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Summary record of the 1233rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

property of the State in territorial authorities, might also be borne in mind. In that connexion, Mr. Kearney had suggested that it should be specified that the transfer of all State property would be "subject to the provisions of subsequent articles dealing with particular forms of succession." The Drafting Committee might well consider a formula on those lines, which would not unduly mortgage the future. Some members of the Commission, including Mr. Castañeda and Mr. Tammes, had expressed a preference for the formula he had used previously, namely, "property necessary for the exercise of sovereignty". But in any case, whatever the formula selected, it was mainly a matter of the property necessary for the viability of the State.

55. He acknowledged that in the past there had been many cases of compensation and indemnification, particularly for property in the private domain of the State. But he did not think it could therefore be said, as Mr. Ago did, that it was unfair to transfer the private property of the predecessor State to the successor State without compensation. In his opinion the notion of equity should not be introduced in that context, because it was not applicable in all cases. In cases of decolonization, for example, equity lay in the opposite direction, since the successor State was merely taking back what had previously belonged to it, of which it had been despoiled.

56. Mr. Bartoš and, before him Mr. Ushakov, had said that they could not regard an agreement concluded between a metropolitan Power and a colony as a treaty under international law; they had cited the case of India, which had signed an agreement with the United Kingdom a few minutes after the declaration of its independence. The Commission would recall that he had dealt with that question in his first report.[8] The case of Algeria was even more complicated, because since 1958 there had been a provisional Government in exile, which the French Government had not regarded as an entity empowered to conclude an agreement with it. Thus the Evian Agreements had begun as parallel declarations, and had subsequently become an agreement.

57. Although it was true, as Mr. Ago had pointed out, that article 9 gave the successor State a great advantage, since in the absence of an agreement the rule laid down in the article was directly applicable, in his own opinion it was nevertheless a general rule which was justified and which could not be departed from too far, even by agreement.

58. The wording proposed by Mr. Ushakov, to the effect that the successor State would, on the date of transfer, acquire full rights to the State property transferred to it on the occasion of a succession of States, did not reflect what he had tried to bring out in article 9, since it did not indicate what property was transferred, which he had tried to do in his draft.

59. The CHAIRMAN said that there appeared to be a general agreement on the essential elements of the rule stated in article 9. He therefore suggested that the article should be referred to the Drafting Committee to find a formula acceptable to all members of the Commission.

60. Mr. KEARNEY suggested that the Drafting Committee should also be authorized to examine article 15 (Property situated outside the transferred territory), since it would be very difficult to work out the text of article 9 without taking article 15 into account.

61. Mr. BEDJAOUI (Special Rapporteur) supported Mr. Kearney's suggestion, but pointed out that article 15 concerned only the particular case of a partial transfer of territory. It would be necessary to consider in general the case of property situated outside the territory and to find a generally valid formula.

62. Mr. BARTOŠ expressed reservations about the similarity between articles 9 and 15. The question dealt with in article 15 had raised many difficulties in international practice; it was very important for third States to know whether property situated outside the transferred territory was on the same footing as that situated within the territory. He was not opposed to referring article 9 to the Drafting Committee, but he fully reserved his position on that article until the Committee submitted a new text.

63. The CHAIRMAN suggested that, subject to those comments, the Commission should decide to refer article 9 to the Drafting Committee, on the understanding that the Committee would also examine not only article 15, but all the various articles dealing with property situated outside the territory subject to succession.

It was so agreed.[9]

Organization of work

64. The CHAIRMAN said that at its next meeting the Commission would take up item 5 (*a*) of the agenda: Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General. He recommended that members who wished to suggest topics for the Commission's programme should do so as soon as possible.

Gilberto Amado memorial lecture

65. The CHAIRMAN announced that the Gilberto Amado memorial lecture would be given on Wednesday, 11 July 1973, at 4.30 p.m., by Mr. C. Eustathiades, a former member of the Commission.

The meeting rose at 1 p.m.

[8] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 103, document A/CN.4/204, para. 63 *et seq.*

[9] For resumption of the discussion see 1240th meeting, para. 1.

