

Document:-
A/CN.4/254

**Observations of members of the International Law Commission on the Commission's
long-term programme of work**

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
1972, vol. II

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

REVIEW OF THE COMMISSION'S LONG-TERM PROGRAMME OF WORK: "SURVEY OF INTERNATIONAL LAW" PREPARED BY THE SECRETARY-GENERAL (A/CN.4/245)

[Agenda item 6 (a)]

DOCUMENT A/CN.4/254

Observations of members of the International Law Commission on the Commission's long-term programme of work

[Original text: English and French]
[3 April 1972]

CONTENTS

	<i>Page</i>
<i>Abbreviations</i>	205
1. Observations of Mr. Reuter	206
2. Observations of Mr. Kearney	208

ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
UNIDROIT	International Institute for the Unification of Private Law

NOTE BY THE SECRETARY OF THE COMMISSION

1. As can be seen from paragraph 128 of its report on the work of its twenty-third session,¹ the International Law Commission decided:

(a) To place on the provisional agenda of its twenty-fourth session an item entitled "Review of the Commission's long-term programme of work: *Survey of International Law* prepared by the Secretary-General (A/CN.4/245)";

(b) To invite members of the Commission to submit written statements on the review of the Commission's long-term programme of work to be circulated at the beginning of the twenty-fourth session of the Commission.

2. In a note dated 23 December 1971, the Secretary of the Commission drew the attention of members of the Commission to this decision and requested them to send him before 1 March 1972 the statements referred to in paragraph 128 (b) of the report quoted above. The statements received by the Secretary before 1 April 1972 are reproduced below. Any statements received after this date will be reproduced in an addendum to the present document.

3. The statements have been arranged in the order in which they were received by the Secretariat. The date on which they were received is given in square brackets under the indication of the original language.

1. *Observations of Mr. Reuter*

[Original text: French]
[28 February 1972]

1. The document prepared by the Secretary-General and entitled *Survey of International Law*² is, from all points of view, a remarkable document, not only on account of the very reliable and detailed information it supplies on work relating to international law carried out under the auspices of the United Nations, but also on account of the lucidity, intelligence and wisdom of the suggestions it makes for the benefit of members of the Commission.

2. It is well worth reading it carefully and reflecting on it at length. This is not the place to make all the observations it calls for or even all those that come to mind; we can simply take this document as a basis for answering some questions that the Commission will have to consider at its next session.

3. The most important question of all—the focal question—which provides the frame of reference for the *Survey*, is whether the Commission should prepare an over-all programme of work to cover a period of time similar to that which has elapsed since the Commission was first established, that is, roughly speaking, 20 years or more. Without any hesitation I would answer this question with a firm "yes".

4. This does not of course involve any rigid or centralized planning; it simply means making forecasts which will have to be continually adjusted to take account of any different factors. It is also true that the final decision rests with the General Assembly, whose servants we are, and which, for various reasons—some of which may completely elude us—might choose solutions different from those we would have favoured, or upset forecasts that have been made.

5. Nevertheless it is strictly our duty to submit rational proposals based on as full as possible an analysis of the experience of the past 20 years.

6. It is clear that, of the various kinds of work the Commission has undertaken or might undertake, the kind that has been the most important and useful and has established the authority of the Commission more effectively than any other is the preparation of draft articles to provide the raw material for international conventions. The Commission would become a completely different institution if, in the future, its activities no longer included work similar to that which engendered the conventions on the *law of the sea*, on *diplomatic and consular relations*, on *special missions*, and on the *law of treaties*.

7. This reflection still leaves open the question whether the Commission's work should be based on a different approach and different methods, and relate to different subjects from those that would normally result in general conventions as broad in scope as those mentioned above. I shall return later to this question, which is an important one, but secondary to the basic reflection just made.

8. If we consider the length of time that should normally elapse between the time when the Commission appoints a special rapporteur and the point at which a convention is about to be concluded, we must reckon on seven to nine years. Even if the Commission's working methods could be somewhat improved, it is still unlikely—for reasons too well known to be repeated here—that these periods of time could be appreciably reduced. After all, rapporteurs must be given time to carry out their research, Governments must be given time to submit comments, and the Commission must be given time to accomplish the task of collective criticism and reflexion which makes its work worth while.

9. In these circumstances we can see that programming for a period of 20 years is a modest undertaking. When we take into account the fact that the Commission is reconstituted every five years and its work on any given subject has to be spread, as regards the collective phase of preparing draft articles, over a period of some five years, the problem amounts to choosing four or five general topics on which we might expect to produce a general convention after five years of work. These four or five subjects should constitute the framework for the programme of work.

