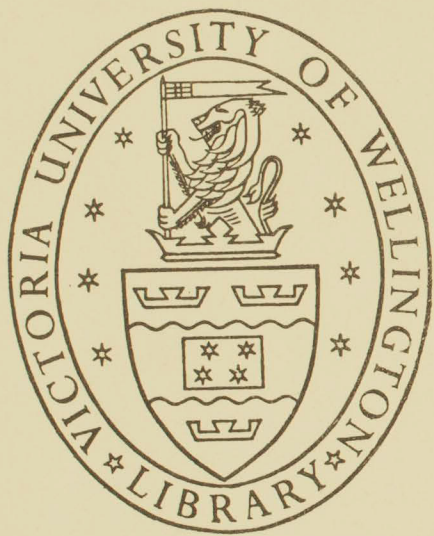
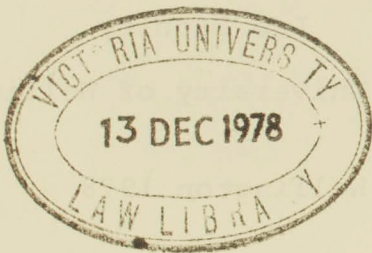


rRO ROSS, D.M.M. 1971 Survey of international law.



CONTENTS

| | | |
|-----------|---|----|
| Chapter 1 | Introduction | 1 |
| 2 | Origins of the Survey | 3 |
| 3 | The Political and Legal Background to the 1971 Survey | 10 |
| | (1) The Commission in 1971 | 10 |
| | (2) The International Political-Legal Order in 1971 | 11 |
| 4 | The Structure of the 1971 Survey | 23 |
| 5 | The Choice of Topics in the 1971 Survey | 39 |
| | Dermot Michael Mabyn Ross | |
| | Individual Topics in the Survey | 43 |
| | The 1971 Survey of International Law Documents | 43 |
| | (1) Economic Development | 52 |
| | Research Paper for International Law | 53 |
| | (2) Law of the Sea | 57 |
| | (3) Disarmament | 60 |
| | (4) Pollution | 62 |
| | (5) Trade | 63 |
| | Law Faculty | |
| | Victoria University of Wellington | |
| | Wellington 1978 | |
| | (6) The Treaty of Commerce Survey | 73 |
| 7 | The Usefulness of the Survey | 90 |
| | Conclusion | 97 |



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CONTENTS

| <u>Chapter</u> | | <u>Page</u> |
|----------------|--|-------------|
| | Introduction | 1 |
| 1 | Origins of the Survey | 3 |
| 2 | The Political and Legal Background to the 1971 Survey | 9 |
| | (1) The Commission in 1971 | 10 |
| | (2) The International Politico-Legal Order in 1971 | 13 |
| 3 | The Structure of the 1971 Survey | 25 |
| 4 | The Choice of Topics in the 1971 Survey | 39 |
| 5 | Individual Topics in the Survey | 48 |
| | (1) Recognition of States and Governments | 48 |
| | (2) Economic Development | 52 |
| | (3) The Law Relating to the Environment | 55 |
| | (4) Succession of Governments | 57 |
| | (5) Extradition | 60 |
| | (6) Unilateral Acts | 62 |
| | (7) Treatment of Aliens | 65 |
| | (8) Lawful Acts | 68 |
| | (9) Jurisdictional Immunities | 70 |
| 6 | The Treatment of the Survey | 73 |
| 7 | The Usefulness of the Survey | 90 |
| | Conclusion | 97 |

INTRODUCTION

This paper is devoted primarily to an examination of the document produced by the United Nations Secretariat known as the 1971 Survey; secondarily, the International Law Commission's discussion of the Survey and the subsequent alterations to its programme of work are considered, for one of the aims of the Survey was that it should serve as the working paper for an eventual reassessment in the light of modern developments of the Commission's long-term programme of work.

Notwithstanding the warning given by one member of the Commission in 1971 that the Survey is "not a document that should be subjected to critical analysis",ⁱ this paper examines the structure of the Survey and its selection of topics. In particular, comparison is made with the earlier survey of international law produced by the Secretariat in 1948. In addition, several topics included in the Survey which attracted the attention of members of the Commission as being suitable additions to the future programme are looked at in some detail.

