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Future work in the field of the codification and progressive development of International Law - Working paper prepared by the Secretariat

Topic:

Programme of work

Extract from the Yearbook of the International Law Commission:-

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FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

[Agenda item 2]

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Working paper prepared by the Secretariat

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Introduction

(*a*) Resolution 1505 (XV)

1. In its resolution 1505 (XV) of 12 December 1960, the General Assembly decided to place on the provisional agenda of its sixteenth session the question entitled "Future work in the field of the codification and progressive development of international law", " in order to study and 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".

2. The resolution also invited Member States to submit in writing to the Secretary-General, before 1 July 1961, any views or suggestions they might have on this question for consideration by the General Assembly.

3. The Secretary-General received observations from seventeen Governments and communicated them to Member States in document A/4796 and Add.1-8. A summary of these replies, prepared by the Secretariat, was issued as document A/C.6/L.491 and Corr.1 and 2.

4. The International Law Commission devoted a number of meetings to this question at its thirteenth session (614th to 616th meetings).[1]

5. In accordance with resolution 1505 (XV), the General Assembly placed the question on the agenda of its sixteenth session and referred it, for study and report, to the Sixth Committee, which considered it at its 713th to 730th meetings, from 14 November to 13 December 1961.

(*b*) Resolution 1686 (XVI)

6. On the recommendation of the Sixth Committee, the General Assembly, on 18 December 1961, adopted resolution 1686 (XVI), reading as follows:

"*The General Assembly,*

"*Recalling* its resolution 1505 (XV) of 12 December 1960,

"*Considering* that the conditions prevailing in the world today give increased importance to the role of international law in relations among nations,

"*Emphasizing* the important role of codification and progressive development of international law with a view to making international law a more effective means of furthering the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations,

"*Mindful* of its responsibilities under Article 13, paragraph 1 a, of the Charter to encourage the progressive development of international law and its codification,

"*Having surveyed* the present state of international law with particular regard to the preparation of a new list of topics for codification and progressive development of international law,

"1. *Expresses its appreciation* to the International Law Commission for the valuable work it has already

[1] See *Report of the International Law Commission covering the work of its thirteenth session, Official Records of the General Assembly, Sixteenth Session, Supplement No. 9* (A/4843), paras. 40-41.

accomplished in the codification and progressive development of international law;

"2. *Takes note* of chapter III of the report of the International Law Commission covering the work of its thirteenth session;

"3. *Recommends* the International Law Commission:

"(*a*) To continue its work in the field of the law of treaties and of State responsibility and to include on its priority list the topic of succession of States and Governments;

"(*b*) To consider at its fourteenth session its future programme of work, on the basis of sub-paragraph (*a*) above and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resotion 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached;

"4. *Decides* to place on the provisional agenda of its seventeenth session the question entitled 'Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations'."

7. The only paragraph of this resolution requiring action by the Commission is paragraph 3, which is itself divided into two sub-paragraphs. Sub-paragraph (*a*) requires no comment. Sub-paragraph (*b*), however, which recommends the Commission to consider its future programme of work, raises many problems in connexion with the selection of possible topics.

(*c*) Programme of work established by the International Law Commission in 1949

8. At its first session in 1949, the International Law Commission established a programme of work on the basis of a memorandum prepared by the Secretariat, entitled *Survey of International Law in relation to the Work of Codification of the International Law Commission*.[2]

9. The Commission considered twenty-five topics, which are listed in the report of its first session.[3] After due deliberation, it drew up a provisional list of fourteen topics selected for codification; it was understood that the list was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.[4]

(*d*) Work completed by the International Law Commission

10. Since its first session, the International Law Commission has studied the following topics: régime of the high seas; régime of territorial waters; nationality, including statelessness; diplomatic intercourse and immunities; consular intercourse and immunities; and arbitral procedure. The Commission has also studied the question of the continental shelf and the conservation of the living resources of the high seas in connexion with the law of the high seas.[5] At the request of the General Assembly, it has prepared a draft declaration on the rights and duties of States and a draft code of offences against the peace and security of mankind, formulated the Nürnberg principles, and considered ways and means for making the evidence of customary international law more readily available, the problem of international criminal jurisdiction, the question of defining aggression and the question of reservations to multilateral conventions.

(*e*) Topics under study or to be studied by the International Law Commission

11. Several reports have been submitted by the Special Rapporteurs on two other topics—the law of treaties and State responsibility—and the International Law Commission has begun discussion of these questions. In its resolution 1686 (XVI), the General Assembly recommended the Commission to continue its studies of these topics. The law of treaties is included in the agenda of the present session. The new Rapporteur on this topic, Sir Humphrey Waldock, will be submitting a report (A/CN.4/144). Mr. García Amador, the Rapporteur on the topic of State responsibility, is no longer a member of the Commission, and the question of his successor will have to be considered. In the same resolution, the Assembly requested the International Law Commission to include the topic of succession of States and Governments on its priority list.

12. In addition, the General Assembly had previously referred the following questions to the International Law Commission:

(*a*) In its resolution 1289 (XIII) of 5 December 1958, it invited the Commission to give further consideration to the question of relations between States and inter-governmental international organizations at the appropriate time, after study of consular intercourse and immunities and *ad hoc* diplomacy had been completed by the United Nations. The Commission, at its eleventh session, took note of that resolution and resolved that in due course consideration would be given to the matter.

(*b*) In its resolution 1400 (XIV) of 21 November 1959, it requested the International Law Commission, as soon as it considered it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum. The Commission, at its twelfth session, took note of that resolution and decided to defer further consideration of that question to a future session.

(*c*) In its resolution 1453 (XIV) of 7 December 1959, it requested the Commission, as soon as it considered it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays. The Commission, at its twelfth session, decided to defer consideration of that subject to a future session. A study on the subject, prepared by the Secretariat, will be circulated at the present session of the Commission (A/CN.4/143).

13. Lastly, in its resolution 1687 (XVI) of 18 December 1961, the General Assembly requested the

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[2] United Nations publication, Sales No.: 48.V.1 (1).

[3] See *Report of the International Law Commission covering its first session, General Assembly Official Records, Fourth Session, Supplement No. 10* (A/925), para. 15.

[4] *Ibid.*, para. 16.

[5] The six topics in the list of fourteen which have not yet been studied by the Commission are: recognition of States and Governments, succession of States and Governments, jurisdictional immunities of States and their property, jurisdiction with regard to crimes committed outside national territory, treatment of aliens, right of asylum.

International Law Commission as soon as it considered it advisable, to study further the subject of special missions and to report thereon to the General Assembly.

(f) Purpose and scope of the present document

14. Apart from these topics, which are still before the International Law Commission, the replies by Governments (A/4796 and Add.1-8) have indicated a number of topics suitable for codification by the Commission; some already appeared in the list of fourteen topics or in the list of twenty-five topics drawn up by the Commission in 1949, while others were new subjects, in the sense that the Commission had never considered making a study of them.

15. The present document has been prepared on the basis of the replies by Governments. However, the question of peaceful coexistence, which was suggested by several Governments for codification and which was the subject of a number of statements in the Sixth Committee, has not been included in view of the fact that the Sixth Committee has proposed to the General Assembly that it should place on the provisional agenda of its seventeenth session the question entitled "Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations" (see above, resolution 1686 (XVI), operative paragraph 4).

16. The study consists of a summary, topic by topic, of the ideas expressed in the replies of Governments and in statements made in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly. The opinions of members of the International Law Commission have been included. Where appropriate, the views of members of the League of Nations Committee of Experts for the Progressive Codification of International Law at its fourth session from 1925 to 1928 have been given. Use has also been made of the *Survey of International Law in relation to the Work of Codification of the International Law Commission*,[6] a memorandum prepared in 1949 by the Secretariat in accordance with article 18, paragraph 1, of the Statute of the International Law Commission, which states that: "The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not". Account has also been taken, where this was found necessary, of studies undertaken or decisions reached by other United Nations bodies and inter-governmental or other organizations. Lastly, the summary is accompanied by a number of commentaries and notes.

17. This document is divided into two parts: part I deals with the possibility of codifying topics included in the lists drawn up by the International Law Commission in 1949, part II with the possibility of codifying new topics, using that adjective in the sense already indicated.

