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Summary record of the 616th meeting

Topic:
<multiple topics>

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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.

7. It followed that reflection, the maturing of ideas in the Commission, were essential for the progress of codification, and the General Assembly should be told those elementary truths. For if the Assembly took the view that codification had become a priority task, changes in structure might become necessary in the interest of advancing the work. There was, however, a limit even to structural reforms: for the purposes of codification, those concerned had at all times to remain in touch with international events. The Commission's successes were attributable to the fact that it brought together experts who approached their task in a spirit of comprehension and tolerance. What the Commission, reflecting the different systems of law, could accept, that the States could likewise accept. Conversely, if *ad hoc* experts or legislators tried hastily to impose something, that would have no chance of acceptance.

8. For those reasons, he associated himself with the views expressed by Mr. Ago and Sir Humphrey Waldock: the two great subjects of codification should be the law of treaties and the international responsibility of the State. Treaties constituted the sum of the daily experiences of each State. In France, for example, an international agreement was concluded every two days. If the Commission provided the international community with unambiguous rules concerning the conclusion, application and termination of treaties, and concerning the circumstances in which the responsibility of the State was incurred, then nobody would be entitled to complain of a lag in the codification of international law. The General Assembly should be thanked for the special interest it had taken in codification, and the summary record of the current debate should not fail to reflect the agreement of the members of the Commission as evidenced by all that had been said concerning the essential content of codification.

9. Mr. PADILLA NERVO said it was agreed that General Assembly resolution 1505 (XV) did not ask the Commission to select new topics for codification, nor did it express an opinion as to the aspects of codification or progressive development of international law to which special attention should be paid. The resolution was not an expression of political differences in the Commission, but did reflect the feelings of States which the Commission itself could not ignore. Extreme political concern certainly existed and found expression through many channels, one of which — the Assembly — was of considerable importance to the Commission, which, as a body of experts sitting in a personal capacity, was perhaps the Assembly's principal non-political organ. It was true that the same might be said of the International Court of Justice, but its comments had a different significance; many of the newer countries felt that they had not participated in framing the rules that would be applied to them by the Court. The Commission, on the other hand, reflected the views of experts from countries and regions with widely differing social and political structures and legal systems. The opportunity should therefore be taken to use the Commission's undoubted authority to allay the misgivings certainly entertained by many States.

10. Undoubtedly, at the sixteenth or seventeenth session of the General Assembly many States would suggest topics of international law for codification and possible progressive development. The Commission should take note of the uneasiness felt by some States and should express its opinion on the topics suggested and the difficulties they might present. It should also express its opinion that many of the concerns felt by the States could be overcome by a study of the more specific items on the Commission's agenda. It would, however, be preferable to refrain from expressing an opinion until governments had made their suggestions at the General Assembly. The Commission would then be able to take those suggestions as a basis and voice any reservations it might have, with added authority.

11. The Mexican Government would probably suggest a number of topics. One might be the study of the legal consequences of the peaceful co-existence of States with differing political, economic and social structures. Peaceful co-existence itself was, of course, a political idea and could not therefore be codified, but the economic, political and cultural relations between different systems would have international legal consequences in, e.g., trade and international services.

12. The Mexican Government would probably also suggest a study of the succession of States and governments. That was a topic of special importance, owing to the emergence of so many new States and its study would involve such problems as the validity of treaties, the problem of nationality, acquired rights, compensation and even certain problems relating to membership of international organizations.

13. Another topic might be the permanent sovereignty of States over natural resources, which was of particular interest to Mexico. The principle was being gradually accepted in practice by States and in the international organizations. It might be dealt with within the framework of State responsibility, if that were given a broader scope. Resolution 1 A, addressed to the General Assembly through the Economic and Social Council, of the Commission on Permanent Sovereignty over Natural Resources (E/3511-A/AC.97/13, annex) specifically requested the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly. The first paragraph of the preamble and sub-paragraphs 2 and 4 of the first operative paragraph would be of particular concern to the Commission.

14. Another possible subject was the study of the international consequences of land reform. The comments made in connexion with the permanent sovereignty over natural resources were partly relevant to land reform also. Land reform might also be studied as a separate topic; although essentially a matter of domestic concern, it undoubtedly had international consequences.

