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Survey of international law - Working Paper prepared by the Secretary-General in the light of the decision of the Commission to review its programme of work

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REVIEW OF THE COMMISSION'S LONG-TERM PROGRAMME OF WORK

[Agenda item 7]

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Survey of international law
Working paper prepared by the Secretary-General

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* A few minor changes have been made in the original text of this document.

ABBREVIATIONS

EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
GATT	General Agreement on Tariffs and Trade (also the Contracting Parties and the secretariat)
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
WMO	World Meteorological Organization

Preface

1. The present working paper has been prepared by the Secretary-General in response to a request made by the International Law Commission at its twenty-second session in connexion with the revision of its long-term programme of work. The relevant passage in the Commission's report is as follows:

> Confirming its intention of bringing up to date in 1971 its long-term programme of work, taking into account the General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment, the Commission asked the Secretary-General to submit at its twenty-third session a new working paper as a basis for the Commission to select a list of topics which may be included in its long-term programme of work. [1]

2. In paragraph 3 of resolution 2634 (XXV) of 12 November 1970, the General Assembly approved the programme and organization of work the session planned by the Commission for 1971, as well as its intention to bring up to date its long-term programme of work. It may be recalled in this connexion that the General Assembly had previously expressed its opinion that the field of international law should be widely examined in determining the future course of the Commission's work. Thus in the preamble to resolution 1505 (XV) of 12 December 1960, entitled "Future work in the field of the codification and progressive development of international law", the General Assembly considered:

> [...] that it is desirable to survey the present state of international law, with a view to ascertaining whether new topics susceptible of codification or conducive to progressive development have arisen, whether priority should be given to any of the topics already included in the Commission's list or whether a broader approach may be called for in the consideration of any of these topics.

3. In order to assist the Commission in its task, a review has accordingly been made in the present document of the principal topics of international law. Before describing, in the Introduction, the main features of this study and the factors which have been taken into consideration in its preparation, it may be helpful to recall briefly the way in which the Commission's existing programme was drawn up and subsequent developments in the Commission's work, which together form the immediate context in which the present document is submitted.

4. At its first session in 1949 the Commission reviewed, on the basis of a memorandum submitted by the Secretary-General entitled *Survey of International Law in relation to the work of Codification of the International Law Commission* [2] (hereinafter referred to as the "1948 Survey"), twenty-five topics for possible inclusion in a list of topics for study. [3] Following its consideration of the matter, the Commission drew up a provisional list of fourteen topics selected for codifi-

[1] *Yearbook of the International Law Commission, 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

[2] United Nations publication, Sales No. 1948.V.1(1).

[3] The topics are listed in the Commission's first report to the General Assembly (A/925), in *Yearbook of the International Law Commission, 1949*, p. 280, para. 15.

cation;[4] it was undertstood that the list was only provisional and that changes might be made after further study by the Commission or in compliance with the wishes of the General Assembly.[5] This list (hereinafter referred to as the "1949 list") has continued to constitute the Commission's basic long-term programme of work. Since 1949 the Commission has submitted final drafts or reports with respect to seven of these topics (régime of the high seas; régime of territorial waters; nationality, including statelessness; law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; arbitral procedure) and two are currently under study (succession of States and Governments; State responsibility). The remaining five topics in the 1949 list which have not been the subject of a final draft or reports and which are not currently under study, are: recognition 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.

5. In addition to considering topics included in the 1949 list, the Commission has studied, or is studying, items referred to it by the General Assembly.[6] These items, together with those on the 1949 list, have constituted the Commission's total programme at any one time,[7] with a distinction being drawn, for reasons of convenience, between those topics which were currently under study ("the current programme of work") and the remainder. Despite the inclusion in its programme of topics suggested by the General Assembly, and the submission by the Commission of final drafts or reports on a number of topics included in the 1949 list, the Commission has not formally made any changes in the 1949 list since it was drawn up.[8]

6. The task which is before the Commission of revising its long-term programme of work may thus be summarized as requiring, in the words of the Commission's 1970 report, the "discarding of those topics on the 1949 list which [are] no longer suitable for treatment", and the devising of a new list "taking into account the General Assembly recommendations and the international community's current needs".[9]

Introduction

7. The following study is intended to provide a review of the state of international law, as it exists at the present time, which will be of assistance to the Commission in the task of drawing up its future long-term programme of work. This document may thus be regarded as a successor to the 1948 Survey,[10] following discussion of which the Commission's existing long-term programme was established. Having regard to the similar scope of the two studies, it has been possible in this survey to refer to the earlier one and to use it as a guide or yardstick by which to measure the progress made since 1948 with respect to the codification and progressive development of international law. There are, however, significant points of difference between the two surveys which should be noted, reflecting the considerable changes that have occurred during the intervening period. Whereas the 1948 Survey was written before the Commission had begun its activities, the survey now submitted contains an account of the Commission's work over the past twenty-two years and of the general experience gained, within the framework of the United Nations, of the codification and progressive development of the law in general. There have, in addition, been developments on a wider scale which have broadly affected the evolution of international law over the last twenty to twenty-five years.

[4] The eleven topics not selected by the Commission were the following: subjects of international law; sources of international law; obligations of international law in relation to the law of States; fundamental rights and duties of States; domestic jurisdiction; recognition of acts of foreign States; obligations of territorial jurisdiction; territorial domain of States; pacific settlement of international disputes; extradition; laws of war. The pacific settlement of international disputes and the laws of war were not included in the 1948 Survey. With regard to the topic entitled "Fundamental rights and duties of States" it should be noted that, in accordance with General Assembly resolution 178 (II) of 21 November 1947, the Commission drew up a "draft declaration on the rights and duties of States" at its first session in 1949.

[5] *Yearbook of the International Law Commission, 1949*, p. 281, paras. 16-17.

[6] In addition to the "draft declaration on the rights and duties of States" (mentioned in foot-note 4 above) the items so referred to the Commission are the following: formulation of the Nürnberg principles; question of international criminal jurisdiction; reservations to multilateral conventions; question of defining aggression; draft code of offences against the peace and security of mankind; extended participation in general multilateral treaties concluded under the auspices of the League of Nations; special missions; relations between States and international organizations; most-favoured-nation clause; juridical régime of historic waters, including historic bays; treaties concluded between States and international organizations or between two or more international organizations; and non-navigational uses of international watercourses. Some of these items arose from the work of the Commission on broader or related topics. An account of the action taken with respect to these topics is given in the previous Secretariat working paper, "Review of the Commission's programme of work and of the topics recommended or suggested for inclusion in the programme" *Yearbook of the International Law Commission, 1970*, vol. II, p. 247, document A/CN.4/230) and in the working papers prepared by the Secretariat in 1967 (*ibid., 1967*, vol. II, p. 337, document A/209/Rev.1, annex). (*ibid.*, 1968, vol. II, p. 226, document A/7209/Rev.1, annex).

[7] The only topic the Commission has considered which was not either included in the 1949 list or recommended by the General Assembly was the topic "Ways and means for making the evidence of customary international law more readily available". See *Yearbook of the International Law Commission, 1970*, vol. II, p. 251, document A/CN.4/230, para. 15.

[8] From time to time the Commission has reviewed the planning of its future work and reached some decisions or conclusions relating thereto, particularly at its tenth session in 1958 (see *Yearbook of the International Law Commission, 1958*, vol. II, pp. 107-110, document A/3859, paras. 57-69), at its fourteenth session in 1962 (*ibid., 1962*, vol. II, pp. 187-191, document A/5209, paras. 24-64) and at its twentieth session in 1968 (*ibid., 1968*, vol. II, pp. 223-224, document A/7209/Rev.1, paras. 95-102). However, those decisions or conclusions were not intended to revise or consolidate the Commission's long-term programme of work. They were aimed rather at establishing a certain order of priority among the topics to be studied by the Commission in the immediate future.

[9] *Yearbook of the International Law Commission, 1970*, vol. II, p. 309 document A/8010/Rev.1, para. 87.

[10] See para. 4 above.

8. The need to encourage "the progressive development of international law and its codification" [11] has been one which, on the whole, States have come increasingly to recognize and to which they have given steadily growing attention during this period. The annual sessions of the General Assembly and of the Commission have provided a regular means, previously lacking, for the systematic examination of international law. The reasons why States have sought, on an increasing scale, to use the opportunity so provided to endeavour to strengthen international law and to extend the range of its functions may be attributed to a variety of causes, but the most fundamental no doubt remains the connexion between the maintenance of international peace and security (which, it may be recalled, is foremost in the list of purposes of the United Nations included in Article 1 of the Charter) and the development of international law. There is an immediate and basic link between the effective operation of a system of legal rules relating to the conduct of States, including the prohibition of the threat or use of force, and the codification and progressive development of international law, regarded as a process aiming at facilitating the interpretation and ensuring the application of these rules in international relations by formulating, restating or recasting them in a form which clarifies its content or restores its certainty.

9. Besides this underlying preoccupation with the need to maintain international peace and security, there have been other major factors which have led States to attach growing importance to the process of the continuing adaptation of international law. The years since 1945 have witnessed a growing degree of interdependence between States, brought about by the ease of modern communications and the necessities of economic progress, which in turn has created demands for the development of international law in fields hitherto untouched. Scientific and technological inventions have also played their part by producing a need for legal regulation of activities—such as those in outer space or on the sea-bed—which, even twenty years ago, were beyond man's capacities. Moreover, the membership of the international community has more than doubled since 1945. Whereas some fifty States signed the United Nations Charter at San Francisco, one hundred and twenty seven States are now Members of the United Nations. The States which have become independent since 1945 have contributed new interests and aspirations to international law. The fact that the codification process—in the widest sense as meaning the means whereby existing law is adapted to changing needs—has been open to a much broader range of countries, has served to accentuate the role which codification can play as an important element in peaceful development, permitting the revision of the law in the light of fresh requirements, and as a means of securing general endorsement for the law so as to contribute to the maintenance of stability in international relations.

10. Recognition of the need that, to the greatest extent possible, States should seek to regulate their relations by legal means, has been expressed on various occasions by the General Assembly, both in its resolutions concerning the work of the Commission and more generally. In the preamble to resolution 2501 (XXIV) of 12 November 1969, for example, dealing with the report of the Commission, the General Assembly emphasized

> the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations.

11. More recently, in the Declaration on the Occasion sion of the Twenty-fifth Anniversary of the United Nations (resolution 2627 (XXV) adopted on 24 October 1970), the General Assembly stated, in paragraph 3, that

> the progressive development and codification of international law, in which important progress was made during the first twenty-five years of the United Nations, should be advanced in order to promote the rule of law among nations.

12. The General Assembly welcomed in this connexion the adoption, on the same day, of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV), annex) (hereinafter referred to as the Declaration on Principles of Friendly Relations). Under the terms of the general part of the instrument the General Assembly declared

> The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

13. Taking account of these general trends as well as of the practice developed by the Commission, the present survey covers the various topics into which international law as a whole may be divided, so as to permit an approximate side-by-side comparison to be made of the degree of codification achieved in different branches and at the same time to indicate, if only in the broadest terms or by implication, the scope of the work which remains to be done with respect to the codification and progressive development of individual topics. It was considered that a survey of this nature would best meet the Commission's needs by enabling it to examine, within the relatively short time available to it, the wide range of topics involved, and to determine the contents of its future long-term programme.

14. The matters dealt with have accordingly been arranged under seventeen headings, with sub-divisions where appropriate. In each chapter a brief indication is

[11] Article 13, paragraph 1 (a) of the United Nations Charter provides, *inter alia:*

"The General Assembly shall initiate studies and make recommendations for the purpose of [. . .] promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;".

given of the scope and, if possible, importance of the subject, of the separate issues which arise, and the approximate extent of relevant State practice. Reference is made to activities relating to the codification and development of the topic undertaken by the Commission itself, by other United Nations organs, by plenipotentiary conferences, or by various regional organizations or learned bodies. These references are selective and do not purport to be exhaustive of all the activities which may possibly be cited in this connexion. A survey of this character, with a short commentary on each item, is almost bound to have certain limitations. Since the survey is not intended to provide a description of the actual content of the law—which would require a document very much greater in length—but only a description of the nature and extent of the law in each area, it has been necessary to ensure that, while not entering into an unduly detailed account of the substance in each chapter, nevertheless sufficient information was given to the reader to enable him to evaluate the scope and form of the matter under discussion.

15. Besides this methodological consideration, the question also arises of the selection of topics for inclusion in the present survey and the manner of their presentation. In accordance with the practice followed by the Commission, [12] the survey is primarily concerned with matters falling within the sphere of public international law. While there are a number of topics which, by general consent, form part of this field of law, there is no complete uniformity in the doctrine. Writers, even those sharing a similar basic viewpoint, frequently differ in the organization of their works covering the whole of international law. Although different opinions may be advanced, therefore, on whether a particular topic should come under one or another heading, and on the degree of relative importance to be attached to it, nevertheless it is believed that the topics covered in the present review include those to be found in most treatises and which represent (with whatever degree of difference in emphasis) what would generally be considered to be the main branches of the subject at the present time.

16. A related issue concerns the degree of systematization and comprehensiveness aimed at. In the 1948 Survey attention was drawn to the fact that the Commission's Statute contemplated the eventual codification of the whole of international law; accordingly the selection of topics by the Commission at any one time needed to be viewed against this broad objective. Therefore that survey attempted, like the present one, to cover the major branches of international law. However, the 1948 Survey did not endeavour to place all topics and aspects of international law within a definitive and formal framework. [13] This policy—of seeking, on the one hand, to show the need for a wide and comprehensive approach whilst, on the other, avoiding over-systematization—has also been followed in the preparation of the present survey. It may be justified on several grounds, including the fact that the endorsement of a definition or delimitation, by the Commission, of the contents of international law at a given moment, could not be more than a mere tentative working tool, subject necessarily to permanent revision. As the legal order in force in international society at a given stage of its historical development, international law has an essentially fluid content which varies from age to age and cannot be circumscribed once and for ever. New questions are endlessly added to those already covered —for instance, at present, international law is enriched as a result of the creation of international organizations entrusted with functions related to new fields of international co-operation, of the elaboration of new rules to cover technological advances, etc.; on the other hand, questions traditionally included among the contents of international law have simply disappeared, lost their original significance or are now approached from a somewhat different perspective.

17. As regards other features of the study, it should be pointed out that this document, like the 1948 Survey, does not deal expressly with a number of major issues which, although influential on the actual course of international law, do not fall (or have not hitherto fallen) within the immediate ambit of the codification process. These issues include the functioning of the system of international security created by the United Nations Charter, the interpretation of its provisions in specific instances, and the consideration by United Nations organs of problems, such as actual disputes between States, which may have an impact on international law. Nor does the survey attempt to describe the interaction which may take place between the adoption of a resolution by a plenary organ of a major inter-governmental body and a subsequent change in State practice, although such interaction may occur as part of the intricate process whereby international law is adapted to changing circumstances. As regards the question of the sources of international law more generally, it should be noted that this matter—which was dealt with in the 1948 Survey under a single heading—has, in the present study, been referred to in connexion with specific topics and not on an over-all basis.

18. Unlike the 1948 Survey, moreover, this survey does not contain sections dealing with "The function of the Commission and the selection of topics for codification" and "The method of selection", "The

[12] Article 1, paragraph 2 of the Commission's Statute provides:

"The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law."

[13] This approach was apparently endorsed by the Commission which, at its first session, after discussing whether or not a general plan of codification embracing the entirety of international law should be drawn up, expressed its conclusions as follows:

"The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration."

(*Yearbook of the International Law Commission, 1949*, p. 280, para. 14).

character of the work of the Commission" and "Procedure of codification". The 1948 Survey was written as a preparatory document, before the Commission had begun its work and when these issues had not yet received practical application. The Commission has now over twenty years accumulated experience to draw on, and although the questions raised under these headings in the 1948 Survey remain of major importance, they were not considered matters on which explicit commentary was necessary in the present study. The 1948 Survey reflected also the distinction embodied in the Commission's Statute between "codification" and "progressive development", even though part of the text was devoted to indicating the practical indivisibility of these two notions. The experience of the Commission has borne out the validity of this argument, and the distinction between "codification" and "progressive development", as the methodological basis for the approach to be taken by the Commission, has not been maintained in the practice of the Commission. The present survey therefore does not attempt to categorize the topics dealt with into those suitable for codification and those suitable for progressive development, but simply provides a conspectus of the whole field of subtantive international law, on the basis of which the Commission may select the topics to be included in its future long-term programme. Attention may be drawn to the fact that the Commission's recommendations, even with respect to the codification of a topic, must in any case be submitted to the General Assembly. [14] At such time therefore as the Commission may report to the General Assembly regarding the topics selected for its future programme, the Commission may point out (if such indeed is the case) that it will be difficult for it to distinguish whether its efforts with regard to these topics will pertain to their codification or to their progressive development.

19. Besides issues of this character, there are certain other general considerations which may need to be borne in mind in connexion with the Commission's present task. One matter, which has already been touched on, concerns a certain shift in method and emphasis that may be said to have occurred with regard to international law since the Commission last undertook the preparation of its long-term programme. States seek more and more to change, adjust or recast existing rules of international law and to bring within the scope of international law areas of activities previously regarded as being entirely within the discretion of the State. Furthermore, the present needs of the world are such that a vastly more active attitude is now taken to the development of international law. The awareness of the nature, novelty and magnitude of such needs has led States to tackle collectively the legal problems involved from their inception and on a more regular and systematic basis than in the past. The 1948 Survey was mainly based on the law which had developed between States by means of the conclusion of particular treaties and through the growth of customary law over previous centuries, and the accent was put for the most part on the codification of that body of law. This was reflected in the list of topics selected for codification adopted by the Commission at its first session. [15] The work subsequently done by the Commission has contributed significantly to the development of international law; during the period of the Commission's existence, and very much as a result of its activities, a substantial body of law has been successfully codified and endorsed by the international community. Although not exclusively so, the achievements of the Commission have been in areas traditionally lying within the scope of international law, where topics, long familiar in State practice, have been examined and recast so as to meet changing circumstances. Having regard to the requirement that, in bringing up to date its long-term programme of work, the Commission should do so "taking into account [. . .] the international community's current needs", [16] the Commission may wish to take into consideration the shift referred to above in determining the contents of its future programme, without of course overlooking its responsibility for the codification and progressive development of the rules relating to areas lying traditionally within the scope of international law and the fact that the rules governing several of those areas have not yet been codified.

20. A more specific series of observations concerns the conclusions which may be drawn from the accumulated practice of the Commission and the fact that a body of codified law now exists, much of it based on drafts prepared by the Commission. One important and well-evidenced point to which attention may be drawn is that the practice of the Commission has consistently shown that the headings of main chapters of international law should not be identified, so far as the actual process of codification is concerned, with particular topics falling within them to which separate attention may need to be given. Even within a general chapter, the study of a particular topic necessarily implies the delimitation of its scope and the leaving aside of a certain number of issues which may themselves eventually require treatment, either as distinct topics or as aspects of another more widely defined subject, possibly encompassing elements to be found in various branches of the law. Apart from factors of this kind, brought about by the need to deal with topics on a reasonably manageable scale and at a pace convenient to governments, the question also arises of the effect of the passage of time on codification activities. The codification of a given topic creates a new legal situation, with consequences for future as well as for existing law. The new legal situation may

[14] Article 18, para. 2, of the Statute of the Commission.

[15] See para. 4 above.

[16] See para. 1 above.

itself require that further acts of codification or revision be undertaken, in order to meet fresh problems that arise. Even without that, on the basis of the newly codified law States may develop practices that may become customary rules, which in turn may be made the object of codification. Although the last mentioned development cannot yet be said to occur to any marked degree, the existence of a considerable amount of codified international law may on occasions raise difficulties of co-ordination when new areas of law are being examined. The question of the relationship between different codified chapters or sections of international law is thus one to which the Commission may need to give increased attention as its work proceeds. The progress made through codification by means of treaty instruments raises further issues, to some of which the Commission has already had occasion to give attention—such as the relationship between conventional codified law and general customary law, the desirability of shortening the final stage of the codification of international law by expediting the process of ratification of or accession to codification conventions, and the question of the significance of codification conventions, irrespective of their contractual force. All these points serve to underline the fact that the process of the codification of international law, and thus the revising of the Commission's long-term programme of work, has become a much more complex and delicate task than it was in 1949.

21. While this may be so, there are nevertheless various features of the codification process, as it has evolved over the past twenty years, which may assist in dealing with the various problems posed. As the contents of this study indicate, there is in fact a considerable variety of methods by which the General Assembly may seek to achieve the objectives set out in Article 13, paragraph 1 (*a*) of the Charter with regard to the codification and progressive development of international law. While the Commission has been established as the permanent body available for this purpose, the development of specific topics of international law has on various occasions been entrusted to special bodies, or recourse had to other procedures. Even as regards the work of the Commission itself, moreover, it may be useful to draw attention to the degree of differentiation which has been achieved with regard to codification in different areas. Examination of the codification conventions which have been concluded on the basis of the Commission's efforts brings out the fact that, quite apart from the particular modifications introduced in the branch of law concerned, the nature and extent of the act of codification has varied considerably from case to case. The Conventions on the Law of the Sea, on Diplomatic Relations, on Consular Relations, on Special Missions and on the Law of Treaties, differ from one another not merely in their content but also in the different kind, or different degree, of legal obligation they entail and in the varying extent to which, within the basic principles laid down, States may adapt their provisions to meet particular requirements. Whilst reflecting the different character of the branch of law being treated in each case, it is the need to achieve this differentiation which renders the task of codification a significantly distinct one, with separate problems and issues, in each instance undertaken. One of the most valuable features of the Commission's work, it is submitted, has been its ability to deal with this element and to develop, as its study of a given topic has proceeded, the most suitable vehicle for the specific act of codification and progressive development under consideration. The fact that the results of the Commission's activities in different areas have mostly been embodied in the same instrument, namely a codification convention, has sometimes caused this particular aspect of the Commission's work to be overlooked. The achievements of the Commission have thus been due, not only to the development of the process of co-ordinating the Commission's study of a given topic with the opinions expressed by governments, either in their written comments or during discussions in the Sixth Committee, but to the flexibility of approach which has been shown. The Commission's practice in this regard, as indicated in the following survey, has thus served to demonstrate that there is a range of possibilities available whereby the object of the Commission—"the promotion of the progressive development of international law and its codification" [17]—may be pursued, and that what may fit the needs of the particular topic and of the international community in one context may not be equally suitable in another. As the Commission's work continues in future years it will no doubt further extend the repertoire of the techniques which are available, within the framework of the Statute, for the successful codification and progressive development of the law in different spheres.

22. In conclusion, attention may be called to the fact that the question of the period of time envisaged for the duration of the Commission's future long-term programme and the number of topics which the Commission may choose to include in its programme, are of course related. The adoption of a programme of work on the basis of a twenty to twenty-five year period (which would be roughly the duration of the previous programme) would itself provide some general indication of the number of topics which would have to be added to those now under study and which, it may be presumed, the Commission will wish to retain on its programme. This consideration, while perhaps an obvious one, was thought worthy of mention since, as a practical matter, the Commission may find its task facilitated if there is broad agreement at the outset on the approximate time span that should be chosen.

[17] Article 1, para. 1, of the Statute of the Commission.

Chapter I

The position of States in international law

1. Sovereignty, independence and equality of States

23. The doctrines of the sovereignty and equality of States have provided the bases of international law since the emergence of a society of independently governed States. These elements have formed the starting point for the development of various fundamental principles of international law relating to the conduct of States and, in particular, of the rule forbidding interference in the affairs of other States. The basic rights and duties of States derived from these principles may thus be said to consist, in essence, of the exercise of sovereignty by individual States and the respect these States owe in turn to the exercise of sovereignty by others, within an international community governed by international law.

24. References to these elements are to be found in each of the instruments establishing international organizations possessing a wide range of responsibilities, whether of a universal or regional character. The Charter of the United Nations contains, notably in Chapter I, a series of provisions concerning the basic rights and duties of States, whilst Article 2, setting out the principles on which the Organization and its Members shall act, provides in paragraph 1 that

> The Organization is based on the principle of the sovereign equality of all its Members.

25. As regards regional organizations, the reciprocal operation of the fundamental rights and duties of States is well illustrated by the Charter of the Organization of American States (Bogotá, 1948) [18]

> International order consists essentially of respect for the personality, sovereignty and independance of States... (Article 5, para *b*.)

26. The OAS Charter also provides that:

> States are juridically equal, enjoy equal rights and equal capacity to exercice these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law. (Article 6.)
>
> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements. (Article 15.) [19]

27. The Organization of African Unity expressly stated in its Charter (Addis Ababa, 1963) [20] that it had amongst its purposes "to defend [the] sovereignty, [...] territorial integrity and independence" (article II, para. 1 (*c*)) of African States, and the principles affirmed in article III include:

1. The sovereign equality of all Member States;
2. Non-interference in the internal affairs of States;
3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.

28. There are, in addition, other general treaties, such as the Vienna Conventions on Diplomatic Relations, [21] on Consular Relations, [22] on the Law of Treaties [23] and the Convention on Special Missions, [24] and many multilateral and bilateral treaties, especially those of alliance or friendship, which refer expressly, usually in their preamble or in the general provisions, to the sovereignty, independence and equality of the States parties thereto.

29. So far as the Commission has been concerned, it may be said that its work has throughout necessarily been based on the assumptions of the sovereignty, independence and equality of States, and reflections of these assumptions are to be found in all of the texts it has prepared. The Commission has not, however, attempted to codify, in the sense of formulating in more precise terms, the meaning to be attached to the principles relating to the sovereignty, independence and equality of States as such, except on one occasion. At its first session in 1949 the Commission, acting in response to a request by the General Assembly, prepared a draft Declaration on Rights and Duties of States, [25] a task which necessarily involved consideration of the basic principles under discussion. According to the draft, which was drawn up in the form of a declaration for adoption by the General Assembly, the General Assembly would have proclaimed, *inter alia*, the following provisions:

> Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government. (Article.)
>
> Every State has the duty to refrain from intervention in the internal or external affairs of any other State. (Article 3.)
>
> Every State has the right to equality in law with every other State. (Article 5.)

30. In paragraph 2 of resolution 375 (IV) of 6 December 1949, the General Assembly deemed the draft Declaration "a notable and substantial contribution towards the progressive development of international law and its codification" and commended it as such "to the continuing attention of Member States and of jurists of all nations". Member States were requested to comment on the draft and on the future action, if any, to be taken by the Assembly. In resolution 596 (VI) of 7 December 1951 the General Assembly, considering that the number of States which had made comments

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[18] United Nations, *Treaty Series*, vol. 119, p. 3.

[19] See also articles 7, 8 and 13.

[20] United Nations *Treaty Series*, vol. 479, p. 39.

[21] *Ibid.*, vol. 500, p. 95.

[22] *Ibid.*, vol. 596, p. 261.

[23] *Official Records of the United Nations Conferences on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289

[24] General Assembly resolution 2530 (XXIV), annex.

[25] *Yearbook of the International Law Commission, 1949*, pp. 287 *et seq.*

and suggestions was too small to form a basis for any definite decision, postponed further examination of the draft Declaration until a sufficient number of States had submitted comments. No action has since been taken by the Assembly.

31. As regards efforts towards the codification and progressive development of the concepts under discussion which have been undertaken since the Commission's work in 1949, particular mention may be made of the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. The Special Committee, composed of the representatives of Member States [26] and established in 1963, held a series of sessions between 1964 and 1970 in order to reach agreement on the formulation of the principle, among others, [27] of the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter [of the United Nations], [28] and the principle of sovereign equality of States. The formulation of these principles, embodied in the Declaration on Principles of Friendly Relations are reproduced below:

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

[...]

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantage of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(*a*) States are juridically equal;

(*b*) Each State enjoys the rights inherent in full sovereignty;

(*c*) Each State has the duty to respect the personality of other States;

(*d*) The territorial integrity and political independence of the State are inviolable;

(*e*) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(*f*) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

32. The principle of the sovereignty of States, which has as one of its consequences the duty of one State not to interfere in the affairs of another, also entails a similar obligation on the part of international organizations. Thus Article 2, paragraph 7, of the United Nations Charter provides

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

2. Fulfilment in good faith of the obligations of international law assumed by States

33. The principle that States shall fulfil their obligations in good faith is one which is of general application with respect to all obligations internationally binding on a State. Apart from such issues as may arise in individual cases, the principle may be of particular relevance, however, in instances where the international obligation includes the requirement that States give effect, through national laws, to their duties arising out of international law, or, more widely, in so far as provisions of domestic or constitutional law may be invoked by States in connexion with the implementation of international obligations.

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[26] Originally twenty-seven, increased to thirty-one in accordance with General Assembly resolution 2103 A (XX) of 20 December 1965. The item entitled "Consideration of principles of international law concerning friendly relations and co-operation among States in accordane with the Charter of the United Nations", was placed on the provisional agenda of the seventeenth session of the General Assembly, in accordance with resolution 1686 (XVI) of 18 December 1961, under the item entitled "Future work in the field of the codification and progressive development of international law". For detailed references to the history of the work of the Special Committee, see chapter I, section B, of its final report: *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18* (A/8018).

[27] The others being: the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United (see paras. 44 and 109 below); the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered (see para. 124 below); the duty of States to co-operate with one another in accordance with the Charter (see para. 151 below); the principle of equal rights and self-determination of peoples (see paras. 46 and 198 below); and the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter (see para. 35 below).

[28] See also the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, adopted by the General Assembly in resolution 2131 (XX) of 21 December 1965, and the provisions contained in the draft Declaration on Rights and Duties of States quoted in paragraph 29 above.

34. Article 13 of the draft Declaration on Rights and Duties of States, prepared by the Commission in 1949, [29] contains the following statement of the principle:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

Article 14 declared further that States have the duty to conduct their relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

35. The matter was examined more recently in connexion with the preparation of the Declaration on Principles of Friendly Relations which contains an elaboration of the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. The Special Committee which drafted the Declaration took no action on a proposal which would have denied States the right to avoid their obligations on the grounds of their incompatibility with national law or national policy. [30] The formulation contained in the Declaration is as follows:

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

36. The general principle set out in the above texts has been reflected in provisions contained in conventions adopted under the auspices of the United Nations. Article 27 of the Vienna Convention on the Law of Treaties, [31] for example, provides

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

(Article 46, which is referred to in paragraph 37 below, regulates the effect of non-compliance with provisions of internal law regarding competence to conclude treaties.) Treaties frequently contain provisions requiring the States parties to take the necessary steps under their constitutional processes to adopt such legislative or other methods as may be necessary to give effect to the rights recognized in the convention. [32] In other cases the substantive obligations are stated in terms of an obligation to enact legislation or to take other domestic action to achieve specifically stated purposes. [33] A particular instance of the basic principle is also found in the text of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, adopted by the Commission in 1950. [34] Principle II states that

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law. [35]

37. The 1948 Survey included a section entitled "The obligations of international law in relation to the law of the State" (part II, section I, 3), dealing with the issues raised in relation to the obligation of States to give effect, through their national law, to the responsibilities they have assumed internationally. The Commission decided, however, to postpone until later its consideration of the topic, which was not therefore included in the 1949 list of topics for codification. As was noted in the 1948 Survey, there are considerable variations in domestic constitutional provisions and practices with respect to the ratification and implementation of treaties. One aspect of these variations, and of the problems which may be posed on the international plane, was considered by the Commission and by the United Nations Conference on the Law of Treaties during the preparation of article 46 of the

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[29] See foot-note 25 above.

[30] See the 1966 report of the Special Committee (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 525, 548 and 566) and the 1967 report (*ibid., Twenty-second Session, Annexes*, agenda item 87, document A/6799, paras. 239-240, 291 and 296-297).

[31] This provision was based on an amendment submitted to the United Nations Conference on the Law of Treaties by the delegation of Pakistan (document A/CONF.39/C.1/L.181 reproduced in *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 145, document A/CONF.39/14, para. 233). The Commission considered that this matter rather fell within the scope of the law of State responsibility; see the statement at the Conference by its Special Rapporteur on the Law of Treaties, Sir Humphrey Waldock (*Ibid., First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 29th meeting, para. 73.

[32] See, for example, article 2, paragraph 2 of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex); article V of the Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaty Series*, vol. 78, p. 277); and articles III and IV of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII), annex).

[33] For example, article 2 of the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 A (XXI), annex) and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly resolution 2106 A (XX), annex). See also the 1949 Geneva Convention (United Nations, *Treaty Series*, vol. 75, pp. 2 *et seq.*).

[34] *Yearbook of the International Law Commission, 1950*, vol. II, p. 374, document A/1316, part III.

[35] See also Principle IV (*ibid.*, p. 375), and article 4 of the Draft Code of Offences against the Peace and Security of Mankind, regarding governmental and superior orders as a defence (*ibid., 1954*, vol. II, p. 151-152, document A/2693, chap. III).

Vienna Convention. [36] The majority of the Commission were of the view that the complexity and uncertain application of provisions of internal law relating to the conclusion of treaties was such that that law should not be accepted as relevant to the validity, on the international level, of actions taken in violation of it unless the violation was manifest. [37]

3. The territorial domain of the State [38]

38. In the course of examining matters coming under this heading the 1948 Survey pointed out that, although there had been a number of relevant international awards and decisions [39] and a considerable amount of State practice existed, chiefly as regards territorial disputes, the subject had remained almost entirely outside the codification efforts. The reasons given in explanation of this state of affairs were:

> The salient aspect of this part of international law lies in the rules relating to the original acquisition of territorial sovereignty by discovery, occupation, conquest and prescription. Rights and claims to territory have been traditionally regarded as synonymous with the most vital interests of States, and it is perhaps not surprising that there has been a reluctance to cast the applicable rules of law in the form of codified principles which might be invoked immediately, with some eagerness, by parties to pending disputes. [40]

39. The 1948 Survey concluded its discussion on this topic by examining certain questions relating to the acquisition of, and change in, sovereignty that "would seem to require clarification", mention being made of specific aspects of the modes of acquisition of territory (acquisitive prescription; role of conquest) and the question of the effect of changes in sovereignty (through conquest or cession) upon the nationality of the residents of the territories concerned, and the right of option in that regard. In connexion with the formulation of a rule of international law concerning prescription, the 1948 Survey underlined the technical character of some aspects of the matter, enumerating among them questions of determination of boundaries, the rule of the thalweg, accession and alluvion, and the like. So far as the acquisition of title through conquest was concerned, the Survey indicated that, with the prohibition of the right of war, "the time would appear ripe for a revaluation of the role of conquest as conferring a legal title" and that there was room for the view that "the principle of non-recognition of acquisition of territory by force may find a place as a legal rule denying the title of conquest to States resorting to war in violation of their fundamental obligations". [41] Finally, the Survey drew attention to the fact that "the regulation by treaty of the right of option frequently raises problems for the solution of which a general formulation of the applicable law would be both feasible and useful." [42]

40. When the topic was considered during the Commission's first session, the view was expressed that the subject was not suitable for immediate codification, and the Commission decided not to include it in its future programme. [43]

41. Since that time, although there have been further examples of State practice and several pertinent decisions have been given by the International Court of Justice [44] and by international tribunals, [45] the situation, at least from the standpoint of codification of the legal rules involved, has remained much as was described in the 1948 Survey. Attempts to codify the principles and rules have continued to be limited, so as to relate either to particular areas of the globe (for example, the conclusion of the Antarctic Treaty in 1959) [46] or to

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[36] See article 43 of the 1966 draft articles on the law of treaties and the Commission's commentary thereon (*Yearbook of the International Law Commission 1966*, vol. II, p. 240, document A/6309/Rev.1, part II, chap. II), and the discussion at the United Nations Conference on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 238 *et seq.*, 43rd meeting, and *ibid., Second Session, Summary records* ... Sales No. E.70.V.6, pp. 84 *et seq.*, 18th plenary meeting). See also the discussion of a proposal by the delegation of Luxembourg, which would have required the parties to take any measures of international law required to ensure that treaties are fully applied (*ibid.*, pp. 44 *et seq.*, 12th and 13th plenary meetings).

It may be noted that article 2, paragraph 1, of the Vienna Convention on the Law of Treaties deals with the use of terms such as "treaty", "ratification", "acceptance", "approval", and "accession", for the purposes of the Convention; paragraph 2 of the same article provides that this is "without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State".

[37] Paragraph 10 of the commentary to draft article 43, in *Yearbook of the International Law Commission, 1966*, vol. II, p. 242, document A/6309/Rev.1, part II, chap. II.

[38] For questions relating to territorial waters, the continental shelf, the sea-bed beyond the limits of national jurisdiction, and internal waters, see chapters IX and X below. For matters relating to air space see chapter XI.

[39] The 1948 Survey referred specifically to the decision of the Permanent Court of International Justice in the Legal Status of Eastern Greenland case, *P.C.I.J.*, Series A/B, No. 53, p. 22.

[40] 1948 Survey, para. 64.

[41] *Ibid.*, para. 66.

[42] *Ibid.*, para. 67.

[43] *Yearbook of the International Law Commission, 1949*, pp. 42-43, 5th meeting, paras. 55-61.

[44] Mention may be made, in particular, of The Minquiers and Ecrehos Case (*I.C.J. Reports 1953*, p. 47); Case concerning Sovereignty over certain Frontier Land (*ibid.*, 1959, p. 209); Case concerning Right of Passage over Indian Territory [Merits], (*ibid., 1960*, p. 6); and Case concerning the Temple of Preah Vihear, (*ibid., 1962*, p. 6). See also the Advisory Opinion of 21 June 1971 on the "Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)" [*ibid., 1971*, p. 16].

[45] For example, Argentine—Chile Frontier Case (see United Nations *Reports of International Arbitral Awards*, vol. XVI (United Nations publication, Sales No. E/F.69.V.I) p. 109) and Rann of Kutch Arbitration (American Society of International Law. *International Legal Materials, 1968* (Washington, 1968), vol. VIII, No. 3, p. 633).

[46] United Nations, *Treaty Series*, vol. 402, p. 71. The Treaty provides for a suspension, without renunciation, of rights, and claims to, territorial sovereignty and establishes in effect a special régime for the area reflecting its particular characteristics.

particular matters connected with the topic. A brief account is given below of the more recent developments which are of significance with regard to different aspects of the subject. The account has been divided as follows:

(*a*) Questions relating to modes of acquisition of territory;

(*b*) Questions concerning specific limitations on the exercise of territorial sovereignty.

(a) *Questions relating to modes of acquisition of territory*

42. The State system within which international law has traditionally operated has as one of its bases the occupation and division of territory: each State is established within a definite area of the globe delimited normally by agreed boundaries. International law gives recognition to the territorial sovereignty exercised by the State in question within that area, and to the exercise in principle of sole jurisdiction by that State to the exclusion of the jurisdiction of any other State. [47] International law nevertheless lays down certain general regulations concerning the exercise of territorial sovereignty by States, for instance in the interest of maintaining international peace and security. [48] In general, however, it is necessary that specific limitations on the exercise of territorial sovereignty (which are considered in the following sub-section) be established by treaty or be otherwise explicitly acknowledged by the State in question. As regards the rules which have been elaborated by international law with respect to the acquisition of territorial sovereignty, historically these were based on institutions of private law, developed and amplified to fit the circumstances of a society of independent States. Any attempt to codify those rules which might be undertaken at the present time would need, however, to reflect the progress made in the development and application of a number of fundamental principles of international law—in particular the principle of the prohibition of the threat or use of force and the principle of equal rights and self-determination of peoples—and to assess their effect upon the rules relating to the acquisition of territory by a State.

43. In particular the role of conquest as a possible mode of acquiring sovereignty has—as the 1948 Survey indicated—been further discussed in the light of the principle of the prohibition of the threat or use of force. On this question the draft Declaration on Rights and Duties of States would have imposed on States "the duty to refrain from recognizing any territorial acquisitions by another State" (article 11) which had acted in violation of its "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 or political independence of another State, or in any other manner inconsistent with international law and order." (Article 9.) [49]

44. More recently, the Declaration on Principles of Friendly Relations contains in its elaboration of the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, various provisions declaring illegal the acquisition of territory, if effected by the threat or use of force, subject to the limits and exceptions prescribed. The Declaration includes in particular the following provisions:

> Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.
>
> The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:
>
> (*a*) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or
>
> (*b*) The powers of the Security Council under the Charter. [50]

45. Besides the question of the impact on the rules concerning modes of acquisition of territory of the principle of the prohibition of the threat or use of force, the relationship between those rules and the principle of equal rights and self-determination of peoples also raises a series of major issues. The period since 1945 —the period in fact since the establishment of the

[47] Thus, in the language of article 2 of the draft Declaration on Rights and Duties of States,

> "Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law."

[48] See, for example, the eighth and ninth paragraphs of the text relating to the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, contained in the Declaration on Principles of Friendly Relations (quoted in para. 109 below), and the provisions from that formulation cited in para. 44 below; see also articles 4 and 7 of the Draft Declaration on Rights and Duties of States.

[49] See also *Preparatory study concerning a draft Declaration on the Rights and Duties of States* (United Nations publication, Sales No. 1949.V.4), pp. 111-113.

[50] General Assembly resolution 2625 (XXV), annex.

United Nations—has witnessed an unparalleled increase in the number of States enjoying or regaining national sovereignty. This movement has been closely identified with the process of decolonization in which the United Nations has played a large part. The Declaration on the granting of independence to colonial countries and peoples (resolution 1514 (XV) of 14 December 1960) includes amongst its provisions

...

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

...

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

46. Besides the establishment of special bodies to examine the steps taken, or to be taken, to ensure the implementation of this Declaration, it may be noted that the principle of equal rights and self-determination of peoples was also amongst those included in the Declaration on Principles of Friendly Relations. The formulation adopted with regard to that principle included, in particular, the following passages:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

47. The following general conclusions suggest themselves on the basis of the above. First, the decolonization movement and the establishment of self-determination as a legal principle, culminating in the establishment of sovereign equal States throughout most of the world, will result, if they have not indeed already done so, in the drying up of some of the modes of acquisition of territory (most notably discovery and occupation of overseas territories) and affect the traditional operation of those modes. However, they do not destroy *per se* legal titles of the past, although new legal principles and rules may be instituted with respect to situations which continue to exist. Attention may be called in this connexion to the distinction drawn, in the provisions of the Declaration quoted above, [51] between "the territory of a colony or other Non-Self-Governing Territory" and that of "the territory of the State administering it". Present international law recognizes that the former enjoys a particular international status even before the exercise of the right of self-determination, a development very much bound up with the United Nations. The action taken by the United Nations with respect to Namibia and the Advisory Opinion of the International Court of Justice of 21 June 1971 concerning the legal consequences for States of the continued presence of South Africa in Namibia [52] may be noted in this connexion. Lastly, by way of generalization it may be mentioned that, subject to certain exceptions relating to territorial claims arising out of particular boundary disputes and instances of partition, the principles of *uti possidetis,* followed by the States of Latin America during the early nineteenth century, has been the main guideline for determining the boundaries of the new States emerging from the recent process of decolonization. The principle, which entails delimitation of boundaries according to lines of demarcation of former colonial possessions, has been generally applied both as regards administrative lines of demarcation between two former dependent territorial entities administered by the same State, and as regards boundaries between territories administered by different States.

48. As indicated earlier, the application to particular disputes of the legal rules concerning the acquisition of territorial sovereignty has often been considered by international courts and tribunals. Although the court or tribunal has necessarily taken account of legal rules and principles applicable to other aspects also, much of the judgement has frequently been concerned with the elaboration of customary rules dealing with the acquisition, and retention, of territorial sovereignty. Such judicial discussions, taken together with the State practice arising out of particular territorial disputes, provide a rich and extensive source of material on which many jurists have already based statements of principle. As the 1948 Survey indicated, there would appear to be no obstacle, if regard is had solely to legal grounds, to spelling out that practice and the judicial statements concerned in one of the forms envisaged in article 23 of the Statute of the Commission. The difficulties—as the 1948 Survey recognized—are, it would seem, primarily political. It has nevertheless been recognized since 1949 that possible claims to sovereignty in specific areas can be dealt with by treaty. Proceeding from this, it could be argued that it would be advantageous—and desirable—to seek to clarify the rules involved, particularly in the light of the development of certain fundamental principles of international law, even if the rules concerned were to be formulated in rather flexible terms. Those rules would, in any case, have to be stated in general terms and their application to particular instances would, as practice shows, involve account being taken of the special facts relating to given situations. As against this is the consideration, to which the Commission will no doubt wish to give weight, of the form any such

[51] See para. 46 above.

[52] See foot-note 44 above.

clarification might take, and the difficulty which would in all probability be experienced in producing a text that would enjoy the support of the widest possible number of States.

(b) *Questions concerning specific limitations on the exercise of territorial sovereignty*

49. The question of specific—as opposed to general—limitations on the exercise by the State concerned of territorial sovereignty arises in three main, if overlapping, contexts: the existence of special limitations on territorial sovereignty which may occur in certain circumstances, sometimes referred to under the heading of "State servitudes"; the concept of "objective régimes"; and rights of transit.

50. While the whole concept of "State servitudes" is the subject of controversy, it is accepted that, in accordance with the fundamental importance which international law attaches to the principle of territorial sovereignty, such limitations as may exist in given instances—for example, prohibitions on militarization or the establishment of neutrality—are particular restraints, applicable to the instant case, and to that case only. From this it is argued that the rights are personal only, that there is no need to use the language of property law, and that the "régime" or situation has no inherent right of permanence. Although the controversy—to a considerable degree doctrinal and terminological—has been primarily about the character of the alleged "servitude", discussion has inevitably involved consideration of the preliminary issue also, of the process whereby the rights and duties in question came to be established. Principles of general law have therefore been invoked, despite the agreed particularity of any servitude which may have been established, since they have provided the basis on which each specified network of rights and obligations has been founded. This basis, in broad terms, can consist either in treaty law, in so far as a treaty may be the foundation of a given servitude, or in the law relating to unilateral acts, [53] where the act of a single State began the process which led to the claimed servitude. There are, of course, also intermediate situations: a local custom or tacit agreement resulting from the acts of two or more States immediately involved is a prime instance. Situations of this character have inevitably given rise to a number of disputes and international tribunals have, on occasions, considered arguments as to whether or not a servitude was established, or that some "objective régime" with a considerable degree of permanence had been created. It cannot be said, however, that any very large body of distinctive case law has emerged on the topic. Moreover, the question would not appear to have been the object of any codification process. As regards the work of the Commission, it may be noted that the Commission is concerned with matters relating to "dispositive", "localized" or "territorial" treaties in the context of the topic of State succession, in particular as regards succession in respect of treaties. [54]

51. So far as the treaty aspect is concerned, this was dealt with to some extent by the Commission when, during the preparation of its draft articles on the law of treaties, it considered the question of so-called "objective régimes". The Commission decided not to include a provision on this issue, stating its reasons as follows:

> The Commission considered whether treaties creating so-called "objectives régimes", that is obligations and rights valid *erga omnes*, should be dealt with separately as a special case. Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article. Since to lay down a rule recognizing the possibility of creation of objective régimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present possible. Accordingly, it decided not to propose any special provision on treaties creating so-called objective régimes. [55]

52. Consistent with the above, the matter now falls, at least in part, within the framework of part III, section 4 ("Treaties and third States"), of the Vienna Convention on the Law of Treaties. The operation of the provisions of the Convention concerned has been examined by the Secretary-General in a study relating to the possible establishment of international machinery for the promotion of the exploration and exploitation of the resources of the international area of the seabed; [56] although given in a specific context, it is believed

[53] See generally chap. VIII below.

[54] See paras. 201-204, below.

[55] *Yearbook of the International Law Commission, 1966*, vol. II, p. 231, document A/6309/Rev.1, part II, para. 4 of commentary to article 34.

[56] "Study on the question of establishing in due time appropriate international machinery for the promotion of the exploration and exploitation of the resources of the sea-bed and the ocean floor beyond the limits of national jurisdiction, and the use of these resources in the interests of mankind", chap. IV, section 2. The study was annexed to the report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction: *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 22* (A/7622), p. 81, annex II.

that the opinion there expressed may be of general application.

53. The question of rights of transit has become closely identified with the question of the rights to be accorded to land-locked States (including their right of access to the sea). Strictly speaking, however, the legal position of such States is merely a special element of the topic as a whole. There are a number of multilateral conventions which deal with the matter, including the Convention on Transit Trade of Land-Locked States (New York, 1965). [57] These treaties are either of a general character, such as the 1965 Convention, or contain provisions relating to transit in connexion with other issues, such as customs arrangements or regional measures of economic co-operation. There are in addition many bilateral treaties regulating transit rights (chiefly as regards the transit of goods and persons) as between the particular States involved. In some cases special practices have led to the establishment of institutional arrangements on a regular basis in order to administer an agreement. In addition to this body of law, which is mainly treaty law, the question of transit has also been before the International Court of Justice. [58]

54. The existence of the Convention on Transit Trade of Land-Locked States, and the fact that most transit rights now enjoyed by particular States are based on treaty arrangements, together with the individual nature of the respective needs and interests of the States most directly concerned, would suggest that this is a sphere where efforts towards the codification and progressive development of the law would not appear to be called for on the part of the Commission at the present time.

4. Recognition of States and governments

55. The 1948 Survey [59] emphasized the importance of the question of recognition of States, as well as that of governments and belligerency. [60] After quoting some of the statements made by members of the League of Nations Committee of Experts with regard to the suitability, or otherwise, of the subject for codification, and referring to the work of other bodies, the Survey declared that

> The main reason for the inability—or reluctance—to extend the attempts at codification to what is one of the central and most frequently recurring aspects of international law and relations has been the widely held view that questions of recognition pertain to the province of politics rather than of law. [61]

56. It was stated that there were many, however, who believed that that view was contrary to the evidence of international practice, and, if acted upon, probably inconsistent with the authority of international law. An imposing body of practice and doctrine existed, making it feasible to attempt to formulate and answer, as a matter of international law,

> ... such questions as the requirements of statehood entitling a community to recognition; the legal effects of recognition (or of non-recognition) with regard to such matters as jurisdictional immunity, State succession, diplomatic intercourse; the admissibility and effect, if any, of conditional recognition; the question of the retroactive effect of recognition; the modes of implied recognition; the differing legal effects or recognition *de facto* and *de jure;* the legal consequences of the doctrine and practice of non-recognition; and last—but not least—the province of collective recognition. [62]

Most of these problem were also germane, it was said, to the question of recognition of governments and belligerency.