10. The choice of topics presents difficult problems. It entails not only a technical evaluation of the scope of the subject-matter, but also a practical evaluation of the interest it might have for Governments and a political evaluation of the chances of reaching a wide consensus on the basic issues. Members of the Commission are

¹ *Yearbook of the International Law Commission, 1971*, vol. II, (Part One), p. 275, document A/8410/Rev.1.

² *Ibid.*, vol. II (Part Two), p. 1, document A/CN.4/245.

clearly qualified to make the first of those three evaluations, but they might try to express themselves cautiously on the other two points.

11. For my part, I have no hesitation in stating that the subject of *international responsibility* should be a priority subject for the conclusion of a convention over the next five years. First of all, the work that has already been accomplished will save time; secondly the subject-matter is an extensive one, so that other undertakings may arise out of the research done on it. The topics of *responsibility for lawful acts*, *international penal responsibility* and *special applications* can cover a vast area of research.

12. With regard to other topics, however, I must admit that I would be hesitant and cautious about expressing an opinion, because the observations of my colleagues might lead me to reconsider some of my views.

13. Subject to that reservation, I must say first of all that the topic of *State succession* would seem to have the same advantages as *international responsibility*. However, I very much doubt whether an international convention on this subject could be concluded within the next five or more years given the conditions described above. The draft articles on *the succession of States in respect of treaties* have more to do with *the law of treaties* than *the succession of States*; and *succession in respect of property* has up to now been considered in the context of the problem of decolonization in the historically and geographically limited sense in which the term is understood at the United Nations. Decolonization has, however, practically been completed and the last traces may well be eliminated under quite special conditions. Moreover, it is against a background very different from that of decolonization that changes are now taking place through secession (particularly in Asia), or changes of Government (also in Asia) or federation (which is occurring in various parts of the world), and I have some doubts as to the chances a convention on *the succession of States* might have in these circumstances.

14. Although useful, I doubt if the work in progress on *the most-favoured-nation clause* and on *agreements between international organizations*, even if reinforced by the topic of *the succession of States in respect of treaties*, could constitute a corpus that could form an extension of the 1969 Convention in the field of treaty law.

15. We therefore have to look for major topics among those not yet taken up by the Commission.

16. Before embarking on the process of elimination, we may first note an important point concerning the work of the Commission. When, as a result of developments in modern technology, a new field opens up which calls for rules of international law, the General Assembly does not turn to the International Law Commission, but rather to intergovernmental commissions or governmental experts. This has happened in the case of nuclear questions, outer space and the sea-bed. Also, when a subject is connected primarily with some specific technical field, the Commission is not asked to consider it or else it declines to do so. For example, the Commission had nothing to do with the codification work involved in the Single Convention on Narcotic Drugs (1961), and it also

stated that it was not competent to deal with matters relating to international trade law.

17. That is why we do not think that the *law relating to development* is a suitable topic for the International Law Commission. However there are three new topics which the Commission might consider for a major project: *immunities of foreign States and bodies corporate*, *the law relating to watercourses* for uses other than navigation, and the *territorial competence of States*.

18. Of all these subjects, the one that probably has the best prospects of being "profitable" is *immunities of foreign States and bodies corporate*, and on this point we cannot but refer to the very fair and sensible comments of the Secretariat. The other two topics could each encompass a number of fairly varied questions. The *territorial competence of States* not only covers matters referred to in paragraphs 38 to 54 of the *Survey*, but also those matters dealt with in paragraphs 81 to 95 and possibly paragraphs 96 to 99; some questions relating to environment or responsibility might possibly also be dealt with under this heading. Regarding the question of *watercourses* we think that, on the basis of the positions already taken in the General Assembly, and excluding specific questions of navigation, there is material for the preparation of drafts relating to both industrial use and pollution.

19. Naturally some of the topics mentioned in the Secretary-General's study could also be studied. We would certainly hesitate to undertake a general study of *international organizations* in the hope of reaching a general convention; the rules governing international organizations are very varied and the preparation of texts applicable only to the "United Nations family" could probably not extend beyond the scope of what has already been undertaken or achieved in the field of *privileges and immunities* and *international agreements*. The *law relating to armed conflicts* has been entrusted to the Red Cross and the *law relating to individuals* has been absorbed by the machinery for the protection of human rights and the prevention of discrimination.