But it is neither practicable nor useful to study the Survey and the Commission's long-term programme in isolation. Consequently it is necessary to place the document in a much broader context, namely that of a rapidly developing international politico-legal order. Moreover, it is possible to regard the present study as a study in miniature of the Commission as a whole - most of the issues and influences that have affected the Commission since its inception are to some extent re-examined in this paper. Hence there are many pervasive themes recurring throughout the following pages which are highlighted not only by the Secretariat's treatment of the topics in the Survey but also by the Commission's treatment of the Survey - the Commission's role in the U.N. network, and its relationship with other organisations; its role as a contemporary law-maker, and its effectiveness in discharging that role; the appropriate criteria for selection of topics for treatment, and the manner in which the Commission should best study a topic; the rapid changes in the world in general and in international law in particular; the distinction between codification and progressive development;

i. Yearbook, 1971, Vol I, p. 380, para. 17 (Elias).

the Commission's methods of work; and, above all, the Commission's relationship with States. This last factor - especially to the extent that it illustrates the complementary nature of the relationship between the Commission and the Sixth Committee - is the one theme that constantly recurs throughout these pages.

In much the same manner as the authors of the 1971 Survey had difficulty in their categorisation of topics, the present writer has experienced trouble in dividing the material into chapters. Chapters 3 and 4, for instance, could equally conveniently be combined under one heading. Similarly, the chapter dealing with the treatment of individual topics, while being a natural continuation of the preceding chapter, has a very close connection with parts of the chapter entitled "The Treatment of the Survey". Again, parts of the last chapter could easily have been considered earlier in the paper. Not too much attention, then, should be attached to the division of chapters in this paper - the whole should be regarded as the sum of several inter-related parts.

1. A/CN.4/L/Rev.1, reprinted in M. Lauterpacht, Collected Works, Vol. 1, p. 439. It was not publicly revealed until 1960 that the author of the 1948 document was none other than Sir Hersch Lauterpacht, though this fact was widely known before then: Yearbook of the International Law Commission, 1960, Vol. 1, p. 52, para. 31. The document clearly bears the hallmarks of his scholarship and lofty idealism. As an example of the latter quality, Lauterpacht considered that "in two decades or so" the Commission could cover practically the entire field of international law. 1948 Survey, para. 22.
2. The Commission also considered three other topics (domestic jurisdiction, pacific settlement of international disputes, and the laws of war), but it decided that these topics were not suitable for codification.
3. In fact, only the Economic and Social Council (apart from the Assembly) twice, both times in 1950, has submitted topics to the Commission. These topics concerned aspects of nationality.

CHAPTER 1

ORIGINS OF THE SURVEY

For the first 30 years of the Commission's existence the Survey¹ produced by the Secretariat in 1948 has served as the basis for selection of topics for codification and progressive development. At its first session the Commission considered the 1948 Survey and from the 22 topics suggested therein the Commission selected 14 as being suitable for treatment.² These topics were placed on the Commission's long-term programme of work ("the 1949 list") and, apart from topics referred to the Commission by the General Assembly or by some other United Nations body,³ the 1949 list has served as the exclusive source of the work undertaken by the Commission. The only exception is the topic "ways and means for making the evidence of customary international law more readily available", considered (pursuant to Article 24 of its Statute) by the Commission in 1950.

At various times since 1949 the Commission and the Sixth Committee have had occasion to reconsider the former's future programme of work, notably in 1958 and 1960-62. Thus, in 1960 the Commission submitted its annual report to the Assembly - but that report was a small one which called for no action by the Sixth Committee. Furthermore, the Committee only had three items on its 1960 agenda, one of which concerned the Commission's

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1. A/CN.4/1/Rev.1, reprinted in H. Lauterpacht, Collected Works: Vol I, p. 449. It was not publicly revealed until 1960 that the author of the 1948 document was none other than Sir Hersch Lauterpacht, though this fact was widely known before then: Yearbook of the International Law Commission, 1960, Vol I, p.52, para. 33. The document clearly bears the hallmarks of his scholarship and lofty idealism. As an example of the latter quality, Lauterpacht considered that "in two decades or so" the Commission could cover practically the entire field of international law: 1948 Survey, para 22.
 2. The Commission also considered three other topics (domestic jurisdiction, pacific settlement of international disputes, and the laws of war), but it decided that those topics were not suitable for codification.
 3. In fact, only the Economic and Social Council (apart from the Assembly) twice, both times in 1950, has submitted topics to the Commission. Those topics concerned aspects of nationality.