15. An attempt might be made to formulate certain basic legal rules for the control of outer space. That might contribute to the study of political and military topics. The competent committee of the United Nations was studying procedure and had come to the conclusion that decisions should be taken not by majority vote,

but by general agreement. The question had so many aspects apart from the scientific that a legal study of the implications of the use of space might well be undertaken with a view to finding certain moral and non-mandatory rules before the political and military aspects made such a study far more difficult. Other studies connected with international relations, such as the study of neutrality, should be carried out in the light of recent international instruments and recent changes in those relations. Another suggestion for the General Assembly which might act as a guide for the Commission might be a study of the sources of international law in the light of resolutions adopted by international organizations which had a strong impact on international law, directly or indirectly. The legal aspects of the consequences of nuclear explosions might also be examined.

16. Probably, many other subjects would be suggested and the Commission's opinion on them would be very useful, especially if it could convince governments that many of their apprehensions concerning the application of international law might be allayed if the Commission continued to give priority to the topics already on its programme and were given the means to speed up its work on those topics. The Commission might even say that the codification of such topics would require a change in the Commission's methods of work and even of its Statute.

17. With better means at its disposal, the Commission might in time be able to give advisory opinions, in addition to continuing its work on the codification and progressive development of international law. It might work out draft treaties for such matters as disarmament and the cessation of nuclear tests. Such legal studies of political matters would not be misplaced, since the Commission was composed of individual experts, not of political representatives.

18. The Commission should therefore continue with its present programme, but should be given more facilities. It should not adopt any specific position on the matters raised in General Assembly resolution 1505 (XV) until after hearing what had transpired at the General Assembly's sixteenth session.

19. Mr. TSURUOKA observed that nobody had contested the view that codification involved both the statement of existing law and its systematic and progressive development. The existence of international law presupposed the existence of customary law. Codification since the nineteenth century had only been possible when not dominated by extra-legal considerations. The Commission should jealously maintain its position as an expert legal body, though at the same time it should naturally pay due attention to new facts as they emerged.

20. The law of treaties and state responsibility should be given priority for codification for the reasons given by Mr. Ago (615th meeting, para. 26) and Mr. Gros. Some of the suggestions put forward in the Sixth Committee in 1960 were covered by the codification of those two topics. The Commission might well add to its programme the topic of succession of States and governments.

21. So far as his experience went, it would hardly be possible to improve the Commission's work unless the Commission was prolonged. Its work would, however, be facilitated if States, instead of awaiting a report, submitted their comments as soon as it began to study a particular topic. A legal library might also be formed to help the special rapporteurs in their work.

22. With regard to relations between the Commission and the General Assembly, all the Assembly's apprehension should be allayed. The Commission should, of course, pay careful attention to the Assembly's legitimate wishes, but it should also make great efforts to ensure that the Assembly appreciated the Commission's endeavours to carry on its work efficiently. That might be done partly by statements by the Commission's members who sat in the Sixth Committee and partly by personal contacts between them and government representatives in the General Assembly.

23. Mr. EDMONDS said it was unfortunate that Sir Humphrey Waldock's suggestion for a special statement addressed by the Commission to the Sixth Committee (615th meeting, para. 66) had not been acted on owing to shortage of time and the pressure of work. In order that the views of each member should be presented in full, he would propose formally that the sound recordings of the meetings on item 6 be transcribed and be made available to the members of the Commission and to members of the Sixth Committee.

24. Mr. LIANG, Secretary to the Committee, explained that according to the regulations only the principal organs of the United Nations were entitled to verbatim records. It would not therefore be feasible to issue verbatim records for certain meetings of the Commission. Members' statements might be recorded more fully than usual in the summary records.

25. Mr. YASSEEN requested that the statements made in the debate on item 6 should receive fuller treatment than usual in the summary records.

26. Mr. AMADO said that, speaking extemporaneously and not reading from written notes, he had to rely to some extent on subsequent interpretation. What he said represented in any case what he considered right.

27. The CHAIRMAN said that naturally all members listened with the greatest interest to everything said by every other member of the Commission, but the summary record would be sufficient to convey to the Sixth Committee the essence of the views stated in the discussion. Fuller treatment than usual might well be given in the summary records.

28. Mr. MATINE-DAFTARY, Rapporteur, suggested that a detailed account of the discussion might be given in the Commission's report.

29. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the general tenor of the statements made by previous speakers. Plainly, the General Assembly had the original competence under article 13 of the Charter to promote the codification and progressive development of international law. Since the Assembly had not delegated that responsibility, it was quite logical for it

to take a decision *ex novo* on the topics to be codified, particularly at a time when the composition of the Commission was about to be changed, and when certain members might be unable to complete the tasks allotted to them as special rapporteurs. He was convinced that the renewal of the Assembly's interest in international law would strengthen the role of the Commission as the main subsidiary organ of the Assembly for the codification and development of international law.

30. In his opinion, the Commission's work went far beyond pure codification and its achievements already had historical value. Owing to the impending change of its membership, the Commission should not at that time establish a definite line for its future work but, as Mr. Ago had pointed out (615th meeting, para. 35), whatever topics were selected, the last word should rest with the Commission itself, for it was better qualified to decide whether the topics concerned were ripe for codification. The two main items on the Commission's existing agenda — the law of treaties and state responsibility — were likely to yield positive results. With regard to the disagreement on state responsibility at the Commission's twelfth session (566th and 568th meetings), he thought there had been of late a tendency which gave hope of positive results, even with respect to the international law affecting injuries to aliens in the territory of the State. All States now recognized the principle of their obligation towards States whose nationals were affected by nationalization measures taken in their territories. The question was not one of international protection of private property or of acquired rights, but of the principle that, if a State was enriched by capital belonging to nationals of another country, the latter must be compensated for losses incurred as a result of expropriation or nationalization. He cited certain recent treaties concluded amongst themselves by socialist countries (e.g., that between Yugoslavia and Czechoslovakia of 11 February 1956 and that between Poland and Czechoslovakia of 29 March 1958) which recognized the principle of compensation and mutual settlement of obligations in connexion with claims arising out of nationalization measures or other provisions depriving the legal subjects of one party of rights of ownership in the territory of the other.

31. He considered that the topics suggested by certain members, especially by Mr. Padilla Nervo, were most interesting, but thought that if too many subjects were proposed, the Commission would have difficulty in completing detailed drafts on each one. With regard to Sir Humphrey Waldock's suggestion made at the previous meeting, he pointed out that the General Assembly had not asked the Commission for any recommendation; it was therefore questionable in what form a statement of the kind suggested by Sir Humphrey could be submitted to the Sixth Committee. Finally, he had not enough experience of the Commission's work to make suggestions for the improvement of its method of work, but he had been most impressed by Mr. Pal's statement (615th meeting, paras. 15-22).

32. The CHAIRMAN, speaking as a member of the Commission, said that criticisms of General Assembly resolution 1505 (XV) were unjustified and were motivated by considerations foreign to the codification and progressive development of international law. The Commission should be grateful to the General Assembly and to the States which had sponsored a resolution drawing the attention of governments to the importance of international law in international relations and envisaging the reconsideration of the whole subject in the light of new developments throughout the world.

33. The first question to be considered in connexion with the codification and progressive development of international law was which of the branches of international law should receive priority. It was obvious that they should be the branches most closely connected with the maintenance of peace and security and the development of friendly relations among nations.

34. The resolution itself stated that the programme of codification should take into account the need to promote friendly co-operation among States. Several members had rightly pointed out that the subjects concerned were vast; they included, for example, codification of the principles of peaceful co-existence, of State responsibility and of the succession of States. That did not mean, however, that other branches of international law should be neglected. There seemed to be no difference of opinion in the Commission on that score, and although Mr. François had expressed the view that more restricted topics should be dealt with, he would surely not object to giving priority to the most important subjects.

35. The question was obviously one of approach, rather than of fundamental disagreement. Certain doubts had been voiced concerning passages of the General Assembly resolution which mentioned the possibility of a broader approach towards the selection of subjects for codification and the establishment of the programme in the light of recent developments in international law. The Commission's existing programme was over ten years old and the main question to be answered was whether any developments had in fact taken place which would warrant its reconsideration. He was convinced that a review of the programme was fully justified, firstly, because it was generally useful to reconsider a programme from time to time and, secondly, because important changes had in fact taken place in international society. It was enough to mention the disintegration of the colonial system and the emergence of new States during the past fifteen years; that fact could not fail to have serious repercussions on the development of international law. Again, the important changes that had taken place in the past few decades had not yet been fully digested, even by international lawyers, and it could be said with certainty that not all the necessary conclusions had yet been drawn from those changes. For example, so far as the subject of state responsibility was concerned, fundamental changes had taken place in consequence of the establishment of the principles of non-aggression, the prohibition of the use and threat of force and the principles of peaceful co-existence. The establishment of those principles had completely transformed the international law relating to state respon-