20. But even if we selected four or five main topics for codification to form the framework for a 20-year programme, that still would not mean that the Commission's programme would be complete.

21. In fact, experience has shown that, in addition to large-scale priority tasks, the Commission could devote itself to more limited but extremely useful projects. Furthermore, if a session is to be properly organized, there should be several projects on the agenda at the same time. Experience has also shown that the Commission cannot deal simultaneously with two major projects of equal priority (treaties and the law of the sea, international responsibility and treaties), and it would therefore be as well if other more limited projects were undertaken.

22. This question would need to be considered in conjunction with another which can only be alluded to in passing here, namely the Commission's working methods. The Commission's work could probably be made far more profitable if certain reforms were carried out; one of the more simple reforms would be to request members to transmit, in advance, written notes on agenda items or

on texts which have been submitted (as is being done in this case for the *Survey*).

23. The Commission would therefore have to deal with a number of less important subjects over a number of years.

24. First of all, the General Assembly might wish to refer a relatively simple but urgent question to the Commission. Such tasks should have first priority and should be dealt with by an accelerated procedure; but, by definition, such questions cannot be placed within a particular planning framework in advance.

25. But the Commission should also consider types of activity different from those it has rightly concentrated on so far. Although we can see why it abandoned the formula of the "guide" or "code" 10 years ago, there is no reason why that formula should not be quite appropriate for certain types of question. The *Survey* rightly suggests that the problem of *unilateral acts* should be approached by preparing a series of definitions. That is a very apt example.

26. The Commission might also follow a procedure that has already been adopted by the United Nations (and the League of Nations) and prepare "model treaties" on arbitration and tax matters, particularly in the case of problems that should ultimately be the subject of bilateral treaties.

27. Lastly, when over 20 years have passed since a codification treaty was concluded, it should be brought up to date in the light of international practice. The Commission should undertake a systematic revision of conventions it has prepared. The reason why it has not even been consulted on the law of the sea is that the items on the agenda for the 1973 conference refer to completely new aspects of the law; but it would be quite appropriate if, in a year or two, arrangements were made to review the 1958 Conventions with a view to supplementing or amending them in the light of the conference.

28. Among the topics surveyed by the Secretary-General which should be dealt with by the Commission in some way still to be discussed, we will find some topics which have been "pending" for a long time, such as the question of *historical waters*, which is clearly connected with the question of territorial jurisdiction and deserves to be considered; in particular we would urge the Commission to consider *agreements not in written form*. It would be a pity to let such a topic fall into oblivion, when we have devoted so much time and effort to the law of treaties and complementary aspects of this law (agreements with international organizations, the most-favoured-nation clause, succession of States in respect of treaties); however, it is quite possible that the usual method of preparing draft articles for a convention would not be the most appropriate treatment for this topic.

29. We might also contemplate considering the question of *extradition* as it stands now in connexion with the topic of *international penal responsibility*.

30. All these topics should be classified according to their degree of maturity and urgency, and should be spread out over a period of 20 years.

2. Observations of Mr. Kearney

[Original text: English]
[20 March 1972]

1. The present work programme of the International Law Commission is an impressive one. The subjects of State responsibility, State succession to treaties, State succession in respect of matters other than treaties, and the law of treaties with respect to international organizations are of sufficient complexity to occupy the attention of the Commission for the next six to eight years. The question can legitimately be raised whether there is any point in attempting to choose additional fields of work when that cannot be started for a number of years or brought to conclusion perhaps within the next ten to fifteen year.

2. The answer to such a question would be difficult if the objective of a review of the Commission's work were directed solely to the end of selecting items for future consideration. This would amount to nothing more than a kind of insurance that the Commission would not on some occasion or other find itself without some subject to take up.

3. The major objective in considering the future programme of work, however, should be to determine what the needs of the international community are with regard to the codification and progressive development of international law during the next 15 to 20 years. Once those needs have been established as the programme of work which the Commission should accomplish during such a period it will be possible to consider the further and equally important question of the means by which such a programme of work can be carried through. This means a review of the work patterns which have evolved in the Commission and the nature and extent of the resources currently and prospectively available to the Commission in carrying out its work. If those work patterns and those resources will not permit the Commission to meet the reasonable needs of the world community, then it will be necessary to consider what changes may be required in the Commission's practices and procedures and what additional resources should be sought.