Report. The Committee thus had little to occupy it during its fifteenth session - this was part of the reason for what turned out to be a fiery session in the Sixth Committee. The other reason was mainly political. The process of decolonisation was reaching its peak by that time, and in 1960 alone sixteen new states had become members of the United Nations - some of these newly independent states were of the opinion that international law (hitherto the rules of the older, "European" nations) was not serving the interests of the expanded world community. Indeed, some of the new states considered that international law was working contrary to their interests. Many delegates spoke of a lack of interest by the United Nations in international law. Thus during the Sixth Committee's debate on the Commission's report the very role of international law in the modern international order was questioned. The Commission itself came in for much criticism, principally from the Socialist delegates, who denounced what they saw as the Western domination of the Commission. For instance the Secretary of the Commission was attacked for having issued an invitation to the Harvard Law School to revise the 1929 draft of the Harvard Research in International Law on the "Responsibility of States for damage done in their Territory to the Person or Property of Foreigners" - "Such a draft could reflect only the reactionary views of its parent institution".⁴ Similarly, the Special Rapporteur for "State Responsibility" was denounced by the Soviet bloc for disregarding Assembly resolution 799 (VIII) by emphasising the treatment of aliens in his reports.

These attacks represented more than a mere dissatisfaction felt in some quarters that the Commission was not pursuing its task properly - they represented an undisguised attempt to influence the Commission's future treatment of the topic of State Responsibility. This was a marked departure from the stance normally taken by the Sixth Committee, which had usually allowed the Commission a certain degree of autonomy in its functioning, especially on the subject of the contents of topics

4. Summary Records, Sixth Committee, 40, 657th meeting (U.S.S.R.).

(and their method of treatment) currently under study.⁵ The criticisms had emerged during the more general debate on the question whether the Commission itself or a special committee (of members of the Sixth Committee) should undertake a reconsideration of the 1949 list of the topics - the Socialist and the newly independent states generally preferred the latter solution. No decision was reached by the Sixth Committee, but a compromise was agreed upon in the form of Assembly Resolution 1505 (XV) of December 12 1960, by which the Assembly, "deeming it necessary ... to reconsider the Commission's programme of work in the light of recent developments in international law and with due regard to the need for promoting friendly relations and co-operation among states", decided to place on the provisional agenda of its sixteenth session the item "Future work in the field of the codification and progressive development of international law". Member states were invited to submit written suggestions, an invitation to which 25 states made written replies.

At its sixteenth session, eighteen meetings (the 713th to the 730th) of the Sixth Committee were devoted to the item. The debate involved more than just individual state's preferences for the treatment of certain topics⁶ - the questions whether or not the Commission should study politically sensitive topics and whether the Commission or the Sixth Committee should draw up the former's list of topics were hotly debated. By resolution 1686 (XVI) of December 18 1961 the Assembly answered the latter question by recommending the Commission "to consider at its fourteenth session its future programme of work, ... in the light of the discussions in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the General Assembly at its seventeenth session on the conclusions it has reached."

This decision was in effect a compromise - ostensibly it seemed to give the Commission the task of recasting its future programme, but the emphasis on taking into account the Sixth Committee's discussions and on reporting its recommendations to the Assembly left little doubt that the Sixth Committee

5. See Briggs, The International Law Commission, Ch. 4, pp. 316 - 361.

6. Summarised in Briggs, ibid., pp. 332 - 337.

intended to participate in any decisions reached.⁷

To assist the Commission in its task, the Secretariat prepared a working-paper⁸ which summarised all the suggestions made by the Member States. At its fourteenth session the Commission duly considered the matter of its long-term programme but because its current programme was so heavy (namely Law of Treaties, state responsibility, and succession of states and governments) it considered it "inadvisable for the time being to add anything further to the already long list of topics on its agenda".⁹ It can thus be seen that its extensive current programme afforded the Commission an excuse for not adding new topics to its agenda; but it is probable that political factors played a large part in this decision, because the question had been left unresolved at the Sixth Committee's previous session whether or not the Commission should undertake treatment of politically sensitive topics - the General Assembly had by resolution 1686 (XVI) placed the question of "friendly relations" on the Sixth Committee's provisional agenda for its seventeenth session. Hence it would have been an undiplomatic move on the part of the Commission had it chosen to add a controversial topic without the prior approval of the Assembly.

