Document:-
A/CN.4/SR.1143

Summary record of the 1143rd meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
1971, **vol. I**

1143rd MEETING

Thursday, 22 July 1971, at 3.45 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen.

Review of the Commission's long-term programme of work

(A/CN.4/245)

[Item 7 of the agenda]
(resumed from the 1141st meeting)

1. The CHAIRMAN invited the Commission to resume its consideration of item 7 of the agenda and of the Secretariat working paper, Survey of International Law (A/CN.4/245).

2. Mr. BEDJAOUI said that he must express his real admiration for what he might call the epitome of modern international law submitted by the Secretariat in its Survey of International Law. It deserved the widest possible dissemination, for it was of interest to all jurists. It was a lucid statement of the needs of the international community. The proposals in it betokened realistic ambitions as well as wide-ranging views. At a time when what might be called the second age of the Commission was at hand, he hoped the Secretariat would bring up to date and speedily republish the "green book" on the International Law Commission and its work.

3. The wealth of documentation in the Secretariat's working paper showed to the full the value of the work performed by the many bodies, whether official or unofficial, whether subsidiaries of the United Nations or not, which were engaged on tasks parallel to that of the Commission. The abundance of kindred activities seemed to show the need for greater co-ordination, as permitted by the Commission's statute; but that demanded further reflection. He hoped the Secretariat would in any case prepare a brief paper before each session of the Commission giving a list of and progress report on the legal work carried out by such bodies during the previous year.

4. The Secretariat suggested (para. 22) a period of twenty to twenty-five years for the Commission's future long-term programme. That might seem a rather long period, since technological and political developments, speedier communications and the acceleration of the pace of history in general were likely to open up prospects unconceived as yet. The suggestion was reasonable, however, and in any case was dictated by the Commission's methods and the pace of its work. The Commission should, however, pause for meditation at some stage in its work in order to review its programme, if need be.

5. The Commission should also reflect on its methods of work. Could it not split up during a session into as many working groups as there were topics and special reports? There would be fewer plenary meetings, but they would certainly be more fruitful, because they would have been prepared for by the work of the groups.

6. Another point on methods of work was the question whether very broad topics should be chosen, requiring long and exacting labour, or whether topics should be limited, but more numerous and more varied. The questions of the hi-jacking of aircraft, and the kidnapping of diplomats which Mr. Kearney had asked the Commission to consider,[1] might be completed in two or three years. The right of asylum and the juridical régime of historic waters, also on the Commission's programme of work, were other topics of limited scope.

7. There were other topics which would require ten to fifteen years. Experience showed, however, that when the Commission dealt with such major topics, it often had to leave aside a particular aspect or a related topic and then revert to it later and consider it either separately or as part of some other topic. The choice, then, did not lie between major and minor topics, but was dictated by the needs of the international community. So in drawing up its programme of work, the Commission must bear in mind the recommendations of the General Assembly and the needs of the international community. Those needs developed under the pressure of economic and technological development, and as the Secretariat's working paper emphasized, "the States which have become independent since 1945 have contributed new interests and aspirations to international law" (para. 9).

8. The law should express both the present and the foreseeable needs of the international community. As early as 1929, the Institute of International Law[2] had said of codification that it should not be restricted to formulating the law of nations as it was, but should develop it as it should be in accordance with the rules which, as international life evolved, the interests of mankind required and morality and justice demanded. Admittedly the Commission's terms of reference required it to propose measures of codification which would prove acceptabe to governments. There was, however, a pressing need to get away from the false dichotomy between codification and progressive development, which went hand in hand on that subject. He could endorse what was said in paragraph 9 of the working paper and the comments in paragraph 19 with regard to the shift which had occurred since 1949 in the methods of studying traditional international law and the emphasis placed upon one or other branch of law.

9. Before tackling the problem of the selection of topics, the question of the criteria for the selection had to be settled. By elimination, the topics already considered by

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[1] See 1087th meeting, para. 38.

