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Summary record of the 634th meeting

Topic:
Programme of work

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634th MEETING

Wednesday, 2 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Appointment of drafting committee

1. The CHAIRMAN proposed the appointment of a drafting committee consisting of: Mr. Gros as Chairman, Mr. Ago, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Tunkin, Sir Humphrey Waldock and Mr. Yasseen.

It was so agreed.

Appointment of a committee to consider the future programme of work under General Assembly resolution 1686 (XVI), paragraph 3 (*b*)

2. The CHAIRMAN proposed the appointment of a committee to consider the future programme of work, consisting of: Mr. Amado as Chairman, Mr. Ago, Mr. Bartoš, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Pessou and Mr. Tunkin.

It was so agreed.

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*)

(*resumed from the previous meeting*)

3. The CHAIRMAN said that the officers of the Commission had tried to reach agreement on proposals for the membership of the suggested committees to deal with the topics of state responsibility and succession of states and of governments, but had not been successful owing to a difference of opinion over the function of the committees. His own opinion was that the function of the committees would be solely to define and determine the scope of the subjects. They would then report to the Commission and their functions would be at an end. The special rapporteur might perhaps consult his committee from time to time, if he so wished; but it would not be a standing committee having authority to instruct the rapporteurs. It would be for the special rapporteur to study the law on the subject, keeping within the scope defined, and prepare a first draft. The Commission would then give his report a first reading, circulate it to governments and prepare a final draft in the light of the comments of governments. The other opinion had been that it should be a standing committee always ready to help the special rapporteur and perhaps from time to time to give him instructions. In his view such a procedure would embarrass the special rapporteur.

4. Mr. ROSENNE said that he wished to continue his remarks from the previous meeting by speaking on the subject of succession as such, not succession of states and governments. He had long had doubts whether the topic was suitable for codification. The Commission was, however, under an obligation to give the General Assembly some formal answer to its recommendation in resolution 1686 (XVI), sub-paragraph 3 (*a*). He doubted, from the scientific point of view, whether succession existed as a chapter in international law, but the discussion in the Commission and in the Sixth Committee of the General Assembly had convinced him that the Commission should deal with the subject as rapidly as possible, especially as Mr. Elias and Mr. Pessou had pointed out its practical importance.

5. The terms succession of states and succession of governments might be misleading. Succession of states arose primarily from the cession or retrocession of territory together with its resident population. Succession of governments arose in consequence of a revolutionary change in government, which was not necessarily in conformity with the previously prevailing constitutional law. That was not an appropriate subject for the Commission. The problem with regard to which the Commission had to formulate appropriate rules was that of the future of all the international rights and obligations after a fundamental change in the internal regime and international status of a territory, and after the political, economic, social and cultural reorganization of the political community leading to a redefinition of the objectives for which the state existed. It was immaterial whether that was the result of a revolution within the framework of the existing international personality of a state, or of the process of emancipation — that was to say, the creation of a new independent international person where none had previously existed. He had been much struck by Mr. Elias' remark drawing attention to a treaty signed a year before the first elected members had participated in the government of Nigeria.[1] That was the heart of the problem. It therefore seemed that the Commission should not lightly discard the rubric of succession of governments, but should approach it within the context of the broader question of succession as he had described it.

6. He also doubted the advisability of over-stressing the significance of the precedents of the nineteenth century, and of concentrating on material deriving from such events as the unification of Italy and of Germany. Those precedents and the literature dealing with them were not strictly germane. The Commission was concerned with the problems of the second half of the twentieth century. The 1919 peace treaties had given rise to a number of instances of succession, and the resulting jurisprudence had been intimately connected with those treaties and in part with the question of membership of the League of Nations. The practice and the jurisprudence fell into two categories: that concerning the cession of territory as between pre-existing countries, and that concerning the cession of territory to another country brought into existence as the result of the war, such as Poland. The experience had been quite different since 1945, being characterized by the creation of new states where none had formerly existed. There was also the subsidiary question of whether there was any difference in law between independent states which had formerly been territories under mandate or trusteeship, and independent states which had never in modern times been

[1] 629th meeting, para. 26.

persons in international law; possibly, because some of the mandates and trusteeship agreements contained provisions for the eventuality of the termination of the mandate or trusteeship, the questions of succession could be governed by special rules in those cases.