The subject of this paper had its immediate origins in discussions in the Commission that began in 1967. At its nineteenth session, the Commission, bearing in mind that the 1968 session would be its twentieth, considered it appropriate on the basis of a working-paper¹⁰ prepared by the Secretariat to review its topics for consideration. Accordingly it placed on its provisional 1968 agenda the item "Review of the Commission's programme and methods of work".¹¹ At its twentieth

7. With regard to the question whether the Commission should study politically controversial topics, it is important to note that the most sensitive topic of all at that time - friendly relations, or peaceful coexistence - would be entrusted not to the Commission but to a special committee composed of representatives of States.

8. A/CN.4/144, Yearbook, 1962, Vol II, p. 84.

9. ibid., p. 190, para 61 (Report).

10. "Organisation of Future Work", A/CN.4/L.119, Yearbook, 1967, Vol II, p. 337.

11. ibid., p. 369, para. 49 (Report).

session the Commission had before it two further documents prepared by the Secretariat: one related to the Commission's methods of work, and the other¹² constituted a working-paper which "revised, completed and up-dated" the memorandum prepared the previous year. In its report for 1968 the Commission decided to ask the Secretary-General to produce an up-to-date version of the 1948 Survey¹³. This decision, based on a suggestion first raised by Rosenne at the 979th meeting, was reaffirmed the following year: in its report on the work of its twenty-first session, the Commission "... confirmed its intention of bringing up to date in 1970 or 1971 its long-term programme of work, taking into account the General Assembly's recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment. For this purpose the Commission will again survey the topics suitable for codification in the whole field of international law, in accordance with Article 18 of its Statute. It asked the Secretary-General to submit a preparatory working paper with a view to facilitating this task".¹⁴

It is perhaps worth noting that the General Assembly by resolution 2501 (XXIV) of November 12 1969 "noted with approval" the Commission's intention of bringing up to date its long-term programme of work before the expiry of the term of office of its membership (a newly-constituted Commission would commence work in 1972).¹⁵

In response to the request for a preparatory working-paper, the Secretariat submitted in 1970 a memorandum entitled "Organisation of future work"¹⁶ which was divided into two parts. The first part consisted of a review of the progress made by the Commission on the topics on the 1949 list, together with those topics not included on the 1949 list but which the Commission had placed on its programme as a result of recommendations from the General Assembly. Also included were two

12. A/CN.4/L.128, Yearbook, 1968, Vol II, p. 226.

13. ibid., p. 223 (Report).

14. ibid., 1969, Vol II, p. 235, para 91.

15. It is ironic that one of the reasons stated by the Commission in 1971 for deferring consideration of its long-term programme was that it did not wish to tie the hands of the Commission that would succeed it in 1972.

16. A/CN.4/230. Yearbook, 1970, Vol II, p. 247.

further topics on which the Commission had submitted final drafts to the Assembly: ways and means for making the evidence of customary international law more readily available, and nationality, including statelessness. In this first part, 25 topics were cited. The second part of the 1970 working-paper consisted of 18 further topics which had been recommended for inclusion in the programme by Member States or by representatives in the Sixth Committee during the 1960 and 1961 sessions of the General Assembly. Also included were topics subsequently suggested by representatives in the Sixth Committee or by members of the Commission. Finally, the Assembly's recommendation pursuant to resolution 2501 concerning the question of treaties concluded between states and international organisation or between two or more international organisations was included. The 1970 paper, then, contained a review without comment of all the topics (i) on which the Commission had begun or completed work, and (ii) on which the Commission proposed to begin work, and (iii) which had been suggested as possible subjects for future treatment.