[2] See *Yearbook of the Institute of International Law*, New York session, 1929, II, p. 312 (French only).

the Commission could be discarded, even if a revised codification or general reconsideration was necessary, as in the case of the law of the sea. Topics already under consideration should be retained, subject to a reassessment of their priority, and might be completed in stages. Thus, the study of State succession should, in the normal course, be followed by succession of governments and succession of membership of international organizations, as well as succession of organization to organization.

10. With regard to that last-mentioned aspect of succession, since the limitation of State sovereignty was not to be presumed, there ought not be a succession. According to some writers, however, there was a continuity in organic international law as an expression of the principle of the continuity of the international public service. That question might perhaps be examined more appropriately not as part of the topic of succession, but as part of the law of international organizations.

11. Topics recommended by the General Assembly must necessarily be included in the Commission's programme of work, but topics being dealt with by *ad hoc* committees should be left aside for the time being.

12. In any event, was it useful and reasonable to draw up an unduly long list? In twenty-three years the Commission had not exhausted the programme established in 1949, and, as Mr. Castrén had reminded the Commission,[3] room must be left for requests of the General Assembly. The Commission should also begin next year to consider the appointment of special rapporteurs for new topics to be put in hand forthwith.

13. Among new topics he might suggest was that of the territorial domain of the State, a topic which had hardly as yet been considered for codification. The economic, technological and political development of the world had, however, led to a situation in which the traditional procedures of acquiring "terrestial" territories had lapsed, and such procedures were in any event inadequate so far as outer space was concerned and would have to be recast for the seas.

14. Recognition of States, governments and belligerents and recognition of *de facto* situations in general might be placed on the agenda again, despite their obvious political implications, and he agreed with the views expressed on that subject in paragraph 66 of the working paper. Some writers drew a distinction between recognition and invocability. Though the creation of a State might be invoked—and there was no rule of international law prohibiting that—if the creation came about contrary to a peremptory principle such as that laid down in Article 2 (4) of the Charter, then it could not be invoked and still less could it be recognized.

15. Because the law relating to international peace and security was so complex, one or more of those parts of it which had already been pioneered in the United Nations should be retained on the programme. The use of force when legal or just, such as its use by the Security Council or by a State in legitimate self-defence, should also be codified, and it was worth considering the case of wars of liberation and revolutionary wars, for they were still hedged about by the old rules governing civil war. With regard to the law relating to internal armed conflicts, although he agreed with the views expressed by the Secretariat in paragraphs 396 and following, he felt that the topic should be included in the programme of work in terms that went rather beyond merely humanitarian law.

16. The law relating to economic development, which was only one branch of the international law relating to development, was a very new part of it, which, owing to the manifest and ever-increasing needs of the international community, called for the Commission's special attention. The Secretariat's working paper provided a very good exposition of that view in paragraphs 150 and following.

17. With regard to the law relating to international organizations, the Commission should take note of the General Assembly's recommendations as they were made and comply with them. It would then be, so to speak, working to order instead of drawing up a programme which might not be quite what was expected of it.

18. Lastly, it was certainly desirable that fresh and substantial progress should be made in international criminal law over the next twenty years, but it would be better to entrust the subject to some body other than the Commission, since it was completely bound up with the problem of the definition of aggression.

19. The order of priorities should certainly be reviewed, if only in order to draw up the agenda for the twenty-fourth session.

20. Mr. BARTOŠ said that the question of methods of work had been discussed continually throughout the fifteen years he had been a member of the Commission, while in 1947, in the Sub-Committee which had prepared the Commission's draft statute, there had been more talk about ways and means than of the list of topics to be codified. The problem had been whether to embark upon a systematic codification of international law, in which case all that had to be done was to decide how to set about it, or whether to select a number of topics for codification, the choice to be made by people who were in touch with the realities of international life. It was the latter method that had finally been adopted. Codification should therefore be undertaken of those topics which the Commission and the General Assembly considered to be the most important from the point of view of the international community.