57. As regards attempts to regulate the question of recognition, attention may be called to the relevant provisions of two major inter-American instruments. The Convention on Rights and Duties of States, signed at Montevideo in 1933, [63] provides in article 3, *inter alia,* that

> The political existence of the State is independent of recognition by other States.

Articles 6 and 7 of the Convention are as follows:

> The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.
>
> The recognition of a State may be express or tacit. The latter results from any act which implies the intention of recognizing the new State.

58. The Charter of the Organization of American States, [64] concluded in 1948, repeats, in article 9, the sentence from article 3 of the Montevideo Convention quoted above. Article 10 of the Charter declares

> Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.

These two treaties appear to be the only instances in which an explicit attempt has been made to regulate the question by way of a multilateral instrument.

59. As regards the attitude of the Commission with respect to the topic, in 1949 it was agreed to place the item "Recognition of States and Governments" on the list of subjects for study. Although reference was made to the political aspects of the question the general opinion was that, in view of its undoubted importance, an attempt should be made to codify it.

60. Since 1949 the Commission has referred to the subject of the recognition of States and governments in several of its drafts, but has not entered into an extensive examination of the question. A paragraph of the observations concerning the draft Declaration on Rights

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[57] United Nations, *Treaty Series,* vol. 597, p. 3. As of 1 April 1971, 23 States were parties to the Convention.

[58] Case concerning Right of Passage over Indian Territory (Merits), *I.C.J. Reports 1960,* p. 6.

[59] Paras. 40-43.

[60] Regarding the recognition of belligerency, see generally chapter XVI below.

[61] 1948 Survey, para. 42.

[62] *Ibid.*

[63] League of Nation, *Treaty Series,* vol. CLXV, p. 19.

[64] United Nations, *Treaty Series,* vol. 119, p. 3.

and Duties of States, adopted by the Commission at its first session in 1949, stated:

Another proposed article would have provided that "Each State has the right to have its existence recognized by other States". The supporters of this proposal took the view that, even before its recognition by other States, a State has certain rights in international law; and they urged that, when another State on an appraisal made in good faith considers that a political entity has fulfilled the requirements of statehood, it has a duty to recognize that political entity as a State; they appreciated, however, that, in the absence of an international authority with competence to effect collective recognition, each State would retain some freedom of appraisal until recognition had been effected by the great majority of States. On the other hand, a majority of the members of the Commission thought that the proposed articles would go beyond generally international law in so far as it applied to new-born States; and that in so far it related to already established States the article would serve no useful purpose. The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration, and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commision to be necessary or desirable. [65]

61. Secondly, paragraph 1 of the commentary to article 60 (Severance of diplomatic relations) of the draft articles on the law of treaties adopted by the Commission in 1966 states:

[...] any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments, which is excluded from the present discussion for the reasons indicated in paragraph 30 of the Introduction to this chapter, or recognition of States and Governments, which the Commission in 1949 decided to include in its provisional list of topics selected for codification. [66]

The United Nations Conference on the Law of Treaties amended article 60 of the Commission's draft with a view to cover not only the "severance" but also the "absence" of diplomatic relations, as well as of consular relations. [67]

62. Paragraph 2 of article 7 of the draft articles on special missions, adopted by the Commission in 1967, stated:

A State may send a special mission to a State, or receive one from a State, which it does not recognize. [68]

As indicated in paragraph 2 of the commentary to this draft article, the Commission did not, however, decide the question whether the sending or reception of a special mission prejudges the solution of the problem of recognition, as that problem lay outside the scope of the topic of special missions. The Sixth Committee, which considered the draft articles at the twenty-third session of the General Assembly in 1968, decided to delete the paragraph quoted [69] and the Convention on Special Missions adopted by the General Assembly on 8 December 1969 does not refer to the existence or absence of recognition on the part of the States concerned.

63. Finally, it may be noted that during its 1969 session the Commission briefly considered, in connexion with the topic entitled "Relations between States and international organizations", the desirability of dealing, in separate articles, with the possible effects of various exceptional situations, such as absence of recognition, on the representation of States in international organizations. The Commission decided, in view of the delicate and complex nature of the questions concerned, to resume examination of the matter at a future session and to postpone any decision. [70]

64. When, pursuant to paragraph 2 of General Assembly resolution 1505 (XV) of 12 December 1960, Member States submitted written comments regarding possible subjects for study by the Commission, three expressed support for a study of the question of the recognition of States and governments, whilst another considered that discussion night be postponed for the time being because of the political considerations which are interwoven with the basic questions. A broadly similar division of views was expressed in the Sixth Committee. [71]

65. In general summary of the position, it may be said that the subject has continued to be of importance, and indeed, in a society composed largely of independent States, it appears unlikely that the act of recognition could cease at any time to be of significance in international relations. Although steps have been taken (for example, the inclusion of the topic on the Commission's long-term programme in 1949) towards codifying the topic so as to make its legal parameters more distinct, there has has been a persistent current of opinion which has considered that since what was involved was a matter of discretion, lying in the hands of individual governments, there was, in effect, nothing to codify except this basic freedom of choice. While the question of the recognition of particular bodies (whether as States, governments or as other entities, such as those engaged in belligerency or national liberation movements) has been raised on numerous occasions since the inception of the United Nations, a process of collective recognition has not

[65] *Yearbook of the International Law Commission, 1949*, p. 289, para. 50. Provisions of the draft Declaration on Rights and Duties of States and of the Declaration on Principles of Friendly Relations, concerning the non-recognition of territorial acquisitions made by illegal means are cited in paras. 43-44 above.

[66] *Ibid., 1966*, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II.

[67] Vienna Convention on the Law of Treaties, article 74.

[68] *Yearbook of the International Law Commission, 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, D.

[69] *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1048th meeting, para. 43.

[70] *Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

[71] *Ibid., 1970*, vol. II, p. 258, *et seq., document A/CN.4/230*, paras. 52-58.

emerged; [72] membership of and representation in international organizations such as the United Nations has remained in terms distinct from the act of recognition. [73] Whether or not for that reason, there has been no general move to institutionalize the process of recognition on a world-wide scale. An effort to codify the topic would thus have, at the outset, to consider the major issue of whether or not the exercise of recognition is to remain essentially a matter lying wholly or largely in the hands of individual States and governments.

66. A distinction may perhaps be usefully drawn, however, between the basic act of recognition itself and elements of its application or implementation. While the act of recognition is exercised by individual States, the freedom of choice which is granted is supposed to be exercised by them in good faith and in accordance with the rules of international law governing the conditions, requirements, forms and effects of recognition. In this perspective, attention may be called to various specific aspects of the matter which may themselves be suitable for codification: for instance, modes of recognition, including implied recognition; recognition *de facto* and *de jure*; the retroactive effect of recognition; and the legal effects of recognition (or of its absence) with regard to such matters as jurisdictional immunity, State succession, diplomatic and consular relations and treaty relations. When aspects of the question of the effects of non-recognition have arisen in connexion with the Commission's work in various spheres (for example, with respect to the preparation of the draft articles on the law of treaties and in connexion with the topic of "Relations between States and international organizations"), the Commission has had difficulty in dealing with the question in isolation and has tended to set it aside until such time as it might decide to study the topic on a wider basis. It is possible, therefore, that by distinguishing the role of recognition in terms of the political relations between States on the one hand, and its legal requirements and consequences in various spheres on the other, consideration might be given to examining aspects listed above, not just in a single context, but more widely, with a view to its possible codification as a distinct legal institution or procedure, albeit one which is part of a larger whole. It may be pointed out in this connexion that over the past thirty to fifty years there have been numerous cases of one State refusing to recognize another (or, more commonly, of one government declining to recognize another) and nevertheless engaging in a series of legal transactions with that other State—negotiating with that State or government, entering into agreements with it, trading with it, and being members of the same international organization. The question thus arises of the exact significance, outside of formal diplomatic relations and under domestic law, to be attached to non-recognition, and the legal basis of such relations as the two States or governments may be said to maintain. Subject to the more general political factors indicated, to which the Commission will no doubt wish to give due weight, the Commission may therefore like to take this possibility into consideration, as a way in which the topic might conceivably be approached, in the event that it should decide to take up the study of the question of recognition.

5. Jurisdictional immunities of foreign States and their organs, agencies and property [74]

67. The 1948 Survey included a section on "Jurisdiction over foreign States" [75] and the Commission decided to include in its 1949 list of topics "Jurisdictional immunities of States and their property". Under the heading "Jurisdiction over foreign States", the 1948 Survey mentioned the jurisdictional immunities of States and their property, sovereigns, armed forces, public vessels, and of bodies engaged in commercial transactions and activities as an agency of the State. It appears that the scope of the corresponding section of the 1948 Survey was thus somewhat wider than the topic included by the Commission in its 1949 list which, as mentioned, referred to jurisdictional immunities of the States and their property only. However, for the present purposes of the revision of the list by the Commission, it was considered more appropriate to deal in this section with all the aspects referred to in the 1948 Survey.

68. The basic principle that States and their property are immune from the jurisdiction of foreign courts, although generally recognized, has not been directly stated in a multilateral convention having a universal character. [76] The obligation to grant jurisdictional

[72] "Collective recognition" means that States act collectively during the process of receiving information of the situation, evaluating that information and reaching a decision, and communicating that decision; "individual recognition", on other hand, means that States act individually throughout this process. Between these two modes, of individual or collective recognition, intermediate procedures have, to some degree, been evolved on a regional basis, most notably within the framework of the inter-American system. Doctrine has distinguished in this connexion, as particular intermediate types, "consulted" and "concerted" recognition. In so-called "consulted recognition" States act collectively as regards the collection of information, the other two steps (the taking of a decision and its communication) being in principle performed individually. "Concerted recognition" implies concerted action at the decision-making stage, as well as during the stage of gathering information. Lastly, the acts of individual recognition (whether or not forming part of the process of "consulted recognition" may be communicated at the same time ("simultaneous recognition") or by the same act ("joint recognition"). Without a detailed examination of State practice, it would be difficult to evaluate the extent to which these procedures and distinctions have actually been observed.

[73] It may be noted that in resolution 396 (V) of 14 December 1950, entitled "Recognition by the United Nations of the representation of a Member State", the General Assembly expressly declared that the attitude adopted by the General Assembly concerning the question of which of several authorities shall be regarded as the Government entitled to represent a Member State, "shall not of itself affect the direct relations of individual Member States with the State concerned".

[74] For matters relating to diplomatic and consular privileges and immunities of representatives of States, diplomatic agents and consular officers, see chapter VI below.

[75] 1948 Survey, paras. 50-56.

[76] At the regional level the Convention on Private International Law (the Bustamante Code of 1928 (League of

immunity is grounded in the overriding legal duty to respect the independence and equal status of States. However, if the basic principle is generally recognized as flowing from "customary law" or "international comity", its contents and, particularly, its application to certain organs, vessels or agencies of the State, are far from being clear. Frequently, however, these uncertainties have been settled by specific agreements. The need to codify the topic was underlined by the 1948 Survey as follows:

> There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States. [77]

The Survey added:

> [...] it may be found convenient to include in the effort to codify this branch of the law the immunities of the Head of the State as well as those of men-of-war and of the armed forces of the State. [78]

69. The existence of the basic principle referred to above has been reflected in several conventions, *inter alia,* in conventions adopted on the basis of the Commission's drafts, such as the Conventions relating to diplomatic law and the law of the sea. The principle has also been reflected in other conventions and more restricted agreements, primarily, it would seem, with the object of defining its limits and any exceptions agreed upon. The latter treaties have been concerned with State trading activities, with the activities of separate State entities (which generally again raise the State trading question), with State ships and with the armed forces of the State. [79] So far as State trading is concerned, several States, including some whose foreign trade is carried out only by State agencies and others whose trade is only partly public, have concluded a number of bilateral treaties of commerce and navigation and trade agreements containing provisions waiving jurisdictional immunities in the case of commercial activities. [80] At the regional level the Convention on Private International Law (the Bustamante Code) [81] provides that the courts of the contracting States will normally be incompetent to take cognizance of civil or commercial cases to which other contracting States are parties.

70. On the other hand, the final report on the Immunity of States in respect of Commercial Transactions, drawn up in 1960 by the Asian-African Legal Consultative Committee, [82] favoured a restrictive approach to the immunities of States in respect of commercial transactions. More specifically, all the delegations (other than that of Indonesia) were of the view that a distinction should be made between different types of State activity and that immunity should not be granted in respect of those activities which may be called commercial or of a private nature. All delegations were agreed that where the State trading organization was a separate entity under the law of the State, immunity should not be available. The position adopted in this report was based, at least in part, on the trends in the very extensive judicial and executive practice which exists and appears to be similar, generally speaking, to the practice followed at present in most west European countries and in the United States of America. It is perhaps also relevant to note here that, in several States which had previously been largely immune in their own courts, legislation has been enacted limiting or abolishing that immunity.

71. So far as one particular form of State trading activity is concerned—air transport—immunity has also been recognized as limited. The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929) [83] makes subject to the rules of the Convention (presumably including those concerning jurisdiction) transportation performed by the State or by legal entities constituted under public law. (An additional Protocol to the Convention, concluded in 1955, [84] provides that parties can declare that this provision is not to apply to transportation performed directly by the State or by territories under its administration. Few States have made this declaration.) Further, some bilateral air transport agreements provide for waiver of any immunities by carriers designated under them, and it is understood that such waiver is in some instances a condition of the grant of operating permission.

72. So far as State ships are concerned, the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State Owned Vessels

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Nations, *Treaty Series*, vol. LXXXVI, p. 111) provides generally for immunity, subject to certain specified exceptions, some of which are mentioned below.

It may be noted that a Committee of Experts established by the Council of Europe completed in 1970 a draft European Convention on State Immunity and Additional Protocol which has been submitted to other organs, including the Committee of Ministers of the Council, for approval.

[77] 1948 Survey, para. 52.

[78] *Ibid.*, para. 54.

[79] There are other matters which have been subject of practice, litigation and of doctrinal discussion but on which, it would appear, there are no relevant treaties: jurisdiction in respect of immovable property, in respect of the distribution of estates and other funds, and in respect of ownership of shares in a corporation organized in another State.

[80] In certain of these agreements, immunity was retained with respect to members of the State trading organ, whilst waived in respect of the actual commercial activities undertaken.

[81] See foot-note 76 above.

[82] *Asian-African Legal Consultative Committee, Third Session, Colombo, 20 January to 4 February 1960* (New Delhi, 1960), pp. 55-81.

[83] League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

[84] United Nations, *Treaty Series*, vol. 478, p. 371.

(1926) [85] provides in general for the submission of such vessels, their cargo and the State to the jurisdiction of foreign courts with the exception of vessels owned or operated by the State and used, at the time the cause of action arose, exclusively on governmental and non-commercial service. [86] The substance of this Convention is included in the relevant title of the Treaty on International Commercial Navigation Law signed at Montevideo in 1940. [87]

73. The Convention on the Territorial Sea and the Contiguous Zone (Geneva, 1958) [88] contains provisions concerning the immunity of State vessels. Article 21, based on the Brussels Convention, provides that the set of rules applicable to merchant ships in passage through the territorial sea applies also to government ships operated for commercial purposes, but not to other government ships. One consequence of this article, which was controversial, [89] is that government ships operated for commercial purposes might be stopped or diverted by the coastal State for purposes of certain legal proceedings. Somewhat similarly, article 9 of the Convention on the High Seas (Geneva, 1958) [90] provides that ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State. [91] On the other hand, article 22 of the Convention on the Territorial Sea and the Contiguous Zone provides that, with certain exceptions, nothing in the articles on innocent passage which apply to government ships (other than warships operated for non-commercial purposes) affects the immunities which such ships enjoy under these articles "or other rules of international law", and article 8 of the Convention on the High Seas states that warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

74. It may be noted that there is a series of procedural issues which may arise in virtually any case, irrespective of subject-matter, involving jurisdiction over, and the immunities of, a foreign State or its agencies. These questions, which have been referred to (but not always fully clarified) in some of the treaties, are listed below. First, in what circumstances can a State waive its immunity and when can it be said to have done so? While it is usually clear that express submission before a court is sufficient, what interpretation is to be given to a provision in a contract, or in a national law or executive order? Second, in what circumstances, if any, can precautionary action (for instance, arrest of a ship) be taken before trial against a State? Third, what weight should be given to certificates or other statements by the executive of the States involved as to matters in issue in the suit? Fourth, what rights, if any, exist with regard to the discovery of documents and the obtaining of evidence? And, finally, to what extent is execution available in respect of the property of the State or its agencies?

75. Differences of view exist on these questions, as indeed they do on the substantive matters referred to above. But it may be suggested that the differences are not in all cases large, although they can nevertheless cause friction and uncertainty; that, as was said in the 1948 Survey, it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic, commanding general acceptance; and that its day-to-day importance makes it suitable for codification and progressive development.

76. So far as the immunities of the Head of State are concerned, perhaps the major development since the 1948 Survey has been the inclusion in the Convention on Special Missions of article 21, paragraph 1, which reflects the existence of customary immunities as follows:

> The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State national law to Heads of State on an official visit.

Paragraph 2 of the same article recognizes that the Head of Government, Minister for Foreign Affairs and other persons of high rank likewise enjoy certain privileges and immunities under international law when outside their country.

77. There remains one major instance of the application of jurisdictional immunities with respect to organs of a foreign State, namely, with respect to armed forces stationed in the territory of another State. [92] While the issues which arise are, from a legal standpoint, often similar to those which may occur in the other contexts mentioned earlier, the special considerations attendant on the deployment and control of armed forces require

[85] League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

[86] Note, however, that under the Convention, in certain cases, such vessels can be sued in the courts of the State which owns or operates them.

[87] M. O. Hudson, ed., *International Legislation* (Washington, Carnegie Endowment for International Peace, 1949), vol. VIII (1938-1941), p. 460.

[88] United Nations, *Treaty Series*, vol. 516, p. 205. On the law of the sea, see chap. X below.

[89] The Commission in paragraph 2 of its commentary on its article 22 (article 21 of the Convention) noted that certain members were unable to accept the rules of the Brussels Convention and opposed the article (*Yearbook of the International Law Commission, 1956*, vol. II, p. 276, document A/3159). A number of State made declarations and reservations with respect to this and related provisions, to which objections were made (see United Nations, *Multilateral Treaties in respect of which the Secretary-General performs depositary functions: List of signatures, Ratifications, Accessions, etc. as at 31 December 1970* (United Nations publication, Sales No. E.71.V.5), pp. 362 *et seq.*

[90] United Nations, *Treaty Series*, vol. 450, p. 11.

[91] Again it can be noted that this provision is concerned with execution of jurisdiction outside territorial limits rather than the exercise of jurisdiction by the courts. As regards declarations and reservations made, and objections thereto, see United Nations, Multilateral treaties ... 1970 *(op. cit.)*, pp. 368 *et seq.*

[92] Discussion here is limited to armed forces present with the consent of the host State outside the immediate battlefield situation. Occupying forces are also excluded. Regarding the law of armed conflicts, see generally chapter XVI below.

that this topic or aspect be distinguished from those referred to above.

78. The principal questions which arise are the powers of the sending State to exercise jurisdiction over its forces in the host State, the immunity from local jurisdiction of the sending State in respect of those proceedings, and the immunities, if any, of the force and its members from local jurisdiction in respect of matters governed by the local law. These questions have been regulated by local legislation, by administrative action, by bilateral agreement and, more recently, by multipartite treaties. National courts have also had frequent occasion to determine the questions involved.

79. The practice would now appear to have developed that where members of the armed forces of a State are stationed in another State for any period of time an agreement relating to that presence and to their status in general will be concluded. When this is done, largely consistent precedents are available to those preparing the agreements. The existence during the past twenty-five years of a number of pertinent multipartite and other treaties has largely ensured that the customary law has not had to be invoked. One central feature of the whole of this practice, however, which should be noted is that it has mostly, if not solely, concerned particular groups of countries only. The questions involved have arisen on a general basis only in respect of United Nations peace-keeping forces. [93]

6. Extra-territorial questions involved in the exercise of jurisdiction by States

80. Extra-territorial elements may need to be considered in connexion with the exercise of jurisdiction by States in two main sets of circumstances: in determining the extent to which a State may claim jurisdiction with respect to matters having an extra-territorial aspect, and, secondly, with regard to the question of the recognition by foreign States of the exercise of jurisdiction by another. The present section is divided under two headings in accordance with this distinction. The following account does not purport to be exhaustive of the matters which might be referred to under this heading, attention being concentrated on aspects which may be of particular interest to the Commission.

(a) *Exercise of jurisdiction by a State in matters having an extra-territorial element*

81. This section is not concerned with the full range of purposes to which the exercise of State jurisdiction may be put, which would hardly be a subject for codification in terms of international law, but with the narrower question of the exercise of such jurisdiction to regulate matters having a distinct extra-territorial element. Such matters broadly comprise, on the one hand, those where the act in question may be said to be a matter of general international concern—for example, the commission of acts of piracy, or war crimes, trading in narcotic drugs or aerial hijacking—and those in which the particular State has a specific interest, even though the activity was conducted outside its territory or has some other external element. The two categories frequently overlap or coalesce, however, in particular instances. Specific topics which are usually considered to fall, to a greater or lesser extent, within the purview of international law (matters such as human rights, nationality, extradition, asylum and the rights of aliens) are considered elsewhere in the survey.

82. So far as the Commission is concerned, it may be recalled that the 1948 Survey included, under the heading "Jurisdiction of States", *inter alia* the topic "Jurisdiction with regard to crimes committed outside national territory". The 1948 Survey pointed out that the right of a State to try its nationals for offences committed abroad was not in issue. The question which required clarification and authoritative solution was the existence and extent of the right in respect of aliens. [94] The Commission decided to include the question in its list of topics for codification, but without any mention of priority. The Commission has not subsequently taken up the study of the topic.

83. A number of the conventions which have been concluded in order to regulate issues of international concern have included provisions for extra-territorial litigation (i.e. litigation having an extra-territorial element), usually in terms of criminal jurisdiction, although it cannot be said that a clear and consolidated pattern of practice has emerged. Thus the Geneva Conventions of 1949 [95] require the prosecution by the parties of all those who commit breaches of the obligations specified, regardless of the place where the offence was committed. The 1923 International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications [96] provides in certain cases for the prosecution of nationals for offences committed abroad. The International Convention for the Suppression of Counterfeiting Currency [97] of 1929 goes further and allows the prosecution of aliens for certain offences committed abroad. The Single Convention on Narcotic Drugs [98] of 1961 similarly provides—in the absence of the possibility of extradition—for proceedings against aliens for extra-territorial violations of the rules.

84. So far as offences committed in aircraft are concerned, the Convention on Offences and Certain Other

[93] The question of the privileges and immunities of United Nations peace-keeping forces is referred to in paragraph 351 below.

[94] 1948 Survey, paras. 61-63.

[95] United Nations, *Treaty Series*, vol. 75, p. 2. The Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, vol. 78, p. 277), by contrast, provides for prosecution by the courts of the State in whose territory the crime was committed, or by an international tribunal. The Nürnberg Principles, prepared by the Commission in 1960, do not deal with the question of jurisdiction. (See paras. 442-443 and 434-436 below.)

[96] League of Nations, *Treaty Series*, vol. XXVII, p. 213.

[97] *Ibid.*, vol. CXII, p. 371.

[98] United Nations, *Treaty Series*, vol. 520, p. 151.

Acts Committed on Board Aircraft (Tokyo, 1963) [99] provides, *inter alia,* for the exercise of jurisdiction by the State of registration and also by other States, where the offence in question has certain specified characteristics. A Convention for the Suppression of Unlawful Seizure of Aircraft, which was signed at The Hague in December 1970 under the auspices of ICAO, contains provisions requiring the State of registry and the State where the aircraft lands to take various measures regarding the exercise of jurisdiction with respect to such offences. [100] Any State which is able to arrest the alleged offender is obliged to submit the case to its competent authorities if it does not extradite him.

85. Under the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, concluded by OAS (February, 1971), [101] it is provided in article 1 that

> acts of terrorism, especially kidnapping, murder and other assaults against the life or physical integrity of those persons to whom the State has the duty, according to international law, to give special protection, as well as extortion in connexion with those crimes,

are to be considered common crimes of international significance, regardless of motive (article 2). Where the alleged offender is not extradited, the State in whose territory he is is required to try him, as if the deed imputed to him had been committed in that State (article 5).

86. Most of the treaties mentioned in the preceding paragraphs are primarily if not solely concerned with criminal jurisdiction. The law relating to maritime activities contains, however, elements of both civil and criminal jurisdiction. The absence of any particular national jurisdiction over the high seas (as opposed to land areas) has necessarily entailed a wide exercice of jurisdiction by States with respect to their ships operating there. The 1958 Law of the Sea Conventions contain a number of articles, based largely on customary law, defining the scope of national jurisdiction over activities outside the State's territory and territorial sea. Other general instruments drawn up outside the United Nations also regulate jurisdiction over acts on the high seas. The 1954 International Convention (with annexes) for the Prevention of the Pollution of the Sea by Oil, as amended in 1962 and 1969, [102] for example, requires that legal proceedings be brought by the flag State in certain circumstances in respect of oil discharges. The European Agreement for the prevention of broadcasts transmitted from stations outside national territories (Council of Europe, 1965) [103] requires the parties to take jurisdiction over the defined offences which are committed by their nationals, *inter alia,* outside any national territory, or by aliens whether within their territory, on their ships or aircraft, or on board any floating or airborne object under their jurisdiction. The parties also have power to apply its provisions to broadcasting stations conducted from objects affixed to or supported by the sea-bed.

87. As regards the issue of civil jurisdiction more generally, this has also given rise to questions which have—especially regionally—been answered by treaties. At least one group of treaties concerning civil jurisdiction—those regulating maritime claims—are potentially of universal scope. The International Convention relating to arrest of seagoing ships (Brussels, 1952) [104] and the International Convention on certain rules concerning civil jurisdiction in matters of collision (Brussels, 1952) [105] after defining the claims to which they apply, prescribe the States which have jurisdiction. With the exception of this group of treaties, however, those regulating civil jurisdiction are either bilateral or regional. The principal multipartite convention concluded to date appears to be that signed by the member States of EEC in 1968. This European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters [106] bases jurisdiction primarily on the domicile of the defendant, but provides for various additional grounds of jurisdiction as well.

88. In commenting on the material set out above it may be useful to point to a distinction between civil and criminal jurisdiction. Whereas there has been relatively little action, especially at the universal as opposed to regional level, with reference to civil jurisdiction, for criminal jurisdiction the contrary is true. This activity, much of it in the form of treaties, [107] has however arisen out of particular substantive concerns —with war crimes, with trafficking in narcotic drugs, with aerial hijacking and so on—and has not been directed towards the question of exercise of the jurisdiction of a State in extra-territorial matters as such. Putting it another way, that question has not been regarded as a subject or problem in itself, but rather as one of the issues which sometimes—but not always

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[99] *Ibid.*, vol. 704 (not yet published), No. 10106.

[100] ICAO, *Convention for the Suppression of Unlawful Seizure of Aircraft,* document 8920 (1970). For a more detailed account, see para. 328 below.

[101] *Official Documents of the Organization of American States,* OEA/Ser.A/17 (Washington D.C., OAS General Secretariat, 1971), p. 6. It is provided in article 9 that the Convention is open for signature by member States of OAS as well as by any other State that is a Member of the United Nations or any of its specialized agencies, or is a party to the Statute of the International Court of Justice, or is invited by the General Assembly of OAS to sign it. See also paras. 247-248 below.

[102] United Nations *Treaty Series,* vol. 327, p. 3 and *ibid.,* vol. 600, p. 332. The 1969 amendments are annexed to IMCO Assembly resolution A 175(VI) of 21 October 1969.

[103] United Nations, *Treaty Series,* vol. 634, p. 239.

[104] *Ibid.,* vol. 439, p. 193.

[105] *Ibid.,* p. 217.

[106] American Society of International Law, *International Legal Materials, 1969* (Washington, 1969), vol. VIII, No. 2, p. 229.

[107] Note however the adoption by the General Assembly of resolutions 2583 (XXIV) of 15 December 1969 and 2712 (XXV) of 15 December 1970 (see para. 448 below) on the question of prosecution and extradition of war criminals, and also the numerous national laws adopted in implementation of the treaties referred to above.

— [108] arise when certain substantive activities which are of widespread international concern are being prohibited or regulated by treaty. Moreover the extent of the grant of jurisdiction differs from one convention to another.

89. Attention might be drawn to the case of national legislation, which by contrast usually deals with jurisdiction in general terms. [109] Proceeding from this, however, it might be said that State practice as represented by legislative provisions on jurisdiction is so diverse and conflicting that no common rule could be drawn from it. [110] It could nevertheless be suggested that the differences in practice between national laws are not so great as they may appear at first sight; accordingly, it might perhaps be possible to reconcile the apparent disparities. [111]

90. A further and perhaps more basic issue is whether the available material, taken within its over-all setting, is such as to suggest that any attempted codification could, in practice, proceed beyond the inclusion of certain very generally worded rules. Would it be possible to say more, in essence, than that States may exercise jurisdiction in respect of acts having extra-territorial elements if the act has some reasonable connexion with them or their territory, subject to the rules established in conventions dealing with specific matters of international concern? Investigation may, of course, show that a more narrowly drafted rule or rules could be prepared, at least in defined areas, in accordance with the prevailing pattern of dealing with major instances separately. The central question which arises for consideration, therefore, can perhaps be summarized as follows: to what extent would a general codification instrument, probably in broad terms, assist in the implementation or improvement of the means available for dealing with matters such as jurisdiction over war criminals, over persons committing crimes on aircraft, or trafficking in narcotics, where a degree of exercise of jurisdiction by a State in matters having an extra-territorial element has been generally accepted by the international community?

91. The matters treated above have been chiefly those in which a treaty has been concluded involving the possibility of the use of national legislative and judicial jurisdiction to deal with widespread problems of a general or social nature. A more particular body of practice has to some degree developed with respect to various forms of national economic regulation, most notably taxation where a foreign element is involved, or other controls applied, such as restrictive trade practices legislation. In these instances the interest which a State may have in seeking to exercise jurisdiction derives from its own position and circumstances, and the matter becomes of international concern only, as it were, by process of a chain reaction, when the steps taken are such as to involve the interests of another country or countries.

92. The competence of a State to tax an alien or foreign income is generally considered to be subject to some limitations—albeit very limited; it would appear that the State must be able to claim at least some interest in the income in question. In practice these very vague limits are generally replaced by bilateral treaties between the States involved. [112] These treaties, which allocate the taxing competence between the two States and provide for mutual assistance, follow in many cases almost standard forms. Accordingly, there have been attempts to draw up model conventions either as a basis for a multilateral treaty or as a guide for those preparing bilateral treaties. Certain of these efforts have looked particularly to the concerns of the developing States. Thus, within the United Nations, an *Ad Hoc* Group of Experts on Tax Treaties between Developed and Developing Countries has met pursuant to resolution 1273 (XLIII) of the Economic and Social Council. [113] Second, the Asian-African Legal Consultative Committee in 1967 adopted a Final Report on Relief against Double Taxation and Fiscal Evasion (or Multiple Taxation). [114] The report contained "General Principles recommended for adoption in international agreements for avoidance of double or multiple taxation of income". [115] Finally, the Fiscal Committee of OECD in 1963 drew up a draft model convention. [116]

93. Other taxes—for instance on capital gains and estates and on such activities as air and shipping transport—have also been the subject of special bilateral treaties. Such taxes have sometimes also been regulated in the course of more comprehensive bilateral treaties (e.g. those on air transport, consular treaties, and treaties of commerce and navigation). And, of course, multilateral agreements, especially the General Agreement on Tariffs and Trade, often control the imposition

[108] Thus it may be noted that although the practices of slavery and racial discrimination have been overwhelmingly condemned by the international community, the pertinent treaty instruments have not included any extensive grant of extra-territorial jurisdiction. And see foot-note 95 above as to the position under the Genocide Convention.

[109] There would appear to have been no comprehensive investigation of national law on the question of extra-territorial jurisdiction since that of the Harvard Research of 1935. It is not clear whether any significant changes have occurred since then.

[110] Indeed, the draftsmen of several of the treaties were not successful in preparing exhaustive provisions on jurisdiction. and reserved the possibility of the application of national laws defining the extent of the jurisdiction which might be exercised.

[111] On this issue, see for example the introduction to the draft Convention prepared by the Harvard Research, quoted in the 1948 Survey, para. 63. In addition it might be noted that apparently wide claims of jurisdiction may often in practice be limited by the exercise of prosecutorial and judicial discretion.

[112] See generally United Nations, *International Tax Agreements: World Guide to International Tax Agreements.*

[113] See United Nations, *Tax treaties between developed and developing countries* (United Nations Publication, Sales No. E.69.XVI.2)

[114] *Asian-African Legal Consultative Committee, Report of the Ninth Session, New Delhi, 18-29 December 1967,* p. 97.

[115] *Ibid.,* p. 100.

[116] OECD, *Draft Double Taxation Convention on Income and Capital: Report of the OECD Fiscal Committee* (Paris, 1963).

of certain taxes by reference to most-favoured-nation or national treatment.

94. Questions concerning the exercise of competence in cases having an extra-territorial element have also arisen in respect of the attempts of a number of States to apply their legislation prohibiting or controlling monopolies to activities occurring outside their territories. Once again it is accepted that there are limits on this competence (the State claiming jurisdiction must have some real interest in the matter it is attempting to regulate), and again the limits are vague. The situation is different from the case of taxation, however, in that treaties have not in general been negotiated to resolve the questions. [117]

95. It is probable that the above two questions are not suitable for general codification as carried out by the Commission. The problems involved may occur (especially in the second case) only in limited areas of the world and may be better resolved on a bilateral or regional basis; the questions, although arising against a broader background of the restrictions on the exercise of the jurisdiction of a State in cases having an extra-territorial element, are in many respects technical ones to be resolved by the appropriate expert bodies; the issues often appear to differ from one case to the next and to need discreet treatment often by way of a bilateral treaty; and, as noted, steps have already been taken by other bodies to resolve the issues. On the other hand the issues which have presented themselves and the possible answers are illustrative for the purposes of a more general consideration of the exercise of jurisdiction in cases having an extra-territorial element, and, as such, of interest to the Commission.

(b) *Extra-territorial recognition of the jurisdiction exercised by States*

96. The basic rule is that a State has no power to take action outside its territory in order to apply and enforce its laws, as by carrying out acts of sovereignty in the territory of another State. It is, for instance, contrary to international law for a State to send members of its police force into another State to effect an arrest, or to execute a judgement. The rigours of this rule have been reduced in many cases by bilateral, regional and universal treaties providing for various kinds of judicial assistance (independent of the operation of private international law, whereby the courts of the system may give recognition to legal transactions in another). Thus, so far as arrest of alleged criminals is concerned, extradition treaties have been concluded, and other treaties regulate the service of documents, the obtaining of evidence and the recognition and enforcement of foreign judgements. The question of extradition is discussed later. [118] So far as the other matters—service of process, obaining of evidence and the recognition and execution of judgements—are concerned, while it is not possible to list the large number of bilateral instruments, [119] it is possible to mention one or two recent regional and general codification instruments. Thus the Asian-African Legal Consultative Committee in 1965 adopted sets of model rules: first on the recognition and enforcement of foreign judgement in civil cases, and second on the service of judicial process and the recording of evidence in civil and criminal cases, and recommended them for consideration of governments. [120] The Convention signed in 1968 by the States members of EEC regarding civil and commercial judgements deals *inter alia* with the enforcement of judgements. [121]

97. Within the United Nations, two conventions have been adopted concerned with specific aspects of execution. In 1958 the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded [122] and in 1956 the Convention on the Recovery Abroad of Maintenance. [123]

98. The basic question here is whether the Commission should concern itself with the preparation of texts concerning judicial assistance. Although it might be said that this question falls within the field of private international law rather than of public international law, and that the Commission has generally not been concerned with the former, elements of both would be involved in any regulation which was attemped. There has already been a considerable amount of practice on a bilateral or regional basis and, at the universal level, with regard to specific aspects (such as foreign arbitral awards). Arguably this suggests that this pattern of practice should be continued, but the evidence is not such as to impose a categorical answer on this point.

99. More broadly, as was stated in the 1948 Survey when dealing with the question of recognition of the acts of foreign States, [124] it might be said that it would be inconsistent with the independence or equality of States if the organs of one State were to refuse to recognize private rights grounded on the legislative, judicial or administrative acts of other States. Moreover weighty reasons of international economic stability and orderly intercourse might counsel an international regulation of the subject. On the other hand, it was acknowledged that such questions were questions of private international law. Further, limits resulting from *l'ordre public* and other sources clearly restrained the scope of any

[117] Except in so far as the restrictive practice law of a number of countries has been harmonized. The extra-territorial problem then does not generally arise.

[118] See paras. 368-371 below.

[119] Or the provisions in the law of many States providing, even in the absence of a treaty, for service of foreign process, and other forms of judicial co-operation.

[120] *Asian-African Legal Consultative Committee, Report of the Seventh Session, Baghdad, 1965*, pp. 107-115.

[121] Referred to in para. 87 above.

[122] United Nation, *Treaty Series*, vol. 330, p. 3. The work of UNCITRAL in the field of international commercial arbitration may be noted. More generally it may be noted also that some of the general conventions concerned with such matters as counterfeiting of currency and traffic in women and children provide for the issuance of letters rogatory and for the recognition of foreign conviction for the purpose of laws on recidivism.

[123] *Ibid.*, vol. 268, p. 3.

[124] 1948 Survey, paras. 48-49.

obligation of recognition. The Commission decided not to include the topic of "Recognition of Acts of Foreign States" in its list, mainly, it would seem, because the area was considered too vast and ill-defined. [125] In the light of this consideration, the Commission may therefore possibly like to examine whether it might include in its future long-term programme the undertaking at some stage of a study dealing with the more limited question of judicial assistance (or of specific aspects of that question, such as service of civil proceedings and the taking of evidence), due account being taken of the regional and bilateral activity which has already been pursued in this field.

Chapter II

The law relating to international peace and security

1. Charter provisions and adoption of the Declaration on the Strengthening of International Security and of the Declaration on Principles of Friendly Relations

100. Article 2 of the Charter, which sets out the principles on which the United Nations and its Members shall act, includes in paragraphs 3 and 4 a statement of the basic obligations of States with respect to the maintenance of international peace and security. These paragraphs provide as follows:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

101. These two fundamental provisions of the Charter were amplified and re-endorsed by the General Assembly in two Declarations adopted during the twenty-fifth session (1970). In paragraph 1 of the Declaration on the Strengthening of International Security (resolution 2734 (XXV) of 16 December 1970) the General Assembly "*Solemnly reaffirms* the universal and unconditional validity of the purposes and principles of the Charter" and, in paragraph 2, "*Calls upon* all States to adhere strictly" to those purposes and principles. Paragraphs 5 and 6, which relate expressly to the two principles contained in Article 2, paragraphs 3 and 4 of the Charter, are as follows:

The General Asseembly,

...

5. *Solemnly reaffirms* that every State has the duty to refrain from the threat or use of force against the territorial integrity and political independence of any other State, and that the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter, that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, that no territorial acquisition resulting from the threat or use of force shall be recognized as legal and that every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State;

6. *Urges* Member Sates to make full use and seek improved implementation of the means and methods provided for in the Charter for the exclusively peaceful settlement of any dispute or any situation, the continuance of which is likely to endanger the maintenance of international peace and security, including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, good offices including those of the Secetary-General, or other peaceful means of their own choice, it being understood that the Security Council in dealing with such disputes or situations should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

The other provisions of the Declaration on the Strengthening of International Security refer to additional aspects of the matter.

102. The Declaration on Principles of Friendly Relations, adopted by the General Assembly under resolution 2625 (XXV) of 24 October 1970 on the occasion of the twenty-fifth anniversary of the United Nations, includes specific texts relating to these two major principles, based on the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which met between 1964 and 1970. In the preamble to resolution 2625 (XXV) the General Assembly stated that it was "deeply convinced" that the adoption of the Declaration would contribute to the strenghtening of world peace and constitute a landmark in the development in international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter.

103. Particular reference is accordingly made below to the formulation contained in the Declaration with respect to the two major principles coming under the heading "The law relating to international peace and security", namely the prohibition of the threat or use of force and the requirement that disputes be settled by peaceful means.

2. Prohibition of the threat or use of force

104. The basic principle contained in Article 2, paragraph 4, of the Charter [126] is the outcome of an historical development undergone by international law over the past half century. The Covenant of the League of Nations provided in article 11 that

1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.

Article 16 declared that

[125] *Yearbook of the International Law Commission, 1949*, p. 4, 5th meeting, paras. 30-36.

[126] Quoted in para. 100 above.

1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, [127] it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League,

which thereby agreed to suspend all relations with it, whilst the Council was empowered to recommend what military contribution Members should make to the armed forces to be used to protect the covenants of the League.

105. Under the General Treaty for Renunciation of War as an Instrument of National Policy [128] (the "Kellogg-Briand Pact") of 1928 the parties condemned

recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another [article I]

and agreed

that the settlement or solution of all disputes of conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means [article II].

106. These instruments, which were invoked by the International Tribunals of Nürnberg and Tokyo, contributed to the process whereby the principle of the prohibition of the threat or use of force received express recognition in the United Nations Charter and in present international law. Chapter VII of the Charter deals with the action which may be taken "with respect to threats to the peace, breaches of the peace, and acts of aggression" and Chapter VIII with "regional arrangements". Besides the steps which may be taken by the Security Council (in particular under Articles 39 to 42 of the Charter), particular reference may be made in this connexion to Article 51, relating to "the inherent right of individual or collective self-defence" and to Articles 52 and 53, concerning regional arrangements with respect to the maintenance of international peace and security.

107. The Commission has, at the request of the General Assembly, on several occasions considered the general question of the prohibition of the threat or use of force. The draft Declaration on Rights and Duties of States prepared by the Commission in 1949 [129] contains the following provisions:

Article 9. 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 or political independence of another State, or in any other manner inconsistent with international law and order.

Article 12. Every State has the right of individual or collective self-defence against armed attack. [130]

108. The Commission was also concerned with the law relating to the prohibition of the use of force in the course of its preparation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, [131] and of the draft Code of Offences against the Peace and Security of Mankind. [132]

109. The principle of the prohibition of the threat or use of force was amongst those considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. [133] The formulation contained in the Declaration adopted under resolution 2625 (XXV) of 24 October 1970 is set out below:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international issues.

A war of agression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

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127 Article 12 provided that Members should submit "any dispute likely to lead to a rupture" to arbitration, judicial settlement or inquiry by the Council, and agree in no case to resort to war until three months after the award, decision or report. Under Article 13, Members agreed to submit suitable disputes to arbitration or adjudication, to comply with the award or decision, and not to go to war with a Member which so complied. Disputes not submitted to arbitration or adjudication were, under Article 15, to be dealt with by the Assembly or Council of the League; if the report of the Council was agreed to by all Members, except the parties to the dispute (or, in the case of a report of the Assembly, by all Members of the Council and a majority of other Members of the League, other than the parties), the Members agreed not to go to war with any party which complied with the recommendations of the report.

128 League of Nations, *Treaty Series*, vol. XCIV, p. 57.

129 *Yearbook of the International Law Commission, 1949*, p. 287.

130 See also articles 3 (duty of non-intervention in the internal or external affairs of another State), 4 (duty to refrain from fomenting civil strife in the territory of another State), 7 (duty of State to ensure that conditions prevailing in its territory do not menace international peace and security), 8 (duty to settle disputes with States by peaceful means in such a manner that international peace and security, and justice, are not endangered), 10 (duty to refrain from giving assistance to a State acting in violation of article 9) and 11 (non-recognition of territorial acquisition by a State acting in violation of article 9). See generally, *Preparatory study concerning a Draft Declaration on the Rights and Duties of States* (United Nations publication, Sales No. 1949.V.4).

131 See paras. 434-436 below.

132 See paras. 437-441 below.

133 The elaborations of other principles—especially that on equal rights and self-determination (quoted in part in para. 46 above)—also contain relevant provisions. Other General Assembly resolutions, such as resolutions 380 (V) and 381 (V) of 17 November 1950 and 2160 (XXI) of 30 November 1966, also bear on the principle, as do a number of resolutions of the General Assembly and Security Council concerned with particular disputes and questions.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(*a*) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(*b*) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligation under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

110. The principle has also been affirmed in many regional, multipartite and bilateral treaties. Multipartite treaties of alliance also often contain provisions embodying the principle, as do a large number of bilateral treaties of alliance, friendship, and non-aggression.

111. As regards the specific aspect of the principle involved in attempts to define the concept of aggression, attention may be drawn to a series of efforts which have been made in this respect within the framework of the United Nations. Thus, in 1951, a proposal that the General Assembly define the concept of aggression as precisely as possible was referred, along with the relevant documents, to the Commission.

The sense of the Commission was that it was undesirable to define aggression by a detailed enumeration of aggresive acts, since no enumeration could be exhaustive. Furthermore, it was thought inadvisable unduly to limit the freedom of judgment of the competent organs of the United Nations by a rigid and necessarily incomplete list of acts constituting aggression. It was therefore decided that the only practical course was to aim at a general and abstract definition. [134]

112. The Commission was unable, however, to agree to the broadest general definition submitted, and rejected a proposal that it make further attempts to define aggression on the basis of the other texts before it, [135] although it did subsequently include in its draft Code of Offences against the Peace and Security of Mankind paragraphs relating to aggression. Among the offences listed in article 2 of the draft code are:

(1) Any act of aggression, including the employment by the authorities of a State of force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggresion against another State. [136]

113. The definition of the concept of aggression has also been the subject of extensive consideration by the General Assembly itself and by a number of special Committees. [137] Following debates in 1951 and 1952, the General Assembly by resolution 688 (VII) of 20 December 1952, established a Special Committee which was requested to submit to the Assembly's ninth session "draft definitions of aggression or draft statements of the notion of aggression". This Committee, to which several texts were presented, decided unanimously not to put the texts to a vote but to transmit them to the General Assembly and Member States for comments. [138] A second Special Committee, which was established by General Assembly resolution 895 (IX) of 4 December 1954 and met in 1956, also did not adopt a definition. [139]

114. By resolution 1181 (XII) of 29 November 1957, the General Assembly decided *inter alia* to invite the views of those States which had been admitted to membership since 14 December 1955 and to refer their and other replies to a new Committee composed of the Member States of the General Committee of the General Assembly. This Committee was to deter-

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[134] *Yearbook of the International Law Commission, 1951*, vol. II. p. 132, document A/1858, para. 45.

[135] *Ibid.*, pp. 132-133, paras. 46-52.

[136] *Ibid.*, p. 135.

[137] For a history of the consideration of the question before 1952 see *Official Records of the General Assembly, Seventh Session, Annexes*, vol. II, agenda item 54, document A/2211. This was prepared in answer to General Assembly resolution 599 (VI) of 31 January 1952, in which the General Assembly stated its view that, althought the existence of the crime of aggression may be inferred from the circumstances peculiar to each particular case, it is nevertheless possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it.

[138] *Official Records of the General Assembly, Ninth Session, Supplement No. 11* (A/2638), p. 3, para. 26.

[139] *Ibid., Twelfth Session, Supplement No. 16* (A/3574), p. 5, para. 24.

mine when it was appropriate for the General Assembly to consider again the question of defining aggression. The Committee met in 1959, 1962 and 1965 but did not determine that any particular time was appropriate for the General Assembly to renew its consideration of the question.

115. The matter came before the General Assembly again in 1967. In resolution 2330 (XXII) of 18 December 1967 the Assembly recognized that there was a widespread need to expedite the definition of aggression and established a Special Committee on the Question of Defining Aggression which was "to consider all aspects of the question so that an adequate definition of aggression may be prepared". This Committee met in 1968, 1969 and 1970. At these sessions it made some progress towards its objective and by General Assembly resolution 2644 (XXV) of 25 November 1970 it was requested to continue its work during 1971. A session of the Special Committee was held between 1 February and 5 March 1971.

116. It may be noted that the Commission also considered the question of coercive acts during the preparation of its articles on the law of treaties. Article 49 of its final draft provided that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations. Paragraph 3 of the commentary noted that:

> Some members of the Commission expressed the view that any other form of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter", and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter. [140]

117. Article 49, with one change ("the principles of the Charter" became "the principles of international law embodied in the Charter"), became article 52 of the Vienna Convention on the Law of Treaties. [141] In addition the Conference adopted a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties. [142] This Declaration, *inter alia*, solemnly condemned the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.

118. The formulation of the principle contained in the Declaration on Principles of Friendly Relations [143] included a provision that

> All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control...

Without attempting to give a complete account of the disarmament negotiations which have been pursued since the adoption of the United Nations Charter, [144] reference may be made to a series of treaties which have been adopted in this sphere. The main instances are the following: the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Moscow, 1963), [145] the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (1967), [146] the Treaty on Non-Proliferation of Nuclear Weapons (1968), [147] and the Treaty on the Prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof (1970). [148] Efforts have also been made or are being pursued on a regional basis with respect to the introduction of arms control measures, or of steps to reduce or prohibit particular military activities, in given areas: the conclusion in 1967 of the Treaty for the Prohibition of Nuclear Weapons in Latin America (Mexico City, 1967) [149] may be noted in this connexion. Issues raised with regard to the weapons referred to in these agreements, and other forms of mass destruction, remain under discussion.

