Document:-
A/CN.4/SR.630

Summary record of the 630th meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
1962 , **vol. I**

intergovernmental organizations, the right of asylum, and the juridical régime of historic waters including historic bays, as indicated in the note appended to the provisional agenda (A/CN.4/142).

53. Mr. ROSENNE said he agreed that the Commission must submit a report on its future programme of work at the seventeenth session, but the terms of sub-paragraph 3 (*b*) did not seem to oblige it to complete its consideration of that programme at the present session. He would not, however, press the point if the members of the Commission thought otherwise.

The meeting rose at 1 p.m.

630th MEETING

Thursday, 26 April 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) **(A/CN.4/145)** (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. LACHS said that he had followed the Commission's work closely from the outset and had taken part in discussions on its progress at twelve sessions of the General Assembly. On more than one occasion, he had been among those who had expressed grave concern at the declining role of international law of which there had been evidence in recent years; the Commission could do much to arrest and reverse that process. Codification was slow and laborious, but the Commission's achievements in that field, compared with earlier official and private efforts, were impressive. It should, however, guard against both excessive adherence to principles that belonged to the past and over-hasty anticipation of future developments.

3. The interesting range of topics referred to the Commission by the General Assembly would call for different methods of approach, and it might prove impossible to deal adequately with some of them. The Commission, in fulfilling its tasks, should take due account of the great changes taking place in the world and keep in touch with the new international relationships that were being formed. Among the topics mentioned in sub-paragraph 3 (*a*) of General Assembly resolution 1686 (XVI), the only one on which work was well under way was the law of treaties, and despite the wording of the sub-paragraph it was clear that state responsibility did not fall within the same category. In the case of the latter, the Commission should not only consider the appointment of a new special rapporteur or rapporteurs, but also decide how the topic was to be treated. A preliminary debate concerning the procedure to be followed in regard to the topic of succession of states and governments would also be necessary.

4. Finally, pursuant to sub-paragraph 3 (*b*) of the same resolution, the Commission would have to give thought to the selection of topics referred to it by the General Assembly and the order in which this should be dealt with.

5. Mr. BRIGGS said he agreed that first priority should be given to a statement of the existing law of treaties and its codification, which should be of the greatest value to states. On a conservative estimate that work was likely to take up most of the Commission's time for the next four or five years, so that the question of the priority to be accorded to other topics was, from the practical point of view, somewhat academic, though it would be of advantage at least to make a start on a few other subjects.

6. Certainly, the trend of opinion in the Sixth Committee of the General Assembly at its sixteenth session had been that the Commission should consider appointing special rapporteurs for the topics of state responsibility, succession of states and special missions. Rather fewer speakers in the Committee had thought that the Commission should deal with the topics of right of asylum, the juridical regime of historic waters and the relations between states and international organizations. He could not judge whether that attitude was due to their being less interested in the topics or to the realization of the limitations of time.

7. If the Commission were to appoint special rapporteurs only for the additional topics, other than the law of treaties, which the General Assembly had asked it to study, there next arose the question whether enough material existed to make codification possible. He noted from paragraph 176 of the Secretariat's working paper (A/CN.4/145) that volumes 10 and 11 in the United Nations *Legislative Series* were devoted to the legal status, privileges and immunities of international organizations, and from paragraph 12 (*c*) that a secretariat study of the juridical regime of historic waters was to be circulated at the present session; but no such material was readily available on the important topic of succession of states, and a special rapporteur might not be willing to undertake research on it until material had been collected and classified.

8. Furthermore, the succession of states and of governments were in reality two separate topics with some analogies and some important differences, both in theory and in practice. Even if state succession were considered alone, the Commission would have to decide whether state succession in relation to treaties, public property, public rights, tort liability, public debts, concessions, contracts, pensions, private rights and the survival or otherwise of the old law should all be treated under the topic. It was conceivable — though he expressed no final opinion on the subject — that it might be preferable to deal with the relation of state succession to treaties in the draft of the law of treaties as part of the topic of the effect of certain political changes on the termination or survival of treaties.

9. In the matter of state responsibility, no problem of material arose, since there were many judicial decisions by international tribunals in existence. Of 54 states endorsing at the sixteenth session of the General Assembly the codification of the law of state responsibility, 13 had advocated what they termed a "broader approach" to the topic; but the United Kingdom representative had warned that any attempt to give the topic a political content should be firmly resisted. He (Mr. Briggs) was strongly of the opinion that some of the questions mentioned during the discussions in the Sixth Committee had a remote or no connexion with what international lawyers and judges dealt with as the law of state responsibility.