sibility. He could not agree with the Secretary to the Commission that state responsibility in the broad sense did not exist in international law, but was dispersed among all its component branches. In his opinion, there was a branch of international law dealing with the responsibility of States, and that branch should constitute a separate subject for codification; the fact that the Commission had for a number of years been confusing the subject of state responsibility as a whole with that of responsibility for injury to aliens did not mean that the topic in its broad sense did not exist as such in international law. The new concept of state responsibility followed from the new principles and practices of States and was reflected in the post-war settlements, but not as yet in the doctrine of international law or in the work done by the Commission on the subject. There were, however, definite new trends from which logical consequences must follow. The Commission should pay the utmost attention to new developments and should draw the necessary conclusions.

36. With regard to the programme of the Commission's work, he agreed with previous speakers who had stressed the fact that the codification and progressive development of international law required much patience and was necessarily a slow process. The whole complex of international relations was involved and, as Mr. Gros in particular had emphasized, the work of codification in itself was extremely complicated. The Commission was agreed that it should always present drafts of high quality, embodying its best efforts to contribute to the maintenance of peace and of friendly relations among States. It should therefore heed the recommendations of the Sixth Committee, and some practical steps might be taken to draw the Commission's attention to specific remarks made in the Committee. The Secretariat might supply the Commission with a comprehensive paper summarizing the relevant observations made during the debate of the Sixth Committee and the Chairman should report to the Commission on the discussion of its report in the General Assembly. Moreover, the Commission should be modest and should concede that its work was not impeccable. It had been suggested that its sessions should be prolonged, in order to increase the volume of its production; he very much doubted the necessity and advisability of such a course, since some members were unable to attend sessions in their entirety, even when they lasted for a mere ten weeks.

37. In his opinion, the Commission's work might be best expedited by a thorough preparation of its drafts. In that connexion, it was most important that the special rapporteurs should know in advance what the Commission expected of them. On many occasions, the instructions given to special rapporteurs had been so vague that they had been obliged to rely on their own judge-

para. 57) that it would take the Commission seven years

ment only. Mr. Zourek had said (615th meeting,

to deal adequately with the subject of the law of treaties. A considerable amount of work had already been done on the subject, but the absence of specific instructions had brought about the situation that if the Commission took up the present draft articles it could hardly produce a draft acceptable to States. It had been suggested that non-members of the Commission could be appointed as special rapporteurs; in the five years during which he had been a member of the Commission, there had always been enough members willing and able to undertake the study of various topics and, moreover, the Secretary had pointed out that it was inadmissible for administrative reasons to call in outside assistance. He was sure that contacts between special rapporteurs and regional juridical bodies studying the same subject could be extremely valuable. Mr. Verdross's suggestion that either two special rapporteurs or a committee of three members might be appointed to examine certain topics deserved consideration.

38. Mr. ŽOUREK drew attention to the view put forward (614th meeting) that the subject of State responsibility was so vast that it could hardly be dealt with otherwise than from the restricted point of view of injury to aliens in the territory of a State. There could be no doubt that such material injuries in violation of international law were regrettable and could cause friction between States; but the violation of fundamental rules of international law, especially those established with the purpose of maintaining international peace and security, had even more regrettable consequences, and, as experience had shown, could lead to the infliction of incalculable losses on mankind. Accordingly, after establishing the general rules governing State responsibility, the Commission would be in duty bound to tackle the particular problem he had mentioned. Moreover, its studies might be based on some of its earlier work in the field: in particular, he had in mind the codification of the principles recognized in the Charter and Judgement of the Nürnberg Tribunal.