1233rd MEETING

Monday, 25 June 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

(*a*) **Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245).**

(*b*) **Priority to be given to the topic of the law of the non-navigational uses of international watercourses**

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

1. The CHAIRMAN invited the Commission to examine item 5 of the agenda. He drew attention to the "Survey of International Law" prepared by the Secretary-General (A/CN.4/245) and to the written observations submitted by three members of the Commission on its long-term programme of work (A/CN.4/254).

2. Mr. TAMMES said that the "Survey of International Law", which was the result of discussions over the last five years about the Commission's long-term programme of work, was intended to provide the Commission with a documentary and scientific basis on which to draw up a plan of work for the next generation. That had likewise been the purpose of the first *Survey of International Law* prepared in 1948.[1]

3. However, the Commission had never really got down to considering its second long-term programme to the extent of contemplating the choice of new topics and the abandonment of others. When the *Survey* had appeared, in 1971, the Commission had been in the last year of its term of office and it had been thought that a newly elected Commission would be in a better position to take decisions about the future.

4. On the basis of the *Survey* it would seem that the Commission might now be able to reach conclusions, as the General Assembly would probably expect it to do on the occasion of its twenty-fifth anniversary. Nevertheless, he wondered whether it was really possible to undertake long-term prognostication of the development of international law. Some might well be sceptical and recall the Commission's experience at the outset of its work.

5. The first *Survey* had not excluded the possibility that the Commission, under its long-term programme, might be able to codify the whole of international law, but an unexpected situation had immediately come to light. New phenomena unknown to traditional international law as expounded in the 1948 *Survey* had appeared in the form of new branches of law, such as those covered in the 1971 *Survey* by chapter III, on the law relating to economic development, chapter XIII, on the law relating to the environment, chapter XIV, on the law relating to international organizations and chapter XV, on international law relating to individuals.

6. Those new developments had had only a limited effect on the long-term programme drawn up at the first session;[2] two major topics, State responsibility and State succession, were still under consideration, while the study of other topics had been completed more or less according to plan. What the new situation had meant, however, was that the Commission would henceforth work within a narrower framework of United Nations law-making activities than had originally been conceived, except for the Commission on Human Rights, which had been planned from the outset. What had actually occurred was perhaps somewhat astonishing: the bulk of international law, as conceived in 1948 and delimited in the long-term programme, was now practically codified, so that the Commission needed major new topics to take up. On the other hand, whole new sectors of international law had meanwhile come into existence.

7. As to his own personal preferences and priorities, he considered that certain great projects of codification constituted the very structure of international law. One of those codifications, the law of treaties, had now been completed, while two others, State responsibility and State succession, were well under way. What similar broad areas were left to the Commission for doing the kind of work that was expected of it?

8. Going through the 1971 *Survey* he had singled out the topic of unilateral acts, which were dealt with in chapter VIII. As a counterpart to bilateral and multilateral acts, in other words to the law of treaties, it seemed to him that that was a neglected part of international law, although one very rich in practice. Not all aspects of that topic were ripe for codification, but the clarification of other aspects, such as unilateral promises and acts of protest, might contribute to the certainty of the law. A cautious approach to that subject-matter, not aiming directly at draft conventions, but rather at authoritative statements, as suggested by the Secretary-General in paragraph 283 of the *Survey*, might encourage the Commission to give the topic some consideration, especially since the participation of many new States in the law-making process might place in a new light a problem which had been neglected for generations.

9. There were also important subjects on which the Commission had already done some work. For example, the draft Code of Offences Against the Peace and Security of Mankind[3] had resulted from one of the early assignments given the Commission by the General Assembly. Like other work of that period it had been relegated more or less to the background of the Commission's achievements, but if it was read again in the light of later problems, the draft Code might very well be considered a possible framework for the examination of "other offences of international concern", as they were called in chapter XVII, section 4 of the Survey, as well as of certain other fundamental issues which were also involved in the law of extradition. Chapter XV, which dealt with that topic, also included a section on the right of asylum, which was still outstanding on the 1949 list.

10. In considering new topics for possible inclusion in its programme of work, the Commission would also have to consider discarding some old ones, one of which should, in his opinion, be the right of asylum. The Commission had never tackled that topic, and in the meantime the General Assembly had adopted a Declara-

[1] Document A/CN.4/1/Rev.1 (United Nations publication, Sales No. 1948.V.1(1)).

[2] See *Yearbook of the International Law Commission, 1949*, p. 281, para. 16.

