Document:-

A/CN.4/SR.1265

Summary record of the 1265th meeting

Topic:

Other topics

Extract from the Yearbook of the International Law Commission:-

1974, vol. I

approach and his balanced presentation of the comments of Governments, which would provide an excellent basis for the Commission's work. In his introductory remarks, the Special Rapporteur had mentioned the possibility of dealing with the question of the settlement of disputes, but in view of the number of draft articles the Commission had to consider, he doubted whether it would have time to take up what was in fact a separate and quite substantial subject, which at present was touched upon only in Article 33 of the United Nations Charter.

40. Mr. MARTÍNEZ MORENO said he shared Mr. Ustor's views on the question of the settlement of disputes. The experience of Latin American countries had shown that it presented many difficulties, in spite of a very comprehensive inter-American agreement on the subject. The Commission should at present confine itself to the second reading of the articles it had already adopted.

41. Sir FRANCIS VALLAT (Special Rapporteur) said he had no intention of trying to persuade the Commission to adopt articles on the settlement of disputes, which would involve a considerable amount of work; but some Governments had raised the question, which in fact had a bearing on some of the draft articles before the Commission. He would discuss it in an addendum to his report, and the Commission should perhaps mention it in its report to the General Assembly. It would be desirable to devote at least one meeting to discussion of the subject.

42. He agreed with Mr. Tammes that the status of conventions establishing a general law which should continue to apply *erga omnes* was a very real problem. Before commenting on it, he wished to consult other members of the Commission to see if it was possible to draft a generally acceptable provision for inclusion in the draft articles.

43. The CHAIRMAN said that the general debate was concluded. He invited the Commission to begin its second reading of the draft articles on succession of States in respect of treaties.

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 1

Article 1

Scope of the present articles

The present articles apply to the effects of succession of States in respect of treaties between States.

44. Sir Francis VALLAT (Special Rapporteur) said he thought that article 1 could be referred to the Drafting Committee. In paragraphs 96 and 97 of his report he had drawn attention to a drafting change suggested by the Government of Pakistan. The absence of comments on the question of hybrid unions suggested that it could be dealt with by mentioning the views of Governments in the Commission's report and that it would not be necessary to include a provision on that question in the draft articles.

45. The CHAIRMAN, speaking as a member of the Commission, expressed his approval of article 1 as drafted, and his agreement with the Special Rapporteur regarding hybrid unions. Participation in hybrid unions did not affect the treaty obligations of a State and all such unions were based on that premise. He suggested that article 1 should be provisionally approved and referred to the Drafting Committee for further consideration.

It was so agreed.[13]

ARTICLE 2 (Use of terms)

46. Mr. ELIAS suggested that the consideration of definitions should take place at a later stage.

47. Mr. KEARNEY said it might be unwise to postpone consideration of the definitions until the end, as some of them would affect the wording of articles, which might then have to be reconsidered.

48. Sir Francis VALLAT (Special Rapporteur) said that the definitions would ultimately have to be made to accord with the substantive decisions on the articles themselves, which might in any case have to be revised subsequently. The definitions would then be useful for any redrafting. The Commission could therefore proceed provisionally on the basis of the existing definitions; any comments and suggestions made on them during the consideration of the articles would facilitate preparation of the final version of article 2.

49. The CHAIRMAN agreed that it was customary for the discussion of definitions to be deferred until the last stage of the work, and suggested that article 2 should be provisionally adopted and referred to the Drafting Committee.

It was so agreed.[14]

The meeting rose at 12.50 p.m.

[13] For resumption of the discussion see 1285th meeting, para. 3.

[14] For resumption of the discussion see 1296th meeting; para. 46.

1265th MEETING

Monday, 27 May 1974, at 3.15 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Commemoration of the twenty-fifth anniversary of the opening of the first session

[Item 2 of the agenda]

1. The CHAIRMAN declared open the 1265th meeting of the Commission, held to commemorate the twenty-

fifth anniversary of the opening of its first session. He warmly welcomed the representatives of the host country—Mr. Bindschedler, the Legal Adviser to the Swiss Federal Political Department, Mr. Schneeberger, of the Permanent Mission of Switzerland, and Mr. Buensod, Vice-President of the Administrative Council of the City of Geneva—and high United Nations officials including Mr. Winspeare Guicciardi, Director-General of the United Nations Office at Geneva and Prince Sadruddin Aga Khan, United Nations High Commissioner for Refugees.

2. He extended a special welcome to Sir Humphrey Waldock, a former member of the Commission, representing the International Court of Justice; to Mr. Vyzner, the Chairman of the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space and to the representatives of States members of that Committee; to the Legal Advisers and other officials of the specialized agencies and other intergovernmental organizations based at Geneva; to the representative of the International Committee of the Red Cross; to Mr. Dominicé, Dean of the Faculty of Laws of Geneva University and to the Professors of that Faculty and of the Graduate Institute of International Studies.

3. He was glad to see that Mr. Eustathiades, a former member of the Commission was among those present; the Commission had received a number of congratulatory letters and telegrams from other former members who were unable to attend. He welcomed the participants in the Seminar on International Law and the Senior Legal Officer in charge of the Seminar. It was a pleasure to note the presence of the observer for one of the regional legal bodies with which the Commission co-operated; good wishes had been received from the others.