Part I. Possibility of codifying the topics included in the list drawn up by the International Law Commission in 1949

1. Recognition of States and Governments

18. At its first session, held at Geneva in 1925, the Committee of Experts for the Progressive Codification of International Law decided, during the debate on its agenda, to withdraw the item entitled "Form of Recognition of Governments: International Position of Governments which have not been formally recognized".[7]

19. Dr. José Léon Suarez (Argentina), who had proposed the inclusion of the item, emphasized its extreme importance. He mentioned, *inter alia*, that "misunderstandings and difficulties arose every moment". He admitted that "it was legitimate for States occasionally to exercise measures of coercion for reasons of a political kind, but when those reasons did not exist considerable delays occasionally occurred because there was no test by which the form of recognition of a Government could be regulated". In his opinion, "the moment a sovereign State possessed a Government there ought to be an international formula or practice which would permit the automatic recognition of the existence of that Government".[8]

20. On the other hand, Professor James Leslie Brierly (United Kingdom) said that the Committee "should refuse to discuss this question of all others since the regulation of it by means of international conventions was neither realisable nor desirable. The difficulties arising from it and the delicacy of the question were well known, and, from a purely legal point of view, it was a subject which neither could nor ought to be treated juridically. To take an analogy, it was as though a State passed a law regulating the choice of friends to be adopted by its citizens. Such a law, if passed, would be null and void at the outset and the same was true of a regulation of international relations".[9]

21. Mr. Charles de Visscher (Belgium) and Mr. Fromageot (France) supported that view.

22. Dr. Barboza de Magalhaes (Portugal) suggested that "perhaps an immediate study could be made of the form which this recognition should assume, which was a legal question".

23. Professor Diena (Italy) thought that the Committee could also undertake the examination of the international position of Governments which had not been formally recognized, because that was an essentially legal question.

24. The Committee decided to delete the question from its agenda, on the understanding that Dr. Suarez could "present at the next session a detailed list of the points involved in the question".

25. Dr. Suarez agreed with the view of the majority that the inquiry should be put aside "for reasons of a political nature, but he desired the Committee to state definitely that the question was an urgent one, that had been put aside for political reasons, and that he personally would have desired to see it investigated".

26. The International Commission of American Jurists introduced the question of recognition into five of the nine articles[10] of its Project No. 2 entitled "States: Existence—Equality—Recognition", which was prepared in 1927 for the Sixth International Conference of American States.

27. Two articles (articles 6 and 7) of the Convention on the rights and duties of States, adopted in 1933

[6] Op. cit.

[7] *League of Nations, Committee of Experts for the Progressive Codification of International Law*, first session, eighth meeting.

[8] *Ibid.*

[9] *Ibid.*

[10] See *American Journal of International Law*, vol. 22 (1928), *Special Supplement*, p. 240.

by the Seventh International Conference of American States, dealt with recognition.[11]

28. The topic was also the subject of a resolution adopted by the Institute of International Law in 1936.[12]

29. The Harvard Research began a study of the question of recognition but did not make sufficient progress to be able to prepare a draft convention.

30. In 1949, at the first session of the International Law Commission,[13] Mr. Alfaro, Mr. Brierly, Mr. Córdova, Mr. Sandström, Mr. Scelle and Mr. Yepes expressed support for codification of the topic "recognition of States and Governments". The Chairman, Mr. Hudson, pointed out that the subject had several aspects and had often been considered a political rather than a legal question.

31. Mr. Córdova said that by providing for the admission of new States to the United Nations, the Charter had tacitly acknowledged that collective recognition of such States was possible. That was further reason for not omitting that question from the list of subjects suitable for codification.

32. Mr. Scelle was of the opinion that the objection that had been raised that the question was political rather than legal was not pertinent; the Commission's task was precisely to distinguish what was legal even in the most political questions.

33. Mr. Yepes pointed out that the recognition of a new State should not be confused with that of a new Government. It was the latter only which had a political rather than a legal character.

34. Mr. Brierly observed that his opinion had changed since the time of the League of Nations and he thought that an attempt should be made to codify the question, even if it was not certain to be successful.

35. At the thirteenth session of the International Law Commission, Mr. Bartoš suggested that the topic should be codified.[14]

36. Of the Governments which submitted replies to the General Assembly at its sixteenth session, three expressed support for a study of the question: Ghana (A/4796/Add.1), Venezuela (A/4796/Add.5) and Yugoslavia (A/4796).

37. In its observations, Colombia (A/4796) pointed out: "The Charter of the Organization of American States refers incidentally to the recognition of States in article 9. Furthermore, in so far as the question of recognition of Governments is concerned, the antecedents for relations between American States include the Tobar (Minister for Foreign Affairs of Ecuador, 1908) doctrine and the Estrada (Minister for Foreign Affairs of Mexico, 1930) doctrine. Also relevant are resolutions 35 and 36 of the Ninth International Conference of American States dealing with the right of legation and the recognition of *de facto* Governments, as well as the work done on this latter topic by the Inter-American Juridical Committee and the Inter-American Council of Jurists and reported on in the records of the four meetings of the latter body."

38. The Netherlands (A/4796/Add.7) considered that discussion of the topic "might be postponed for the time being because a number of basic questions are interwoven with political considerations".

39. During the discussion in the Sixth Committee, the representatives of Denmark (A/C.6/SR.725), Nicaragua (A/C.6/SR.722), Mexico (A/C.6/SR.722) and Yugoslavia (A/C.6/SR.714) expressed themselves in favour of a study of the topic.

40. The representative of Yugoslavia, enlarging on the ideas contained in his Government's reply, stated *inter alia* that it was not so much a matter of "seeking to find an answer to the classical question of the relationship between the declarative and constitutive theories of recognition, although that matter, too, would have to be treated within the framework of the codification of the general topic". The main point was "to ascertain the criteria that had recently governed the recognition of States and Governments and to find out whether certain general rules might be established on that basis. In addition, the legal significance of admission to membership in the United Nations and in other international organizations, more specifically as regards collective recognition, should be defined. Of no less urgency was the question of the recognition of insurgents and of Governments. The uniformity of practice which could be achieved through the codification of those rules would be of considerable interest from the point of view of establishing more stable relations among States and of facilitating the position of newly independent States".

41. On the other hand, the representative of Brazil (A/C.6/SR.721) included the topic among those which were essentially dominated by political considerations. In his view "The Commission was unlikely to succeed in attempts to deal with subjects of that type for while it might produce clever formulations, it would not achieve effective solutions".

2. Succession of States and Governments

42. The League of Nations Committee of Experts left this matter aside, although Mr. de Visscher was in favour of including it in the list of topics for codification.[15] The *Survey of International Law* states that "Considerations of justice and of economic stability in the modern world probably require that in any system of general codification of international law the question of State succession should not be left out of account" and that topic "would seem to deserve more attention in the scheme of codification than has been the case hitherto".[16]

43. At the first session of the International Law Commission, Mr. Alfaro, Mr. Córdova, Mr. François and Mr. Scelle spoke in favour of codification of the topic. In the absence of objection,[17] the question was included in the provisional list of topics for codification.[18]

44. At the thirteenth session of the International Law Commission, Mr. Bartoš, Mr. Padilla Nervo, Mr. Pal, Mr. Tunkin and Mr. Žourek suggested that the topic should be codified.[19]

45. In their replies submitted to the Assembly at its sixteenth session, eight Governments indicated that they favoured a study of the topic: Austria (A/4796/Add.6), Belgium (A/4796/Add.4), Ceylon (A/4796/Add.8), Ghana (A/4796/Add.1), Mexico (A/4796/

[11] *The International Conferences of American States, First Supplement* (1933-1940), p. 122.

[12] *American Journal of International Law*, vol. 30 (1936), *Supplement*, p. 185.

[13] Summary record of the fifth meeting, paragraphs 1-13.

[14] Summary record of the 615th meeting, paragraph 13.

[15] *L of N, Committee of Experts*, first session, second meeting.

[16] *Survey of International Law*, op. cit., page 32.

[17] *Ibid.*

[18] Summary record of the fifth meeting, paragraphs 14-15.

[19] Summary records of the 614th and 615th meetings.

Add.1), the Netherlands (A/4796/Add.7), Venezuela (A/4796/Add.5) and Yugoslavia (A/4796).

46. In its comments, Mexico stated that "Since many new nations have recently become independent, this problem takes on particular importance. A study of the topic would naturally involve important questions of all kinds: the validity of treaties, the problem of nationalities, inheritance, debts, acquired rights, indemnification, compensation and, in addition, certain problems which might arise concerning membership in international organizations. Problems which in future might emerge in the converse case of the amalgamation or federation of a number of States might also be included in a study of this topic".

47. In the opinion of Yugoslavia, the topic had "a substantial impact upon a number of questions of vital concern to the newly independent States and their efforts towards full and complete emancipation".

48. The discussion in the Sixth Committee revealed a very clear tendency in favour of codification of the topic. There was no opposition.

49. Resolution 1686 (XVI) of 18 December 1961 recommended the International Law Commission, *inter alia*, "to include on its priority list the topic of succession of States and Governments".

3. Jurisdictional immunities of States and their property

(a) *General immunity*

50. This is a topic on which the domestic case-law of States has produced a greater abundance of material than in any other branch of international law. It covers the entire field of the jurisdictional immunities of States and their property, their ships, their sovereigns and their armed forces. There is, moreover, a very extensive bibliography on the subject.

51. The Committee of Experts for the Progressive Codification of International Law dealt with the topic, starting with its third session in 1927. It adopted a questionnaire No. 11 dealing with the competence of the courts in regard to foreign States.