4. Consideration of a programme of work is thus the first step in a larger process. The *Survey of International Law* produced by the Secretary-General is admirably suited for the type of review suggested above because of its wide-ranging scope. While the *Survey* may not include every existing and prospective topic for work in the field of international law it does achieve substantially universal coverage. Accordingly, these comments are based upon the same plan of organization as is contained in the table of contents of the *Survey*.

I. THE POSITION OF STATES IN INTERNATIONAL LAW

1. *Sovereignty, Independence and Equality of States*

5. Any codification effort with regard to the principles of sovereignty, independence, and equality of States would require interpreting the Charter of the United Nations. The Commission should not volunteer to assume a role as the interpreter of the Charter. In addition, the effort

would largely duplicate that involved in preparing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.³

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

6. Nothing more than some variety of exhortation is likely to result from a codification exercise in this area.

3. *The territorial domain of the State*

7. Codification of this topic faces formidable obstacles. With regard to acquisition of territory, for codification to be of substantial value it should be directed to the selection of rules for the purpose of settling existing territorial disputes. The adoption of such rules could result in disposing of a substantial number of long-standing and vexatious disputes among nations. However, if the rules were drafted with sufficient particularity to dispose of the disputes it is doubtful that they would be adopted on a broad enough basis to have any substantial effect upon existing trouble areas. For example, a very effective provision from the standpoint of settling disputes would be the establishment of a prescriptive period with regard to claims to territory. A party in possession of territory would be conclusively considered as sovereign over that territory upon expiration of some fixed number of years. Would it be possible ever to obtain general international agreement upon the length of time that should be controlling? Or upon the underlying assumption that the manner of acquisition was immaterial? The subject undoubtedly deserves consideration for inclusion in a long-term work programme for the Commission but the obstacles to producing a generally acceptable set of rules seem so great as to shift the balance against a decision to include it.

8. With regard to specific limits on the exercise of territorial sovereignty, the conclusion in the *Survey* that most of the problems in this area fall within the scope of the law of treaties, including succession to treaties, justifies the conclusion that no action be taken with respect to it.

4. *Recognition of States and Governments*

9. The basic issue, as the *Survey* points out in paragraph 65, is whether recognition is to be treated as a political decision or whether a requirement should be laid down that recognition must be accorded if certain criteria are met. In the present state of world politics agreement upon the latter point and upon what criteria should be governing does not appear attainable. Given this situation there does not seem to be any great advantage in attempting to define the legal consequences of recognition and non-recognition. If recognition is to remain fundamentally a political decision it would seem desirable to permit States a substantial degree of tolerance in the range of actions which may be taken vis-à-vis the non-recognized State without attempting

to specify specific legal consequences that follow upon such acts. The absence of conventional requirements in this area would tend to permit mitigation of the consequences, whatever they may be, of non-recognition and thus contribute to reduction of international tensions rather than exacerbate them.

5. *Jurisdictional immunities of foreign States and of their organs, agencies and property*

10. Paragraph 68 of the *Survey* tends to understate the existing confusion with respect to State immunity when it remarks that the contents and application of the doctrine are far from clear. In practice there appears to have been little consistency between what one State may do and what another State may do in similar circumstances and, on occasion, inconsistency in what the same State may do in two cases involving substantially identical facts.

11. Existing uncertainties regarding the scope and application of the doctrine of sovereign immunity give rise to friction among States that could be reduced, even if not completely avoided, by codification of the law in this field. The problem is basically a legal one in that it concerns claims that would normally be subject to juridical determination. The subject should be included in the future work programme of the Commission.

12. The subject, however, should not include the question of immunities granted with respect to the armed forces of one State which are stationed in the territory of another State discussed in paragraphs 77 *et seq.* of the *Survey*. As the *Survey* points out, problems of this character are almost invariably covered by treaty arrangements.

6. *Extraterritorial questions involved in the exercise of jurisdiction by States*

13. Paragraph 90 of the *Survey* raises the question to what extent a codification instrument would assist in dealing with matters having an extraterritorial element that has been generally accepted by the international community as a basis for exercising jurisdiction; e.g., war crimes, trafficking in narcotics, and the like. The question might be phrased more pertinently as whether it is more efficacious to deal with these subjects on an *ad hoc* basis. Any effort to draw up such a code would entail attempting to forecast the international requirements for protection against criminal activities for a substantial period of time in the future. Ten years ago it would have been difficult to predict the dramatic upsurge in regard to the hijacking of airplanes or the politically-motivated attacks upon diplomats which have now become of great concern to the world community. In addition to this problem of foretelling the future there are advantages to tailoring protective measures to the specific international crimes that are being dealt with. Thus the question of applicability of statutes of limitation or the principle of asylum may well vary from one species of crime to another. Consequently it does not appear desirable at this stage to contemplate the development of the general codification instrument put forward in paragraph 90.

