being within the competence of the experienced jurists as such. Any dealing with juristic and scholastic rigour would be likely to conceal from the view the underlying new tension in social relationships.

19. It had been pointed out that there was no such thing as pure codification without progressive development of international law. Members of the Commission,

and particularly special rapporteurs, would indeed be helpless without expert help and, in the circumstances, it was most desirable that a politically aware body should select topics to meet the demands of the new developments. The new tension would necessarily be experienced by those shouldering the responsibility of working the State-machinery: they it was who would feel and know where the real conflict arose and once they would specify the fields of tension and the extent and character of such tension, the experienced jurists would usefully come in with their formulations to relax, remove or release them. As he read the resolution, in conjunction with the debate in the Sixth Committee, he did not find anything to associate the same, closely or otherwise, with any " aggressive and demagogic propaganda campaign ". It was just what was to be expected in the circumstances envisaged. The States members of the international community life alone were essentially and justly qualified to specify the field of tension and the character and height of tension in each sphere. That was essential to determine which way to direct law-making energy. The preparation of a list of topics would not go further.

20. With regard to the methods of dealing with various topics, he wished to point out that it could hardly be denied that the Committee had made out a just case for revision of the international law and made out such a case for immediate attention. The problem of the revision of the law in the international field was not an easy one and certainly was not wholly within the competence of jurists. It would hardly be denied that a legal rule, once issued, would always, from its very nature, have a tendency to become obsolete or inapt after some time. It prescribed a certain behaviour in order to solve a specific difficulty of the then social relationships. With changes intervening they might, instead of producing order and harmony, begin to beget difficulties and friction. In domestic systems, the " will " giving the law would always be in existence and ready to adjust. In the international field, the rule would not generally be supported in action by any continuous adaptation to changing circumstances. The discrepancy between the " reality of life " and the legal rule might soon become intolerable and unless the legislative unit of will was brought into operation in time the only alternative to revision would appear in the undesirable form of outright defiance. Under existing conditions in the international community, especially in view of the present effort to bring it within a constitutional framework, it would have been proper and wise to provide the community organizations with a permanent institutionalized or organized legislative unit of will. Law having to do with life would have to face continuous change and would thus require continuous adaptation to changing circumstances through the help of a constantly watchful, discerning and active body.

21. As a concrete suggestion, he would have liked to see the International Law Commission itself placed on a permanent footing at least like the Court, with the provision that a certain fraction only of the membership would retire at intervals and that the Commission itself could withdraw from routine retirement those of its members appointed as special rapporteurs who had already submitted their reports the acceptance of which had not been completed by the Commission. The absurdity of the present position of the Commission would be easily visualized if it was remembered that even with its extended term of five years no complete work was possible. During the first year, the Commission would take up the study of a subject and would appoint a special rapporteur who would be expected to produce a draft during the second year. After the first reading of the draft the matter would go to the governments for their comments and suggestions. They would get two years for that purpose, and in that way the second reading of the draft would never be possible before the fifth year. By 1962, the whole complexion of the Commission might change. It was indeed lucky that special rapporteurs such as Dr. François, Dr. Sandström, and Dr. Zourek had been re-elected and it was thus sheer luck that the Commission had been able to finish the work undertaken with their help as Special Rapporteurs.

22. He would not suggest any specific topics for discussion: in order fully to meet the demands of the changes in international life, the world, he suggested, must be prepared to face at least two of the complexities presenting themselves in two distinct dimensions, namely (1) the dimension of the structures of the United Nations itself as also of its various organs and perhaps also of its member units; and (2) the dimension of the legal norms. He agreed generally with some of the suggestions made by Mr. Verdross (614th meeting, para. 44). He also considered that the topics of the succession of States, the structure of the United Nations and rules of law, if any, governing the recognition and membership of States should be taken up as soon as possible.

23. Mr. AGO said that he had read with much care what had been said during the discussions in the Sixth Committee on the need to revise the programme of work of the International Law Commission. The suggestion that the Commission's whole programme should be overhauled was a new one; in the past, the General Assembly had been content to add on occasion a further subject to the original list of topics drawn up at the inception of the Commission's work.

24. Much had also been said in the Sixth Committee of the need to take into account new trends and developments in the fields of international law and to favour the development of international co-operation and friendly relations among nations. Some of the ideas which had been put forward by some members of the Committee did not appear entirely clear in the records. Nevertheless, the opinions voiced were of great interest, particularly in so far as they expressed the aspirations of new States to participate in the formulation of the rules of international law.