52. After full discussion, the Committee was of opinion that, even though the conclusion of a uniform agreement between the Powers might meet with serious difficulties, these difficulties were not the same for all parts of the subject, and it felt that it was desirable to ascertain, exception always being made of the case of acts of State: "Whether and in what cases, particularly in regard to action taken by a State in the exercise of a commercial or industrial activity, a State can be liable to be sued in the courts of another State".[20]

53. The Committee's rapporteur on the subject, Mr. Matsuda (Japan), concluded: "It is unanimously admitted that the courts of one State have no jurisdiction over another State where the foreign State is sued for acts accomplished by it in the exercise of its sovereign rights. Apart from this case, the opinion of writers and experts in the various countries is divided".[21]

54. In its Second Report to the Council,[22] the Committee of Experts stated that, in its view, the topic was "ripe" for codification.[23]

55. Out of twenty-four replies received from Governments, twenty-one recognized that codification of the topic was desirable and possible, while only three expressed the opposite view.

56. It must be acknowledged, however, that some of the Governments which were in favour of the codification of the topic formulated a number of important reservations.[24]

57. A draft convention with a detailed commentary was prepared by the Harvard Research.[25]

58. There is also a Brussels Convention of 10 April 1926[26] for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, which provides for the immunity of such vessels and their cargo in time of peace.

59. The Convention on the Territorial Sea and the Contiguous Zone, adopted in 1958 by the United Nations Conference on the Law of the Sea, also contains an article 22 which deals with the immunities enjoyed by Government ships.[27]

60. At the first session of the International Law Commission, the question[28] was placed, without objection, in the list of topics for codification. Mr. Sandström and Mr. Spiropoulos were in favour of its codification.[29]

61. In the replies by Governments submitted to the General Assembly at its sixteenth session, two Governments—Belgium (A/4796/Add.4) and the Netherlands (A/4796/Add.7)—suggested that the topic should be studied.

62. Belgium stated that "it would seem logical, after the consideration of these problems [succession of States, special missions and right of asylum], to examine the question of the jurisdictional immunities of States and of their property".

63. In the course of the discussion in the Sixth Committee, the representatives of Belgium (A/C.6/SR.721), Denmark (A/C.6/SR.725), Ireland (A/C.6/SR.727) and New Zealand (A/C.6/SR.719) expresses themselves in favour of a study of the topic.

64. The representative of Brazil (A/C.6/SR.721) said that a sensible solution of some aspects of that problem would encourage trade between countries with different social systems. Although his delegation realized that the subject was a controversial one it would not oppose its reference to the International Law Commission for study.

65. According to the *Survey of International Law*, "it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law commanding the agreement of a vast majority of nations on this matter".[30]

(b) *Immunity with respect to commercial transactions*

66. The codification of a more limited aspect of the question of the jurisdictional immunities of States and their property was proposed by Ceylon (A/4796/Add.8). This was the question of the jurisdictional

[20] *L of N*, C.204.M.78.1927.V.
[21] *Ibid.*, annex, pp. 6-7.
[22] *L of N*, A.15.1928.V. (C.P.D.I.) 117 (1). See also Minutes of the Fourth Session, fourth meeting, of the Committee of Experts, *L of N*, C.395.1928.V, pp. 22-23.
[23] *Ibid.*, p. 6.
[24] *Ibid.*, p. 93.
[25] "Competence of Courts in regard to foreign States" *A.J.I.L.*, vol. 26 (1932), *Supplement*, pp. 455-460.
[26] See text in Hudson, *International Legislation*, vol. III, pp. 1837-1845.
[27] *United Nations Conference on the Law of the Sea, Official Records, Vol. II, Plenary Meetings*, annexes, p. 132.
[28] Initially entitled "Jurisdiction over foreign States".
[29] Summary record of the fifth meeting, paragraphs 38-39.
[30] Op. cit., page 34.

immunities of States with respect to commercial transactions. There exist a great number of publications and judicial decisions on this subject.

67. The Asian-African Legal Consultative Committee considered this question at its first session (New Delhi, 1957).

68. A final report on the immunities of States with respect to commercial and other transactions of a private nature was adopted at the second session (Cairo, 1958).[31] This final report was revised at the third session (Colombo, 1960).[32]

4. Jurisdiction with regard to crimes committed outside national territory

69. The Committee of Experts for the Progressive Codification of International Law, which considered this topic in 1926 at its second session,[33] restricted the problem to the competence of States, in criminal cases, with regard to crime committed outside their territory by persons other than their own nationals.

70. A sub-committee, of which Mr. Brierly was the rapporteur, had to answer the question whether it is possible to lay down, by way of conventions, principles governing the criminal competence of States in regard to offences committed outside their territories, and, if so, what these principles should be.

71. In his report,[34] Mr. Brierly stated: "The practice of States is far from uniform. Nor is it easy, except in the case of those States which maintain the territorial theory, to infer from the practice adopted by a State the theory upon which it bases its assumption of jurisdiction, since we cannot safely argue from the fact that a State assumes jurisdiction only in certain cases that it regards those cases as the only ones in which the assumption of jurisdiction would be legitimate. It would, however, appear that there are few, if any, States which would maintain the view that international law leaves an absolute discretion in this matter to every State. Most States, if not all, would appear to regard the territorial basis of jurisdiction as the normal rule, and the question of real doubt is whether international law permits any, and, if so, what, exceptions from it. We felt assured that any conventional regulation of the matter would necessarily have to be based on this assumption".

72. Among the exceptions to the territorial theory, the one most commonly invoked is that in favour of jurisdiction in regard to crimes against the security or good name of a State.

73. In the Committee,[35] the rapporteur explained that, while the question whether it is possible to lay down by way of conventions principles governing the criminal competence of States in regard to offences committed outside their territories seemed a simple one in certain respects, it nevertheless presented a major practical difficulty which arose from the fact that there was no uniform practice in the matter. There were two completely opposed viewpoints, each represented by a large group of States. Furthermore, some States claimed the right to punish certain crimes committed outside their own territory, not only by their nationals, in which case the right to claim jurisdiction was unquestioned, but also by aliens. On the other hand, other States, which maintained the so-called "territorial" theory, no more claimed to have jurisdiction over aliens for acts committed outside their territory than they recognized that other States might exercise their jurisdiction in the contrary case.

It would be difficult, the rapporteur continued, to reach agreement in the Committee if a compromise was not adopted, and a compromise implied concessions on the part of the two legal schools.

After a close study of the special questions to which attention was drawn by the Brierly report and by Mr. de Visscher, a member of the sub-committee, the Committee found that "international regulation by way of a general convention, although desirable, would encounter grave political and other obstacles".[36]

74. The Committee limited its action to communicating Mr. Brierly's report to the Governments "to give them the opportunity of profiting by the light [he had] thrown on the subject".

75. This question was the subject of regulations laid down in the Havana Convention of 1928 (the Bustamante Code) and of resolutions adopted by the Institute of International Law at Munich in 1883 and at Cambridge in 1931.[37] It has been studied at a series of international congresses on comparative and criminal law. The Harvard Research examined the subject and prepared a draft convention, according to which "The investigation indicates that States have much more in common with respect to penal jurisdiction than is generally appreciated".[38]

76. At the first session of the International Law Commission, Mr. Brierly, Mr. Scelle and Mr. Spiropoulos expressed themselves in favour of codification of the question but did not recommend that it should be given priority. Mr. Córdova opposed its codification.[39] The Commission decided to inscribe the question on its provisional list.

77. Mr. Scelle thought that that question was of the utmost interest both in itself and also in so far as it related to the formulation of the principles of Nürnberg and the drafting of an international criminal code.

78. Mr. Hudson and Mr. Koretsky pointed out that the question concerned national jurisdiction only in the case of crimes committed abroad by aliens, and that, viewed from that angle, it had no connexion with the principles of Nürnberg nor with the code of laws on crimes against the peace and security of humanity.

79. Mr. Brierly shared the optimistic views of the Harvard Research on the possibility of codification of the subject.

80. Mr. Spiropoulos thought that the problem was clearly a question of international law of great practical interest.

81. Mr. Córdova thought a distinction should be made between crimes committed abroad against a State and those committed against an individual. In his opinion, the first category only could be considered an appropriate topic for codification.

82. In the replies from Governments which were submitted to the General Assembly at its sixteenth

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[31] *Asian-African Legal Consultative Committee*, second session, pages 29 to 51.

[32] *Ibid.*, third session, pages 55-81.

[33] *L of N, Committee of Experts*, second session, twelfth meeting.

[34] *L of N*, C.P.D.I., 26, page 2.

[35] Twelfth and thirteenth meetings, 19 January 1926.

[36] *L of N*, C.50.M.27.1926.V.

[37] See *Annuaire de l'Institut de droit international*, 1931, pp. 145-152.

[38] *A.J.I.L.*, vol. 29 (1935), *Supplement*, p. 446.