119. Whilst it is difficult, given the breadth and importance of the issues involved, to pronounce on the matter with any degree of finality, the following general comments suggest themselves with regard to the question of the prohibition of the threat or use of force. First, major steps have already been taken, or are being taken, by the international community to emphasize and elaborate the basic principle prohibiting the use of force; these efforts, chiefly in the context of the Declaration on Principles of Friendly Relations, have resulted in the adoption of texts commanding general support. Second, the history of these attempts over the past twenty-five years suggests that they are more likely to be successful, at least in the sense of receiving the eventual broad approval of governments, if they are made in bodies which are composed of representatives of States. Lastly, the history of the matter indicates the importance of co-ordinating activities in this area, so as to avoid the problems which may arise if parallel and possibly conflicting or overlapping codification efforts are undertaken at the same time.

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[140] *Yearbook of the International Law Commission, 1966*, vol. II, p. 246, document A/6309/Rev.1, part II, chap. II.

[141] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[142] *Ibid.*, p. 285, document A/CONF. 39/26, annex.

[143] Quoted in para. 109 above.

[144] For a detailed description, see United Nations, *The United Nations and Disarmament, 1945-1970* (United Nations publication, Sales No. E.70.IX.1).

[145] United Nations, *Treaty Series*, vol. 480, p. 43.

[146] *Ibid.*, vol. 610, p. 205.

[147] Annexed to General Assembly resolution 2373 (XXII) of 12 June 1968.

[148] Annexed to General Assembly resolution 2660 (XXV) of 7 December 1970.

[149] United Nations, *Treaty Series*, vol. 634, p. 281.

3. Law relating to the peaceful settlement of disputes

120. Although States are obliged under present general international law to settle their disputes [150] by peaceful means, they are not obliged to submit to any particular method of settlement. This is also the position under the Charter of the United Nations, Article 2, paragraph 3 of which sets out the general obligation in the following terms:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

121. Article 33, paragraph 1, lists in a non-exhaustive manner [151]—the parties may use "other peaceful means of their own choice"—the main "peaceful means" of settlement of disputes identified by general international law at the present time, namely: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement and resort to regional agencies or arrangements. The possibility under the Charter system of resort to one of the political organs of the United Nations should also be noted. Consistent with the principle stated earlier, the various procedures which have been developed and which are listed above operate on a basis which is, in the last resort, optional. A general distinction may, however, be drawn between instances (such as acceptance of the jurisdiction of the International Court of Justice, under Article 36, paragraph 2 of its Statute) where States have agreed before a dispute arises to accept a given mode of settlement, and those procedures where agreement is reached on the method of settlement only after the dispute has arisen (thus probably the commonest method, at least in the initial stages of a dispute, is for the parties to seek a settlement by negotiation).

122. The present survey does not attempt to review the total amount of practice, and accompanying commentaries, relating to each of the means listed above and various additional means which could be distinguished, although it may be recalled here that each means entails a procedure having its own characteristics and particularities and that a codification of the topic as a whole, or of some of the specific means of peaceful settlement, would imply the need to deal, in precise terms, with such characteristics and particularities. The following section has been divided as follows:

(*a*) Treaties relating to the peaceful settlement of disputes, and consideration of the matter, and of specific means, by United Nations bodies.

(*b*) Consideration by the Commission of the subject of the peaceful settlement of disputes.

(*c*) Dispute settlement provisions included in various specific treaties, in particular those concluded on the basis of drafts prepared by the Commission.

123. Strictly speaking, the last heading relates to particular methods of settling disputes arising out of treaties on specific topics, rather than to over-all legal provisions on the subject *per se,* but it serves to indicate the attitude of the international community and of the Commission on the question of peaceful settlement as a whole. Moreover the matters dealt with under that heading bear on the issue, which has often been raised, of whether the better or more feasible method of providing for the peaceful settlement of disputes is through the conclusion of a general instrument or through the use of more particularized means, such as the inclusion in a treaty on a given topic of an article (or other provision) providing for the settlement of disputes arising out of the application or interpretation of the treaty in question.

(*a*) *Treaties relating to the peaceful settlement of disputes, and consideration of the matter, and of United Nations bodies*

124. The major instance of a treaty bearing on peaceful settlement as such is the Charter of the United Nations. This imposes an obligation on States Members to settle their disputes by the peaceful means mentioned: but, as noted, adoption of one or other means is not made obligatory. In addition, United Nations organs have certain powers to consider disputes which threaten international peace or security, with a view to their peaceful settlement. These powers have frequently been used; indeed, the majority of disputes between States which have occurred during the last twenty-five years have been discussed at some stage by one of the major political organs of the United Nations. [152] The relevant Charter provisions, and subsequent practice, have been the subject of extensive consideration by the General Assembly and by the Security Council and other United Nations bodies at different times, [153] most recently in the context of the consideration of the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Declaration on Principles of Friendly Relations [154] contains the following elaboration of the principle of peaceful settlement of disputes. [155]

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[150] As regards the definition of a dispute that given by the Permanent Court of International Justice in the Mavromatis Palestine Concession (Preliminary Objections (P.C.I.J., 1924 Series A, No. 2., p. 11) may be noted—"a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"—with the qualification that the present section is concerned only with disputes between States.

[151] Thus it may be noted the use of "good offices" is not specifically mentioned.

[152] It has not been thought possible to attempt, within the scope of the present survey, to summarize this practice. See, however, generally the *Repertory of Practice of United Nations Organs* and the *Repertoire of the Practice of the Security Council.*

[153] For a summary of pertinent studies and decisions by United Nations organs, see S. D. Bailey, *Peaceful Settlement of International Disputes: Some Proposals for Research,* 3rd rev. ed. (UNITAR, 1971), chap. II, and annexes I and II.

[154] General Assembly resolution 2625 (XXV), annex.

[155] As regards the various proposals made in the course of the adoption of this text, see *Official Records of the General Assembly, Twenty-first Session, Annexes,* agenda item 87, document A/6230, paras. 158-161; *ibid., Twenty-second Session, Annexes,* agenda item 87, document A/6799, paras. 371-374; and, generally, *ibid., Twenty-fifth Session, Supplement No. 18* (A/8018), p. 12, paras. 16-18 and p. 35, paras. 56-57.

The principles that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

125. It may be noted that the principle was also considered by the General Assembly in 1965 and 1966, at the request of the United Kingdom, which suggested that a study be made "of the entire field of peaceful settlement of disputes in all its aspects". [156] The Assembly did not take any substantive action in either year and the item mentioned has not been further considered.

126. The General Assembly has also considered particular methods of disputes settlement, [157] of which the most recent was a study, arising out of a proposal made by the Netherlands, concerning the feasibility and desirability of establishing a special international body for fact-finding or of entrusting to an existing organization fact-finding responsibilities. In resolution 2329 (XXII) of 18 December 1967 the General Assembly, *inter alia,* urged Member States to make more effective use of the existing methods of fact-finding, drew special attention to the possibility of recourse to procedures for the ascertainment of facts, and requested the Secretary-General to prepare a register of experts in legal and other fields, whose services the parties to a dispute might use for fact-finding, and asked Member States to nominate up to five of their nationals for inclusion in such a register. [158]

127. Finally, it may be noted that, in the course of its twenty-fifth session in 1970, the General Assembly considered an item entitled "Review of the role of the International Court of Justice" and adopted resolution 2723 (XXV) of 15 December 1970, whereby the Secretary-General was requested to seek the views of Member States on the matter and to submit a report, analysing the replies received, to the twenty-sixth session of the General Assembly. Reference was also made by a number of speakers to the topic of the peaceful settlement of disputes during the discussion at the General Assembly's twenty-fifth session of the item "Need to consider suggestions regarding the review of the Charter of the United Nations".

128. General instruments concerning the pacific settlement of disputes have also been concluded at the regional level. Thus in 1948 the American Treaty on Pacific Settlement (the Pact of Bogotá) [159] was signed. After a first chapter setting out and reaffirming the parties' general obligations to settle disputes by peaceful means, the Treaty includes chapters on good offices and mediation, investigation and conciliation, jurisdiction of the International Court of Justice and arbitration. It replaces, for the parties to it, eight earlier multilateral conventions drawn up within the Inter-American system. The members of the Council of Europe prepared and opened for signature in 1957 a European Convention for the peaceful settlement of disputes, containing chapters on judicial settlement, conciliation and arbitration. [160]

129. The Charter of the Organization of African Unity (Addis Ababa, 1963) [161] includes as one of its principles the peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration, and provides for the establishment of a Commission of Mediation, Conciliation and Arbitration. A Protocol to the Charter dealing with the Commission was concluded in 1964. [162] The Protocol provides for the composition and organization of the Commission and the general principles applicable to its operation, and contains chapters on mediation, conciliation and arbitration.

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156 *Ibid., Twentieth Session, Annexes,* agenda item 99, document A/5964, para. 3; *ibid., Twenty-first Session, Annexes,* agenda item 36, document A/6617.

157 Including revision of the General Act for the Pacific Settlement of International Disputes of 26 September 1928. The Revised General Act, to which, as of 1 January 1971, six States had acceded, is contained in United Nations, *Treaty Series,* vol. 71, p. 101.

158 A first version of the register was issued in 1968 (A/7240) and a second version, containing summaries of biographical data supplied by Member States in respect of their nationals, was issued in 1969 (A/7751), together with a further supplement in 1970 (A/8108). See also *Yearbook of the International Law Commission, 1970,* vol. II, p. 268, document A/CN.4/230, para. 139, for a suggestion made in 1967 that the Commission should consider drawing up the statute of a new United Nations body for fact-finding.

159 United Nations, *Treaty Series,* vol. 30, p. 55.

160 *Ibid.,* vol. 320, p. 243.

161 *Ibid.,* vol. 479, p. 39.

162 American Society of International Law, *International Legal Materials* (Washington, D.C., 1964) vol. III, No. 6, p. 1116. Under article XIX of the Charter, the Protocol required approval only by the Assembly of Heads of State and Government to make it effective, and, as thus approved, forms an integral part of the Charter.

(b) *Consideration by the Commission of the subject of the peaceful settlement of disputes*

130. The question of peaceful settlement as such has been before the Commission in at least three different contexts: first, as a proposal that the "Pacific settlement of international disputes" be included in its 1949 list of topics for codification; second, in the preparation of the draft Declaration on Rights and Duties of States; and, third, in its works on arbitral procedure. These are now considered in turn.

131. When the Commission was drawing up its list of topics in 1949, one of its members suggested that it consider the inclusion of the pacific settlement of international disputes.[163] Some members of the Commission doubted whether codification—rather than progressive development—was really involved and also pointed to the fact that the Interim Committee of the General Assembly was working on the question. Doubts were also expressed whether anything that the Commission produced would be other than a dead letter. The Chairman accordingly concluded that the general opinion did not favour inclusion of the topics.[164]

132. The draft Declaration on Rights and Duties of States, prepared by the Commission in 1949, contains the following provision:

Article 8. Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The Commentary notes that the text was derived from article 15 of the Panamanian draft and that its language follows closely Article 2, paragraph 3, of the United Nations Charter.

133. The 1948 Survey contained a section on the law of arbitral procedure, with reference to the arbitration of disputes between States, and the Commission decided to include this subject on its 1949 list.[165] In 1952 it adopted a provisional draft on arbitral procedure[166] which it submitted to Governments for their comments. Following the receipt of those comments the Commission prepared in 1953 a revised draft which it recommended the General Assembly should recommend to Members with a view to the conclusion of a convention.[167] The General Assembly however made no such recommendation; in resolution 989 (X) of 14 December 1955, the Assembly noted that a number of suggestions for improvement of the draft had been made and invited the Commission to consider the comments of Governments and the observations made in the Sixth Committee, and to report to the General Assembly at its thirteenth session. The resolution expressed also the General Assembly's belief that a set of rules on arbitral procedures would inspire States to draw up provisions for inclusion in treaties and special arbitration agreements and declared that the General Assembly would consider at its thirteenth session the problem of the desirability of convening a conference to conclude a convention on the topic.

134. The Commission was accordingly faced with the question whether it should aim at a convention or rather prepare a set of model rules which States and others might adopt in drawing up arbitration agreements.[168] The Commission chose the latter alternative: the 1953 draft went beyond what a majority of Governments were prepared to accept in a general multilateral convention, and recasting it with a view to attracting their support would mean complete revision involving in all probability an alteration of the whole concept on which the draft was based. The Model Rules on Arbitral Procedure[169] which were prepared as a result were then submitted to the General Assembly which, in resolution 1262 (XIII) of 14 November 1958, decided to bring

the draft articles ... 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 invited Governments to send their comments to the Secretary-General with a view to facilitating a review by the United Nations at an appropriate time. No action has subsequently been taken by the Assembly or the Commission on this item.

(c) *Dispute settlement provisions included in various specific treaties, in particular those concluded on the basis of drafts prepared by the Commission*

135. Before some of the instances of such provisions are considered it may be useful to draw a distinction between procedural provisions which can be said to be an integral part of the main body of the treaty or entwined with substantive rules, and those having the nature of final clauses. A clear instance of the former

[163] The 1948 Survey (see para. 4 above) had included only the law of arbitral procedure (1948 Survey, para. 99).

[164] *Yearbook of the International Law Commission, 1949*, pp. 43 *et seq.*, 5th meeting, paras. 69-82.

[165] *Ibid.*, pp. 50-51, 6th meeting, paras. 33-44.

[166] *Ibid., 1952*, vol. II, p. 60, document A/2163, chap. II.

[167] *Ibid., 1953*, vol. II, p. 201, document A/2456, chap. II. For the draft convention, see *ibid.*, p. 208.

[168] The criticisms in the General Assembly of the Commission's first draft and of its proposal for the preparation of a convention were summarized as follows by the Special Rapporteur:

"The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the *compromis*. The General Assembly took the view that the International Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, the codification of custom."

See *Yearbook of the International Law Commission, 1957*, vol. II, p. 2, document A/CN.4/109, para. 7. The passage was reproduced by the Commission in its report on its tenth session (*ibid.*, 1958, vol. II, p. 80, document A/3859, para. 12).

[169] *Ibid., 1958*, vol. II, p. 83, document A/3859, chap. II, section II.

kind is provided by the provisions in the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 1958) [170] concerning the establishment and competence of commissions (articles 9-11). The same may be said of articles 65 and 66, and the related annex, of the Vienna Convention on the Law of Treaties.

136. The two sets of draft articles prepared by the Commission in 1953 as draft conventions on the elimination of future statelessness and on the reduction of future statelessness both contained an identical provision (article 10) regarding the establishment of a tribunal which would be competent to decide complaints presented by an agency acting on behalf of stateless persons and, secondly, for disputes between contracting parties regarding the interpretation or application of the conventions to be submitted either to the International Court of Justice or to the tribunal to be established. [171] The commentary noted with reference to the provision concerning the settlement of disputes between the parties that

> That provision is common to most international conventions of a legislative character, in particular, those concluded under the auspices of the United Nations. [172]

137. The Convention on the Reduction of Statelessness, [173] which was prepared on the basis of the Commission's draft and which was opened for signature in 1961, provides in article 14 for the compulsory jurisdiction of the International Court of Justice in the following terms: [174]

> Any dispute between Contracting States concerning the interpretation or application of this Convention which cannot be settled by other means shall be submitted to the International Court of Justice at the request of any one of the parties to the dispute.

138. The first set of draft articles prepared by the Commission and considered by a codification conference —those on the Law of the Sea—contained no general provisions on peaceful settlement. It did, however, include the provisions already mentioned relevant to the conservation of maritime resources. [175] In addition, the Commission included provisions for the settlement of disputes arising from the articles on the continental shelf (article 73). Having explained that certain members were opposed to the inclusion of a draft clause on compulsory arbitration or jurisdiction, on the ground that there was no reason to impose on States one only of the various means provided by international law for the settlement of disputes, the reasons why the majority of the Commission nevertheless considered such a clause to be necessary were set out as follows:

> The articles on the continental shelf are the result of an attempt to reconcile the recognized principles of international law applicable to the régime of the high seas with recognition of the rights of the coastal State over the continental shelf. Relying, as it must, on the continual necessity to assess the importance of the interests at stake on either side, this compromise solution must allow for some power of discretion. Thus, it will often be necessary to rely on a subjective assessment—with the resultant possibilities of disagreement—to determine whether, in the terms of article 71 paragraph 1, the measures taken by the coastal State to explore and exploit the continental shelf result in "unjustifiable" interference with navigation or fishing; whether, as is laid down in paragraph 2 of that article, the safety zones established by the coastal State do not exceed a "reasonable" distance around the installation, whether, in the terms of paraph 5 of the article, a sea lane is "recognized" and whether it is "essential to international navigation"; finally, whether the coastal State, when preventing the laying of submarine cables or pipelines, is really acting in the spirit or article 70, which only authorizes such action when it comes within the scope of "reasonable" measures for the exploration and exploitation of the continental shelf. If it is not kept within the limits of respect for law and is not impartially complied with, the new régime of the continental shelf may endanger the higher principle of the freedom of the seas. Consequently, it seems essential that States which disagree concerning the exploration and exploitation of the continental shelf should be required to submit any dispute arising on this subject to an impartial authority. For this reason the majority of the Commission thought it necessary to include the clause in question. It is incumbent on the parties to decide the manner in which they wish to settle their differences; if the parties are unable to reach agreement on the manner of settlement, however, either party may refer the matter to the International Court of Justice. [176]

139. It would appear therefore that the particular provisions for settlement of disputes included by the Commission in its draft articles on the law of the sea arose directly out of the various specific provisions. By contrast, so far as the inclusion of a comprehensive article for the settlement of disputes with respect to the law of the sea in general was concerned, the view was expressed that the continental shelf provision was a special case and that it did not follow that similar machinery should be set up for the whole draft. Furthermore, such a task did not lie within the Commission's purview, but was properly the concern of the General Assembly. [177] The first United Nations Conference on

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[170] United Nations, *Treaty Series*, vol. 559, p. 285.

[171] *Yearbook of the International Law Commission, 1953*, vol. II, p. 228, document A/2456, chap, IV, section IX. Regarding the Commission' work on statelessness, see paras. 360-367 below.

[172] *Yearbook of the International Law Commission, 1953*, vol. II, p. 227, document A/2456, para. 157. The final draft conventions submitted by the Commission in 1954 contained a revised version of the articles in question *(ibid., 1954*, vol. II, p. 142, document A/2693, para. 25).

[173] See United Nations, *Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6), p. 53.

[174] Note also Article II:

> "The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to appropriate author ity."

[175] See para. 135. above.

[176] *Yearbook of the International Law Commission, 1956*, vol. II, pp. 300-301, document A/3159, para. 4 of commentary to article 73. The contrary view that there was no organic connexion between the disputes settlement provision and the substantive articles was expressed at the 1958 Conference on the Law of the Sea.

[177] *Ibid.*, vol. I, 334th meeting, paras. 30-37.

the Law of the Sea held in 1958 finally decided to delete the provision concerning the settlement of disputes arising out of the articles relating to the continental shelf, did not insert in the Conventions a comprehensive dispute settlement provision, and instead adopted an Optional Protocol [178] providing for the compulsory settlement of disputes arising out of the interpretation or application of any of the four Law of the Sea Conventions. The machinery for the settlement of disputes arising out of the Convention on Fishing and Conservation of the Living Resources of the High Seas was retained in that Convention. [179]

140. The draft articles concerning diplomatic intercourse and immunities prepared by the Commission in 1958 [180] and submitted to the General Assembly with a recommendation that they be recommended to Member States with the view to the conclusion of a convention, did contain, unlike the articles on the law of the sea, a comprehensive article on dispute settlement (article 45). The article provided that disputes that could not be settled through diplomatic channels were to be referred to conciliation or arbitration or, failing that, at the request of one of the parties, to the International Court of Justice. The commentary to draft article 45 read in part:

> Some members considered that where, as in the present case, the Commission's task had consisted of codifying substantive rules of international law, it was unnecessary to deal with the question of their implementation. Others suggested that the clause should be included in a special protocol. A majority, however, thought that, if the present draft were submitted in the form of a convention, a provision governing the settlement of disputes would be necessary and that, for this purpose, it should stipulate that, in cases where other peaceful means of settlement proved ineffective, the dispute would be referred to the International Court of Justice. [181]

Once again a provision for comprehensive settlement was not adopted by the codification Conference, which instead adopted an Optional Protocol [182] establishing a compulsory procedure of settlement as between the parties to the latter instrument.

141. Neither the draft articles on consular relations nor those on special missions prepared by the Commission in 1961 and 1967 respectively contained provisions for the settlement of disputes. In both instances the body responsible for preparing a convention on the basis of the Commission's draft adopted an optional protocol establishing a compulsory procedure, rather than a settlement procedure in the conventions.

142. Finally, the question has been considered by the Commission in relation to the law of treaties. The final set of draft articles on the law of treaties which were submitted by the Commission in 1966 [183] contained no general provisions for the settlement of disputes arising from the interpretation and application of the draft. Part V, concerned with the invalidity, termination and suspension of the operation of treaties, contained, however, a section on the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of a treaty. In its commentary on draft article 62, the Commission noted that many of its members regarded this provision as a key article for the application of Part V. If the grounds set out in Part V were arbitrarily asserted, the security of treaties might be endangered; moreover the facts were often controversial.

> Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation.
>
> [The Commission] considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties would be a valuable step forward. The express subordination of the substantive rights... to the procedure prescribed... and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of that operation of a treaty. [184]

143. The United Nations Conference on the Law of Treaties, in preparing the Vienna Convention on the Law of Treaties on the basis of the Commission's draft, did not change the scope of the article on the procedure to be followed which was proposed by the Commission (article 65 of the Convention), but it added a new article (article 66) providing, unlike the Commission's draft, for compulsory judicial settlement or arbitration in disputes concerning the application or interpretation of articles 53 or 64 (*jus cogens*) and a compulsory conciliation for disputes concerning the application or interpretation of other articles of Part V of the Convention. The conciliation procedure so established is embodied in an annex to the Convention. [185]

144. The conclusion may be advanced from the above chronology that the Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions—with one exception. That

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[178] Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. United Nations, *Treaty Series*, vol. 450, p. 169.

[179] The Optional Protocol exempts (article II) from its operation the provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas establishing such machinery.

[180] *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, document A/3859, chap. III, section II.

[181] *Ibid.*, p. 105.

[182] Optional Protocol concerning the Compulsory Settlement of Disputes. United Nations, *Treaty Series*, vol. 500, p. 241.

[183] For the draft articles and commentaries, see *Yearbook of the International Law Commission, 1966*, vol, II, p. 187, document A/6309/Rev.1, part II, chap. II.

[184] *Ibid.*, pp. 262 and 263, paras. 1 and 6 of the commentary to article 62.

[185] Note also article 77, paragraph 2, of the Convention. It provides a procedure to be followed in the event of a difference between a depositary (whose functions are set in the first paragraph of the article) and a State.

exception arises when the procedure is seem as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words "as an integral part" of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as issues to be decided by the General Assembly or by the codification conference of plenipotentiaries which acts on the draft.

145. A number of other conventions drawn up within the United Nations, not based on the Commission's drafts, contain provisions concerning settlement of disputes between the parties. Some of them provide for compulsory adjudication or arbitration. As regards those containing provisions relating to compulsory settlement, reference may be made to the Convention on the Privileges and Immunities of the United Nations, [186] article VIII, section 30 of which provides as follows:

> All differences arising out of the interpretation and application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court be accepted as decisive by the parties.

146. The Single Convention on Narcotic Drugs (1961) [187] provides in article 48:

> 1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or oher peaceful means of their own choice.
>
> 2. Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for decision.

147. It may be noted that in some instances States have, on becoming parties, made reservations—in a few cases under express provisions of the convention in question—with respect to clauses providing for compulsory adjudication or arbitration.

148. In the case of certain other treaties—particularly in the fields of human rights and economic activities—specific procedures which have been considered particularly appropriate have been adopted. Thus the International Convention on the Elimination of All Forms of Racial Discrimination [188] and the International Covenant on Civil and Political Rights [189] provide for the establishment of committees which may be entrusted with the task of reviewing the reports of the parties on their implementation of the conventions and of considering communications from States and individuals. [190] The procedures adopted within the framework of the Council of Europe in the field of human rights include the functioning, under the European Convention for the Protection of Human Rights and Fundamental Freedoms, [191] of a Commission and of a Court, which have dealt with a considerable number of complaints or cases involving the interpretation and application of the Convention. The various commodity agreements which have been concluded also provide for specific methods of dispute settlement, such as consideration of the matter by the Council established by the agreement, or through some similar procedure by a designated body.

149. Other peaceful settlement provisions, often more tested and elaborate, have been included in other treaties in the economic field: for example, the General Agreement on Tariffs and Trade and the various treaties relating to the establishment, in different parts of the world, of "common market" or "free trade" areas, or similar economic groupings. Particular reference may be made in this connexion to the treaties establishing the various European Communities and the operation in this regard of the European Court in Luxembourg. So far as bilateral treaties are concerned, it may be noted that many agreements, especially those relating to trade, economic aid, technical assistance and air transport, provide for the application of specified means for the peaceful settlement of disputes including, in many cases, compulsory adjudication or arbitration.

Chapter III

The law relating to economic development

150. This topic, which was not included as such in the 1948 Survey, [192] is one which cuts across traditional categories of international law. It is included here, however, for two reasons. First, there has been a growing emphasis, both within the United Nations [193] and outside, on this emerging body of law as a part of, and a complement to, the objective stated in the Preamble to the United Nations Charter of promoting "social progress and better standards of life in larger freedom" and the purpose of the Organization mentioned in paragraph 3 of Article 1 of the Charter,

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186 United Nations, *Treaty Series*, vol. 1, p. 15.

187 *Ibid.*, vol. 520, p. 151.

188 General Assembly resolution 2106 A (XX), annex.

189 General Assembly resolution 2200 A (XXI), annex.

190 See paras. 384-390 below. The Economic and Social Council is empowered to consider reports submitted under the International Covenant on Economic, Social and Cultural Rights. Note also the variety of procedures developed by the ILO over the past fifty years, and the Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking a Settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education, adopted by the General Conference of UNESCO in 1962. See *Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6), p. 33.

191 United Nations, *Yearbook of Human Rights for 1950* (United Nations publication Sales No. 1952.XIV.1), pp. 418 *et seq.*

192 See para. 4 above.

193 See, for example, *Yearbook of the International Law Commission, 1970*, vol. II, pp. 267 and 268, document A/CN.4/230, paras. 130-134 and 141-142.

namely "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character".[194] Secondly, the bringing together of the various matters which come under this heading enables one to take an over-all look at, and to make a more comprehensive review of, the different activities in question. This treatment also helps emphasize the growing scope of international law, from a body of law imposing negative restraints on independent sovereign States, to a body of law which, in recognition of conditions of increasing interdependence, imposes on States various positive obligations of a procedural and substantive kind. The law, in other words, is coming to be seen as concerned not only with the protection of the independence of States but also with the duty to co-operate in the promotion of national and human welfare. Article 55 of the Charter indeed provides that

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,

the United Nations shall promote various measures of international economic and social co-operation.

151. The Declaration on Principles of Friendly Relations, adopted on 24 October 1970,[195] includes amongst its principles "the duty of States to co-operate with one another in accordance with the Charter". The formulation of the principle refers not only to the duty of States of co-operating in maintaining international peace and security but also to the duty to co-operate in promoting "economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences" (i.e. in their political, economic and social systems).

152. The present chapter deals only with the public international law aspects of economic development, specially with the economic relations and co-operation conducted by States as subjects of public international law. It is not proposed to enter into discussion of questions concerning the private international law aspects of economic development,[196] For reasons of convenience, this chapter is divided as follows:

1. International legal rules and measures concerning the regulation and co-ordination of the economic activities of States.
2. International trade.
3. Economic and technical assistance.

153. None of these categories is completely self-contained, but the divisions drawn are useful in suggesting some of the principal features of the law falling under the present heading which are of interest in the matter.

1. International legal rules and measures concerning the regulation and co-ordination of the economic activities of States

154. Multilateral efforts have been made recently, within the framework of various international organizations, universal and regional, designed to specify the principles, rules and policies which should govern the relation between the sovereign right of States to determine their economic affairs (in particular their right freely to dispose of their natural resources), and the inter-dependence which, for a variety of reasons, exists between the States of the world and their respective economies. Issues relating to this general topic have been frequently discussed, and may indeed be said to be of predominant interest for many international bodies.[197] It is not intended to deal here, on a comprehensive scale, with the debates held and proposals made, but to single out those which may be of particular interest to the Commission in revising the 1949 list of topics selected for codification.

155. So far as the General Assembly is concerned, reference may be made to the establishment in 1958 of the United Nations Commission on Permanent Sovereignty over Natural Resources.[198] On the basis of the work of that Commission the General Assembly adopted, under the terms of resolution 1803 (XVII) of 14 December 1962, a Declaration of permanent sovereignty over natural resources, whereby the General Assembly gave recognition to the inalienable rights of all States freely to dispose of their natural wealth and resources. The Declaration also contained various provisions regarding the rights and duties of the State and the foreign investor under agreements, the authorizations and laws of the State, and international law, with regard to the exploration, development and disposition of the natural resources. Paragraphs of the resolu-

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[194] See also Chapter IX of the Charter, entitled "International economic and social co-operation".

[195] General Assembly resolution 2625 (XXV), annex.

[196] As regards the private international law aspects, it is perhaps sufficient to recall that the Commission in 1966 was of the view that it should not undertake responsibility for studying the question of furthering co-operation in the development of the law of international trade and in promoting its progressive unification and harmonization (see *Yearbook of the International Law Commission, 1966*, vol. I, part II, 880th meeting, paras. 38-66), and that later that year the General Assembly by resolution 2205 (XXI) decided to establish the United Nations Commission on International Trade Law (UNCITRAL). At the first session (1968) of UNCITRAL a great number of delegations considered that the following, non-exhaustive list of topics should form the future work programme of UNCITRAL: (1) international sale of goods; (2) commercial arbitration; (3) transportation; 4) insurance; 5) international payments; (6) intellectual property; (7) elimination of discrimination in laws affecting international trade ; (8) agency; and (9) legalization of documents (see *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968 1970* (United Nations publication, Sales No. E.71.V.1), p. 77, para. 40). UNCITRAL has subsequently begun consideration of the international sale of goods, international payments, international commercial arbitration and international shipping legislation.

[197] Within the United Nations, the organs engaged in this field include, besides the General Assembly and the Economic and Social Council, UNCTAD and UNIDO.

[198] See *Yearbook of the International Law Commission, 1964*, vol. II, p. 131, document A/CN.4/165, paras. 44-54, and *ibid.*, 1969, vol. II, p. 120, document A/CN.4/209, paras. 27-31 and the sources referred to there.

tion deal with such matters as the import of foreign capital, earnings on such capital, acts of nationalization and foreign investment agreements.

156. The issues raised have been further considered at subsequent sessions of the Assembly. [199] This continuing consideration has been concerned not only with the elaboration of the principle in abstract legal terms; the General Assembly has consistently placed the principle in its economic and social context and has looked to practical means of exploiting and marketing resources. [200] At its twenty-fifth session the General Assembly adopted resolution 2692 (XXV) of 11 December 1970, which, *inter alia,* called upon Governments to continue their efforts aimed at the complete implementation of the principles and recommendations contained in previous resolutions and invited the Economic and Social Council

to instruct the Committee on Natural Resources to include in its work programme a periodic report on the advantages derived from the exercise by developing countries of permanent sovereignty over their natural resources, with particular reference to the impact of such exercise on the increased mobilization of resources, especially of domestic resources, for their economic and social development, on the outflow of capital therefrom as well as on the transfer of technology.

157. Member States were further invited to inform the Committee on Natural Resources

on the progress achieved to safeguard the exercise of permanent sovereignty over their natural resources, including the measures taken to control the outflow of capital in a manner compatible with the exercise of their sovereignty and international co-operation.

158. The General Assembly also considered the question of sovereignty over natural resources in preparing the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.[201] Both Covenants contain articles which state that

All peoples may... freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law ...

and that

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully their natural wealth and resources. [202]

159. The question of sovereignty over natural resources also arose in the elaboration of the Declaration on Principles of Friendly Relations. [203] In addition to the formulation of the principle of the duty to co-operate cited above, [204] one element of the text on the principle of sovereign equality of States embodied in the Declaration reads as follows:

Each State has the right freely to choose and develop its political, social, economic and cultural system.

The statement of the principle of equal rights and self-determination of peoples similarly provides that

all peoples have the right... to pursue their economic, social and cultural development.

160. Resolution 2626 (XXV) of 24 October 1970 proclaimed the Second United Nations Development Decade to begin 1 January 1971, and adopted an International Development Strategy for the Decade. The resolution, a document comprising several pages, is divided as follows: (A) preamble; (B) goals and objectives; (C) policy measures (international trade; trade expansion, economic co-operation and regional integration among developing countries; financial resources for development; invisibles including shipping; special measures in favour of the least developed among the developing countries; special measures in favour of the land-locked developing countries; science and technology; human development; expansion and diversification of production; plan formulation and implementation); (D) review and appraisal of both objectives and policies; (E) mobilization of public opinion. Paragraph 10 of the preamble stated, *inter alia,* that "Every country has the right and duty to develop its human and natural resources...". Each economically advanced country was requested to provide by 1972 annually to developing countries financial resource transfers of a minimum net amount of one per cent of its gross national product.

161. As regards more particular aspects concerning economic relations between States, attention may be called to the conclusion of a substantial number of treaties in recent years, on a multilateral, regional or bilateral basis, concerning the establishment and operation of foreign companies, or of companies in which both foreign and local interests participate, and the investment of funds for development. [205] Many States have enacted investment or company laws which have amongst their purposes the implementation of such treaties. There is, furthermore, a good deal of State practice, including in some instances agreements resolving the issues, arising from various acts of expropriation and nationalization. National and international courts have also given a number of decisions relating

[199] See the working paper and supplement cited in the previous note.

[200] See, most recently, the Report of the Secretary-General entitled "The exercise of permanent sovereignty over natural resources and the use of foreign capital and technology for their exploitation" (mimeographed document A/8058).

[201] For the text of the two Covenants, see General Assembly reolution 2200 A (XXI), annex.

[202] Article 1, para. 2, of each Covenant and articles 25 and 47 respectively. See also *Yearbook of the International Law Commission, 1969,* vol. II, p. 120, document A/CN.4/209, para. 30.

[203] For more precise formulations which were not included in the Declaration, see *ibid.,* p. 121, para. 31.

[204] See para. 151.

[205] The work of the Inter-American Juridical Committee with respect to the harmonization of the legislation of the Latin American countries on companies, including the problem of international companies, may be noted in this connexion; see the report made to the Commission in 1969 (*Yearbook of the International Law Commission, 1969,* vol. II, pp. 196-197, document A/CN.4/215, paras. 4-11) and the statement made before the Commission in 1970 (*ibid., 1970,* vol. II, p. 312, document A/8010/Rev.1, para. 101). See also United Nations, *Foreign Investment in Developing Countries* (United Nations publication, Sales No. E.68.II.D.2), p. 59, annex III.

to the expropriation or nationalization of property owned, in whole or in part, by foreign nationals or companies. IBRD has given attention to the question of agreed methods for the settlement of disputes involving foreign investment. Following a series of regional meetings the Executive Directors of IBRD, on the instructions of the Bank's Board of Governors, in 1965 adopted and opened for signature the Convention on the Settlement of Investment Disputes between States and Nationals of other States, [206] providing for the settlement, with the consent of the parties, by arbitration or conciliation of any investment dispute. An International Centre for Settlement of Investment Disputes has been established in connexion with the Convention.

162. It may be recalled in this connexion that the Commission has considered the rights of aliens (including rights with respect to property) in the course of its examination of the topic of State responsibility, [207] and also during its consideration of the succession of States and governments. [208]

163. The extensive powers of States in respect of monetary and fiscal policy have, in several instances, been limited by a widespread network of treaties and of regulations of international organizations or institutions. Some of them are of potentially universal scope, such as the Articles of Agreement of IMF and GATT. Others are more limited or regional (for example, various régimes established, usually by agreement, with respect to the use of certain major currencies) and still other bilateral (especially in the tax field). [209]

2. International trade

164. In the body of treaty law regulating economic relations between States, trade agreements are a sector with special features. In general, trade agreements establish the right to trade between the States concerned and the conditions under which that trade is to be carried out. Beyond that, however, it is not really possible to generalize, although one can note that a large percentage of international commerce is subject to the rules established within GATT and that this Agreement, at least *de facto*, replaces many of the previous bilateral agreements. Further, regional arrangements (economic communities and free-trade areas) established in many parts of the world are also increasingly generalizing particular conditions of trade. [210] There is the further fact—so far as the bilateral treaties are concerned—that a number of clauses and devices have led historically to the establishment of certain standard conditions. The principal examples are the most-favoured-nation and national clauses, which have the effect of spreading benefits given to other countries, or to a signatory State's own nationals, to the beneficiaries of the provisions.

165. The work programme of UNCITRAL, [211] which includes the study of the international sale of goods, international payments, international commercial arbitration and international shipping legislation, involves to a considerable degree examination of these and other standard conditions and practices relating to international trade. The Commission is, of course, currently considering the most-favoured-nation clause, although not simply in the economic context. [212] The question of whether a similar study could be made of certain other standard formulas which appear frequently in trade agreements would need to be carefully considered, having regard not only to the work being undertaken by UNCITRAL but also to the fact that any such study would in all probability be more narrowly technical and less legal than that on the most-favoured-nation clause, if only for the reason that the latter raises such purely legal issues as those relating to the effect of treaties on third States. [213]

3. Economic and technical assistance

166. The law relating to the granting and operation of economic and technical assistance and the related international structures and procedures, are to be found in widely accepted texts, including resolutions of the General Assembly and Economic and Social Council, in many multilateral and bilateral treaties or agreements,

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[206] United Nations, *Treaty Series*, vol. 575, p. 159. It may be also noted that the International Bureau of the Permanent Court of Arbitration, which had until then been open only to States, in 1962 adopted rules of arbitration and conciliation for the settlement of international disputes to which only one of the parties is a State.

[207] See chap. IV below.

[208] See chap. V below.

[209] On tax treaties, see paras. 92-93 above.

[210] Distinct from this, it may be noted that a number of commodity agreements have been concluded (in recent years, under the auspices of UNCTAD) which have had the effect of unifying conditions of trade with respect to particular commodities. The matter has become bound up, however, with the general system of preferences, referred to in foot-note 212 below.

[211] See foot-note 196 above.

[212] For a summary of the Commission's work in this field, see paras. 275-278 below. Reference may be made to the agreed conclusions adopted within UNCTAD in October 1970 concerning the grant of a general system of preferences for the exports of the developing countries. As is noted in the relevant documents, this marks a departure from the most-favoured-nation clause (in that the preferences will not be extended to developed countries) and members of GATT (and possibly parties to other treaties embodying the most-favoured-nation claim as well) will have to obtain waivers of their obligations. The International Development Strategy for the Second United Nations Development Decade, adopted by the General Assembly on 24 October 1970, also briefly notes these arrangements (General Assembly resolution 2626 (XXV), para. 32).

[213] The present consideration of the most-favoured-nation clause item had indeed its origins in the draft articles prepared by the Commission, in the course of its work on the law of treaties, on the position of third States in relation to treaties. In addition to the extensive body of treaty law dealing with the terms and conditions of trade, there are many agreements—several concluded within the United Nations—for the facilitation of trade by easing and standardizing customs requirements.

in instruments not governed by international law, and in a wide range of national laws and executive actions. It is not possible even to begin it itemize this material here. At the universal level are such bodies as the United Nations. UNDP, UNCTAD and the specialized agencies, including IBRD and its associated agencies. There are also regional or more limited bodies, such as the various regional banks established under the auspices of the United Nations. Many developed countries have established bilateral programmes directly with the recipients. In all this practice many common trends appear [214] and the question has been asked and is asked whether a body of customary, general law is beginning to emerge. Thus it has been suggested in the Commission, with reference to the legal principles of reciprocal assistance between States, that certain developments were expressions of the duty of States to render assistance to one another in economic matters. [215] Portions of the formulation of the principle of co-operation contained in the Declaration on Principles of Friendly Relations may be noted in this connexion. The adoption, under resolution 2626 (XXV), of the International Development Strategy for the Second United Nations Development Decade, is also relevant. Thus paragraph 12 of the Strategy reads:

> Governments... pledge themselves, individually and collectively, to pursue policies designed to create a more just and rational world economic and social order in which equality of opportunities should be as much a prerogative of nations as of individuals within a nation. They subscribe to the goals and objectives of the Decade and resolve to take the measures to translate them into reality.

And further, Governments, individually and jointly, solemnly resolved to adopt and implement the policy measures set out in the document.

167. The comment can of course be made that no such obligation as that suggested has been accepted in positive law; that at the most there is an imperfect obligation to take certain actions towards certain objectives within particular institutional and procedural arrangements. Moreover, it might be thought that these arrangements—and any resulting substantive obligation—are still at an early stage of their development, and that the time is not yet ripe for any attempt to spell out an obligation in concrete legal terms. There are moreover, as the foregoing suggests, many bodies immediately and continually concerned both with the broad policies and with their detailed implementation.

Chapter IV

State responsibility

168. The topic of the law of State responsibility was included in the 1949 list, and remains currently under study by the Commission. As is perhaps inevitable with a subject of such far-reaching scope, there has been some shift of emphasis over the years as regards the various aspects to be studied and their respective order of priority within the over-all framework. Indeed, no other subject examined by the Commission has required such extensive consideration of questions of methodology, and of the range of issues to be tackled and of the level at which their codification was to be attempted.

169. The issue of greatest difficulty which has faced the Commission has been that of deciding whether to proceed on a basis of codifying specific aspects of the question in a way which would embrace the actual content of the obligation involved, or whether to proceed, at least initially, on a more abstract plane and to seek to codify, not the substantive body of rules the violation of which may entail the responsibility of a State, but the law of State responsibility *per se,* regarded as in itself a distinct institution or complex of legal rules. The Commission has followed both approaches at different times. Initially, an attempt was made to concentrate attention on the law of State responsibility as it relates to the treatment given to the person and property of aliens. The Commission eventually decided that it would be unable to make progress by pursuing that approach, to the exclusion of other aspects of the law of State responsibility. It was therefore agreed, pursuant to the adoption by the General Assembly of resolution 1765 (XVII) of 20 November 1962, [216] to resort to the other approach, so as to comprise, within a set of fundamental rules, State responsibility for any internationally wrongful act. It is this course which the Commission is now pursuing. A comparison may perhaps be made in this connexion, if only to provide an illustration of the nature (and of the difficulty) of the problem involved, with the Commission's work on the law of treaties: the Commission may be said to be following the same approach in the case of the law of State responsibility as it adopted with regard to the law of treaties, with the difference that whereas for the law of treaties the treaty instrument itself existed, as a focus of attention, in the case of State responsibility it is a conceptual notion or set of principles which is supposed to play that central role.

170. Having regard not only to the importance of the subject itself but also to the significance of the development of the Commission's own views concerning the way in which the codification of the law of State responsibility should be undertaken, the following paragraphs give an account of the steps taken or proposed in regard to the Commission's work in this sphere since 1949. This account is brief, and at times it has been necessary to summarize complex statements or arguments in a few lines or words. A more complete description of the discussions and issues involved is

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[214] Many standard agreements are, of course, concluded for example by UNDP and IBRD.

[215] See *Yearbook of the International Law Commission, 1970,* vol. II, p. 268, document A/CN.4/230, para. 142. Note also the suggestion made in the Sixth Committee that there was now a generally recognized legal rule that no political or other conditions should be attached to the aid extended to developing countries (*ibid.,* p. 267, para. 132).

[216] The relevant portion of the resolution is quoted in paragraph 174 below.

contained in the works mentioned in the foot-notes, and in the further documents to which those works refer.

171. Beginning first with the 1948 Survey, [217] this drew attention to the efforts at codification in the sphere of State responsibility which had been made under the auspices of the League of Nations. The comment was made that it was only natural that the preparatory work for the Codification Conference of 1930 should, when dealing with the responsibility of States for damage to the person and property of aliens, have covered "what is perhaps the major part of the law of State responsibility". [218] Two reasons were given for this. In the first instance, the treatment of aliens and injuries to aliens was said to constitute the most conspicuous example of the application of the law of State responsibility and the bulk of cases decided by international tribunals related to this aspect. Secondly, the central problems of State responsibility had been raised in dealing with these cases, as indeed they were whatever the occasion on which a State was charged with responsibility under international law. Proceeding, the 1948 Survey suggested that there were a number of questions which are common to all aspects of State responsibility. Those listed included the question of the responsibility of the State for the acts of officials acting outside the scope of their competence; the responsibility of the State for acts of private persons; the degree, if any, to which national law may be invoked as a reason for the non-fulfilment of international obligations; and the requirement of fault as a condition of liability. However, the law of State responsibility transcended the question of responsibility for the treatment of aliens. Besides mentioning problems concerning responsibility which related to the codification of the principles of the Nürnberg Charter and judgement, [219] the 1968 Survey set out a range of other questions: the prohibition of abuse of rights; the forms of reparation; the question of penal damages; and the various forms and occasions of responsibility resulting from the increasing activities of the State in commercial and economic fields. [220]

172. The subject of State responsibility was included in the 1949 list by the Commission, following a relatively short discussion. The principal motives for its inclusion appear to have been, on the one hand, its importance, and, on the other, the feeling that an evolution might have occurred since the 1930 Codification Conference such as to suggest that a better chance existed to codify the topic.

173. The General Assembly, by resolution 799 (VIII) of 7 December 1953, requested the Commission to undertake the codification of "the principles of international law governing State responsibility" as soon as it considered it advisable. Following the General Assembly recommendation, the Commission, at its seventh session in 1955, decided to begin the study of the topic State responsibility and appointed Mr. F. V. García Amador as Special Rapporteur. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented a series of reports devoted mainly to the study of questions relating to the responsibility of the State for injuries caused in its territory to the person and property of aliens, [221] Owing to its work in other branches of international law, the Commission was not able between 1956 and 1961 to proceed to the stage of giving full consideration to the task of codifying the law relating to State responsibility, although it held some general exchanges of views on the matter. [222] At the Commission's session in 1961, when the planning of the future work of the Commission was discussed, all members who spoke were agreed that the subject of State responsibility should be included among the Commission's priority topics. There were differences of opinion, however, regarding the approach to the subject and in particular as to whether the Commission should begin by codifying the general rules governing the State responsibility, or whether it should codify at the same time the rules whose violation entailed international responsibility.

174. At the Commission's fourteenth session, in 1962, it was agreed, in accordance with sub-paragraph 3 (*a*) of General Assembly resolution 1686 (XVI) of 18 December 1961 that "State responsibility" should receive priority in the Commission's work. A Sub-Committee on

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[217] See para. 4 above.

[218] 1948 Survey, para. 97. The 1948 Survey also dealt, under a separate heading, with the question of the treatment of aliens (*ibid.*, paras. 79-84), chiefly as regards their status under the law of the country of residence. Particular mention was made of the equal protection of such rights as aliens possess under that law and of the recognition of human rights.

[219] Regarding the Commission's treatment of this topic, see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 251-252, document A/CN.4/230, para. 16. See also, paras. 434-436 below.

[220] 1948 Survey, para. 98.

[221] The first report, a preliminary one, was entitled "International responsibility" and contained some "bases of discussions" (See *Yearbook of the International Law Commission, 1956*, vol. II, p. 173, document A/CN.4/96). The second report (*ibid., 1957*, vol. II, p. 104, document A/CN.4/106) added to the title the sub-heading "Responsibility of the State for injuries caused in its territory to the person or property of aliens. "Part I: Acts and omissions", and contained in annex a set of preliminary draft articles. The third report (*ibid., 1958*, vol. II, p. 47, document A/CN.4/111) was sub-titled "Part II: The international claim". The fourth report (*ibid., 1959*, vol. II, p. 1, document A/CN.4/119) was sub-titled "Measures affecting acquired rights" and undertook a more detailed study of matters dealt with in the second report (international protection of acquired rights; expropriation in general and contractual rights). The fifth report (*ibid., 1960.*, vol. II, p. 41, document A/CN.4/125), adding to the previous sub-title the phrase "constituent elements of international responsibility", dealt, *inter alia*, with measures affecting acquired rights and the constituent elements of a wrongful act, including "abuse of rights" and "fault". The sixth and last report (*ibid., 1961*, vol. II, p. 1, document A/CN.4/134 and Add.1) was devoted to the subject of "reparation of the injury" and also included in its addendum revised texts of the draft articles previously submitted. Mr. García Amador ceased to be a member of the Commission in 1961.

For further references to the reports of Mr. García Amador and to the Commission's consideration of the topic up to 1969, see *ibid., 1969*, vol. II, p. 229, document A/7610/Rev.1, chap. IV.

[222] For a summary, see *ibid.*, p. 229, para. 67.

State Responsibility was established and asked to make suggestions regarding the scope of the future study and the approach to be followed. [223] By resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission should continue its work on State responsibility.

taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations.

175. The report of the Sub-Committee was considered by the Commission at its fifteenth session in 1963. All members of the Commission who took part in the discussion agreed with the general conclusions of the report, namely: (1) that priority should be given to the definition of the general rules governing the international responsibility of the State; (2) that, in defining these general rules, the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the person or property of aliens, should not be overlooked; and (3), that careful attention should be paid to the possible repercussions which developments in international law might have on State responsibility. After having unanimously approved the report of the Sub-Committee, the Commission appointed Mr. R. Ago as Special Rapporteur for the topic. By resolutions 1902 (XVIII) of 18 November 1963, 2045 (XX) of 8 December 1965, and 2167 (XXI) of 5 December 1966, the General Assembly reiterated the recommendation contained in resolution 1765 (XVII) mentioned above. In its resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended that the Commission should expedite the study of the topic of State responsibility and, by resolution 2400 (XXIII) of 11 December 1968, requested the Commission to "make every effort to begin substantive work" on the topic.