7. The Commission should, therefore, concentrate mainly on the situation prevailing after 1945, though it should not ignore earlier material, especially that relating to the period between 1919 and 1945. It should not, however, be too much attached to the events of the nineteenth century.

8. The practice which had to be collected and analysed appeared to fall into four categories: that of metropolitan or ceding states; that of newly independent states; that of third states not directly parties to the arrangements between the ceding and the newly independent states; and that of international organizations, not only the United Nations but also some specialized agencies, notably the International Labour Organisation and the World Health Organization.

9. He had had personal experience of the complexities involved in succession and had had to deal with such problems as double succession — problems involving at one and the same time the succession which followed the break-up of the Ottoman Empire in 1919 and that which followed the termination of the Mandate for Palestine and the establishment of Israel — as well as such novel issues as succession to the formal state of war after the termination of hostilities in 1945. He would be glad to make such material available to the special rapporteur.

10. Another problem was the connexion of the topic of succession with other topics. He could not agree that the link with the law of treaties was a major part of the topic of succession — although it might be the most immediate issue — for experience showed that many of the more complex questions of succession arose only after a lapse of time. Furthermore, to deal with succession as part of the law of treaties might lead to distortion of the law of treaties, as it might necessitate a classification of treaties different from that commonly envisaged — in so far as there was any substance in any purported classification of treaties. He had, in fact, felt the existence of that problem in reading the latest, the 1961, edition of McNair's *The Law of Treaties*. The Commission would have to solve the problem of the interrelationship of the two topics early in its work, but any decision that it took could be regarded as tentative.

11. With regard to the action to be taken, he agreed that the special rapporteur for succession should be appointed at the current session. The first report should be analytical and descriptive. He had no objection to the establishment of the suggested committee, which could consider now the question of the connexion with other topics. The Commission might have to use the questionnaire method, and such a committee might usefully consider what questions could be put to governments and to international organizations, and give guidance on the collection of materials.

12. In general, he entirely agreed with the Chairman that the proposed committees should define and determine the scope of the subjects and should not be standing committees. They should be established only for the current session, with the broad terms of reference indicated by the Chairman, but with the modification he (Mr. Rosenne) had suggested with regard to the topic of succession.

13. He would have no objection if the Commission began work forthwith on the subject of special missions, which should be completed within the Commission's term of office. Work should not, however, be too hasty. The normal procedure of appointing a special rapporteur should be followed, as the scope was fairly clear and the subject did not require elaborate preliminary research. The Commission might also initiate at the current session the study of relations between states and international organizations. He agreed with the view expressed by the Secretariat in its working paper (A/CN.4/145, para. 176) that the relations of international organizations among themselves and with governments raised complex legal problems which were not always settled satisfactorily. The work on the juridical regime of historic waters, including historic bays, might be postponed until the Secretariat had prepared its memorandum.

14. With regard to General Assembly resolution 1686 (XVI), sub-paragraph 3 (*b*), it had been suggested that the general review of international law carried out in 1949 under article 18 of the Commission's statute had been a one-time operation. He did not share that view, and the resolution showed that the General Assembly did not do so either. The reference to the discussions in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and the observations of Member States submitted pursuant to resolution 1505 (XV) obliged the Commission to examine all the topics proposed by governments and report thereon. The report would not necessarily have to be a final one at that stage, nor should the resolution be interpreted as requiring work to be initiated forthwith on any of the topics listed in the programme of future work. The Commission's agenda was full for several years to come and the law of treaties had complete priority. In the course of the examination, however, some topics might be found which might be brought within the topics it had been decided to study. The topic of economic and trade relations, for instance, might have some aspects which could be dealt with under the topic of state responsibility.

15. Mr. AGO said that he would not like his remarks expressing impatience at the late appearance of Sir Humphrey Waldock's report on the law of treaties to be interpreted as criticizing the Secretariat. He appreciated highly the services that the Secretariat was rendering with its very limited resources, but the staff at the Commission's disposal was not large enough and the services provided were not adequate. It was incredible that the secretariat of the Commission should not have at its disposal services capable of reproducing rapidly a report which might, for intelligible reasons, come in late and need to be reproduced and translated urgently. The secretariat also needed to be more generously equipped for preliminary research work on

topics inscribed on the Commission's agenda. The United Nations should make an effort, and an urgent effort, if it really wished the Commission to be in a position to accomplish a task which was much heavier than that of a great many organs.

