

United Nations
**GENERAL
ASSEMBLY**

FOURTEENTH SESSION
Official Records



**SIXTH COMMITTEE, 610th
MEETING**

Monday, 12 October 1959,
at 3.25 p.m.

NEW YORK

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Chairman: Mr. Alberto HERRARTE (Guatemala),

*In the absence of the Chairman, Mr. Monaco (Italy),
Vice-Chairman, took the Chair.*

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 and 2, A/C.6/L.445/Rev.1) (*continued*)

1. The CHAIRMAN invited representatives who wished
to do so to exercise their right of reply.

2. Mr. ZEPOS (Greece), replying to the Romanian
representative, who had said at the 609th meeting that
the case, which he himself had cited earlier, of the
asylum granted to General Radescu by the United
Kingdom Legation at Bucharest in March 1945 was not
a case of diplomatic asylum, explained that it had been
mentioned as an example of diplomatic asylum by
Professor Rousseau in his treatise on public inter-
national law. The disagreement on the matter between
that author and the Romanian representative was an
additional argument in favour of the Salvadorian draft
resolution (A/C.6/L.443).

3. Mr. CACHO ZABALZA (Spain), replying to the
representative of Indonesia, assured that representa-
tive that his delegation's statement at the 609th meet-
ing had not been intended as a polemic; his delegation
had merely referred to the case of Indonesia in passing
because it had been one of the main subjects of the
Committee's discussions at the thirteenth session of
the General Assembly. With regard to maritime ques-
tions, Spain had always adhered to the same principles.

4. The Indonesian representative might rest assured
that if, in due course, he had any proposal to submit,
the Spanish delegation would consider it with the great-
est interest.

5. Mr. SALAMANCA (Bolivia) wished, before making
use of his right of reply, to comment on his delega-
tion's revised draft resolution (A/C.6/L.445/Rev.1)
concerning the rules applied in connexion with the
utilization and exploitation of international rivers.

6. He recalled that the importance of that problem
had been emphasized on several occasions by the Eco-
nomic and Social Council, in its resolutions 417 (XIV),
533 (XVIII), 599 (XXI) and 675 (XXV).

7. In its resolution 675 I (XXV) of 2 May 1958, the
Council had commended the Panel of Experts (includ-
ing Mr. Zvonkov of the USSR) for its report entitled

"Integrated River Basin Development". 1/ The serious-
ness of the problem raised by the steady increase of
the world's population and the inadequacy of agricul-
tural resources was repeatedly stressed in the report.
The authors emphasized (chap. 1, paras. 64, 65 and
66) the urgent need for large-scale river-basin devel-
opment which would soon pay for itself.

8. From the legal standpoint, the utilization and ex-
ploitation of inland waters were not governed by any
international statute. In that connexion the law applied
was purely customary, ill-defined and lacking in uni-
formity. There was accordingly a pressing need for
an over-all study on the subject to prepare the way
for a subsequent, more thorough study, and only the
Secretary-General possessed the necessary technical
resources for such a task.

9. There was no need to demonstrate the importance
of the question, both inside and outside the United
Nations. Several United Nations organs, and the Inter-
national Law Association, the Institute of International
Law, and the Inter-American Bar Association had taken
the matter up. In that connexion, in the report of the
Panel of Experts, approved by the Economic and Social
Council, the section entitled "Inadequacy of Relevant
International Law" should be read. It contained, *inter
alia*, the statement of principles adopted by the Inter-
national Law Association at its meeting at Dubrovnik,
Yugoslavia, in 1956, 2/ the observance of which, parti-
cularly principle V, would go far to aid adjustment of
international water disputes. Of course those princi-
ples were only tentative, but they were a valuable point
of departure and could serve as a basis for a provis-
ional decision by the Council.

10. After a brief review of the various theories in
that field of international law, he admitted that the
question was complex, that regional practices differed
and that complete codification was not possible. But
such complexity was inevitable in international law.
There was hope of achieving a practical solution in
two respects, i.e., rules could be prepared concerning,
on the one hand, the conservation and utilization of
water resources and, on the other, the peaceful settle-
ment of disputes.

11. He then went on to answer some of the comments
which had been made on his draft resolution (A/C.6/
L.445/Rev.1).

12. He explained that the new form of words used in
operative paragraph 1 met the objections made by those
delegations, including the French delegation (607th
meeting) which had expressed doubts regarding the
possibility of codifying the subject. In any case, only
a preliminary survey was intended.