10. It was a complete misnomer to call the law of state responsibility which dealt with the treatment of aliens a colonial or imperialist law. International law in that field was and always had been the law governing relations between independent states — a law which had been applied in thousands of cases by international judicial tribunals constituted by the states in dispute — and almost always including judges of their own nationality. One case in which the two states in dispute dispensed with judges of their own nationality was the case of the British Claims in the Spanish Zone of Morocco[1] where Judge Max Huber had clearly indicated the basic problem in relation to responsibility under international law for the protection of aliens, when he said:

> "It is admitted that all law has the object of assuring the coexistence of interests worthy of legal protection. That is undoubtedly also true of international law. The conflicting interests in relation to the problem of indemnification of aliens are, on the one hand, the interest of the state in the exercise of its authority in its own territory without interference or control by any foreign state, and, on the other hand, the interest of the state in seeing the rights of its nationals in a foreign country respected and effectively protected."

Whiteman's "Damages in International Law" provided an examination of over 30,000 international law claims in that field in which the cases were decided judicially rather than by force or intervention. Even if, however, the Commission should decide to treat the topic of state responsibility *lato sensu,* it would be advisable to deal with a specific aspect of the topic in the first place, and for that purpose no better subject could be selected than the international responsibility of a state for the just and humane treatment of aliens. He certainly thought that the Commission should appoint a special rapporteur to study that subject. In view of the Commission's heavy programme, it should perhaps defer for the time being the appointment of special rapporteurs on other subjects.

11. Sir Humphrey WALDOCK explained that the first report which he had prepared as special rapporteur on the law of treaties (A/CN.4/144) covered the conclusion, entry into force and registration of treaties. His intention was to put forward two further groups of articles on substantive and temporal validity, dealt with in Sir Gerald Fitzmaurice's second and third reports (A/CN.4/107 and 115) and on the effects as between the parties and on third states, dealt with in Sir Gerald's fourth and fifth reports (A/CN.4/120 and 130). He hoped to finish that task in two years, but of course, as the work proceeded, additional matters might emerge for consideration.

12. Mention had been made at the previous meeting of certain points at which the subjects of state responsibility and that of succession of states and governments touched upon that of the law of treaties. The fact that Sir Gerald Fitzmaurice had alluded only briefly to the question of state succession in his fifth report might perhaps lead to the conclusion that state succession could be dealt with separately. Sir Gerald had merely made brief mention of state succession in two articles and seemed to have assumed that there was a general principle of state succession. He himself, perhaps, approached the matter from a somewhat different standpoint from Sir Gerald. It seemed to him doubtful how far a general doctrine of state succession could be said to exist. There were a number of disparate topics with regard to which a problem analogous to that of succession arose; but that the solution of those problems was based on a coherent doctrine of state succession was not at all certain. Such was, indeed, the conclusion of O'Connell in his recent study.[2] There was, in fact, quite a lot of material, apart from the recent practice to which reference had been made. As to succession in the matter of treaties, most of the modern practice in regard to British territories was available; and there was, for example, an instructive account of the Irish Republic's attitude towards British extradition treaties in a recent volume of the *British Yearbook.*[3] He himself thought that succession in regard to treaties was primarily a matter of examining how the political changes had affected the personalities of the contracting states. Perhaps even more important than the practice as between the parent state and the new state was the attitude of third states towards succession to treaties, concerning which less information was available. From one point of view the problem formed part of the law of treaties and it had, in fact, been dealt with by Lord McNair in his *Law of Treaties* in connexion with the effect of territorial changes and the doctrine of *rebus sic stantibus.*

13. The points at which the doctrine of state responsibility touched the law of treaties had been mentioned by Sir Gerald Fitzmaurice in his fourth report in connexion with the articles relating to the consequences of the breach of a treaty. Some delimitation of the subjects as between the special rapporteurs would be necessary.

14. The subject of state responsibility was of immense scope but there were a number of general principles, for example, those concerning the principles of tortious responsibility, due diligence, the treatment of aliens, local remedies, nationality of claims, respect for territo-

[1] *Reports of International Arbitral Awards, Vol. II, p. 640* (United Nations publication, Sales No.: 49.V.1).

[2] D. P. O'Connell, *The Law of State Succession,* 1956.