16. With reference to the topic of state responsibility and to a list of topics which he (Mr. Ago), Mr. Gros and Mr. Amado had suggested, Mr. Tunkin had said that the Commission should not base itself solely on classical international responsibility but should take account of new developments. Mr. Tunkin had implied that in the early twentieth century responsibility had not, for example, covered certain of the gravest breaches of international law. In his (Mr. Ago's) opinion he would have been more nearly right if, instead of saying that responsibility at that time had not covered some of the gravest breaches of international law, he had said that it had not covered breaches of some of the most important rules. The innovation lay not so much in the realm of responsibility itself as in the basic law. International law had made great strides in the past fifty years, especially with regard to the maintenance of peace. It woul undoubtedly develop further in future and, of course, more rules would evolve so that there would be more rules to be broken, with the consequence that more cases of responsibility would occur. The Commission should not, however, make the same error as had been made with regard to the treatment of aliens, that was, to confuse basic rules and responsibility for breaches of those rules.

17. He was as anxious as Mr. Tunkin to see responsibility for breaches of major basic rules, breaches which were a greater danger to peace, well established, but he did not think that the evolution in the field of basic rules was followed by a comparable evolution in the field of state responsibility. Of course some changes had occurred and would have to be studied. He thought, for instance, that a clearer distinction would have to be drawn today between acts which called for reparation and torts which called for sanctions. The distinction might be in relation to the nature of the rule violated. There were probably rules whose breach would call only for reparation, but there were others whose breach called not only for reparation but also for sanctions.

18. Mr. Rosenne had raised the question whether it would be preferable to codify the law of state responsibility as a whole, or to concentrate on the more specific aspects of the exhaustion of local remedies and the nationality of the claim. The Institute of International Law had been working for years on the former of those two aspects and, after having drafted only one article, had recognized that it was impossible to treat that matter without considering the whole field of state responsibility. He (Mr. Ago) therefore still believed that it would be relatively futile to work on the detail until the whole had been defined. Moreover, the General Assembly seemed to wish for the codification of the subject as a whole.

19. He disagreed with Mr. Rosenne's suggestion that in its study of state succession the Commission should concentrate only on events since 1945. It was an easy error to believe that what happened in one's own lifetime was entirely different from that which had happened in the past. He himself had had an opportunity of establishing the resemblance between some present problems in relation to certain African states and the situation in Latin America fifty years previously. It was certainly necessary to work out the modern rules, but one way of doing so would be to compare them with past rules and see where changes had occurred. That was a matter which could very easily be settled by the proposed committee.

20. Besides the essential items, the only other topic the Commission should take up was that of special missions, to fill any gap that might be caused by the absence of the special rapporteurs on the main subjects. There would not be time to do more within the Commission's term of office.

21. So far as procedure was concerned, he preferred the Chairman's suggestion, which was identical with his own earlier suggestion, but would be prepared to accept the alternative if the majority of the Commission so decided. The problem in the alternative was whether the Committee should only assist or should give instructions to the special rapporteur, who would then have to bow to the committee, which would take the responsibility for the report. If the intention was to tie the rapporteur too much, there would certainly be difficulties in finding special rapporteurs prepared to serve.

22. The CHAIRMAN, speaking as a member of the Commission, said that in referring to new developments in international life, Mr. Tunkin had presumably had in mind those new historical factors not yet adequately assimilated in any requisite legal thinking, matters concerning which the conscience of the international community had not as yet presented, in the form of specific norms, any instrument designed to reduce the potential anarchy of forces and interests to a tolerable harmony. As an illustration, he (Mr. Pal) referred to the situation created by the nuclear tests and drew attention to the views expressed by members of the Commission from time to time and recorded in the Commission's yearbooks.[2] The Asian-African Legal Consultative Committee had taken up the question of state responsibility involved in nuclear tests and he drew the attention of the Commission to his report as observer for the Commission at the fifth session of that body (A/CN.4/146).

23. Mr. CASTRÉN said that, in view of the lack of general support, he would not press his suggestion that the Commission should work in two subdivisions, even though he was sure that such a procedure was feasible.