[3] *Ibid., 1954*, vol. II, p. 151, document A/2693, para. 54.

tion on Territorial Asylum,[4] while the High Commissioner for Refugees had recently sent a draft Convention on Territorial Asylum to the United Nations.

11. The possibility of returning to the Commission's earlier work in the light of subsequent experience was closely bound up with the problem of revision. Mr. Reuter had referred to that problem in a most constructive manner in paragraph 27 of his written observations (A/CN.4/254). However, it might also happen that legal concepts which had been developed elsewhere in the United Nations would have an impact on the Commission's current work, in contradistinction to what it had already accomplished. One example was provided by the Commission's recent discussion of State responsibility, during which a need had been felt to take account of modern types of responsibility, which had been referred to the Commission by other bodies engaged in the law-making process in such fields as outer space, the human environment and the sea-bed. In that situation two things might happen: either the current work of codification would be adapted in the direction of progressive development, or the current topic would generate new topics, as had already been suggested in the case of State responsibility.

12. Those new topics would reach the Commission by "feedback" from its law-making environment in the United Nations and the regional bodies, but it was impossible to predict them and submit them to the General Assembly for approval. Nevertheless they would, he was sure, provide the Commission with much work for the next twenty-five years.

13. Mr. HAMBRO said that the present debate was a very important one and dealt with a very difficult matter. He himself believed that it would be dangerous, and probably not very wise, for the Commission to try to draw up a programme of work for twenty-five years.

14. The rate of development of international law was much quicker today than it had been at the time of the first *Survey* in 1948. Progress in the scientific and technological fields was being made at an unprecedented pace. That situation, combined with the evolution of legal rules in the community of nations, made it unrealistic to try to draw up a programme of codification and progressive development of international law for a quarter of a century to come. The Commission would do better to avoid engaging in "futurology" and concentrate on the problems that should engage its attention for the next five or six years.

15. It would be generally agreed that the Commission should try to draw up laws for nations and peoples, not just for lawyers. It should avoid the danger of being unduly esoteric. Subjects should be selected with an eye to their seriousness, but should not be so charged with political implications as to make it impossible to draw up legal rules.

16. In its work of codification and progressive development of international law, the Commission had benefited from the co-operation of the new States in building up a law for all nations. Its work on the law of the sea had been a very great success, culminating in the 1958 Conventions. It would thus have been natural for the Commission to deal with the subject of the sea-bed and ocean floor, but that subject had been referred by the General Assembly to a special Committee, so that it could not be taken up by the International Law Commission.

17. The same applied to the law of the environment and the law of outer space—subjects which were of increasing importance. He believed that the problems the world had to face in regard to protection of the human environment were likely to prove much more important in the future than other matters now in the forefront of international relations. On the protection of the environment, as on outer space, however, new law was being made all the time and it would be dangerous to try to freeze the development of the law.

18. Another important subject which the Commission could not usefully take up in the near future was that of human rights. The controversies which arose on that subject showed clearly that it was not ripe for codification at the world level. The best results could be obtained at the regional level.

19. As to the topics which, in his view, were ripe for attention by the Commission, he agreed with Mr. Tammes that it would be useful to deal with unilateral acts as a continuation of some of the Commission's other work. In the immediate future, the topics of State responsibility and succession of States would continue to take up much of the Commission's time. In addition, it should study the topic of international watercourses, as the General Assembly had requested. As a sequel to its work on State responsibility, the Commission could also study the development of international law relating to ultra-hazardous activities. The subject of succession of governments seemed a natural continuation of the topic of succession of States. The Commission might perhaps follow its previous method of appointing a small working party of undertake a preliminary study of that subject. Another vast field which the Commission could usefully study was that of the recognition of States and governments, which would soon be ripe for codification.

20. Mr. SETTE CÂMARA said he doubted that, in the space of one week, the Commission would be able to deal with all the points raised in the Secretariat's excellent *Survey of International Law* and come to concrete decisions bringing its long-term programme of work up to date.