176. In 1969, at the Commission's twenty-first session, Mr. R. Ago submitted his first report on the international responsibility of States. [224] This report contained a review of previous work undertaken by various bodies with regard to the codification of the topic and also summarized the methodological conclusions reached by the Sub-Committee set up in 1962, and later by the Commission itself in 1963 and 1967, on the basis of which the Commission decided to resume the study of the topic from a fresh viewpoint, in an effort to achieve positive results in accordance with various recommendations which had been made by the General Assembly. After examining this study, the Commission requested the Special Rapporteur to prepare a report containing a first set of draft articles on the topic, the aim being, in the Commission's words,

to establish, in an initial part of the proposed draft articles, the conditions under which an act which is internationally illicit and which, as such, generates an international responsibility, can be imputed to a State. [225]

The criteria laid down by the Commission as a guide for its future work on the topic were summarized as follows: [226]

(*a*) The Commission intended to confine its study of international responsibility, for the time being, to the responsibility of States;

(*b*) The Commission would first examine the question of the responsibility of States for internationally wrongful acts. The question of responsiblity arising from certain lawful acts, such as space and nuclear activities, would be examined as soon as the Commission's programme of work permitted;

(*c*) The Commission agreed to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and that of defining the rules that place obligations on States, the violation of which may generate responsibility;

(*d*) The study of the international responsibility of States would comprise two broad separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task was to determine what facts and circumstances must be established in order to be able to impute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task was to determine the consequences attached by international law to an internationally wrongful act in different cases, in order to arrive, on this basis, at a definition of the content, forms and degrees of responsibility. Once these tasks had been accomplished, the Commission would be able to decide whether a third phase should be added in the same context, covering the examination of certain problems relating to what has been termed the "implementation" of the international responsibility of States and questions concerning the settlement of disputes with regard to the application of the rules on responsibility. [227]

177. At the Commission's twenty-second session in 1970, the Special Rapporteur presented a second report, entitled "The origin of international responsibility", [228] which examined the following general rules governing

[223] The Sub-Committee was composed of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen (*ibid.*, pp. 230-231, paras. 70-73). The report of the Sub-Committee (A/CN.4/152) is reproduced as Annex I to the 1963 report of the Commission (*ibid., 1963*, vol. II, p. 227, document A/5509).

[224] *Ibid., 1969*, vol. II. p. 125, document A/CN.4/217 and Add.1.

[225] *Ibid., 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 80. The Commission's conclusions were contained in paras. 80-84.

[226] An abridgement of the account given in the Commission's report in 1970 (*ibid., 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66).

[227] In resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that the Commission should continue its work on the topic taking into account the relevant paragraph (para. 4 (*c*)) of resolution 2400 (XXIII) referred to in paragraph 175 above.

[228] *Yearbook of the International Law Commission, 1970*, vol. II, p. 177, document A/CN.4/233.

the topic as a whole: the principle of the internationally wrongful act as a source of responsibility; the essential conditions for the existence of an internationally wrongful act; and the capacity to commit such acts. Draft articles were submitted in respect of these fundamental rules. The Commission's discussion of the report ranged over a number of issues, including those relating to the method to be followed. [229] As regards the substance of the report, it was agreed that the work should continue to be based on the general notion of international responsibility, meaning thereby the set of legal relationships to which the commission of an internationally wrongful act by a State may give rise in various possible cases. Such relationships, it was pointed out, may arise between that State and the injured State or between the injured State and other subjects of international law, or possibly even with the international community as a whole.

178. Although there was support for the view that responsibility for lawful acts should be included, it was stressed by several members, including the Special Rapporteur, that this aspect should continue to be kept distinct; this would not, however, prevent the Commission from undertaking a study of this form of responsibility, either when the study on responsibility for wrongful acts had been completed, or even on a simultaneous but separate basis. The majority of members recognized the need to deal in the draft with the notion of "indirect" responsibility, or responsibility for the acts of others, although it was considered that that notion did not necessarily need to be taken into account specifically in defining the basic general rule on responsibility for wrongful acts.

179. In the course of further discussion, the Commission confirmed the agreement, already reached, that every internationally wrongful act contains both a subjective element and an objective element; these elements are logically distinct, even though indissolubly linked in any concrete situation. The Commission decided that the essential aspect of the subjective element—that is to say, the existence of positive conduct or of an omission which, in the specific case, must be ascribable to the State and thus figure as an act or omission by the State itself—should be designated the "attribution" rather than the "imputation" to the State. This aspect—the attribution of an act or omission to the State as an international legal person—is an operation which, of necessity, falls within the scope of international law, and is therefore distinct from the parallel operation which may take place under domestic law. This point was considered particularly important in relation to acts performed by State organs outside their competence or in violation of internal law, or by organs or public institutions distinct from the State.

180. As to the objective element, the Commission was in general agreement that this should be defined in terms of a violation or breach of an international obligation, or of failure to fulfil such an obligation. Interest was expressed in this connexion in the notion of abuse of right; it was recognized that failure to fulfil an international obligation would also cover the case where the obligation in question is specifically an obligation not to exercise rights in an abusive or unreasonable manner.

181. The Commission also discussed the distinction between the cases where the conduct of an organ of the State is held to be sufficient in itself to constitute complete failure to fulfil an international obligation, and those where such failure comes to light only when the conduct, as such, is followed by an act or event connected with it but not included in it. As regards the question of whether the element of "injury" is a constituent element of an internationally wrongful act, it was recognized that under international law an injury, material or moral, is necessarily inherent in every impairment of an international right of a State. Any economic injury sustained may be taken into consideration *inter alia* for the purpose of determining the amount of reparation, but is not prerequisite for the determination that an internationally wrongful act has been committed.

182. With regard to what is sometimes referred to as the "capacity" of States to commit internationally wrongful acts and the possible limits of such "capacity", the Commission agreed that this notion has nothing to do with capacity to conclude treaties or more generally, to act internationally. What is meant or implied is a physical ability rather than a legal capacity to perform certain acts. The Special Rapporteur will examine the possibility of using a different formula, perhaps negative rather than positive, to deal with this point.

183. At the close of its consideration of the topic in 1970, the Commission encouraged the Special Rapporteur to continue his study and to submit a further report containing a revised version of the parts so far considered and a detailed analysis of the various subjective and objective conditions [230] which must be met if an internationally wrongful act is to be attributed to a State as an act giving rise to international responsibility.

184. When, at the twenty-fifth session of the General Assembly, the Sixth Committee examined the report of the International Law Commission, the general conclusions reached by the Commission on the topic of State responsibility were considered broadly acceptable. In resolution 2624 (XXV) of 12 November 1970, adopted on the recommendation of the Sixth Committee, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII), 1902 (XVIII) and 2400 (XXIII). With regard to the question of responsibility for lawful acts, the Sixth Committee's report summarized the views expressed as follows:

[229] *Ibid.*, vol. I, 1074th to 1076th and 1079th to 1081st meetings. For a further summary of the Commission's discussion, see *ibid.*, vol. II, pp. 307 *et seq.* document A/8010/Rev.1, paras. 69-83.

[230] Reference may be made in this connexion to the over-all plan contained in paragraph 91 of the Special Rapporteur's first report (see foot-note 224 above).

Some representatives stressed that, in addition to responsibility for wrongful acts, it was necessary to study responsibility for lawful acts. Some agreed that the Commission could consider the latter question separately at a later stage in its work. Others felt that the two questions should be dealt with simultaneously. It was also observed that the two forms of responsibility could be dealt with in parallel but separate studies. Some representatives felt that responsibility for lawful acts should cover all types of activities giving rise to such responsibility, such as the pollution of the oceans, and should not be restricted only to some of them (outer space and nuclear activities). Other representatives said that it would be useful to consider a third category of acts—such as pollution of the atmosphere or the oceans with radioactive substances or deadly gases—which, because of their dangerous nature, fell half way between lawful and wrongful acts. [231]

185. In the light of its current work on the topic and the successive recommendations of the General Assembly, it may be assumed that the Commission will include this subject in its revised list and continue to give it a high degree of attention. The difficult task which is presented is to attempt to give an evaluation first of the scope of the Commission's work in this regard and, secondly, of the approximate length of time which may be required for its completion. On the latter aspect, the position is affected by the relative degree of priority which the Commission may choose to give to the various items it has before it. It may perhaps be recalled in this connexion, that the General Assembly has on several occasions emphasized the importance which it attaches to the subject of State responsibility. Even assuming that the Commission were to give a relatively high priority to this item, however, completion of the Commission's work in this sphere might nevertheless be expected to take several years.

186. With respect to the scope of the work, as the Commission has acknowledged, the approach now being followed by the Commission would entail or imply that, at some stage, consideration would have to be given to the task of determining how the general law governing State responsibility, once agreed upon, is to be related to the content of the rules the violation of which may generate international responsibility,—such as, for instance, the rules relating to the maintenance of international peace and security. If it is decided to undertake a separate study of the question of responsibility for lawful acts, this would presumably include responsibility for harm caused by various activities, such as those relating to outer space, the civil application of nuclear energy and activities resulting in marine pollution. The question would have to be considered whether responsibility for certain of those activities should be, at least in some instances, strict or absolute as opposed to the principle of reasonable foreseeability applied in respect of other activities involving the risk of harm.

187. The approach which the Commission has decided to follow in its study of this topic may be summarized, in the light of the foregoing, as an attempt to achieve the formulation of a uniform set of rules governing the general law of State responsibility and, at the same time, to permit, as its work proceeds, the possibility of distinctions being drawn according to the category of cases involved so as to reflect the relevant substantive rules.

Chapter V

Succession of States and Governments

188. The 1948 Survey [232] dealt with both "succession of States" and "succession of Governments". With regard to the former, the 1948 Survey concluded as follows:

> 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. The law of State succession prevents the events accompanying changes of sovereignty from becoming mere manifestations of power. As such it would seem to deserve more attention in the scheme of codification than has been the case hitherto. [233]

189. Pointing out that the question of State succession, even more than that of recognition, had so far remained outside the work of codification, the 1948 Survey continued as follows:

> One possible explanation of this fact is that State succession has often been regarded as a problem arising primarily as the result of war and that as such it ought, like the law of war itself, to remain outside the field of codification. This view is open to question. Experience has demonstrated that changes of sovereignty may take place in ways other than the liquidation of the aftermath of war—as has been shown, for instance, by the questions of State succession which have arisen as the result of the emergence of the independent States of India and Pakistan. [234]

190. The 1948 Survey suggested certain aspects of "succession of States" which might be studied by the Commission. In particular, it singled out the need to give a precise formulation to the general principle of respect for acquired private rights, such as those grounded in the public debt, in concessionary contracts, in relations of government service, and the like, and to study such exceptions to that principle as the obligations of the predecessor State in matters of tort and the public debt contracted for purposes inimical to the successor State. It was also added that the position with regard to rights and obligations arising out of treaties concluded by the predecessor State was in many respects obscure and should be clarified.

191. The 1948 Survey considered finally the question of the extent to which the codification of State succession ought to concern itself with "succession of Governments" and with the affirmation of the principle that

[231] *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 104. At the conclusion of the debate, the Chairman of the Commission assured the representatives of the Sixth Committee that, in response to the wishes which had been expressed by some of them, the Commission would give due consideration to the question of responsibility for lawful acts (*ibid., Sixth Committee*, 1193rd meeting, para 47.)

[232] See para. 4 above.

[233] 1948 Survey, para. 46.

[234] *Ibid.*, para. 44.

the obligations of the State continued notwithstanding any changes of government or of the form of government of the State in question. The conclusion reached in the matter was as follows:

> Any attempt to codify the rules governing the latter principle would not be feasible without a parallel attempt to qualify some such rules as that the obligations in question must have been validly contracted or that their continuation cannot be inconsistent with any fundamental changes in the structure of the State accompanying the revolutionary change of government. It is clear that any attempt to formulate the principles—and their qualifications—in question would raise problems of great legal and political complexity. However, this need not necessarily constitute a decisive argument against including it within the scheme of codification. [235]

192. At its first session in 1949, the Commission included "Succession of States and Governments" in the list of topics selected for codification, but it did not give priority to its study. [236] The Commission did not in fact revert to "Succession of States and Governments" until its fourteenth session, held in 1962, when it decided to include the topic in its future programme of work. This action of the Commission followed the adoption by the General Assembly of resolution 1686 (XVI) of 18 December 1961, paragraph 3 (*a*) of which recommended that the Commission "include on its priority list the topic of succession of States and Governments". In 1962 the Commission set up a Sub-Committee on the Succession of States and Governments, which was entrusted with the task of submitting suggestions on the scope of the subject and the method of approach for its study. [237]

193. By its resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission should

> continue its work on the succession of States and Governments, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments, with appropriate reference to the views of States which have achieved independence since the Second World War.

In 1963, the Commission gave its general approval to the recommendations contained in the Sub-Committee's report and appointed Mr. M. Lachs as Special Rapporteur for the topic of "Succession of States and Governments".

194. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended, in language similar to that of resolution 1765 (XVII), that the Commission should continue its work on the topic. Subsequently, the General Assembly reaffirmed the recommendation in resolutions 2272 (XXII) of 1 December 1967, 2400 (XXIII) of 11 December 1968, 2501 (XXIV) of 12 November 1969 and 2634 (XXV) of 12 November 1970.

195. The main relevant conclusions reached by the Commission, when it endorsed the Sub-Committee's report on the topic in 1963, may be summarized as follows:

(*a*) The objectives should be a survey and evaluation of the present state of law and practice in the matter of State succession, and the preparation of draft articles on the topic in the light of new developments in international law;

(*b*) In view of the modern phenomenon of decolonization, special attention should be given, in the view of several members, to problems of concern to the new States;

(*c*) Priority should be given to the study of the question of "succession of States";

(*d*) For the time being, the "succession of Governments" would be considered only to the extent necessary to supplement the study on State succession;

(*e*) Succession in matters of treaties should be considered in connexion with succession of States, rather than in the context of the law of treaties;

(*f*) Three headings were distinguished within the topic, namely:

(i) Succession in respect of treaties;

(ii) Succession in respect of matters other than treaties; [238]

(iii) Succession in respect of membership of international organizations.

196. At its nineteenth session, in 1967, the Commission made new arrangements for the work on the Succession of States and Governments. Taking into account the broad outline of the subject laid down in 1963 and the fact that Mr. Lachs, the Special Rapporteur, had ceased to be a member of the Commission, it was decided, in order to advance the study of the topic, to divide it into the three headings mentioned in the preceding paragraph and to appoint Special Rapporteurs for two of them: Sir Humphrey Waldock was appointed Special Rapporteur for "succession in respect of treaties" and Mr. M. Bedjaoui Special Rapporteur for "succession in respect of matters other than treaties". At the same time, the Commission decided to leave aside, for the time being, the third heading in the division, namely "succession in respect of membership of international organizations", which it considered to be related both to succession in respect of treaties and to

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[235] *Ibid.*, para. 47.

[236] For a detailed historical background of the consideration of the question by the Commission, see *Yearbook of the International Law Commission, 1968*, vol. II, p. 213, document A/7209/Rev.1, paras. 29-42; *ibid., 1969*, vol. II, p. 222, document A/7610/Rev.1, paras. 20-34; and *ibid., 1970*, vol. II, p. 299 *et seq*, document A/8010/Rev.1, paras. 27-36.

[237] The Sub-Committee was composed of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The report of the Sub-Committee (A/CN.4/160 and Corr.1) is contained in annex II of the 1963 report of the Commission (*Yearbook of the International Law Commission, 1963*, vol. II, p. 260, document A/5509).

[238] In 1963 the heading was formulated as follows: "Succession in repect of rights and duties resulting from sources other than treaties". In 1968 the Commission replaced this heading by the present title (see *Yearbook of the International Law Commission, 1968*, vol. II, p. 216, document A/7209/Rev.1, para. 46).

relations between States and international organizations, and did not appoint a Special Rapporteur for this aspect.

197. Before considering further the aspects of the topic currently under consideration by the Commission and those which, for the time being, have been left aside, reference should be made to one of the more significant phenomena which have occurred in international relations since the adoption of the United Nations Charter, namely the process of decolonization. Under the impact of the principles embodied in the Charter and numerous relevant resolutions and declarations adopted by the General Assembly—in particular resolution 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples and resolution 2160 (XXI) of 30 November 1966 on the strict observance of the prohibition of the threat or use of force, in international relations and of the rights of peoples to self-determination—decolonization has become one of the aims of the international community and is proceeding under its supervision. It is not intended to deal in this context with the political, human, cultural, social and economic consequence of decolonization, nor, even, to analyse its present or future impact in the application, interpretation and development of international law. Particular reference has been made to the process of decolonization in the present context since, although only one amongst the possible causes of succession, it has in fact been the major reason why international attention has been given in recent years to the topic of State succession. This preoccupation explains also the priority given since 1962 to the study of the topic by the Commission, following the General Assembly and Commission decisions mentioned above. The records of recent sessions of the Commission and of the Sixth Committee of the General Assembly likewise reflect this preoccupation. In the words of General Assembly resolution 1765 (XVII), the Commission was requested to study the succession of States and Governments taking into consideration, *inter alia,* "the views of States which have achieved independence since the Second World War", namely taking due account of the succession practice resulting from the recent process of decolonization. [239]

198. In this perspective, and bearing in mind that the main principle of international law involved in the decolonization is the "principle of equal rights and self-determination of peoples", attention may be called to the work done in connexion with that principle by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. In its resolution 2625 (XXV) of 24 October 1970, containing the Declaration on Principles of Friendly Relations, the principle of equal rights and self-determination of peoples is formulated as follows:

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(*a*) To promote friendly relations and co-operation among States; and

(*b*) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the

[239] The Secretariat has prepared, in accordance with the Commission's request, the following documents and publications relating to succession of States and Governments and containing mainly recent practice on the subject: (*a*) a memorandum on "The succession of States in relation to membership in the United Nations" (*Yearbook of the International Law Commission, 1962,* vol. II, p. 101, document A/CN.4/149 and Add.1); (*b*) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (*ibid.*, p. 106, document A/CN.4/150): (*c*) a study entitled "Digest of the decisions of international tribunals relating to State Succession" (*ibid.*, p. 131 document A/CN.4/151) supplement in 1970 (*ibid., 1970,* vol. II, p. 170, document A/CN.4/232); (*d*) a study entitled "Digest of decisions of national courts relating to succession of States and Governments" (*ibid.*, 1963, vol. II, p. 95, document A/CN.4/157); (*e*) seven studies in the series "Succession of States to multilateral treaties", entitled respectively "International Union for the Protection of Literary and Artistic Works: Berne Convention of 1886 and subsequent Acts of revision" (Study I); "Permanent Court of Arbitration and The Hague Conventions of 1889 and 1907" (Study II); "The Geneva Humanitarian Conventions and the International Red Cross" (Study III); "International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements" (Study IV): "The General Agreement on Tariffs and Trade (GATT) and its subsidiary instruments" (Study V) (Studies I-V are contained in *ibid., 1968,* Vol. II., p. 1, document A/CN.4/200 and Add.1 and 2); "Food and Agriculture Organization of the United Nations: Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General" (Study VI) (*ibid., 1969,* vol. II, p. 23, document A/CN.4/210) and "International Telecommunication Conventions and subsequent revised Convention and Telegraph, Telephone, Radio and Additional Radio Regulations" (Study VIII) (*ibid., 1970,* vol. II, p. 61, document A/CN.4/225; (*f*) three studies in the series "Succession of States in respect of bilateral treaties" entitled "Extradition treaties" (Study I) (*ibid.*, p. 102, document A/CN.4/229), "Air transport agreements" (Study II) and "Trade agreements" (Study III) (see below, pp. 118 and 149, documents A/CN.4/243 and A/CN.4/243/Add.1); (*g*) a volume of the United Nations Legislative Series entitled *Materials on succession of States* (United Nations publication, Sales No. E/F.68.V.5), containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request.

emergence into any political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charer shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

1. Succession in respect of treaties

199. In accordance with the decision of principle referred to in paragraph 195 above, the Commission decided in 1963 not to concern itself with succession in respect of treaties, in the context of the codification of the law of treaties. [240] The introduction to the chapter dealing with the law of treaties in the Commission's report on its eighteenth session states that

> ... the draft articles do not contain provisions concerning either the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments, or the effect of the extinction of the international personality of a State upon the termination of treaties. In regard to the latter question, as is further explained in paragraph 6 of its commentary to article 58 and in its 1963 report, the Commission "... did not think that any useful provisions could be formulated on this question without taking into account the problem of the succession of States to treaty rights and obligations." [241]

200. Article 73 of the Vienna Convention on the Law of Treaties, [242] like article 69 of the Commission's draft, expresses the following reservation on this matter:

> The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from sucession of States ...

201. The Special Rapporteur for succession in respect of treaties, Sir Humphrey Waldock, has submitted, since his appointment in 1967, three reports; the first report [243] was considered by the Commission in 1968 and the second [244] and third [245] in 1970. The discussion in 1968 concerned general questions relating to the dividing line between succession in respect of treaties and succession in respect of matters other than treaties, the nature and the form of the work and the title of the topic. [246] The second and third reports together contained twelve draft articles, with commentaries, covering questions such as the use of certain terms (for instance, "succession" and "new State"), the case of a territory passing from one State to another (the so-called principle of "moving treaty-frontiers"), devolution agreements, unilateral declarations by successor States, and the rules governing the position of "new States" in regard to multilateral treaties (the question of the rights or obligations of a "new State" with regard to multilateral treaties previously applied to its territory).

202. As explained by the Special Rapporteur: (*a*) the draft was based on the thesis that in regard to treaties the question of "succession" should be considered as a particular problem within the general framework of the law of treaties; (*b*) the concept of "succession" as it has so far emerged from his study of the subject was characterized first by the fact of the replacement of one State by another in the sovereignty of a territory or in the competence to conclude treaties in respect of it and, secondly, by a distinction between the fact of a succession and the transmission of treaty rights and obligations on its occurrence. [247]

203. The discussion in the Commission showed a large measure of general agreement with the solutions proposed by the Special Rapporteur as a basis for the study of

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[240] In its work on the law of treaties, the Commission noted certain points to which the succession of States or Governments might be relevant. Examples which may be mentioned are the reference made at the Commission's fiftheenth session to the succession of States and Governments in connexion with the extinction of the international personality of a State and the termination of treaties (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 206-207, document A/5509, para. 3 of the commentary to draft article 43) and the reference to the territorial scope of treaties and the effects of treaties on third States (*ibid., 1964*, vol. II, p. 175, document A/5809, para. 18).

[241] *Ibid., 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 30.

[242] *Official Records of the United Nations Conference on the Law Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[243] *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202.

[244] *Ibid., 1969*, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

[245] *Ibid., 1970*, vol. II, p. 25, document A/CN.4/224 and Add.1.

[246] It should be recalled that it was considered unnecessary to repeat in the context of succession in respect of treaties the general debate which took place, likewise in 1968, on several aspects of succession in respect of matters other than treaties (see para. 207 below). It was considered that it would be for the Special Rapporteur to take account of the views expressed by members of the Commission in that debate in so far as they might also have relevance for succession in respect of treaties.

[247] For a summary of proposals by the Special Rapporteur, see *Yearbook of the International Law Commission, 1970*, vol. II, p. 301 *et seq.* document A/8010/Rev.1, paras. 37-48.

the topic. [248] Some doubts or reservations were voiced on certain particular aspects of questions such as the use of the expressions "succession" [249] and "new State" in the draft as a term of art; the relationship between a provision laying down the absence of any general obligation on a new State to take over the treaties of its predecessor, and the possible exceptions to that rule (in particular, with regard to so-called "dispositive", "territorial" or "localized" treaties and to the "moving treaty-frontier" principle); the right of a new State to consider itself a party to a multilateral treaty in force in respect of its territory at the date of the succession; the relationship between the present topic and succession in respect of matters other than treaties; the distinction between the treaty itself and the situation or régime established by it; and the convenience of a reservation similar to that contained in article 43 of the Vienna Convention on the Law of Treaties concerning rules in a treaty which were generally accepted customary law.

204. The Special Rapporteur pointed out that it was essential to see the whole draft before final conclusions were reached. Accordingly, in his next report he would give priority to dealing with all the remaining aspects of the topic, enumerating among them particular forms of succession" relating to protected States, mandates and trusteeships and the question of "dispositive", "territorial" or "localized" treaties, including the problem of boundaries. [250] The Special Rapporteur drew attention to the scope of the treaties to be covered by the draft and the need to reserve the application of any relevant rules governing succession to constituent instruments of international organizations or to treaties adopted within such organizations, assuming that (*a*) the draft, like the Vienna Convention on the Law of Treaties, would be limited to treaties between States and (*b*) the draft would contain a provision similar to that in article 5 of the Convention on the Law of Treaties reserving the application of any relevant rules of international organizations to those categories of treaties. [251]

205. By resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on succession of States, taking into account previous relevant resolutions, with a view, *inter alia*, to completing in 1971 the first reading of draft articles on succession of States in respect of treaties.

2. Succession in respect of matters other than treaties

206. The Special Rapporteur for this topic, Mr. M. Bedjaoui, has submitted three reports to the Commission. The first report, [252] considered by the Commission in 1968, gave rise to a general debate involving questions of interest for the "succession of States and Governments" as a whole. [253] The main points discussed during the debate were: title and scope of the topic; general definition of State succession; method of work; form of the work; origins and types of State succession; specific problems of new States; judicial settlement of disputes; order of priority or choice of certain aspects of the topic. A few preliminary comments were also made by some members of the Commission on certain particular aspects of the topic such as public property, public debts, legal régime of the predecessor State, territorial problems, status of the inhabitants and acquired rights.

207. Among the preliminary conclusions reached by the Commission in 1968 at the end of its debate, those relating to the order of priority or choice of certain aspects of the topic are particularly important for the purpose of the present document. [254] They are summarized in the Commission's report on the session as follows:

> In view of the breadth and complexity of the task entrusted to the Special Rapporteur, the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later. It was also pointed out that the order in which subjects would be studied would not affect their positions in the draft finally adopted.
>
> Among the aspects to which priority should be given, the following were mentioned: (*a*) public property and public debts; (*b*) the question of natural resources; (*c*) territorial questions which came under the heading; (*d*) special problems arising from decolonization; (*e*) nationality changes resulting from succession; (*f*) certain aspects of succession to the legal régime of the predecessor State. The predominant view was that the economic aspect of succession should be considered first. At the

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[248] For detailed summary of the debate, see *ibid.*, p. 303 *et seq.*, paras 49-63.

[249] Some members felt that the draft articles should include a general reservation on the question of military occupation, just as the special cases of "aggression" and the "outbreak of hostilities" had been reserved from the Vienna Convention on the Law of Treaties.

[250] The Special Rapporteur reminded the Commission that in its work on the law of treaties it had considered the analogous question of treaties establishing "objective" régimes in the context of "treaties" and third States". It seemed to him that the question of "objective" régimes presented itself from a somewhat different angle in the case of succession of States and had to be examined *de novo* on its own merits in dealing with succession in respect of treaties. See also paras. 49-52 above.

[251] For the views expressed in the Sixth Committee on the Commission's consideration of succession in respect of treaties in 1970, see *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 73-97.

[252] *Yearbook of the International Law Commission, 1968*, vol. II, p. 94, document A/CN.4/204.

[253] For a detailed summary of the Commission's debate, see *ibid.*, p. 216, document A/7209/Rev.1, paras. 45-79.

[254] For the relevant views expressed in the Sixth Committee on the Commission's debate in 1968, see *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, paras. 43-53.

outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources [so] as to cover problems of succession in respect of the different economic resources (interests and rights) including the associated questions of concession rights and government contracts (acquired rights). The commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next session. [255]

208. In 1969, the Commission considered the second report by the Special Rapporteur, entitled "Economic and financial acquired rights and State succession". [256] As indicated in his report, the Special Rapporteur took as his starting point the principle of equality of States and went on to show that the successor State possessed its own sovereignty, as an attribute that international law attached to statehood.

Finding no legal basis for the theory of acquired rights and convinced of the highly contradictory nature of the precedents, which needed re-examination, the Special Rapporteur held, in short, that the successor State was not bound by the acquired rights granted by the predecessor State, and that it was so bound only if it acknowledged those rights of its own free will or if its competence was restricted by treaty. But the competence of the successor State was obviously not arbitrary. In its actions, it must not depart at any time from the rules of conduct governing every State. For, before becoming a successor State, it was a State, in other words, a legal entity having in addition to its rights, international obligations the violation of which would engage its international responsibility. [257]

209. Different views were expressed by the members of the Commission on the approach and conclusions of the report during the several meetings devoted to its study. [258] While some members supported in principle that approach and the conclusions drawn, or agreed with certain of the arguments advanced, others expressed reservations as to a number of issues dealt with in the report. In particular, some members were of the opinion that the report put too much emphasis on decolonization and that other types or causes of succession should be studied also. As far as the specific issues were concerned, the discussion focussed on the following points: the succession of States and the problem of acquired rights; economic and financial acquired rights and specific problems of new States; succession in economic and financial matters as a question of continuity or discontinuity of legal situations existing prior to the succession; relationship between succession in economic and financial matters, the rules governing the treatment of aliens and the topic of State responsibility.

210. At the end of the debate, most members of the Commission were of the opinion that the codification of the rules relating to succession in respect of matters other than treaties should not begin with the preparation of draft articles on acquired rights. The topic of acquired rights was extremely controversial and its study, at a premature stage, could only delay the Commission's work on the topic as a whole. The efforts of the Commission should, therefore, be directed to finding a solid basis on which to go forward with the codification and progressive development of the topic, taking into account the differing legal interests and needs of States. Consequently most members of the Commission considered that an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts. Not until the Commission had made sufficient progress, or perhaps had even exhausted the entire topic, would it be in a position to deal directly with the problem of acquired rights. The Commission requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters. The Special Rapporteur expressed the intention to devote his next report to public property and public debts. [259]

211. In 1970, the Commission was unable, owing to the lack of time, to study the third report [260] submitted by the Special Rapporteur containing four draft articles, with commentaries, concerning certain aspects of the subject of succession to public property.

212. By its resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on succession of States, taking into account previous relevant resolutions, with a view, *inter alia,* to making progress in the consideration of succession of States in respect of matters other than treaties.

3. Other questions relating generally to succession of States and Governments

213. In the light of the preceding paragraphs, it may be assumed that the Commission will continue to be concerned with the study of succession in respect of treaties and of succession in respect of matters other than treaties. Besides these aspects, the Commission may, however, like to consider, from the standpoint of its future long-term programme, certain other questions relating to the general heading of "Succession of States and Governments".

214. As has been mentioned above, [261] the Commission decided in 1967 to leave aside, for the time being, the question of "succession of membership of international organizations" and, in 1970, the Special

[255] *Yearbook of the International Law Commission, 1968,* vol. II. p. 221, document A/7209/Rev.1, paras. 78-79.

[256] *Ibid., 1969,* vol. II, p. 69, document A/CN.4/216/Rev.1.

[257] *Ibid.,* p. 225, document A/7610/Rev.1, para. 38.

[258] *Ibid.,* pp. 225-229, paras. 35-63.

[259] For the views expressed in the Sixth Committee on the Commission's consideration in 1969 of the question of economic and financial acquired rights and State succession, see *Official Records of the General Assembly, Twenty-fourth Session, Annexes,* agenda items 86 and 94 (*b*), document A/7746, paras. 67-83.

[260] *Yearbook of the International Law Commission, 1970,* vol. II, p. 131, document A/CN.4/226.

[261] See para. 196 above.

Rapporteur for succession in respect of treaties stated that he assumed that the draft articles on that topic would reserve the application of any relevant rules of international organizations governing succession to constituent instruments or to treaties adopted within such organizations. [262]

215. The Special Rapporteur assumed also that the draft articles on succession in respect of treaties would be limited to treaties concluded between States. If this assumption is finally endorsed by the Commission, treaties concluded between States and other subjects of international law, or between these other subjects, would remain outside the scope of the draft articles on succession in respect of treaties.

216. With regard to succession in respect of matters other than treaties, it is more difficult to determine the exact final scope of the draft articles which the Commission intends to prepare on the topic. In 1968 the Commission decided that succession in economic and financial matters should be considered first and, in 1969, it was agreed to begin with the study of public property and public debts and to postpone dealing directly with the problem of acquired rights. However, it should be recalled that the 1968 decision of the Commission was made on the understanding that it did not imply in any way that "all other questions" coming under the heading "succession in respect of matters other than treaties" would not be considered later.

217. So far as "succession of Governments" is concerned, the Commission in 1963 decided that the priority given to the study of State succession was fully justified and that succession of Governments would, for the time being, be considered only to the extent necessary to supplement the study on State succession. It should be noted that the present headings of the two topics currently under consideration omitted any reference to States or to Governments. However, in 1968, some members of the Commission recalled that "succession in respect of treaties" should cover only succession of States and leave succession of Governments aside. [263] Likewise, when the Commission decided to give priority, within "succession in respect of matters other than treaties", to the economic and financial aspects of succession, it entitled these aspects "Succession *of States* in economic and financial matters". [264] At present, the Commission is conducting its study of succession in respect of treaties and of succession in economic and financial matters on the basis of the general decision reached in 1963 and concentrating, therefore, its work on problems of State succession. This approach appears to have been endorsed by the General Assembly. The relevant paragraph (para. 4 (*b*)) of its resolution 2634 (XXV) refers only to "succession of States".

218. There are, accordingly, a number of questions coming under the general heading of "Succession of States and Governments" to which the Commission may like to give attention when planning its future long-term programme; the delimitation of such questions depends, however, to a large extent, upon the scope of the Commission's final draft articles on the two topics currently under consideration. Bearing this in mind, it would seem advisable to keep, for the time being, the general heading of "Succession of States and Governments" on the revised list of topics, which would permit the Commission to determine at a later stage how best to deal with such issues as may still be outstanding with respect to this branch of law in the light of the Commission's final draft articles on the two aspects now under study.

Chapter VI

Diplomatic and consular law

219. This general heading is intended to cover all major branches of international law concerning diplomatic and consular law, and questions related thereto. The matters dealt with have been divided in accordance with the work done, or being done, by the Commission. The final section concerns questions relating to the implementation of certain rules and which have recently attracted attention. The chapter is accordingly divided as follows:

(1) Diplomatic relations;
(2) Consular relations;
(3) Special missions;
(4) Representatives of States to international organizations;
(5) Questions concerning the implementation of certain rules of diplomatic and consular law.

1. Diplomatic relations

220. This topic was mentioned in the 1948 Survey [265] and included in the 1949 list. [266] As recommended by the General Assembly in resolution 685 (VII) of 5 December 1952, the Commission decided at its sixth

[262] *Yearbook of the International Law Commission, 1970*, vol. II, p. 27, document A/CN.4/224 and Add.1, para. 6.

[263] *Ibid., 1968*, vol. II, p. 222, document A/7209/Rev.1, para. 90.

[264] *Ibid.*, p. 221, para. 79. (Italics supplied).

[265] See para. 4 above.

[266] *Idem*. The topic was entitled "The law of diplomatic intercourse and immunities" in the 1948 Survey and "Diplomatic intercourse and immunities" in the 1949 list. The Commission's final draft of 1958 was entitled "Draft articles on diplomatic intercourse and immunities".

At the United Nations Conference on Diplomatic Intercourse and Immunities (Vienna, 1961) it was decided to give the following title to the convention adopted: "Vienna Convention on Diplomatic Relations" (see *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), pp. 50 and 69, document A/CONF.20/L.2, para. 17 and annex 1); and *ibid.*, vol. I (United Nations publication, Sales No. 61.X.2), p. 7, 4th plenary meeting, para. 4). For the text of the Convention and of the two protocols, see United Nations, *Treaty Series*, vol. 500, pp. 95, 223 and 241.

session (1954) to treat it as a priority topic. The same year, it appointed Mr. A. E. F. Sandström as Special Rapporteur. The Commission considered the topic at its ninth session (1957) and tenth session (1958) on the basis of the reports submitted by the Special Rapporteur. A preliminary draft was adopted in 1957. In the light of comments on the preliminary draft received from Governments in 1958, the Commission adopted at its tenth session a final draft, containing forty-five articles with commentaries, and requested the General Assembly that the draft be recommended to Member States with a view to the conclusion of a convention. The General Assembly, by resolution 1450 (XIV) of 7 December 1959, decided to convene an international conference of plenipotentiaries to consider the question and to embody the results of its work in an international convention, together with such ancillary instruments as might be necessary. The relevant chapter of the Commission's report on its tenth session was referred by the Assembly to the conference as the basis for its consideration of the question.

221. The United Nations Conference on Diplomatic Intercourse and Immunities met in Vienna from 2 March to 14 April 1961. The Conference adopted a convention entitled the "Vienna Convention on Diplomatic Relations", consisting of fifty-three articles and covering, from a legal standpoint, most major aspects of permanent diplomatic relations between States. The Convention codifies and develops progressively the customary rules on the matter. The Convention deals with: (*a*) diplomatic relations in general, including the establishment of diplomatic relations and of diplomatic permanent missions; (*b*) diplomatic facilities, privileges and immunities relating to the mission and is work as well as to persons composing the mission and their families; (*c*) the conduct of the mission and of its members; (*d*) the end of the functions of a diplomatic agent; (*e*) non-discrimination in the application of the provisions of the Convention. The Conference adopted also an optional protocol concerning acquisition of nationality [267] and an optional protocol concerning compulsory settlement of disputes. [268] The Convention and both protocols entered into force on 24 April 1964. On 1 April 1971, ninety-nine States were parties to the Convention, and twenty-nine and forty States respectively were parties to the two protocols.

222. The conclusion of the 1961 Vienna Conference would appear to have marked the successful completion of the codification work of the United Nations in this field.

2. Consular relations

223. As in the case of diplomatic relations, this subject was referred to in the 1948 Survey and included by the Commission in its 1949 list. [269] At its seventh session (1955) the Commission decided to begin the study of the topic and appointed Mr. J. Zourek as Special Rapporteur. The Special Rapporteur submitted his reports on the topic in 1957, 1960 and 1961. Although brief exchanges of views took place in 1956 and 1958, the Commission was not actually in a position to undertake a systematic and detailed study of the topic until its eleventh session in 1959. The Commission completed a provisional set of draft articles on consular intercourse and immunities at its twelfth session (1960). At its thirteenth session (1961) it adopted its final draft articles, taking the comments of Governments on the provisional draft into account, and recommended that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft and conclude one or more conventions on the subject.

224. The draft articles on consular relations, consisting of seventy-one articles accompanied by commentaries, was referred by General Assembly resolution 1685 (XVI) of 18 December 1961 to the international conference of plenipotentiaries convened by the Secretary-General pursuant to that resolution. A further discussion on the subject-matter of the draft articles took place in the Sixth Committee at the seventeenth session of the General Assembly in 1962. The United Nations Conference on Consular Relations, which met in Vienna from 4 March to 22 April 1963, adopted the Vienna Convention on Consular Relations, consisting of seventy-nine articles, an optional protocol concerning acquisition of nationality [270] and an optional protocol concerning the compulsory settlement of disputes. [271] The Convention and both optional protocols came into force on 19 March 1967. On 1 April 1971, forty-six States were parties to the Convention, and fifteen and eighteen States respectively were parties to the two protocols.

225. The Convention deals comprehensively with the legal aspects of consular relations governed by international law. Like the draft articles prepared by the Commission, the provisions contained in the Convention are mainly based on customary law and concor-

[267] The substantive provision of the protocol, namely that members of the mission not being nationals of the receiving States, and members of their families shall not acquire the nationality of that State "solely by the operation of the law of the receiving State" was included in the Commission's draft articles (article 35). The Conference decided, however, to make it the subject-matter of a separate optional protocol.

[268] The Commission's draft articles contained a provision (article 45) concerning the settlement of disputes which established a compulsory settlement procedure. This provision was deleted from the Convention by the Conference and replaced by a separate optional protocol. The optional protocol adopted by the Conference regulates matters in a more detailed fashion than did the provision in the Commission's draft articles.

[269] The topic was entitled "The law of consular intercourse and immunities" in the 1948 Survey and "Consular intercourse and immunities" in the 1949 list. In 1961, the Commission entitled its final draft articles on the topic "Draft articles on consular relations". The text adopted by the United Nations Conference on Consular Relations was entitled "Vienna Convention on Consular Relations". For the text of the Convention and of the two protocols, see United Nations, *Treaty Series*, vol. 596, pp. 261, 469 and 487.

[270] This optional protocol replaces article 52 of the Commission's draft articles.

[271] This optional protocol was elaborated at the Conference. The Commission's draft articles did not contain provisions concerning the settlement of disputes.

dant rules to be found in international conventions, especially consular conventions. In formulating the Convention, due account was also taken of the practice of States as evidenced by internal consular regulations, in so far as these regulations are in conformity with the fundamental principles of international law. The broad division of matters covered by the Convention is as follows: (*a*) consular relations in general (establishment and conduct of consular relations and end of consular functions); (*b*) facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post, as well as to members of their respective families; (*c*) the régime of honorary consular officers and consular posts headed by such officers; (*d*) general provisions, including non-discrimination and the relationship between the Convention and other international agreements.

226. The codification and progressive development of the rules of international law concerning consular relations has therefore been completed, at least for the foreseeable future. Drawing when the purposes and principles mentioned in the Preamble to the Charter of the United Nations—in particular the principle of the sovereign equality of States—the Vienna Convention consecrates implicitly the abolition of the former "capitulation régimes". At the time of the adoption of the Convention such régimes had already disappeared from international relations, but the abrogation had been made by a series of particular legal acts concerning specific cases or groups of cases. By adopting a general consular convention inspired by the sovereign equality of States, the international community, through a Conference which was attended by delegations of ninety-five States, sealed this abolition by a collective act.

227. Following the Vienna Convention, the main significant development in the field of consular law has been the adoption of two multilateral regional conventions, namely the European Convention on Consular Functions (11 December 1967), [272] and the Convention on the Abolition of Legalization of Documents executed by Diplomatic Agents or Consular Officers (7 June 1968), [273] both of them concluded within the framework of the Council of Europe.

3. Special missions

228. In submitting its final draft on diplomatic intercourse and immunities to the General Assembly in 1958, [274] the Commission stated that although the draft dealt only with permanent diplomatic missions, diplomatic relations might also assume other forms, under the heading "*ad hoc* diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. [275] At its eleventh session (1959) the Commission decided to place the question of *ad hoc* diplomacy on the agenda of its twelfth session as a special topic, and Mr. A. E. F. Sandström, who had acted as Special Rapporteur for the subject of diplomatic intercourse and immunities, was appointed as Special Rapporteur for this further topic. On the basis of a report submitted by the Special Rapporteur, the Commission adopted, at its twelfth session (1960), draft articles 1 to 3 on special missions, together with commentaries. The Commission, although stating that the draft should be regarded as constituting only a preliminary study of the matter, recommended that it should nevertheless be referred to the United Nations Conference on Diplomatic Intercourse and Immunities (Vienna, 1961) for consideration. The Commission decided not to deal, at least at that juncture, with the topic of "diplomatic conferences" which, as the Commission observed, was linked both to "special missions" and to the topic of "relations between States and international organizations". By resolution 1504 (XV) of 12 December 1960, the General Assembly referred the three draft articles on special missions to the Conference on Diplomatic Intercourse and Immunities.

229. The Sub-Committee established at the United Nations Conference to examine the question of special missions noted that, because of lack of time, the draft articles had not been submitted to governments for their comments and that, in substance, they did little more than indicate which of the rules on permanent missions applied to special missions. The Sub-Committee considered that, while the basis rules might be the same, it could not be assumed that this approach necessarily offered a complete solution. On the basis of the recommendation adopted by the Conference, the General Assembly, in resolution 1687 (XVI) of 18 December 1961, accordingly requested the Commission to study further the subject of special missions.

230. At its fifteenth session (1963) the Commission appointed Mr. M. Bartoš as Special Rapporteur for the topic. The Special Rapporteur submitted reports in 1964, 1965, 1966 and 1967. A provisional first set of draft articles was adopted by the Commission in 1964 and completed in 1965. At its eighteenth session (1966) the Commission considered certain questions of a general nature, amongst them the question of whether provisions should be included concerning the legal status of the so-called high-level special missions. Finally, at its nineteenth session (1967) the Commission re-examined the whole provisionnal draft, taking into account the comments and observations received from governments, and adopted a final draft on special missions, consisting of fifty articles with commentaries. The draft, which covered itinerant envoys but not delegates to conferences, was submitted by the Commission to the General Assembly with the recommen-

[272] Council of Europe, *European Treaty Series*, No. 61.

[273] *Ibid.*, No. 63.

[274] See para. 220 above.

[275] For a detailed account of the Commission's consideration of the topic of special missions, see *Yearbook of the International Law Commission, 1967*, vol. II, pp. 345 *et seq.*, A/6709/Rev.1, paras. 9-32.

dation that appropriate measures be taken for the conclusion of a convention on special missions.

231. By resolution 2273 (XXII) of 1 December 1967, the General Assembly decided to include an item entitled "Draft convention on special missions" in the provisional agenda of its twenty-third session, with a view to the adoption of such a convention by the General Assembly. The draft articles on special missions were accordingly examined by the Sixth Committee during the General Assembly's twenty-third and twenty-fourth sessions, in 1968 and 1969. By resolution 2530 (XXIV) of 8 December 1969, the General Assembly adopted the Convention on Special Missions which had been agreed upon at the Sixth Committee, together with an Optional Protocol concerning the Compulsory Settlement of Disputes. [276] The Convention will enter into force thirty days following the date of deposit of the twenty-second instrument of ratification or accession. The Convention was open for signature until 31 December 1970, by which date fourteen States had signed the instrument, and ten States had signed the Protocol. As of 1 April 1971 no instrument of ratification or accession had been deposited to either instrument.

232. The Convention provides a full legal framework for the operation of a special mission, defined in article 1, paragraph (*a*), as

> a temporary mission, representing the State, which is sent by one to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.

It regulates the sending and conduct of special missions as well as its facilities, privileges and immunities. Like the Commission's draft, the Convention contains a provision concerning the sending of special missions by two or more States to another State in order to deal at the same time with a question of common interest, but does not deal with the over-all question of conferences. [277] A provision of the Convention, article 21, [278] concerned the status of the Head of State and persons of high rank leading or taking part in a special mission.

233. Finally, it may be noted that the non-discrimination provision of the Commission's draft was in part amended, taking into consideration paragraph 1 (*b*), of article 41 (Agreements to modify multilateral treaties between certain of the parties only) of the Vienna Convention on the Law of Treaties. [279]

4. Representatives of States to international organizations [280]

234. When the Commission submitted its draft articles on diplomatic intercourse and immunities in 1958, it pointed out in its report that, apart from diplomatic relations between States there was also the question of relations between States and international organizations. [281] The Commission noted, however, that these matters are, as regards most organizations, governed by special conventions. [282] In the course of the discussion in the Sixth Committee of the Commission's report, the proposal was made that the General Assembly should request the Commission to include in its agenda the subject of relations between States and international organizations. On the recommendation of the Sixth Committee, the General Assembly adopted resolution 1289 (XIII) of 5 December 1958, inviting the Commission

> to give further consideration to the question of relations between States and inter-governmental international organizations at the

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[276] The text of the Convention and of the Protocol are annexed to General Assembly resolution 253 (XXIV).

[277] An amendment submitted by the United Kingdom, the purpose of which was to add to the Convention a new article concerning conferences was considered at the Sixth Committee. The amendment was subsequently withdrawn, but the Sixth Committee decided, on the proposal of the United Kingdom representative, to include in its report on the topic to the General Assembly the following summary of the views expressed during the discussion of the question of conferences:

> "The Committee was of the opinion that the question of legal status, privileges and immunities of members of delegations to international conferences and of the secretariat of conferences constitued a gap in the law relating to international representation which remained to be filled. Once again, it was necessary to start from the proposition that the status, privileges and immunities should be those necessary to ensure the efficient and independent exercise of their respective functions. There were a number of precedents which could serve as a starting point for the study of the problem—the conventions on the privileges and immunities of international organizations (including those relating to the United Nations and to the specialized agencies), together with the Vienna Conventions on Diplomatic and Consular Relations and the forthcoming Convention on Special Missions.
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> "The Committee noted that the International Law Commission's Special Rapporteur on relations between States and international organizations, Mr. El-Erian, had indicated his intention to include articles on the status of delegations to conferences in the draft articles on representatives to international organizations. The Committee also noted that the International Law Commission had discussed, and would discuss again at its next session, the general question of further work on the status, privileges and immunities of delegations to international conferences.
>
> "The Committee requested the International Law Commission to take into account in its further work on the subject the interest and the views expressed in the debates in the Sixth Committee at the twenty-fourth session of the General Assembly." (*Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda item 87, document A/7799, para. 178).

[278] Paragraph 1 of this article is quoted in paragraph 76 above.

[279] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[280] As indicated below, the legal status, privileges and immunities of representatives of States to international organizations has been considered by the Commission within the framework of the topic "Relations between States and international organizations". For questions to other aspects of that topic, see chapter XIV below ("The law relating to international organizations").

[281] The Commission referred also to the question of the privileges and immunities of the organizations themselves. For this question, see likewise chapter XIV below.

[282] *Yearbook of the International Law Commission, 1958* vol. II, p. 89, A/3859, para. 52.

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.