24. He had no objection to the appointment of small committees of perhaps five members to discuss with the special rapporteurs on state responsibility and state

[2] *Yearbook of the International Law Commission 1956*, Vol. I (United Nations publication, Sales No.: 56.V.3, Vol. I), pp. 11-14, paras. 35-62; *Yearbook of the International Law Commission 1957*, Vol. I (United Nations publication, Sales No.: 57.V.5. Vol. I), p. 156, paras. 55-59, and p. 158, para. 4; *Yearbook of the International Law Commission 1960*, Vol. I (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 280, paras. 37-39.

succession how the work on those topics should be carried out. Of course, the Commission would not delegate its own functions to such committees; it would remain free to accept or reject any proposals they might make. It was an open question whether those committees should be appointed for the duration of the current session only or should continue in existence until work on the two topics had been completed. Since the Commission would in the main be engaged on the law of treaties, there was no hurry for the preliminary reports on the other two topics.

25. He agreed with the general view that the subject of state responsibility was so broad and covered such a large part of international law that the Commission should first formulate certain general principles and then pass on to study some topics of special interest, such as the status of aliens.

26. The problems raised by state succession were also vast and complex. The nature of the territorial changes which gave rise to the succession of states would certainly have to be examined, since the consequences were not the same when a state disappeared altogether as when there was a cession of territory. And it could not be said that all obligations of the predecessor were automatically taken over by the successor state.

27. One way of circumscribing the study of state succession would be to leave aside, at least for the time being, the question of the future of the inhabitants of ceded territory. He was inclined to agree with Mr. Rosenne that, after examining the general principles, the Commission should concentrate on more recent instances of state succession, though of course earlier ones and past practice should not be overlooked.

28. Mr. YASSEEN said he was firmly opposed to the idea that the Commission should divide into two subcommissions; such a course would conflict with the provisions of the statute concerning the functions and character of the Commission, and from the practical point of view would offer no solution because discussions on substance would still have to be conducted in plenary meeting. On the other hand, he saw no objection to the appointment of small committees with clearly defined terms of reference.

29. There seemed to be no practical reason why the work of a special rapporteur should not be carried out by a special committee though, to be representative, such a committee should not be too small. However, he would prefer a system analogous to that adopted by the Institute of International Law, under which a committee of persons specially interested in a particular topic would be appointed to advise and help the special rapporteur. Such a committee would in no way restrict the freedom of the special rapporteur, who after all was engaged not in a personal task but in preparing the ground for a collective effort of codification and progressive development of law. A further advantage of that method would be that members of the committee could give the special rapporteur valuable assistance in explaining particularly difficult issues in plenary meeting.

30. Either of those two methods was suitable for broad subjects, and whichever was chosen the Commission itself should always keep full control over the work and give precise instructions to the special rapporteur or committee.

31. As far as state responsibility was concerned, the first step should be to extract general principles from theory and practice. It would be illogical to study first the application of general principles in a specific sphere, however important, such as the treatment of aliens. At the same time, he did not wish to imply that that particular subject would not be extremely useful as a source of general principles; it should be given a fairly high place on the list of topics to be discussed later.

32. Mr. PADILLA NERVO said that the two trends of opinion which were emerging from the discussion — that on the one hand the Commission should be careful to avoid drafting rules which would not gain acceptance and on the other that it should take account of new factors affecting international relations — were not, as might seem at first sight, divergent but complementary and could easily be reconciled with the Commission's dual task of codification and the progressive development of law. For the purpose of truly constructive and collective work on state responsibility, members should be prepared to make concessions and to recognize the sincerity of the views of others which might derive from differences in educational, social and economic background. If international law were to evolve in such a way as to influence the behaviour of states, the Commission had to play its part in breaking down the barriers which stood in the way of understanding between nations.

33. Traditional concepts of state responsibility had been radically altered by a series of revolutionary changes, such as the appearance of many new states, the end of colonialism and the improvements in communications. In a disarmed world — and no other offered a future for mankind — the rule of law for the pacific settlement of disputes would prevail.

34. In considering the effects on the rights and duties of states of recent scientific and sociological changes which had destroyed the old legal framework of international relations, the Commission would still have to take into account the essential elements of the traditional theory of state responsibility.

35. Among the matters that would have to be reexamined in the light of modern needs were the self-determination of states and economic, political or military interference in the domestic affairs of states. The events of the past five years had confirmed his view that the recent history of Latin American countries had been largely that of safeguarding independence, gaining control of natural resources and moving towards social integration. A comparable process was probably taking place in other parts of the world.