25. Hopes had also been expressed for the development of international justice. Indeed, perhaps the most interesting part of the discussion had been that concerning the role of the International Court of Justice. The reluctance to submit cases to that court was plainly due

not to any lack of confidence in the court, but rather to a feeling of uncertainty regarding the rules of international law which the court would apply. In many instances, States might be uncertain as to the exact content of those rules; in addition, the new States considered that they had had no part in the formation of the rules of customary international law over the centuries.

26. In the circumstances, the feeling that the International Law Commission should prepare the codification of more of the rules of international law was a natural one. Also, it was true to say that the task of codifying international law had become much more urgent. In normal circumstances, he preferred the rules of law to develop naturally and gradually and had no great enthusiasm for codification *per se*. In a revolutionary situation, however, codification might become an imperative necessity and the situation facing the international community, in particular as a result of the very rapid doubling of the number of sovereign States, was indeed revolutionary.

27. Codification was, however, a long, slow and arduous process. The German Civil Code, which was a good model of codification, was the result of one century of work. The Commission was expected to cope with the enormous task of codifying international law in only ten weeks annually, and the General Assembly should take that fact into consideration.

28. The General Assembly had discussed the question whether to set up a special Committee to select new topics for codification, or to entrust the International Law Commission with that task. In the end, it had been decided that the General Assembly would undertake the task itself, on the basis of government comments. As yet, however, the response from governments had not been very encouraging.

29. Of course, the Commission should be happy with the renewed interest taken by the General Assembly in questions of international law and should welcome its suggestions. The Commission should recognize that the General Assembly was best qualified to deal with the political implications of the choice of topics for codification. The General Assembly, for its part, should leave it to the Commission to decide whether a topic was really suitable for formulation in rules of law or not. The Secretary to the Commission had read at the previous meeting a long list of subjects, and he (Mr. Ago) had noticed that some of the subjects had barely any legal implications. But, above all, it should be left to the Commission to decide whether a topic was really ripe for codification or not. Much had been said of new topics, but some could hardly be said to be ripe for codification. International conventions could be entered into in relation to those new topics but the formulation of general rules of international law thereon would be premature; the Commission itself could not be expected to invent an entirely new set of rules for a matter on which no rules of international law existed as yet.

30. The General Assembly was thus in an excellent position to make useful suggestions for new topics but the Commission should be entrusted by the Assembly with the decision on the question of priorities. In drawing up a list of topics, a political body might easily reach the result of establishing too long a list, with the consequence that the Commission would be given a task which it would be unable to perform if it were not free to make a choice and to establish priorities.

31. He agreed with Mr. François that the Commission's time was short, in particular if it was remembered that its members were elected for only five years. He could not, however, subscribe to the conclusion that the Commission should only undertake small subjects. Future generations would remember the Commission for its achievements in connexion with great subjects, in particular the codification of the law of the sea and of the rules governing diplomatic and consular relations. And it was precisely to Mr. François that the Commission and the world owed a debt of gratitude for his outstanding contribution to the study of the law of the sea, a subject on which the Commission's labours had met with a very broad measure of success.

32. It was his considered opinion that the Commission should concentrate on a small number of important subjects, of which State succession, which had been mentioned in the discussion, could well be one. There were also in the Commission's agenda three important subjects which stood in need of codification and which called for special priority: the law of treaties, State responsibility and the international law relating to the treatment of aliens.

33. It was essential that those three subjects should be codified first, before any attempt was made to codify other, smaller subjects. It should not be forgotten that the great majority of international legal disputes which arose were in practice connected in some way or another with the law of treaties, State responsibility or the treatment of aliens.

34. The General Assembly should therefore be urged to enable the Commission to carry out its essential task of codification in regard to those important subjects. Their codification would give to the new States confidence in international law and hence in international justice.

35. In conclusion, he did not believe that there was any opposition between a so-called conservative approach on the part of the Commission and a more progressive one on the part of the General Assembly. There was nothing conservative in urging priority for the codification of some of the major topics of international law. Moreover, the General Assembly could rest assured that it was precisely in connexion with the great subjects which he had mentioned that significant new developments had taken place in international law. There was no conflict of views between the General Assembly and the Commission; the General Assembly wanted the Commission to perform certain tasks and the Commission, which was the competent technical body, should be given the time, the means and the possibility of choice which were indispensable in order to carry out those tasks successfully.