[3] Paul O'Higgins, "Irish Extradition Law and Practice", *British Yearbook of International Law,* Vol. XXXIV, 1958, p. 274.

rial sovereignty and others. He had not himself a fixed mind about the order in which the various principles could best be studied, but while he agreed with Mr. Briggs that the treatment of aliens remained a very real problem in the world of today, affecting every independent state, he was doubtful whether priority should be given to that aspect of state responsibility.

15. In addition, it might be useful to initiate work on one or two more restricted topics. He looked forward with interest to the Secretariat's paper on the juridical regime of historic waters, which might give some idea of what could be done in that direction.

16. Regarding the Commission's method of work, although he had originally been attracted by the idea of dividing the Commission into two committees, after attending one session he had decided that such a procedure would impair the value of the Commission's work. Working in plenary meeting it was able to do much towards reconciling differences of opinion due to misconceptions, and the fruits of its discussions gained a notable measure of support and acceptance for the very reason that its conclusions were representative of opinion all over the world. Division into two groups would have the result either that that advantage would be lost or that the same discussions would have to be renewed in plenary. A further practical difficulty was that, once the drafting committee had started work, it would probably be impossible to hold two meetings concurrently.

17. Mr. PESSOU said that some of the difficulties mentioned by Mr. Elias at the previous meeting[4] had been common to all African states on the acquisition of independence, but widely different ways had been used to overcome them. The thirteen governments of the African and Malagasy Union (UAM) had concluded a number of agreements with France, other states and international organizations. Mr. Gros, who had spoken of the relations between those governments and France, was certainly aware that there had been no dispute between them.

18. It was a clear rule of international law that treaties were binding on the parties only, and some which had not been concluded on equal terms had to be regarded as void when circumstances changed, a development on which Mr. Tunkin had thrown light in his statements to the Sixth Committee. For instance, the international regime for the Congo and Niger rivers set up by the Treaty of Berlin of 1885 and confirmed by the Convention of St. Germain-en-Laye of 1919 should be considered as having lapsed, since it was no longer consonant with actual conditions.

19. Members of the UAM had concluded both collectively and individually a number of economic, financial and cultural agreements with France and with each other. They had also entered into or renewed a series of trade agreements with a number of countries, some of which had been originally concluded before independence. In some cases the compatibility of new treaty relations with earlier bilateral or multilateral treaties would arise — a question discussed by the Chiefs of State of the UAM at their recent meeting at Bangui.

20. He earnestly hoped that the law of the succession of states and of governments would be codified, since it was a matter of direct importance for the political development of African states.

21. Mr. YASSEEN said the world had changed and very substantial adjustments to many of the rules of international law were now required. One of the most important contemporary facts was the wholesale accession of peoples to independence. Since the Commission's list of topics had been established in 1949, the membership of the United Nations had doubled and the day was not far distant when all peoples would accede to independence.

22. If the world community was to continue to be governed by the rule of law, it was essential that new states should freely accept the rules of international law and should do so wholeheartedly and not just formally. Such acceptance was the surest means of making international law effective.

23. Unfortunately many of the new states had had unhappy experiences of international law. That very real fact had had grave repercussions on the international order, for it had led in some instances to a questioning of the rules of international law in general. While he did not wish to dwell on that extremist tendency, which though perhaps understandable, was not justifiable, he felt it was necessary to understand the crisis of international law so as to confine its effects within reasonable bounds.

24. A notable effort in that direction had been made by Mr. Verdross as President of the Institute of International Law, in his opening address at the Salzburg session of the Institute in September 1961. Mr. Verdross had then said that the new states did not appear to question the validity of the whole of international law, but only certain safeguards affecting the status of aliens; at the same time, Mr. Verdross had expressed his belief that the new states would be prepared to afford protection to the capital of aliens admitted to the territory after the liberation and at the request of the new states. By "liberation" was presumably meant genuine independence and not an apparent independence which only constituted a cloak for colonialism. The valuable thought put forward by Mr. Verdross underlined the need to revise many sections of international law, in particular the rules governing the conclusion of international conventions and their termination, the status of aliens, and the rules governing international concessions and diplomatic protection of such concessions.

25. With regard to sub-paragraph 3 (*a*) of General Assembly resolution 1686 (XVI), he had no comment to offer on the topic of the law of treaties, which it was agreed should be the main subject for the Commission at its current session.