36. The Commission's preliminary report on state responsibility, which would presumably outline its future work on the subject, should be submitted at the seventeenth session of the General Assembly in order that delegations could comment on it. The discussion in the

Sixth Committee would show whether or not the rules that the Commission was formulating and the concepts on which they were based corresponded to modern realities.

37. It would be of help if the Secretariat could prepare a digest of relevant national laws and practice on state responsibility.

38. Mr. ROSENNE said he was anxious that Mr. Ago should not be under any misapprehension: he (Mr. Rosenne) considered that the whole topic of state responsibility should be codified, and his remarks should not be construed as suggesting that the Commission should study only the rules concerning the exhaustion of local remedies and the nationality of the claim. However, the problems posed by those particular rules were so broad that they deserved separate treatment, and since the Commission had more facilities at its disposal than the Institute of International Law it should, with the assistance of the Secretariat, be able to make more progress with them than had been possible in the past.

39. Referring to Mr. Ago's observations concerning state succession, he explained that he had not urged that the Commission should ignore all the experience of the past, but that it should concentrate on the practice of the past twenty years or so, which was more likely to yield material of immediate practical relevance.

40. Sir Humphrey WALDOCK said that the committee set up to consider the programme of work might also discuss in detail the Commission's requirements in regard, for example, to secretariat services and other matters on which it should report to the next session of the General Assembly.

41. As far as state responsibility was concerned, it seemed to be generally agreed that the Commission should first study the general principles rather than specific aspects, such as the treatment of aliens, although the latter would yield useful illustrations of some of those principles.

42. Past practice could certainly not be disregarded in the study of state succession; the problems had remained much the same, and the sources of the nineteenth century would certainly be instructive.

43. The choice of other subjects for inclusion in the Commission's programme of work could perhaps be left to the committee. In his opinion the list should not be too long.

44. So far as the small committees were concerned, he considered that each should have a rapporteur, whatever the basis on which the work was to be conducted; otherwise, it was difficult to see how any progress could be made. He did not think that a committee of rapporteurs would be at all helpful. The Chairman had indicated that he was thinking in terms of a special rapporteur for each topic, with a committee to assist him during the current session. It was most desirable that special rapporteurs should be appointed soon, for then they would be able to consult, albeit informally, during the session with the members of the committees concerned.

45. He would have no objection if the committees were not actually disbanded at the end of the session, provided that they remained in being in a purely consultative capacity only; the Commission would thus be following a method similar to that followed by the Institute of International Law. On no account, however, should any such committee be empowered to give instructions to the special rapporteur.

46. Each of the committees should be large enough, consisting of perhaps ten members, to constitute a useful consultative body.

47. The CHAIRMAN said that he would have no objection to the idea that committees should continue in being even after the end of the session, provided that it was clearly understood that they would act in a purely consultative capacity. He could not agree to permanent committees with powers to give instructions to the special rapporteurs for the two topics.

48. Mr. TUNKIN said that some of the remarks made during the discussion, as well as some of those made to him during informal talks, had convinced him of the need to dispel some misunderstanding of his earlier comments on the topic of state responsibility.

49. As he had stated, the new developments which had taken place in regard to state responsibility involved certain changes in the very concept of that responsibility. It was well known that the doctrine of state responsibility had developed on the assumption that it covered mainly — he did not say exclusively — the liability for damage caused to aliens in the territory of the respondent state.

50. Patently, however, the Commission could not study the topic on the basis of that traditional assumption. In modern international law, state responsibility arose not so much out of the treatment of aliens, as out of actions which endangered, or could endanger international peace or friendly relations between states and out of breaches of the United Nations Charter as developed by General Assembly resolution 1514 (XV) of 14 December 1960, the declaration on the granting of independence to colonial countries and peoples. Accordingly, the very concept of state responsibility in international law needed to be re-examined in the light of those new developments.

51. For instance, in the traditional international law of state responsibility, attention had been focused on such problems as denial of justice, the exhaustion of local remedies, responsibility for *ultra vires* actions and the problem of reparation. Those problems had, of course, not become obsolete, but their relative importance had greatly diminished. In the modern law of state responsibility for actions which violated or theatened international peace, such questions as denial of justice and the exhaustion of local remedies were quite irrelevant.