36. Mr. MATINE-DAFTARY pointed out that resolution 1505 (XV) of the General Assembly was not directly addressed to the Commission. Members had, however, discussed in the course of the current debate the functioning of the Commission and he accepted the idea that something should be done in the matter.

37. The Commission had no doubt done splendid work in the past, but it was perhaps true that it might have done more. One important reason why it had not was the inevitable lack of continuity in regard to special rapporteurs. For the topic of the law of treaties, the Commission had recently appointed the fourth special rapporteur; in the circumstances, it was difficult to complete the work on that topic.

38. Some more permanent solution would have to be found for the problem of special rapporteurs. One solution might well be to appoint eminent international lawyers from outside the Commission. If necessary, the Statute of the Commission should be amended in order to make that possible. There were some eminent international jurists, qualified to act as special rapporteurs, who were debarred from membership of the Commission because they had the same nationality as one of its members.

39. If the Commission should continue to operate as before, it would have to concentrate on a few subjects but it would then hardly be fulfilling the function assigned to it by the General Assembly in pursuance of Article 13 of the Charter.

40. Article 13 of the Charter gave expression to an imperative need of the international community. It was the duty of States Members of the United Nations, under Article 33 of the Charter, to settle their disputes by peaceful means, including arbitration and judicial settlement. It was difficult, however, for States to accept judicial settlement when the content of international law was unknown, in other words if its rules were not settled in advance. Hence the need for the codification and development of that law.

41. By virtue of Article 38, paragraph 1(b), of its Statute, the International Court of Justice was called upon to apply the rules of customary international law. It followed that those rules needed definition. The Court had not yet built up a sufficient body of precedents to clarify international custom.

42. Another problem arose in connexion with the provisions of Article 2, paragraph 7, of the Charter, concerning " matters which are essentially within the domestic jurisdiction " of States. Many States had not accepted the jurisdiction of the International Court of Justice in all the legal disputes specified in Article 36, paragraph 2, of the Statute of the Court. Others, like the United States of America, had accepted that jurisdiction subject to a reservation regarding matters essentially within their domestic jurisdiction and some had even gone so far as to reserve to themselves the right to determine what matters came within the domestic jurisdiction. It was clear that States were reluctant to submit their disputes to the Court so long as the exact scope and meaning of Article 2, paragraph 7, of the Charter remained undefined. That was one of the matters which might be placed on the Commission's programme.

43. It was therefore apparent that the work of codification of international law would have to be advanced in order to give States more confidence not only in international law but also in international justice. The United Nations had a judicial organ, but one which depended for its operation on the will of States. The failure of that organ to function normally was due to the inadequacy of the legislative process within the United Nations system.

44. The General Assembly should give the International Law Commission the means of carrying out the tasks entrusted to it. He suggested that a small committee should be set up to prepare, in the light of the Commission's thirteen years' experience, proposals to the General Assembly for the revision of the Commission's Statute.

45. Mr. AMADO said that the Sixth Committee and the General Assembly should be told emphatically that a Commission of scholars took four days to formulate a rule of international law governing a specific diplomatic or consular immunity.

46. He had been a member of the Committee which had drafted the Statute of the International Law Commission. It had not been the intention to draw in that Statute a clear-cut distinction between the codification of international law and its progressive development. A codification should fill any gaps which might appear; the rules had to be arranged, clarified and if necessary amplified. The task of codification and that of development of international law could not therefore be separated.

47. One of the most important phenomena of the modern world was the appearance of new States, eager to participate in the formulation of the rules by which international society was governed. He had consistently argued that international law was made by States and not by jurists.

48. He regretted that he could not accept Mr. François's suggestion that the Commission should devote its attention only to small subjects. He did, however, believe that the Commission should concentrate on the practical aspects of important subjects, leaving aside theoretical questions.

49. Thus, the subject of the law of treaties had been chosen for codification not because of its general theoretical aspects but because of the desire to clarify the rules of international law governing new types of international agreements which were becoming increasingly important. For example, a new type of treaty, which did not need to be ratified in order to enter into force, had made its appearance and it was important to determine how far the traditional rules governing the law of treaties applied to that type of instrument.