26. So far as state responsibility was concerned, he noted that the special rapporteur had concentrated on only one of the many practical applications of the general

[4] 629th meeting, paras. 25 and 26.

rules of state responsibility — namely, the treatment of aliens. Notwithstanding the importance of that particular aspect of the question, that approach was unfortunate. The Commission should work towards the formulation of rules enunciating the general principles which governed the responsibility of the state in all forms of international activity. Once the Commission had reached agreement on those general principles, it could usefully consider how they would operate in practice, for which purpose it might appoint several special rapporteurs, each to be concerned with a particular field of international activity.

27. It was hardly necessary to stress the importance of the topic of the succession of states and of governments. Mr. Elias and Mr. Pessou had clearly shown the great practical importance of that topic to the newly independent states. There was a genuine and urgent need to formulate rules, as complete and precise as possible, on that topic for the benefit of the many newly independent states.

28. Mr. LIANG, Secretary to the Commission, said that several references had been made to the assistance which the Secretariat might be able to give to the Commission in its future work and he wished to take that opportunity to make some comments on that point. He had been very much impressed by the remarks of the General Rapporteur. Along the same lines, he wished to make the point that General Assembly resolution 1686 (XVI), and more particularly sub-paragraph 3 (*b*), demonstrated the Assembly's special interest in reviewing the programme of work of the International Law Commission. That special interest had not been apparent before resolution 1505 (XV) of 12 December 1960.

29. Since its inception in 1949, the Commission had included in all its annual reports a section on the planning of its future work and on its methods of work. However, that customary consideration of the Commission's tasks for the immediate future, and of the manner in which it proposed to carry them out, would not suffice for the purposes of sub-paragraph 3 (*b*). By that sub-paragraph, the General Assembly asked the Commission to consider its long-term programme of work; the Commission was invited to select for codification a number of topics in the same manner as it had done at its first session in 1949, as explained in paragraph 9 of the secretariat working paper (A/CN.4/145).

30. The Commission should give an account of its discussions in support of its conclusions on the selection of topics. He therefore strongly recommended to the General Rapporteur that in the report on the present session a separate section should set out those discussions and conclusions. That section would follow the lines of chapter II of the Commission's report covering the work of its first session.[5] It was only by thus giving a list of topics for its long-range work that the Commission could adequately respond to the active interest demonstrated by the General Assembly in the work of the Commission through its resolutions 1505 (XV) and 1686 (XVI).

31. The drawing up of such a list of topics was, of course, a separate matter from the consideration of the Commission's programme for the immediate future in response to sub-paragraph 3 (*a*) of resolution 1686 (XVI). In that connexion, he could not agree with the suggestion that the specific reference to certain items in that sub-paragraph meant that the General Assembly attached less importance to subjects which it had already referred to the Commission. Such topics as historic waters, special missions and the relations between states and international organizations did not need to be specifically mentioned in the sub-paragraph in question, for they had been referred to the Commission by the earlier resolutions referred to in the secretariat working paper (A/CN.4/145, paras. 12 and 13).

32. With reference to the topic of the law of treaties, he said that the English text of the Special Rapporteur's report would be circulated within a few days; the translations into other languages would follow.

33. With regard to the topic of state responsibility, he shared the view of the General Rapporteur that the topic could not be placed on the same level as the law of treaties. The Commission had never engaged in a sustained discussion on the general principles governing state responsibility. There had been no real discussion of the extensive reports submitted by the Special Rapporteur on state responsibility; there had only been some casual comments on those reports. The Commission was now called upon to turn over a new leaf so far as that topic was concerned and would do well to consider the general approach to be adopted as well as the actual scope of the subject of state responsibility.

34. There had been some discussion as to whether the Commission should appoint one or more special rapporteurs on the subject of state responsibility. It seemed somewhat premature to consider the appointment of more than one. There was an interpenetration between the subject of state responsibility and practically all parts of international law, the law of treaties and the succession of states, for instance. In the past, a large part of the discussion on state responsibility had concerned the treatment of aliens; that had been the case, for example, at the Codification Conference of 1930 at The Hague. The newer tendency seemed to be in favour of undertaking a synthesis of the general principles governing the subject of state responsibility. In the circumstances, it did not appear advisable to appoint a second special rapporteur on the subject of the treatment of aliens until the Commission had clarified its views on the general principles governing state responsibility, for those principles would of necessity affect the rules relating to the treatment of aliens.

35. With regard to the topic of the succession of states and governments, he agreed with Sir Humphrey Waldock that its confines were not too clearly demarcated: that subject, too, was interrelated with other subjects of international law.