52. On the other hand, in the new fields of international responsibility, the problem of sanctions and other consequences of breaches of the rules of international law became more prominent. He would not at that stage dwell at length on certain other changes, such as those connected with the formulation of new rules governing the legal relationships arising from breaches of international law.

53. He did not wish to suggest for a moment that he had arrived at any very definite views at that early stage on all those important questions. That was precisely the reason for his belief that a thorough preliminary study of the topic of state responsibility was absolutely necessary.

54. With regard to the Commission's more immediate problems, he agreed with Mr. Ago that the list of topics for the Commission's future programme of work should not be a very long one. Experience had shown that when a report was prepared on a particular topic by a special rapporteur which the Commission was unable to consider for a number of years, it almost invariably became necessary to review the work.

55. The Commission already had on its programme three major topics: the law of treaties, state responsibility, and the succession of states and of governments. It was quite conceivable that as many as fifteen reports might be submitted to the Commission, which would not be able to study them thoroughly for a number of years. In addition, it was generally agreed that the Commission should take some action in respect of certain lesser topics, such as special missions and the relations between states and intergovernmental international organizations. It was right that the Commission should have such topics in reserve to be dealt with as occasion permitted; indeed it might well happen that the Commission would be in a position to report to the Assembly on the one or other of those smaller topics before completing its consideration of the main topics on its programme.

56. In view of the dimensions of its task, the Commission should not take any formal action which would have the appearance of advancing its work but would only lead to waste of effort and resources. The Commission should take action only in regard to the topics of state responsibility and succession of states and some of the lesser subjects, and keep the list of topics for future work reasonably short.

57. With regard to the proposed appointment of special committees, he would not be in favour of standing committees, whether consultative or otherwise. In any event, he did not think purely consultative committees would serve any useful purpose. Committees of that type were familiar to the practice of the Institute of International Law, but the Institute was completely different in character from the Commission: it had a membership of over 100 and at each of its sessions had a great variety of subjects on its agenda. The Commission's membership was much smaller and it concentrated on one topic, or at most two topics, at each of its sessions.

58. The idea of creating a consultative committee implied that a rapporteur should consult the members of the committee. But why should not all the members of the Commission be given an opportunity of commenting on the preliminary reports?

59. With regard to the special committees to be set up to consider the topics of state responsibility and succession of states, the Chairman had indicated his preference for committees which would consider the scope of each topic. While in principle he had no objection to that suggestion, he thought that the committees' terms of reference should be more flexible; each committee should be allowed not only to deal with the scope of the topic referred to it, but also with any other preliminary questions.

60. Each special committee might consist of some five members, as suggested by Mr. Castrén. Those few members would make a special study of the topic, and not merely the general study in which they would participate as members of the Commission; in a sense, each committee would constitute a collective rapporteur. Furthermore, each of the committees should be allowed adequate time to give its considered opinion on the two difficult topics of state responsibility and succession of states.

61. The new developments which had taken place regarding both topics had rendered them more complicated than ever. Not only new principles of international law which had already come into force, but also new principles of international law which were in process of emerging should be taken into consideration. That complex situation made it all the more necessary to avoid haste in the preliminary study of both topics. It also meant that the future work of the Commission would be both facilitated and expedited by the collective reports of the two committees, even if they took the form of the separate or dissenting reports of members.

62. He wished to make it clear that the committees in question would be purely *ad hoc,* their sole purpose being to report on the preliminary aspects of the two topics and make suggestions regarding future work thereon. They would cease to exist as soon as they had reported to the Commission; the Commission would then discuss their reports and appoint one or more rapporteurs for each topic.

63. He could not understand the haste of some members in regard to the appointment of special rapporteurs. As had been pointed out by the Chairman, the whole of the session would be taken up with the law of treaties; that same topic, perhaps together with that of special missions, would absorb the next session. There would, therefore, be no loss whatsoever if the designation of the special rapporteurs were deferred until the two committees had submitted their reports on the preliminary problems involved. If special rapporteurs were to be appointed at the current session, they would only duplicate the work of the committees; moreover, in view of the complexity of the two topics, the preliminary work could best be carried out in committee. The Commission itself would not be able to discuss the substance of either state responsibility or succession of states for years.