³ General Assembly resolution 2625 (XXV), annex.

14. The reasons put forward in paragraph 95 against the Commission's taking up such matters as the extra-territorial effects of tax legislation and of "anti-trust legislation" support the conclusion that these subjects should not be taken up. Bilateral or multilateral conventions with a limited number of parties appear more likely to produce efficacious results than an endeavour to draft a general codification convention.

15. The activities of various international organizations such as the Hague Conference on Private International Law in the field of judicial assistance, and in particular the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1964) and on the Taking of Evidence Abroad in Civil and Commercial Matters (1968); indicate that there is no pressing need for the Commission to move into this field. This is underscored by the interest displayed by regional organizations in promoting wide acceptance of conventions along these lines.

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 International Law*

16. This item involves consideration of the desirability of Charter interpretation by the Commission and duplication of work that has been done in other bodies. The objections to the Commission's taking such action that were raised regarding section I. 1. are equally valid here.

2. *The prohibition of the threat or use of force*

17. In so far as an attempt to deal with the threat or use of force is concerned, the record of attempts to define aggression under the aegis of the United Nations indicates the wisdom of leaving the task to the Special Committee currently charged with the problem.

3. *The law relating to the peaceful settlement of disputes*

18. Item 3 regarding the law relating to the peaceful settlement of disputes clearly concerns a matter with substantial legal content and of fundamental importance. The issue, however, is not whether the Commission should take action to promote the peaceful settlement of disputes but the manner in which it should do so.

19. The record relating to the Commission's proposals with respect to arbitral procedure set forth in paragraph 134 of the *Survey* as well as the existing impasse in the General Assembly with respect to the item "review of the role of the International Court of Justice"⁴ underline the difficulties of attempting to deal with this subject as a separate problem. The sharp split in view-

⁴ See the report of the Sixth Committee on the item (*Official Records of the General Assembly, Twenty-sixth Session, Annexes, agenda item 90, document A/8568*).

points regarding the extent to which third-party settlement procedures should be used in the settlement of international disputes argues against the Commission's dealing with the matter as a separate topic.

20. Nevertheless, the Commission would pursue the objective of promoting the peaceful settlement of disputes. With this purpose in mind the Commission should, as a matter of standard procedure, take up in each of the draft conventions which it prepares the question of what methods of dispute-settlement would be best suited to the particular topic dealt with in the draft convention. The Commission should then include such provisions in the draft.

21. For any disputes-settlement procedure to be effective in a convention that is designed for world-wide acceptance the proposed procedure should represent a substantial consensus of view. Conciliation procedures along the lines of those contained in the Commission's draft articles on the representation of States in their relations with international organizations⁵ are illustrative of the manner in which procedures to promote disputes-settlement can be tailored to the requirements of a particular set of problems. It would be desirable for the Commission to maintain a flexible approach to the procedures that might be adopted with respect to any particular topic. In this respect the compromise solution of limited recourse to the International Court of Justice plus generally applicable conciliation procedures contained in article 66 of the Vienna Convention on the Law of Treaties and the annex thereto⁶ furnish a precedent of substantial value.

III. THE LAW RELATING TO ECONOMIC DEVELOPMENT

22. As the Secretary-General's *Survey* points out, this topic was not discussed in the *Survey* prepared by Mr. Lauterpacht in 1948.⁷ The discussion in the 1971 *Survey* points out the growing emphasis upon economic development law and the desirability of taking an overall look at this field as the basis for inclusion. The *Survey*, however, indicates that basic responsibilities in this field have been allotted to a variety of other international agencies and United Nations organs including UNCTAD, UNIDO, UNCITRAL, IBRD and its associated agencies, IMF, and GATT. In addition to these organizations, of course, there are regional economic organizations and other specialized international organizations such as IMCO and UNIDROIT which are active in various aspects of what might be called international economic law. There does not appear to be, therefore, any demon-

⁵ See *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, p. 333, document A/8410/Rev.1, chap. II, D, art. 82.

⁶ 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. 298.

⁷ *Survey of international law in relation to the work of codification of the International Law Commission: memorandum submitted by the Secretary-General* (United Nations publication, Sales No. 1948.V.1(I)).

strable need for the Commission to enter into a field that has been pre-empted by other organizations, particularly when, in the field which is traditionally its own, there remain so many unsatisfied demands.