50. The law of treaties and that of state responsibility were both vast subjects and it was therefore essential to extract from them those portions which could usefully be codified.

51. Lastly, it was essential to inform the General Assembly that the Commission did not have the

necessary time to carry out fully the immense task which was expected of it.

52. Mr. ŽOUREK said he was happy that the General Assembly of the United Nations had given expression in its resolution 1505 (XV) to its interest in the codification and progressive development of international law. The resolution rightly stressed the growing importance of international law as a means of establishing friendly relations and co-operation between nations, of strengthening international peace, of settling international disputes peacefully and of furthering economic and social progress throughout the world. International law was, after all, the only basis for the pacific settlement of disputes between States with different economic and social systems and also for the solution of all problems arising in their co-operation and rivalry. The resolution further emphasized the importance of international law in the maintenance of peace, a point which had not always been recognized in the early years of the existence of the United Nations. Indeed, the strict observance of articles 1 and 2 of the Charter was the best means of ensuring peace.

53. The resolution in question had the great merit of drawing special importance to international law and to the work of its codification. For that reason one should not countenance the attempt made at the 614th meeting by the Special Rapporteur on the topic of state responsibility to discredit the sponsors of so important a resolution, which had been adopted unanimously by the General Assembly.

54. The question of future work in the field of codification should be considered and the programme established in the light of the importance of the topics in question for the maintenance of international peace. In 1949, the Commission had chosen fourteen subjects for codification which had been approved by the General Assembly. From time to time, the Assembly had added other topics and presumably would continue to do so in the future. Of the fourteen topics originally selected (A/925, chapter II, para. 16) the Commission had completed six. Consequently, if one remembered the difficulties inherent in the work and in particular the need to study international treaties, the case-law of international courts and the practice of States in a particular matter, the Commission had accomplished an appreciable volume of work.

55. At its next session the General Assembly would certainly consider what subjects should receive priority for purposes of codification. If its methods of work remained unchanged, the Commission would be unable to study more than a very small number of topics. Hence, the list of topics placed on the Commission's agenda should not be excessively long. Past experience showed that there was little point in having several topics on the agenda if the Commission was unable to study them. Where that happened, reports accumulated and after a number of years the special rapporteurs ceased to be members of the Commission on the expiry of their term of office or left it for some other reason, and then the Commission had to elect a fresh rapporteur who had to do the work all over again.

56. The Commission should concentrate on the most important questions and disregard secondary ones. Two large topics were already on its agenda: the law of treaties and state responsibility. A third — the status of aliens — had been placed on the agenda by implication by the way in which the special rapporteur had dealt with the topic of state responsibility. The members of the Commission had suggested other important topics, in particular the succession of states, but he thought that the list should not be too long.

57. It would, of course, be the Assembly's responsibility to decide what priority those topics should receive; in making its decision it might, in the case of large topics, indicate what subdivisions of the topic should be discussed first by the Commission. The Commission, for its part, should try to devise fresh methods of work, for otherwise progress would be very slow. When at its eleventh session in 1959 the Commission had discussed only a small part of the law of treaties he had estimated that it would take at least seven full sessions to deal with all the questions which the last Special Rapporteur on the particular subject, Sir Gerald Fitzmaurice, had treated in his reports to the Commission.

58. The Commission's study of the topic of state responsibility had been held up by lack of time. It had been unable to do more than hold a general debate at its eighth session in the course of which considerable differences of opinion had appeared amongst the members. Many of them had openly criticized the ideas voiced in the first report submitted by Mr. García Amador, the Special Rapporteur for that topic (A/CN.4/96). The Commission had then asked the Special Rapporteur to continue his study with instructions to take into account the views expressed in the course of the discussion. The Special Rapporteur had complained that his reports had been criticized by some delegations in the Sixth Committee of the General Assembly; but surely he could only blame himself for that for he had failed in his reports to take into account the views expressed during the general debate in the Commission in 1956.

59. The study of the topic of state responsibility should in his (Mr. Zourek's) opinion concentrate first on the general principles governing the responsibility of States. When once those general principles had been identified and laid down, then it would be possible to apply them in the different branches of international law. It would be wrong to begin with secondary questions and to ignore the fundamental problems of the day. The first subject to be studied was that of the international responsibility incurred by the violation of the rules of international law which were essential for the maintenance of international peace and security and which were laid down specifically in articles 1 and 2 of the Charter. In the course of that study one of the matters that would crop up would be that of the responsibility of the State by reason of aggression. It would be strange to try to study the responsibility of the State or injuries caused to the property of aliens and to disregard the vastly more serious responsibility for acts of aggression which could cause incalculable harm to all mankind. All

specific problems would have to be dealt with in the order of their importance.