64. The CHAIRMAN asked Mr. Tunkin whether he had any objection to the appointment of committees to report if possible during the current session. If a committee, after considering the topic referred to it, arrived at the conclusion that it could not report during the present session, the Commission could then decide to extend until the next session the time limit for the submission of that committee's report. Moreover, the

Commission's ultimate purpose was to appoint a special rapporteur for each topic; it was therefore appropriate that the future special rapporteurs should be members of their respective committees.

65. Mr. TUNKIN said that in principle there would be no objection to a committee reporting to the Commission at the current session. Viewing the position realistically, however, he could not help thinking that such a development was extremely unlikely. Sir Humphrey Waldock's first report on the law of treaties, to be circulated shortly, would have to be studied. It was therefore apparent that, in regard to the main topic before the Commission, members were faced with a difficult situation. A committee had been set up to deal with the programme of work of the Commission; the drafting committee would begin its work within one or two weeks. The members would therefore be unable to give sufficient study to the topic of state responsibility.

66. Mr. GROS said he disputed Mr. Tunkin's contention that, in the traditional doctrine, the rules of state responsibility applied mainly to the treatment of aliens. He could not, therefore, agree that there had been any change in the very conception of state responsibility. While it was perfectly true that many of the rules of the law of state responsibility had arisen out of cases concerning the treatment of aliens, in traditional international law state responsibility covered a good deal more than the treatment of aliens.

67. Many instances could be cited of important arbitration cases, and many in which international commissions of inquiry had been instituted, relating to state acts involving direct state-to-state responsibility. For example, the Dogger Bank incident[3] had led to the institution of a commission of inquiry (1904). Another example of direct responsibility had been that of the case of the Casablanca deserters, a case between France and Germany which had been decided by the Permanent Court of Arbitration in 1909.[4]

68. Numerous other examples could be given to show that international responsibility had always been studied independently of the treatment of aliens. Of course, in any case of international responsibility, there were always innocent bystanders involved who had no connexion with the state responsible: in the Dogger Bank incident, for example, a number of fishermen had been the victims of the act of the Russian State. Undoubtedly, however, the case in question had been one of direct state responsibility and had had no connexion whatsoever with the treatment of aliens in the territory of the respondent state.

69. It was generally admitted that the field of application of the rules relating to international responsibility had broadened considerably in recent years. That fact, however, did not affect in any way the basic concept of that responsibility. All it meant was that there were new causes of responsibility and new occasions for bringing claims based on the responsibility of the state. To sum up his position, he would say that the concept of a wrongful act had always existed in international law; it was only the instances of such acts that had increased in number. It was also true to say that modern examples of wrongful acts tended more often to involve directly the states themselves.

70. The discussion being conducted by the Commission was just the kind of study which should have been entrusted to a special committee. It was hardly necessary to undertake an entirely new study of the topic of state responsibility simply because in the past many of the rules governing that responsibility had been evolved from cases concerning the treatment of aliens.

71. He did not think that the two committees should do more than draft the table of contents of the study of each of the two topics. In the circumstances, he saw no reason why the committees should not meet during the session, for a few hours a week for four weeks. In that time each committee should be able to complete its task. Each special rapporteur would, of course, be solely responsible for his own report on his particular topic.

72. Mr. LIU said that one of the outstanding characteristics of modern international life was the increasing interdependence of states, particularly in economic matters. The newly independent states needed a flow of new capital and skills from outside. It was necessary to facilitate that flow, and the time had therefore come to codify the rules governing the protection of the capital and of the skilled persons concerned.

73. Another new fact of international life, and one which tended to be overlooked, was that many persons resident in the territory of newly independent states had become aliens. They were non-indigenous persons who had settled in those countries in former colonial times; in some countries they numbered thousands, in others millions. The problem was a very real one both in South-East Asia and in Africa and it was essential that some measures should be taken to safeguard the life, liberty and economic security of those persons. The problem was much wider than that of responsibility in the event of damage; it involved the responsibility of the state concerned to guard those persons against persecution or discrimination.

74. With regard to the methods of work of the Commission, he was at a loss to understand why it should be assumed that work on state responsibility should have to be begun afresh. Several reports had been submitted by the former special rapporteur; those reports represented a comprehensive study of the topic and covered most of the points mentioned in the discussion. It would be setting a bad precedent to discard all that work, which properly belonged to the Commission.