13. In reply to the Swedish representative, who had
asked how the expression "utilization and exploitation"
was to be understood (609th meeting), he said that in

1/United Nations publication, Sales No.: 58.II.B.3.

2/*Ibid.*, chap. 4, para. 14.

previous studies of the question the expression had been used to cover, inter alia, municipal usage, navigation, irrigation, hydro-electric works, fisheries, tourism, drainage and flood control. Moreover, the reason why the word "navigation" did not appear in the operative part although it occurred in the preamble, a fact which had surprised the Swedish representative, was simply that the question of navigation was already covered by treaties and consequently required no further study.

14. He was surprised that the USSR representative had questioned the importance of the problem, and had gone so far as to describe it as artificial (609th meeting). The USSR, as a member of the Economic and Social Council, had been one of the sponsors of resolution 675 (XXV), in which the Council called the report of the Panel of Experts to the attention of Governments of Member States and noted with interest the efforts being made to formulate legal principles applicable to users of international rivers. The USSR delegation was thus contradicting itself. Moreover, the USSR representative had expressed the view that the International Law Commission should not be asked to take up any new questions. But the Chairman of the Commission himself had said that it should have several questions under consideration at the same time. The USSR representative had also suggested that there were other subjects more deserving of the Commission's attention. He himself did not see what other subjects would lend themselves to codification.

15. In conclusion, he said that the revised draft resolution took into account the comments made by members of the Sixth Committee. Although operative paragraph 1 might give rise to some objections, the value of operative paragraph 2 was beyond question. He recalled that the study to which that paragraph referred could not be undertaken without the collaboration of the Secretary-General.

16. Sir Gerald FITZMAURICE (Chairman of the International Law Commission) expressed, on behalf of the Commission, his gratitude for the understanding shown by the Sixth Committee. He recalled the close relations which the Commission had always maintained with the Sixth Committee, owing partly to the fact that the same persons had often sat on both bodies.

17. Turning to the comments which had been made during the discussion on the report, he said that he would first consider the procedural points.

18. Referring to the remarks of the Czechoslovak representative (605th meeting), he pointed out that such situations as those in which the Commission had found itself at its eleventh session could be avoided if Governments bore in mind that its members held their offices in a personal capacity and could not nominate substitutes; whereas in the case of other offices, if one person a Government thought of appointing could not serve, another could be appointed instead. He agreed that the Commission might possibly have completed the draft on consular intercourse and immunities if it could have started it at the beginning of the session. For procedural and administrative reasons that was not possible in the second half of the session. It had also then been too late to initiate a new method of work.

Mr. Herrarte (Guatemala) took the Chair.

19. Sir Gerald FITZMAURICE (Chairman of the International Law Commission), replying to delegations, including those of Burma, Ceylon and India, which wished

the Commission to maintain closer contacts with Governments and with other bodies having an interest in international law, observed that it would be difficult for members of the Commission, between its sessions, to attend further conferences and meetings, except perhaps at fairly long intervals. However, arrangements could be made for the Commission's Secretary to attend the meeting of the Inter-American Council of Jurists at Santiago, Chile, and the meeting of the Asian-Afro-Legal Consultative Committee, provided that the latter did not coincide with the session of the General Assembly. The Commission was already in correspondence with the Consultative Committee.

20. Several delegations, in particular those of Canada, Turkey and Ceylon, which were anxious to speed up the Commission's work, had suggested the appointment of special rapporteurs who would not be members of the Commission; they had pointed out that the Commission's Statute did not specify that only members of the Commission could act as rapporteurs. But the main difficulty was not to find members of the Commission competent to be rapporteurs; it arose rather because the Special Rapporteur's other obligations sometimes kept him away when the Commission's work required his presence. In such circumstances it would not serve any useful purpose to appoint a rapporteur *ad hoc* since, however expert he might be, he would neither be familiar with the work so far done and with the reports already submitted by the regular Special Rapporteur. Moreover, the Special Rapporteur had to be able to participate fully in the Commission's discussions. In any case a special rapporteur who was not a member of the Commission would have no right to vote. Such a procedure should therefore not be resorted to except in extreme circumstances.