[39] Summary record of the fifth meeting, paras. 47-54.

session, the Netherlands (A/4796/Add.7) and Venezuela (A/4796/Add.5) expressed the view that the question should be studied.

5. The legal status of aliens

83. The movement towards codification has not yet affected this topic, apart from the somewhat general provisions of the Convention concerning the status of aliens[40] adopted by the Sixth International Conference of American States in 1928 on the basis of a project prepared by the International Commission of American Jurists[41] in 1927, and certain aspects discussed at The Hague in 1930 in connexion with the responsibility of States for damage to the person and property of aliens (taxation of aliens, right of establishment, right to follow any occupation, etc.).

84. The Economic Committee of the League of Nations prepared a draft convention[42] on this subject; the text was submitted to the International Conference on Treatment of Foreigners which met in Paris from 5 November to 5 December 1929 but which did not succeed in adopting a convention.[43]

85. According to the *Survey of International Law*, "In one definite respect the law relating to the treatment of aliens would seem to require authoritative statement or restatement, namely, with regard to (1) the full equal protection of such rights as they possess by the law of the State, and (2) absolute recognition and protection of what the Charter of the United Nations describes as human rights and fundamental freedoms."[44]

86. "It is possible that in the recent experience of various controversies on the subject there may be discernible a solution which would act both as an inducement to and as a basis of codification."[45]

87. At the first session of the International Law Commission, Mr. Sandström, Mr. Scelle and Mr. Spiropoulos supported the inclusion of this question, which was not opposed.[46] The Chairman (Mr. Hudson) thought that the question could be linked up with the question of State responsibility. Mr. Sandström thought that it served as an introduction to the latter question. In Mr. Scelle's view, the question of State responsibility was subordinate to that of the treatment of aliens, since the responsibility only arose if the State was under an obligation to treat aliens in a certain way. At the thirteenth session of the International Law Commission, Mr. Ago suggested codification of the question.[47]

88. In the replies from Governments which were submitted to the General Assembly at its sixteenth session, Ceylon (A/4796/Add.8), Ghana (A/4796/Add.1) and Venezuela (A/4796/Add.5) proposed that the question should be studied.

89. During the discussions in the Sixth Committee, the representative of New Zealand (A/C.6/SR.719) supported that proposal.

90. The Asian-African Legal Consultative Committee considered the treatment of aliens at its second (Cairo, 1958) and third (Colombo, 1960) sessions.[48] At its fourth session (Tokyo, 1961) it adopted a set of eighteen articles setting forth principles concerning admission and treatment of aliens.[49] At its fifth session (Rangoon, 1962) the Committee was to study the topic of State responsibility and the diplomatic protection of citizens abroad.[50]

6. The right of asylum or political refuge

91. The question of the right of political refuge, though closely linked to that of the non-extradition of persons charged with political offences, is a much broader topic. It has again become a subject of urgent interest in the past fifteen years and its importance is beyond question, for the principle of the right of refuge is not uniformly accepted even by States which are relatively liberal in this matter.

92. The American States concluded a Pan American Convention on the right of asylum (diplomatic asylum)[51] in 1928; in addition, the Seventh International Conference of American States adopted a general Convention of Political Asylum[52] in 1933. In 1954, the Tenth Inter-American Conference adopted a Convention on Diplomatic Asylum and a Convention on Territorial Asylum.[53]

93. At the first session of the International Law Commission, Mr. Alfaro, Mr. Scelle and Mr. Yepes suggested that this question should be included in the list,[54] and the Commission so decided.

94. The General Assembly adopted at its fourteenth session resolution 1400 (XIV) of 21 November 1959, requesting the International Law Commission, as soon as it considered it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum. The International Law Commission took note of this resolution at its twelfth session (1960) but decided to defer consideration of the question to a future session.

95. At the General Assembly's fifteenth session, when the report of the International Law Commission on the work of its twelfth session was under discussion in the Sixth Committee, the United Kingdom representative (A/C.6/SR.652) expressed the view that a draft declaration on the right of asylum was an item which the Committee could usefully discuss.

96. The representative of Bolivia (A/C.6/SR.652), supported by the representative of Spain (A/C.6/SR.653), proposed that the Sixth Committee should take up the question to consider its legal aspects, the social aspects being within the competence of the Commission on Human Rights and the Third Committee.

97. The Commission on Human Rights has been dealing with this question since its thirteenth session in 1957. After discussion at its fifteenth (1959) and sixteenth (1960) sessions, the Commission adopted a draft declaration in 1960 and transmitted it to the Economic and Social Council which, by its resolution 772 E

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[40] *The International Conferences of American States 1889-1928*, New York, Oxford University Press, 1931, pp. 415-416.
[41] See *A.J.I.L.*, vol. 22 (1928), *Special Supplement*, pp. 242-243.
[42] League of Nations, *Preparatory Documents*, C.36.M.21.1929.II.
[43] See League of Nations, *Proceedings*, C.97.M.23.1930.II.
[44] Op. cit., p. 46.
[45] *Ibid.*, p. 47.
[46] Summary record of the fifth meeting, paras. 96-99.
[47] Summary record of the 615th meeting, para. 32.
[48] See Asian-African Legal Consultative Committee, third session, Colombo 1960, pp. 82-161.
[49] A/CN.4/139, annex 1.
[50] *Ibid.*, section entitled "Status of aliens and State responsibility."
[51] *The International Conferences of American States 1889-1928*, op. cit., pp. 434-435.
[52] *Ibid., First Supplement, 1933-1940*, pp. 116-117.
[53] Pan American Union, Law and Treaty Series, *Convention on Diplomatic Asylum; ibid., Convention on Territorial Asylum*; Washington, D.C., 1954.
[54] Summary record of the sixth meeting, paras. 5-13.

(XXX), transmitted it in turn to the General Assembly. The draft Declaration on the Right of Asylum (A/4792, annex) prepared by the Commission on Human Rights is now before the Third Committee. After a procedural discussion, the Third Committee decided at the Assembly's sixteenth session to examine the Declaration "as early as possible" during the seventeenth session. The General Assembly endorsed this decision by its resolution 1682 (XVI) of 18 December 1961.

98. The replies from Goverments which were submitted to the General Assembly at its sixteenth session showed that five countries had proposed that the question should be studied: Belgium (A/4796/Add.4), Ceylon (A/4796/Add.8), Colombia (A/4796), Ghana (A/4796/Add.1) and Venezuela (A/4796/Add.5).

99. During the discussions in the Sixth Committee, the representative of Colombia (A/C.6/SR.727) proposed, *inter alia,* in a draft resolution (A/C.6/L.496) that the International Law Commission should include the topic of the right of asylum on its priority list. The representative of the United Arab Republic (A/C.6/SR.723), the representative of Nicaragua (A/C.6/SR.722) and the representative of Belgium (A/C.6/SR.721) were in favour of study of the subject. However, the Colombian proposal met with some opposition on the ground, not that the question of the right of asylum was unworthy of United Nations attention, but that it was already on the agenda of the International Law Commission, which would study it in due course. As a result, the Colombian representative later withdrew his proposal on the understanding that his views and those of the representatives[55] who supported them would be brought to the attention of the International Law Commission.

7. Sources of international law

100. Project No. 4 on the "Fundamental Bases of International Law", prepared by the American Institute of International Law in 1925, is devoted almost exclusively to the various aspects of the sources of international law.[56]

101. At the first session of the International Law Commission, Mr. Brierly considered that the codification of this question would have more disadvantages than advantages. Mr. Spiropoulos observed that the question was of no practical interest.[57] The Commission did not place it on the list.

102. Mexico (A/4796/Add.1) requested that this question should be studied. It stated its grounds for the request in the following terms: "There is need for a re-examination of this question in the light of the many and varied decisions and resolutions of all kinds, some of doubtful legal validity, which have been adopted by the various international organizations. The actions of these organizations undoubtedly have a strong impact on international affairs and contribute in one form or another to the creation of international law. As the creation of international law in this manner is becoming daily more important, this might be a profitable topic of study for the International Law Commission." The Mexican representative in the Sixth Committee reiterated his Government's observations (A/C.6/SR.722).

[55] Ecuador and Nicaragua (A/C.6/SR.730); Venezuela (A/C.6/SR.729).

[56] *A.J.I.L.*, vol. 20 (1926), *Special Supplement*, p. 304.

[57] Summary record of the fourth meeting, paras. 67 and 68.

8. Recognition of acts of foreign States

103. At the first session of the International Law Commission (fifth meeting), Mr. Hudson, the Chairman, "thought the title of the topic—'Recognition of acts of foreign States'—unsatisfactory, in view of the fact that the word 'recognition' had in this case a different meaning from the one it had in the words 'recognition of States'. The recognition of the acts of foreign States signified the effect given in a State to the acts of another State".