4. The Commission greatly appreciated the presence of Mr. Erik Suy, the Legal Counsel of the United Nations. Before giving him the floor he wished, however, to recall the names of the deceased members of the Commission who, in their lifetime, had shared in its noble tasks and dedicated themselves so wholeheartedly to the cause of the codification of international law and its progressive development: Gonzalo Alcívar, Ricardo J. Alfaro, Gilberto Amado, Milan Bartoš, James L. Brierly, Roberto Córdova, Douglas L. Edmonds, Faris El-Khouri, Manley O. Hudson, Sergei B. Krylov, Sir Hersch Lauterpacht, Antonio de Luna, Ahmed Matine-Daftary, Radhabinod Pal, Sir Benegal N. Rau, A.E.F. Sandström, Georges Scelle, Jean Spiropoulos and Jesús María Yepes.

5. Mr. SUY (Legal Counsel of the United Nations) said that at its twenty-eight session the General Assembly had already paid a resounding tribute to the work accomplished by the Commission over the past quarter of a century. All internationalists would no doubt wish to join in that tribute, though it was now tinged with sadness because of the great loss the Commission had suffered by the death of Mr. Milan Bartoš.

6. Jurists appreciated the Commission's work all the more because they were well aware of its difficulties, which were thrown into relief by the fate of former attempts at codification. They had at all times tried to codify custom, that was to say, they had been concerned not with the mere statement of existing law, but with its arrangement, reform, amendment and adaptation or, to use the language of the United Nations Charter, its progressive development.

7. The earliest systematic attempts to codify international law dated back to the end of the eighteenth century. Since then, there had been many more attempts, but most of them had remained without official approval throughout the nineteenth century and up to the end of the Second World War. Undoubtedly, the codifications attempted by well-known authorities on international law, either individually or within learned societies, had been of great scientific value, but their private character had necessarily limited their practical effect. As to official codification by States, governments had been very reserved before the establishment of the United Nations. It was true that just before the Second World War several topics of international law had been regulated by multilateral conventions, the most important of which had been those of the International Labour Organisation and the Hague Conferences of 1899 and 1907; but those conventions had dealt with only a few particular aspects of international law. When the League of Nations had tried to codify larger topics it had failed.

8. In 1925, a committee of experts appointed by the League of Nations Council had drawn up an initial list of eleven subjects suitable for codification by convention, some of which had later been codified by the International Law Commission. In 1930, a Codification Conference had been convened by the League Assembly to consider three specific subjects: nationality, territorial waters and the responsibility of States. No draft convention had been prepared beforehand to provide a basis for the work of the Conference. The Conference had made some progress on nationality: it had adopted a convention, three protocols and several recommendations. With regard to territorial waters, on the other hand, it had confined itself to making a few recommendations, and on State responsibility it had failed completely. No further codification conferences had been convened by the League of Nations.

9. The question arose whether the failure of the codification work begun by the League of Nations had been due to the very nature of any codification undertaken by States or to lack of adequate preparation for the Hague Conference. Shortly after the Second World War, the *Institut de droit international* had called in question the very principle of official codification and had stated its preference for "scientific research designed to ascertain precisely the present state of international law". On the other hand, when the Hague Conference had reviewed the reasons for its failure, it had stressed the need for the most detailed preparation for every codification conference. Its final act had contained recommendations for future codification conferences; it had urged the need to consult States on the selection of topics for codification and to prepare in advance, on each topic, a draft convention with comments by governments.

10. On the International Law Commission had devolved the task of finding, within the framework of its Statute, a method combining scientific codification with official codification, and taking further account of the lessons to be learned from the failure of the 1930 Hague Conference. Three stages could be distinguished in the Commission's usual method of work: the choice of the topic to be codified, the preparation of provisional draft articles and the preparation of a final draft. The choice of topics for codification and the priorities to be adopted rested with States, acting through the General Assembly. Nevertheless—and it was there that the scientific side came in—the Assembly usually acted on the Commission's recommendation.

11. As early as its first session, the Commission had concluded that codification of the whole of international law was the ultimate aim, but that obviously it must be carried out in stages. On the basis of a comprehensive survey of international law, it had drawn up an initial list of fourteen topics for codification.[1] On seven of them, it had already produced final drafts in accordance with the General Assembly's recommendations. Two further topics were being dealt with in drafts in course of preparation, and the Commission had also prepared several drafts on subjects which had not been on the original list, but had subsequently been referred to it by the General Assembly.

12. In 1970 the Commission had expressed a wish to review the original list of topics, and had asked the Secretariat to submit a further working document to help it select topics for its long-term programme of work. In compliance with that request, the Secretariat had submitted to the Commission in 1971 a working document entitled *Survey of International Law*.[2] With regard to the choice of topics for codification, it was to be regretted that the Commission had not been asked to prepare draft articles for the forthcoming Conference on the Law of the Sea.

13. The second stage in the Commission's usual method of work was to prepare provisional draft articles. At that stage it was the scientific side of the method that was dominant, whether in the work of a special rapporteur, the consideration of his reports or the drafting of articles by the Commission or by its Drafting Committee. The views of States were not overlooked, however, since the Commission always paid the greatest attention to the opinions expressed by their representatives in the Sixth Committee.

14. The third and last stage was the preparation of final draft articles. That, too, was scientific work; but States played an essential part in it, since the final draft articles were prepared in the light of their comments on the provisional draft.