36. At that stage, however, he wished to dwell on what the Secretariat could do to place at the disposal of the future special rapporteur and of the Commission itself

[5] *Yearbook of the International Law Commission, 1949* (United Nations publication, Sales No.: 57.V.1), p. 279.

the facts in its possession which could be of assistance in the study of the topic of the succession of states and governments. In the first place, the Secretariat had considerable experience in questions of the succession of states and governments relating to the membership of international organizations. In the second place, the Secretariat could furnish all facts and information in connexion with the succession to treaty obligations in regard to conventions of which the United Nations was the depositary.

37. Turning to a wider field of research, he considered that practical steps could be taken to deal with the more difficult question of investigating state practice in the matter of the succession of states. The Commission had in the past adopted the system of addressing to governments a general request for information regarding the relevant treaties. The response to that type of question had not been altogether satisfactory. Governments had displayed no alacrity to supply the information requested. He therefore suggested that the Commission should adopt a system which had been employed with success by League of Nations organs in the past: the Special Rapporteur, the Commission itself, or a special sub-committee, could with the assistance of the Secretariat prepare a detailed questionnaire to be addressed to governments. There was no doubt that it was easier for governments to reply to a questionnaire of that type.

38. While on the subject of the Commission's programme for the immediate future, he said that the Commission might find ways and means of dealing with the other tasks already assigned to it by the General Assembly. A secretariat document on the subject of historic waters was ready but its actual production had been delayed until early June in order that the report on the law of treaties should receive priority. In the case of both historic waters and special missions, he suggested that the Commission should deal with those topics directly instead of by appointing new special rapporteurs, a procedure which would delay the work by about two years.

39. The right of asylum and relations between states and intergovernmental international organizations, however, were such broad topics that the Commission would have to appoint a special rapporteur.

40. The Commission's methods of work was a question which might be dealt with later in the session, for practical reasons. The Secretariat would always be ready to adapt itself to any method of work decided upon by the Commission, but early notice was necessary of any change that might be proposed. If, for example, it were desired at forthcoming sessions to hold two meetings a day, or sub-committee meetings during the period when the Commission itself was not in session, a decision would have to be taken at the current session. The reason was that any such decision would involve additional expenditure and would therefore need to be submitted to the appropriate United Nations organs in good time.

41. Mr. CADIEUX said he agreed with the view put forward by Mr. Rosenne that the Commission might submit to the General Assembly an interim report in response to sub-paragraph 3 (*b*) of resolution 1686 (XVI). In fact, by paragraph 4 of the same resolution, the General Assembly itself had decided to place on the provisional agenda for its seventeenth session the question entitled "Consideration of the principles of international law relating to friendly relations and co-operation amongst States in accordance with the Charter of the United Nations": in the course of the debate on that question, additional topics might be suggested as suitable for priority treatment and referred to the International Law Commission, as in the case of the topic of the succession of states. The list of topics to be established by the Commission for its future work could not therefore be definitive.

42. Personally, he had some doubts as to the advantages of drawing up a long rigid list of topics for codification. In the first place, the Commission would hardly find time in the next five years to deal with anything more than the law of treaties, the succession of states and state responsibility. In the second place, political considerations, which were paramount in the Sixth Committee of the General Assembly, could lead to the alteration of the list of topics. Nevertheless, the Commission could certainly begin to study some topics, even if it were unable to complete work on them before the expiry of the term of office of the present members; that was a practical argument in favour of drawing up a list of topics as suggested.

43. He shared the views of the Secretary to the Commission concerning the programme of work for the immediate future. The General Assembly had entrusted two distinct tasks to the Commission: first, the continuation of the work on the law of treaties and state responsibility; secondly, the preparation of a programme of work for the years to come, for which purpose the Commission was to give priority to the succession of states and governments.

44. With regard to state responsibility, the suggestion by Mr. Verdross for the division of the subject might offer a way out of some of the difficulties. Actually, however, the subject of state responsibility covered practically the whole field of international law and even if agreement were reached on the division of the subject, it might be difficult for the Commission to agree on the precise manner of effecting that division.

45. Accordingly, he suggested as a possibility that a rapporteur might be appointed to study the whole subject of state responsibility and to submit to the Commission, at the commencement of the next session, his proposals on such questions as whether certain aspects of state responsibility should receive priority and whether special rapporteurs should be appointed for them. A further question to be considered was whether certain sections of the topic of state responsibility should be dropped, in particular the treatment of aliens. He would not in principle be averse to the codification of the law concerning the treatment of aliens but would prefer to hear the opinion of the other members of the Commission before making up his mind as to the best course to follow in dealing with the subject as a whole.