104. He said that "there was a considerable amount of documentation on certain aspects of the question. There were, for example, two conventions on the recognition and enforcement of the arbitral awards of foreign courts which had been concluded under the auspices of the League of Nations. One of the Conventions prepared by The Hague Conference on Private International Law dealt with the enforcement of judicial decisions of foreign courts in a limited field. Moreover, Mr. Feller had made a valuable contribution to the draft convention on judicial assistance prepared by the Harvard Research".[58]

105. Mr. Feller (Secretariat) pointed out that "the subject was a very broad one in view of the numerous acts of States and of the complexity of the problems that each of those acts might raise. The Legal Department, while recently studying a question of such secondary importance as the international effect of the declaration of the decease of a person reported missing during the war, had had occasion to ascertain that even on so limited a subject there already existed a great deal of documentation and that numerous difficulties were occasioned by differences in national legislation. It did not seem, therefore, that the Commission could, at that juncture, do more than codify certain specific questions that might be of some particular interest, such as the procedure to be followed in the hearing of witnesses in a foreign country".[59]

106. Only Mr. Sandström, who pointed out that the question bordered on both international public and private law, was in favour of its codification.

107. Mr. Spiropoulos emphasized the complexity of the question, which came within the scope of international public, private and even administrative law. The question was not included in the preliminary list of topics for codification.

108. Venezuela (A/4796/Add.5) requested that the question should be studied.

9. Territorial domain of States

109. This question, which was proposed by Venezuela (A/4796/Add.5), figures prominently in works on international law, but there is little to be gained by its codification.

110. Although declarations have been made and multilateral instruments concluded on various occasions with respect to frontiers and the acquisition of territorial sovereignty, the efforts made at codification have paid very little attention to the law concerning national territory.

111. However, the American Institute of International Law prepared in 1925 two projects entitled respectively "National Domain" and "Rights and Duties

[58] *A.J.I.L.*, vol. 33 (1939), *Supplement*, pp. 15-25.

[59] Summary record of the Commission's fifth meeting, para. 33.

of Nations in Territories in Dispute on the Question of Boundaries".[60]

112. Rights and claims to territories have traditionally been regarded as synonymous with the vital interests of States and the codification of certain principles might lead to a revival of territorial claims which have long been in abeyance. In fact, there are few States which have no territorial claims to make, if only trifling ones.

113. Frontiers, whether of ancient or of recent origin, are rarely considered definitive; the Franco-Spanish frontier, the oldest in Europe, is hardly more than three centuries old and despite complete demarcation still gives rise to minor disputes from time to time.

114. In the draft Declaration on the Rights and Duties of States adopted by the International Law Commission at its first session (A/925, part II), there are two articles dealing with this question.

115. Article 9 stipulates: "Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity ... of another State . . .".

116. Article 11 states: "Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9".

117. At the first session of the International Law Commission, Mr. Alfaro and Mr. Spiropoulos said they did not think that the problem of the territorial domain of States was suitable for immediate codification.

118. The Chairman (Mr. Hudson) "pointed out a matter which, though not suitable for codification, deserved study, namely, the principles governing the frontiers of States and also certain recent practices such as, for example, the arrangement for neutral zones between States made between Saudi Arabia and Iraq in order to protect the interests of the nomad populations by avoiding a fixed frontier" (summary record of the fifth meeting, para. 61). The question was not taken up by the International Law Commission.

10. Pacific settlement of disputes

119. The subject covers the very wide field of prohibition of war, procedures for investigation, mediation and conciliation, the arbitral or judicial settlement of disputes and the obligatory jurisdiction of the International Court of Justice.

(a) *General remarks*

120. The Permanent Court of Arbitration established in 1907 was followed by the system of settlement of disputes established by the Covenant of the League of Nations, the creation of the Permanent Court of International Justice and the General Act for the Pacific Settlement of International Disputes of 26 September 1928, leading finally, after the collapse of the League of Nations, to the system established by the United Nations Charter, notably Article 2 (3).

121. The Permanent Court of Arbitration is continuing to discharge its modest function; the Permanent Court of International Justice has become the International Court of Justice. The General Act was revised in 1949 (by General Assembly resolution 268 A (III)), but by 1952 it had still been ratified by only four States (Belgium, Denmark, Norway and Sweden). From 1952 to 1961 only one ratification was recorded, that of Luxembourg. The functions of conciliation and arbitration and the jurisdiction of the Court are being made use of with some success, but not sufficiently in the view of some. The jurisdiction of the International Court of Justice is not obligatory, and arbitration and conciliation cannot take place without the agreement of all parties. The weakness of the system is obvious.

122. At the Assembly's sixteenth session, the Israel representative stated in the Sixth Committee (A/C.6/SR.726) that the time had come to pass under review all the established machinery for the peaceful settlement of international disputes. There was no assurance that the existing procedures for settlement were really reliable, and their overhaul and adaptation to the contemporary patterns and conceptions of international intercourse were long overdue. The Israel delegation considered that, if complete machinery for the peaceful settlement of international disputes was to be established, it would be worth instructing the Sixth Committee to undertake a legal study on the same lines as that being made at the political level by the First Committee, particularly in the field of disarmament.

123. Similarly, the representative of Argentina (A/C.6/SR.720) stated that it was essential to attempt, by both codification and progressive development, to establish a complete legal system of methods for securing the peaceful solution of international disputes. The representative of Indonesia (A/C.6/SR.726) also spoke in favour of a study of the question by the International Law Commission.

124. Such statements left no doubt of the need to improve the system. However, the Interim Committee set up under General Assembly resolution 111 (II) of 13 November 1947 had undertaken a systematic study of methods of the pacific settlement of disputes. It had even set up a sub-committee for that purpose which had submitted a preliminary report to the Assembly at its fourth session.[61]

125. In 1950, the Interim Committee created a Sub-Committee on International Co-operation in the Political Field; this Sub-Committee submitted a report to the General Assembly and to Member States "for information".[62] The report, which is very detailed, is on the whole of a historical character. A study prepared by Mr. García Amador entitled "Regional action for pacific settlement within the framework of the Charter" appears in an appendix. The study compares the inter-American system for pacific settlement with that of the Charter, and examines the possibility of regional action for pacific settlement by the organs of the United Nations.

126. At the first session of the International Law Commission, Mr. Alfaro proposed that the pacific settlement of international disputes should be included in the list of topics for codification. He envisaged the question as a whole, in accordance with Article 2 (3) of the Charter. Only Mr. Scelle supported the pro-

[60] Projects Nos. 10 and 11, *A.J.I.L.*, vol. 20 (1926), *Special Supplement*, pp. 318-322.

[61] *Official Records of the General Assembly, Fourth Session, Supplement No. 11* (A/966).

[62] *Ibid., Fifth Session, Supplement No. 14* (A/1388).

posal (summary record of the fifth meeting, paras. 69-82).

127. Mr. Brierly, Mr. Córdova, Mr. Sandström and Mr. Spiropoulos opposed it. The question was not included in the list of topics for codification. Mr. Brierly observed that the General Act of 1928 had always been a dead letter, and there was every reason to fear that the same fate would befall any similar document.

128. Mr. Córdova "suggested that consideration of that question should be deferred, because the time did not seem ripe"; he thought, however, that in view of the provisions of Article 2 (3) of the Charter, that topic would have to be codified sooner or later.

(b) *Prohibition of war*

129. Afghanistan suggested (A/4796) "the preparation of a declaration on the prohibition of war, in line with the Declaration of St. Petersburg of 1868 and the Brussels Conference of 1874, and the Geneva Protocol of 1925".

130. Czechoslovakia proposed (A/4796/Add.3) "... the elaboration of legal principles to govern the prohibition of aggressive wars and laying down the responsibility for the violation of peace (definition of aggression, prohibition of use of weapons of mass destruction, consequences of the responsibility for a violation of peace and security)".

(c) *Recourse to procedures for investigation, mediation and conciliation*

131. The observations submitted by the Government of Colombia to the General Assembly at its sixteenth session, include the following passage (A/4796): "The International Law Commission has already examined the topic of arbitral procedure and produced a model set of rules which is submitted to the General Assembly and which the latter transmitted to Governments in November 1958 for comments and to be taken into account in drawing up treaties of arbitration. The Commission, as the codifying organ of the United Nations has still, however, to consider the other procedures for pacific settlement provided for both in Article 33 of the Charter of the United Nations and in article 21 of the Charter of the Organization of American States, *viz.*, good offices, mediation, investigation and conciliation—judicial procedure being regulated by the Statute of the International Court of Justice annexed to the Charter of the United Nations. With regard to such procedures for the pacific settlement of international disputes, there are many Inter-American precedents having a bearing on codification (Treaty to Avoid or Prevent Conflicts between the American States (Gondra Pact), approved at the Fifth International Conference of American States and centred around the investigation procedure; General Convention on Inter-American Conciliation, General Treaty of Inter-American Arbitration and Protocol of Progressive Arbitration, all approved at the International Conference of American States on Conciliation and Arbitration held at Washington in 1929; Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Pact), concluded at Rio de Janeiro in 1933; Inter-American Treaty on Good Offices and Mediation, adopted by the Inter-American Conference for the Maintenance of Peace at Buenos Aires in 1936; Inter-American Treaty on Pacific Settlement (Pact of Bogotá), approved at the Ninth International Conference of American States".