15. At all those stages the Commission had always been assisted by the Codification Division set up within the United Nations Legal Office to do the work which fell to the Secretariat in the codification and progressive development of international law. The Codification Division supplied the Commission's secretariat and assisted it throughout its annual session. It was also continuously engaged on a research programme, the main purpose of which was to give the Commission and its special rapporteurs easier access to documentation on the questions of international law on the Commission's work programme. Lastly, the Codification Division tried to make the work of the Commission and the spirit in which that work was undertaken better understood in the other forums called upon to participate in the process of codification, namely, the Sixth Committee, plenipotentiary conferences and the special committees set up by the General Assembly. In accordance with the wish expressed by the Commission in 1968, the level of the Division of Codification would be maintained as far as possible and its staff would be strengthened so that it could give the Commission even greater assistance, in particular, because codification had become a far more complex and delicate task than when the Commission had first been set up.

16. The success of the Commission's method of work was undoubtedly characterized by the continuous interaction of scientific expertise and governmental responsibility throughout the preparation of a codification draft. That interaction required much time, but the fate of codifications attempted in the nineteenth century and the first half of the twentieth century clearly showed that it was the only way to achieve practical results. Today, the choice was no longer between slow codification and quick codification, but between slow codification and no codification at all. Other United Nations organs had had to devote considerable time to codifying quite well delimited areas of international law.

17. The codification of a given subject did not, however, end with the Commission's adoption of final draft articles. States still had to complete an international instrument based on the draft. So far, the instrument considered most appropriate was the convention. Thus ten conventions, some of them with optional protocols, had been concluded on the basis of drafts prepared by the Commission. Two of them dealt with topics of limited scope: the Convention on the Reduction of Statelessness and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Six of the other eight Conventions had come into force after intervals of varying length. Two of them, the Convention on the Law of Treaties and the Convention on Special Missions, were not yet in force; although they had been adopted by 79 votes to 1 with 19 abstentions and 98 votes to none with 1 abstention, respectively, on 1 May 1974 they had still required a further seventeen instruments of ratification or accession to bring them into force.

18. With regard to the non-ratification of codification conventions adopted by large majorities, it was true, as the Commission had observed, that adoption, from a strictly logical point of view, did not concern the substance, but was confined to settling the form of a convention. There was no denying, however, that in the great majority of cases States meant to express an

[1] See *Yearbook ... 1949*, pp. 279-281.

[2] Reproduced in *Yearbook ... 1971*, vol. II, Part Two (document A/CN.4/245).

opinion on the substance of a convention by their vote on its adoption. So why was it that, very often, the vote of a State for the adoption of a codification convention was not followed within a reasonable time by the deposit of an instrument of ratification or accession? Referring to an opinion given by Mr. Ago and Mr. Eustathiades, he stressed that in most cases it was for reasons inherent in the heaviness of the political and administrative machinery of the modern State, and not because of opposition in principle or on a particular point, that a State was late in sending in the instrument formally establishing its consent.

19. It might therefore be asked whether a convention was always the most appropriate instrument for codification undertaken within the United Nations. It was worth noting that the General Assembly had adopted unopposed, or by very large majorities, several resolutions embodying important provisions designed to codify certain aspects of international law, both in the strict sense of that term and in the sense of progressive development of law. The best known was probably resolution 2625 (XXV) approving the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, but there were many others. At its very first session, in resolution 95 (I), the General Assembly had confirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and by the judgment of that Tribunal. The Commission seemed to have considered that that resolution had ended the controversy over the conformity of the Nuremberg principles with international law, and its task had subsequently been confined to formulating those principles. Other examples of resolutions containing provisions which codified or developed particular aspects of international law were resolutions 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, and 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.

20. The legal value of resolutions of general scope adopted by the General Assembly and, in particular, of those containing declarations of a legal character, was a complex question on which much had been written. In paragraph 52 of its advisory opinion of 21 June 1971 on Namibia,[3] the International Court of Justice had gone into the matter very thoroughly. The practice of adopting such declarations by consensus complicated the question still further. If many States maintained their negative attitude with regard to ratification or accession, the Commission might wish to study the possibility of recommending the General Assembly to codify certain particular drafts, not by a convention, but by a declaratory resolution. That possibility, which, incidentally, appeared to be provided for by article 23, paragraph 1 (*b*) of the Commission's Statute, would in no way affect the form of the Commission's drafts, which could, as in the past, consist of articles capable of serving as a basis for either a convention or a declaration.

21. Several recent developments tended to increase the Commission's problems. There was the universal character which the United Nations had gradually acquired thanks to decolonization; the development of new legal concepts; and the need to formulate rules of law to give effect to the great political and economic declarations recently adopted by conferences, such as the Algiers Conference of 1973, and by the sixth special session of the General Assembly, which were designed to institute a new international economic and, hence, legal order, with a view to organizing North-South co-operation on a more just and equitable basis. Those new tasks would dominate the future work of the United Nations and be reflected in the Commission's deliberations. It was, indeed, necessary to have the courage to look beyond classical international law. International law could not be progressively developed without taking account of the opinions and practice of the great majority of new States and of the profound transformation of the international community which had taken place since the Commission had been established.

22. Both on behalf of the Secretary-General and speaking for himself, he expressed his best wishes for the Commission's success in its task, which was the noblest of all those that jurists could be called upon to perform. He had no doubt that the Commission would bring its work to a successful conclusion, thanks to the support it had always received from the Sixth Committee and the regional intergovernmental organizations with which it had established close relations, and, above all, thanks to the learning and ability of its members and to their spirit of idealism and self-sacrifice.