21. It was hard, however, to decide what topics answered that criterion and were susceptible of codification within a given period, and the Commission had not always been satisfied with the selection. On the other hand, the collaboration of the jurists in the Secretariat had been even more valuable than could have been hoped. Even if there were still too few, they were the best specialists in the world both for their knowledge of international practice, their skill in research and their familiarity with theory. Without the general staff of the

[3] See 1141st meeting, para. 41.

Codification Division, the Commission would not have made much progress.

22. Although at times the Commission had harboured the ambition to complete the codification of a fairly large number of topics, it had not succeeded in doing so. That brought up the problem of the Commission's methods of work. The problem was the more serious because law was dynamic and a codification which might seem excellent at the time it was made, like the codification of the law of the sea, soon began to show gaps owing to the rapid economic, political and legal development of the contemporary world. In that way, a topic would no sooner seem to have been completed than it was already out of date. The Commission's task, therefore, was not only to codify, but also to follow up its codifications and see whether changes in international relations required changes in the law, even in those parts of it which had already been codified. But how was the Commission to find the time to review work it had already completed and to reflect on possible changes to it, when it already had great difficulty in dealing with the codification of three or four topics?

23. A number of topics had been codified and the codification submitted to the appropriate political organ of the United Nations, but they had been considered not yet ripe or else as overripe in view of the existing political balance. All those various problems had led the General Assembly to establish other channels of codification outside the Commission, either by setting up *ad hoc* bodies or by requesting specialized agencies to codify certain topics. The high quality of the Commission's work had been invoked in support of the claim that it should be given a monopoly of codification, but the prerequisite for that was larger resources and more time. As matters stood at present, the Commission had done a great deal of work, but it was still not enough. Besides, apart from any question of the value of its work, the Commission was not necessarily the most appropriate body politically. That was a good enough reason for the establishment of other bodies, such as the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. The Special Committee had been meeting for several years and had finally produced a result which did not perhaps come up to the technical standards of quality which characterized the work of the Commission, but on the other hand the Commission could hardly have produced a text with the political tinge which marked the Special Committee's work.

24. The Secretariat had set out admirably and submitted to the Commission the topics directly or indirectly open to the Commission. It had not arranged them in order of priority, because its intention had been merely to list the topics for codification without expressing any view on the policy of codification. The Commission and the General Assembly had perhaps made the mistake of trying to give priority to too many topics since every topic listed in its programme of work became *ex hypothesi* a priority topic. It should therefore ask the General Assembly for permission to establish an order of priority among the priority topics themselves. For example, it was obvious that the two topics of the kidnapping of diplomats and the hijacking of aircraft warranted immediate consideration, as Mr. Kearney had requested[4] and the officers of the Commission had recognized. But how could that be done?

25. The Commission's methods of work must therefore be made more flexible, but that was impossible unless it had longer sessions. It must be capable of answering the needs of contemporary political and social life and consequently must be in a position to codify a larger number of subjects, without, however embarking on a systematic codification of international law. There could be no question of freezing the law for fifty years. New rules had been introduced even into the Justinian codifications, as need had arisen.

26. It was easy to see that there was practically no topic which was not susceptible of codification and whose codification was not necessary. Codification could deal with principles or it could deal with specific and detailed rules. As a selection was essential, it might be made in accordance with two criteria: urgency and the needs of the international community. But to be realistic, it must be understood that a United Nations codification, like every codification in the world, would always lag some way behind life.

27. Despite that, the Commission must be grateful to the Secretariat for the remarkable paper it had submitted. The Survey ought to be used by all specialists in international law and be given as wide a circulation as possible.

28. Mr. SETTE CÂMARA said he associated himself with the tributes paid to the Secretariat on the excellence of their Survey of International Law. Twenty-two years had elapsed since the Commission had made a selection of 14 topics for study from the 25 examined by the Secretariat in the 1948 Survey. During that period, the Commission had submitted final drafts or reports on seven topics and the time had therefore arrived to undertake the review of the remaining topics and the examination of new ones, so as to bring the future programme of work up to date.