132. Consequently the Colombian Government proposed the study of the following question: "Pacific settlement of international disputes: procedures for investigation, mediation and conciliation".

133. The Colombian representative enlarged on this idea in the Sixth Committee (A/C.6/SR.723), developing it and acknowledging that his proposal would in fact mean studying the general question of the rights and duties of States.

134. The representative of Indonesia (A/C.6/SR.726) expressed views identical with those of the Colombian Government.

135. The question presents an undeniable interest. The local conflicts which break out at various points in the world necessitate the creation of numerous investigation, mediation and conciliation commissions.

136. The United Nations has already set up more than ten conciliation commissions. They have functioned, with varying degrees of success, in Greece, Palestine, Indonesia, Korea, Kashmir and Laos.

(d) *More frequent recourse to arbitral and judicial settlement*

137. In its observations, the Danish Government (A/4796/Add.1) stated that it could not but . . . "welcome any proposal tending to enlarge the scope of arbitral and judicial procedures in international relations. Far from being met with criticism, the International Law Commission ought to be encouraged to pursue its efforts in this direction".

138. In the Swedish Government's view (A/4796):

> "... one of the most important questions of the day is that of strengthening the role of international law in the settlement of conflicts between States.
>
> "Under Article 2 of the Charter of the United Nations, Member States are enjoined to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Nowadays, however, many disputes which lend themselves to settlement by the International Court of Justice or by other international judicial or arbitral bodies are not submitted for such settlement, with the result that they continue to burden relations between the States concerned. In view of this state of affairs, consideration should be given to the means by which States might be induced to resort more frequently to a judicial or arbitral settlement of their disputes. The Swedish Government considers that this question is of such importance that it should be given priority on the list of topics to be studied by the International Law Commission."

139. During the Sixth Committee's debates at the sixteenth session of the General Assembly, the Swedish representative (A/C.6/SR.724) expanded his Government's arguments. He was supported by the representatives of Ireland (A/C.6/SR.727) and Pakistan (A/C.6/SR.720).

140. With regard to the draft on arbitral procedure prepared by the International Law Commission between 1950 and 1958, the General Assembly in its resolution 1262 (XIII) of 14 November 1958 confined itself to bringing "the draft articles on arbitral procedure contained in the report of the Inter-

national Law Commission to the attention of Member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration or *compromis*", and to inviting "Governments to send to the Secretary-General any comments they may wish to make on the draft, and in particular on their experience in the drawing up of arbitral agreements and the conduct of arbitral procedure, with a view to facilitating a review of the matter by the United Nations at an appropriate time".

(e) *Obligatory jurisdiction of the International Court of Justice*

141. During the Sixth Committee's debates at the fifteenth session of the General Assembly, the representatives of Afghanistan (A/C.6/SR.660), Canada (A/C.6/SR.656) and the United Kingdom (A/C.6/SR.652) put forward the question of the obligatory competence of the International Court of Justice as one of the topics to be studied by the International Law Commission. The representative of Burma (A/C.6/SR.653) stated that "adequate measures should be taken... to educate world public opinion to accept the United Nations as the organ for laying down international law and the International Court of Justice as the forum for the determination of international disputes".

142. Ghana (A/4796/Add.1) asked that this question should be studied.

143. In its observations, the Danish Government (A/4796/Add.1) stated: "Codification and development of international law should be contemplated as only one aspect of the rule of law in international relations, and should—in addition to the purposes immediately served—contribute towards the creation of conditions in which the compulsory jurisdiction of the International Court of Justice may gain extended recognition". The Danish representative in the Sixth Committee stated (A/C.6/SR.725) during the debates at the sixteenth session that his delegation considered that the Sixth Committee would be "the appropriate forum for a thorough debate on that well-defined and vital field of international law". The Swedish representative (A/C.6/SR.724) also hoped that the Sixth Committee would take up the question "unless the International Law Commission inserted in it its list of priority topics".

144. The Netherlands Government (A/4796/Add.7) was of the opinion that "a further development in this field is urgently called for but that the preparatory work should be left to other bodies".

145. The representative of Ghana (A/C.6/SR.723) suggested that the Court should be permitted to decide what was within the domestic jurisdiction of a State, just as domestic courts decided whether or not they had jurisdiction in a particular matter. He stated that he was in favour of the obligatory jurisdiction of the Court. The Israel representative (A/C.6/SR.726) supported that proposal.

11. Law of war and neutrality

146. At its first session (9th meeting), in 1925, the Committee of Experts for the Progressive Codification of International Law decided to adjourn for consideration at a later date the various problems connected with war and neutrality.[63] Such consideration never took place, despite the Committee's concern to leave "untouched the question to what extent it ought to deal with the laws of war".[64]

147. Mr. Fromageot criticized the phrase "law of war", which appeared to establish "a special code of law for war, whereas there was only one international code of law, which was the law of nations. When war occurred, it was subject to special rules, but the law of nations continued to be fully binding on all non-combatants".[65]

148. In its report[66] the Committee of Three Jurists appointed by the Council of the League of Nations on 14 December 1928 to prepare The Hague Codification Conference included in its proposal for the publication in the form of a code of conventions open to States in general, item 13 entitled "Conventions on the law of war: (*a*) Land, (*b*) Sea, (*c*) Air".

149. At its first session, the International Law Commission "considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term 'laws of war' ought to be discarded, a study of the rules of governing the use of armed force—legitimate or illegitimate—might be useful. The punishment of war crimes, in accordance with the principles of the Charter and judgement of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace".[67]

150. During the debates on this question in the Commission (sixth meeting), Mr. Scelle expressed the view that the topic should be examined, but under another heading. Since the Charter had endeavoured to organize an international police system for the prevention of war, the regulation of the employment of an international police force should be one of the chief preoccupations of the Commission; specific rules, he thought, should be established for that most dangerous executive function.

151. Mr. Sandström wondered whether the question presented by Mr. Scelle did not fall within the province of the progressive development of international law rather than that of its codification. Mr. Spiropoulos agreed with Mr. Sandström that war was a possibility but that, since the greater part of the law of war had already been codified by international conventions, in particular by The Hague Convention and by the London Declaration, it would be enough to apply those conventions.

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[63] C.P.D.I. [first session] PV.9 and C.P.D.I.15 (1).

[64] *Ibid.*

[65] *Ibid.*

[66] *League of Nations*, A.12.1929.V. The Committee consisted of Mr. Diena, Mr. Guerrero and Mr. Schücking.

[67] *Report of the International Law Commission covering its first session* (A/925), para. 18.

152. At the fifteenth session of the General Assembly, the representative of Ceylon (A/C.6/SR.658) proposed that the law of neutrality should be codified.

153. In its observations (A/4796/Add.6), Austria proposed the codification of the laws of war and neutrality.

154. The Austrian Government observed that the "provisions of the Charter may have had an effect other than abrogation on traditional norms of international law. Some norms, for instance, may have to be modified in order to correspond to the regulations of the Charter. This is especially true for the laws of war and neutrality which reflect the State practice of the nineteenth century and do not, therefore, provide for military actions of a world organization of States".

155. On the other hand, the Netherlands Government (A/4796/Add.7) was of the opinion "that the laws of war—though their adaptation to modern methods of warfare is an urgent necessity—are not susceptible of codification, since this topic is closely connected with problems of disarmament which are under discussion in other bodies of the United Nations".

156. It is to be noted that in 1949 the International Committee of the Red Cross convened a conference which adopted four conventions—the so-called Geneva Conventions of 12 August 1949—on the amelioration of the condition of the wounded and sick in armed forces in the field, on the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea, on the treatment of prisoners of war, and on the protection of civilian persons in time of war.

12. Fundamental rights and duties of States

157. At its first session, in 1949, the International Law Commission, under the terms of General Assembly resolution 178 (II) of 21 November 1947, adopted a draft Declaration on Rights and Duties of States.[68] That draft, which consisted of fourteen articles, was based on a draft submitted by Panama. The International Law Commission also used a Secretariat memorandum entitled "Preparatory study concerning a Draft Declaration on the Rights and Duties of States".[69]

158. In its resolution 375 (IV) of 6 December 1949, the General Assembly noted the draft Declaration on Rights and Duties of States and transmitted it to Member States, requesting their comments. Because of the few comments it received, the Assembly decided, in resolution 596 (VI) of 1 December 1951, to postpone consideration of the draft Declaration until a sufficient number of States had transmitted their comments and suggestions and in any case to undertake consideration as soon as a majority of Member States had transmitted such replies. By the end of 1952, only eighteen States had replied. Since no comments have been received since that time, there have been no further developments in regard to the question.