IV. STATE RESPONSIBILITY

23. The law of State responsibility is actively under study by the Commission, which in accordance with its decision in 1963⁸ is defining the general rules governing the international responsibility of States. In considering a long-range programme of work, the major considerations that should be borne in mind is that completion of a convention on the general principles giving rise to responsibility will only be the foundation for the Commission's work in the field. It will be necessary to build on this foundation more specific rules relating to State responsibility in specific areas. It is at this stage that the Commission may find it necessary to consider those aspects of subjects such as limitations on the exercise of territorial sovereignty and prohibition of the threat or use of force which relate specifically to responsibility. It would be premature to attempt to draw up a list of such areas at this stage in the consideration of the general principles of responsibility but, as part of its long-range work programme, the Commission should plan for further activities in the field of State responsibility as soon as the codification of general principles has reached an advanced stage.

V. SUCCESSION OF STATES AND GOVERNMENTS

24. The Secretary-General's *Survey* suggests in addition to the present work regarding succession of States in respect of treaties and in respect of matters other than treaties, future work on succession with regard to treaties concluded between States and other subjects of international law. The subject certainly should be included in the long-term work programme of the Commission. The basic issue is whether it would be desirable to have the matter dealt with in connexion with the existing project on the law of treaties with respect to international organizations or as a separate topic. A decision on this point might be appropriate after receipt of the comments of States on the draft articles on succession of States in respect of treaties.

25. With regard to other aspects of the law of succession the suggestion in paragraph 218 of the *Survey* that the topic of "succession of States and Governments" be retained on the long-term work programme is a sound one which will permit later consideration of the need, if any, to take up the topic "succession of Governments".

VI. DIPLOMATIC AND CONSULAR LAW

26. Except for the special subject of a draft convention concerning crimes against persons entitled to special

protection under international law, the work of the Commission in the field of diplomatic and consular law is substantially complete. However, the continued review of the 1961 Convention on Diplomatic Relations⁹ and the 1963 Convention on Consular Relations¹⁰ in the course of the Commission's work on special missions and representation of States in their relations with international organizations established the presence of a substantial number of minor problems in the formulation of those conventions and the possible existence of major omissions or flaws. Nevertheless, in the absence of a showing of substantial difficulties arising in the implementation of the conventions there would not be sufficient reason to incorporate a proposed revision of those conventions in the long-term work programme.

27. On the other hand, the rate of change in the area of international relationships is such as to eliminate any possibility that the rules contained in the Conventions of 1961 and 1963 could enjoy more than a fraction of the immutability accorded to the Regulation on the classification of diplomatic agents (*Vienna Règlement*) of 1815. The same factors are bound to affect any other convention that the Commission has fathered, to a greater or lesser degree. It seems reasonable to consider as an element of the Commission's long-term programme of work the establishment of a system for reviewing conventions on a regular basis in order to determine whether there is an existing need for study and possible revision.

28. One method of achieving this reconsideration would be to charge the United Nations Secretariat with the duty of carrying out a survey at fixed intervals in order to determine whether there was need for some action by the Commission. Thus the Secretariat could, after a treaty had been in effect for possibly 10 years, send out a questionnaire to all the Parties to determine whether any problems had been encountered in its interpretation or implementation. Such questionnaires could be thereafter sent out on a five—or ten—year basis. The results of the questionnaire should, of course, be supplemented by Secretariat research with respect to particular convention. The Commission could then as part of its regular agenda consider the Secretariat reports and reach a conclusion as to whether any remedial action would be required.

VII. THE LAW OF TREATIES

29. As the question of treaties concluded between States and international organizations or between two or more international organizations and the most-favoured-nation clause are both on the active agenda of the Commission the only subject raised in the *Survey* which requires comment is the question of participation in a treaty. This question, as illustrated by developments at the United Nations Conference on the Law of Treaties, is primarily political rather than legal. As the matter is currently before the General Assembly, hopefully it will be settled in that context.

⁸ *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, document A/5509, para. 52.

⁹ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁰ *Ibid.*, vol. 596, p. 261.

VIII. UNILATERAL ACTS

30. A decision to take up the topic of unilateral acts would require consideration of the entire subject of the sources of international law. This is so because it would be necessary to express the relationship of unilateral acts to the accepted sources of international law that appear in Article 38, paragraph 1 of the Statute of the International Court of Justice. Difficulties might be expected to arise in expressing the relationship of unilateral acts not only to "international custom, as evidence of a general practice accepted as law" but also to "the general principles of law . . .".