29. Unlike the 1948 Survey, which made a preliminary analysis of a mass of customary rules and divergent practice and norms of treaty law which had not yet been systematically arranged, the new Survey appeared as a complete document, based on a thorough analysis of the realities of modern international law and firmly directed towards meeting the needs of the methods of work of the International Law Commission. It had benefited from the existence of a considerable body of codified international law, much of it based on drafts prepared by the Commission itself, and it paid due attention to the new needs of co-ordinating the codified provisions of international law and the new areas of law now being examined.

30. With regard to section 2 of chapter I of the new

[4] See 1087th meeting, para. 38.

Survey, he believed that the Commission should adhere to its previous decision to postpone the examination of the topic of "The Obligations of International Law in relation to the law of the State"[5] because of the difficulties arising from the considerable variations in State practice and in the provisions of domestic constitutional law.

31. As for section 4 of the same chapter, he agreed with the conclusion (para. 66) that, although the act of recognition was essentially political, there were various specific aspects of recognition which might be suitable for codification; recognition of States and Governments should therefore remain on the Commission's list of topics.

32. He also agreed with the conclusion that extra-territorial questions involved in the exercise of jurisdiction by States were "not suitable for general codification as carried out by the Commission" (para. 95). As the Survey pointed out, current interest in questions of criminal jurisdiction in respect of crimes committed outside national territory—as evidenced by the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague in December 1970,[6] and the Convention to Prevent and Punish Acts of Terrorism taking the Form of Crimes against Persons and Related Extortion that are of International Significance, signed at Washington in February 1971,[7] had developed from a concern to solve particular substantive problems rather than to deal with the question of extra-territorial jurisdiction as such and as a whole.

33. Chapter II of the Survey dealt extensively with the question of the peaceful settlement of disputes, and demonstrated the variety of solutions adopted in different cases, both in the Commission's own drafts and in the treaties concluded on the basis of such drafts. The 1949 decision not to include the item on the list of topics for codification was still valid.[8] The difficulties encountered in the General Assembly by the Commission's draft on arbitral procedure[9] showed that rules on the peaceful settlement of disputes were outside the realm of topics ripe for codification.

34. Chapter III, on the law relating to economic development, opened out a new field of the utmost importance; the time was bound to come when the Commission would study the problems connected with the activities of States in the field of trade and economic and technical assistance with a view to covering them in its future programme of work.

35. The conclusions set out in chapter IV, on State responsibility, and in chapter V, on succession of States and Governments, could only be assessed by the competent special rapporteurs.

36. Chapter VI, on diplomatic and consular law, dealt with a field most of which had been covered by the Commission; in fact there remained only the subject of "Questions concerning the implementation of certain rules of diplomatic and consular law" (paras. 240-249) to be taken up in due course.

37. With regard to the law of treaties, which was the subject of chapter VII, two reports by its special rapporteurs on the most-favoured-nations clause had still to be considered by the Commission. The question of participation in a treaty (paras. 269-274) had been considered by the Commission when preparing the draft articles on the law of treaties, and later by the Vienna Conference of 1968/69; further study of the question had been deferred by the General Assembly at its twenty-fifth session.

38. In chapter VIII, the Survey emphasized the difficulties with which the subject of unilateral acts was fraught and expressed doubts about the possibility of undertaking the formulation of draft rules on the subject. It recognized, however, the importance of unilateral acts and expressed the hope that the Commission would undertake an exploratory study of the subject.

39. He would not comment on chapter IX, since the subject of the law relating to international watercourses had only recently been discussed by the Commission, or on chapter X, on the law of the sea, and chapter XI, on the law of the air, which dealt with matters largely covered by existing international conventions.

40. Chapters XII and XIII drew attention to the law of outer space and the law relating to the environment, although those problems were under consideration by other United Nations bodies, because they might in the future require examination by the Commission under its long-term programme of work.

41. On the subject of the law relating to international organizations, the Survey suggested that the Commission should continue its present course of action, "namely to deal with specific aspects which have similarities to the parallel practices of States, after the relevant inter-State law has been examined", a course which "would appear to offer the best possibilities for the Commission to contribute to the codification and development of the law in this area" (para. 356). The general body of rules pertaining to the law of international organizations would not be ripe for codification in the foreseeable future, if at all.