235. At its fourteenth session (1962) the Commission decided to include the question in its programme of work, to place it on the agenda of its fifteenth session, and to appoint Mr. A. El-Erian as Special Rapporteur for the topic. The Special Rapporteur's first report, [283] which was submitted in 1963, examined the subject with a view to defining its scope and the order in which its study should be undertaken. Three groups of questions were distinguished: (*a*) those relating to the general principles of the international personality of international organizations and their legal capacity; (*b*) issues concerning international immunities and privileges, comprising the institution of legations in respect to such organizations and diplomatic conferences as well as the privileges and immunities of international organizations themselves; (*c*) special questions concerning the law of treaties in respect to international organizations, responsibility of international organizations and succession between them. The Special Rapporteur suggested that a distinction should be made between questions concerning the juridical personality and immunities of international organizations, and the special questions referred to above; consideration of the latter, it was felt, should be deferred until the Commission had completed or made substantial progress in its work on the branches of law involved in relation to States.

236. The Commission's discussion at its fifteenth and sixteenth sessions revealed differences of interpretation and approach as to the scope of the topic "Relations between States and international organizations" and the concept of the international personality of international organizations. Some of the more interesting issues raised, from the standpoint of considering topics for inclusion in the Commission's future long-term programme, will be considered in the context of chapter XIV below ("The law relating to international organizations"). However, it may be noted here that, following the discussion at the sixteenth session, the majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of "diplomatic law", in its application to relations between States and international organizations, should receive priority. Subsequently, the Commission has concentrated its work with respect to the topic on the study of the status, privileges and immunities of representatives of States to international organizations.

237. The further study by the Commission of "diplomatic law" applicable in relations between States and international organizations was not resumed until its twentieth session (1968). In 1967, however, the Special Rapporteur submitted a second report [284] which summarized the previous discussion and surveyed the principal issues; the report also contained three draft articles of a general character. Thereafter the Special Rapporteur submitted a series of further reports, [285] containing draft articles and commentaries, relating to the representatives of States to international organizations. The Commission adopted, at its twentieth, twenty-first and twenty-second sessions, a draft comprising, besides certain general provisions, draft articles on permanent missions to international organizations, permanent observers of non-member States, and delegations to organs of international organizations and to conferences convened by international organizations. [286] This provisional draft, consisting of 116 articles with commentaries, has been transmitted to governments for comments. By resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work, taking into account the views expressed at the twenty-third, twenty-fourth and twenty-fifth sessions of the General Assembly and the comments which may be submitted by Governments, with the object of presenting in 1971 a final draft on the topic.

238. The draft articles apply to representatives of States to international organizations of a universal character, defined in article 1 as organizations "whose membership and responsibilities are on a world-wide scale". It deals, therefore, with permanent missions and permanent observer missions to international organizations of a universal character, as well as with delegations of States to organs of an international organization of a universal character, and to conferences convened by or under the auspices of such organizations. The difference of opinion as to whether or not the Commission's work should extend to regional organizations was met by the adoption of an intermediate solution, to the effect that the limitation of the scope of the draft articles to international organizations of a universal character should not be deemed to entail their non-application to representatives to other organizations, if those representatives would be subject independently to the same rules as are contained in the Commission's draft. [287]

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[283] *Ibid., 1963,* vol. II, p. 159, A/CN.4/161 and Add.1.

[284] *Ibid., 1967,* vol. II, p. 133, document A/CN.4/195 and Add.1.

[285] *Ibid., 1968,* vol. II, p. 119, document A/CN.4/203 and Add.1-5; *ibid., 1969,* vol. II, p. 1, document A/CN.4/218 and *ibid., 1970,* vol. II, p. 1, document A/CN.4/227 and Add.1-2. At the Commission's twenty-second session (1970) the Special Rapporteur also submitted a working paper on temporary observer delegations and conferences not convened by international organizations (A/CN.4/L.151).

[286] The Commission also decided, at its twentieth session in 1968, to change the word "inter-governmental" in the title of the item to "international", in accordance with the terminology used in other codification conventions (*ibid., 1968,* vol. II, p. 195, document A/7209/Rev.1, para. 23). To avoid any misunderstanding, article 1, paragraph (*a*) of the draft states that, for the purposes of the present articles, and international organizations" means an intergovernmental organization.

[287] The views expressed during the twenty-fifth session of the General Assembly, with regard to the scope of the draft articles, are summarized in *Official Records of the General Assembly, Twenty-fifth Session, Annexes,* agenda item 84, document A/8147, para. 17.

239. The draft articles contain provisions safeguarding existing rules and agreements concerning international organizations and permitting the conclusion of new agreements in the future. However, the issue raised since the beginning of the consideration of the topic by the Commission, regarding the effect that the adoption of a new convention would have on existing rules and agreements, such as the Conventions of 1946 and 1947 on the privileges and immunities of the United Nations and of specialized agencies, continues to be of major concern. [288] The part dealing with delegations to organs and to conferences contains also a provision (article 80) concerning the rules of procedure of a conference. In the commentary to this provision, the Commission expressed the opinion that

> in view of their nature, rules of procedure should not derogate from certain provisions, such as those relating to privileges and immunities or upon which the host State may have relied in making arrangements for the conference. [289]

Provisions concerning non-discrimination in the application of the draft have likewise been included.

5. Questions concerning the implementation of certain rules of diplomatic and consular law

240. With the adoption of the Vienna Conventions on Diplomatic Relations and Consular Relations, together with the Convention on Special Missions, and with the expected successful completion of the Commission's work on representatives of States to international organizations, all major branches of the diplomatic and consular law are, or will be in the near future, codified by general codification conventions. Problems involving the protection and inviolability of diplomatic agents, representatives of States and consular officers have, however, attracted considerable attention in recent years.

241. The matter was placed before the General Assembly at its twenty-second session and discussed in the Sixth Committee. In resolution 2328 (XXII) of 18 December 1967, the General Assembly, besides urging States Members which had not yet done so to accede to the Convention on the Privileges and Immunities of the United Nations and to ratify or accede to the Vienna Convention on Diplomatic Relations, declared that it

> 1. *Deplores* all departures from the rules of international law governing diplomatic privileges and immunities and the privileges and immunities of the Organization;
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> ...
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> 3. *Urges* States Members of the United Nations, whether or not they have acceded to the Convention on the Privileges and Immunities of the United Nations, to take every measure necessary to secure the implementation of the privileges and immunities accorded under Article 105 of the Charter to the Organization, to the representatives of Members and to the officials of the Organization;
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> ...
>
> 5. *Urges* States, whether or not they are parties to the Vienna Convention on Diplomatic Relations, to take every measure necessary to secure the implementation of the rules of international law governing diplomatic relations, and in particular to protect diplomatic mission and to enable diplomatic agents to fulfil their tasks in conformity with international law.

242. More recently, in a letter dated 5 May 1970, addressed to the President of the Security Council, the Permanent Representative of the Netherlands to the United Nations drew attention to the problem, in the light of the increasing number of attacks on diplomats which had inflicted great danger and hardship and might endanger the conduct of friendly relations between States. The President of the Security Council transmitted the letter to the President of the International Court of Justice and to the Chairman of the Commission. The letter was brought to the attention of members of the Commission. In the reply sent to the President of the Security Council, the Chairman referred to the work done by the Commission in this area, in particular in the Commission's draft on diplomatic intercourse and immunities; a quotation was given from the Commission's commentary to article 27 of its final draft, in which the Commission recorded its interpretation of the principle of the personal inviolability of diplomatic agents. At the conclusion of the letter it was stated that the Commission expected to continue to be concerned with this problem in the future. [290]

243. During the discussion of the Commission's report in the Sixth Committee at the General Assembly's twenty-fifth session, certain representatives referred to the serious attacks on diplomatic agents which had recently occurred and to the international tension they created. These speakers stressed the need that adequate measures be adopted to put an end to the situation and to ensure the protection and inviolability of such agents. The wish was expressed that the Commission would take the question of the protection of members of diplomatic missions and consular posts into consideration when determining the topics to be included in its future programme. [291]

244. When attacks have actually been carried out on the person of a diplomatic agent, a representative of a State or consular agent (whether involving the direct infliction of physical injury or the deprivation of liberty, as by acts of kidnapping) by individuals or organized

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[288] For the views expressed on this question in the Sixth Committee during the twenty-fifth session of the General Assembly, see *ibid.*, para. 21. On this question, see also chapter XIV below.

[289] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 286, document A/8010/Rev.1, chap. II, B, commentary to article 80.

[290] *Ibid.*, p. 273, document A/8010/Rev.1, para. 11.

[291] See *Official Records of the General Assembly, Twenty-fifth Sesion, Annexes*, agenda item 84, document A/8147, paras. 14 and 113. It was also suggested that a statement on the issue should be included in the present document.

groups uncontrolled by the government or opposed to it, the duty of the receiving State to protect and restore the inviolability of the person concerned continues. In such circumstances, the government of that State is obligated, under general principles of law, to take all the measures which may reasonably be required to re-establish the inviolability of such person and to apprehend the offenders. Under article 29 of the Vienna Convention on Diplomatic Relations, [292] which reflects customary international law, the receiving government is required to take "all appropriate steps" to prevent any attack on the person, freedom or dignity of the diplomatic agent. As stated in the Commission's commentary on this provision, [293] this may include the provision of a special guard, if circumstances so require. The issue, so far as the duties of the receiving State are concerned, thus becomes one of the proportionality of the measures taken in the particular case; in the event that the receiving State had advance knowledge of the attack, or ought reasonably to have foreseen its occurrence, then steps (such as provision of a special guard) are required which might otherwise not be regarded as appropriate.

245. Following the actual commission of an attack on a representative of another State, the receiving State is required to take all steps which may reasonably be required to apprehend the offenders. In the cases which have recently come into prominence the receiving government has had either to accede to the demands (for example, to free certain persons detained by the government) of the persons who have attacked or abducted the diplomat (or other agent, as the case may be), or to accept that he might suffer personal harm. Although various provisions of international law can be invoked, it cannot be said that international law provides a rule which automatically determines how this choice is to be exercised: whether, in all circumstances, preference is to be given to the preservation of the safety of the diplomat, or to other considerations which might also be legitimate with respect to the State where the act has occurred.

246. It has been suggested, however, that the practical implementation of the obligation under international law, requiring the host State to respect, and to ensure respect for, the person of a diplomatic agent (or other person to whon a duty of special protection is owed), might be aided by the adoption of supplementary measures. Besides the references to the need that suitable measures should be taken to deal with the problem, expressed during the twenty-fifth session of the General Assembly, [294] consideration has also been given to the matter by two regional organizations. The measures adopted at regional level emphasize the seriousness of the incidents in question, indicate, *inter alia,* collective means which may be taken to prevent attacks on diplomats, and call upon governments to punish those who make such attacks. The commission of deliberate acts which threaten the life or safety of diplomatic agents may thus come to assume the character of a recognized "common crime" or one which is acknowledged to be of international concern. [295]

247. Within the framework of OAS, a Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, was signed on 2 February 1971. [296] Although cast in terms wider than that of protection of persons having diplomatic or consular status *per se,* the provisions of article 1 of the Convention may be noted here:

> The contracting States undertake to co-operate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this convention, to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life of physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connexion with those crimes.

248. In addition to the provisions relating to extradition and prosecution previously mentioned, contracting States agree to co-operate in preventing and punishing offences falling within the scope of the Convention by taking measures within their territories to prevent the commission of such offences in the territory of other contracting States; by exchanging information and taking administrative steps in order to protect persons to whom the State owes a duty to give special protection according to international law; to endeavour

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[292] That article provides:

"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

[293] The Commission's commentary on article 27 of its draft (which became, without substantive amendment, article 29 of the Vienna Convention) includes the following:

> This articles confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences. (*Yearbook of the International Law Commission, 1958*, vol. II, p. 97, document A/3859, para. 53.)

This passage was quoted in the letter sent by the Chairman of the Commission to the President of the Security Council and mentioned in paragraph 242 above.

[294] See para. 243 above. As regards the adoption of General Assembly resolution 2328 (XXII) of 18 December 1967, see para. 241 above.

[295] The proposals have thus certain similarities with those put forward with respect to aerial hijacking, referred to in paras. 326-329 below. As regards other offences of international concern, see generally paras. 444-446 below.

[296] For a further summary of the Convention (in particular as regards prosecution and extradition), see para. 85 above.

to have the criminal acts contemplated in the Convention included in their penal laws, if not already so included; and to comply expeditiously with requests for extradition with respect to the offences in question.

249. The Committee of Ministers of the Council of Europe adopted, on 11 December 1970, a series of recommendations addressed to member Governments, on the topic of protection of members of diplomatic missions and consular posts. They suggested that member Governments should survey the security measures in force for the protection of such persons and, whenever necessary, reinforce those measures, bearing in mind the provisions of the Convention on Diplomatic Relations, the Convention on Consular Relations and the Convention on Special Missions. Secondly, it was recommended that member Governments should examine the extent to which their national laws afforded the possibility of punishing severely the authors of attacks on the life and person of members of diplomatic missions and consular posts. Lastly, member Governments were asked to ensure close co-operation among themselves as regards the protection of members of diplomatic missions and consular posts against such attacks.

Chapter VII

The law of treaties

250. This chapter is subdivided as follows:

(1) The Vienna Convention on the Law of Treaties;

(2) International agreements not within the scope of the Vienna Convention on the Law of Treaties;

(3) Question of participation in a treaty;

(4) The most-favoured-nation clause.

A number of particular issues involving the application of the law of treaties in various specific contexts are dealt with elsewhere in the survey. [297]

1. The Vienna Convention on the Law of Treaties

251. The 1948 Survey, [298] contained (in paragraphs 90-92) a summary of the efforts previously undertaken with a view to the codification of the law of treaties and listed the major reasons why the codification of this branch of law was of keen importance. Treaties occupied a leading place in the system of international law, and the majority of questions which had come before the Permanent Court of International Justice had concerned questions of treaty interpretation; nevertheless there was scarcely a branch of the law of treaties which was free from doubt and, in some cases, confusion. This applied to questions of terminology; to the legal consequences of the distinction drawn between treaties and other agreements; to the designation of parties; to the necessity, or otherwise, of ratification; to the relevance of constitutional limitations upon the treaty-making power; to the conferment of benefits on third parties; and to the general field of rules to be followed regarding the interpretation of treaties. Above all, it was said, there was room for increased scientific effort to clarify the conditions of the operation of the doctrine *rebus sic stantibus*. This brief recital of the problems, as they were seen in 1948, and the Commission's success in drafting a set of articles which formed the basis for the adoption, in 1969, of the Vienna Convention on the Law of Treaties, serves to illustrate both the magnitude of that achievement and the range of issues which had to be considered and resolved in order to achieve a convention codifying this branch of law.

252. Following the inclusion of the topic "Law of treaties" in the 1949 list, [299] the question was studied by four Special Rapporteurs in turn: Mr. Brierly (1949-1952), Mr. (later Sir Hersch) Lauterpacht (1952-1954), Sir Gerald Fitzmaurice (1955-1960), and Sir Humphrey Waldock (1961-1966). [300] The Commission examined the reports submitted by these Rapporteurs at various sessions between 1950 and 1966. One feature of the discussion to which attention may be drawn, since the issue concerned is one of possibly general significance, was the question whether the work of the Commission should take the form of a draft convention or of an expositary code. The third Special Rapporteur, Sir Gerald Fitzmaurice, favoured the latter approach, while the other Special Rapporteurs were of the opinion that the aim of the Commission should be to prepare a set of draft articles which could serve as a basis for a convention. The Commission decided at its thirteenth session (1961), when Sir Humphrey Waldock was appointed, to follow the latter course. At its following session, it pointed out that a convention would give a better opportunity than an expositary code to consolidate the law, and that the adoption of a convention would give the many new States which had recently become members of the international community an opportunity to participate in the formulation of the law. [301] Between 1962 and 1966 the Commission gave priority to the study of the law of treaties and to the preparation of draft articles thereon.

253. By resolution 2166 (XXI) of 5 December 1966, the General Assembly decided to convene a plenipotentiary conference and to refer to it the final draft

[297] See in particular, as regards succession in respect of treaties, paras. 199-205 above.

[298] See para. 4 above.

[299] *Idem.*

[300] For a detailed history of the Commission's consideration of the topic and the various reports submitted, see *Yearbook of the International Law Commission, 1966*, vol. II, p. 173, document A/6309/Rev.1, part II, paras. 9 *et seq.* Besides examining the reports submitted and adopting draft articles, the Commission submitted reports to the General Assembly on the question of reservations to multilateral conventions and on extended participation in general multilateral treaties concluded under the auspices of the League of Nations. For a summary, see *The Work of the International Law Commission* (United Nations publication, Sales No. 67.V.4), pp. 22-24 and 41-43.

[301] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, paras. 23 *et seq.*

articles on the law of treaties, consisting of seventy-five articles with commentaries adopted by the Commission the same year. The General Assembly decided also to have a further discussion on the law of treaties before the conference was convened in 1968. Accordingly, the topic was discussed in the Sixth Committee at the General Assembly's twenty-second session; in the light of the discussion the Assembly adopted resolution 2287 (XXII) or 6 December 1967, supplementing the previous one. The United Nations Conference on the Law of Treaties was held at Vienna, the first session in 1968 (26 March–24 May) and the second session in 1969 (9 April–22 May). The Conference adopted the Vienna Convention on the Law of Treaties [302] on 23 May 1969, together with two declarations and five resolutions annexed to the Final Act of the Conference. [303] The Convention was signed by forty-seven States. As of 1 April 1971, five States had ratified or acceded to the Convention, which will enter into force thirty days following the deposit of the thirty-fifth instrument of ratification or accession.

254. With regard to scope of the work undertaken, the Vienna Convention on the Law of Treaties, in line with the draft articles prepared by the Commission, applies to treaties between States. [304] For the purposes of the Convention the term "treaty" means

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. [305].

255. The principal matters covered in the Convention are: part II: conclusion and entry into force of treaties (including reservations and provisional application of treaties); part III: observance, application and interpretation of treaties (including treaties and third States); part IV: amendment and modification of treaties; part V: invalidity, termination and suspension of the operation of treaties (including the procedure for the application of the provisions of that part and for the settlement of disputes concerning the application or interpretation of those provisions, and the consequences of the invalidity, termination or suspension of the operation of a treaty); part VI: miscellaneous provisions (dealing with cases of State succession, State responsibility and outbreak of hostilities, diplomatic and consular relations and the conclusion of treaties and the case of an aggressor State); and part VII: depositaries, notifications, corrections and registration. The conciliation procedure referred to in article 66 of part V is specified in an annex to the Convention.

2. International agreements not within the scope of the Vienna Convention on the Law of Treaties

256. Since the Vienna Convention as such applies only to treaties concluded between States in written form, the law applicable to other international agreements remains to be considered. Although there was some question during the Commission's consideration of the topic as to whether the draft articles should deal also with treaties or international agreements between States and other subjects of international law or between such subjects themselves, particularly with regard to international organizations, the Commission finally decided to exclude them from the scope of its draft articles on the law of treaties. [306] The Commission also decided not to deal with international agreements not in written form. The United Nations Conference on the Law of Treaties endorsed the conclusions reached by the Commission on this question.

257. To prevent any misconception of the decisions mentioned above, the Commission included in its draft articles a provision containing a general reservation regarding (*a*) the legal force of international agreements concluded between States and other subjects of international law or between such other subjects of international law, and of international agreements not in written form; and (*b*) the application to them of any of the rules set forth in the draft articles to which they would be subject independently of these articles. [307] The provision, in the form finally adopted by the Conference in article 3 of the Vienna Convention, is as follows:

> The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
>
> (*a*) The legal force of such agreements;
>
> (*b*) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
>
> (*c*) The application of the Convention to the relations of State as between themselves under international agreements to which other subjects of international law are also parties.

258. The inclusion of sub-paragraph (*b*) of article 3 in the Convention, like the corresponding provision of the draft articles, may be explained by the fact that, in preparing a convention on the law of treaties concluded between States in written form, the Conference and the Commission were conscious that they were likewise engaged in the codification and progressive development of the general law of treaties and that,

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302 See *Official Records of the United Nations Conference on the Law of Treaties Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

303 *Ibid.*, p. 285.

304 See article 1 of the Convention. The Convention does not define the term "State". The Commission, in paragraph 4 of its commentary to draft article 5, entitled "Capacity of States to conclude treaties" (*ibid.*, p. 12), indicates that the term "State" as used in paragraph 1 of the article means "a State for the purposes of international law". The Conference deleted paragraph 2 of draft article 5 relating to the capacity of States members of a federal union to conclude treaties.

305 Article 2, para. 1 (*a*), of the Convention.

306 *Yearbook of the International Law Commission, 1966*, vol. II, p. 176 *et seq.*, A/6309/Rev.1, part II, para. 28 and commentaries to articles 1, 2 and 3, *passim*.

307 See draft article 3 (and commentary); para. 4 of commentary to draft article 1; and paras 5 and 7 of commentary to draft article 2 (*ibid.*, pp. 187-191).

consequently, several rules set out in the Convention might have relevance in regard to international agreements formally excluded from the scope of the Convention itself. This matter is particularly important as regards any further work of the Commission in this sphere, since it implies that the starting point of any study of the law applicable to those international agreements should be the Vienna Convention on the Law of Treaties, or at least the substantive provisions in the Convention having a general character, and that such a study should concentrate rather on the special features of the agreements in question, and not on a reconsideration of the general issues already settled by the Convention. By adding sub-paragraph (*c*) to the provision proposed by the Commission, the Conference went still further in underlining the general nature of several substantive rules embodied in the Convention.

(a) *Treaties concluded between States and international organizations or between two or more international organizations* [308]

259. At the United Nations Conference on the Law of Treaties amendments were submitted with a view to extending the scope of the Convention to treaties concluded between two or more States or other subjects of international law. These amendments were withdrawn, but the Conference adopted a resolution entitled "Resolution relating to article 1 of the Vienna Convention on the Law of Treaties", annexed to the Final Act, recommending that the General Assembly should refer to the Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations. Acting on this suggestion, in resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended (paragraph 5):

that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question. [309]

260. At its twenty-second session (1970) the Commission included this question in its general programme of work and set up a Sub-Committee to consider the preliminary problems involved in the study of the topic. The Sub-Committee's report, as adopted by the Commission, [310] requested the Secretariat to undertake certain preparatory work, in particular as regards United Nations practice, and asked the Chairman (Mr. P. Reuter) to submit to members of the Sub-Committee a questionnaire concerning the method of treating the topic and its scope. The replies received, prefaced by an introduction by the Chairman, were to be circulated as a working paper at the Commission's session in 1971. [311]

261. The Commission is, therefore, already engaged in preliminary work necessary to undertake the substantive study of this new topic. Its future work on the question of treaties concluded between States and international organizations or between two or more international organizations may be expected to provide further clarification of this particular aspect of the law of treaties. At its twenty-fifth session, the General Assembly by resolution 2634 (XXV) of 12 November 1970 recommended that the Commission should continue its consideration of the question.

(b) *International agreements concluded with or between subjects of international law other than States or international organizations.*

262. The question presents itself as to whether international agreements concluded with or between subjects of international law other than States or international organizations is a matter which should be included by the Commission in its long-term programme of work. A prior necessity would appear to be a clarification or a definition of the "other subjects" concerned.

263. The Commission's commentaries to the set of draft articles on the law of treaties provisionally adopted in 1962, and the commentaries to the final draft articles on that topic adopted in 1966, contain some indications of what the Commission had in mind when referring to "other subjects" of international law. Paragraph 8 of the commentary to article 1 of the 1962 draft states:

The phrase "other subjects of international law" is designed to provide for treaties concluded by: (*a*) international organizations, (*b*) the Holy See, which enters into treaties on the same basis as States, and (*c*) other international entities, such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law. [312]

264. Further, paragraph 2 of the commentary to article 3 of the same set of draft articles indicates:

The phrase "other subjects of international law" is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded. [313]

265. Leaving aside the question of the Holy See and of international organizations, it should be recalled that

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[308] For a historical survey of the question, see document A/CN.4/L.161.

[309] For a summary of views expressed in the Sixth Committee in connexion with this recommendation, see *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (*b*) document A/7746, paras. 109-115.

[310] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89. The Sub-Committee was composed of the following thirteen members: Mr. P. Reuter (Chairman), Mr. G. Alcívar, Mr. E. Castrén, Mr. A. El-Erian, Mr. Nagendra Singh, Mr. A. Ramangasoavina, Mr. S. Rosenne, Mr. J. Sette Câmara, Mr. A. Tabibi, Mr. D. Thiam, Mr. S. Tsuruoka, Mr E. Ustor and Sir Humphrey Waldock.

[311] The replies are reproduced in annex II to document A/CN.4/250 (see below, p. 189).

[312] *Yearbook of the International Law Commission, 1962*, vol. II, p. 162, document A/5209, chap. II, sect. II.

[313] *Ibid.*, p. 164.

paragraph 5 of the commentary to article 2 of the Commission's final draft articles on the law of treaties[314] refers expressly to "insurgent communities" and paragraph 2 of the commentary to article 3 of the same draft uses the expression "non-Statal subjects of international law".[315] As the Commission noted in 1962, the capacity of "insurgent communities" to conclude treaties is linked to the question of their recognition as such.[316]

266. It may be, therefore, that before undertaking a study of the treaties so concluded, the Commission would wish to consider whether or not it should first make a study, on a wider basis, of the legal status of the "other subjects of international law" concerned, so as to determine (however broadly) which subjects of international law were under discussion, before examining the relatively specialized question of the degree to which international agreements to which they are parties are subject to particular rules. Although it was not necessary to follow this course in the case of treaties concluded between States, since acceptance of the notion of statehood and its attributes could be assumed, it will be noted from chapter XIV ("The law relating to international organizations") that some difficulty was experienced initially in deciding which international organizations should be dealt with in the Commission's work. This issue would appear to be even more fundamental as regards the other subjects of international law under discussion.

(c) *International agreements not in written form*

267. The question of whether oral or tacit international agreements should be the subject of a separate study by the Commission does not permit of an easy answer. The Commission itself

> recognized that oral international agreements may possess legal force and that certain of the substantive rules set out in the draft articles may have relevance also in regard to such agreements.[317]

This category of international agreements has not been greatly studied in the literature, and, virtually by definition, has been relatively little recorded in works dealing with State practice. Although no statistics are available, the main instances at the present time of oral agreements (as opposed to oral declarations of a unilateral character) are, in all probability, either agreements of a confidential political nature, made between leading figures (for example, during the visit of a head of State or government, or at foreign minister level) and often more in the nature of a mutual understanding than an agreement having precise obligations of a legal character, or more commonly, an agreement reached (for example, during a visit of a diplomatic agent to the foreign ministry of the receiving State, or even by telephone) on relatively minor points, perhaps involving matters of detail concerning the application or interpretation of an existing treaty. It should, however, be recalled that a dispute involving an oral agreement reached the Permanent Court of International Justice, the "Ihlen declaration" referred to in the *Legal Status of Eastern Greenland Case*.[318]

268. Having regard to the fact that the legal force of those international agreements is not in question, their very nature, the relative minor importance of most of them, and the absence of any particular request from Member States or from members of the Commission to codify the topic, it is suggested that the Commission may like to decide not to take up the study of oral or tacit agreements, unless for some reason circumstances would advise on the contrary.

3. Question of participation in a treaty

269. The Commission considered this issue when preparing its draft articles on the law of treaties.[319] Article 8 of the 1962 draft provided that

> 1. In the case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.
>
> 2. In all other cases, every State may become a party to the treaty:
>
> (*a*) Which took part in the adoption of its text, or
>
> (*b*) To which the treaty is expressly made open by its terms, or
>
> (*c*) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.[320]

270. The Commission, commenting on this provision in its 1966 report, summarized its discussions as follows:

> The second provision gave rise to no particular difficulty, but the Commission was divided with respect to the rule to be proposed for general multilateral treaties. Some members considered that these treaties should be regarded as open to participation by "every State" regardless of any provision in the treaty specifying the categories of States entitled to become parties. Some members, on the other hand, while not in favour of setting aside so completely the principle of the freedom of States to determine by the clauses of the treaty itself the States with which they would enter into treaty relations, considered it justifiable and desirable to specify as a residual rule that, in the absence of a contrary provision in the treaty, general multilateral treaties should be open to "every State". Other members, while sharing the view that these treaties should in principle be open to all States, did not think that a residuary rule in this form would be justified, having

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[314] *Ibid.*, 1966, vol. II, pp. 188-189, document A/6309/Rev.1, part II, chap. II.

[315] *Ibid.*, p. 190.

[316] With regard to this question, see below chap. XVI ("The law relating to armed conflicts").

[317] *Yearbook of International Law Commission, 1966*, vol. II, p. 190, document A/6309/Rev.1, part II, para. 3 of commentary to draft article 3. Note also the reference made by the Commission to oral agreements in paragraph 4 of its commentary to article 35 in connexion with the theory of *acte contraire* (*ibid.*, pp. 232-233).

[318] *P.C.I.J.*, series A/B, No. 53, p. 20.

[319] For a summary, see *Yearbook of the International Law Commission, 1966*, vol. II, p. 200, document A/6309/Rev.1, part II, chap. II, where the matter was dealt with under the heading used in the present text.

[320] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 167-168, document A/5209, chap. II, sect. II.

regard to the existing practice of inserting in a general multilateral treaty a formula opening it to all Members of the United Nations and members of the specialized agencies, all parties to the Statute of the International Court of Justice and to any other State invited by the General Assembly. By a majority the Commission adopted a text stating that unless otherwise provided by the treaty or by the established rules of an international organization, a general multilateral treaty should be open to participation by "every State". In short, the 1962 text recognized the freedom of negotiating States to fix by the provisions of the treaty the categories of States to which the treaty may be open; but in the absence of any such provision, recognized the right of "every State" to participate. [321]

271. As regards the views of Governments on this issue, the Commission's report stated that

A number of Governments in their comments on article 8 of the 1962 draft expressed themselves in favour of opening general multilateral treaties to all States, and at the same time proposed that this principle should be recognized also in article 9 so as automatically to open to all States general multilateral treaties having provisions limiting participation to specified categories of States. Certain other Governments objected to the 1962 text from the opposite point of view, contending that no presumption of universal participation should be laid down, even as a residuary rule, for cases when the treaty is silent on the question. [322]

272. At its seventeenth session the Commission re-examined the problem of participation in general multilateral treaties *de novo*; at the conclusion of the discussion a number of proposals were put to the vote but none was adopted. The Commission therefore requested its Special Rapporteur, with the assistance of the Drafting Committee, to try to submit a proposal for subsequent discussion. At its eighteenth session, in 1966, the Commission

concluded that in the light of the division of opinion it would not be possible to formulate any general provision concerning the right of States to participate in treaties. It therefore decided to confine itself to setting out pragmatically the cases in which a State expresses its consent to be bound by signature, ratification, acceptance, approval or accession. Accordingly, the Commission decided that the question, which has more than once been debated in the General Assembly, and recently in the Special Committees on the Principles of International Law concerning Friendly Relations among States, * should be left aside from the draft articles. In communicating this decision to the General Assembly, the Commission decided to draw the General Assembly's attention to the records of its 791st-795th meetings ** at which the question of participation in treaties was discussed at its seventeenth session, and to its commentary on articles 8 and 9 of the draft articles in its report for its fourteenth session, *** which contains a summary of the points of view expressed by members in the earlier discussion of the question at that session. [323]

273. At the United Nations Conference on the Law of Treaties a "Declaration on Universal Participation in the Vienna Convention on the Law of Treaties" was adopted, [324] whereby the Conference invited the General Assembly to give consideration to the matter of issuing invitations to States which are not Members of the United Nations or of any specialized agency or of IAEA, or parties to the Statute of the International Court of Justice, to become parties to the Convention.

274. At its twenty-fourth and twenty-fifth sessions the General Assembly decided to defer its consideration of the matter. In the preamble to resolution 2530 (XXIV) of 8 December 1969, adopting the Convention on Special Missions, the General Assembly declared however that it was

Convinced that multilateral treaties which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to universal participation.

4. The most-favoured-nation clause

275. This topic was raised in 1964 when the Commission was examining the question of treaties and third States. After considering the matter, the Commission reached the conclusion recorded in paragraph 32 of the introduction to its final draft articles on the law of treaties. The paragraph in question states that the Commission

did not think it advisable to deal with the so-called "most-favoured-nation clause" in the present codification of the general law of treaties, although it felt that such clause might at some future time appropriately form the subject of a special study. Likewise the Commission, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, found it unnecessary to make a specific exception regarding such clauses in articles 30-33 [Treaties and Third States] of the present draft, since it did not consider that these clauses were in any way touched by these articles. [325]

276. In view of the manageable scope of the topic, of the interest expressed in it by representatives in the Sixth Committee, and of the fact that the clarification of its legal aspects might be of assistance to the work of UNCITRAL, the Commission decided at its nineteenth session (1967) to place on its programme the topic of the most-favoured-nation clause in the law of treaties. It also decided to appoint Mr. E. Ustor as Special Rapporteur on that topic. [326] In 1968, after a general discussion on the matter, the Commission instructed the Special Rapporteur not to confine his studies to the domain of international trade but to explore the major fields of application of the clause.

* A/5746, chap. VI, and A/6230, chap. V.

** *Yearbook of the International Law Commission, 1965*, vol. 1, pp. 113-142.

*** *Yearbook of the International Law Commission, 1962*, vol. II, pp. 168 and 169.

[321] *Ibid., 1966*, vol. II, p. 200, document A/6309/Rev.1, part II, chap. II, "Question of participation in a treaty", para. 1 of commentary.

[322] *Ibid.*, para. 3 of commentary.

[323] *Ibid.*, para. 4 of commentary. The foot-notes are those given in the 1966 *Yearbook*.

[324] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285.

[325] *Yearbook of the International Law Commission, 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II, sect. A.

[326] *Ibid., 1967*, vol. II, p. 369, document A/6709/Rev.1, para. 48. See also para. 165 above.

The Commission considered that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. [327]

277. At its twenty-first session (1969), the Special Rapporteur presented his first report [328] containing a history of the most-favoured-nation clause up to the time of the Second World War. The Commission instructed the Special Rapporteur to prepare next a study having regard, *inter alia,* to the three cases dealt with by the International Court of Justice relevant to the clause. [329] The Special Rapporteur submitted in 1970 his second report [330] dealing with the jurisprudence of the International Court and the experience of international organizations in respect to the clause. Owing to the lack of time the Commission was unable to consider the second report during its twenty-second session.

278. Finally it may be recalled that the General Assembly, by resolutions 2400 (XXIII) of 11 December 1968, 2501 (XXIV) of 12 November 1969, and 2634 (XXV) of 12 November 1970, recommended that the Commission should continue its study of the most-favoured-nation clause.

Chapter VIII

Unilateral acts

279. As is implicit in the title, the basic notion of the concept of "unilateral acts" consists in the affirmation that there are certain actions which a subject of international law may take unilaterally and which, *proprio motu,* have certain legal effects under international law, independent of the actions of any other subject or subjects. Although the topic, as a general and unified group of cases, has attracted attention in the doctrine of international law mainly in recent years, [331] the various acts included under the heading have long been familiar in the actual practice of international law, [332] and indeed may be said to have as long a history as any other institution of international law. The literature of international law contains a large amount of material relating to the separate instance of unilateral acts.

280. As regards the scope and import of unilateral acts, there has been considerable discussion in the doctrine and it cannot be said that any broad consensus has yet emerged, either as regards their definition or their exact place in the operation of international law. With respect to the definition of unilateral acts, there has been agreement that, granted the wide degree of autonomy left to the subjects of international law (most notably as regards States), it was inevitable that many of the actions of individual States should have legal effects, creating (or preventing) changes in the existing legal situation. However, this definition in itself, regarded as a tool of legal analysis, leads easily to the position in which nearly all legal transactions (in particular those on the international plane) can be subdivided and refined into a series of unilateral acts: the formation of a treaty by means of distinct acts of offer and acceptance is the most obvious case in point. In order, therefore, to retain the usefulness of the concept, its application has normally been confined to acts which, at least for purposes of obtaining their immediate effect, were confined to action on the part of a single State. The examples most frequently cited are acts of recognition, protests, estoppel, proclamations or declarations, waivers and renunciations, [333] whilst other authors have referred to acquiescence, unilateral promises or undertakings and notifications.

281. Having regard to the fact that these terms have not received an agreed and precise definition, it will be apparent that the instances referred to may frequently overlap in practice. The greatest obstacle to reaching agreement, at least as regards doctrine, has not however occurred with respect to the terms to be used, their legal significance, or their application in specific instances (although difficulties have arisen in this connexion also), but in determining the relationship of unilateral acts to the accepted sources of international law, most notably with respect to the operation and formation of customary rules. This problem has only to be stated for its difficulty to be apparent. Although international law is agreed on the existence of customary rules, the actual process (regarded as a series of acts, including acquiescence or silence, on the part of individual States) whereby

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[327] Ibid., 1968, vol. II, p. 223, document A/7209/Rev.1, para. 93.

[328] *Ibid., 1969,* vol. II, p. 157, document A/CN.4/213.

[329] *Ibid.,* p. 234, document A/7610/Rev.1, para. 89.

[330] *Ibid., 1970,* vol. II, p. 199, document A/CN.4/228 and Add.1.

[331] It has been suggested in the literature that the topic, as a general concept, owes its origin to certain concepts found in German, Italian and Swiss municipal law. However, this would appear to apply more to the particular titles and categories used for purposes of legal classification than to any particular institutions contained in those legal systems.

[332] In this connexion attention may be called to the fact that in many cases the International Court of Justice and other tribunals have purported to decide the matter before them on the basis of particular relationships and not solely or largely according to the application of general rules. This would appear to reflect not only the respect paid by international tribunals to the limits of the jurisdiction granted to them, but also the individualization of many international situations, and the consequent importance of unilateral actions in providing a means whereby general rules may be adjusted by States, in accordance with international law, to take account of particular circumstances.

[333] These were the instances mentioned by a member of the Commission at its nineteenth session (1967) when it was suggested that the Commission should consider examining the topic, which greatly needed clarification and systematization.

> "The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations *(Yearbook of the International Law Commission, 1967,* vol. I, p. 179, 928th meeting, para. 6).

See also *ibid.,* p. 187, 929th meeting, para. 63. Estoppel may perhaps more accurately be regarded as not in itself a unilateral act but as the consequence of such an act or acts.

customary rules are created or exceptions allowed is one which can rarely if ever be exactly quantified, in relation to any particular rule, at any one time. Nevertheless, many customary rules appear to have been created or modified by a series of acts, many of which have been originally unilateral in character. Unilateral acts, regarded as a general concept, thus prove, on closer examination to be concerned not so much with acts *per se* but with the notion of the rights (or legal capacities) which States have under international law, including the right, or attribute, of characterizing particular legal actions as being either legal or illegal, both those which they themselves may take and the action of others, the whole operating within the framework of a general, normally customary, body of laws.

282. As regards any future study which the Commission might decide to undertake in this area, the Secretariat would offer only a few general observations. First, although, as has been indicated, it is difficult if not impossible to separate the notion of the unilateral act of a particular subject of international law from the acts, possibly also unilateral, taken by other subjects in regard to the same subject-matter, an initial distinction should be drawn—if only to reduce the subject to manageable proportions—between a unilateral act which occurs in relation to another unilateral act of the same order (for example, offer and acceptance of an agreement), or which may be part of a bilateral or multilateral transaction (for example, denunciation of or accession to a treaty), or the process of formation of a customary rule (for example, in establishing a general practice and its acceptance as law), and what may be regarded as unilateral acts in a narrower and more limited category. This would comprise unilateral acts with definite legal consequences emanating from a single subject of international law, and of which the main examples are recognition, protests, estoppel,[334] proclamations or declarations, waivers and renunciations, in each case other than under the provisions of a treaty.[335] Since this definition includes the unilateral acts of all subjects of international law, it may be deemed to include the performance of such acts not only by States but also by international organizations, possessed of a distinct legal personality. This inclusion (if not rejected on the ground of *petitio principii*) raises additional issues, and it may therefore be that any study undertaken should be confined to cases involving States, in which the practice over a long period of time is more abundantly available and where the question of the personality (or extent of the personality) of the subject of international law itself is not controversial.

283. As regards the nature of any study which might be undertaken by the Commission, one further observation may be made. During recent years the Commission has chiefly concentrated on producing, in relation to the particular topic under discussion at the time, a series of draft articles which could form the basis of a convention to be adopted by States. Perhaps the most classic and definite statement of the reasons for following that course was that given with reference to its work on the law of treaties, contained in its report on its fourteenth session.[336] The reasons given there are weighty: the existence of a convention serves to consolidate the law on a given branch of law, and its preparation gives an opportunity for the participation of the vast majority of States. Whilst it is clear that the Commission's work on unilateral acts, if undertaken, could take the form of draft articles—as indeed could its work in any sphere—the review, albeit brief, given above suggests that this is a topic on which other directions might also be explored. A study which examined the subject, or its different branches, and concluded with a series of definitions of the main forms of unilateral acts and their respective legal effects under international law, together with a succinct commentary, might prove to be of considerable practical value to States in their dealings with one another; at the moment no comparable agreed text exists to which reference can easily be made. The work of the Commission in this field might thus provide, or come to provide, a measure of authoritative clarification in this branch of the law, irrespective of the formal status of the text. The subject of unilateral acts appears, in any case, to be important enough to merit attention by the Commission at some stage in the future, whatever the precise form which may eventually be chosen for its codification.

284. While the choice in the matter rests of course with the Commission, and ultimately with the General Assembly, the consideration above are advanced in the hope that the Commission may find them of value in determining the scope of its long-term programme.

334 Also referred to as preclusion. As previously noted, estoppel is perhaps more accurately to be regarded as the consequence of an act, rather than itself an act. A survey by Mr. Justice Alfaro of the jurisprudence (notably of the International Court of Justice) and of much of the literature relating to this question is to be found in his separate opinion in the Case concerning the Temple of Preah Vihear (*I.C.J. Reports 1962*, p. 39).

335 It may conceivably be possible to widen this last exception, so as to distinguish on the one hand situations where States are given unilateral powers by specific facultative rules of international law (e.g. to establish contiguous zones, or to exercise diplomatic protection) or under treaties, and on the other, situations where no specific rule exists but where the State can, under general international law, make a unilateral claim or surrender some interest. Further study would be required in order to determine how rigorously this distinction could be drawn and applied.

Chapter IX

The law relating to international watercourses

285. States have frequently adopted rules and agreements governing the use of rivers flowing through or between their respective territories. In addition, the numerous international river commissions established by treaty have contributed to the development of the law concerning international watercourses. Nevertheless,

336 *Yearbook of the International Law Commission, 1962*, vol. II, p. 160, document A/5209, para. 17.

despite the number of treaties concluded, [337] the general law relating to the utilization of international rivers has remained, in considerable part, customary law. With the exception of the Convention on the Régime of Navigable Waterways of International Concern (Barcelona, 1921) [338] and the Convention relating to the Development of Hydraulic Power affecting more than one State (Geneva, 1923), [339] no other general international conventions on the law relating to international watercourses has been concluded.

286. Having regard, on the one hand, to the increasing importance of the use of these watercourses for a variety of purposes—for navigation, water supply for irrigation and industrial needs, for the disposal of waste, and for production of hydroelectricity—and, on the other, the uncertainty, in many respects, of the generally applicable law, several proposals have been made in recent years that the codification and progressive development of the relevant rules of international law should be undertaken as a matter of general concern. As regards discussion in the framework of the United Nations, [340] during the fourteenth session (1959) of the General Assembly, it was suggested in the Sixth Committee that the question of the utilization and exploitation of international waterways should be included in the agenda of the Commission; the view was also expressed that an attempt to codify the matter would be premature, and that it should be left to the Commission to decide whether the subject was an appropriate one for codification.

287. In the event, the General Assembly, considering that it would be desirable to initiate preliminary studies "with a view to determining whether the subject is appropriate for codification", adopted resolution 1401 (XIV) of 21 November 1959, whereby it requested the Secretary-General to prepare a report on legal problems relating to the utilization and use of international rivers. The Secretary-General accordingly circulated to Member States a report (A/5409) containing, as requested by the resolution: information provided by Member States regarding their pertinent laws and legislation; a summary of existing bilateral and multilateral treaties; a survey of decisions of international tribunals; and a survey of the studies made or being made by non-governmental organizations. Annexes to the report contained the text of declarations and resolutions adopted by intergovernmental bodies and reports and extracts from reports prepared by such bodies or by conferences of government experts, as well as a bibliography and list of documentation and detailed indexes. Having regard to the terms of the resolution, the expression "utilization and use" as employed in the report, was used as denoting

> every possible utilization or use of an international river, excluding navigation, but including fishing, the floating of timber, flood control and the prevention of water pollution (A/5409, para. 8).

In the light of the discussion in the Sixth Committee, the report did not include documents dealing with technical aspects of the utilization of international rivers or with legal problems involved in the delineation of fluvial boundaries. Lastly, documentation relating to disputes between States regarding the utilization or use of international rivers was also excluded, except where the dispute in question had given rise to a treaty or been the subject of an international judicial decision.

288. A volume was subsequently issued in the *United Nations Legislative Series,* containing the full texts of the legislative enactments, forwarded by governments, and of existing bilateral and multilateral treaties. [341] Amongst the agreements more recently concluded, particular mention may be made of the Act regarding navigation and economic co-operation between the States of the Niger Basin, [342] done on 26 October 1963, and the Statute of the Organization of Senegal Riparian States, of 24 March 1968.

289. Following the adoption of General Assembly resolution 1401 (XIV), there were a number of suggestions at different times that the Commission should consider taking up the question. [343] At the request of Finland the item "Progressive development and codification of the rules of international law relating to international watercourses" was included in the agenda of the twenty-fifth session of the General Assembly, held in 1970. In an explanatory memorandum, [344] the Government of Finland called attention, *inter alia,* to the adoption by the International Law Association, at its fifty-second Conference (Helsinki, 1966) of a series of articles on the law of international drainage basins. These articles, known as the Helsinki Rules, [345] con-

[337] For instance, the relevant volume of the *United Nations Legislative Series* (see foot-note 341 below) contains some 253 treaties dealing solely with matters relating to the utilization of international rivers for purposes other than navigation. Virtually all these treaties related to particular rivers or boundary waters as conventionally defined; whereas some of these sought to provide a comprehensive regulation of the matter as between the parties, others dealt with limited aspects, such as particular problems or certain forms of utilization only.

[338] League of Nations, *Treaty Series,* vol. VII, p. 35. As of 1 April 1971, twenty-three states were parties to the Convention.

[339] *Ibid.,* vol. XXXVI, p. 75.

[340] For further detailed references to the discussion in the Sixth Committee and in the International Law Commission prior to 1970, see *Yearbook of the International Law Commission, 1970,* vol. II, p. 266, document A/CN.4/230, paras. 123-129.

[341] United Nations, *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation* (United Nations publication, Sales No. 63.V.4).

[342] United Nations, *Treaty Series,* vol. 587, p. 9. Note also the Agreement concerning the Niger River Commission and the navigation and transport on the River Niger, done on 25 November 1964: *ibid.,* p. 19.

[343] Including suggestions made in the Commission itself at its nineteenth session, (see *Yearbook of the International Law Commission, 1967,* vol. II, p. 369, document A/6709/Rev.1, para. 46). See likewise *ibid., 1970,* vol. II, p. 266, document A/CN.4/230, paras. 126-129.

[344] *Official Records of the General Assembly, Twenty-fifth Session, Annexes,* agenda item 91, document A/7991.

[345] International Law Association, *Helsinki Rules on the Uses of the Waters of International Rivers* (London, 1967).

tain provisions on the equitable utilization of the waters of an international drainage basin, on the abatement of pollution, on navigation and timber floating, and recommendations concerning the settlement of disputes. The Government of Finland also referred to the adoption by the Inter-American Juridical Committee in 1967 of a "draft convention concerning the industrial and agricultural use of international rivers and lakes", and to the adoption in 1969 by the Asian-African Legal Consultative Committee of a resolution establishing an intersessional sub-committee to consider the "law of international rivers". The time was therefore ripe, in the opinion of the Finnish Government, for a study of the matter to be undertaken by the United Nations on a world-wide basis. The Finnish Government suggested that the topic could be referred to the Commission, which would be the most appropriate body to prepare a draft "developing progressively and codifying the rules of international law relating to international watercourses, including international drainage basins".[346] At a later stage the work might lead to the adoption of a convention. The Government of Finland expressed the view that existing legal texts and materials, including the Helsinki Rules, could be used as a basis for the codification of the topic and suggested that, without affecting the outcome of such work as the United Nations might undertake, the General Assembly might adopt a resolution, recommending that Member States should take into account or resort to the Helsinki Rules in cases where there were no rules binding on the parties.

290. During the discussions in the Sixth Committee a variety of views were put forward as to the desirability and feasibility of the progressive development and codification of the law on this topic at the present time, in particular on the question whether the subject was suitable for treatment in a general convention.[347] In resolution 2669 (XXV) of 8 December 1970, adopted following discussion in the Sixth Committee, the General Assembly recommended that the International Law Commission

should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate.

291. By the same resolution the Secretary-General was requested to continue the study initiated by General Assembly resolution 1401 (XIV) in order to prepare a supplementary report on the legal problems relating to the utilization and use of international watercourses, taking into account the recent application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies of this matter.

292. A suggestion made by the Finnish Government in its explanatory memorandum concerning the adoption of a resolution recommending that, pending codification of the law relating to the topic, Member States should take into account or resort to the Helsinki Rules, was not endorsed by the General Assembly. During the discussion leading to the adoption of resolution 2669 (XXV), different views were expressed in connexion with the advisability of making an express reference in the text of the resolution to the Helsinki Rules as well as to a resolution entitled "Utilization of Non-Maritime International Waters (except for navigation)", adopted by the Institute of International Law in 1961.[348] It was finally agreed to include the following in the report of the Sixth Committee to the General Assembly:

It was agreed in the Sixth Committee that intergovernmental and non-governmental studies on the subject, especially those which are of a recent date, should be taken into account by the International Law Commission in its consideration of the topic.[349]

Chapter X

The law of the sea

1. The law of the sea: the 1958 Geneva Conventions

293. The matters examined in this chapter were covered in the 1948 Survey[350] under the titles "The régime of the high seas" and "The régime of territorial waters".[351] As regards the first, it was pointed out

[346] *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 91, document A/7991, para. 6.