23. The CHAIRMAN invited Sir Humphrey Waldock, Judge of the International Court of Justice, to address the Commission.

24. Sir Humphrey WALDOCK said that he was discharging a very pleasant duty in conveying, on behalf of the whole Court, its warmest congratulations to the Commission on the celebration of its silver jubilee. He had also been entrusted with a particular message of greeting and friendship from the seven judges of the Court who were former members of the Commission and one of whom, Mr. Lachs, was the President of the Court. In all, some fifteen members of the Commission had become judges of the Court, but the present number of seven could be called a high-water mark.

25. At the Vienna Conference on the Law of Treaties he had heard it said that the Commission appeared to have an iron in every fire. Members of the Commission had held the offices of President of the Conference, Chairman of the Committee of the Whole, Chairman of the Drafting Committee, Rapporteur of the Committee of the Whole and Expert Consultant. Every autumn, members and former members of the Commission attended the meetings of the Sixth Committee of the General Assembly when the Commission's report came before it. And at the present meeting, where he was appearing on behalf of the International Court of Justice at the kind invitation of the Commission, he had the feeling, as a former member, of having come home. Those many manifestations of the Commission were an index of its success and of the place which it had won

[3] *I.C.J. Reports, 1971*, p. 31.

for itself in contemporary international law. Even ten years ago, Professor Jennings of Cambridge had already felt compelled to write of the work of the Commission: "This whole procedure that has developed under Article 13, paragraph 1.a of the Charter now seriously rivals the International Court of Justice in its importance for international law". He felt certain that none of his colleagues on the Court would quarrel with that appreciation, except perhaps for the word "rivals", because it was not a question of rivalry.

26. The Commission and the Court served the same grand design: the furtherance of the rule of law in the international community. But the roles of the two bodies and the context in which they worked were different. The Court could only deal with the cases put before it and its treatment of the law was dominated and limited by the concrete case it had to decide. Despite that, its contribution to the determination and development of the law in some fields had generally been considered remarkable. The Commission's contribution, in its different way, had been no less remarkable; it was fortunate in the large freedom it had to choose both the subject of its work and the manner of treating it. Its difficulty was rather to avoid being submerged by the number of important subjects awaiting its attention, and it had been wise in not allowing the length of its agenda to distract if from the thorough scientific study and sharp analysis of each subject which had been the very essence of its success.

27. The Court's judgments, although strictly speaking they were binding only upon the parties to the case, at once carried such authority as everywhere attached to judicial decisions. The Commission's work, on the other hand, was but one stage, although a very important one, in the whole process of clarifying and developing the law—a process in which a diplomatic conference, or the General Assembly, had the final say as to whether the seal of legal authority was to be set upon the Commission's conclusions. If, therefore, the Commission's work had come to have its own measure of authority in its own right, it was because of the sheer quality of that work.

28. The number and importance of the international instruments which had resulted from the Commission's drafts during its first twenty-five years was truly impressive, especially in the field of diplomatic law, in the law of the sea and in the law of treaties. But its success was not to be measured simply by those instruments. The Commission's work exercised an important influence on the formation of legal opinion throughout the international community: not merely in the offices of legal advisers to governments, but in the writings of jurists and in universities and all institutions where international law was studied. By its representative character, by the large measure of general consensus which it achieved and by the high distinction of its work, the Commission, in the long term, would surely prove a potent force in the development and strengthening of international law.

29. The Court itself had recently begun to feel the impact of the Commission's work. In the cases submitted to it, counsel often found support of their arguments in the Commission's drafts and commentaries, and one or two individual judges had referred to the Commission's reports. But it was in the *North Sea Continental Shelf Cases*[4] in 1969, that the Commission's work had for the first time been a central feature of the proceedings and had helped to guide the Court to its conclusions. Since then, the Vienna Convention on the Law of Treaties, although not yet in force, had begun to figure prominently in the Courts' decisions, as was shown by its 1971 advisory opinion on Namibia,[5] its 1972 judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council*[6] and its 1973 judgment in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland) case*.[7]

30. Scarcely a case came before the Court which did not turn upon the interpretation and application of a treaty, and he ventured to prophesy that the Commission's handiwork—the Vienna Convention on the Law of Treaties—was destined to play an increasingly frequent role in the proceedings and decisions of the Court. He would add that the topic of State responsibility, which was on the Commission's agenda for the present session, had similar potentialities for the work of the Court. Few contentious cases came before the Court which did not, to a greater or lesser degree, raise some aspect of State responsibility, and he was convinced that the Commission's work on that topic would also have a large and continuing interest for the Court.

31. He wished to take that opportunity of paying a tribute to the contribution made by the Secretariat to the work of the Commission. The Codification Division of the Office of Legal Affairs had prepared, over the years, a long series of excellent papers on the topics appearing on the Commission's agenda. Those papers showed evidence of a high standard of scholarship and formed a significant element in the contribution made by the work of the Commission to the development of international law.

32. In conclusion, he expressed the regret of the President of the Court that the calls of his work had prevented him from accepting the Commission's invitation to address it. He hoped, however, that his own words had sufficed to assure the Commission of the high esteem in which it was held by the Court. He also hoped that he had been able to convey something of the warm feeling of friendship which the judges of the Court had for the members of the Commission who were, in truth, their brothers in the law within the family of the United Nations.