42. Lastly, he found both reasonable and judicious the conclusions of the last two chapters, dealing with international law relating to individuals and with the law relating to armed conflicts.

43. There remained the problem of what action, if any, should be taken at the present session with regard to the Commission's long-term programme of work. In view of the lack of time for any thorough discussion at the present late stage and more particularly of the fact that the present membership was at the end of its mandate, he suggested that the question of a new programme of future work be left to the Commission in its new composition at the next session. The present

[5] See *Yearbook of the International Law Commission, 1949*, p. 37.

[6] ICAO document 8920.

[7] OAS document AG/88/RW.I.

[8] See *Yearbook of the International Law Commission, 1948*, p. 44.

[9] *Ibid., 1953*, vol. II, pp. 201-212.

exchange of views would undoubtedly be helpful to the new members.

44. Mr. AGO said that he had not had time for a detailed study of the Working Paper submitted by the Secretariat. He would therefore confine his remarks to a few statements in the excellent introduction, on which he congratulated the Legal Adviser and his staff. He might wish to offer some more extensive comments later.

45. First, he thought it was not correct to say, as was stated in paragraph 8, that the codification and progressive development of international law were a process whereby efforts were made to translate the fundamental principles relating to the conduct of States into specific legal obligations. The fact was that international obligations, whether the result of codification or a matter of customary, conventional or any other kind of rules, were always legal obligations, and what could affect the more or less specific nature of the obligation was not the process of codification but the manner in which the obligation was defined.

46. What characterized the process of codification was the fact that the law passed from unwritten form to written form. In any human society, codification generally took two forms; one related to the physiology, or structure of the law, and in the other to the pathology or state of the law. In normal circumstances, when the only defect of non-codified law was that it had become obscure or lost its homogeneity, codification consisted simply in clarifying it, in eliminating what was obsolete and removing the sources of confusion between rules which appeared to contradict each other. But when the law no longer reflected the exigencies of society, and when, as the result of far-reaching social changes, or even a revolution, it had not only to be clarified but also to have its quality of certainty restored by recasting and restating it, it was then that the task of codification took on a heightened significance. All the great codifications of history, the Code Napoléon, for example, had been produced immediately after a social upheaval. That was what was happening now; the world was undergoing the greatest revolution which international society had ever experienced, for two major continents which had never previously been anything more than the "object" of international relations had made their appearance in international society with a series of full subjects of international law, all with their aspirations, their genius, their traditions and their legal, religious, moral, social, economic and other ideas. Those new subjects of international law intended not only to question the rules they found there, but also to participate in the formulation of the rules that would constitute the international law of the future.

47. International law therefore had to be re-examined *in toto* and cast in a new mould which, it was to be hoped, would preserve everything that was valid in the old rules, but especially would attract the indispensable support of all the new States. In normal times theoretical codes might be a possibility, but in the world of today written rules had to be stated in the form of conventions. That was a point that should not be overlooked.

48. His second comment concerned over-systematization, which was something the authors of the paper seemed to be afraid of, since they stated in paragraph 16 that the adoption or endorsement of a conclusive definition of international law and its contents by the Commission might make it difficult to add new topics.

49. The content of international law could not be circumscribed. International law could be said to be the legal order in force in international society, yet its content was essentially fluid, and was a function of the time; it changed from age to age, either because new questions were added to those already covered, or because the rules governing old questions became firmly established, or because some institutions disappeared.

50. His third comment was that he would like to see a clearer expression of the idea advanced in paragraph 17, that a resolution adopted by a plenary organ, though not law-making, could nevertheless become part of State practice and be thereby transformed into a customary rule.