21. The same remarks would apply to a deputy rapporteur. In that case, moreover, the two rapporteurs would have to have identical views on the subject under study. Since it would be necessary to hear and reply to them both, the result might well be to prolong the Commission's discussions. The possibility of such an arrangement should not, however, be ruled out entirely.

22. The Canadian representative had suggested (606th meeting) that the Commission might be divided into groups which could examine two or more drafts at the same time. That suggestion had been made before and had been thoroughly gone into. It would give rise to budgetary and technical difficulties. On the one side the secretarial, translation and interpreting staff would have to be increased and, on the other, the drafts prepared by the groups would have to be approved by the Commission in plenary session and that would lead to further discussions and to a loss of time rather than to any saving.

23. Several delegations had stressed the importance which they attached to questions of *ad hoc* diplomacy and relations between States and international organizations. The Commission would take account of their remarks and would deal with those questions as soon as it could.

24. He then turned to treaty law. As stated in paragraph 13 of the Commission's report covering the work of its eleventh session (A/4169), the Commission had considered that the nature of the subject would allow it to draft articles on different parts of treaty law and to submit them in stages to the Assembly subject to eventual adjustment in the light of the completed code.

25. Some delegations, in particular those of Brazil and Canada (606th meeting), had suggested that the articles of the future codes should be divided into two sections, one theoretical, the other practical. That hardly seemed feasible; theory and practice were so inextricably bound up with one another that the Commission would meet with serious drafting difficulties.

26. The Indonesian representative had referred to the question of reservations (605th meeting). That question was already included in the Commission's programme. He would also draw the Commission's attention to the question of depositaries.

27. With respect to the present text of the articles included in the Commission's report (A/4169), the Belgian representative had pointed to the omission of several articles on the legal effects of signature in those cases in which signature did not of itself bring a treaty into force (602nd meeting). The reason for that was explained in paragraph 17 of the report.

28. The Italian representative had pointed out (604th meeting) that the procedure for the authentication of treaties provided for in article 9, paragraph 1 (c), would give binding force to a text incorporated in the resolution of an international organization. He considered that the Commission should review that point, although the text as it stood appeared to him to be correct. It was not, in general, true to say that the inclusion of a text in the resolution of an international organization gave binding force to that text. For instance, General Assembly resolution 260 (III) concerning the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide was in fact an authentication. The same was true of the ILO Conventions.

29. In chapter II of the report, in paragraph (5) of the commentary on draft article 2 on the law of treaties, the Commission had given an explanation of the expression "States ... possessed of treaty-making capacity" in that article, to which the Ukrainian representative had drawn attention (605th meeting). In drafting that article the Commission had been thinking of States which were not fully sovereign or independent. The text could, however, be amended to read for example, that all States had treaty-making capacity in principle but that in the case of some that capacity might be limited by particular agreements or by the legal situation applicable to such States.

30. The next question was whether the draft should be prepared in the form of a code or a convention. As the Hungarian representative had pointed out (602nd meeting), the Commission had not yet reached a decision in the matter. It would certainly take full account, at the appropriate time, of what had been said in the Sixth Committee and follow the General Assembly's recommendations. He assured the USSR representative that the Commission had no set practice in that respect and based its decisions on the merits of each case. The representative of the United Arab Republic had been right in making a distinction between the general question of the form which the Commission's drafts should normally take and the particular case of the form of any given draft (608th meeting).

31. The various arguments that had been put forward in favour of the one form or the other appeared to be premature, but he considered it appropriate to answer them. The Committee was talking, not about the formulation of new rules of international law, but about

a draft that codified existing, and generally recognized, law, already having binding force. It was from that fact that a code secured its authority, and no one could pretend that it would lose that authority unless it was embodied in a convention. Naturally, a merely private venture would not have that effect, but as the International Law Commission was an official organ of the General Assembly, the Assembly was in the position to confer its *imprimatur* on drafts sent to it by the Commission. He was in agreement with most of what the representative of Mexico had said on the subject (608th meeting). At the same time he did not believe that, if a draft code were approved and recommended by a resolution of the General Assembly, it would then, as such, become obligatory. Nevertheless, such a resolution would constitute recognition of the fact that the code was declaratory of generally binding rules of international law.