60. Mr. SANDSTRÖM said that the General Assembly had the indisputable right to indicate to the Commission topics for codification, and it had made ample use of that right. It was worth recalling that only three or four of the thirteen or fourteen topics to be codified had been selected, for purposes of codification, on the Commission's own initiative: the law of the sea, arbitral procedure, the law of treaties and possibly consular immunities, as a corollary to diplomatic intercourse and immunities. At first, the Commission had wished to undertake primarily work which did not have undue political implications.

61. It had been suggested that the Commission's method of work should be reviewed. He agreed with all that had been said by Mr. François and Mr. Ago. The suggestion of Mr. Hsu that assistant special rapporteurs might be recruited from outside the membership of the Commission was worth considering.

62. Sir Humphrey WALDOCK said that he had studied the records of the Sixth Committee's debates at the fifteenth session and agreed with the views expressed by Mr. Ago. In particular, he agreed that there was not and should not be any basic divergence between the views of the Commission and those of the General Assembly, since it was the aim of both to further the codification of international law. He felt, however, that the General Assembly might be unable to appreciate the technical difficulties inherent in the Commission's work. He fully recognized the General Assembly's political interest in the list of topics which the Commission should undertake, but statesmen could not always be expected to understand the difficulties of drafting in legal terms the practices which they had established.

63. The Commission, he thought, had an undoubted right to give an expert view on the technical aspects of codification and it would be of real advantage to the General Assembly if it did so, since it certainly would not serve the interests of the General Assembly to ask the Commission to undertake projects which could not be brought to fruition for technical reasons.

64. There was an absolute limit to what the Commission could produce in a session of ten weeks. Although it might be suggested that the Commission should speed up its methods of work, that could be done only to a very slight extent. The pace of work was dictated by the subject matter and by the very process of codification. Unless there was a full exchange of views, it would be impossible to obtain a synthesis of the opinions held in various parts of the world. One of the chief uses of the Commission was as a forum for bringing together differing points of view. The idea that it should, in certain cases, break up into sub-commissions (A/3859, chapter V, para. 60, footnote 33) was therefore not to be recommended since that might seriously weaken the effectiveness of the Commission as an instrument for harmonizing divergent opinions and producing modern formulations of the law acceptable to all.

65. An excessively long list of topics was also open to objection, because it would result in a lack of focus. He agreed that fundamental topics must be tackled, however much work that entailed. Moreover, they corresponded in many respects with the preoccupation of the Sixth Committee to codify subjects that would make a contribution to peace. For example, the law of treaties might seem a dull subject, but the work of the International Court of Justice showed that the law of treaties was a very large and growing part of international law and of the greatest relevance to the maintenance of international peace. If the Commission succeeded in producing an authoritative statement on the law governing the termination of treaties, that would certainly be a major contribution to the settlement of disputes and the maintenance of friendly relations.

66. The Chairman had stated that the discussion would be merely for the record and that the Commission was not asked to take any action. After Mr. Ago's statement, however, it might be thought that it should attempt to draft an agreed statement on some of the technical difficulties involved in connexion with the planning of the Commission's future work, since that was the best way to make an impression on the Sixth Committee.

67. The CHAIRMAN reminded Sir Humphrey that, when the Commission had decided to deal with item 6 of its agenda, it had been made clear that it could do no more than record an expression of members' views on the subject. The Commission had not been instructed to submit any statement to the General Assembly. There would in any case hardly be time to draft such a statement at the current session.

68. Sir Humphrey WALDOCK observed that so much general agreement had been expressed that it was to be hoped that it would not be hard to draft the statement.

69. The CHAIRMAN replied that that idea had been discussed on many previous occasions and the Commission had always found almost insuperable difficulties in arriving at agreed conclusions.

70. Mr. LIANG, Secretary to the Commission, said he would first comment on some points of an organizational nature raised in the discussion.