46. Mr. BARTOŠ said that the first question to be settled was the Commission's approach to the establishment of its programme of work. General Assembly resolution 1686 (XVI) was binding on the Commission, as were all relevant General Assembly resolutions, but the Commission should also take into account the developments in international law which made topics ripe for codification. There were at least four strata of international law: classical international law before the foundation of the United Nations; the modifications and rules inherent in the United Nations Charter; the rules which had subsequently emerged and had been enshrined in the modern practice of states; and *lex ferenda,* or the progressive development of international law.

47. General Assembly resolution 1686 (XVI) was not very clearly phrased. He did not agree that sub-paragraph 3 (*a*) required no comment, as the Secretariat had stated (A/CN.4/145, para. 7). Even from a practical point of view the three topics mentioned in it — the law of treaties, state responsibility and succession of states and governments — could not be put on the same footing. The work on the codification of the law of treaties had already started and the Commission had given the Special Rapporteur implicit instructions. Parenthetically, he wished to say that he could not agree with Mr. Briggs' idea that the Commission should prepare a statement of the existing practice with regard to the law of treaties, since it had already decided that the Special Rapporteur should use the form of a draft convention.

48. The topic of state responsibility was an extremely broad one and of the utmost importance. No one, he believed, was opposed to its codification. What was involved, however, was not the continuation of the Commission's work; rather, the study of the whole topic would have to be started afresh. The reports of the previous Special Rapporteur, Mr. García Amador, had not been accepted even in principle and Mr. García Amador himself had stated that in the course of his research work he had completely changed his ideas on the subject. But Mr. García Amador was no longer a member of the Commission, which had never had a chance to see any document in which he explained how his ideas had changed. He agreed with Mr. Lachs and other members that the topic should be delimited, and especially with Mr. Verdross, who had urged that the title of the topic itself should be defined.

49. The topic of succession of states and governments fell into the mixed category, partly so-called classical law, partly United Nations Charter law, partly law developed in practice after the establishment of the United Nations — in particular as regards the creation of new states — and partly *lex ferenda,* seeing that some of the old rules no longer met present day requirements, and a number of states had urged the Commission to give the topic priority because of its practical importance. The Commission might in due course consider whether the succession of states and governments formed a single subject or two subjects.

50. As he had said, the three topics were not really on the same footing, although all three had been placed together in an effort to achieve a definite and practical solution for difficulties which had arisen in the international community. Sub-paragraph 3 (*a*) of resolution 1686 (XVI) called for that comment, at least.

51. The question of what other topics should appear on the Commission's work programme remained to be settled. The topics might be divided into four groups: first, the six topics of the 1949 work programme which had not yet been studied (A/CN.4/145, para. 10, footnote 5); second, the topics which the General Assembly had referred to the Commission under special resolutions (*ibid.,* para. 12); third, topics suggested by governments (*ibid.,* parts I and II); and fourth, topics which the Commission itself might suggest on its own initiative under article 18 of its statute.

52. The Commission should not, of course, be over-ambitious, but it should keep two or three subsidiary items on its agenda at the same time as the major items. Experience at the eleventh session had shown the wisdom of that course, since at that session work on the major item had been interrupted by the enforced absence of the Special Rapporteur, who had been called to perform important duties at The Hague, while the second item had been treated in some confusion and the third item had eluded the Commission's grasp almost entirely. It would be desirable, therefore, for the Commission to have several reports before it so that it could work continuously during its sessions. The major item required several years not only of the Commission's work, but of preparation, but there might be other topics which would need less preparation; a fair balance should be struck, in keeping with the Commission's needs and abilities. He did not mean to imply that the Secretariat would have to do the preparatory work on all items at the same time, but it should prepare them in due course. The Commission should work continuously and bequeath a heritage to the future membership of the Commission, instead of thinking in terms of merely five years.

53. He had noted not only in the Sixth Committee of the General Assembly, but also at other assemblies of jurists outside the United Nations, a current of opinion that the Commission should do more work on the codification of international law than it had done. The Commission had achieved great things, notably the draft on the law of the sea, but it could not evade such expressions of public opinion. He would therefore formally propose that the Commission should examine the four groups of topics he had mentioned, although naturally they could not all receive priority.

54. In particular, work on the topic of special missions should be pressed on because it was being anxiously awaited. Diplomatic and consular relations had already been codified; that work needed to be supplemented by the completion of a draft on special missions.