33. The CHAIRMAN thanked Sir Humphrey Waldock for his address and asked him to transmit to the former members of the Commission who served on the International Court of Justice, and to the whole Court, the Commission's warm greetings. He then called on Mr. Ago.

34. Mr. AGO, pointing out that he was now the senior member of the Commission, referred individually to the

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[4] I.C.J. Reports, 1969, p. 3.

[5] I.C.J. Reports, 1971, p. 16.

[6] I.C.J. Reports, 1972, p. 6.

[7] I.C.J. Reports, 1973, p. 3.

members who had welcomed him in 1957, to those who had joined the Commission at the same time as himself, to those who had joined later and to those he had seen leave. He noted that the best internationalists had taken part in the Commission's work.

35. The year 1957 had been a turning point in the history of the codification of international law. Until then, and even when the Commission had been established in 1949, codification had been regarded as something of a luxury; perhaps there had not even been much faith in its usefulness. After 1957, the Commission's task of codification had appeared more necessary and urgent. In both internal and international law, codification was always linked with a social revolution. In the middle of the 1950s an important social revolution had begun in the international community, which had brought the different peoples of two great continents onto the world scene, making them subjects of international law in great numbers and thus necessitating a revision of the fundamental rules applicable to relations between States, to adapt them to the new situation.

36. The Commission had then just completed its first major work of codification of international law, which was to result in the adoption of the four Geneva Conventions on the law of the sea. In 1958, after preparing model rules on arbitral procedure, the Commission had begun the second main stage of its work, devoted to diplomatic law. A number of subjects had been successively dealt with in draft articles: diplomatic relations, consular relations, special missions, relations between States and international organizations and, lastly, the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.

37. The third stage, which overlapped the second, had been the codification of the law of treaties, which had been on the Commission's programme of work for a long time. Just as in its time, the Swiss Confederation had taken pride in the adoption of its Code of Obligations, the international community would be able to take pride in the codification of the very important topic of the law of treaties. A succession of Special Rapporteurs had brought that task to a successful conclusion. At first, the Commission had considered drafting model rules; then, in 1961, it had decided to prepare draft articles, which in 1969, had led to the adoption of the Convention on the Law of Treaties.

38. The Commission had then taken up a question linked with the law of treaties: succession of States in respect of treaties, for which Sir Humphrey Waldock, the author of the final report on the law of treaties, had been appointed Special Rapporteur. After his election as a judge of the International Court of Justice, he had been succeeded by Sir Francis Vallat. The related topic of treaties concluded between States and international organizations or between two or more international organizations had been entrusted to Mr. Reuter, while the present Chairman of the Commission had been appointed Special Rapporteur for the most-favoured-nation clause. When those subjects had been disposed of, the whole of the law of international obligations would have been codified.

39. At the same time, the Commission was now working on other subjects: succession of States in respect of matters other than treaties, for which Mr. Bedjaoui had been appointed Special Rapporteur, and State responsibility, a topic which had been on the Commission's agenda since its establishment and which he himself, as Special Rapporteur, was endeavouring to bring to a successful conclusion. In view of the failure of the 1930 Hague Conference, at which the latter topic had been examined, the Commission had decided to approach it from a new angle, no longer linking it with the treatment to be accorded by States in their territory to the person and property of aliens, but detaching the question of State responsibility from the substantive rules of international law. The subject was certainly a difficult one, but he hoped the Commission would master it thanks to the endurance and dedication of its members and the prevailing spirit, which made them understand each other better when they disagreed and overcome their differences to achieve a common success.

40. The Commission still had to decide how to deal with the questions of the responsibility of States for risk and the law of non-navigational uses of international watercourses. Other subjects could also be considered; they were listed in the remarkable *Survey of International Law* prepared by the Secretariat to whose competence and valuable collaboration he drew attention.

41. Referring to the statement by the Legal Counsel, he said that he shared his views on the various courses open to the Commission, but doubted whether the main topics of international law could be codified otherwise than by conventions. In those matters, clarity and certainty were essential, and it was often because of its uncertainty that the law was not respected. It was, moreover, that uncertainty which explained the distrust of international judicial settlements shown by many members of the international community.

42. The activities of the International Law Commission were less spectacular than those of other United Nations organs, but there was reason to believe that in the long term its work would not be the least important. Just as the battle of Austerlitz was only a historical memory, whereas the *Code Napoléon* was still a reality, the world would perhaps one day forget the successes and failures of the United Nations in those spheres which today were the centre of attention, the better to remember the contribution made by the great international organization to the codification of the law of nations.

43. Mr. YASSEEN said that the establishment of the International Law Commission had marked the institutionalization of a new system of codification and progressive development of international law. That system, which suited an era characterized by world progress and the democratization of the international community, made it possible to follow such progress closely and to reflect the realities of international life. Written law was, indeed, the most appropriate means to that end, for the process of formation of custom was generally slow. Consequently, as Mr. Ago had said, the Commission's main task was to draft conventions.

44. It was true that in a time of change like the present, custom could be formed quickly. At a seminar of the *Société française pour le droit international*, Professor Jean Dupuy had referred to a "wild" custom, to emphasize its rapidity and strength. Perhaps it would be possible to speak of a revolutionary custom. Nevertheless, the customary process could hardly reflect rapid progress and meet all the needs for change and adjustment in a systematic and harmonious fashion.