21. In 1949, on the basis of the 1948 *Survey*, the Commission had chosen for its long-term programme of work 14 topics out of the 25 suggested by the Secretariat. In the 24 years which had elapsed, the Commission had submitted final drafts or reports on only seven topics and two others were under examination, namely, succession of States and State responsibility. The remaining five topics, on which no work had so far been done, were: recognition of States and governments; jurisdictional immunities of States and their property; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and right of asylum. The Commission was now called upon to revise that list of remaining

[4] See General Assembly resolution 2312 (XXII).

topics, discarding those considered no longer suitable and introducing new topics to meet the current needs of international life.

22. The situation had changed a great deal since the Commission had started with a clean slate in 1949, and the 1971 *Survey* was a very different document from that of 1948. It was based on the experience of years' work by the Commission and a thorough analysis of the modern realities of international law, and it took into account the general practice of the law of the United Nations and the evolution of international law over that period. It had benefited from the existence of a body of codified international law, much of it based on the Commission's own drafts. It gave due attention to the needs of co-ordination between the codified provisions of international law and the new branches of law which were emerging.

23. When the Commission had discussed the 1948 *Survey* it had been under pressure to draw up its first programme of work. The present situation was completely different; the Commission had its hands full with the topics of succession of States, State responsibility, the most-favoured-nation clause, and treaties concluded between States and international organizations or between two or more international organizations. The limited progress achieved on those topics at the present session clearly showed that the Commission was occupied to the limit of its capacity. The work was advancing only slowly, and that fact would be reflected in the Commission's report to the General Assembly; in the circumstances it would not be appropriate for the Commission to submit to the Assembly an extensive and ambitious programme of work. Moreover, it was doubtful whether such a programme could be worked out in the very few days available for the review.

24. He considered that the *Survey* should be fully discussed, chapter by chapter, starting with the five topics still on the Commission's list. That would involve examining, first, sections 4, 5 and 6 of chapter I and the whole of chapter XV. Only when that had been done would the Commission be able to decide which topics should be retained. It should then take up the other chapters of the *Survey* to select items for a revised list of topics. Some of those chapters dealt with traditional fields of international law in which customary rules, international regulations and State practice abounded. Others related to new subjects such as the law of the air, the law of outer space and the law relating to the environment, in considering which great care must be taken to ascertain whether the experience of States had yet attained the degree of firmness needed to provide guidance for progressive development or codification. Chapter III of the *Survey*, concerning the law relating to economic development, deserved immediate attention and special priority.

25. It should be borne in mind that, over its 24 years of existence, the Commission had developed its own methods of work, which were directed to the drafting of specific texts with a view to their acceptance by States for adoption in future conventions. Subjects unlikely to be accepted by States should therefore be rejected.

26. In conclusion, he thought the Commission would need at least a month to draw up a long-term programme of work. It could not reject or adopt topics without a thorough discussion of each of them. Consideration of item 5 of the agenda should therefore be postponed until the twenty-sixth session, when it should be given the attention it deserved. However, if the Commission saw fit to start examining the item at the present session, he would be prepared to make a few comments on most of the subjects dealt with in the *Survey*. He would also wish, in that case, to comment on item 5 (*b*).

27. The CHAIRMAN said that at the twenty-fourth session he had suggested that each member should submit a brief list of topics which he considered to deserve priority. It was not his idea that the Commission should take a quick decision by a sort of poll. However, the discussion would probably reveal that certain topics were generally regarded as deserving attention.

28. At the meeting of the officers and former chairmen of the Commission it had been pointed out that one week was too short a period in which to discuss the *Survey*. It had been noted, however, that the item had been on the agenda for three successive sessions and that the Commission had not yet had time to take it up. It could give a week to discussion of the item at the present session, but might not have any time at all for it at the twenty-sixth session.

29. Mr. REUTER said that on the substance of the matter he had submitted his observations in writing, as members of the Commission had been asked to do (A/CN.4/254).

30. Those members who had spoken before him all seemed to think that the Commission should not make very long-term plans. It was rather difficult not to do so, however; for assuming that any important topic needed five to seven years' study and that the Commission could not handle two major topics at the same session, if it chose three topics it would in fact be adopting a programme of work for 20 years or so. What mattered now was not that the Commission should review all the topics proposed for study, which would be a waste of time, but that each member should arrange those topics in what he considered the most appropriate order of priority, so that the general feeling could be ascertained and the Commission, while remaining at the disposal of the General Assembly, could indicate to it two or three topics which might be given priority. Experience having shown that two major topics could not be dealt with at the same session, but had to be taken at alternate sessions, a few subjects of lesser importance and narrower scope should be selected in addition to the major topics.