39. Mr. AGO thought that the main question before the Commission was how it could best inform the General Assembly of the tenor of its debates. All members would agree that the summary records might be expanded by careful correction; but all the members of the Sixth Committee could not be expected to read those in detail, and it was essential that they should be given a general and comprehensive view of the Commission's ideas. Accordingly, the Commission should ask the Chairman, in presenting the Commission's report to the Sixth Committee, to interpret its views on the subject, in order to remove all misunderstandings and to convey to the General Assembly the Commission's appreciation of the renewal of interest in international law as a factor of peace and co-operation among nations. The General Assembly's attention might also be drawn to the fact that the work of codification was of necessity long and slow. Moreover, it should not be forgotten that that work did not end in the Commission, but was continued at plenipotentiary conferences. Thus, despite the many years of hard work that the Commission had expended on the law of the sea, it had then been necessary to hold two plenipotentiary conferences on the subject, and the subject was still not exhausted. The codification of the international law of diplomatic relations had culminated in the signature of the Vienna Convention; but that success, achieved in a relatively short time, was due essentially to the very long and careful preparation of the draft in the Commission. He

agreed with the Chairman that it was sometimes possible to improve the Commission's work by giving more precise instructions to special rapporteurs. But miracles should not be expected so long as the Commission had only ten weeks at its disposal annually. So far as the prolongation of the Commission's sessions was concerned, that course had both advantages and disadvantages, and it was not for the Commission to make any recommendations on the subject: the General Assembly usefully consider it. But the essential point in his opinion was that a choice among the very many topics proposed for codification was indispensable and that, at the moment, priority should be given to the most important and general topics, to those which were the most essential if the codification of international law was to make real and substantial progress. Those were, he thought, the main points of the Commission's views which he hoped the Chairman would put before the Assembly and the Sixth Committee.

40. The CHAIRMAN said he would do his best to convey the views of the Commission to the Sixth Committee.

41. Mr. LIANG, Secretary to the Commission, replying to the Chairman's remarks on the question of State responsibility, said that he did not disagree with him in theory. He had merely pointed out that the principle of State responsibility in the widest sense was implicit in every branch of international law; the whole field of international law must be applied in the light of those principles, just as constitutional law was governed by the principle of governmental responsibility. Taken in that sense, State responsibility would be an extremely broad subject, and he wondered whether it was practical to codify it in all its ramifications. For that reason, past attempts at codification had been limited to the topic of injury to aliens in the territory of a State.

42. Mr. GARCÍA AMADOR said that he had examined with care the records of the Sixth Committee's discussions, in the course of which some criticisms had been expressed regarding the extent and scope of the reports submitted by him as Special Rapporteur on the subject of the international responsibility of States.

43. He wished to explain that his first report (A/CN.4/96) had dealt with the subject of State responsibility as a whole. In his subsequent reports (A/CN.4/106, 111, 119, 125 and 134), he had dealt only with the problem of the responsibility of the State for injuries caused in its territory to the person or property of aliens. He had done so not by his own choice, but in pursuance of the Commission's wishes and in deference to the views expressed by its members (A/3623, chapter III, para. 17). During the five years which he had devoted to the study of the question of the international responsibility of the State for injuries to aliens, there had been no objection to that limitation of the subject by any member of the Commission; nor had there been any criticism from the Sixth Committee or the General Assembly.

44. In the circumstances, he could not therefore understand the objections voiced in the Sixth Committee at the fifteenth session of the General Assembly. Much had been said about the need for the Commission to deal with certain important subjects. There could be no doubt that matters affecting property rights as a result of measures of expropriation and nationalization, matters for which considerable enthusiasm had been shown, were directly connected with the international responsibility of States for injuries to aliens. Indeed, long before that enthusiasm had become manifest, he had devoted a considerable portion of his reports to a detailed study of those particular matters. In doing so, he had taken into account not only the traditional principles of international law, but also the new trends and recent developments in the matter.

45. A tendency had been apparent during the Sixth Committee's discussion to criticize his reports for not having taken sufficiently into account new developments in international law. Those criticisms would have been more helpful if specific reference had been made to a particular development, explaining how he had omitted to take it into account. As a matter of fact, none of the critics had mentioned a single such development. In reality, the one leading recent development in the matter had been the impact of the progressive internationalization of human rights on the whole subject of the international law of state responsibility and the treatment of aliens. He had, of course, devoted considerable attention in his reports to that new development, but regretted to note that the criticisms to which he had referred came from those quarters least sympathetic to the concept of international human rights as accepted by the United Nations as a whole.

46. Lastly, it had been said that he had not taken into consideration problems of violations of territorial sovereignty. In fact, those problems were dealt with in the Charter of the United Nations itself. He wondered whether his critics would have had the same enthusiasm for the study of the problem of the violation of a country's sovereignty by means of infiltration and subversion by States pursuing a policy of expansion.

47. The CHAIRMAN said that the subject of state responsibility was not being dealt with by the Commission at the current session; some members had referred, in the course of the discussion on the Commission's future work, to the fact that the two subjects of state responsibility and the rights of aliens had become somewhat intermingled.