45. Moreover, the International Law Commission was the instrument accepted by the new international community—a quasi-universal community which had been created by the United Nations Charter and was the best organized and most democratic community the world had ever known. For although the system of dependence in all its forms had not yet completely disappeared, it was on the point of doing so. Relations between the States which formed the international community today were based on the principle of sovereign equality; the exploitation of some peoples by others and the monopoly of common resources held by certain nations were condemned and must give place to fruitful co-operation.

46. The body of international rules inherited from the nineteenth and early twentieth centuries was the work of a small international community and could not reflect the new international life in its entirety or meet its needs. Hence it was necessary to proceed to adaptation, revision and even innovation, but in a democratic manner, without allowing international legal rules to be imposed by the hegemony of certain Powers.

47. In its declaratory role, which consisted in stating existing rules, and in its creative role, which consisted in proposing new rules, the International Law Commission, thanks to its method of work, drew on all the opinions expressed by States and all the practices they followed. If it had been able to do useful work, that was because its work was the result of "continuous interaction, throughout the development of a codification draft, between professional expertise and governmental responsibility, between independent vision and the realities of international life".[8] The object was, indeed, to ensure possible progress by preparing acceptable drafts.

48. The Commission's method of work placed it in continual contact with international life by enabling it to ascertain the opinions of States on all its proposals. Thus the Commission had always endeavoured to establish what represented the common interest or a balance of conflicting interests, whether in codification proper or in the progressive development of international law. That method ensured the widest possible participation in the development of international law, which was, without doubt, a guarantee of efficiency. All States were associated with the development of international law, for each of them was able to follow the whole process of preparing a draft and to express its opinion on every provision. Thus the development of international law had become a really international undertaking, thanks to the present system of codification, in which the Commission played an important part.

49. In the 25 years which had elapsed since its establishment, the International Law Commission had well understood its task. It had done much in the past, but could do still more in the future, to which it looked forward with more experience and, hence, more confidence. It was called upon to write the new chapters in the international legal order that were being introduced by ever-increasing progress and international relations in continual development.

50. Mr. USHAKOV said that the work of the Commission had played a prominent part in the history of international relations and international law, and that part would continue to grow. The codification and progressive development of international law were assuming increasing importance, as they provided a basis for peaceful and friendly relations between all States, especially in the present-day world of States with different social systems. The Commission was carrying out the work of codification and progressive development for the United Nations successfully, because it was composed of eminent experts in international law working in a personal capacity, but was at the same time under the authority of the international community. It worked in close co-operation with States, taking careful account of the opinions expressed by them in the Sixth Committee and in the United Nations as a whole.

51. The Commission's success was also due to the excellent arrangements made by the United Nations and its Secretariat, for which he thanked the Secretary-General, the Legal Counsel and the staff of the Codification Division of the Office of Legal Affairs.

52. The Commission had rightly decided to concentrate on the preparation of draft articles, appointing a Special Rapporteur for each topic. That method had proved its worth in practice. He paid a tribute to all the past and present special rapporteurs for the diligence with which they had performed their difficult and often thankless tasks. The friendly atmosphere in the Commission had helped it to work as a team. A great contribution to the success of the Commission's work had been made by the Drafting Committee, to past and present members of which he expressed his appreciation.

53. The progressive development of international law was in fact primarily the responsibility of other bodies, composed of representatives of States, but the specialized task of codification associated with that development devolved mainly on the Commission, as a permanent substantive body of the United Nations and a subsidiary body of the General Assembly. There were still many branches of international law in which codification and progressive development were necessary, and he trusted that the Commission would continue to carry out that work with increasing success. It had been criticized for making slow progress and might consider ways of speeding up its work, but it could be proud of the high quality of the work it had done. With very few exceptions, the texts it had drafted had been adopted at diplomatic conferences by very large majorities. He

[8] *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, para. 166.

commended all past and present members of the Commission for their contribution to that work.

54. Mr. ELIAS paid a tribute to all the Commission's members, past and present, for their individual and collective contribution to the codification and progressive development of international law over the past 25 years.

55. The impressive list of major international conventions completed or being drafted by the Commission clearly made it the *de facto* principal legal organ of the United Nations, although the latter seemed reluctant to recognize it as such. The Commission was in fact regarded as one of the subsidiary organs of the United Nations coming under Article 7, paragraph 2, of the Charter; that status was not commensurate with the great importance of its services to the Organization. Like the members of the International Court of Justice, members of the Commission were elected by the General Assembly and were required, under the Commission's Statute, to be persons of recognized competence in international law. Unlike the members of the Court, however, the Commission's members received only the allowances payable to members of subsidiary committees of the General Assembly. Those allowances were insufficient to cover members' living expenses during the annual sessions at Geneva.

56. Moreover, the Commission had no permanent accommodation at the Palais des Nations and had frequently been displaced by more transient sub-committees of the General Assembly. The Fifth Committee was often parsimonious in its appropriations for the Commission to an extent which was not conducive to the proper discharge of the Commission's functions. The Sixth Committee was more often than not censorious in its comments on the Commission's reports. The only redeeming feature of the situation was that the Commission had an excellent secretariat and enjoyed the support of the Legal Counsel.