55. The Commission should take into account practical matters which were intimately bound up with topics to which the General Assembly itself had given priority, such as the independence and sovereignty of states. It should not consider technical questions only, but also political questions. It should not confine itself to studying existing rules. Even the Conventions on the Law of the Sea of 1958 contained many new rules, especially

the Conventions on Fishing and Conservation of the Living Resources of the High Seas and on the Continental Shelf. The Commission would be rendering a real service to the international community if it examined controversial questions and succeeded in removing the sources of discord among states.

56. To sum up, everyone agreed that work should be continued on the law of treaties; the Commission should then examine how and how far it would study the topic of state responsibility; it should then pass to the question of succession of states and governments and decide whether that involved one or two topics; and, lastly, it should consider what priority should be given to other topics.

57. Mr. TSURUOKA said that he had listened with great interest to the discussion because it had turned on fundamental questions of international law as well as on methods of work and had confirmed his ideas about the Commission's role. All speakers had explicitly or implicitly stated that the purpose of international law was to furnish the international community with a basis of security without which there would be chaos. They had been unanimously of the opinion that international law should develop in order to adapt itself to the modern conditions of international life, and all had expressed a belief in the efficacy and flexibility of international law. It had been generally agreed that the Commission, in codifying international law, was also engaged in its progressive development for the general interest, not for the benefit of one country or region. The Commission's future work should continue along those lines.

58. While the Commission should appreciate the difficulties of particular nations, it was not a negotiating body. Its task was to discover and codify the existing law, and when innovations were made to meet new and genuine needs, it should take into account the legitimate interests of states, interests which were often diametrically opposed, and find some means of harmonizing solutions so that they would be acceptable to at least a majority of nations. No difficulties were insurmountable, as Mr. Pessou had shown in his remarks concerning the succession of states.

59. The Commission would, however, be wasting its time if it tried to undertake unduly bold innovations, since, even if they seemed justifiable to certain states, they would meet with strong resistance from others and the text would remain a dead letter. Such considerations should guide the choice of future topics for study and the methods of work. The choice, however, had in fact already been made and was to be welcomed. The three topics chosen by the General Assembly were important and urgent, and their study would contribute to the cause of peace and to closer collaboration among nations. Some new topics might, however, be included in the future programme of work, as Mr. Bartos had suggested, notably some of the pending work such as that on the juridical regime of historic waters, including historic bays.

60. Interesting suggestions had been made with regard to methods of work. Some changes had, perhaps, become necessary in consequence of the increased membership of the Commission, but caution should be exercised, for the traditional methods of work had yielded such good results. Above all, undue haste should be avoided; the Commission should aim at quality rather than quantity.

61. The CHAIRMAN again drew attention to previous discussions of the Commission's work programme and method of work, which were not, of course, binding on the Commission, but might provide some guidance. The subjects had been discussed at the eleventh and twelfth sessions of the General Assembly. On the basis of those discussions Mr. Zourek had made certain specific proposals to the Commission [6] which had been discussed at the Commission's 464th meeting,[7] but no final decision had been reached.[8] It had, however, been decided to include the matter in the report to the General Assembly and that had been done.[9]

62. To subdivide the Commission into two sub-committees would not be practicable, because the report of a sub-committee would inevitably have to be discussed again at length in the plenary meeting if it was to be accepted by that body as its report. That method had been given a trial in connexion with arbitral procedure at the ninth session,[10] but without success.

63. The choice of subjects had also been discussed at the second to seventh meetings of the first session and the Commission might wish to pay special attention to the criteria then suggested by Mr. Amado [11] and Mr. Scelle.[12] A provisional list of fourteen topics selected for criticism would be found in the 1949 *Yearbook* [13] and might offer some guidance.

64. There could be little doubt that the work on the law of treaties would keep the Commission fully occupied for the term of office of the present members. Sir Humphrey Waldock had prepared his first report and, if the Commission completed consideration of that report at the current session, it would be able to examine the governments' comments in the fourth year of its term and their comments on Sir Humphrey's second report in its fifth. On the assumption that the term of office was not extended, the Commission would therefore spend its whole term discussing the law of treaties without perhaps completing its work even on that subject.

65. The terms of sub-paragraph 3 (*b*) of resolution 1686 (XVI) demanded special attention. The Commission always included a section on its future work in its

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[6] *Yearbook of the International Law Commission 1958*, Vol. II (United Nations publication, Sales No. 58.V.1, Vol. II), pp. 74-76.

[7] *idem.*, Vol. I, pp. 174-180.