[347] See below, p. 207, document A/CN.4/244/Rev.1. It may also be noted that, as part of the material prepared for the first session (22 February-5 March 1971) of the Committee on Natural Resources, the Secretary-General issued a report under the general heading of "Natural resources development and policies, including environmental considerations", containing an addendum entitled "Issues of international water resources development" (E/C.7/2/Add.6).

[348] See *Annuaire de l'Institut de droit international, Session de Salzbourg, septembre 1961* (Basel, 1961), vol. 49, tome II, p. 381.
The text of the resolution is reproduced in para. 1083 of document A/5409.

[349] *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 91, document A/8202, para. 17.

[350] See para. 4 above.

[351] As regards the law relating to territorial waters, the 1948 Survey recalled that this has been considered at the Hague Codification Conference of 1930, on the basis of the work of a League of Nations' Committee of Experts, but that full agreement had not been reached on that occasion. The Commission, it was stated, was in a somewhat different position from the earlier bodies; rather than, in effect, assuming agreement on issues for incorporation in a convention, the Commission would be enabled, under the terms of its Statute and in the light of what had gone before, to adopt a more thoroughgoing and analytical approach to the problem, taking account of all major factors involved—economic and strategic, as well as legal. The 1948 Survey concluded as follows:

"There need be no disposition to discard subjects with regard to which previous efforts are deemed to have failed. For the failure which attended one method and one object need not be decisive with regard to different methods and objects. Moreover, it would be unfortunate if the regulation of questions of obvious importance in the sphere of international transport and international economic intercourse

(Continued on next page)

that the task of its comprehensive codification involved aspects of "codification", as well as of "development", within the meaning of these terms in the Statute of the International Law Commission. There was a body of widely accepted customary rules and of State practice concerning the freedom of the sea and various other elements of the law of the sea; in addition, there existed numerous multilateral conventions regulating specific questions relating to such matters as maritime transport and safety and the protection of submarine cables. There were also gaps, however, and certain subjects, particularly as regards the exploitation of the resources of the sea, would require a degree of development of the law. In the absence of an agreed international regulation aimed at producing clarity and a reconciliation of conflicting interests, the régime of the freedom of the seas might be conducive to a waste of resources and provoke unilateral measures of self-help. The 1948 Survey concluded its exposition on the régime of the high seas as follows:

> In view of the already available substantial body of practice, in the form of conventions and otherwise, in these matters it would appear that they would more properly fall within the framework of codification rather than "development"—although it would be codification with a considerable element of "development" in it. As mentionned, there is in existence an imposing body of non-controversial rules and principles on other aspects of the international law of the sea. This being so, it must be a matter for consideration whether, of all the branches of international law, that of the law of the sea does not lend itself to comprehensive treatment by way of codifying the entire branch of the law. A codification—in its widest sense—of the entire field of the law of the sea in a unified and integrated "restatement" or similar, more ambitious, instrument, would go far towards enhancing the authority both of the work of codification and of international law as a whole. [352]

294. Since the 1948 Survey, four international conventions—the Geneva Conventions on the law of the sea—have been concluded. Their adoption in 1958 marked the first major success for the Commission in its work of ensuring the codification and progressive development of international law. Of all subjects so far tackled by the Commission, this has been the one which has involved most closely the immediate economic and other interests of States, and where specialized, extra-legal knowledge—as regards, for example, oceanography, marine biology, geology and other technical aspects—has been of obvious significance. In the short account which follows of the steps taken by the Commission between 1949 and 1956 in regard to this topic, mention has accordingly been made of the way in which the Commission's approach to the topic, or to parts of the topic, was adapted in the light of the views expressed by the General Assembly, as well as by States individually, and how measures were taken to ensure that the Commission's drafts took appropriate account of technical factors.

295. At its first session in 1949, the Commission included in its list of topics selected for codification the two topics on the law of the sea referred to in the 1948 Survey, and gave priority to the study of the régime of the high seas, for which Mr. J. François was appointed Special Rapporteur. In response to the recommendation made by the General Assembly in resolution 374 (IV), the Commission decided at its second session (1950) to include in the list of priorities the topic of the régime of territorial waters. At its following session, in 1951, the Commission appointed Mr. J. François as Special Rapporteur for that topic also. Within the context of the régime of the high seas, the Commission dealt in its reports to the General Assembly in 1950 and 1951 with a wide range of subjects, including the resources of the sea, contiguous zones and continental shelf, and adopted at its third session (1951) a set of draft articles on "the continental shelf and related matters". [353] The régime of the territorial waters began to be substantively considered by the Commission at its fourth session (1952). It decided to use the term "territorial sea" instead of "territorial waters", as the latter expression had sometimes been taken to include also inland waters, and further considered certain other questions relating to the topic. [354] The Commission did not adopt, however, any draft article on the matter. At its fifth session (1953), the Commission prepared, taking into consideration the comments received from governments on its 1951 set of draft articles, final drafts on three questions: the continental shelf; fishery resources of the seas; and the contiguous zone. In its report, the Commission recommended the following actions in respect of those drafts: (*a*) that the General Assembly should adopt by resolution the part of the report and the draft articles (eight articles) relating

(Footnote 351 continued)

generally—such as the position of foreign merchantmen in territorial and national waters—were to suffer from the inability to achieve uniformity with regard to the breadth of territorial waters." (1948 Survey, para. 75).

[352] *Ibid.*, para. 73.

[353] At its second session the Commision took the view that it could not undertake at once a codification of maritime law in all its aspects and that it would be necessary to select the subjects a study of which could be begun as a first phase of its work on the topic. The Commission thought also that it could for the time being leave aside all those subjects which were being studied by other United Nations organs or by specialized agencies as well as those which, because of their technical nature, were not suitable for study by it. The subjects selected for study by the Commission were: nationality of ships; criminal jurisdiction on matters of collision; safety of life at sea; the right of approach; slave trade; submarine telegraph cables; resources of the sea; right of pursuit; contiguous zone; sedentary fisheries; continental shelf. The 1951 set of draft articles on "the continental shelf and related matters" drawn up at the third session (see *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), annex) contained seven articles on the continental shelf, two articles on conservation of the resources of the sea, one article on sedentary fisheries and one on contiguous zones. At the same session (1951), the Commision considered likewise certain questions relating to nationality of ships, criminal jurisdiction on matters of collision on the high seas, safety of life at sea, the right of warships to approach foreign merchant vessels on the high seas, submarine telegraph cables and hot pursuit.

[354] The juridical status of the territorial sea, of its bed and subsoil, and of the air space above it; the breadth of the territorial sea; the delimitation of the territorial sea of two adjacent States; base line; bays.

to the continental shelf; (*b*) that the General Assembly should adopt by resolution the part of the report and the draft articles (three articles) on fisheries, and enter into consultation with FAO with a view to the preparation of a draft convention on the subject incorporating the principles adopted by the Commission, [355] and (*c*), that no action should be taken by the General Assembly with regard to the draft articles on the contiguous zone, since the Commission had not yet adopted draft articles on the territorial sea. [356]

296. However, the General Assembly, by resolution 798 (VIII) of 7 December 1953, noting that "the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters are closely linked together juridically as well as physically", decided that any action to be taken by it should be deferred until the Commission had reported on "all the problems" involved in the study of the régime of the high seas and of the régime of territorial waters. The following year, the General Assembly, by resolution 899 (IX) of 14 December 1954, again deferred action and requested the Commission "to devote the necessary time to the study of the régime of the high seas, the régime of territorial waters and all related problems in order to complete its work on these topics" and to submit its final report for consideration by the Assembly at its eleventh session (1956).

297. The Commission, meanwhile, continued its study of the régime of the territorial sea and of the régime of the high seas and related matters. With regard to the former, it requested Governments to provide information concerning their attitude to the delimitation of the territorial sea of two adjacent States, and a meeting of a group of experts was held at The Hague from 14 to 16 April 1953, under the chairmanship of the Special Rapporteur, in order to elucidate technical questions relating to hydrographic aspects of the demarcation of marine boundaries. The Special Rapporteur's earlier draft on the régime of the territorial sea was revised in the light of the technical information received from the group of experts. At its sixth session (1954), the Commission adopted a number of provisional articles concerning the régime of the territorial sea, dealing with its judicial status and limits and with the rights of passage of vessels and warships. The Commission postponed, however, the formulation of draft articles on the breadth of the territorial sea and the connected questions of bays, groups of islands and delimitation of the territorial sea at the mouth of a river. On the question of the breadth of the territorial sea, the Commission listed in its report [357] the various suggestions made by its members at various sessions of the Commission and asked Governments to state, in their comments on the provisional draft articles on the régime of the territorial sea, what their attitude on the matter was and to suggest how it could be solved.

298. At its fifth session (1953), the Commission had invited the Special Rapporteur to undertake a further study of the régime of the high seas and to prepare a report on subjects within this field which were not covered in his previous reports. At its seventh session (1955), the Commission again considered the topic. [358] The Commission adopted provisional articles concerning the régime of the high seas and an annex (draft articles relating to the conservation of the living resources of the sea) [359] and submitted them to Governments for comments. In addition, the Commission communicated the provisions on the conservation of the living resources of the sea (namely, the relevant part of the provisional articles and annex) to the organizations represented by observers at the International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome from 18 April to 10 May 1955. [360] In preparing provisions dealing with that subject-matter, the Commission had taken account of the report of this Conference. The provisional articles adopted by the Commission concerning the régime of the high seas dealt with the definition of the high seas, the freedom of the seas, navigation (including status of ships and related matters, collision, assistance, slave trade, piracy, right of visit, right of pursuit and pollution), fishing (including conservation of the living resources of the high seas) and submarine cables and pipelines.

299. At its eighth session (1956), the Commission was in a position to draw up its final report on the subjects dealt with by it in connexion with the "régime of the high seas" and "régime of the territorial sea", taking into consideration the replies received from Governments and international organizations on its 1955 provisional articles on the régime of the high seas, and from Governments on its 1954 provisional articles on

[355] In doing, so the Commission underlined that it "believes that the general importance and the recognized urgency of the subject matter of the articles in question warrant their endorsement by a formal act of approval on the part of the General Assembly" and that "an authoritative statement of the legal position on the subject, both *de lege data* and *de lege ferenda*, by the General Assembly is indicated as a basis of any future regulations which may be adopted" (*Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), para. 103).

[356] *Ibid.*, paras. 91, 102 and 114.

[357] *Ibid., Ninth Session, Supplement No. 9* (A/2693).

[358] For the report of the Commission on its seventh session, see *ibid., Tenth Session, Supplement No. 9* (A/2934).

[359] The text of the "draft articles relating to the conservation of the living resources of the sea" were identical with articles 25 to 33 of chapter II of the "provisional draft articles concerning the régime of the high seas". In chapter II of the latter draft the nine articles were accompanied by commentaries. In the annex, the articles in question had a preamble, the whole being presented as a kind of draft resolution adopted by the International Law Commission. On the other hand, chapter II of the "provisional draft articles" contained an article, namely article 24 (Right to fish), which was not included in the articles of the annex because it did not deal with conservation of resources.

[360] The Conference was convened by the Secretary-General pursuant to General Assembly resolution 900 (IX) of 14 December 1954.

the régime of the territorial sea. In pursuance of General Assembly resolution 899 (IX) mentioned above, the Commission recast all the draft articles it adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea, so as to constitute a single, co-ordinated and systematic body of rules and entitled them "Articles concerning the law of the sea". [361]

300. The Commission's final draft on the law of the sea, containing seventy-three articles with commentaries, was prefaced by certain observations which are of interest. In particular, the Commission stated: (*a*) that although at the time of its establishment it had been thought that the Commission's work might have two different aspects concerning respectively the "codification" and the "progressive development" of international law, the Commission had become convinced that, in the domain of the law of the sea at any rate, "the distinction established in the statute between these two activities can hardly be maintained"; (*b*) that although it tried at first to specify which articles of the draft on the law of the sea fell into the category of "codification" and which into the category of "progressive development", the Commission had had to abandon the attempts, as several did not wholly belong to either; (*c*) that, in these circumstances, in order to give effect to the project as a whole, it was necessary to have recourse to conventional means. [362] Consequently, the Commission recommended that the General Assembly should summon an international conference of plenipotentiaries

> to examine the law of the sea, taking into account not only the legal but also the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

Considering that the various sections on the law of the sea hold together, and are so closely interdependent that it would be extremely difficult to deal with only one part and leave the others aside, the Commission was of the opinion that the conference should deal with all the parts of the law of the sea covered by its final project. In addition, the Commission indicated that the answer to the question of the relationship between the proposed rules and existing conventions was to be found in the general rules of international law and the provisions drawn up by the international conference. Finally, as regards the substance of its draft on the law of the sea, the Commission pointed out that the articles regulated the law of the sea in time of peace only. [363]

301. The final draft articles on the law of the sea was divided into parts, sections, sub-sections and articles as follows:

Part I: Territorial sea
- Section I: General (articles 1 and 2)
- Section II: Limits of the territorial sea (articles 3 to 14)
- Section III: Right of innocent passage
  - Sub-section A: General rules (articles 15 to 18)
  - Sub-section B: Merchant ships (articles 19 to 21)
  - Sub-section C: Government ships other than warships (articles 22 and 23)
  - Sub-section D: Warships (articles 24 and 25)

Part II: High seas
- Section I: General régime (articles 26 and 27)
  - Sub-section A: Navigation (articles 28 to 48)
  - Sub-section B: Fishing (articles 49 to 60)
  - Sub-section C: Submarine cables and pipelines (articles 61 to 65)
- Section II: Contiguous zone (article 66)
- Section III: Continental shelf (articles 67 to 73)

302. In accordance with a recommendation by the Commission, the General Assembly decided, by resolution 1105 (XI) of 21 February 1957, to convene an international conference of plenipotentiaries to examine the law of the sea, and to refer to it as a basis for its work the report on the topic submitted by the Commission. The operative paragraph of the resolution deciding that the conference be convened reproduced the language used by the Commission quoted in paragraph 300 above.

303. The United Nations Conference on the Law of the Sea, which met in Geneva in 1958, had before it, besides the final report of the Commission, some thirty preparatory documents drawn up by the Secretariat, by certain specialized agencies and by a number of independent experts. One matter which had not been covered in the Commission's report, namely, the question of the free access to the sea of land-locked countries, was the subject of a memorandum submitted by a preliminary conference of land-locked States [364] which met prior to the convening of the Conference on the Law of the Sea.

304. The Conference agreed to embody the articles it adopted in four separate conventions the convention on the Territorial Sea and the Contiguous Zone; [365] the Convention on the High Seas; [366] the Convention on Fishing and Conservation of the Living Resources of the High Seas; [367] and the Convention on the Continental Shelf. [368] The recommendations made by the Fifth Committee (Question of Free

[361] See *Yearbook of the International Law Commission, 1956*, vol. II, p. 256 *et seq.*, document A/3159, chap. II, sect. II.

[362] On subsequent occasions when it has submitted final draft articles, the Commission has arrived at the same conclusions and followed the same or a similar course.

[363] *Yearbook of the International Law Commission, 1956*, vol. II, pp. 255-256, document A/3159, paras. 25-32.

[364] *Official Records of the United Nations Conference on the Law of the Sea*, vol. VII (United Nations publication, Sales No. 58.V.4, Vol. VII), p. 67, document A/CONF.13/C.5/L.1.

[365] United Nations, *Treaty Series*, vol. 516, p. 205. Came into force on 10 September 1964. As of 1 April 1971, forty-one States were parties.

[366] *Ibid.*, vol. 450, p. 82. Came into force on 3 January 1963. As of 1 April 1971, forty-eight States were parties.

[367] *Ibid.*, vol. 559, p. 285. Came into force on 20 March 1966. As of 1 April 1971, thirty-two States were parties.

[368] *Ibid.*, vol. 499, p. 311. Came into force on 10 June 1964. As of 1 April 1971, forty-six States were parties.

Access to the Sea of Land-locked Countries) [369] were included in article 14 of the Convention on the Territorial Sea and the Contiguous Zone and in articles 2, 3 and 4 of the Convention on the High Seas. In addition to the four Conventions, the Conference adopted an Optional Protocol concerning the Compulsory Settlement of Disputes, [370] and nine resolutions, [371] one of which concerned the convening of a second Conference to consider the question of the breadth of the territorial sea and issues relating to fisheries which it had not been possible to settle. Accordingly, in 1960 a second United Nations Conference on the Law of the Sea was held in an effort to reach agreement on the breadth of the territorial sea and fishery limits, but without success.

305. As this fact indicates, the four Conventions, though consolidating the bulk of the law of the sea, did not embody agreement on all aspects. Because of this, and by reason of technological advances since the Conventions were drafted, questions relating to the law of the sea have continued to receive international attention. Taking the four Conventions as the starting point, the present position is summarized briefly below.

306. The Convention on the High Seas, the preamble to which states that the Conference adopted the provisions contained therein "as generally declaratory of established principles of international law", deals with the definition and freedom of the high seas; the access to the sea of land-locked States; navigation, including a series of articles relating to nationality, status and operation of ships and warships; jurisdiction in matters of collision; assistance at sea; slavery; piracy; right of visit and hot pursuit; pollution of the seas; and submarine cables and pipelines. No major difficulties appear to have been encountered in the application of the treaty itself. Member States were requested, however, under the terms of General Assembly resolution 2574 A (XXIV) of 15 December 1969, to express their views regarding the desirability of holding a conference to review, *inter alia,* the régime of the high seas (that suggestion was made following discussion of developments in relation to the sea-bed which are referred to below). [372]

307. One issue relating to the high seas régime which has been the cause of special attention is that of marine pollution. It may be noted that two conventions were drawn up in November 1969 under the auspices of IMCO, regulating, on the one hand, the conditions under which a State may intervene on the high seas to prevent oil pollution of its coasts caused or threatened by oil tankers, and, on the other, the system of financial reparation for any damage so caused. [373] Under the terms of General Assembly resolution 2566 (XXIV) of 13 December 1969, the United Nations Secretariat is engaged in an extensive survey of the various forms and sources of marine pollution, and Member States were asked to express their views "on the desirability and feasibility of an international treaty or treaties on the subject".

308. The Convention on the Territorial Sea and the Contiguous Zone contains, besides certain general provisions, articles concerning the juridical status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil; the limits of the territorial sea (base lines, outer limit, bays, ports, roadsteads, islands, low-tide elevations, delimitations of opposite coasts, mouth of rivers); the right of innocent passage (rules applicable to all ships and rules applicable to merchant ships, government ships other than warships, and warships) and the contiguous zone, (control and limits), but it does not, however, specify the breadth of the territorial sea. This issue has continued to be of international concern. [374]

309. The Convention on Fishing and Conservation of the Living Resources of the High Seas endeavoured, as its title indicates, to institute a system of conservation measures which might be adopted on a multilateral, bilateral or unilateral basis by the interested States or State, subject to the conditions laid down in the Convention, and also to establish a special disputes settlement procedure. Although some thirty-two States are now parties to the Convention, the fact that not all countries engaged in fishing have become parties, and the existence of a large (and still growing) number of agreements [375] regulating fishing in particular areas of the high seas or as regards particular types of fish, has caused the Convention to play a somewhat residual role; whilst it has remained the only multilateral instrument of potential general application, in practice recourse has more often been had to the more particular agreements referred to, some of which provide for the establishment of standing bodies to deal with questions

[369] On the subject of transit rights of land-locked countries, the conclusion in 1965 of the Convention on Transit Trade of Land-Locked States may be noted (referred to in para. 53 above).

[370] United Nations, *Treaty Series,* vol. 450, p. 169. As of 1 April 1971, ten States were parties to the Protocol.

[371] *Ibid.,* p. 58.

[372] See generally para. 315 below. It may be recalled that article 35 of the 1958 Convention on the High Seas states the following:

"1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

"2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request."

Similar provisions are contained in the final clauses of the other three conventions on the law of the sea.

[373] The text of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and of the International Convention on Civil Liability for Oil Pollution Damage are attached to the Final Act of the International Legal Conference on Marine Pollution Damage, 1969. IMCO has continued to give active attention to this matter. The International Convention for the Prevention of the Pollution of the Sea by Oil, which was concluded in 1954 and amended in 1962 and 1969, is referred to in para. 86 above.

[374] See para. 315 below.

[375] Article 1, para. 1, of the Convention specifies that "All States have the right for their nationals to engage in fishing on the high seas, subject (*a*) to their treaty obligations ...".

of management and conservation. Since 1958, moreover, the volume of fishing has almost doubled, [376] technological advances have led to the intensification of long-distance operations, and many States which were not formerly engaged in large scale fishing have entered the industry. [377] Questions have been raised as to the ability of the existing fishery arrangements to cope with the increased demand for living resources of the sea; different views have been expressed on this issue, some holding that the fishery agreements in force offer a viable and equitable way of meeting such difficulties as may arise, others that existing arrangements are insufficient. While resolution of the issue will require consideration of various factors, the international legal community generally, as well as the Commission, may be expected to be concerned with the problems raised and the solution eventually adopted in so far as this may entail changes in the existing body of law.

310. Dealing finally with the Convention on the Continental Shelf, this represents the most obviously innovatory of the four, although based on treaty provisions and unilateral declarations which States had made in order to establish a legal framework for the exploitation of mineral resources (most notably hydrocarbons) found in the continental shelf adjacent to their coasts. Under the Convention, coastal States were granted "sovereign rights" over the continental shelf "for the purpose of exploring it and exploiting its natural resources" (article 2, para. 1). The term "continental shelf" was used as referring to the sea-bed and subsoil adjacent to the coast but outside the area of the territorial sea "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" (article 1). [378]

2. Historic waters, including historic bays

311. Acting in response to a resolution adopted by the 1958 Conference, [379] the General Assembly, by resolution 1453 (XIV) of 7 December 1959, requested the Commission

> as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate.

The Commission requested the Secretariat to undertake a preliminary study of the topic [380] and decided at its fourteenth session in 1962, to include the topic in its programme, but without setting any date for the start of its consideration or appointing a special rapporteur. At its nineteenth session (1967) the Commission considered whether to proceed with the study of this topic (and also that of the right of asylum, which had been referred to the Commission by the General Assembly). The Commission's report summarized the views expressed as follows:

> Most members doubted whether the time had yet come to proceed actively with either of these topics. Both were of considerable scope and raised some political problems, and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study [...] [381]

312. During the General Assembly's twenty-third session (1968), several representatives in the Sixth Committee referred to the topic in connexion with the future work of the Commission. [382]

3. The sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, and the law of the sea

313. The fact that, under the 1958 Convention on the Continental Shelf, no fixed limit was set to the outer limit of the continental shelf over which a coastal State might exercise sovereign rights was brought in issue when it became apparent, during the 1960s, that technical means now existed, or were being developed, which would enable the exploration and exploitation of natural resources to proceed at depths well beyond 200 metres, and, indeed, possibly extend far towards mid-ocean. After this matter had been raised in the First Committee of the General Assembly at its twenty-second session in 1967, it was discussed by an *Ad Hoc* Committee which met during 1968.

By resolution 2467 A (XXIII) of 21 December 1968, the General Assembly established the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, composed of forty-two Member States. In operative paragraph 2 of the resolution the Committee was requested to study *inter alia,*

> ... the elaboration of the legal principles and norms which would promote international co-operation in the exploration and use of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction and ensure the exploitation of their resources for the benefit of mankind, and the economic and other requirements which such a régime

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[376] FAO, *Yearbook of Fishery Statistics, 1969*, vol. 29, 1970.

[377] For a general review of the present situation and trends, see the statement made by the FAO representative before the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (A/AC.138/SR.54).

[378] As regards the question of continental shelf boundaries, see also the North Sea Continental Shelf Cases, *I.C.J. Reports 1969*, p. 3. Issues relating to the sea-bed and ocean floor beyond the limits of national jurisdiction are referred to in paras. 313-317 below.

[379] See *Official Records of the United Nations Conference on the Law of the Sea*, vol. II (United Nations publication, Sales No. 58.V.4, Vol. II), p. 145, resolution VII. This resolution had its origin in the adoption by the Conference of paragraph 6 of article 7 of the Convention on the Territorial Sea and Contiguous Zone, providing that the Convention's rules on bays "shall not apply to so-called "historic" bays".

[380] *Yearbook of the International Law Commission, 1962*, vol. II, p. 1, document A/CN.4/143.

[381] *Ibid., 1967*, vol. II, p. 369, document A/6709/Rev.1, para. 45. See also *ibid., 1970*, vol. II, p. 269, document A/CN.4/230, para. 144, where it is reported that at the nineteenth session (1967) a member of the Commission stated that the Commission might be requested by an appropriate organ of the United Nations to give its opinion on topics such as international bays and international straits.

[382] *Ibid., 1970*, vol. II, p. 261, document A/CN.4/230, para. 79.

should satisfy in order to meet the interests of humanity as a whole.

314. On the basis of the Committee's work, including that of its Legal Sub-Committee, and following discussion by the First Committee, the General Assembly adopted under resolution 2749 (XXV) of 17 December 1970, a Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction. It is stated in paragraph 9 of the Declaration, that an international régime applying to the area and its resources, including appropriate machinery to give effect to its provisions, shall be established by an international treaty of a universal character, generally agreed upon. The text of the Declaration is as follows:

Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction

The General Assembly,

Recalling its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area to which the title of the item refers,

Affirming that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined,

Recognizing that the existing legal régime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international régime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by fluctuation of prices of raw materials resulting from such activities,

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international régime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States whether coastal or land-locked, without discrimination, in accordance with the international régime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal and taking into particular consideration the interests and needs of the developing countries.

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The régime shall, *inter alia*, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes:

(*a*) By participation in international programmes and by encouraging co-operation in scientific research by personnel of different countries;

(*b*) Through effective publication of research programmes and dissemination of the results of research through international channels;

(*c*) By co-operation in measures to strengthen research capabilities of developing countries, including the participation of their nationals in research programmes.

No such activity shall form the legal basis for any claims with respect to any part of the area or its resources.

11. With respect to activities in the area and acting in conformity with the international régime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia:*

(*a*) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

(*b*) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the

exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.

13. Nothing herein shall affect:

(*a*) The legal status of the waters superjacent to the area or that of the air space above those waters;

(*b*) The rights of coastal States with respect to measures to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat thereof resulting from, or from other hazardous occurrences caused by, any activities in the area, subject to the international régime to be established.

14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in confomity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability.

15. The parties to any dispute relating to activities in the area its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international régime to be established.

315. Consideration of the question of the régime of the sea-bed beyond the limits of national jurisdiction has been accompanied by proposals that the law of the sea be reviewed. In paragraph 1 of resolution 2574 A (XXIV) of 15 December 1969, the Secretary-General was requested

to ascertain the views of Member States on the desirability of convening at an early date a conference on the law of the sea to review the régimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the sea-bed and ocean floor which lies beyond the limits of national jurisdiction, in the light of the international régime to be established for that area.

In the light of the replies received [883] and the progress made towards the elaboration of the international régime for the area of the sea-bed beyond the limits of national jurisdiction, the First Committee considered, *inter alia,* questions relating to the law of the sea during the twenty-fifth session (1970) of the General Assembly. Following the First Committee's debate the General Assembly, in paragraphs 2 and 3 of resolution 2750 C (XXV) of 17 December 1970, decided:

2. ... to convene in 1973, in accordance with the provisions of paragraph 3 hereof, a conference on the law of the sea which would deal with the establishment of an equitable international régime—including an international machinery—for the area and the resources of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction a precise definition of the area, and a broad range of related issues including those concerning the régimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment including, *inter alia,* the prevention of pollution) and scientific research;

3. ... to review at its twenty-sixth and twenty-seventh sessions the reports of the Committee referred to in paragraph 6 below on the progress of its preparatory work with a view to determining the precise agenda of the conference on the law of the sea, its definitive date, location and duration, and related arrangements; if the General Assembly, at its twenty-seventh session, determines the progress of the preparatory work of the Committee to be insufficient, it may decide to postpone the conference.

316. The General Assembly reaffirmed the mandate of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction set forth in resolution 2467 A (XXIII), as supplemented by resolution 2750 C (XXV), and enlarged the membership of the Committee from forty-two to eighty-six Member States. In paragraph 6 of resolution 2750 C (XXV) the General Assembly intructed

the enlarged Committee ... to hold two meetings in Geneva, in March and July-August 1971, in order to prepare for the conference on the law of the sea draft treaty articles embodying the international régime including an international machinery—for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, taking into account the equitable sharing by all States in the benefits to be derived therefrom, bearing in mind the special interests and needs of developing countries, whether coastal or land-locked, on the basis of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction and a comprehensive list of subjects and issues relating to the law of the sea referred to in paragraph 2 above, which should be dealt with by the conference, and draft articles on such subjects and issues.

317. In accordance with General Assembly resolution 2750 C (XXV), the question of the régime of the sea-bed beyond the limits of national jurisdiction, together with a range of issues concerning the law of the sea, have been referred to the enlarged Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction. As indicated in paragraph 6 of the resolution, the Committee is required to act as a preparatory body for the Conference on the Law of the Sea, which is to be convened (subject to the provisions of the resolution) in 1973 and, in particular, to prepare draft articles on the matters to be considered by the Conference.

Chapter XI

The law of the air

318. The 1948 Survey [884] did not include "fields already covered by existing international conventions such as ... air law". [885] In order, however, that the present survey may be as comprehensive as possible and because, as is mentioned below, the Commission has in fact considered some aspects of air law, whilst

[883] Reproduced in the Secretary-General's report (A/7925 and Add.1-3).

[884] See para. 4 above.

[885] 1948 Survey, para. 25.

others have been the object of concern on the part of the international community during recent years, it was thought that a brief summary of the question should be included.

319. The international law of the air can be divided in two: public international air law and private international air law. Provisions concerning both are to be found in a large number of treaties, some of which are considered to reflect, at least to some degree, what has become general international law in this area.

320. As regards public international air law, the basic instruments are the Convention on International Civil Aviation (Chicago, 1944) [386] and the Convention relating to the Regulation of Aerial Navigation (Paris, 1919),[387] which, for practical purposes, was replaced by the 1944 instrument. These treaties postulate the fundamental principle that States have complete and exclusive sovereignty over the air space above their territories.[388] They also provide limited rights for the aircraft of States parties to fly over the territory of other States parties, establish certain other rules relating to flight over the territory of States parties, the nationality of aircraft and the facilitation of air navigation, and provide a method for the elaboration of international standards and recommended practices.

321. The rights granted in the Chicago Convention were supplemented by two other agreements signed in 1944: the International Air Transit Agreement [389] and the International Air Transport Agreement. [390] The first, which has been widely accepted, grants the air carriers of the parties the right to fly over, and make non-traffic stops in, the territories of the other States parties in the course of scheduled international flights; the second, which is in force between only a handful of States, grants the right to pick up and put down passengers and cargo. Since this second agreement has not been widely accepted [391] and since, as noted, it is recognized that States have complete and exclusive sovereignty over their air space, a very large number of bilateral agreements have been concluded granting, usually on a reciprocal basis, the commercially valuable rights to pick up and put down passengers and cargo. These agreements, which in nearly all instances follow certain standard forms, in addition to granting these rights, specify the routes on which, and the conditions according to which, the services are to be operated. In at least one instance a regional agreement has been concluded to grant traffic rights in respect of *non*-scheduled flights. [392] Bilateral treaties have also been used by Governments to regulate related matters such as the recognition of pilots' licences and certificates of air-worthiness, [393] and taxation of the income of air carriers.

322. The Commission had also been concerned, in a limited way, with the question of air traffic when engaged in the elaboration of the juridical status of certain zones or spaces. Article 2 of the Convention on the Territorial Sea and Contiguous Zone provides, similarly to the Paris and Chicago Conventions, that the sovereignty of the coastal State extends to the air space of the territorial sea. [394] Since its draft dealt solely with the sea, the Commission did not study the conditions under which sovereignty over the air space is exercised. [395] Article 2 of the Convention on the High Seas includes as an element of the freedom of the seas the freedom to fly over the high seas. The Commission included this reference because it considered that this freedom flowed directly from the principle of the freedom of the sea; it refrained from formulating rules on air navigation however, since its task in that phase of its work was confined to the codification and development of the law of the sea. [396]

323. The Continental Shelf Convention contains a provision which confirms article 2 of the High Seas Convention. Article 3 stipulates that the rights of the coastal State over the continental shelf do not affect

386 United Nations, *Treaty Series*, vol, 15, p. 295.

387 League of Nations, *Treaty Series*, vol. XI, p. 173.

388 See also the Havana Convention on Commercial Aviation, of 20 February 1928 (League of Nations) *Treaty Series*, vol. CXXIX, p. 223.

389 United Nations, *Treaty Series*, vol. 84, p. 389.

390 *Ibid.*, vol. 171, p. 387.

391 Note also the failure of early efforts to draft a multilateral convention granting traffic rights.

392 Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe (Paris, 1956) (United Nations, *Treaty Series*, vol. 310, p. 229).

393 Largely replaced in practice by one of the standards adopted by ICAO and by provisions in the multilateral air transport agreements.

394 The Commission's draft article 2 was, with one change referred to below, identical. According to the commentary, the article was taken from the regulations proposed by the 1930 Codification Conference convoked by the League of Nations (*Yearbook of the International Law Commission, 1954*, vol. II, p. 154, document A/2693).

The Commission's draft article 2 contained the word "also", which was omitted in the version of the article eventually adopted in the Convention. If the word had been retained this could have been interpreted as establishing a link between the general reservation of article 1, paragraph 2, relating to the juridical status of the territorial sea, which provides that the sovereignty over the territorial sea is exercised subject to the provisions of the Convention and to other rules of international law, and article 2, which, by contrast, contains no such provision. The Commission rejected a proposal to include such a provision, several members expressing the view that there were no limitations on sovereignty over air space, except those found in particular treaties (*ibid., 1955*, vol. I, pp. 70-71, 295th meeting, paras. 26-34). More specifically it would appear to have been accepted that, under general international law, there is no right of innocent passage through the air space above territorial waters (*ibid., 1952*, vol. I, p. 187, 172nd meeting, paras. 15-32). At the 1958 Geneva Conference, an amendment submitted by the Netherlands according to which the "sovereignty of a State extends also to the air space over its territorial sea, without prejudice to existing conventions or other rules of international law relating to the exercise of this sovereignty" was withdrawn before voting. (See *Official Records of the United Nations Conference on the Law of the Sea*, vol. II (United Nations publication, Sales No. 58.V.IV, Vol. III), annexes, p. 234, and 59th meeting, p. 183, para. 13.

395 *Yerbook of the International Law Commission, 1956*, vol. II, p. 265, document A/3159, chap. II, sect. III, commentary to article 2.

396 *Ibid.*, p. 278, commentary to article 27, para. 1.

the legal status of the superjacent waters as high seas, or that of the air space above those waters. The régime of the continental shelf, said the Commission, was "subject to and within the orbit of the paramount principle of the freedom of the seas and of the air space above them". The Commission added that "no modification of or exceptions to that principle are admissible unless expressly provided for in the various articles" of the draft. [397]

324. The Convention on the High Seas does, however, include two further groups of articles dealing with aircraft: those relating to piracy and to hot pursuit. Because it considered acts committed in the air by one aircraft against another could hardly be regarded as acts of piracy and because such acts were, in any event, outside the scope of the draft articles, the Commission did not include acts by an aircraft against another (as opposed to a ship) within its definition of piracy. At the first Conference on the Law of the Sea, however, the scope of the definition of piracy was widened and article 15 of the Convention on the High Seas now refers to acts by aircraft against other aircraft. The provisions on hot pursuit on the high seas authorize pursuit of ships "by aircraft" when there is good reason to believe that the ship has violated the laws and regulations of the coastal State and, *inter alia,* the pursuit is commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone (if there is a violation of the rights for the protection of which the zone was established) of the pursuing State.

325. Many other treaties regulate aspects of international air transport. Thus there are agreements for air navigation services, regional agreements for safety and control purposes, a multipartite agreement establishing the method of fixing rates, agreements for the establishment of joint operating agencies and sanitary regulations. [398] It does not appear to be necessary to pursue these matters since they are largely technical and fall within the continuing competence of various universal and regional expert agencies.

326. One area of concern in the public international law of the air which requires more detailed summary is the question of crimes committed on board aircraft or affecting international civil aviation, one aspect of which, it has been suggested, should be considered by the Commission. [399] This matter has been considered by the competent bodies of ICAO, as well as by the General Assembly and the Security Council, over a period of several years. In 1963 a Conference convoked by ICAO adopted the Convention on Offences and Certain other Acts committed on board Aircraft ("Tokyo Convention"). [400] This Convention, which entered into force in 1969, contains provisions concerning the jurisdiction of the State of registration and of certain other States affected by acts on board aircraft, the powers of the aircraft commander, the unlawful seizure of aircraft and the relevant powers and duties of States. Two points can be noted. First, the Convention does not require the States which have jurisdiction to exercise it or, alternatively, to extradite the offender; and, in the case of unlawful seizure in particular, it requires States in which the aircraft lands only to permit the passengers and crew to continue their journey as soon as practicable and to return the aircraft and its cargo to those entitled to it. (In other words, there is no obligation on any State to take any action against those who seize aircraft in flight). Second, the Convention does not deal specifically with all forms of attack on aircraft and their passengers and crew.

327. The question of the commission of crimes on board aircraft, in particular the forcible seizure of control in order to divert civil aircraft in flight, has also been considered by United Nations organs following a number of such incidents. On 12 December 1969, the General Assembly, having considered the item "Forcible diversion of civil aircraft in flight", adopted resolution 2551 (XXIV) in which, *inter alia,* it called upon States to take every appropriate measure to ensure that their national legislation provided an adequate framework for effective legal measures against unlawful interference with, seizure of, or other wrongful exercise of control by force or threat thereof over, civil aircraft in flight, urged full support for the efforts of ICAO in this area, and invited States to ratify or accede to the Tokyo Convention. The question was next considered within the United Nations in September 1970 when the Security Council took up the matter. The Council unanimously adopted resolution 286 (1970) in which it expressed its grave concern at the threat to innocent civilian lives from the hijacking of aircraft and any other interferences in international air travel, appealed to all parties concerned for the immediate release of all passengers and crews held as a result of the hijacking and interference in international air travel, and called on States to take all possible legal steps to prevent further hijackings or other acts of interference with such travel. In resolution 2645 (XXV) of 25 November 1970, adopted following debate in the Sixth Committee, the General Assembly condemned without exception all acts of aerial hijacking and other interference with civil air travel, called upon States to take all appropriate measures to deter, prevent and suppress such acts, and, *inter alia,* invited States to become parties to the Tokyo Convention and urged them to support the efforts of ICAO towards the strengthening of effective measures with respect to interference with civil air travel.

[397] *Ibid.*, p. 298, commentary to article 69.

[398] See also article 25, paragraph 2, of the Convention on the High Seas, which requires States to co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio active materials or other harmful agents.

[399] In the course of the debate in the Sixth Committee on the report of the International Law Commission at the twenty-fifth session of the General Assembly, it was suggested that the Commission should study "aerial piracy" (see *Official Records of the General Assembly, Twenty-fifth Session, Annexes,* agenda item 84, document A/8147, para. 113).

[400] United Nations, *Treaty Series,* vol. 704 (not yet published), No. 10106.

328. As regards the activities of ICAO, [401] a plenipotentiary conference was held at The Hague under that organization's auspices which resulted in the adoption, on 16 December 1970, of the Convention for the Suppression of Unlawful Seizure of Aircraft. [402] The draft text on which this instrument was based was prepared by the Legal Committee of ICAO. The Convention is to come into force thirty days following the deposit of instruments of ratification by ten States signatory to the Convention and which participated in The Hague Conference. The Convention recognizes the serious nature of the act of unlawful seizure of aircraft, establishes the principle of universal jurisdiction as regards prosecution of the offences in question, and provides for extradition procedures. Under the Convention any person who, by force or threat of force, unlawfully seizes control of a civil aircraft in flight, or is an accomplice of such a person, commits an offence which States parties to the Convention undertake to make punishable by severe penalties (articles 1 and 2). Every State party is required to establish its jurisdiction in the case of offences committed on board airplanes bearing its registration, when the aircraft lands in its territory with the alleged offender still on board, or where it does not extradite the alleged offender (article 4). Any State party in whose territory the offender or alleged offender is present is required to take him into custody, to make a preliminary inquiry, and to inform the State of registration of the aircraft, the State of nationality of the detained person, and any other interested States if it considers it advisable; such States are to be informed of the findings of the preliminary inquiry and whether the detaining State intends to exercise jurisdiction (article 6). If a Contracting State does not extradite the alleged offender it is obliged "without exception whatsoever and whether or not the offence was committed in its territory" to submit the case to its competent authorities for the purposes of prosecution (article 7). The offence defined in the Convention is to be deemed, however, to be included as an extraditable offence in any extradition treaty existing between the States parties; States parties undertake to include the offence as an extraditable offence in any future treaties concluded between them (article 8). [403] Lastly, the ICAO Council is to be informed of the circumstances of the offence, the steps taken to restore control of the aircraft to its commander and to facilitate the continuation of the journey of its passengers and crew, and the measures taken with respect to the offender or alleged offender (article 11). It should be further noted that the ICAO Legal Committee, at its eighteenth session (1970), adopted a draft convention on acts of unlawful interference with civil aviation (other than those covered by the Convention for the Suppression of Unlawful Seizure of Aircraft). [404] This draft convention is to be considered by a diplomatic conference to be held at Montreal in September 1971.

329. With regard to the above it may be noted that reference was made by the General Assembly, and by many speakers during United Nations discussions of the item, to the importance of the co-ordination of efforts to prevent aerial hijacking, and also of deferring to the technical competence of ICAO in this sphere. At the same time, the humanitarian and political implications have been such that it was held appropriate for the General Assembly and the Security Council to consider the latter aspects. It may also be noted that the Commission has generally not itself prepared draft provisions concerning the methods of implementation of substantive rules unless it has considered the matter inseparable from the operation of the rule it is codifying. [405]

330. So far as the private international law of the air is concerned, reference is once again to be made to a large number of multilateral treaties. First, the Warsaw Convention of 1929, [406] as supplemented, [407] provides for the uniformity of certain documents (tickets and waybills) and states a set of rules for the determination of claims in respect of damage to person and property arising in the course of international air transport. Second, the two Rome Conventions (1933 and 1952) provide rules in respect of damage caused to third parties on the surface. [408] These Conventions, along with the Warsaw Convention, also regulate jurisdiction in respect of claims arising under them. Third,

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[401] Note also the resolution adopted by the ICAO Council on 1 October 1970, in which the Council called upon Contracting States:

"in order to ensure the safety and security of international civil air transport, upon request of a Contracting State, to consult together immediately with a view to deciding what joint action should be undertaken in accordance with international law, without excluding measures such as the suspension of international civil air transport services to and from any State which after the unlawful seizure of an aircraft, detains passengers, crew or aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, or any State, which contrary to the principles of articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes."

ICAO, *Documents of the Legal Committee, eighteenth session* (London, 29 September-22 October 1970), Montreal, 1971, vol. II, p. 179 (LC/Working draft No. 770).

[402] For the text of the Convention, see ICAO, document 8920, p. 1.

[403] Provision is also made, subject to certain conditions, for extradition in the absence of an extradition treaty between the parties.

[404] See ICAO, document 8910 (LC/163), part II.

[405] See paras. 130-144 above.

[406] League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

[407] In 1955 by the Hague Protocol (United Nations, *Treaty Series*, vol. 478, p. 371), in 1961 by the Guadalajara Convention (*ibid.*, vol. 500, p. 31), and in 1966 by the so-called Montreal Agreement which operates by way of amendments to the standard form of ticket; the text of the Montreal agreement is contained in *Yearbook of Air and Space Law*, 1966, p. 119. The ICAO Legal Committee is currently working on further amendments to the Warsaw Convention.

[408] League of Nations, *Treaty Series*, vol, CXCII, p. 289, and United Nations, *Treaty Series*, vol. 310, p. 181. Neither Convention has been widely accepted and the later one is being reviewed by the ICAO Legal Committee with a view to its revision.

a convention signed at Geneva in 1948 requires parties to recognize certain legal rights with respect to aircraft. [940] Finally, the Legal Committee of ICAO has before it such further questions as the law applicable to collisions, the liability of air control agencies and the legal status of aircraft. Much of the scope of private international air law—the law applicable to claims, jurisdiction, arrest and rights in aircraft—has thus been, or is being, subjected to consideration by the competent technical bodies and a number of general multilateral instruments have been adopted regulating the particular issues involved.

Chapter XII

The law of outer space

331. The development of means of space exploration, which began during the 1950s, raised, in essence, two questions for international law and, indeed, for the international community in general: first, what substantive rules were to be adopted to regulate activities in outer space; secondly, what means were to be used to reach agreement on those rules. As regards the second, the General Assembly, by resolution 1472 (XIV) of 12 December 1959, established a Committee on the Peaceful Uses of Outer Space (in succession to a previous *ad hoc* committee), composed of representatives of States, which was charged with the task of studying means for encouraging international co-operation and examining the legal problems involved in space exploration. In December 1963 the General Assembly adopted a "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space" (resolution 1962 (XVIII) and, in connexion with the work of the Committee on the Peaceful Uses of Outer Space recommended that consideration should be given to incorporating in international agreement form, as appropriate, legal principles governing activities of States in the exploration and use of outer space (resolution 1963 (XVIII)).

332. The Outer Space Committee has established a Legal Sub-Committee which has prepared two major agreements relating to the substantive aspects of space activities, both of which were adopted by resolution of the General Assembly. The agreements concerned are the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, [410] and the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space. [411] Several provisions of the Treaty on Principles are based on principles set forth in the Declaration mentioned in the preceding paragraph. Articles 1 to 3 of the Treaty provide as follows:

Article I. The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

Article II. Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III. States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celectial bodies in accordance with international law, including the Charter of the United Nations, in the interest of maintaining peace and security and promoting international co-operation and understanding.

333. The Committee's Legal Sub-Committee has not yet succeeded in adopting the text of an agreement on liability for damage caused by the launching of objects into outer space, although the General Assembly has on several occasions indicated the importance it attaches to this question. [412] In addition, the Committee has been entrusted with the study of questions "relative to the definition of outer space and the utilization of outer space and celestial bodies, including the various implications of space communications". [413] The legal problems of the utilization of outer space which have been suggested for international action include the registration of objects launched into outer space; the legal principles relating to space communications and, in particular, to broadcast satellites; and the rules governing man's activities on, and substances originating from, the moon and other celestial bodies.

334. In summary of this brief review of the international steps taken to regulate space activities, it may be said that the foundations have now been laid and that certain basic principles have been established and cast in treaty form. Although, as noted above, there are a number of outstanding issues, the Committee set up by the General Assembly is continuing its efforts to reach further agreement. More generally, it is probable that, the broad rules having been laid down, the future course of space law will, at least for the development of means of space communications and the establishment of multinational arrangements whereby space activities may be pursued. The legal arrangements in question, although having distinctive features, may

[409] United Nations, *Treaty Series*, vol. 310, p. 151.

[410] Commended by the General Assembly in resolution 2222 (XXI) of 19 December 1966, to which the text of the Treaty is annexed.

[411] Commended by the General Assembly in resolution 2345 (XXII) of 19 December 1967, to which the text of the Agreement is annexed.

[412] Resolution 2260 (XXII) of 3 November 1967, resolution 2453 B (XXIII) of 20 December 1968, and resolution 2601 B (XXIV) of 16 December 1969.

[413] General Assembly resolution 2260 (XXII). Text repeated in resolution 2453 B (XXIII).

thus have much in common with developments in other fields affecting the interests of all or several States, where recourse has been had to a pooling of resources, on an agreed basis of international or regional co-operation, in order to achieve desired results which it would be difficult for one State to achieve on its own.

Chapter XIII

The law relating to the environment

335. The 1948 Survey [414] did not contain a chapter dealing with matters coming under this heading, nor did it have a section on the law of outer space, or on the law relating to the sea-bed and the ocean floor beyond national jurisdiction, while the reference to the legal aspects of the continental shelf was brief. Nevertheless, technological developments have raised problems which have now become familiar in each of these areas. The steps taken in order to provide an appropriate international legal framework for the development of space activities and for the exploration and exploitation of the natural resources of the sea-bed have been referred to earlier. In the case of the law relating to the preservation of the environment the "law" as such, regarded as a distinct segment of international law, is relatively less developed. Furthermore —unlike the case of outer space and the continental shelf and sea-bed beyond—the matters under discussion concern activities which are not confined to a single area, so as to be prescribed by reason of their geographical scope; by definition, matters affecting the environment are all-embracing. By the same token, the kind of law to be developed—treaty arrangements, regulatory bodies of various kinds, the co-ordination of national activities, for example—has (at least as yet) no special quality in itself which would enable attention to be concentrated on the particular character of the legal instruments *per se*. Nevertheless it is likely that, for a variety of reasons—including most notably the growth in industrial production, the rising volume of potential harmful agents transported (for instance oil), the accompanying rise in consumption and the steadily increasing figure of world population—greater attention will have to be paid in future to the problems of preserving, or conserving, the environment, so as to enable it to continue to support large numbers of people.