71. The Commission was not unaware of the difficulties of continuing its treatment of a topic if a special rapporteur was not re-elected. It had in fact taken a decision on that subject at its fifth session (A/2456, para. 172). If a special rapporteur was re-elected, he would continue his work unless and until the Commission, as newly constituted, decided otherwise.

72. The suggestion that outside help should be recruited in the form of assistants to special rapporteurs raised a different question, which had been discussed very thoroughly when the Commission's Statute had been drafted. At that time it had been decided that the system would not be feasible, since the assistants could not be supervised if they were not members of the Commission or of the Secretariat. The suggestion also raised the very delicate question of the area from which such assistants should be recruited. Unless the General

Assembly saw fit to reverse its decision, it would therefore not be feasible to recruit from outside the United Nations.

73. The suggestion that associate special rapporteurs who were also members of the Commission be appointed was, however, workable, and arrangements for such a system might be examined later.

74. The Secretariat had issued a document for the Commission's first session in 1949 (A/CN.4/1/Rev.1, cited in report on the Commission's first session, A/925, chapter II, para. 13), listing topics for codification. That document had not, of course, been exhaustive. Comments had been made with regard to the stage of ripeness for codification, but the Commission had not spent much time in discussing each subject, and the Chairman, Judge Manley O. Hudson, had taken the initiative, with the Commission's consent, of proposing the four main subjects which had been before the Commission ever since. There remained, however, an almost embarrassing choice of topics to be undertaken.

75. It was the Secretariat's experience with regard to the selection of topics that in most cases they could not be compartmentalized. But there were subjects which by their nature were broad in scope. State responsibility and the law of treaties were cases in point. He himself had ventured on previous occasions to urge that the larger subjects should be broken up. When State responsibility had originally been placed on its agenda, it had been understood that the Commission's work would, at the outset at least, be limited to the question of the responsibility of the State for injuries caused in its territory to aliens. If the topic of State responsibility were to include the violation of State sovereignty and other rules of international law, it would be virtually equated with the whole field of international law. Certain subjects must, therefore, be treated separately. The international legal aspects of land reform, for example, which he had mentioned at the 614th meeting, might be regarded as an aspect of State responsibility, but might equally be taken as a limited subject in itself. Such restricted treatment might also be given to certain aspects of the law of treaties.

76. The CHAIRMAN said that, in view of the short time remaining at the Commission's disposal, he wished to close the list of speakers.

77. Mr. AGO asked that the list should be left open, as points were likely to be raised that required a reply.

78. The CHAIRMAN replied that members could hardly speak twice on the same subject, but perhaps they might make short explanatory statements.

The meeting rose at 1.10 p.m.

616th MEETING

Thursday, 22 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Planning of future work of the Commission
(A/CN.4/138)
(concluded)

[Agenda item 6]

1. The CHAIRMAN invited further comment on the planning of the Commission's future work in the light of General Assembly resolution 1505 (XV).

2. Mr. GROS said that since the Commission had decided that the debate would not produce a conclusion, he felt bound, owing to the capital importance of the question, to state his views briefly.

3. Mr. Ago had explained magisterially both what codification was and what it could not be. And virtually all the speakers seemed to have supported those views.

4. In the first place, as an organ of the General Assembly, the Commission had the duty to provide the Assembly with the technical elements necessary for deliberations on the codification of international law. In that connexion, he wished to clear up a certain myth concerning codification, a confusion of two ideas: the first was that codification was a simple operation involving no more than adding up rules of law and reducing them to a common denominator; and the second that the factors of modern international life lent the rules of law a new aspect with the consequence that it became possible to re-write international law in rules entirely different from those known.

5. Those were two errors of judgement. As had been said before, codification had never been a rapid and simple operation. It involved first a knowledge of the laws and usages of many countries. The labour of compiling repertories of international law, which were after all mere documentary reference works and which constituted the first step towards codification, showed that teams of specialized jurists would take years to codify a particular topic.

6. But there was more to it than that. For the purposes of codification, it was not enough just to know; one had to think out anew the rules in the light of the evolution of life. That was the progressive development of international law. It was an intellectual exercise which the Commission performed with excellent effect in its drafts; it was not, as some people thought, merely noting that existing rules had fallen into desuetude and replacing them by new rules called for by a new system of law. It involved more than that, for the simple reason that international law had no other source than the consent of States and that if they were not agreed to admit a new rule, that rule might become part of national or regional law, but never of international law.