31. The Commission decided in 1949 that the topic of the sources of international law ought not to be placed on the list of topics suitable for codification.¹¹ This decision appears as valid now as it did in 1949.

32. The *Survey* raises in paragraph 282 the more specific question whether the subject of unilateral acts should be taken up by the Commission, in the context of "unilateral acts with definite legal consequences emanating from a single subject of international law, and of which the main examples are recognition, protests, estoppel, proclamations or declarations, waivers and renunciations . . .". The *Survey* continues by suggesting in paragraph 283 that the product of the Commission might well not be draft articles but in effect a legal study, and points out that no such study currently exists to which reference can easily be made. Accepting the importance of the subject, the final decision as to inclusion in a long-term programme involves whether such a study could not be undertaken by some other organization than the Commission such as the International Law Association of the Institut de droit international. It would then be possible to determine whether additional work by the Commission itself was necessary in this field.

IX. THE LAW RELATING TO INTERNATIONAL WATERCOURSES

33. The subject of the "Law of the non-navigable uses of international watercourses" has been referred to the Commission by the General Assembly and may thus be considered to be part of the Commission's agenda.¹² The formulation of the General Assembly resolution, however, raises substantial practical problems.

34. The exclusion of navigable uses from the Commission's consideration prevents a balanced study of this subject. For example, if a downstream riparian decides to use a navigable river for hydroelectric production, the construction of the necessary dam will eliminate navigation for upstream riparians unless that construction is accompanied by building locks to carry vessels around the dam. Contrariwise, if an upstream riparian decides to use waters for irrigation purposes it may well reduce stream flows to an extent that interferes with the established navigational uses by downstream riparians.

35. Apart from the foregoing practical problem there is a serious question whether it is possible to produce a draft set of provisions regarding the uses of international watercourses that would not be at such a level of generality as to be of extremely limited utility. The variations between river basins are sufficiently substantial so as to make what would be a reasonable set of rules for the control of one river basin unreasonable for that of another. An example would be the difference between the Rhine River basin and the Tigris and Euphrates system.

36. This may well account for the very general character of the provisions in the Helsinki Rules¹³ on equitable utilization of the waters of an international drainage basin. The two key rules are contained in article VI, which denies preference to any use or category of uses and article VIII which provides that an existing reasonable use may continue in operation unless on balance it is reasonable to conclude that it should be modified or terminated so as to accommodate a competing incompatible use. These principles do not afford any great assistance in resolving disputes between upstream and downstream riparians.

37. In three areas the Helsinki Rules provide reasonably detailed and effective provisions—in chapter 3 with respect to pollution, chapter 4 with respect to navigation and chapter 5 with respect to timber floating. This greater degree of definition undoubtedly stems from the fact that differences among river basins do not substantially affect the rules which are required to ensure a reasonable régime to prevent pollution and to control navigation and timber floating.

38. As the General Assembly has expressed a preference that the Commission not take up navigational uses at the first stage of its study of international waterways, and as it would be fruitless to consider timber floating without taking navigational uses into account, the area in which the Commission could perform some useful work would be that with respect to pollution of international waterways. The ever-increasing concern which is being demonstrated with respect to environmental problems generally emphasizes the over-all importance of the topic of water pollution. Intensive international, regional and national efforts are being made to deal with the subject. The International Law Commission, with its character as a body of independent experts, would be an excellent forum in which to seek to work out legal principles for application to the problems of the pollution of international watercourses.

39. The task would be a complicated one because the problems of pollution are complex and their solution even more complex. Economic, financial and scientific studies are an essential adjunct to the formulation of workable legal requirements in this area. As a consequence of the United Nation Conference on the Human Environment, however, it may be anticipated that United Nations studies will be carried out in these fields that

¹¹ See *Yearbook of the International Law Commission, 1949*, document A/925, para. 16.

¹² General Assembly resolution 2780 (XXVI), section I, para. 5.

¹³ International Law Association, *Helsinki Rules on the Uses of Waters of International Rivers* (London, 1967).

will supply the necessary technical information for the Commission's consideration of river pollution. It may well be necessary for the Commission to set up working arrangements with other United Nations bodies in order to secure appropriate technical advice and assistance. Despite all the complications that may arise in dealing with the subject, however, the Commission should include it on the long-term agenda and should give it substantial priority among the items on that agenda.