48. He declared the discussion on item 6 closed.

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1 to 11, A/CN.4/137)
(resumed from the 614th meeting)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING

49. The CHAIRMAN invited the Commission to consider on second reading the draft articles on consular relations (A/4425).

ARTICLE 1 (Definitions)

50. The CHAIRMAN said that the following (partly new) text had been prepared by the Drafting Committee for article 1.

" 1. For the purpose of the present draft, the following expressions shall have the meanings hereunder assigned to them:

" (a) 'Consulate' means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

" (b) 'Consular district' means the area assigned to a consulate for the exercise of its functions;

" (c) 'Head of consular post' means any person in charge of a consulate;

" (d) 'Consular official' means any person, including the head of post, entrusted with the exercise of consular functions in a consulate;

" (e) 'Consular employee' means any person who is entrusted with administrative or technical tasks in a consulate, or belongs to its service staff;

" (f) 'Members of the consulate' means all the consular officials and consular employees in a consulate;

" (g) 'Members of the consular staff' means the consular officials, other than the head of post, and the consular employees;

" (h) 'Member of the service staff' means any consular employee in the domestic service of the consulate;

" (i) 'Member of the private staff' means a person employed exclusively in the private service of a member of the consulate;

" (j) 'Consular premises' means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the consulate;

" (k) 'Consular archives' means all the papers, documents, correspondence, books and registers of the consulate, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

" 2. Consular officials may be career officials or honorary consuls. The provisions of section III of chapter II of this draft apply to officials who are career consuls; the provisions of chapter III apply to honorary consuls as well as to career officials who are assimilated to honorary consuls under article 54 *bis*.

" 3. The particular status of members of the consulate who are nationals of the receiving State is governed by article 50 of this draft."

51. The CHAIRMAN invited comments on paragraph 1 (a) to (k).

Paragraph 1 (a) was adopted.

Paragraph 1 (b) was adopted.

52. Mr. LIANG, Secretary to the Commission, referring to paragraph 1 (c), pointed out that the expression " person in charge " suggested that the situation envisaged was temporary in character. The language of the provision was not consistent with the terms of article 16 on acting heads of post.

53. Mr. ŽOUREK, Special Rapporteur, said that probably the expression used in English was too broad. Perhaps the language of article 16 might be adjusted to avoid any inconsistency.

54. Sir Humphrey WALDOCK said that the expression " person in charge " was no broader than the French *personne qui dirige*.

55. The CHAIRMAN said that under article 19 of the Vienna Convention on Diplomatic Relations the acting head of a diplomatic mission was deemed to be head of the mission.

Paragraph 1 (c) to (k) was adopted.

Paragraph 1, as a whole, was adopted.

56. The CHAIRMAN invited comments on paragraph 2.

57. Mr. BARTOŠ said that there was a discrepancy between the English " career officials or honorary consuls " and the corresponding French *fonctionnaires de carrière ou honoraires*.

58. Sir Humphrey WALDOCK said that there was no difference in substance. It would have been awkward to refer to " honorary officials ".

59. Mr. AMADO said that the French *fonctionnaires honoraires* was equally awkward.

60. Mr. ŽOUREK, Special Rapporteur, said that the expression " honorary consuls ", which was one of long standing, had been replaced by " honorary consular officials " in deference to an observation by the Netherlands Government (A/CN.4/136/Add.4). In view of the difficulties of translation, he thought perhaps the best solution would be to revert to the use of " honorary consuls " and to explain in article 54 that the expression covered also persons who served as consular officials, other than head of post, in an honorary capacity.

61. The CHAIRMAN suggested that paragraph 2 should be re-drafted to read:

" 2. Consular officials may be career officials or honorary. The provisions of section III of chapter II of this draft apply to officials who are career officials. The provisions of chapter III apply to honorary consular officials, as well as to career officials who are assimilated to them under article 54 *bis*.

Paragraph 2, as so amended, was adopted.

62. The CHAIRMAN invited comments on paragraph 3.

63. Mr. ERIM asked what was the purpose of paragraph 3. Article 50 already specified the status of members of the consulate who were nationals of the receiving State.

64. Mr. ŽOUREK, Special Rapporteur, said that by drawing attention to article 50 in the definitions article, the Commission would avoid having to include in a large number of articles a reference to the status of persons who were nationals of the receiving State.