32. He felt that there would be dangers in embodying the law of treaties in a convention which would not be ratified by all States or which would be ratified and subsequently denounced by some States; the fact that those States would still be bound by the provisions of the convention embodying rules of customary international law would give rise to a certain amount of confusion. Such a possibility would admittedly arise regardless of the subject codified; but in the case of a subject so basic as the law of treaties, it ought not to be risked.

33. On the question of consent as the source of the international law obligations of States, which had also been raised during the debate, he observed that it was of course unnecessary to have recourse to any doctrine of natural law in order to postulate the binding force of the rules of customary international law, whether or not they had been embodied in a convention. The consent of States could be given in other forms than the explicit one, sanctioned by signature of a convention; it could also be implied, and, as had been pointed out by the representative of the United States (605th meeting), a general practice of States which supported the existence of a rule of international law was binding on all members of the international community. But it was not enough to say that consent, regardless of its form, was the formal source of the obligatory force of the individual concrete rules to which the States conformed; one had to ask what it was that gave to consent the power to create obligations. It could not be the actual consent of the parties, since in that case there would be a vicious circle. If obligations could arise from consent, it was because international law already made consent a source of obligation.

34. Acts, decrees, international conventions and other instruments which constituted the immediate and proximate sources of law expressed legal ideas, but did not create them. Indeed, those ideas must already be in existence, if only in the mind of the lawgiver, before they could be embodied in such instruments. And where the existing texts did not permit of an answer to a legal problem, as was often the case in international law, one had to go back to the first principles of law. Those were not normally found in formal texts; and underlying all statutes and conventions was a substratum that constituted the ultimate source of most of the rules on which legal systems were founded. Some sources called it natural law, and others, as in Article 38 of the Statute of the International Court of Justice, spoke of the general principles of law recognized by civilized nations. While it would be undesirable to

exaggerate the importance of that substratum, or attribute to it effects which it did not have, it should not be rejected nor should its existence be denied, for jurists could not do without it.

35. It had been argued that if the law of treaties were to be codified in the form of a convention, that field of international law would be transferred from the category mentioned in Article 38, paragraph 1 b, of the Statute of the International Court of Justice to the allegedly higher category referred to in paragraph 1 a. He found it difficult to accept that view. Like the representative of Mexico, he did not believe that Article 38 established any priority as between the various categories listed in the four sub-paragraphs of paragraph 1; the only hierarchy was that which followed from a general principle of law, namely that the particular should prevail over the general. The representative of Mexico had also rightly observed that too much insistence on the value of consent given in the form of a convention was likely to cast doubt on the validity of any rule of customary international law not embodied in a convention. No one would seriously dispute the validity of such rules as those relating to the exercise of a State's jurisdiction over persons who were present in its territory, or over its nationals wherever they happened to be, merely because those rules were not the subject of international conventions. Of course, the task of the International Court of Justice would be simplified if certain rules of customary international law had been given conventional form and if the States in dispute were both parties to the convention, but it had to be borne in mind that that task would be correspondingly more complicated if the dispute was one between a State which was and a State which was not a party to the convention.

36. It was, however, for reasons less of principle than of drafting and presentation that, in his capacity of Special Rapporteur, he favoured the codification of treaty law in the form of a code rather than of a convention. Unlike such subjects as diplomatic intercourse and immunities, the law of treaties did not lend itself to codification consisting of a series of obligations and prohibitions. On that subject, a statement of abstract principles seemed more appropriate than a listing of acts which States must, might or might not perform. Some time might be gained if the General Assembly took a basic decision on that point before the final formulation of the text. Perhaps it would be able to do so when the full text of the first part of the law of treaties was submitted to it. The suggestion made by the Nicaraguan delegation in that connexion (603rd meeting) was very interesting and deserved consideration. A code might be drafted and annexed to a convention whereby the parties would undertake, not to apply each provision of the code, but, whenever they concluded treaties, to act in a manner compatible with the provisions of the code. Such a solution would permit great flexibility in the drafting of the code, and would combine the advantages of the two methods of codification.