57. The present stage in the Commission's development, and in that of the United Nations itself, perhaps called for a review of the stated objectives of the Commission's founders, and of its proper place in the United Nations in the light of the present-day realities of international law. The Commission's enlargement had enabled it to draft more generally acceptable rules of international law, and its services were of the highest legal importance. To meet the often unjustified criticism of the Fifth and Sixth Committees concerning the pace of its work, however, the Commission might take the present anniversary as an opportunity to review its future programme of work and working methods. It might, for example, try to limit the number and length of members' statements, which should, if possible, concentrate on principles and techniques of presentation of articles. The debates could then be more business-like. Fundamental principles could, of course, always be discussed at a length considered appropriate by the Commission itself.

58. He suggested that the Commission should establish a working group to review the programme of work and make recommendations along those lines without delay. Every effort should nevertheless be made to maintain the present excellent *esprit de corps* and cordial—indeed congenial—atmosphere, which made the Commission's debates so rewarding.

59. Mr. TSURUOKA paid a tribute to the International Law Commission for the excellent and abundant work it had accomplished during its first quarter of a century. He also expressed his gratitude to the Swiss Confederation and the city of Geneva, which had been host to the Commission for so many years, and thanked the Secretariat for its assistance.

60. He could not, on that occasion, refrain from evoking the memory of his former colleagues, their great ability and their devotion to the cause of the progressive development of international law and its codification. Some of them, like Sir Humphrey Waldock, had left the Commission for the International Court of Justice. Others had resumed their academic, administrative, judicial or diplomatic careers. Others, again, whose names had been read out by the Chairman, had died. He wished to pay a tribute to their memory and thought that the Chairman could perhaps convey the Commission's thanks to their families.

61. Without expatiating on the work accomplished by the Commission, the merits of which had been described by previous speakers, he would merely draw attention to the fact that the Commission consisted of 25 members, of high competence in the field of international law, who represented the main legal systems of the world and were recruited from among jurists—judges, professors, ambassadors, and so on—who by reason of their professions were in constant contact with international life. Their varied experience provided the Commission with a source of exceptional quality embracing the various legal trends—revolutionary, progressive, conservative—the synthesis of which had shaped the Commission's work. The spirit animating that work was both realistic and idealistic and took account of the interests of all countries of the world. That explained the success of the draft articles prepared by the Commission in such fields as the law of the sea, the law of treaties and special missions.

62. In the new world, where the birth of a great number of States had created a new diplomatic, political, economic and cultural climate, the Commission was called upon to play an increasingly important part, meeting the new needs and aspirations and taking account of all the trends of ideas and legitimate interests of all peoples.

63. Mr. KEARNEY said that everywhere in the world there were injustices, quarrels, conflicts and killings, which could be remedied or prevented by world law, but the world was unaware of its need for law. The Commission was the only body specifically entrusted with the immense task of drafting rules that might serve as the foundation for a world at peace, governed by law. The obstacles of excessive nationalism, competing governmental, social and economic philosophies, and the collapse of confidence in the utility of international organization might well make the establishment of a world law seem less attainable than 25 years ago, when

the Commission had held its first meeting. Few law-making treaties drafted by the Commission were in force, but they were proof that universality of legal concept was not unattainable. They did not, however, provide even a partial skeleton around which a living body of world law could be constructed.

64. In its task of filling the structural gaps, the Commission must move with the degree of deliberate speed demanded by the needs of world society. Its basic structure should not be changed in an effort to accelerate the codification of international law, which could best be achieved through the interplay of minds trained in different legal systems and different cultures, and through the harmonization of a wide range of experiences—those of the cabinet minister, the judge, the diplomat, the professor, the foreign office legal adviser and the specialist in international organizations. Any substantial change in the organization or functioning of the Commission would destroy that delicate balance.

65. The Commission must nevertheless continually balance the preservation of that diversity against the demands of its imperative objectives. It should constantly experiment in seeking ways of eliminating unnecessary restraints on progress in codification. A combination of minor obstacles could sometimes cause considerable delay. For example, much time might be spent on the discussion of issues which appeared to be substantive, but eventually proved to be difficulties of translation. Long debates sometimes took place when there was no concept in one legal system to express a concept in another with reasonable exactitude. The selection of reasonable equivalents in such circumstances was an important element in international codification, but it was basically a technical matter which could perhaps be settled without a full debate in the Commission.

66. Practice had shown that to deal effectively with a group of draft articles the Commission needed to gather momentum, which could easily be lost if the work was interrupted for a substantial period. Once that momentum was lost, the short duration of the sessions rarely permitted the Commission to regain the cohesive determination to finish the job that was essential in joint efforts. It was painfully clear that ten-week sessions were quite inadequate to meet the world need for law. He was not in favour of the suggested division of the Commission into committees dealing with separate topics, or of the replacement of the Special Rapporteurs by experts working full time on the preparation of reports, draft articles and commentaries. Such suggestions should, however, be studied, together with other possibilities, such as an annual session of 15 or 16 weeks, or two sessions of 8 weeks. The study should include an analysis of the limited time which members, including special rapporteurs, could devote to the Commission's work, in order to determine what was feasible in the light of their other commitments.

67. The Commission should perhaps give some attention to its own organization. He agreed with the remarks made by Mr. Elias, and proposed that the Commission should set up a standing committee which, at each session, would examine the functioning of the Commission; consider proposals for improvements; decide, in consultation with the Special Rapporteurs, on the organization of work for the subsequent session and on a longer-term basis; and review, with the Secretariat, the Commission's executive, administrative and financial problems. The standing committee, which would serve as the Commission's management and planning body, could also prepare each year, for consideration by the Commission, a memorandum reviewing the problems it had studied and making recommendations for their solution. That memorandum would form part of the Commission's report to the General Assembly.