65. The CHAIRMAN, speaking as a member of the Commission, said that the paragraph was a useful one. If a provision of that type had been included in the draft on diplomatic relations, many doubts and uncertainties would have been dispelled and much discussion avoided at the Vienna Conference.

66. Mr. BARTOŠ said that it was particularly useful to have in article 1 an indication of the status of a whole category of members of the consulate.

Paragraph 3 was adopted.

Article 1, as amended, was adopted as a whole.

67. Mr. AGO, speaking as Chairman of the Drafting Committee, said that the titles of chapter I and section I, like all the titles, were provisional. The Drafting Committee would take a final decision on those titles when all the articles had been adopted. The same was true of the order in which the articles were placed.

68. The CHAIRMAN said that the Commission would do well to defer its decision on the placing of the articles and the titles until it had adopted all the draft articles, when comments of members on these points would be taken into account.

ARTICLE 2 (Establishment of consular relations)

69. The CHAIRMAN invited comments on article 2, for which the Drafting Committee had prepared the following text:

" 1. The establishment of consular relations between States takes place by mutual consent.

" 2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.

" 3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations."

Paragraph 1 was adopted.

70. Mr. ŽOUREK, Special Rapporteur, said that he had no objection to paragraph 2. It was, however, his opinion that, if the receiving State refused to accept the establishment of consular relations, it could not be said to maintain diplomatic relations but only political relations with the other State.

Paragraph 2 was adopted.

Paragraph 3 was adopted.

Article 2, as a whole, was adopted.

ARTICLE 2*bis* (Exercise of consular functions)

71. The CHAIRMAN said that the following text had been submitted by the Drafting Committee for article 2 *bis:*

" Consular functions are normally exercised by consulates. They are also exercised by diplomatic missions within the limits of their competence."

72. Mr. ŽOUREK, Special Rapporteur, proposed the deletion of the word " normally ". He had examined the practice of States very carefully in the matter and had found, for example, that all Swiss diplomatic missions exercised consular functions throughout the territory of the receiving State, with the exception of the districts for which the sending State had established consulates. The practice of other countries was similar, as would be obvious from a glance at the list of the diplomatic missions of the various States.

73. If the word " normally " were left in the first sentence the impression might be given that consulates had some sort of priority, even where there existed a diplomatic mission. The reverse was true, and there were even some other arrangements which deserved to be noted: for example, in some cases, the embassy's consular section in the capital dealt with all particularly important matters and the consulates throughout the receiving State had to refer those matters to that consular section.

74. The CHAIRMAN, speaking as a member of the Commission, supported the proposal that the word " normally " be deleted. The word suggested that the exercise of consular functions by diplomatic missions, referred to in the second sentence, was in some way not normal.

75. Mr. FRANÇOIS said that he had no objection to the deletion of the word " normally ", but thought that the concluding words of the second sentence " within the limits of their competence " were ambiguous. That phrase would certainly have to be explained in the commentary.

76. Mr. ŽOUREK, Special Rapporteur, said that he would explain the phrase in the commentary. He recalled the terms of article 3, paragraph 2, of the Vienna Convention: " Nothing in the present convention shall be construed as preventing the performance of consular functions by a diplomatic mission."

77. It was one of the functions of a diplomatic mission, by virtue of article 3, paragraph 1 (b), of the Vienna Convention, to protect in the receiving State the interests of the nationals of the sending State. For that purpose, and therefore within the normal limits of their competence, diplomatic missions could exercise consular functions.

78. Mr. AMADO criticized the phrase " within the limits of their competence ". He agreed to the deletion of the word " normally ". The whole article could, with advantage, be revised to read: " Consular functions are exercised by consulates. They may also be exercised by diplomatic missions."

79. Mr. PADILLA NERVO said that by including the phrase " within the limits of their competence " the intention had been to cover much the same ground as in article 3, paragraph 2, of the Vienna Convention. In the circumstances, the actual words of article 3, paragraph 2, of the Vienna Convention might be included in article 2 *bis* of the draft.

80. Mr. LIANG, Secretary to the Commission, agreed included in article 2*bis* of the draft.

81. As to the phrase " within the limits of their competence ", it did not appear to fulfil the purpose for which it had been intended. Questions of competence were implicit in all the provisions of the draft, and a phrase of that type could be used almost anywhere.