159. Venezuela (A/4796/Add.5), as one of the Governments which, at the sixteenth session, had submitted observations in accordance with resolution 1505 (XV), suggested that priority might be given in the future work of the International Law Commission to the fundamental rights and duties of States.

160. At the sixteenth session of the General Assembly, the Nicaraguan representative (A/C.6/SR.722) in the Sixth Committee included the question among those topics for which codification was urgently needed. Similarly, the Mexican representative (A/C.6/SR.722) referred to the necessity of drawing up a set of rules concerning the rights and duties of States. He stated that developments in the past fifteen years might make it necessary to adapt the Declaration which the International Law Commission had drafted in 1949 to the new conditions now prevailing. In his view, the draft was far from perfect and the Mexican delegation had serious reservations respecting it; but it could be amended and improved. The 1949 draft and other documents, such as chapter III of the Charter of the Organization of American States, might serve as a guide. Although it did not make a formal proposal, the Mexican delegation believed that it would be appropriate to draw the attention of the International Law Commission to that problem.

161. The Brazilian representative (A/C.6/SR.721), on the other hand, wished to avoid as far as possible the preparation of academic documents devoid of practical significance, such as the Declaration on the Rights and Duties of States.

Part. II. Possibility of codifying "new" topics

1. Law of space

162. At the fifteenth session of the General Assembly, during the discussion in the Sixth Committee on the report of the International Law Commission, the representatives of Afghanistan (A/C.6/SR.660), Mexico (A/C.6/SR.665) and the Philippines (A/C.6/SR.663) proposed that the Commission should undertake the study of the legal aspects of the use of outer space.

163. Among the replies from Governments transmitted in accordance with resolution 1505 (XV), Afghanistan (A/4796) and Mexico (A/4796/Add.1) proposed that the legal aspects of outer space should be studied. Mexico expressed the following opinion: "Apart from the military and political aspects of this problem, which are being studied by other United Nations organs, it would appear that an attempt might be made at the same time to formulate certain minimum basic rules—without of course attempting, at this stage, to produce a complete code—which might even help in future studies of the military and political aspects of the problem".

164. Burma (A/4796) suggested the study of sovereignty in air space and Ghana (A/4796/Add.1) that of the law of space.

165. During the discussion in the Sixth Committee at the sixteenth session of the General Assembly, the representative of Ghana (A/C.6/SR.723) stated that an international convention codifying the rules of outer space was urgently necessary, but that, until the initial survey in that field was undertaken, many important questions would remain unanswered. The representatives of Nepal (A/C.6/SR.728) and Mexico (A/C.6/SR.722) also advocated the codification of the law of outer space. The representative of Nicaragua (A/C.6/SR.722) said that he would prefer a study of the "law of aviation" which would cover atmospheric and outer space and also installations and facilities.

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[68] *Report of the International Law Commission covering its first session, Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), pp. 8-10.

[69] A/CN.4/2 (United Nations publication, Sales No.:49.V.4).

166. On the other hand, the representative of Brazil (A/C.6/SR.721) was of the opinion that the International Law Commission was unlikely to succeed in the legal study of outer space, because it would not achieve effective solutions. The representatives of the United Kingdom (A/C.6/SR.717) and the United States (A/C.6/SR.722) also thought that the question was too technical for the International Law Commission.

167. This topic has already been the subject of a number of studies. At its session in Neuchatel in 1959, the Institute of International Law established a commission to study the law of celestial space. The International Law Association dealt with the topic at its fifty-ninth Conference held at Hamburg in 1960.

168. By its resolution 1348 (XIII) of 13 December 1958, the United Nations General Assembly established an *ad hoc* Committee on the Peaceful Uses of Outer Space, and finally, by its resolution 1472 (XIV) of 12 December 1959, a Committee on the Peaceful Uses of Outer Space.

169. By its resolution 1721 (XVI) of 2 January 1962, the General Assembly invited the Committee on the Peaceful Uses of Outer Space to Study and report on the legal problems which might arise from the exploration and use of outer space. The Committee met at Headquarters on 19 March 1962. It was decided to establish a legal sub-committee.

2. Law of international organizations

170. In the replies from Governments transmitted under resolution 1505 (XV), the following four subjects were proposed for codification:

(*a*) Status of international organizations and the relations between States and international organizations;

(*b*) The validity of norms of international law with regard to the entrance of new members in the international community;

(*c*) The responsibility of international organizations;

(*d*) The law of treaties in respect of international organizations.

171. The first topic was proposed by Austria (A/4796/Add.6) and the Netherlands (A/4796/Add.7), and the three others by Austria.

172. Among its comments, the Austrian Government stated that "International organizations partake, within the express or implied powers conferred upon them by their statute, in international intercourse. Some aspects of the existence of international organizations as international legal phenomena are covered by international conventions which have been concluded for or by individual organizations. To other aspects of the external relations of international organizations, for which no such conventions exist, the traditional norms of international law can be applied only to a limited degree".

173. The question has already been touched upon by the General Assembly. By its resolution 1289 (XII) of 5 December 1958, it invited the International Law Commission to consider the question of relations between States and international organizations "at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly".

174. At its eleventh session (1959), the International Law Commission took note of the resolution and decided to consider the topic in due course.

175. At the sixteenth session of the General Assembly, the representative of Indonesia in the Sixth Committee (A/C.6/SR.726) suggested the study of the law of international organizations and the representative of the United Arab Republic (A/C.6/SR.723) suggested the consideration of the relations between States and international organizations.

176. It would seem that the law of international organizations is appropriate for codification and that codification would meet a growing need. The number of regional or universal inter-governmental organizations is continually increasing, and is now about 150. Their relations among themselves and with Governments raise complex legal problems which are not always settled satisfactorily. Almost a century has elapsed since the establishment of the Universal Postal Union, the ancestor of international organizations. An established practice has come into being and there are numerous texts. Volumes 10 and 11 of the United Nations Legislative Series "Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations" each contain about 400 pages (ST/LEG/SER.B/10 and 11).

3. Human rights and defence of democracy

(a) *Preparation of a draft Convention for the defence of democracy, to be co-ordinated with the work currently being done along those lines by the Organization of American States and the Inter-American Commission for the Protection of Human Rights*

177. The preparation of a draft convention was proposed by Venezuela (A/4796/Add.5).

178. The Government of Colombia in its comments (A/4796) stated: "Another topic studied by the Inter-American Council of Jurists is the effective exercise of representative democracy, which has been placed on the provisional agenda of the Eleventh Inter-American Conference. Since, however, this topic is relatively political in nature and within the inter-American regional organization comes directly under article 5 (*d*) of the Charter of Bogotá, it might for the moment be regarded as exclusively inter-American. The same would seem to apply to the topic of the juridical relationship between respect for human rights and the exercise of representative democracy, which is also a subject of study by the Inter-American Council of Jurists and has been dealt with in a report to the Eleventh Inter-American Conference".

(b) *International protection of human rights through the creation of a special international court*

179. The subject was proposed by Colombia (A/4796).

180. The representative of Argentina in the Sixth Committee stated at the sixteenth session of the General Assembly that his Government considered that a vigorous effort should be made to ensure international protection of human rights by establishing procedures which, while respecting State sovereignty, would grant the individual the safeguards necessary to the full enjoyment of his rights.

181. The representative of Colombia submitted a draft resolution (A/C.6/L.493), the operative part of

which provided for the inclusion in the agenda of the seventeenth session of the Assembly of the question of the establishment of an international tribunal for the protection of human rights. That draft was subsequently replaced by an amendment (A/C.6/L.496). In the course of the debate the representative of Colombia withdrew his proposal, accepting the fact that most representatives, while recognizing the importance of the question, felt that its inclusion in the agenda of the next session of the General Assembly was inappropriate, since it had already for some years been on the agenda of the Commission on Human Rights (A/5036, para. 37).

182. The question of the establishment of an international court of human rights was, indeed, raised at the second (1947), third (1948) and fifth sessions (1949) of the Commission on Human Rights.

183. An Australian draft (E/CN.4/AC.1/27) of thirty-two articles for a statute of an international court of human rights on those lines was submitted in 1948.

184. At its 132nd meeting in 1949, the Commission on Human Rights adopted a resolution deciding to request the Secretary-General to transmit to the Governments of Member States, for their comments, the proposal submitted by Australia (E/CN.4/AC.1/27). Some comments were received and were reproduced in document E/CN.4/366.

185. The question was included on the agenda of the sixth, seventh, eighth, ninth, tenth and eleventh sessions of the Commission on Human Rights (1950-1955). At its eleventh session in 1955 (E/2731 and Corr.1, page 4), the Commission decided that that question (agenda item 18) should no longer have priority and it was not subsequently discussed.

186. The Secretariat of the Commission on Human Rights has been informed of the Colombian proposal. It would therefore be preferable for the International Law Commission to leave the Commission on Human Rights to deal with that question. In any case the representative of Colombia wished the question to be referred to the Assembly and not to the International Law Commission.