68. The CHAIRMAN said that it was perhaps not for him to recount once more the accomplishments of the Commission, a body of which it had been said, at the last session of the General Assembly, that it was the most silent Commission of the United Nations. Indeed, it was both silent and productive—two characteristics that usually went together.

69. In celebrating its silver jubilee, the Commission was celebrating not only its performance, but also the realization of an old dream. It was difficult to trace the original source of the idea of codification of international law, which brought to mind such names as Bentham, Abbé Grégoire, Bluntschli, Mancini and Katchenovsky. He would not dwell on the history of codification, but wished to refer to a work by a little-known Austrian jurist, Alfons von Domin-Petrushévecz. In his book *Précis d'un code de droit international*, published in 1861, that writer had suggested the establishment of an international commission of jurists to codify the law of nations, and had even clearly indicated that the codification should be embodied in international conventions. It had taken more than eighty years for the international commission he had dreamt of to become a reality, and the moral to be drawn was that it was worth while contemplating such possibilities because sometimes the wildest dreams came true.

70. Thanks to the decisions of Governments, the United Nations and, very soon afterwards, the International Law Commission, had been born. Those events had marked a moment in world history when traditional distrust had given way to a co-operative spirit, and when the fear that the codification of international law might be dangerous for sovereign States had been allayed by the expectations accompanying the establishment of a new, universal international organization.

71. Looking back on the past twenty-five years, it was clear that the setting up of an elaborate procedure based on Article 13, paragraph 1.a, of the Charter had been both timely and useful. One writer had pointed out that the United Nations thus had at hand, and actually working, a procedure which, within its limits, was a law-making procedure. That writer had also said, as Sir Humphrey Waldock had mentioned in his address, that the whole procedure which had developed under Article 13 of the Charter seriously rivalled the International Court of Justice in its importance for international law.

72. It was interesting to note that Domin-Petrushévecz, writing in 1861, had stressed the fact that, with the growth of international relations, national legislation was no longer sufficient and new measures would need to be taken for the satisfactory organization of the

world. On the present solemn occasion, one had the feeling that notwithstanding all that had been achieved, the ever growing needs of the international community were making new demands upon the ingenuity of thinkers and upon the skill of practical politicians and governments. It was to be hoped that the world would once more move towards a climate of understanding and co-operation in which international law would constitute not only a body of doctrine, but also a useful means of attaining peace, justice and the welfare of mankind.

73. In that context, the law-making procedure, in which the Commission played an important part, was destined to improve even further. International law would increasingly consist of rules intended to guarantee general peace and to promote and secure economic stability and growth, human rights and fundamental freedoms, social justice and the dedication of science and technology to the common good. It would then become the law of a true community, sustained by, and itself sustaining, each successive stage in the development of the international community.

74. Despite their different creeds and colours, different legal systems and different political persuasions, men were bound to live together on a shrinking earth, and that they could only do by constantly maintaining and developing the legal order, which would enable them to live in peace, freedom and justice. The tasks before the international law-making machinery were endless. He hoped that the Commission would continue to work effectively for the accomplishment of those noble tasks in the tradition of the past twenty-five years, thanks to the selfless dedication of its past and present members.

The meeting rose at 5.35 p.m.

1266th MEETING

Tuesday, 28 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-3; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the 1264th meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 3

1. The CHAIRMAN invited the Special Rapporteur to introduce article 3, which read:

Article 3

Cases not within the scope of the present articles

The fact that the present articles do not apply to the effects of succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(*a*) the application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;

(*b*) the application as between States of the present articles to the effects of succession of States in respect of international agreements to which other subjects of international law are also parties.

2. Sir Francis VALLAT (Special Rapporteur) said that article 3, which corresponded to article 3 of the Vienna Convention on the Law of Treaties,[1] was a saving clause referring to cases outside the scope of the present articles. The Swedish Government, the only one to comment on the article, considered that the principles embodied in it were self-evident and need not be expressly stated in the articles (A/CN.4/275). He did not share that view. Self-evident principles sometimes needed to be stated in order to provide the foundation or framework for the rules which followed. The Swedish Government's contention that the title of article 3 should be changed because the provisions of the draft articles were in fact applicable to the cases mentioned was mistaken. Sub-paragraph (*a*) referred to the applicability, not of the provisions of the articles, but of the rules of international law which existed independently of the articles and happened to coincide with their provisions. Article 3 did in fact deal with cases outside the scope of the articles, by stating that customary international law continued to apply in those cases. He would therefore prefer to retain article 3 with its present title.

3. Mr. EL-ERIAN said he agreed with the Special Rapporteur that it was sometimes necessary to state the obvious, in order to establish the basis of certain legal obligations. Article 3 should be retained to make the provisions as complete as possible.

4. Mr. HAMBRO said he hoped that, during the second reading of draft articles, silence on the part of members would be interpreted as agreement with the Special Rapporteur.

5. The CHAIRMAN assured him that it would.

6. Mr. ŠAHOVIĆ said that he supported the Special Rapporteur's approach to the topic of succession of States in respect of treaties and approved of the draft articles in general. The Special Rapporteur's report (A/CN.4/278 and Add.1-2) raised some new questions which should be considered thoroughly. As to the

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[1] 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. 289.