[8] *ibid.*, p. 180, para. 55.

[9] *idem.*, Vol. II, p. 108, paras. 62-67.

[10] *Yearbook of the International Law Commission 1957*, Vol. I (United Nations publication, Sales No. 57.V.5, Vol. I), p. 104.

[11] *Yearbook of the International Law Commission 1949* (United Nations publication, Sales No. 57.V.1), 2nd meeting, paras. 27-36.

[12] *ibid.*, paras. 61-63.

[13] *ibid.*, p. 281.

annual reports. The resolution, however, called for something more than that sort of routine report. It appeared to him that the Assembly wished to obtain a clear idea of the scope of the work the Commission considered to have been entrusted to it for the purpose of codification or progressive development, keeping in view the object of bringing the international community under the rule of law, and regardless of whether the work had been or could be completed. Indeed the world community had been trying to do that ever since the end of the First World War, which marked the pioneering enterprise of substituting the human device of some sort of constitutional governance for the blind play of physical force in the conduct of international relations. The world had been driven to that serious task by the lash of fear as well as by the incitement of hope. That new and compelling task, if and when fulfilled, would represent the positive side of historical development, revealing the indeterminate possibilities of good in history.

66. As regards the subjects other than the law of treaties mentioned in sub-paragraph 3 (*a*) of resolution 1686 (XVI), immediate steps to study them would have to be taken.

The meeting rose at 1 p.m.

631st MEETING

Friday, 27 April 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) **(A/CN.4/145)** (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. VERDROSS suggested that the Commission's method of work might be improved if it adopted a system similar to that used with some success by the Institute of International Law. In the intervals between sessions, preliminary work might be done not only by a special rapporteur, but also by a committee. The special rapporteur might prepare a first draft, and submit it to the committee and then, in the light of its comments, prepare a final draft for the plenary Commission. That would probably save considerable time. If the Commission decided to place the topics of state responsibility and succession of states and governments on the agenda of its fifteenth session, it should at the current session appoint the special rapporteurs and the committees he had suggested. At the current session the Commission should continue its usual practice ; it should certainly not divide into two sub-commissions, for that would merely mean that the same debate would take place twice, as had happened at the ninth session.

3. Mr. AGO said that the Commission had discussed the subjects before it at several previous sessions. Mr. Verdross's suggestion was, however, relatively new, and he would wholeheartedly support it, provided, of course, that the proposed committee met in the intervals between the plenary Commission's sessions. He was, however, strongly opposed to any idea of dividing the Commission into two sub-commissions. It had been argued that the Commission's membership had been increased and that consequently subdivision would be easier ; his answer to that argument was that, for the purposes of the increase in membership to be achieved, all members must participate in the debates. If the Commission were subdivided and if the work of a sub-commission were to be regarded as final, the whole spirit in which the Commission had been constituted would be violated. On the other hand, if the sub-commission's work was to be regarded as preparatory, the debate would merely be repeated in the plenary meetings. In the light of experience he would urge members who favoured subdivision not to press their proposal, since such a system had been found completely unworkable.

4. He had noted with great pleasure that the General Assembly seemed to have realized that the Commission's essential task was to codify a few very broad topics and not to disperse its efforts on lesser ones. That approach was particularly appropriate in view of the great increase in the membership of the international community, and of the problems of international law arising out of that increase.

5. The topic of the law of treaties would, of course, receive priority. If the Commission succeeded in completing a draft on that topic, it would have achieved a notable success. However, state responsibility, on which a great deal had been said at earlier sessions, was an equally important topic and equally urgently in need of codification. When the Commission had defined the subject, however, it had been led astray by historic considerations. While it was true that the theory of the responsibility of the state had evolved from a body of case-law mainly concerned with the status of aliens, nevertheless the confusion of two distinct questions which had characterized the earlier reports on the topic should be avoided.

6. The two distinct questions were, first, the international responsibility of the state in general, and, secondly, the state's treatment of aliens. The second was of considerable practical importance in modern times, when the ever-increasing development of international intercourse was reason for a greater interest in the definition of the rights and duties of the State with respect to the alien residing on its territory. But the treatment of aliens should not be dealt with merely from the point of view of possible breaches of rules of international law. It was necessary first to establish what were the basic rules and what were the obligations of states with regard to aliens. By contrast, the state's international responsibility as such arose in circumstances in which a subject of international law infringed a rule of international law — any rule whatever, and not just the rules concerning the treatment of aliens. That was the essential subject.