51. His fourth observation related to paragraph 19, where the authors of the paper seemed to be saying that the Commission, which up to the present had devoted itself to the codification and progressive development of traditional international law, should turn to new topics which needed to be regulated by international law. The idea should be expressed differently, in order to avoid giving the impression that future codification should be applied only to what was new. In point of fact, the Commission was far from having exhausted the topics of traditional international law, but its main task now was to recast the rules of traditional international law so as to secure their acceptance by all States, as it had done with the law of treaties. The topicality of a particular problem should not be allowed to obscure the fact that the Commission's essential function was to codify and illuminate the major aspects of traditional international law.

52. Next, he hoped the Secretariat would consider more closely the question of what happened to codifications. It would be wrong to think that codification ceased with the diplomatic conferences that were responsible for adopting the conventions, because there were still the formidable obstacles of ratification and accession to overcome. That was a point that should not be overlooked. At the same time, a codification convention should not be reviewed too soon, because if its achievements were questioned too hastily, the result would be to bring disorder rather than order into international society.

53. Finally, the Survey should include an analysis of the force of codification conventions irrespective of their contractual force, for if a convention attracted the support of a large majority of States, it thereby acquired weight regardless of the number of ratifications or accessions. If the Secretariat would look into those points, it could then round off a study on which he warmly congratulated it.

54. Mr. TABIBI said that since he had begun his career as an international lawyer, more than twenty-three

years ago, rapid changes had taken place in the field of international law and in the attitude of nations towards it. That change of attitude had been particularly marked in the emerging nations of Asia and Africa.

55. In the early days of the United Nations, no diplomat from his part of the world had been anxious to serve as a delegate to the Sixth Committee and it had been a novelty to find a student who wanted to go abroad to study international law. Even ten years ago some delegates to the General Assembly had been startled when he had proposed the adoption of measures for technical assistance in the field of international law.

56. Nevertheless, within a span of less than two decades, international law had caught the imagination of the world, mainly as a result of the work of codification carried out by the Commission and by the Secretariat, and of the success of the Vienna Conventions on diplomatic and consular relations, the four Geneva Conventions on the law of the sea and the Vienna Convention on the Law of Treaties. In that growing support of international law, the role of the emerging nations of Asia and Africa, which had doubled the membership of the United Nations and had also doubled the number of topics of international law, should not be underestimated.

57. With the participation and contribution of Asian and African jurists, international law was no longer just a legal institution of European chanceries and foreign offices; it was a part of the life and education of the new and emerging nations. The theory that international law was a product of Christian civilization had lost its force, and it was now recognized that international law was also to some extent a product of the ethics and morality of the oriental peoples who had produced the main religions of the world.

58. The two world wars, which had begun in Europe, had cast some doubt on the rules of international law. Since then, however, international law had undergone great changes, due to the common sense and imagination of the leaders of the Second World War, who had sought refuge in its principles when they had adopted the basic principles of the Charter at Yalta and later at San Francisco. During the last two decades, the rules of the Charter had not only served to maintain the integrity of States, which was an old concept, but had placed more emphasis on the interests and protection of the community of nations as a whole.

59. Those old rules of international law, based mainly on protection of the individual rights of aliens and the doctrine of minimum standards, had given way to the principles of self-determination and human rights and new norms of international law which had their roots in the interests of the masses and of the community of nations as a whole.

60. The new "Survey of international law" which had been prepared by the Secretariat bore witness to all the genuine efforts of the new community of nations in the last two decades to create a modern international law for the benefit of mankind as a whole. It was a thoroughly up-to-date work and deserved a much wider circulation and greater publicity. It should be made available in printed form for the use of all legal institutes and juridical circles.

61. The new topics recommended for study in the Survey, such as the protection of diplomats abroad, the prevention of the hijacking of civil aircraft and the protection of the environment, were all worthy of consideration, since they concerned problems of vital interest to the present community of nations. But since the term of office of the present Commission was approaching its end, it was important not to tie the hands of the next Commission and of the General Assembly by making proposals for new topics. He proposed, therefore that the Commission should take note of the Survey and request the Sixth Committee to consider it carefully and make appropriate recommendations to the next Commission. Meanwhile, the Commission should request its successor to study the Survey and prepare a new list of topics for the next session as a matter of priority.