75. The CHAIRMAN pointed out that the topic of state responsibility was not the only one in respect of which that problem had arisen. The topic of the law of treaties, for example, had been given priority before 1953, but, owing to lack of time, the Commission had not been able to deal with it. The latest special rap-

[3] Hague Court Reports, Carnegie Foundation publication, Oxford University Press, New York, 1916, p. 403.

[4] *ibid.*, p. 110.

porteur was the fourth one to be appointed and, like his predecessors, he had found it necessary to submit his own report on the topic.

The meeting rose at 1 p.m.

635th MEETING

Thursday, 3 May 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. TUNKIN said that Mr. Gros had misunderstood him at the previous meeting. He had never suggested that the traditional doctrine of state responsibility had developed exclusively under the influence of cases concerning the responsibility of the state for damage to the life and property of aliens. What he had said was that the concept of state responsibility had developed on the assumption that its main field of application was the matter of damage to aliens.

3. On the basis of that misunderstanding, Mr. Gros had suggested that he (Mr. Tunkin) favoured the complete rejection of the traditional rules of state responsibility. Nothing could be further from his mind; he had merely called for a re-examination of those rules in the light of new circumstances, without prejudice to the results of that re-examination.

4. Mr. BRIGGS said he agreed with the view expressed earlier by Mr. Tunkin that the Commission should confine its formal action to dealing with a limited number of topics. It should not go beyond the appointment of special rapporteurs on the topics of state responsibility, succession of states and possibly special missions, and relations between states and intergovernmental international organizations.

5. He recalled the statement by Mr. Tunkin in the 729th meeting of the Sixth Committee of the General Assembly that four topics were the maximum number with which the International Law Commission could effectively deal. He was certain that the committee on the future programme, which the Commission had set up at its previous meeting, would take that important point into consideration.

6. With regard to state responsibility, he noted the important statement by Mr. Jiménez de Aréchaga that the question of the treatment of aliens raised such issues as expropriation, nationalization and compensation, on which other United Nations organs expected leadership from the Commission. Those problems were thorny, but the Commission could not evade its responsibility in regard to them.

7. He disagreed with Mr. Tunkin that the whole concept of state responsibility had changed. Assertions to that effect were mere speculation and no evidence had yet been put forward to substantiate them. In reality, the only change that had taken place in regard to the law of state responsibility was the emergence of new fields for its application.

8. It had been mentioned that certain rules on the subject were in the process of formation. That was tantamount to saying that there was an element of progressive development in the study of the topic of state responsibility, which was incidentally an argument in favour of appointing a special rapporteur in accordance with the statute of the Commission.

9. There had been many references to the practice of the Institute of International Law. The practice of the Institute was, first, to appoint a special rapporteur for each chosen topic and then to appoint a commission to assist him; the rapporteur then made a preliminary statement to the commission, received its comments, decided which of those comments he would take into account, and finally prepared his report for submission to the plenary meeting of the Institute. Although he did not suggest that the Commission should follow that practice in every respect, it was clear that it did not involve a departure from the system of appointing a rapporteur who was responsible for the report.

10. The preliminary study of the special rapporteur should — as Mr. Tunkin had said — be circulated to all the members of the Commission and not merely to a few of them. If, however, other members of the Commission preferred to set up a committee of ten members to conduct the preliminary survey, he would not object, though his consent on that point would depend on the terms of reference of the committee. It was essential, for example, that it should in no sense be a standing committee.

11. Moreover, he was opposed to the idea of a collective rapporteur. If the committee were to be asked to report as a body, there could only be one of two results. Either the committee presented a majority report and a minority report, thus referring in effect the issues back to the Commission, or else it presented a compromise solution with the suggestion that the compromise was too delicate for the Commission to upset. Neither result would be satisfactory.

12. He urged the Commission to appoint a single rapporteur for each topic who would be responsible to the Commission; the report should not be the work of the majority in a committee. Nor did he favour the appointment of multiple rapporteurs. He recalled that a single rapporteur had dealt with the immense subject of the law of the sea, including the régime of the high seas, that of the territorial sea, the problem of the continental shelf and the question of fisheries.

13. The CHAIRMAN said that until the 631th meeting there had appeared to be general support for Mr. Tunkin's proposal that a special working group or committee