37. He then said that he would like to make a few remarks on the draft resolutions submitted by El Salvador (A/C.6/L.443) and by Bolivia (A/C.6/L.445/Rev.1). With regard to the first draft resolution, it was true that the question of the right of asylum was already included among the subjects which the International Law Commission had selected for codification, and, in so far as the draft resolution did not call on the Commission to give priority to that question, it

might appear superfluous. But, while not regarding itself as bound to assign absolute priority to consideration of the question of the right of asylum, the International Law Commission would certainly attach much weight to an Assembly resolution drafted in the terms of the Salvadorian proposal. It was, incidentally, rather unlikely that the International Law Commission would be able to undertake codification of that question in the near future, for many of the Commission's members felt it necessary to make progress with certain subjects which had been on the agenda for several years before undertaking new tasks. Simultaneous work on several subjects would, nevertheless, be possible.

38. To those who feared that the absence, from the draft articles on diplomatic intercourse and immunities, of the proposals relating to the right of asylum might impair the principle of the inviolability of mission premises, he gave an assurance that the International Law Commission regarded that principle as a hard and fast rule, admitting of no reservation whatsoever. If the receiving State had not recognized the right of the sending State to grant asylum on its mission premises, it might consider that the latter had acted illegally by sheltering a refugee in its Embassy, and the question would have to be settled through diplomatic channels; but there would be no justification for violating the mission premises. Furthermore, the International Law Commission had not dealt with the right of asylum in the draft on diplomatic intercourse and immunities because it had considered it undesirable to introduce, into that subject, a controversial element which went beyond the subject's normal scope and was governed, in the countries where it most frequently arose, by established practices and by a number of conventions.

39. The International Law Commission would not fail to take into account the comments made in the Sixth Committee with regard to the work on territorial asylum undertaken by the Commission on Human Rights. It was very unlikely, moreover, that it would take up the question of the right of asylum before the Commission on Human Rights had completed its own work. It should be pointed out in that connexion that very few legal issues arose in the matter of the right of territorial asylum, which mainly involved questions of a political nature. Under existing customary international law, a State had a right to receive political refugees, but was not compelled to do so; in other words, each State was free to grant or to refuse asylum, as it wished. It seemed therefore that the International Law Commission might have very little to say on the subject of territorial asylum, and that its work should deal mainly with diplomatic asylum.

40. With regard to the Bolivian draft resolution concerning international rivers (A/C.6/L.445/Rev.1), he thought that the word "navigation" might be examined more thoroughly, despite the explanation given by the Bolivian representative. In that connexion the words "introducing uniformity" created serious difficulty. In fact, there were already a number of international conventions regulating navigation on international rivers. They had been specially drafted for certain particular rivers, and it would be impossible to standardize them in regard to navigation. As regards utilization on the other hand, the International Law Commission could try to codify existing rules of international law having general validity. However, the Commission probably could not take up the question

for some time—until after it had considered the right of asylum, and in any case not before the Secretariat had carried out a preliminary study. Moreover, that study might show that the International Law Commission could proceed to codify the current laws, and not merely to "study the possibility" of codifying them.

41. Lastly, he wished to pay tribute to the members of the International Law Commission. The credit for its work was shared by all of them; and representing as they did all geographical areas of the world and the principal systems of law, they made possible a fruitful co-operation with the Sixth Committee and the General Assembly. One-third of the members of the Commission had collaborated in its work from the outset, and the work had greatly benefited from the principle of continuity to which the General Assembly had attached considerable importance when filling seats that had become vacant. He also wished to thank the Secretariat staff, and particularly Mr. Liang, for the valuable services rendered to the Commission.

42. In conclusion, he assured the members of the Committee that the International Law Commission was very conscious of its responsibilities, as an instrument created by the General Assembly to assist

it in carrying out the task assigned to it under Article 13 of the Charter—the progressive development of international law and its codification. It was in the discharge of that task that jurists were able to make their essential contribution to the cause of peace which they all had so much at heart.

43. Mr. MOROZOV (Union of Soviet Socialist Republics) wished to state that, contrary to the belief of the Bolivian representative, there was no contradiction between the attitude of the USSR delegation in the Economic and Social Council and its attitude in the Sixth Committee. Both in the Council and in the Committee the USSR delegation had recognized the economic importance of the problem of the exploitation and utilization of international rivers; but the legal aspect of that problem had not been brought up in the Council, where there had never been any question of the codification of current international law on the subject. His delegation continued to think that there was no reason to take at the present session a decision which would commit both the International Law Commission and the General Assembly.

The meeting rose at 6 p.m.