336. The body of law devoted to this end may be expected to grow accordingly in the course of the next ten to twenty years. Much of the law will be national, designed to reduce the pollution caused by industrial processes, the disposal of waste products, heating, vehicle exhaust, the indiscriminate use of insecticides and so forth, but international regulations will also be required, chiefly as regards marine pollution, [415] fresh water pollution in the case of rivers and lakes, and air pollution. A number of universal and regional bodies are indeed already engaged in considering these questions. The full ramifications of the issues raised cannot easily be defined. For example, what attitude will States choose to adopt as regards increasing noise caused by aircraft, alterations in marine conditions (brought about by a combination of complex causes, which leads to a decline in fish stocks), or changes in the water table, affecting the water used for drinking and for irrigation in an area extending to several countries? The problems posed are many, and, if they are not all likely to happen at once, they are foreseeable enough to be the subject of concern.

337. The United Nations Conference on the Human Environment (Stockholm, 1972) is expected to call attention to the nature of the problems raised and to lead to the adoption of a declaration which will set out the basic principles to govern future policies in this area. At this stage it is not possible to say, in definitive terms, what further legal instruments may be adopted, either at that Conference or subsequently in the light of its work. Having regard, however, to the importance of the subject and the sizeable growth in the body of relevant law which may be expected to occur during the years which the Commission's future programme may cover, it has been thought that the Commission's attention should at least be called to this area.

338. There is, of course, a certain amount of customary law which may be referred to in this context and a number of cases [416] relating to the application of the general principles of international law which may be invoked, whilst many existing treaties contain provisions which may be pertinent (for example, article 25 of the Convention on the High Seas, and treaties referring to measures for plant protection or fisheries conservation). Nevertheless it is understood that the task confronting the international community entails the development of essentially new law, on what may eventually prove to be a considerable scale, and not merely the codification of existing legal rules and practices. It is difficult at this stage to say what form the arrangements to be made will take and whether the relationship between the component parts will be such as to result in a coherent body of law, or whether the eventual solution will be a series of piecemeal agreements, without any underlying general pattern or system. Nor is it possible to define, in exhaustive terms, all the areas and aspects which may need to be borne in mind in devising the legal arrangements in question. To provide, however, merely one example of the activities which are becoming realizable and where international regulation will surely be eventually required, mention may be made of weather modification. Weather forecasting has made rapid progress in recent years, greatly accelerated by the development of new instruments, the use of space satellite observations, and a more complete monitoring network. Whilst steps of this kind can be

[414] See para. 4 above.

[415] Already referred to in para. 307 above.

[416] For example, Trail Smelter Case (1941): *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1095; Lac Lanoux case (1957): *ibid.*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 281.

conducted within the framework of WMO and the Intergovernmental Oceanographic Commission of UNESCO, on what grounds and in what circumstances might a State or group of States (even possibly acting under the auspices of an international body) seek to modify the weather for its (or their) own advantage?

339. The matter is referred to in the present document in order to show not only the full range of matters covered, or to be covered, by international law, but also with a view to suggesting—as is borne out by the course which has been followed with respect to outer space and the area of the sea-bed beyond national jurisdiction—that the needs of the international community in the field of the codification and progressive development of international law, as envisaged in the 1948 Survey, have changed to an appreciable degree. As was pointed out in the introduction, for a variety of causes States are now being impelled towards the adoption of a more active and deliberate approach to the development of international law than was formerly the case. Whereas international law was traditionally created largely by a series of individual acts, performed either by a single State or by two or more States and usually continued over an appreciable period, attempts are now made to tackle international problems on a more conscious, regular and collective basis. The requirement that, when drawing up its long-term programme, the Commission should take account of "the international community's current needs" [417] may be recalled in this connexion. Although the tendency under discussion is one of general significance for the future course of the Commission's work, the matters coming under the present heading raise the issue especially clearly.

Chapter XIV

The law relating to international organizations

340. It would appear to be agreed that there is now a body of law relating to international organizations having, in many respects, its own characteristics and being in any case of a scale such as to require that reference be made to it in the present survey. It is not, however, easy to relate the main features of this large and amorphous body of law to the objects of the study now being undertaken. International organizations provide at the present time—and here one may note a significant increase in activity, as well as in the number of participating States, since 1948—the principal means available for the conduct of multilateral relations and for the securing of agreement on, and implementation of, multilateral objectives, whether those objectives relate to the promotion of friendly relations and co-operation between States, to the progressive development and codification of international law, to economic development, or to the peaceful uses of the sea-bed or of outer space. Thus in every section of this survey reference has been made to the work of one or other international body, or to resolutions or treaty instruments adopted within their framework.

341. It is not therefore proposed to attempt to describe the actual operations and structure of the many international organizations which exist, or to evaluate their role in the contemporary world, but to single out certain areas which may be of interest to the Commission. The wider approach which could be taken, so as to encompass the impact in different spheres of the acts of international organizations, would, in any case, despite its importance, necessarily include matters which would not appear to be susceptible to the processes of the codification and progressive development of international law, at least as these have normally been understood by the Commission. Account has been taken in the following chapter of the views expressed in the Commission during its preliminary discussion at its fifteenth session (1963) and sixteenth session (1964) of the scope of the topic "Relations between States and international organizations". [418]

342. The matters dealt with in the present chapter have been sub-divided as follows:

(1) The legal status of international organizations, and the different types of organization.

(2) Privileges and immunities of international organizations, and of entities and officials under their authority.

(3) The law of treaties in respect to international organizations, responsibility of international organizations, succession between them, and other special questions.

(4) Methodological approach to the codification of the law relating to international organizations.

1. The legal status of international organizations, and the different types of organization

343. As has been recalled, [419] the Special Rapporteur on the topic "Relations between States and international organizations" dealt in his first report, [420] submitted in 1963, with questions relating to the international personality of international organizations (including the definition of that personality), their treaty-making capacity, and the capacity to espouse claims. [421] The

[417] *Yearbook of the International Law Commission, 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87. This paragraph is largely reproduced in paragraph 1 of the present document.

[418] For the diplomatic law aspects of the position of representatives of States to international organizations, see paras. 234-239 above.

[419] See para. 235 above.

[420] *Yearbook of the International Law Commission, 1963*, vol. II, p. 159, document A/CN.4/161 and Add.1.

[421] The report contains also a review (part III) of attempts to codify the international law relating to the legal status of international organizations. Section D of that part concerns the efforts made within the Commission in connexion with its work on topics selected for codification, particularly with regard to: the law of treaties (until 1962); law of the sea (the right of international organizations to sail vessels under their flag); State responsibility (reports of the first Special Rapporteur and work of the Sub-Committee on State responsibility); *ad hoc* diplomacy (report of the first Special Rapporteur); and succession of State and governments (work of the Sub-Committee

report likewise examined the evolution of the concept of international organizations, including the various ways in which they might be classified: temporary (or *ad hoc*) and permanent; public (intergovernmental) and private (non-governmental); according to the scope of membership (universal and regional) and to the procedures of admission; and according to functions (sub-divided according to the scope of activities; the nature of the division of power; and according to the extent of authority and power of the organization vis-à-vis States).

344. These matters gave rise to a certain discussion in the Commission at its fifteenth session (1963) and sixteenth session (1964), [422] which revealed differences of interpretation and approach as to the concept of international personality of international organizations. Speaking in connexion with the delimitation of the scope of the topic "Relations between States and international organizations" and the interpretation of General Assembly resolution 1289 (XIII), [423] some members of the Commission, like some representatives in the Sixth Committee, sought to emphasize that international organizations were subjects of international law only to the extent that they needed that status in order to carry out their work; there could be no question of their having the same status as was enjoyed by States. Furthermore whereas all States possessed the same legal status, this was not the case as regards the various international organizations. Consistent with this approach, it was argued that since the legal personality of an international organization depends on its constitution, there were no "general principles" applicable, comparable to those relating to the international personality of States. The rules on the personality of an international organization based on its constitution were, accordingly, binding only on member States and States which accepted that international personality. The view was also put forward that whereas a number of fairly substantial general rules existed on diplomatic questions, there were few, if any, general rules for international organizations concerning treaty law, State responsibility and State succession. Others, by contrast, took issue with the strict concept expressed in these arguments and agreed with the Special Rapporteur's suggestion that the international personality of international organizations should be studied first. While recognizing that the general principles on the subject were rapidly evolving, these members were of the opinion that the problems which arose ought to be studied by the Commission.

345. The place of regional organizations in the work to be undertaken on the topic was also the subject of a division of opinion. Some considered that their omission would result in a serious gap, others that, since regional organizations showed ever greater differences among themselves than did universal bodies, attention should be concentrated primarily on international organizations of a universal character. [424]

346. There are other questions falling under the heading of the present section which may also be listed. There is, as the Special Rapporteur for the topic "Relations between States and international organizations" mentioned in his first report, [425] the general topic of the classification of international organizations and of their respective legal capacity, although here too, as in other instances concerning the law relating to international organizations, it is difficult, having once distinguished the different types of organizations, to proceed to devise a separate law or legal system for each without, by the same token, impinging, or appearing to impinge, on the specific treaty régimes which exist in each case. Specific aspects of legal capacity, other than those relating to the capacity to conclude treaties or to incur responsibility, can, however, be separated: for example, contractual capacity, capacity to acquire and dispose of movable and immovable property, and capacity to engage in legal proceedings. [426]

2. Privileges and immunities of international organizations, and of entities and officials under their authority

347. At the eighteenth session (1966), the Special Rapporteur on "Relations between States and international organizations" stated:

on the Succession of States and Governments). At its fourteenth session (1962) the Commission decided to discuss the draft articles on the law of treaties on the understanding that treaties entered into by international organizations were not within its scope (see document A/CN.4/L.161, paras. 65-66). During the preparation and formulation of the draft articles on the law of treaties, the Commission was, from time to time, concerned with questions relating to international organizations mainly in connexion with provisions such as: the scope of the draft articles, the use of the term "treaty", the international agreements not within the scope of the draft articles treaties which are constituent instruments of international organizations or which have been drawn up within international organizations, the capacity to conclude treaties, full powers to represent the State in the conclusion of treaties, negotiation of a treaty and adoption and authentication of its text participaion in a treaty, reservations, termination and amendment of multilateral treaties, registration, correction of errors and the functions of the depositary. During recent years, in addition to the consideration of the topics "Relation between States and international organizations", the Commission touched upon questions relating to international organizations when discussing the scope of the draft articles on special missions, as well as the delimitation of its initial work on State responsibility and Succession of States and governments. Problems of succession, including to some extent succession of international organizations, were involved in the "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations" on which the Commission submitted its conclusions in at its fifteenth session (see *Yearbook of the International Law Commission 1963*, vol. II, p. 217, document A/5509, chap. III).

[422] For a more detailed summary, see *Yearbook of the International Law Commission, 1967*, vol. II, pp, 136 *et seq.*, document A/CN.4/195 and Add.1, paras. 12 *et seq.*

[423] See relevant paragraph of the resolution cited in para. 234 above.

[424] For the solution given to this question in the context of the draft articles on representatives of States to international organizations, see para. 238 above.

[425] See foot-note 420 above.

[426] These aspects were referred to by the Special Rapporteur in is first report.

With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the topic had been discussed in 1963 and 1964; those apprehensions related to the position of the general Conventions on the privileges and immunities of the United Nations and the specialized agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect. [427]

348. In proposing to give priority to the status, privileges and immunities of representatives of States to international organizations within the context of the topic, the Special Rapporteur pointed out that, from the doctrinal point of view, whereas the representatives of States to international organizations possess, by definition, a representational quality so as to make their status analogous to that of diplomatic representatives sent between States, this was not the case with respect to international organizations and persons connected with them. [428] Lacking a representative character, their position was based on the functional theory. The Special Rapporteur considered that the study of the privileges and immunities of the United Nations and the specialized agencies should be deferred to a later stage, when it could be undertaken separately.

349. Since the adoption of the course outlined by the Special Rapporteur, the Commission has, as has been explained above, made considerable headway with its examination of questions relating to the representatives of States to international organizations. In so doing, the Commission has had to consider certain general issues which would also arise if a study were to be made of the privileges and immunities of international organizations and their agents, namely, the question of whether the Commission's work should be confined to organizations of a universal character or whether it should also extend to regional organizations, and, secondly, the question of the relationship between the Commission's work (in particular in so far as this might take the form of a set of draft articles intended to form the basis for a convention) on existing agreements, most notably, in the present context, the two Conventions of 1946 and 1947 relating to the privileges and immunities of the United Nations and the specialized agencies. [429]

350. Although the Commission's earlier solution to these problems might make their consideration easier in relation to international organizations, there is a question of more basic importance which would also need to be decided at the outset, namely the extent to which there can be said to be a need to change or consolidate the relevant legal provisions relating to the privileges and immunities of international organizations. By comparison with many other branches of law, this area is already contained in treaties and, in the case of the organizations in the United Nations system, subsumed in the two Conventions relating to the privileges and immunities of the United Nations and of the specialized agencies. These basic instruments, to which the overwhelming majority of States are parties, are supplemented by more detailed agreements with the State in which the organization (or organizations as in the case of UNDP agreements) is working. In the opinion of the Secretary-General these agreements and basic Conventions provide on the whole a satisfactory framework for the operations of the United Nations family of organizations, and not strong case presents itself in his view for their revision on a large scale. In the case of the representatives of States, the 1946 and 1947 Conventions dealt only briefly or by implication with the institution of permanent missions, and with the division between permanent missions and delegations to regular sessions and to conferences convened by international organizations, while the practice of sending observer missions (whether on a permanent or *ad hoc* basis) was not mentioned. It is the development in these areas which gave rise to the need for study by the Commission of the question of representatives of States to international organizations and the preparation of a set of draft articles on the matter. Although international organizations forming part of the United Nations system have grown in number and in functions during the same period, the legal basis for their status, privileges and immunities has been more clearly provided by the 1946 and 1947 Conventions. In addition, the fact that, before operating in any given country the organization (or organizations) concludes an agreement with the host State, specifying in more detail the terms under which privileges and immunities are to be granted to the organization and its staff, has resulted, in most cases, in a more definite and precise basis for the legal relations involved than the relatively more piecemeal and summary approach followed with respect to State representatives.

351. That much being said, there are nevertheless specific areas where consideration might be given to the codification and progressive development of the law, most notably where activities are conducted which were not clearly envisaged at the time the initial instruments relating to privileges and immunities were drafted. Under various existing multilateral instruments the privileges and immunities of major bodies, such as the United Nations itself, the specialized agencies and the principal regional organizations, appear to be adequate to their needs, in particular in so far as these organizations function as "conference bodies", with a permanent sec-

[427] *Yearbook of the International Law Commission, 1966*, vol. I, part II, p. 279, 886th meeting, para. 8. It should be added that the "immunities and privileges of international organizations as bodies corporate", and "of officials of international organizations", had been earlier distinguished by the Special Rapporteur, together with "immunities of representatives to international organizations and other related questions under the common general heading of "immunities and privileges of international organizations" (see, *Ibid., 1963*, vol. II, p. 186, document A/CN.4/L.103, para. 4).

[428] *Ibid., 1967*, vol. II, p. 135, document A/CN.4/195 and Add.1, paras. 9-11.

[429] United Nations, *Treaty Series*, vol. 1, p. 15, and *ibid.*, vol. 33, p. 261.

retariat stationed at headquarters or major offices.[430] There has, however, been a very considerable growth in the number of bodies which are to some degree operational, that is to say engaged in direct activities comparable to those conducted by State agencies, and whose status, privileges and immunities, although regulated in many instances by a special agreement, has not been considered from an over-all standpoint. Within the United Nations system, for example, assistance has been furnished, either within the framework of UNDP, or to refugees or other distressed persons (for example, following natural disasters), in circumstances which were not fully envisaged in the 1946 and 1947 Conventions. Frequently it has been necessary to employ large numbers of local citizens, thus raising questions of conditions of employment (wage rates, application of local social security provisions), as well as of the application of privileges and immunities to staff whose task may have, for day-to-day purposes, ostensibly little to distinguish it from that on which others may be engaged in the private sector, or in the service of the local government. Schools have been operated, as well as vocational training centres of all kinds, laboratories (as in the case of that run by IAEA for example, as well as the European Organization for Nuclear Research (CERN)[431] and the Joint Institute for Nuclear Research at Dubna (USSR)[432] and many other institutions of a similar nature, in some cases established on a basis of mixed participation between the State (or group of States) concerned and the parent organization. Besides these activities, often of a generally educational or scientific nature, organizations have also been formed (chiefly outside the United Nations) in order to conduct a joint enterprise. The arrangements made with respect to the development and operation of space satellites on a joint basis for example, have resulted in the establishment of international bodies whose structure and function, though governed by a special agreement, has borne relatively little comparison with that of the more general pattern presented by the United Nations and its specialized agencies. As a further distinct case, attention may be called to the establishment of a number of peace-keeping bodies during the past twenty-five years. Mostly, though not solely, set up within the framework of the United Nations, these bodies have operated under specific host agreements and an express set of rules relating, *inter alia,* to their legal status as well as to their privileges and immunities in terms of local law. The question of the conditions under which such bodies may be established and operate has been a matter of considerable debate and, on occasion, of profound disagreement.

352. Whilst it would be possible to suggest that an examination of the privileges and immunities of operational organizations (excluding the conditions of their establishment and employment) could contribute to clarifying an area of the privileges and immunities of international organizations which has not yet been comprehensively explored, there is an additional question which would also have to be considered in this connexion, namely, whether, even if such an examination were to be made, it would be possible to proceed to any further degree of codification, having regard to the differing and individual nature of the organizations and other bodies concerned, and the existence of a series of separate treaty régimes.

3. The law of treaties in respect to international organizations, responsibility of international organizations, succession between them, and other special questions

353. In his first report on "Relations between States and international organizations"[433] the Special Rapporteur specified the first three above-mentioned questions as "special questions" within the topic. Since then the question of "treaties concluded between States and international organizations or between two or more international organizations" has been referred to the Commission as an "important question" by the General Assembly, following a resolution adopted by the United Nations Conference on the Law of Treaties, and is now under study.[434] As regards the two other questions, "responsibility of international organizations" and "succession between international organizations", the issue which arises may be put in basically the same terms as in respect of treaties, namely: to what extent is the law applicable to States in equivalent circumstances to be applicable, and to what extent must recourse be had to new legal arrangements and concepts? That there is an analogy in these instances with the parallel action of States—unlike, say, rules relating to voting within international organizations, which have no obvious inter-State equivalent—would appear to be undeniable. The precise ramifications of the analogy, however, are by no means clear. Although objections were raised to the assumption that instruments to which organizations are parties are treaties on the ground that this is a *petitio principii,* the similarity in the various practices would seem, at first sight, to be closer in the case of treaties than with respect to examples of the responsibility of, or succession between, organizations. Although there have been a number of examples of succession between different international organizations, it cannot be said that there have been so many as to provide a large body of cases from which general rules could be derived. In most if not all instances, the matter has been regulated by a special agreement (or series of agreements), tailored to fit the particular circumstances. That being so, the scope for codification and progressive development of the law with regard to

[430] For a comprehensive report on the position with respect to United Nations organizations, see the Secretariat study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities", in *Yearbook of the International Law Commission, 1967,* vol. II, p. 154, document A/CN.4/L.118 and Add.1-2.

[431] United Nations, *Treaty Series,* vol. 200, p. 149.

[432] *Ibid.,* vol. 259, p. 132.

[433] See foot-note 420 above.

[434] See paras. 259-261 above.

this aspect would appear to be limited. Unless, therefore, the Commission were to be asked to consider a specific issue, there would not seem to be any pressing utility for the Commission to study this question.

354. As regards the topic of the responsibility of international organizations—to which may be added the subject of the capacity of international organizations to espouse international claims—[435] there has been a somewhat greater (though still not very extensive) volume of practice, and the matter has most frequently been considered in the context of treaties providing for the possibility that operational activities (for example, in outer space) may be conducted under the auspices of an international organization. Having regard to the extremely varied sets of circumstances in which responsibility may be incurred by international organizations—ranging from acts vis-à-vis member States to those vis-à-vis non-member States, individuals and private bodies—there would appear to be considerable difficulties in arriving at a set of provisions on the matter which would be both specific enough in character to be useful and, at the same time, applicable to all or most international organizations. The questions raised in this context are, however, practical and continuing ones and the Commission may like to consider whether, as its work on State responsibility advances, [436] attention might at some stage be given to the study of the topic of the responsibility of international organizations, or of specific aspects of that topic.

355. Another issue is that of membership and representation in international organizations. [437] This and other topics pertaining to the over-all functioning of international organizations would appear, however, to raise doctrinal difficulties which might be difficult to solve, and to be dependent, as regards clarification and resolution, on a political process in which States are directly engaged.

4. Methodological approach to the codification of the law relating to international organizations

356. Proceeding from the above, a distinction may be drawn between the evolution of international law, regarded as a whole, ultimately fused with changes in the nature of international relations, and the more specific area of the codification and progressive development of international law, treated as a deliberate process within the general framework of international legal activity. While the Commission will certainly be concerned to follow the continued development of the law relating to international organizations—in the widest sense it can be said that the future course of international law will be largely determined by the part to be played by these organizations, and by the extent of the responsibilities they assume—this over-all development is separate from the immediate part of the codification and progressive development of international law with which the Commission is engaged. It is therefore suggested that the course which the Commission has so far followed, with the approval of the General Assembly, with respect to the law relating to international organizations—namely to deal with specific aspects which have similarities to the parallel practices of States, after the relevant inter-State law has been examined—would appear to offer the best possibilities for the Commission to contribute to the codification and development of the law in this area. Having regard to the existence of treaties governing the establishment and functioning of intergovernmental (and some non-governmental) bodies, the Commission will nevertheless continue to need to examine carefully the relationship between any study it may make and the operation of the treaties in question—thus acknowledging what is, by necessity, the extremely particularist nature of the various international organizations.

Chapter XV

International law relating to individuals

357. The matters covered in the present chapters have been arranged under four headings:

(1) The law of nationality;

(2) Extradition;

(3) Right of asylum;

(4) Human rights.

358. Specific aspects of certain of these topics are also dealt with elsewhere in the present document. [438] The 1948 Survey [439] examined under the title "The individual in international law" the law of nationality, extradition, the right of asylum, and also the treatment of aliens. The latter topic has been referred to in the present document in chapter IV ("State responsibility").

1. The law of nationality

359. The two central issues with respect to nationality remain those distinguished in the 1948 Survey, [440] namely, problems which arise owing to differences between the nationality laws applied by various countries (in particular as regards the conditions under which nationality may be accorded) and the question of statelessness. By way of general summary it may be said that the position with respect to matters involving conflicts between nationality laws remains basically

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[435] In this connexion see generally the Advisory Opinion given by the International Court of Justice, concerning reparation for injuries suffered in the service of the United Nations (*I.C.J. Reports 1949*, p. 174).

[436] See chap. IV above.

[437] Regarding a suggestion made in 1961, see *Yearbook of the International Law Commission, 1970*, vol. II, p. 256, document A/CN.4/230, para. 42.

[438] In particular, see below chapter XVI ("The law relating to armed conflicts") and chapter XVII ("International Criminal Law").

[439] See para. 4 above.

[440] 1948 Survey, paras. 76-77. The 1948 Survey also referred to the whole of the 1930 Hague Codification Conference and the adoption there of a Convention and of a number of protocols relating to the law of nationality.

unchanged. Nevertheless there have been some efforts, largely of a regional or subregional character, designed to reduce the problems involved or, at least, to introduce practical measures which would render them less acute. [441] In the case of one specific issue, the nationality of married women, a convention was adopted by the General Assembly in 1957, which came into force in 1958. [442]

360. As regards the question of statelessness, it may be noted that at its first session (1949) the Commission agreed to include the topic of "nationality, including statelessness" in its long-term programme. In 1951 the Commission was requested by the Economic and Social Council to prepare a draft international convention or conventions for the elimination of statelessness. At the Commission's third session (1951), Mr. M. Hudson was appointed as Special Rapporteur for the subject of nationality, including statelessness, his place being taken at the end of the fourth session by Mr. R. Córdova. At its fifth session (1953), the Commission provisionally adopted two draft conventions, one on the elimination of future statelessness and another on the reduction of future statelessness, which were then transmitted to Governments for comment.

361. Having examined the comments made by Governments and re-drafted some of the articles, the Commission adopted at its sixth session (1954) the two final draft conventions for submission to the General Assembly. In doing so, the Commission said:

> The most common observation made by Governments was that some provisions of their legislation conflicted with certain articles of the draft conventions. Since statelessness is, however, attributable precisely to the presence of those provisions in municipal law, the Commission took the view that this was not a decisive objection for, if Governments adopted the principle of the elimination, or at least the reduction, of statelessness in the future, they should be prepared to introduce the necessary amendments in their legislation. [443]

362. The draft conventions, each consisting of eighteen articles, aimed, on the one hand, at facilitating the acquisition of the nationality of a country by birth within its borders and, on the other hand, at avoiding the loss of a nationality except when another nationality was acquired. The draft convention on the elimination of future statelessness sought to impose stricter obligations on the contracting parties than the one which aimed merely to reduce statelessness. The Commission stated in its report that it would be for the General Assembly to consider to which of the draft conventions preference should be given.

363. At the General Assembly's ninth session in 1954 the majority of representatives in the Sixth Committee expressed the opinion that the time was not ripe for immediate consideration of the draft conventions. In resolution 896 (IX) of 4 December 1954, the General Assembly expressed its desire that a plenipotentiary conference be held

> to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States have communicated to the Secretary-General their willingness to co-operate in such a conference.

364. The United Nations Conference on the Elimination or Reduction of Future Statelessness, held in 1959, in which some thirty-five States participated, took as the basis for its discussion the draft convention on the reduction of future statelessness. Although a number of provisions were adopted, the Conference did not reach agreement as to how to limit the freedom of States to deprive citizens of their nationality in cases where such deprivation would render them stateless. Consequently, the Conference recommended that it be reconvened in order to complete its work. The second part of the Conference, held in 1961, in which representatives from thirty States participated, was devoted to discussion of outstanding matters. The most controversial issue was the provision relating to the conditions under which a State might deprive a person of nationality. The text finally adopted (article 8 of the Convention) affirms the principle that "a contracting State shall not deprive a person of its nationality if such deprivation would render him stateless", but it adds a certain number of exceptions (nationality obtained by misrepresentation or fraud; long residence abroad; conduct inconsistent with duty of loyalty). This question having been settled, the Conference adopted, on 30 August 1961, the Convention on the Reduction of Statelessness. [444] The instrument is a compromise between countries following the *ius soli* principle and those following that of the *ius sanguinis*, and attempts to reduce the causes of statelessness by a series of provisions regarding conditions for the granting and loss of nationality. The Convention, which was signed by five States, has not come into force, having been ratified or acceded to as of 1 April 1971, by only two States.

365. As for the question of present statelessness the Commission at its sixth session adopted a number of proposals, in the form of seven articles with comment-

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441 See, for example, the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality, concluded under the auspices of the Council of Europe in 1963 (United Nations, *Treaty Series*, vol. 634, p. 221).

442 *Ibid.*, vol. 309, p. 65. In 1950 the Commission was requested by the Economic and Social Council to undertake the drafting of a convention on the nationality of married women. A Special Rapporteur was appointed, who prepared a draft convention on the nationality of married persons in 1952. The Commission decided, however, that the question of the nationality of married women could only be considered in the context, and as an integral part, of the whole subject of nationality and did not therefore take further action with regard to the draft. Thereafter the question of the nationality of married women was considered by other United Nations organs, notably the Commission on the Status of Women, culminating in the adoption of the Convention referred to. As of 1 April 1971, forty-three States were parties to this instrument. (See *The Work of the International Law Commission* (United Nations publication, Sales No. 67.V.4), p. 28.)

443 *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, para. 12.

444 United Nations, *Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6), p. 53.

aries, and submitted them to the General Assembly as part of its final report on nationality, including statelessness. In submitting the proposals, the Commission said:

> In view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that the proposals adopted, though worded in the form of articles, should merely be regarded as suggestions which Governments may wish to take into account when attempting a solution of this urgent problem. [445]

366. As regards present statelessness, it may also be noted that a Convention relating to the Status of Stateless Persons, [446] adopted in 1954 by a conference convened by the Economic and Social Council, came into force in 1960. This Convention, however, as the title indicates, attempts to improve the status of stateless people and not to reduce or eliminate statelessness as such. As of 1 April 1971, twenty-two States were parties to the instrument.

367. Lastly it should be noted that when the Commission completed its task relating to statelessness in 1954, several members expressed the opinion that the Commission should content itself with the work it had done so far in the field of nationality, and the Commission thereupon decided to "defer any further consideration of multiple nationality and other questions relating to nationality." [447] A particular aspect, namely the question of the acquisition of the nationality of the receiving State by members of diplomatic missions and of consular posts and their respective families, was, however, considered in the context of the codification of diplomatic and consular relations. [448]

2. Extradition

368. At its first session the Commission decided not to include extradition in its 1949 list. [449] The principal reason given was that extradition depended on the existence of similar political conditions in the two States concerned. It would accordingly be useless to attempt to create uniform rules for extradition and it would be preferable to maintain the existing method of bilateral or regional treaties. [450]

369. The 1948 Survey mentioned the regional treaties which had been drawn up within the American system. Since then a regional treaty has been concluded by the members of the Council of Europe; [451] extradition among certain States in Africa formerly administered by France is governed by the General Convention for Co-operation in matters of Justice, of 12 September 1961, [452] and between those States and France by a series of almost identical bilateral treaties for co-operation in matters of justice; the members of the Commonwealth have drawn up a scheme for rendition between their territories which is dependent, not on formal agreement, but on uniform legislation which has been enacted by many of them; [453] and the Asian-African Legal Consultative Committee in 1961 prepared a set of draft articles embodying the principles of extradition. [454] Further, a number of new States, mainly in Africa and Asia, have indicated that they consider themselves party to bilateral extradition treaties which were concluded by the former administering Power and applied to them before independence. [455] Finally it would appear that certain basic principles commonly reappear in extradition treaties and in the other instruments mentioned above; in other words, many of the treaties consist of generally similar clauses.

370. One can accordingly raise the question whether the reasons given for the Commission's decision in 1949 are now valid. The common interest in providing for the return and prosecution of alleged offenders would appear to be a major factor in the thinking of Governments, at least in a large proportion of the cases which arise in practice. Certain basic problems—such as the extradition of nationals and the scope of the exception with respect to political offences—tend to recur and, along with other issues, they might be usefully studied and distinguished. In examining again the question in the light of the revision of its 1949 list, the Commission might also wish to consider the suitability of undertaking a study on the meaning and scope of the several standard clauses included in extradition treaties.

371. Several multilateral conventions dealing with such matters as genocide, war crimes and crimes against humanity, traffic in women and children, narcotics, obscene publications and counterfeiting of cur-

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445 *Yearbook of the International Law Commission, 1954*, vol. II, p. 147, document A/2693, para. 36.

446 United Nations, *Treaty Series*, vol. 360, p. 117. The Convention is designed to be complementary to the 1951 Convention relating to the Status of Refugees.

447 *Yearbook of the International Law Commission, 1954*, vol. II, p. 149, document A/2693, para. 39.

448 The matter is now dealt with in optional protocols, providing for the non-acquisition of nationality solely by operation of the law of the receiving State, concluded at the same time as the Vienna Conventions on Diplomatic and Consular Relations respectively. See chap. VI above ("Diplomatic and consular law").

449 See para. 4 above.

450 *Yearbook of the International Law Commission, 1949*, p. 47, 6th meeting, paras. 1-4.

451 European Convention on Extradition, (Paris, 1957): United Nations, *Treaty Series*, vol. 359, p. 273.

452 *Journal officiel de la République Malgache*, 23 December 1961, No. 201, p. 2242.

453 For further details, see *Yearbook of the International Law Commission, 1970*, vol. II, p. 102, document A/CN.4/229.

454 See *Asian-African Legal Consultative Committee, Fourth Session, Tokyo, 1961*, (New Delhi, 1961), pp. 18-41. The Committee was divided on the question whether a multilateral treaty or a series of bilateral treaties should be concluded. It noted that the principles were formulated in the light of the State practice prevailing in various countries and particularly in the Member States participating in the Committee (*ibid.*, p. 22). The text of the draft articles is reproduced in *Yearbook of the International Law Commission, 1961*, vol. II, p. 82, document A/CN.4/139, annex 1.

455 *Ibid., 1970*, vol. II, p. 102, document A/CN.4/229.

rency [456] make provision for extradition, either by requiring extradition or, more commonly, by providing that the various activities proscribed by them should be considered to come within the scope either of any extradition treaties in force between the parties to the convention or, in the case of States which do not require any extradition treaty, the extradition law. This suggests that at least in respect of certain offences States are prepared to accept multilateral treaty provisions on extradition. In any consideration of the matter, pertinent multilateral treaties would, of course, need to be taken into account, and regard paid to the general question of extra-territorial jurisdiction. [457]

3. Right of asylum

372. This topic, which was mentioned in the 1948 Survey, was included by the Commission in the 1949 list. In response to General Assembly resolution 1400 (XIV) of 21 November 1959, which requested the Commission "as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum", the Commission, at its fourteenth session (1962), included the "principles and rules of international law relating to the rights of asylum" in its future work programme, but no date was set for the start of the Commission's consideration of the matter. [458] At the Commission's nineteenth session (1967), when the question was re-examined, most members were of the opinion that the time had not yet come for the Commission to proceed actively with the topic, and that preference should be given to other subject already under study.

373. The general heading "right of asylum" covers two main questions, namely, "territorial asylum" and "diplomatic asylum". The first has been dealt with in several United Nations international instruments. Article 14 of the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)) provides:

1. Everyone has the right to seek and to enjoy in other countries freedom from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

374. The major elaboration of the right of territorial asylum is contained in the Declaration on Territorial Asylum, adopted by the General Assembly under resolution 2312 (XXII) of 14 December 1967. The culmination of long efforts by the Commission on Human Rights, by the Third Committee and by the Sixth Committee in turn, the Declaration contains four articles on which States are recommended to base their practices relating to territorial asylum. [459]

375. Resolution 2312 (XXII) recalls in its second preambular paragraph "the work of codification" to be undertaken by the Commission under resolution 1400 (XIV). In this connexion the Sixth Committee's report indicates:

It was further explained that the sponsors had found it necessary, in order to stress that the adoption of a declaration on territorial asylum would not bring to an end the work of the United Nations in codifying the rules and principles relating to the institution of asylum, to make a reference at the very beginning of the draft resolution, in a preambular paragraph to the proposed declaration, to the work of codification of the right of asylum to be undertaken by the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959.

Some other delegations, while accepting such a reference, recorded their understanding that the preambular paragraph in question should not be understood as modifying or prejudicing in any way the order of priorities for the consideration of items,

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[456] Reference may also be made to the OAS Convention to Prevent and Punish the Acts of terrorism taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (see paras. 247-248 above) and the Convention for the Suppression of Unlawful Seizure of Aircraft (see para. 328 above).

[457] See generally paras. 80-99 above.

[458] For detailed references, see *Yearbook of the International Law Commission, 1970*, vol. II, p. 260, document A/CN.4/230, paras. 70-74.

[459] The operative provisions of the Declaration are as follows:

"*Article 1*

"1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

"2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

"3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.

"*Article 2*

"1. The situation of persons referred to in article 1, paragraph1, is, without prejudice to the sovereignty of States and the purposes and principles of the United Nations, of concern to the international community.

"2. Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.

"*Article 3*

"1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

"2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

"3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

"*Article 4*

"States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations."

already established by the International Law Commission and by the General Assembly. [460]

376. The views expressed on the meaning of the Declaration on Territorial Asylum for the future codification of legal rules relating to the rights of asylum are summarized in the Sixth Committee's report as follows:

It was also said that the practical effect given to the declaration by States would help to indicate whether or not the time was ripe for the final step of elaborating and codifying precise legal rules relating to asylum. In this respect, many representatives expressed the conviction that the declaration, when adopted, should be regarded as a transitional step, which should lead in the future to the adoption of bringing rules of law in an international convention. They drew attention to the fact that asylum was on the programme of work of the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 november 1959. The declaration now to be adopted would be one of the elements to be considered by the Commission in its work. Certain of these representatives expressed the hope, that, when it took up the codification of the institution of asylum, the Commission would correct some of the ambiguities in the terms of the Declaration and would also extend the subject to cover other forms of asylum, such as diplomatic asylum, on which there was extensive Latin American treaty law and practice, both in Latin America and elsewhere. It was also said that the existence of the Declaration should not in any way diminish the scope or depth of the work to be undertaken when the International Law Commission took up the subject of asylum. [461]

377. The institution of "diplomatic asylum" owes its customary and conventional evolution to the practice observed chiefly amongst Latin American States. The legal basis for the institution and its consequences have, however, been the subject of discussion and, on two occasions, cases have been placed before the International Court of Justice concerning particular aspects or instances over which disputes have arisen. [462] The question received regional codification at the inter-American conferences which adopted the 1928 Havana Convention, the 1933 and 1939 Montevideo Conventions and the 1954 Caracas Convention.

378. The Commission did not, during the preparation of its draft articles on diplomatic intercourse and immunities, consider directly the question of diplomatic asylum, although the matter was referred to by various speakers in the course of discussion, both in the Commission and at the United Nations Conference on Diplomatic Intercourse and Immunities, particularly in connexion with inviolability of mission premises. [463] This followed a decision of the Sixth Committee in 1952, rejecting a proposal that asylum should be included amongst the diplomatic topics to be examined by the Commission, [464] and the adoption by the General Assembly of resolution 1400 (XIV) of 21 November 1959. [465]

4. Human rights

379. The Preamble to the Charter expresses the determination of the peoples of the United Nations "to reaffirm faith in fundamental human rights" and Article 1 includes amongst the purposes of the Organization

to achive international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. [466]

Under Articles 55 and 56 Member States pledge themselves "to take joint and separate action in co-operation with the Organization" to achieve the promotion of universal respect for, and observance of, human rights and fundamental freedoms. In furtherance of these provisions, the Economic and Social Council, which is empowered to make recommendations and to establish commissions for the promotion of human rights (Article 62, para. 2 and Article 68 of the Charter) set up the Commission on Human Rights in 1946. The Commission on Human Rights, [467] together with bodies subsequently established, such as the Commission on the Status of Women, has been responsible for the regular examination of matters relating to human rights and for the preparation of texts in this field.

380. Since the 1948 Survey, which dealt with the question of human rights chiefly in the context of the law relating to the treatment of aliens, [468] a series of

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[460] *Official Records of the General Assembly, Twenty-second Session, Annexes* agenda item 89, document A/6912, paras. 64 and 65.

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

[462] Colombian-Peruvian Asylum Case (*I.C.J. Reports 1950*, p. 266) and Haya de la Torre Case (*I.C.J. Reports 1951*, p. 71).

[463] See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, (United Nations publication, Sales No. 62.X.1), p. 57, document A/CONF.20/L.2, para. 105.

[464] See *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 58, document A/2252, paras. 15, 16, 31 and 32.

[465] Referred to in para. 372 above.

[466] A comprehensive account of United Nations activities in this sphere is contained in two studies prepared by the Secretary-General for the 1968 International Conference on Human Rights: "Measures taken within the United Nations in the field of Human Rights" (A/CONF.32/5 and Add.1) and "Methods used by the United Nations in the field of Human Rights (A/CONF. 32/6 and Add.1) where detailed references may be found. The instruments adopted up to 31 December 1966 are collected *in Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6).

[467] The Commission on Human Rights, which is now composed of the representatives of thirty-two States, holds annual sessions and submits annual reports to the Economic and Social Council and, through the Council, to the General Assembly. The Commission has established subordinate bodies, on a permanent or *ad hoc* basis. In addition, special committees have been appointed by the General Assembly or other major organs to consider particular questions relating to human rights (for example, as regards the observance of human rights in given countries or territories, or as regards specific issues).

The Commission on the Status of Women, which is likewise now composed of the representatives of thirty-two States, meets as from 1970, every other year, and submits its reports to the General Assembly through the Economic and Social Council.

A detailed account of the method used within the framework of the United Nations for the development of human rights is to be found in the Secretary-General's study A/CONF. 32/6 and Add.1 (referred to in the preceding foot-note).

[468] 1948 Survey, paras. 81-82.

instruments have been drawn up and a distinct body of law relating to human rights has emerged, as a separate branch of international law. The following paragraphs give a brief account of the main features of this development.

381. When the Commission on Human Rights was established it was decided that its first task would be the preparation of an "International Bill of Rights". After lengthy discussions in 1947 and 1948, the decision was taken that the "Bill" would consist of a Declaration, together with a Covenant or Covenants, and measures of implementation. By resolution 217 A (III), the General Assembly adopted the Universal Declaration of Human Rights, as the first part of the "Bill", on 10 December 1948; completion of the scheme, by the adoption (resolution 2200 A (XXI)) of three treaty instruments, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the international Covenant on Civil and Political Rights, did not follow until 1966.

382. As regards its contents, the Universal Declaration proclaims not only political and civil rights (equality before the law, protection against arbitrary arrest, right to a fair trial, the right to own property, freedom of thought, conscience and religion, freedom of opinion and expression, and of peaceful assembly and association), but also certain economic, social and cultural rights (such as the right to work, to free choice of employment, equal pay for equal work, the right to education), to which all individuals are entitled. The Universal Declaration is not a treaty instrument. It describes itself both as "a common understanding" of the rights and freedoms which Member States have pledged themselves to promote, and as a "common standard of achievement for all peoples and all nations". During the years since its adoption the Declaration has come, through its influence in a variety of contexts, to have a marked impact on the pattern and content of international law and to acquire a status extending beyond that originally intended for it. In general, two elements may be distinguished in this process: first, the use of the Declaration as a yardstick by which to measure the content and standard of observance of human rights; and, second, the reaffirmation of the Declaration and its provisions in a series of other instruments. These two elements, often to be found combined, have caused the Declaration to gain a cumulative and pervasive effect. Historically this development was due in part to the delay which occurred between the adoption of the Declaration in 1948 and the completion of the Covenants in 1966, and the fact that the intervening years were ones of great formative legal activity, both nationally and internationally. Thus most (indeed probably the majority) of the many national constitutions adopted since 1948 embody an endorsement of the Declaration or reflect its provisions, and numerous conventions include or refer to its articles. Besides being incorporated in acts of national legislation and cited before national tribunals, it has been used in United Nations resolutions and declarations,[469] and in the constitutive instruments of international organizations.[470]

383. The preparation of the Covenants proved a difficult task and although the Commission on Human Rights submitted preliminary texts to the General Assembly in 1954, final agreement was not reached until 1966. The process was, however, hastened by the successful preparation and approval by the General Assembly, in resolution 2106 A (XX) of 21 December 1965, of the International Convention on the Elimination of All Forms of Racial Discrimination. Under the Convention, which came into force in 1969,[471] the States parties condemn racial discrimination[472] and undertake to pursue, by all appropriate means and without delay, a policy of eliminating such discrimination in all its forms and promoting understanding among all races. The measures which States agree to take in pursuance of this objective include the making of a review of governmental, national and local policies, amending, rescinding or nullifying laws and regulations which have the effect of creating or perpetuating racial discrimination (article 2, para. 1 (*c*)). The Convention provides, *inter alia*, that States parties shall declare

> an offence punishable by law dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (article 4, subparagraph (*a*))

384. Besides requiring States to take, on the one hand, steps to prohibit activities (such as those referred to in the provision quoted) which are based on, or may incite, racial discrimination, the Convention also specifies, as a positive injunction, that legal, political, civil, economic, social and cultural rights are to be

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[469] For example the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), provides in paragraph 7:

> "All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."

[470] Thus in the Preamble of the Charter of OAU, Heads of African States and Governments "reaffirm" their adherence to the principles of the United Nations Charter and of the Universal Declaration, which instruments "provide a solid foundation for peaceful and positive co-operation among States".

[471] As of 1 April 1971 forty-eight States had submitted instruments of ratification or accession to the Convention. The Convention was preceded by the unanimous adoption by the General Assembly, on 20 November 1963, of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (resolution 1904 (XVIII)).

[472] Defined in article1, para. 1 as

> "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

accorded to all, without distinction as to race, colour, or national or ethnic origin (article 5). The Convention provides (article 8) for the establishment of a Committee on the Elimination of Racial Discrimination, composed of eighteen experts, [473] which is authorized to consider reports from States parties on the legislative, judicial, administrative and other measures they have taken to give effect to the Convention. [474] The Committee, which has so far held three sessions, reports annually, through the Secretary-General, to the General Assembly on its activities and

> may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly, together with comments, if any, from States Parties. (Articles 9, para. 2.)

385. Under article 15 of the Convention the Committee acts in an advisory capacity to United Nations bodies dealing with dependent territories, such as the Trusteeship Council and the Committee of Twenty-four. [475] For this purpose, the Committee receives from these bodies copies of relevant petitions and reports concerning these territories; and it receives from the Secretary-General all relevant information available to him regarding those territories. The Committee is empowered to express its opinions and make recommendations to these bodies.

386. Besides examining reports, the Committee may also deal, under article 11, with allegations brought by a State party that another State party is not giving effect to the Convention. Such matters may only be taken up after the Committee has ascertained that all domestic remedies have been exhausted, unless the application of these remedies is "unreasonably prolonged". An *ad hoc* conciliation commission may be appointed in such cases after the Committee has obtained and collated information (article 12). So far no communication has been received under article 11.

387. Finally, it may be noted that the Committee may, in certain circumstances, and upon special acceptance of one of the Convention's provisions by the State concerned (article 14) deal with communications received from individuals, or groups of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that party of any of the rights set forth in the Convention. [476]

388. Under the terms of resolution 220 A (XXI) of 16 December 1966, the General Assembly adopted and opened for signature and ratification or accession the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, [477] together with the Optional Protocol to the International Covenant on Civil and Political Rights. [478] The Covenants are intended to provide a more systematic means for the application of the human rights listed in the 1948 Universal Declaration, and thus to complete the design of the "International Bill of Human Rights" originally envisaged. The two Covenants differ, not only in their respective subject-matter, but also to some extent in the character of the obligations they impose. Whereas the obligations set out in the International Covenant on Civil and Political Rights are meant, by and large, to be implemented immediately, [479] under the International Covenant on Economic, Social and Cultural Rights each State party agrees to take steps with a view to achieving progressively the full realization of the rights recognized therein. [480]

389. The civil and political rights listed in the relevant Covenant include those traditionally guaranteed and contained in the Universal Declaration. The rights referred to in the two instruments do not fully coincide however: the right to own property and the right of asylum, included in the Declaration, are not recognized in the Covenant; and, on the other hand, the Covenant defines a number of rights not specified in the Declaration, among them the right of all peoples to self-determination and the right of ethnic, religious or linguistic minorities to enjoy their own culture, to

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[473] Article 8 provides that the experts shall be
> of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

[474] Under Article 9 of the Convention reports are to be submitted to the Secretary-General, and through him, to the Committee: (*a*) within one year of the Convention coming into force for the State concerned; and (*b*) "thereafter every two years and whenever the Committee so requests".

At its first session in 1970, the Committee drew up a set of suggestions which Governments might follow in drafting their reports.

[475] Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

[476] This provision is to come into force when at least ten States parties have made declarations of acceptance. As of 1 April 1971, no State Party had done so.

[477] The Covenants will enter into force when thirty-five States have become parties. As of 1 April 1971, ten States had submitted instruments of ratification or accession with respect to each instrument.

[478] Subject to the entry into force of the International Covenant on Civil and Political Rights, the Optional Protocol will enter into force when ten States parties to the Covenant have also become parties to the Protocol. As of 1 April 1971, four States had submitted instruments of ratification.

[479] Under article 2, para. 1, each State Party
> undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[480] The actual text of article 2, para. 1, provides that each State Party.
> undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including the adoption of legislative measures.

The prohibition of discrimination in the enjoyment of the rights in question, and certain other obligations, are intended to be of immediate application, however.

practice their own religion, and to use their own language. As regards its implementation, the International Covenant on Civil and Political Rights provides for the establishment of a Human Rights Committee (article 28), composed of eighteen members, [481] which will consider reports submitted by the States parties on the measures they have adopted to give effect to the rights recognized in the Convention. The Committee will transmit its reports "and such general comments as it may consider appropriate" to the States parties; the Committee may also transmit to the Economic and Social Council its general comments, together with the reports it has received (article 40). In addition the Committee may, under an optional procedure which will come into force when ten States have accepted it (article 41), consider communications from a State party alleging that another is not fulfilling its obligations under the Covenant. If the Committee is not able to resolve the dispute through the use of its good offices, the matter may be referred to an *ad hoc* conciliation commission (article 42).

390. Under the Optional Protocol accompanying the International Covenant on Civil and Political Rights, the Human Rights Committee may also consider communications from individuals claiming to be victims of a violation by a State party to the Protocol (and to whose jurisdiction they are subject) of any of the rights set forth in the Covenant (article 1 of the Protocol). [482] The views of the Committee are to be communicated to the State party and to the individual concerned (article 5, para. 4), and an annual report, containing, *inter alia,* a summary of the Committee's activities under the Optional Protocol, is to be made to the General Assembly (article 6).

391. The rights set forth in the International Covenant on Economic, Social and Cultural Rights are based on those proclaimed in the Universal Declaration. States parties undertake to submit reports to the Economic and Social Council on the measures they have adopted and the progress made in achieving the observance of the rights in question (article 16, para. 1). The Council, upon consideration of the reports and in co-operation with the specialized agencies, may promote appropriate international action to assist States parties with respect to full realization of these rights. The Council may, in particular, transmit reports to the Commission on Human Rights, for study and general recommendation or for information, and submit reports to the General Assembly (articles 19 and 21). [483]

392. Besides the adoption of these general multilateral instruments, providing, *inter alia,* for comprehensive methods of implementation, [484] a series of other measures have been drawn up relating to the promotion and protection of human rights in more specific contexts. Thus the ILO and UNESCO have adopted conventions designed to ensure legal recognition of the principle of equality and non-discrimination. [485] As regards the status of women, reference may be made to the conclusion of the Convention on the Political Rights of Women, [486] the Convention on the Nationality of Married Women, [487] and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. [488] The Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity are referred to in chapter XVII below ("International criminal law"). [489] Other instruments concluded have dealt, *inter alia,* with slavery and similar institutions and practices, prostitution and traffic in women and children, and forced labour.