82. Mr. ŽOUREK, Special Rapporteur, said that the purpose of the phrase under discussion was to indicate that a diplomatic mission did not need to be invested with new functions in order to be able to carry out consular duties.

83. The language of article 3, paragraph 2, of the Vienna Convention was well suited to an instrument on diplomatic relations, but in the draft on consular intercourse it would be necessary to be more explicit; a purely negative formula of that type would not meet the case and would seem strange in a multilateral convention dealing specifically with consular relations and immunities.

84. Mr. BARTOŠ said that he had no objection to article 2 *bis*, but considered that it would have been desirable to make the question of the exercise of consular functions by diplomatic missions the subject of a separate section.

The meeting rose at 1.10 p.m.

617th MEETING

Friday, 23 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137)
(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING *(continued)*

ARTICLE 2*bis* (Exercise of consular functions) *(continued)*

1. The CHAIRMAN invited the members to continue the debate on article 2 *bis*.[1]

2. Mr. YASSEEN said that in connexion with article 2 *bis* two points had to be settled: first, whether a diplomatic mission could exercise all consular functions; secondly, whether that exercise of consular functions was normal, in other words whether it was admissible at all times and without any conditions.

3. So far as the first point was concerned, State practice showed that diplomatic missions performed all consular functions without distinction. Indeed, from the practical point of view, it would be difficult to draw any distinction between the various consular functions for that purpose. So far as the second point was concerned, he believed that the exercise of consular functions by diplomatic missions was normal. He therefore supported the deletion of the word "normally" from the first sentence. However, he felt that that whole sentence was unnecessary; it was unnecessary to state the obvious truth that consular functions were exercised by consulates. Article 2 *bis* might consist simply of a provision stating that consular functions "may be exercised" (*pourront être exercées*) by a diplomatic mission.

4. Mr. MATINE-DAFTARY supported the suggestion for the deletion of the phrase "within the limits of their competence". He also noted that the English and French versions of that phrase differed, the French word *attributions* being rendered in English by "competence". Moreover, the term *attributions* was far too vague and would give rise to difficulties of interpretation.

5. Sir Humphrey WALDOCK said it was difficult to render the French term *attributions*. The phrase was intended to mean that, if a diplomatic mission exercised consular functions, it was acting within its province and within the limits of its duties.

6. The suggestion of Mr. Yasseen raised a more general question. It was necessary to avoid any clash with the compromise formula embodied in article 3, paragraph 2, of the Vienna Convention on Diplomatic Relations. A simple statement to the effect that a diplomatic mission could exercise consular functions might be open to the interpretation that such a mission could exercise consular functions without restriction throughout the territory of the receiving State. From the point of view of substance, it should be made clear to what extent the exercise of consular functions by a diplomatic mission was controlled by the provisions of the draft concerning consular intercourse.

7. The CHAIRMAN, speaking as a member of the Commission, said that he could not support Mr. Yasseen's suggestion for the deletion of the first sentence. It was true that, with the omission of the word "normally" the sentence stated a more or less obvious fact, but it was quite usual to express a self-evident fact as an introduction to another provision logically connected with that fact. The first sentence was rendered necessary by the presence of the second sentence of article 2 *bis*.

8. With regard to the concluding phrase, he was inclined to consider that it could perhaps be best omitted.

9. Mr. PADILLA NERVO said that if article 2 *bis* were put to the vote as it stood he would vote against it.

10. The provisions of article 2 *bis* were intimately connected with those of article 2 on the establishment of consular relations and also with those of article 52 *bis* on members of diplomatic missions responsible for the exercise of consular functions. He recalled that when the Commission had discussed article 52 *bis*, he had raised the question whether its provisions were intended to cover only the cases where consular functions were performed in the capital city, or also the exercise of those functions at a place outside the capital (611th meeting, para. 66).

11. It was essential to limit the scope of the statement in the second sentence of article 2 *bis*, which in its Spanish version at least, stated without any qualification that consular functions could be exercised by diplomatic missions and that such exercise came within the scope of the powers or faculties of those missions (*dentro de la esfera de sus atribuciones*).

12. Some contrast should be established between consular functions as exercised by consulates and the same functions as exercised by diplomatic missions. Some reference should be made to the fact that they were exercised by the consular section of the diplomatic mission concerned; it should also be made clear that the

[1] Text in summary record of 616th meeting, para 71.