62. Mr. EL-ERIAN said he wished to associate himself with the expressions of appreciation of the Survey and the tributes paid to the Legal Counsel for his lucid introduction and to the Director of the Codification Division and his staff for their efforts in preparing that valuable document. The Survey presented a summary, which was both comprehensive and concise, of the activities not only of the International Law Commission but also of other United Nations bodies in the codification and progressive development of international law. It was richly documented and related the Commission's work to that of other organs of the United Nations and of the specialized agencies. It placed international law in its proper setting, which was the United Nations, and brought out clearly the impact of the Charter on traditional international law, which had transformed it into what was now generally considered the law of the United Nations.

63. Previous speakers had dwelt on general aspects and general trends; he would confine his own remarks to a few specific questions.

64. On the question of the utilization of the Survey, he agreed with earlier speakers that it should receive the widest possible distribution. He understood that it would be published in the next *Yearbook*, but the Commission's yearbooks were available only to a limited number of libraries and individual experts. In view of the importance of making it available to institutions of learning generally, he hoped the Secretariat would consider the possibility of publishing it as a separate edition possibly as part of the programme of technical assistance in the dissemination of the knowledge of international law.

65. Reference had been made during the present discussion to offences of international concern which threatened the peace and security of mankind and which undermined the foundations of international law. The gravest of all such offences was the war of aggression, because it struck at the very foundations of the contemporary international order.

66. The section of the Survey devoted to "Questions relating to modes of acquisition of territory" (paras. 42-48) contained a striking analysis of the consolidation of humanity's great achievement in the prohibition of the use of force and of the unlawful effects of the use of force, namely, the acquisition of territory. It mentioned most appropriately the relevant passages of the draft Declaration on the Rights and Duties of States prepared by the Commission in 1949[10] and 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, embodied in General Assembly resolution 2625 (XXV)[11] and other instruments, which proved that those rules had become part of positive international law and were now ripe for codification. He accordingly proposed the inclusion in the list of topics for the Commission's long-term programme of work of a new item entitled "The legal effects of an illegal presence in territory and of the seizure by force of territory".

67. Very pertinent to that position was the Advisory Opinion rendered on 21 June 1971 by the International Court of Justice in the Namibia Case, and he wished to pay tribute to the contributions made during the proceedings before the Court by the Legal Counsel of the United Nations and by two members of the Commission, Mr. Castrén and Mr. Elias. The Advisory Opinion stated *inter alia* that: "By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation"[12] and that the "member States of the United Nations are... under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia...".[13] It then went on to state that "member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia"[14] and that "Member States... should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia".[15] Finally, it had stated: "The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of (Security Council) resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory".[16]

68. He hoped that the Secretariat would find some means of including those important passages of the Advisory Opinion in the relevant portion of the Survey before it was printed.

69. With regard to the Commission's future work of codification, he would suggest a number of criteria for the selection of topics. The first was that the Commission should concentrate on those topics already under consideration. The second was it should avoid duplicating work already being done by other bodies. The third was that it should adopt a flexible programme so as to be able to deal with urgent questions as they arose.

70. Finally, he would suggest, as Mr. Tabibi had already done,[17] that for the time being the Commission should confine itself to taking note of the Survey and leave final decisions to its new membership at the next session.

The meeting rose at 6 p.m.

[10] See *Yearbook of the International Law Commission, 1949*, pp. 286-290.

[11] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 28*, p. 121.

[12] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118.

[13] *Ibid.*, p. 54, para. 119.

[14] *Ibid.*, p. 55, para. 122.

[15] *Ibid.*, p. 55, para. 123.

[16] *Ibid.*, pp. 55-56, para. 124.

[17] See para. 61 above.

1144th MEETING

Monday, 26 July at 3.15 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen.

Review of the Commission's long-term programme of work

(A/CN.4/245)

[Item 7 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of item 7 of the agenda and of the Secretariat working paper, "Survey of international law" (A/CN.4/245).

2. Mr. EUSTATHIADES said he congratulated the Legal Adviser and his staff on the admirable working paper which they had submitted to the Commission; it