(c) *Jurisdiction of international courts and organizations with special reference to the plea of exclusion by the domestic jurisdiction in relation to questions affecting human rights*

187. This question was proposed by the Government of Ceylon (A/4796/Add.8).

4. Independence and sovereignty of States

(a) *The acquisition of statehood*

188. This question was proposed by the Government of Ghana (A/4796/Add.1). At the sixteenth session of the General Assembly, the representative of Ghana (A/C.6/SR.723) stated in the Sixth Committee that the matter was "obviously important", as "the expansion of international society by the emergence of new States was fast being relegated to history; in fact, after General Assembly resolution 1514 (XV) on the granting of independence to colonial countries and peoples had been fully implemented, new States would come into being only by the disintegration, disruption or total extinction of the existing States and the formation of new groupings through fission or fusion. Then the birth of a new State and its recognition would be linked inextricably to the problem of State succession".

(b) *The right of a State, in particular a new State, to determine, to implement and to perfect in its political form, socially and economically in conformity with the professed ideology and to take all necessary steps to accomplish this, e.g., decolonization, normalization, nationalization, and also steps to control all its natural resources and ensure that those resources are utilized for the interests of the State and the people*

and

(c) *The right of every State to take steps which, in its opinion, are necessary to safeguard its national unity, its territorial integrity and for its self-defence*

189. These two topics were proposed by Indonesia (A/4796/Add.2).

(d) *Elaboration of legal principles ensuring the granting of independence to colonial countries and peoples*

190. This topic was proposed by Czechoslovakia (A/4796/Add.3). It relates particularly to the right of nations to self-determination, ensuring to nations full sovereignty over their natural resources, the complex of problems of recognition, State succession and others.

191. The question of sovereignty over natural resources was the subject of a study prepared by the Secretariat at the request of the Commission on Permanent Sovereignty over Natural Resources established under resolution 1314 (XIII) of 12 December 1958.

192. The Commission held three sessions between 1959 and 1961. In a resolution adopted in 1961, it requested the International Law Commission, in connexion with the question of permanent sovereignty over natural resources, to speed up its work on the topic of the responsibility of States.[70]

193. The Second Committee, to which the report of the Commission on Permanent Sovereignty over Natural Resources was referred, did not have time to consider the latter's resolution.

194. By resolution 1720 (XVI) of 19 December 1961, the General Assembly deferred the question to its seventeenth session.

(e) *Acts of one State in the territory of another State*

195. The topic was proposed by the Netherlands (A/4796/Add.7). It is related to that of the jurisdiction and responsibility of States.

(f) *The principle of non-intervention*

196. Study of this topic was proposed by Mexico (A/4796/Add.1). At the inter-American level, a Convention containing five articles, signed at Havana in 1928, sets out the obligations and rights of States in cases of civil war.[71] In the view of the Government of Mexico, consideration should be given to the desirability of extending the provisions of that Convention to all countries or perhaps of formulating new provisions that would be in keeping with present conditions and be universally applicable.

197. At the sixteenth session of the General Assembly, the representative of the Union of Soviet Socialist Republics in the Sixth Committee suggested the

[70] E/3511; A/AC.97/13, annex.

[71] See text in *International Conferences of American States, 1889-1928*, New York, Oxford University Press, 1931, pp. 435-436.

codification of the question of the sovereignty of States and the principle of non-interference (A/C.6/SR.717).

198. The representative of Mexico (A/C.6/SR.722) pointed out that, in view of the current importance of the question of non-intervention, its study should be undertaken as soon as possible.

(g) *The principle of self-determination of peoples*

199. Study of this topic was proposed by Austria (A/4796/Add.6).

200. The principle appears in the draft International Covenants on Human Rights,[72] in article 1 of the draft Covenant on Economic, Social and Cultural Rights and in article 1 of the draft Covenant on Civil and Political Rights. In addition, on 14 December 1960 the General Assembly adopted resolution 1514 (XV) setting forth a Declaration on the granting of independence to colonial countries and peoples. At its sixteenth session, the General Assembly, by resolution 1654 (XVI) of 27 November 1961, established a Special Committee to examine the application of the Declaration set forth in resolution 1514 (XV) and to report to it at its seventeenth session. The Special Committee began its work on 20 February 1962 at Headquarters.

5. Enforcement of international law

201. The topic was proposed by the Government of Ghana (A/4796/Add.1).

202. In a statement in the Sixth Committee during the sixteenth session of the General Assembly, the representative of Ghana (A/C.6/SR.723) said that this topic was closely related to the acceptance by all States of the compulsory jurisdiction of the International Court of Justice. If it were possible to enforce international law against all nations in all cases, many of the difficulties at present confronting the world would be obviated. His delegation hoped that the topic would receive early attention.

203. The representative of Argentina (A/C.6/SR.720) stated that his Government considered it essential to attempt, by both codification and progressive development, to establish a complete legal system of methods for securing the peaceful solution of international disputes and to create additional means of ensuring peace through the rule of law.

6. Utilization of international rivers

204. The Netherlands (A/4796/Add.7) requested that this matter should be studied by the International Law Commission.

205. At the fourteenth session of the General Assembly, the representative of Bolivia in the Sixth Committee pointed out that the utilization of international rivers was governed by law which was purely customary, ill-defined and lacking in uniformity.[73] He therefore suggested that the International Law Commission should include in its agenda the question of the utilization and exploitation of international waterways.

206. Several representatives emphasized the complexity of the problem, which would necessarily require suitable technical knowledge.

207. Other representatives were of the opinion that an attempt to codify the matter would be premature and could do more harm than good. It would be better to leave it to the International Law Commission to decide whether the utilization of international rivers was an appropriate subject for codification.

208. Accordingly, on the recommendation of the Sixth Committee, the General Assembly adopted on 21 November 1959 resolution 1401 (XIV) which requested:

"the Secretary-General to prepare and circulate to Member States a report containing:

"(*a*) Information provided by Member States regarding their laws and legislation in force in the matter and, when necessary, a summary of such information;

"(*b*) A summary of existing bilateral and multilateral treaties;

"(*c*) A summary of decisions of international tribunals, including arbitral awards;

"(*d*) A survey of studies made or being made by non-governmental organizations concerned with international law".

209. The Secretariat has undertaken this work, and a report on the subject and a volume of the United Nations Legislative Series devoted to treaties and national laws concerning the exploitation and utilization of international rivers are to appear early in 1963.

210. At the sixteenth session of the General Assembly, the representative of Iran in the Sixth Committee suggested (A/C.6/SR.725) that the International Law Commission "could well use the research accomplished by the Secretariat as a starting point for an international convention. Such a convention would serve to regulate the use of international rivers by riparian States on the basis of well-defined rules and thus put an end to numerous disputes on the subject".

7. Economic and trade relations

(a) *The rules governing multilateral trade*

211. In proposing the study of this topic, the Yugoslav Government (A/4796) stated that "the rules governing international trade, and more especially trade among States with different economic and social systems, raise a number of novel problems to which satisfactory solutions should now be sought in the interest of the normal development of both economic and political relations in a particularly sensitive area of world affairs. What we have in mind here are not, of course, the technical aspects of the legal regulation of international trade, but the new institutions and rules that have arisen since the Second World War and which make the general pattern of international trade very much different from what it had previously been."

212. At the sixteenth session of the General Assembly, the Yugoslav representative developed these ideas in a statement in the Sixth Committee (A/C.6/SR.714).

(b) *The rules pertaining to the various forms of economic assistance to under-developed countries*

213. This topic was also proposed by Yugoslavia (A/4796). In its observations the Yugoslav Government stated that: "The question of promoting the economic development of the hitherto under-developed countries is generally recognized to be one of the foremost international problems of our time. The various forms of assistance that are now given to the develop-

[72] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (part I), document A/3077.

[73] See *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 55.

ment of these countries—economic and technical, multilateral and bilateral—have considerable legal implications and call for the determination of the principles of international law that should govern their application if they are to achieve their basic purposes".

214. In the Sixth Committee, the Yugoslav representative (A/C.6/SR.714) argued that "in codifying the legal rules concerning economic and technical assistance, the [International Law] Commission should not enter into technical questions, but should seek to define, in the light of general international law, the respective positions of the States and organizations concerned. His delegation was convinced that existing legal standards could provide a basis for establishing some rules which had been reaffirmed many times in the practice of the post-war period. For example, the requirement that no political or other conditions should be attached to the aid extended to under-developed countries was now a generally recognized legal rule".

215. On the other hand, the representative of the United Kingdom, referring to the two topics suggested by Yugoslavia, stated in the Sixth Committee (A/C.6/SR.717) that both tasks seemed more appropriate for an economic body than for the International Law Commission. He further stated that some aspects of international trade might be covered by other subjects, such as the jurisdictional immunities of States.