393. Besides the conclusion, through the United Nations and the specialized agencies, of instruments intended to be of universal application, a considerable body of law relating to human rights has also been built up at regional level. A comprehensive set of provisions, together with institutions to ensure implementation, has been created under the aegis of the Council of Europe. [490] Under the major agreement, the European Convention for the Protection of Human Rights and Fundamental Freedoms, [491] which was signed on 4 November 1950, provision was made for the creation

[481] The members are to be "persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of same persons having legal experience" and are to serve in their personal capacity (article 28). They are to be elected by secret ballot from a list of persons possessing these qualifications and nominated by States parties (article 29).

[482] Complaints may only be considered after the Human Rights Committee has ascertained that the same matter is not being examined under another international procedure and that the individual has exhausted all local remedies (article 5, para. 2).

[483] In article 18 provision is also made for the submission of reports by the specialized agencies on the progress made in achieving the observance of the provisions of the Covenant falling within the scope of their activities.

[484] It may be noted that proposals have also been made for the creation of the post of United Nations High Commissioner for Human Rights; see resolution 2595 (XXIV) of 16 December 1969 and the resolutions cited therein. At its twenty-fifth session (1970), the General Asembly decided to defer consideration of the item to its twenty-sixth session (see *Official Records of the General Assembly Twenty-fifth Session, Supplement No. 28* (A/8028), p. 86).

[485] See, for example ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (United Nations, *Treaty Series,* vol. 165, p. 303) and Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (*ibid.,* vol. 362, p. 31), and, as regards UNESCO, the Convention against Discrimination in Education (*ibid.,* vol. 429, p. 93).

[486] *Ibid.* vol. 193, p. 135.

[487] *Ibid.,* vol. 309, p. 65. See also para. 359 above.

[488] *Ibid.,* vol. 521, p. 231.

[489] Paras. 442-443 and 447-449 below.

[490] For a detailed survey see *Report of the Council of Europe to the International Conference on Human Rights (1968)* (A/CONF.32/L.9), to which the text of the main instruments is annexed.

[491] United Nations, *Treaty Series,* vol. 213, p. 221. Further rights were covered in successive protocols; see the report mentioned in the preceding foot-note. Note also the conclusion of the European Social Charter (1961) and the rights specified therein (*ibid.,* vol. 529, p. 89).

of both a European Commission and a European Court of Human Rights, and to confer certain additional powers on the Committee of Ministers and the Secretary-General of the Council of Europe. The European Commission, which has, over the years, developed a considerable body of case law on the questions regulated in the Convention, is empowered to consider applications submitted by States parties alleging violations of the Convention by another State party, and also complaints by private individuals or organizations if the State complained of has expressly declared its acceptance of the Commission's competence in this regard. If, following examination by the European Commission, an application is declared admissible, the case is referred to a sub-commission which is required to establish the facts and to seek, through conciliation, to effect a friendly settlement of the case. In the event that this attempt is unsucessful, the plenary Commission draws up a report in which it gives its opinion as to whether the facts disclose a breach of the Convention. This report is transmitted to the Committee of Ministers. Thereafter the case may be referred to the European Court on Human Rights, either by the Commission or by a State concerned; if, however, it is not referred to the Court within three months, the Committee of Ministers must take a decision on the case. The Commission's report may thus be the starting point of proceedings before the European Court of Human Rights. Such proceedings are dependent, however, on acceptance of the Court's jurisdiction, which may either be general or limited to the purposes of a particular case.

394. Developments in the field of human rights have also been undertaken by regional organizations in other parts of the world. Particular reference may be made to the signature, on 22 November 1969, of the Convention on Human Rights, which was prepared under the aegis of OAS. [492] The Convention makes provision for the maintenance of the already established Inter-American Commission on Human Rights and for the setting up of an Inter-American Court of Human Rights. The human rights to be accorded are similar to those included in the United Nations and European instruments. The American convention includes, however, as an integral part of its provisions, a right of individual petition to the Inter-American Commission, unlike the position with respect to the International Covenant on Civil and Political Rights, and its Optional Protocol, and as regards the European Commission. Proceedings before the Inter-American Court of Human Rights are dependent, however, on a special declaration of acceptance by States parties.

395. By way of general conclusion, it may be said that the law relating to human rights, which had scarcely been initiated when the 1948 Survey was written, now constitutes a distinct and rapidly growing branch of international law. The process for the formulation and adoption of this law exists, furthermore, both at universal and regional level. The efforts made in this sphere over the past twenty to twenty-five years have thus accompanied those relating to the codification and progressive development of other branches of international law with which the Commission itself has been engaged. The broad division of functions between bodies concerned with human rights and those occupied with other areas of international law may be expected to continue. As the law in one or other sphere develops, there may be an increasing need, however, to reflect the progress made elsewhere—for the law relating to human rights to take account of developments in other areas of international law, and, *vice versa*, for efforts undertaken with respect to the codification and development of other branches of international law to take cognizance of the degree of recognition now given to human rights in a series of specific texts. To a greater extent than hitherto the various instruments which may be proposed may thus require to be formulated in the light of existing provisions of codified law, drawn from a variety of sources, as codification becomes a more elaborate and cumulative process.

Chapter XVI

The law relating to armed conflicts

396. International law traditionally distinguished between the general body of principles and rules applicable in time of peace and those applicable with respect to war, the latter being divided into the *ius ad bellum*, the right of a State to declare and wage war, and the *ius in bello*, or laws governing the conduct of war and matters such as relations between combatant and non-combatant States. The *ius ad bellum* has been replaced, under modern international law, by the prohibition of the threat or use of force, embodied in Article 2, paragraph 4, of the United Nations Charter, whilst the Charter also provides for the institution of a comprehensive system of international peace and security. [493] The question therefore arises as to the operation of what was formerly called *ius in bello*. The issues involved are of extreme difficulty, as well as of great importance for the preservation of the lives and safety of the many thousands of individuals who may be affected by the outbreak of armed conflicts. Bearing these factors in mind, the following chapter is not so much a summary, with conclusions, regarding a body of well-settled law, but rather in the nature of a survey which seeks to distinguish some of the principal areas on which recent attention has centred.

397. The hope that, under the system of international security established under the Charter, the laws regulating the conduct of armed conflict might be of diminishing importance was one which was current during the years shortly after the United Nations Organization was founded; a more general preoccupation, however, and one which has contrived to receive attention, was

[492] *OAS Official Records*, OEA/Ser.K/XVI/1.1, Doc.65 Rev. 1 (Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 1969).

[493] See above, chapter II ("The law relating to international peace and security), sections 1 and 2.

the question of the relationship of this body of law to the operation of the United Nations system. These two notions were both conveyed during the Commission's first session (1949), when the Commission discussed whether to include the laws of war in its list of topics for codification. The Commission decided not to select the topic, for the reasons expressed in the following passage:

> The 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 has ceased to be relevant. On the other hand, the opinion was expressed that, although the term "law of war" ought to be discarded, a study of the rules 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 Judgment 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. [494]

398. As this passage indicates, the Commission did not appear to consider that the prohibition placed on resort to armed force had itself abolished the laws governing the actual use of armed force or that a study of the rules concerned might not be useful at some stage. The codification of a large part of the laws relating to the conduct of armed conflict was in fact already proceeding at the Conference held to draw up the four Geneva Conventions of 1949, when the Commission took its decision. [495] The four Conventions [496] deal respectively, in a series of detailed provisions, with the amelioration of the condition of the wounded and sick in armed forces in the field, with the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, with the treatment of prisoners of war, and with the protection of civilian persons in time of war. As regards the scope of the Conventions, article 2, common to all four instruments, provides that

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Athough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3, which is also common to the four Conventions and deals with the provisions to be applied by parties to an armed conflict not of an international character, is considered below.

399. The Geneva Conventions, which have been widely accepted and applied, [497] constitute indeed the major portion of codified law in this sphere. They did not, however, entirely replace instruments concluded earlier, [498] some of which dealt with aspects not directly covered by the 1949 Conventions. Since the 1949 Conventions were prepared, however, the only major multilateral treaty adopted relating to the conduct of parties to an armed conflict was that drawn up in 1954, under the aegis of UNESCO, namely, the Convention for the protection of cultural property in the event of armed conflict. [499] Having regard to the unparalleled speed and destructiveness of modern weapons, the large number of conflicts which have actually occurred over the past twenty years, and the fact that present-day conflicts, even if initially internal or confined to a single area, tend to have international ramifications, questions have been raised in recent years as to the adequacy of existing agreements, including the 1949 Conventions, to meet the demands placed upon them.

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[494] *Yearbook of the International Law Commission, 1949*, p. 281 (A/925), para. 18. For the Commission' discussion, see *ibid.*, pp. 51-53, 6th meeting, paras. 45-68. For the reasons indicated at the Commission's sixth meeting (*ibid.*, para. 67), the 1948 Survey (see para. 4 above) did not deal with the laws of war. For the Commission's work with respect to the formulation of the Nürnberg Principles, see paras. 434-436 below.

[495] The four Geneva Conventions were adopted by a Diplomatic Conference, convened by the Swiss Federal Council, held between 21 April and 12 August 1949; the period of the Conference thus overlapped with the Commission's first session. For the Final Act of the Conference, the resolutions adopted and the four Conventions, see United Nations, *Treaty Series*, vol. 75, pp. 2 *et seq.*

[496] For an account of the history and operation of these and earlier conventions, *qua* legal instruments, in relation to the work of the International Red Cross, see *Yearbook of the International Law Commission, 1968*, vol. II, pp. 32 *et seq.*, document A/CN.4/200 and Add.1-2, and in particular paras. 128-132.

[497] It may be noted in this connexion that the regulations promulgated by the Secretary-General as regards the United Nations forces in the Middle East, in the Congo and in Cyprus, provided that the forces were to observe the principles and spirit of the general international conventions applicable to the conduct of military personnel. The International Committee of the Red Cross expressed the hope that the United Nations may

> by regular accession, formally undertake to have applied the Geneva Convention and the other provisions of a humanitarian character each time the forces of the United Nations are engaged in military operations. Such a gesture would have value as an example which would without doubt have a favourable effect. [A/7720,[a] annex I, sect. D.]

For comments on this suggestion, see A/7720, para. 114.

[a] See foot-note 501 below.

[498] The principal instances, prior to the 1949 Geneva Conventions, were the instruments adopted at the Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925 (see foot-note 522 below). (Document A/7720, referred to in foot-note 501 below, contains in chapter II a detailed historical survey of the question.) The General Assembly has called on States which have not done so to become parties to the earlier instruments, as well as to the 1949 Geneva Conventions (see, for example, resolution 2444 (XXIII) of 19 December 1968).

[499] United Nations, *Treaty Series*, vol. 249, p. 240.

400. The initiating move as regards recent United Nations activity in this sphere was taken at the 1968 International Conference on Human Rights. Affirming that "peace is the underlying condition for the full observance of human rights and war is their negation", and recalling the purpose of the United Nations "to prevent all conflicts and to institute an effective system for the peaceful settlement of disputes", the Conference noted that armed conflicts continue to plague humanity. It stated that

> the widespread violence and brutality of our times, including massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare, including napalm bombing, erode human rights and engender counter-brutality.

The Conference expressed its conviction "that even during the periods of armed conflicts, humanitarian principles must prevail". [500]

Taking note of the views expressed at the Conference, the General Assembly adopted resolution 2444 (XXIII) of 19 December 1968, in which *inter alia,* it requested the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study

> (*a*) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;
>
> (*b*) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

401. The two reports which the Secretary-General has since submitted, [501] to which further reference should be made in the present connexion, constitute an extensive survey of the current state of the law and contain a number of suggestion for the better protection of human rights in armed conflicts, as requested by resolution 2444 (XXIII) of the General Assembly. As the Secretary-General indicated, [502] the maintenance of peace and security remains the basic purpose of the United Nations, and the activities of the Organization are directed to enabling it, directly or indirectly, to achieve this primary objective. As in the earlier studies therefore, nothing in the latter document is meant to condone resort to armed force in any form, in violation of the provisions of the Charter. On the contrary, it is the belief of the Secretary-General

> that resort to force or armed conflict would not be necessary if Governments and responsible individuals everywhere complied with the principles and purposes of the United Nations Charter and with the decisions of the United Nations organs taken in pursuance of the relevant Charter provisions, in particular those relating to procedures for peaceful settlement of disputes. [503]

Having regard, however, to the immediate humanitarian considerations raised by the actual infliction of harm to individuals, on a widespread scale, during the cases of armed conflict which have occurred, and continue to occur, in many parts of the world, the Secretary-General has concluded that efforts should be made to strengthen the legal means designed to regulate instances or resort to force.

> The aim of the United Nations and of the Governments concerned should be to prevent such conflicts from breaking out, but when they erupt to make all possible efforts by national and international measures to limit as far as possible unnecessary sufferings to human beings. [504]

402. Since the 1968 International Conference on Human Rights the General Assembly has in fact adopted a series of resolutions emphasizing and reaffirming the humanitarian principles which are to be observed during armed conflicts. In resolution 2677 (XXV) of 9 December 1970, the General Assembly welcomed the decision of the International Committee of the Red Cross to convene, from 24 May to 12 June 1971, a conference on the reaffirmation and development of international humanitarian law applicable to armed conflicts, to be attended by government experts, and expressed the hope that the conference would make specific recommendations in this respect for consideration by governments. The Secretary-General was requested to invite early comments by Governments on his reports (A/7720 and A/8052) and to transmit those reports and the comments thereon, together with records of the relevant discussions and resolutions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, to the International Committee of the Red Cross for consideration, as appropriate, by the conference. The Secretary-General was also requested to report to the twenty-sixth session of the General Assembly on the results of the conference and on any other relevant developments.

403. The following account (which, as already indicated, does not attempt to constitute a comprehensive or definitive survey of the full range of issues which may be examined under the heading "the law relating to armed conflicts") has been arranged in the following sections:

(1) The notion of "armed conflict" and the effects of armed conflict on the legal relations between States;

(2) Issues relating to internal armed conflicts;

(3) The status and protection of specific categories of persons in armed conflicts;

(4) The prohibition and limitation of the use of certain methods and means of warfare.

1. The notion of "armed conflict" and the effects of armed conflict on the legal relations between States

404. The progress made in the prohibition of resort to war, as a legally permitted institution, has been

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[500] Conference resolution XXIII. See United Nations, *Final Act of the International Conference on Human Rights* (United Nations publication, Sales No. E.68.XIV.2), p. 18.

[501] Documents A/7720 (20 November 1969) and A/8052 (18 September 1970).

[502] A/8052, para. 12.

[503] *Ibid.*

[504] *Ibid.*, para. 13.

accompanied by a tendency to obliterate the clear distinction formerly drawn between peace and war, as two entirely separate situations or sets of conditions. States have rarely, over the past quarter of a century, issued a formal declaration of war before engaging in armed hostilities. In most major instruments concluded since 1945 the concept of "war" has been largely replaced by formulations which seek to cover a wider range of instances of armed hostilities. Thus Chapter VII of the Charter uses the expressions "threats to the peace", "breach of the peace" and "act of aggression". The draftsmen of the 1949 Geneva Conventions, partly in an attempt to avoid the difficulties in the "war" concept, added in article 2 what was thought to be a more objective test: the Conventions were to apply not only to all cases of declared war, but also to "any other armed conflict" which might arise between two or more of the parties, and "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". Various other terms have been used in other contexts, including municipal law and treaties.

405. The question of the effects of armed conflict on the legal relations of States, which, under the simple dichotomy of war or peace, received the relatively straightforward answer that either States were belligerents or were in a position of neutrality vis-à-vis the combatants, cannot now be answered quite so easily. Under the system of international peace and security established by the Charter it is possible to envisage the adoption of decisions by the Security Council which would determine not only the nature of the conflict but also the steps (including the nature of the legal relations) which States were to maintain with one or other (or both) of the combatants, but this has mostly not formed a feature of the Council's practice.

406. It is of interest to note in this connexion the pattern followed in the various codification conventions adopted on the basis of the Commission's drafts. In the report accompanying its final draft on the law of the sea, the Commission pointed out that the articles regulated the law of the sea in time of peace only; [505] this qualification was accepted by the United Nations Conference on the Law of the Sea. While the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, and the 1969 Convention on Special Missions, [506] contain no explicit provision on the effect of war on the relations so regulated, all provide, however, for the continuity of certain privileges, immunities and facilities "even in case of armed conflict". [507] In this context the provisions concerned reflect previous customary law; there have, furthermore, been several instances in recent years when States engaged in armed conflict have continued to maintain diplomatic relations and to accord immunities.

407. The effect of armed conflict on treaties raises complex issues as regards the termination of treaties and the suspension of their operation. In this instance the Commission did not include in its draft articles on the law of treaties a provision concerning the effect of the outbreak of hostilities.

> The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties. [508]

408. The United Nations Conference on the Law of Treaties included in article 73 of the Convention the following general reservation:

> The provisions of the present Convention shall not prejudge any question that may arise ... from outbreak of hostilities between States. [509]

The issues which may be raised thus stand formally unregulated by the Vienna Convention on the Law of Treaties, although some of the problems might, in certain instances, be solved by reference to the rules of treaty law codified by the Convention, such as fundamental change of circumstances, and breach, or supervening impossibility of performance.

409. Whilst the provisions contained in the various conventions on diplomatic law, and the Convention on the Law of Treaties, are concerned primarily with the effect, as between the combatant States, of the outbreak of hostilities, the question also arises as to the rights and duties of third States in such circumstances. There is a great body of customary law and practice with respect to the status of neutrality which, traditionally, States might choose to adopt with respect to a war or armed conflict between two or more States; once that status had been assumed, certain obligations were imposed on the conduct of neutral States vis-à-vis the combatants and of combatants vis-à-vis neutral States. A distinction was drawn between neutrality with respect to a particular conflict and the adoption by a State of the status of permanent neutrality.

410. As regards the legal position of States in general at the present time, it may be recalled that Article 2, paragraph 5, of the Charter provides that

> All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

This provision is in some respects central to the United Nations role in securing peace, and reference has on

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[505] See para. 300 above.

[506] For the reference to the text of these Conventions, see above, foot-notes 266, 269 and 276 respectively.

[507] Convention on Diplomatic Relations, articles 44 and 45 (*a*); Convention on Consular Relations, article 53, para. 3; and the Convention on Special Missions, articles 45 and 46.

[508] *Yearbook of the International Law Commission, 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para. 29, quoting the 1963 (*ibid., 1963*, vol. II, p. 189, document A/5509, para. 14).

[509] *Official Records of the United Nations Conference on the Law Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.

occasions been made to it (or to the first portion of the obligation) with respect to actions taken by the United Nations organs. The effect of Article 2, paragraph 5, of the Charter with regard to neutrality has, however, not received any interpretation in the practice of United Nations organs. It may be nevertheless recalled that in the case of one Member State (Austria), that State was admitted to membership after it had adopted a status of permanent neutrality. As regards the actual behaviour of States with respect to armed conflicts between two or more other States, there has been considerable variation in the practice followed. States have on occasion issued enactments or decrees, informing their nationals (including shipowners) that an armed conflict had broken out in a certain area and warning them that trade with the countries in question was at their own risk, but without necessarily indicating whether the official policy was one of formal neutrality. Such enactments have, for example, been cited before courts in cases involving the interpretation of the war exemption clause in commercial contracts. The doctrinal position, as to the extent of the rights and duties of third States with respect to instances of armed conflict (which may of course vary greatly in intensity) is uncertain, [510] but in general would appear to support the view that, subject to observance of the fundamental principles of international law and the relevant provisions of the Charter, third States have a considerable liberty in determining their policies in this regard.

411. The question of the effect of armed conflicts on the legal relations of States (both as between combatant States and as between combatant and non-combatant States) is thus one of very considerable difficulty, involving *inter alia,* issues relating to the operation of the system of international security created under the Charter. It would appear that the practice so far adopted by the Commission of dealing with the question as it presents itself in particular contexts, and of not attempting to deal with the matter from the standpoint of its over-all codification and development, would continue to represent the best way for the Commission to proceed at least for the present time.

2. Issues relating to internal armed conflicts

412. In accordance with the traditional pattern whereby the *ius ad bellum* was a right which belonged only to States, the position as regards internal or civil conflicts was uncertain: under general principles of international law regarding the duty of non-intervention, other States were obliged not to render assistance to those engaged in armed revolt against the established government, while the extent to which the laws of war were applicable as between the actual combatants remained an unsettled branch of the law. If the rebels were recognized as belligerents by the *de jure* government, the laws and customs of war were henceforth applicable, but the conflict might not necessarily be converted into an international one (although such a decision would of course indicate that the instance was no longer one of mere insurgency, and might indeed be treated as weighty evidence that the conflict had in fact become international). In the event, on the other hand, that an outside State recognized the belligerent group opposing the existing government as the *de facto* authority (whether of whole or of part of the territory in dispute), the conflict might to that degree be converted into an international one, with a consequent obligation on the part of the combatants to observe the laws of war.

413. Subject to what was said earlier regarding the impact on the law relating to armed conflicts of the system of international security established under the Charter, the position under present-day law continues to reflect part of the former pattern, even while changes have been grafted on it.

414. As regards the obligation of other countries not to intervene, this remains the general duty imposed by international law. The problem of the definition of what, in such circumstances, constitutes "intervention" on the side of those opposing the *de jure* governments remains an unsettled issue. With respect to the question of the circumstances in which another State may decide to recognize the combatants as belligerents, this too remains governed by general principles. Thus, in its resolution 10 the Geneva Diplomatic Conference of 1949 declared that it

> considers that the conditions under which a Party to a conflict can be recognized as a belligerent by Powers not taking part in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva Conventions. [511]

415. As regards the application of the laws of war, the situation is apparently little changed: while recognition by the *de jure* government of the belligerent status of those opposed to it results in the full application of the rules governing armed conflicts, recognition by outside parties is more uncertain and limited in its effects. The question of the consequences, as regards the applicability of the laws of war, of recognition of the belligerent status of those opposed to the *de jure* government was to some extent mitigated however by the adoption of the Geneva Conventions. Article 3, which is common to the four Conventions, provides:

> In the case of armed conflict not of an international character occurring in the territory of one the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race,

[510] It would appear that, in so far as the law of neutrality is associated with the former sharp distinction between war and peace, the replacement of the concept of "war" by other concepts has, as an indirect consequence, made it difficult to determine whether, as a matter of law, the status of neutrality may be claimed (or is imposed) with respect to specific instances of armed conflicts, or, if it is applicable, the precise content of the rights and duties accompanying that status.

[511] United Nations, *Treaty Series,* vol. 75, p. 26.

colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(*a*) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(*b*) Taking of hostages;

(*c*) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(*d*) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constitued court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

416. The introduction, by the Geneva Conventions, of the requirements that henceforth both parties to an internal conflict were to observe the minimum standards of conduct indicated, constituted a novel element in international law. Such minimum standards are indeed the most basic requirements; as stated in article 3, the parties to the conflict are required to endeavour to bring into force, by means of special agreements, all or part of the other provisions. International Red Cross Conferences and other meetings, including those of United Nations bodies concerned with human rights, [512] have considered various issues relating to internal armed conflicts in recent years, in particular the question of the means which might be used to extend the "minimum standards" laid down in article 3 (for example, by the preparation of special agreements in a standard form) and to ensure the observance of humane standards of conduct. Since 1949, internal conflicts have occurred which, in the view of the government concerned, did not come within the scope of article 3 of the Geneva Conventions. In others the provisions of article 3 were applied. The need for procedures and machinery which might determine objectively whether a given situation comes within the purview of article 3 was referred to by the Secretary-General in his report of 18 September 1970. [513] The part which can be played by "an impartial humanitarian body" such as the International Committee of the Red Cross, and ways in which its services may be used by the parties, have also been discussed. It may be recalled in this connexion that the Secretary-General has, on occasions, engaged in various humanitarian activities with respect to internal armed conflicts and, in one instance, provided a representative, by agreement with the Government, who visited the war-affected areas to observe the situation of the population there and assisted in arranging relief for the civilian victims of the hostilities.

417. It may also be noted that, in resolution 2444 (XXIII), entitled "Respect for human rights in armed conflicts", the General Assembly recognized "the necessity of applying basic humanitarian principles in all armed conflicts" and affirmed resolution XXVIII of the XXth International Conference of the Red Cross, which laid down certain principles "for observance by all governmental and other authorities responsible for action in armed conflicts".

3. The status and protection of specific categories of persons in armed conflicts

418. The four Geneva Conventions of 1949 laid down, in an extensive series of provisions, the standard of conduct to be observed by parties to an international armed conflict with respect to four categories of persons: the wounded and sick in armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians. As previously indicated, a large part of this body has recently been the subject of extensive studies by the Secretary-General (A/7720 and A/8052) in connexion with the item "Respect for human rights in armed conflict", which has been before the Third Committee of the General Assembly and the Commission on Human Rights. The debates which have taken place and the resolutions adopted have ranged over a variety of subjects; as noted in the previous section, however, there has been a tendency to require that the same standard of behaviour be observed, irrespective of the nature of the armed conflict. Whilst the various resolutions which have been drawn up by the General Assembly therefore to some extent overlap, three broad areas of particular concern may be distinguished: the protection of civilians (and, as a special category of non-combatants, journalists engaged in missions in places where armed conflicts are occurring); the status and protection of persons engaged in liberation movements in southern Africa and in colonial territories; and the protection of prisoners of war.

419. Before referring to the resolutions which the General Assembly has recently adopted regarding these matters, it may be pointed out that the International Committee of the Red Cross, which was responsible for the drafting of the Geneva Conventions and which performs functions under those instruments, has continued, together with the periodic International Conferences of the Red Cross, to be vitally concerned with all aspects of the law relating to the conduct of armed conflicts. The General Assembly has, on a number of occasions, recognized the need for co-operation with, and expressed support for, the efforts of the Com-

[512] See A/7720, paras. 168-177, and also paras. 21, 61 and 104-108, and A/8052, paras 127-165.

[513] See A/8052, paras. 159-162, where some of the proposals which have been made in this connexion are listed. The question of the role which the International Committee of the Red Cross or other international bodies or agencies might perform in order to help ensure the observance of the Geneva Conventions and of humanitarian rules generally (in respect of both international and internal conflicts) has received considerable attention; see A/7720, paras. 202-227 and A/8052, paras. 238-250.

mittee. [514] As noted in paragraph 402 above, in resolution 2677 (XXV) of 9 December 1970, the General Assembly welcomed the decision of the Committee to convene a conference during 1971 to consider steps which might be taken to reaffirm and develop international humanitarian law.

420. As regards the protection of civilians in armed conflicts, besides the affirmation, in resolution 2444 (XXIII) of 19 December 1968, of the principles that it is prohibited to launch attacks against the civilian population as such and that the distinction must at all times be made between combatants and civilians, in resolution 2675 (XXV) of 9 December 1970 the General Assembly laid down a series of "basic principles for the protection of civilian populations in armed conflicts". [515] After recalling, *inter alia,* the Geneva Conventions of 1949, the General Assembly affirmed the following basic principles "without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict":

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to the civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used by civilian populations should not be the object of military operations.

6. Places or areas designed for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI, adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application.

421. As regards the particular case of journalists working in areas of armed conflict, in resolution 2673 (XXV) of 9 December 1920 the General Assembly invited "all States and all authorities parties to an armed conflict" to respect and apply the provisions of the 1949 Geneva Conventions "in so far as they are applicable, in particular, to war correspondents who accompany armed forces but are not actually a part of them". The General Assembly invited the Economic and Social Council to request the Commission on Human Rights

to consider ... the possibility of preparing a draft international agreement ensuring the protection of journalists engaged on dangerous missions and providing, *inter alia,* for the creation of a universally recognized and guaranteed identification document.

A draft agreement was considered by the Commission on Human Rights at its session held in March 1971 and transmitted to the Economic and Social Council and to the General Assembly.

422. The General Assembly, and various other United Nations bodies have recognized and supported the legitimacy of the struggle of peoples and patriotic liberation movements in southern Africa and in colonial territories. [516] Two principal, though interconnected, issues may be distinguished in this regard: the question of the international status of such movements, and the treatment to be accorded to those engaged in armed conflicts in connexion with them. As regards the first, the international character of the movements in question —and, in particular, the process by which that character is to be determined—has been the subject of extensive discussion. The various arguments which have been put forward are set out in the Secretary-General's report submitted to the twenty-fifth session of the General Assembly. [517] As stated there, whether or not, as various experts have tentatively suggested, the relevant pronouncements of the General Assembly and other United Nations organs

are sufficient to render conflicts "international" (that is, inter-State) in the sense of the Geneva Conventions, or whether they merely stress a strong concern of the international community for adequate measures of protection for [those] involved in such conflicts is a basic and difficult question which the General Assembly itself and the States parties to the Conventions might wish to consider. [518]

423. As regards the treatment to be accorded, the General Assembly has recognized the right of freedom fighters in southern Africa and in colonial territories to be treated when captured as prisoners of war under the 1949 Conventions. [519] In its most recent resolution

[514] Resolution 2444 (XXIII), para. 2; resolution 2597 (XXIV), para. 2; resolution 2675 (XXV), para. 8; and resolution 2676 (XXV), para. 2.

[515] It may be recalled that in his report of 18 September 1970 the Secretary-General set out various proposals with regard to the protection of civilians, in particular concerning the establishment of safety zones for civilians (see A/8052, paras. 30-87).

[516] See, for example, para. 1 of resolution 2649 (XXV) of 30 November 1970.

[517] A/8052, paras. 195-237, and especially 205-212.

[518] *Ibid.,* para. 212.

[519] See resolution 2446 (XXIII) of 19 December 1968 and others cited in A/8052, paras. 197-203.
Under article 4 of the Geneva Convention relative to the Treatment of Prisoners of War, prisoners of war are defined as persons belonging to various categories who have fallen into the hands of the enemy. These categories include (sub-paragraph A, 2) members of "organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied", provided that such movements fulfil the following conditions:

dealing with the subject, resolution 2674 (XXV) of 9 December 1970, the General Assembly affirmed

that the participants in resistance movements and freedom fighters in southern Africa and territories under colonial and alien domination and foreign occupation, struggling for their liberation and self-determination, should be treated, in case of their arrest, as prisoners of war in accordance with the principles of the Hague Conventions of 1907 and the Geneva Conventions of 1949

424. The General Assembly also recognized

the necessity of developing additional international instruments providing for the protection of civilian populations and freedom fighters against colonial and foreign domination as well as against racist régimes

425. As regards the treatment to be accorded to prisoners of war, in resolution 2676 (XXV) of 9 December 1970, the General Assembly called upon "all parties to any armed conflict" to comply with the 1949 Geneva Convention relative to the Treatment of Prisoners of War and *inter alia,*

to permit regular inspection, in accordance with the Convention, of all places of detention of prisoners of war by a protecting Power or humanitarian organization, such as the International Committee of the Red Cross

426. The General Assembly endorsed the continuing efforts of the International Committee to ensure the effective application of the Convention and requested the Secretary-General

to exert all efforts to obtain humane treatment for prisoners of war, especially for the victims of armed aggression and colonial suppression [520]

427. In paragraph 4, the General Assembly urged

compliance with article 109 of the Geneva Convention of 1949, which requires the repatriation of seriously wounded and seriously sick prisoners of war and which provides for agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

they are commanded by a person responsible for his subordinates; have a fixed distinctive sign recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war. Treatment as prisoners of war under the Geneva Conventions, in accordance with the General Assembly resolutions referred to, has as its consequence, that persons engaged in liberation movements may not be treated as criminals and are to receive a standard of protection above that provided for in common article 3 of the Geneva Conventions.

The question of the ability of liberation movements to satisfy the conditions laid down in article 4 has been much discussed (see A/8052, paras. 204-237 and also, as regards guerilla warfare generally, paras. 166-194; and A/7720, paras. 158-167). It may be noted in this connexion that in paragraph 5 of resolution 2676 (XXV) the General Assembly expressly urged

"that combatants in all armed conflicts not covered by article 4 of the Geneva Convention [relative to the Treatment of Prisoners of War] be accorded the same humane treatment defined by the principles of international law applied to prisoners of war."

[520] Note also paragraph 5 of the resolution, quoted in the preceding foot-note, referring to combatants in armed conflicts not covered by article 4 of the Geneva Convention relative to the Treatment of Prisoners of War.

4. The prohibition and limitation of the use of certain methods and means of warfare [521]

428. In expressing its concern for the better protection of civilians, prisoners and combatants in all armed conflicts, the General Assembly in resolution 2444 (XXIII) of 19 December 1968, mentioned in particular "the prohibition and limitation of the use of certain methods and means of warfare". As already noted, the same resolution affirmed certain principles which are relevant to this problem, notably the principle that the right of parties to an armed conflict to adopt means of injuring the enemy is not unlimited and that the distinction between combatants and civilians must be made at all times, with a view to sparing the latter as much as possible.

429. The methods and means of warfare to which the General Assembly referred would appear to include those weapons of mass destruction which, owing to the indiscriminate nature of their effects, strike not only enemy combatants but also those not engaged in the fighting, and which may, in addition, cause unnecessary suffering. Certain other weapons which, though precise in their effects, entail unnecessary suffering, have been prohibited for a long time by international law. [522] In so far as the problems involved concern the military uses of nuclear and thermonuclear energy, the work of the United Nations in the field of disarmament may be considered relevant. The conventions adopted with regard to measures of disarmament and arms control were noted earlier in the present survey. [523] As regards

[521] See generally A/7720, paras. 183-201 and A/8052, paras. 122-126. (The question of napalm is considered in A/7720, paras. 196-201, and in A/8052, paras. 125-126.)

At its session held in 1969 the Institute of International Law adopted a resolution entitled "The distinction between military objectives and non-military objectives in general and particularly the problems associated with weapons of mass destruction" (*Annuaire de l'Institut de droit international, 1969* (Basel, 1969), vol. 53, t. II, p. 375).

[522] See for instance the Hague Declaration of 1899, [a] which prohibited the use of bullets "which expand or flatten in the human body".

In resolution 2674 (XXV of 9 December 1970 the General Assembly considered *inter alia*

"that air bombardments of civilian population and the use of asphyxiating, poisonous or other gases and of all analogous liquids materials and devices, as well as bacteriological (biological) weapons, constitute a flagrant violation of the Hague Convention of 1907, [b] the Geneva Protocol of 1925 [c] and the Geneva Conventions of 1949".

[a] Declaration concerning the prohibition of the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, signed at The Hague on 29 July 1899. The text is reproduced in A.P. Higgins, *The Hague Peace Conferences and other International Conferences concerning the Laws and Usages of War - Texts of Conventions with Commentaries* (Cambridge, University Press, 1909), p. 494.

[b] Convention for the Pacific Settlement of International Disputes, signed at The Hague on 18 October 1907. Text in *ibid.*, p. 95.

[c] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

[523] See para. 118 above.

nuclear and thermonuclear weapons, it may however be recalled that in its resolution 1653 (XVI) of 24 November 1961, the General Assembly declared, *inter alia,* that the use of such weapons

> would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity.

The question of the legal effect of this resolution, which was adopted by a divided vote, has however been subject to discussion. [524]

430. As regards the use of poisonous gases, it may be recalled that in the Geneva Protocol of 1925 the contracting parties stated that the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, had been justly condemned by the general opinion of the civilized world and that such use had been prohibited in treaties to which the majority of Powers of the world were parties. To the end that this prohibition should be universally accepted as part of international law, binding alike the conscience and practice of nations, the contracting parties declared that so far as they were not already parties to treaties prohibiting such use, they accepted this prohibition, agreed to extend it to the use of bacteriological methods of warfare and agreed to be bound as between themselves according to the terms of the instrument.

431. The provisions and principles of the 1925 Geneva Protocol have been repeatedly endorsed in proceedings of United Nations organs. In resolution 2162 B (XXI) of 5 December 1966, the General Assembly called for strict observance by all States of the principles and objectives of the Protocol, condemned all activities contrary to these objectives and invited all States to accede to it. These recommendations were reaffirmed in resolution 2454 A (XXIII) of 20 December 1968, when the General Assembly also requested the Secretary-General to prepare, with the assistance of qualified consultant experts, a report on chemical and bacteriological (biological) weapons and the effects of their possible use. The Secretary-General accepted the consultants' unanimous report, [525] which was submitted to the twenty-fourth session of the General Assembly and to the Security Council. The Secretary-General also felt it incumbent upon him to urge that Member States undertake the following measures: (*a*) to renew the appeal to all States to accede to the Protocol; (*b*) to make a clear affirmation that the prohibition contained in the Protocol applies to the use in war of all chemical, bacteriological and biological agents (including tear gas and other harassing agents) which now exist or which may be developed in the future; and (*c*) to call upon all countries to reach agreement to halt the development, production and stockpiling of all chemical, bacteriological (biological) agents for purposes of war and to achieve their effective elimination from the arsenal of weapons.

432. In the preamble to resolution 2603 A (XXIV) of 16 December 1969, the General Assembly noted specifically that: (*a*) the majority of States then in existence had adhered to the 1925 Protocol; (*b*) that since then other States had become parties; (*c*) that still other States had declared that they would abide by its principles and objectives; (*d*) that these principles and objectives had commanded broad respect in the practice of States; (*e*) that the General Assembly (in resolution 2162 B (XXI) of 5 December 1966) had called for the strict observance by all States of those principles and objectives. The Assembly recognized

> therefore, in the light of all the above circumstances, that the Geneva Protocol embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments

and declared "as contrary to the generally recognized rules of international law, as embodied" in the Geneva Protocol, the use in international armed conflict of certain specified chemical and biological agents of warfare described in the resolution. In resolution 2603 B (XXIV) the General Assembly took note of several draft conventions which had been submitted concerning the weapons or methods of warfare in question and requested the Conference of the Committee on Disarmament to give urgent consideration to reaching agreement on the prohibitions and other measures referred to in the draft conventions mentioned. The Conference of the Committee on Disarmament has continued its examination of the matter, in the light of various draft proposals which have been put forward.

Chapter XVII

International criminal law

433. The following chapter deals with various offences which, while they have certain characteristics as relating to the commission of acts which the international community regards with special severity, have nevertheless a series of distinguishing features. The matters covered have been sub-divided as follows:

(1) Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal;

(2) Draft code of offences against the peace and security of mankind;

(3) Convention on the Prevention and Punishment of the Crime of Genocide;

(4) Other offences of international concern;

(5) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;

(6) Question of an international criminal jurisdiction.

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[524] See *Official Records of the General Assembly, Sixteenth Session, Annexes,* agenda items 73 and 72, document A/4942/Add.3; and *ibid., Sixteenth Session, Plenary meetings,* vol. II, 1063rd meeting.

[525] *Chemical and Bacteriological (Biological) Weapons and the Effects of their Possible Use* (United Nations publication, Sales No. E.69.I.24).

1. Principles of international law recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal

434. Under resolution 95 (I) of 11 December 1946 the General Assembly affirmed that the principles contained in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal constituted principles of international law. At its second session the General Assembly adopted resolution 177 (II) of 21 November 1947, requesting the Commission to formulate these principles. The Commission undertook a preliminary consideration of the subject at its first session in 1949. As regards the question of the extent to which the principles contained in the Charter and in the judgment constituted principles of international law, the Commission concluded that, since the Nürnberg principles had been unanimously affirmed by the General Assembly, the task entrusted to the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them. The Commission completed its work at its second session and submitted its report, with commentaries, to the General Assembly. By resolution 488 (V) of 12 December 1950, the General Assembly decided to send the formulation to Member States for comments and requested the Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the views expressed.

435. The Commission's formulation [526] consists of seven principles. Principle I provides that

> Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

436. Principle VI defines the following crimes under international law:

a. Crimes against peace:
   (i) Planning, preparation, initiation or waging of a war aggression or a war in violation of international treaties, agreements or assurances;
   (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

   Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

   Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

[526] *Yearbook of the International Law Commission, 1950*, vol. II, p. 374, document A/1316.

2. The draft code of offences against the peace and security of mankind

437. The task of preparing a draft code of offences against the peace and security of mankind was entrusted to the Commission under General Assembly resolution 177 (II) of 21 November 1947. At its third session (1951), the Commission completed the draft code and submitted it, together with the commentaries, to the General Assembly. [527]

438. The Commission considered that it was not necessary to indicate the exact extent to which the Nürnberg principles had been incorporated in the draft code. As regards the scope of the term "offences against the peace and security of mankind", the view of the Commission was that

> ... the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security. [528]

The draft code did not therefore deal with such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting of currency and damage to submarine cables. The Commission also decided that it would deal only with criminal responsibility of individuals and that no provisions should be included with respect to crimes by abstract entities. The Commission refrained from providing for institutional arrangements for implementing the code; in that case, pending the establishment of an international criminal court, the code might be applied by national courts.

439. At its sixth session (1951) the Second Assembly postponed consideration of the draft code until its next session and, in 1952, omitted the item from its agenda on the understanding that the matter would continue to be considered by the Commission.

440. The Commission accordingly took up the matter again at its fifth session (1953) and, at its following session, a report was again submitted to the General Assembly. [529] In the final form submitted the draft code consisted of four articles. Article 1 declares that the offences defined in the code "are crimes under international law, for which the responsible individuals shall be punished". Articles 3 and 4 provide that the fact of having acted as head of state, responsible government official, or in response to official orders, shall not relieve the person concerned of responsibility. Article 2 defines the various acts which constitute offences against the peace and security of mankind: in brief terms, these include any act or threat of aggression; [530] the preparation by the authorities of a State of the employment of armed force against another; the organization, or the encouragement of the organization, by State authorities, of armed bands for incursions into the territory of

[527] *Ibid., 1951*, vol. II, p. 133, document A/1858.

[528] *Ibid.*, p. 134, para. 58 *a*.

[529] *Ibid., 1954*, vol. II, p. 149, document A/2693.

[530] The relevant provisions are quoted in paragraph 112 above.

another; the undertaking or encouragement by State authorities of activities calculated to foment civil strife in another State, or of terrorist activities; acts in violation of treaty obligations "designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character"; the annexation of territory belonging to another State, by means contrary to international law; intervention in the internal or external affairs of another State "by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind"; acts committed with intent to destroy national, ethnic, racial or religious groups; inhuman acts committed against any civil population by the authorities of a State; acts in violation of the laws and customs of war; and conspiracy, direct incitement or attempts to commit any of the above offences, or complicity in them.

441. By resolution 897 (IX) of 4 December 1954 the General Assembly postponed consideration of the draft code until the Special Committee on the question of defining aggression established by resolution 895 (IX) had submitted its report. [531] The General Assembly, by resolution 1186 (XII) of 11 December 1957, transmitted the text of the draft code to Member States for comment and further deferred the consideration of the topic until such time as the General Assembly again took up the question of defining aggression. The matter was subsequently brought to the attention of Member States when, at its twenty-third session (1968), the question of defining aggression was taken up again by the General Assembly. [532] The General Committee decided, however, that it would not be desirable at that stage, prior to the completion of the Assembly's consideration of the question of defining aggression, for the items "Draft code of offences against the peace and security of mankind" and "International criminal jurisdiction" [533] to be included in the agenda and that these items should be taken up only at a later session when further progress had been made in arriving at a generally agreed definition of aggression. [534] The General Assembly adopted its agenda as proposed by the General Committee. No further action has since been taken with respect to the draft code.

3. Convention on the Prevention and Punishment of the Crime of Genocide

442. In resolution 260 A (III) of 9 December 1948 the General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide[535] and proposed it to States for signature and ratification or accession. Genocide, "whether committed in time of peace or in time of war" (article I), is defined as follows in article II:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (*a*) Killing members of the group;
>
> (*b*) Causing serious bodily or mental harm to members of the group;
>
> (*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (*d*) Imposing measures intended to prevent births within the group;
>
> (*e*) Forcibly transferring children of the group to another group.

443. The Convention provides that, in addition to genocide, conspiracy, direct and public incitement and attempts to commit genocide, as well as complicity in genocide, shall also be punishable. The States Parties

> undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated ... (article V). [536]

Under Article VI

> Persons charged with genocide or any of the other acts enumerated [...] shall be tried by a competent tribunal of the State in the territory which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

As of 1 April 1971, seventy-five States were parties to the Convention. [537]

4. Other offences of international concern

444. The offences referred to in the previous headings relate to matters immediately affecting international peace and security on a widespread scale. There are also a large number of other offences, which, though of a less far-reaching character, are also of international concern and have been made the subject to particular treaty régimes. The following account, which does not attempt to be exhaustive, notes some of the principal instances, several of which have in fact been referred to earlier in this study.

445. The crime of piracy *iure gentium*, which dates back to the origins of modern international law, remains perhaps the paradigm example of an offence of international concern and which States are called upon to seek to repress. The customary rule, permitting punishment by any State, has now been embodied in the

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[531] See para. 113 above.

[532] *Official Records of the General Assembly, Twenty-third Sesion, Annexes*, agenda item 8, document A/BUR/171/Rev.1, para. 4.

[533] See para. 450 below.

[534] *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 8, document A/7250, para. 10.

[535] United Nations *Treaty Series*, vol. 78, p. 277.

[536] Under Article VII genocide is not to be considered as a political crime for the purposes of extradition. "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."

[537] At the request of the General Assembly, the International Court of Justice gave an advisory opinion on the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*I.C.J. Reports 1951*, p. 15).

articles 14 to 21 of the Convention on the High Seas.[538] The question of what is sometimes referred to as air piracy has recently been made the subject of a convention designed to strengthen measures of international co-operation to prevent and punish this offence. [539] As regards attacks on diplomatic agents and others to whom the receiving State owes a duty of special protection under international law, the convention concluded within the framework of OAS has already been noted. [540]

446. There is, in addition, a very considerable number of instruments relating to the prevention of offences of an anti-social nature. Examples of these include the conventions designed to prevent slavery and slave trading, traffic in persons, and the illicit traffic in narcotic drugs. [541] Provision is made in many of these instruments for the punishment of persons responsible for these offences.

5. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

447. At its twenty-first session (1965), the Commission on Human Rights requested the Secretary-General to undertake a study of the problems raised in international law by war crimes and crimes against humanity, and, by priority, a study of legal procedures to ensure that no period of limitation shall apply to such crimes; [542] the matter arose out of the commission of such crimes during the Second World War. Following the submission of this study, the Economic and Social Council invited the Commission on Human Rights to prepare a draft convention on the topic. In resolution 2391 (XXIII) of 26 November 1968, the General Assembly adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. [543] In resolution 2392 (XXIII) of the same date the General Assembly decided to take up a draft Optional Protocol to the Convention, which raised issues related to the question of international criminal jurisdiction, when it resumed consideration of the latter question. As of 1 April 1971, twelve States were parties to the Convention.

448. The General Assembly has continued to concern itself with the topic of the punishment of war criminals. In resolution 2712 (XXV) of 15 December 1970 the General Assembly drew attention to the fact that many war criminals and persons who have committed crimes against humanity had continued to take refuge in the territories of certain States and called upon all States

> to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trial and punished in accordance with the laws of those countries.

449. States were requested to intensify their co-operation in the collection and exchange of relevant information; to take the necessary measures for the investigation of war crimes and crimes against humanity and to become parties (if they had not yet done so) to the Convention on the Non-Applicability of Statutory Limitations, and to inform the Secretary-General of the measures they had taken or were taking to become parties. An appeal was made to States which had not become parties to observe strictly the provisions of General Assembly resolution 2583 (XXIV), to the effect that they should refrain from action running counter to the main purposes of the Convention. The Secretary-General was asked to continue to study the question of the punishment of war crimes and crimes against humanity, and also of the criteria for determining compensation to be paid to the victims of such crimes.

6. Question of an International Criminal Jurisdiction

450. At the request of the General Assembly, contained in resolution 260 B (III) of 9 December 1948, the Commission examined during its first two sessions the question of international criminal jurisdiction. At its second session (1950), the Commission decided by a majority that it would be desirable and possible to establish an international juridical organ for the trial of persons charged with genocide, or other crimes over which the tribunal might be given jurisdiction by international convention. It recommended against such an organ being set up as a chamber of the International Court of Justice. [544] The task of preparing concrete proposals relating to the creation and statute of an international criminal court and of studying the implications and consequences of establishing such a court was entrusted by the General Assembly to two successive Committee, each composed of representatives of seventeen Member States, set up by resolution 489 (V) of 12 December 1950 and 687 (VII) of 5 December 1952 respectively. Although a draft statute was prepared, the General Assembly decided by resolution 1187 (XII), of 11 December 1957, to defer consideration until such time as it would take up again the question of defining aggression and the draft code of offences against the peace and security of mankind. Although the General Assembly has since resumed its consideration of the question of defining aggression, it was decided at the twenty-third session (1968) not to take up the item "International criminal jurisdiction" until further progress had been made in arriving at a generally agreed definition of aggression. [545]

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[538] For the reference to the text of the Convention, see footnote 366 above.

[539] See para. 328 above.

[540] See paras. 247-248 above.

[541] Detailed references to many of the instruments in question are to be found in chapters VI (Narcotic drugs), VII (Traffic in persons), VIII (Obscene publications) and XVIII (Slavery), of *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of signatures, ratifications, accessions, etc., as at 31 December 1970* (United Nations publication, Sales No. E.71.V.5).

[542] See *Official Records of the Economic and Social Council, Thirty-ninth Session, Supplement No. 8* (E/4024), para. 567.

[543] The text of the Convention is annexed to resolution 2391 (XXIII).

[544] *Yearbook of the International Law Commission, 1950*, vol. II, pp. 378-379, document A/1316, paras. 128-145.

[545] See para. 441 above and references there cited.