31. He acknowledged that the Commission should not deliberately reject topics which were of unduly pressing concern, such as human rights, the environment, outer space and the sea-bed; but the General Assembly and the Security Council had seen fit to entrust them to other organs and it would be unseemly for the Commission to propose that it should deal with them. Unless, of course, it was asked to do otherwise, the Commission would do better to choose less urgent topics, which might be of less direct concern to peoples and nations—which were

more in need of peace and food than of legal texts—but were ripe for codification. His own choice, as he had stated in his written observations, would be the industrial use of watercourses and the immunities of foreign States and bodies corporate.

32. Mr. BARTOŠ said he endorsed Mr. Reuter's comments. The Commission's task was to contribute to the codification of international law as a whole, but it should not try to codify topics which were not yet ripe for codification unless the General Assembly asked it to do so. For however rational they might be, codified rules remained inoperative where principles had been codified prematurely, before they had been universally accepted or established by practice. For instance, the provisions of the Conventions on Fishing and Conservation of the Living Resources of the High Seas, which had been drawn up for reasons that were perhaps more political than legal, were not being applied, because they had not yet become custom. He therefore approved of Mr. Reuter's choices. The topics selected should not be those whose codification would enable the ideas of particular States to prevail, but those which were of general concern to all nations.

33. The Commission should nevertheless beware of being too traditionalist and conservative. It must find a happy medium between codifications and progressive development of international law.

34. Sir Francis VALLAT said he wished to make a few preliminary remarks and would not comment on the substance. It was extremely hard to choose among the many subjects suggested in the *Survey*. There were certain considerations which should guide the Commission in that difficult task. It was necessary to look beyond the subjects at present being studied by the Commission, in order to see which topics were likely to be suitable for codification and progressive development in the future.

35. Experience had shown that the time needed to prepare a topic was inevitably very long. It had taken, in all, no less than 18 years for the Commission's work on the law of treaties to come to fruition. The best results had been obtained by the Commission when its consideration of a topic had been preceded by very thorough initial research conducted a considerable time before a draft was submitted to it. The Commission should therefore choose a few topics which it could take up for study on completing its current programme of work. The General Assembly expected the Commission, on the basis of the 1971 *Survey*, to provide some indication of the direction of its future work.

36. He agreed with the two previous speakers that the Commission should not be over-ambitious. Its aim should simply be to select three, or possibly four topics of importance, to be given priority after it completed the work in hand. If the Commission could take such a decision, the present discussion would be extremely useful.

The meeting rose at 4.40 p.m.

1234th MEETING

Tuesday, 26 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA
later: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

(*a*) Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General

(*b*) Priority to be given to the topic of the law of the non-navigational uses of international watercourses

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(continued)

1. The CHAIRMAN welcomed Mr. Tabibi, who had been unable, for health reasons, to attend the previous meetings. He invited the Commission to continue consideration of item 5 of the agenda.

2. Mr. USTOR said that the Statute of the International Law Commission made a clear distinction between codification and progressive development of international law. Article 18 required the Commission to survey the whole field of international law, but solely with a view to selecting topics for codification, and article 15 restricted codification to fields where there had already been extensive State practice, precedent and doctrine. Work on progressive development was undertaken by the Commission solely at the request of the General Assembly, but the Assembly had only rarely availed itself of its powers under article 16 of the Commission's Statute. Action had been taken by the Commission at the Assembly's request in only eight cases,[1] and in some of them the initiative had really come from the Commission itself.

3. However, experience had shown that codification and progressive development were practically inseparable, so that the distinction between those two aspects of the Commission's work had not been maintained in practice. It followed that, in attempting to draw up its future programme, the Commission was not bound by the strict interpretation of articles 15, 16 and 18 of its Statute, but had complete liberty to survey the whole field of international law and to choose not only subjects from fields in which there had already been extensive State practice, precedent and doctrine, but also subjects which had not yet been regulated by international law or in regard to which the law had not yet been sufficiently developed in the practice of States.

[1] See foot-note 6 to paragraph 5 of the "Survey" (A/CN.4/245).