X. THE LAW OF THE SEA

40. As the law of the sea is currently within the purview of a special committee, the Commission need not take any decisions with respect to the subject at the present time.

XI. THE LAW OF THE AIR

41. ICAO has established its jurisdiction with respect to the law of the air and it would be inappropriate for the Commission to take up subjects normally handled by that body.

XII. THE LAW OF OUTER SPACE

42. The Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space has been dealing satisfactorily with the law of outer space in general and there would not appear to be any need at present for proposing changes in this method of dealing with the subject.

XIII. THE LAW RELATING TO THE ENVIRONMENT

43. One aspect of environmental problems has already been touched upon in the discussion regarding pollution of international waterways.¹⁴ From the broader point of view, the efforts to preserve reasonable environmental living conditions will require the co-operation of every competent international agency. Whether or not the fears of universal disaster expressed by some ecologists are accurate there can be no doubt that enormous international action will be required to safeguard against the possibility of disaster. The Commission should participate in this work. Taking up the problem of river pollution will be a substantial first step. Participation in the development of world environmental law should be included in the long-term agenda of the Commission.

XIV. THE LAW RELATING TO INTERNATIONAL ORGANIZATIONS

44. This is a topic that has special significance for the Commission in view of its own nature. The work now

being carried on with respect to the application of the law of treaties to international organizations should serve as a foundation for future consideration of other fundamental legal problems in this area. Possibly the subject raised under point 2 chapter XIV in the *Survey* (Privileges and immunities of international organizations, and of entities and officials under their authority), should be taken up as the next subject in this field when the work on treaties is completed, followed possibly by a study of responsibility of such organizations. This aspect might be broadened to include certain of the problems raised under point 1 of this subject (Legal status of international organizations), such as contractual capacity, capacity to engage in legal proceedings, and the like.

XV. INTERNATIONAL LAW RELATING TO INDIVIDUALS

45. The *Survey* suggests four headings for this topic. As to the first, the law of nationality, it appears unlikely that substantial progress could be made in this area given the past history recounted in the *Survey*.

46. With regard to point 2 (extradition) of chapter XV, the *Survey* suggests that it may be possible to agree to multilateral treaty provisions on extradition in respect of certain offences. It is true that in the context of specific conventions dealing with specific offences of general concern to the international community it has been possible to incorporate provisions regarding extradition. It seems doubtful, however, whether this fact supports the conclusion that consequently it would be possible to conclude a general extradition treaty. The substantial obstacles to such a treaty which led the Commission not to include this subject on its agenda in 1949 have not disappeared. The Commission should not devote scarce time and resources to the subject until more favourable prospects appear.

47. The third subject, right of asylum, appears too controversial to take up at this time. The difficulties are implicit in article 14, paragraph 2 of the Universal Declaration of Human Rights,¹⁵ which specifies that a right of asylum may not be invoked in case of prosecutions for non-political crimes or for acts contrary to the purposes and principles of the United Nations. This formulation leaves any State substantially free to grant or not grant asylum as it sees fit and there is little likelihood that any more meaningful definition that might be proposed by the Commission would be widely accepted.

48. Point 4 in chapter XV of the *Survey* on the general subject of human rights is generally within the purview of the Commission on Human Rights. There does not appear to be any urgent reason for the International Law Commission to move into this area.

XVI. THE LAW RELATING TO ARMED CONFLICTS

49. As the *Survey* points out, the Commission considered whether the laws of war should be included on its original

¹⁴ See para. 38 above.

¹⁵ General Assembly resolution 217 A (III).

agenda and decided against taking up the subject. While the reason for that decision (that such action might indicate lack of confidence in the ability of the United Nations to maintain peace), may not at the present moment appear overly persuasive, there are substantial reasons for not reversing the decision. Principal among these is that the International Committee of the Red Cross is currently dealing with most important aspects of this subject and a major international diplomatic conference may be expected on the basis of the preparatory work initiated by the International Committee. In so far as matters not being dealt with in this context are concerned, other major issues are being dealt with in the

Conference of the Committee on Disarmament. There are minor issues, such as have surfaced in the course of the Commission's consideration of the law of treaties and of the 1961 Convention on Diplomatic Relations. To the extent they have not been settled in such conventions, they are not of sufficient urgency to be placed on the long-term agenda of the Commission.

XVII. INTERNATIONAL CRIMINAL LAW

50. The discussion of this subject in the *Survey* establishes that topics in this area are best dealt with on an *ad hoc* basis as the need arises.