At its twenty-second session the Commission devoted only one meeting (the 1066th) to a discussion of its future programme of work. Many members were of the opinion that an appropriate way of celebrating the twenty-fifth anniversary of the United Nations in 1971 would be the preparation of a comprehensive survey of the whole field of international law. Accordingly, the Commission asked the Secretary-General to submit at its twenty-third session yet another working-paper (it was the fourth paper of its kind produced by the Secretariat within a period of five years) which would serve "as a basis for the Commission to select a list of topics which may be included in its long-term programme of work".¹⁷ By resolution 2634 (XXV) of November 12 1970 the General Assembly approved the Commission's intention of bringing its long-term programme up to date.

In 1971, the Secretariat submitted its working-paper entitled "Survey of International Law".¹⁸

17. *ibid.*, p. 309, para. 87 (Report)

18. A/CN.4/245 Yearbook, 1971, Vol II, Part Two, p. 1.

CHAPTER 2

THE POLITICAL AND LEGAL BACKGROUND
TO THE 1971 SURVEY

Lauterpacht had written the 1948 Survey against the backdrop of three major historical events. The first was the Second World War, which had ended only three years previously; the world community had been horrified by the mass-destruction and atrocities. Thus it was not unnatural that in 1948 there was a general desire for lasting peace,¹⁹ a state which Lauterpacht optimistically believed could be achieved by not only a reaffirmation but also a strengthening of international legal rules. Secondly, and related to the first, there was the post-war creation of a completely new organisational network of international co-operation, the United Nations Organisation. The U.N. represented a fervent hope for a stable peaceful future, the formation of the Commission being seen as a necessary ingredient of that peace; the relationship between peace and security on the one hand and international law on the other had been reflected in the Charter. Article 13(1)(a) read: "The General Assembly shall initiate studies and make recommendations for the purpose of ... promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." The Assembly discharged this obligation by inter alia establishing the Commission. Thirdly, the chief body of codification work which had been effected in the recent past had been that carried out under the auspices of the League of Nations. That work, of course, had been far from successful - the Committee of Experts of the mid-1920's and the Codification Conference of 1930 had been, for varying reasons, dismal failures, and they certainly did not augur well for the future codification of international law. Lauterpacht, however, was not deterred - he considered

19. It should be noted that the Cold War, with its correlative doubts about continued peace, was in its early days. East-West relations continued to deteriorate in the following years to such an extent that Lauterpacht suggested a moratorium of the codification process until the world political tensions had relaxed: "... in times of stress ... it may be provident, for the sake of continuity and preservation of future possibilities, to maintain what is no more than a token in [the codification] spheres": (1955) 49 AJIL 16,42.

that valuable lessons could be derived from the previous failures, notably with respect to the selection of topics for treatment and to the need for progressive development as well as codification.²⁰ The chances of success, argued Lauterpacht, were much greater in the post-war world.

The 1971 Survey, on the other hand, was written against a politico-legal background quite different from that that had existed twenty-three years earlier. The first and most obvious difference was that the Commission had been functioning ever since 1949, and other bodies had also been active in the regulation of international law - the authors of the Survey were thus able to derive considerable assistance from that experience. The second general difference was that the world political situation had undergone a rapid and significant change of character during the two intervening decades.

1. The Commission in 1971

By the end of its twenty-first session, the Commission had completed work on seven²¹ of the topics that it had placed on the 1949 list. In addition it had submitted final drafts or recommendations to the General Assembly on nine²² further topics that had been referred to it by the Assembly. The amount of the Commission's completed work was thus, at least in numerical terms, quite substantial. In some cases it had merely attempted to restate existing principles (e.g. the formulation of the Nürnberg principles) and to that extent it

20. 1948 Survey, paras. 9,17.

21. Régime of the high seas; régime of territorial waters; nationality, including statelessness; law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; arbitral procedure.

22. Draft Declaration on the Rights and Duties of States; Ways and means for making the evidence of customary international law more readily available; formulation of the Nürnberg principles; question of an international criminal jurisdiction; reservations to multilateral conventions; question of defining aggression; Draft Code of Offences against the Peace and Security of Mankind; extended participation in general multilateral treaties concluded under the auspices of the League of Nations; special missions. The two last-mentioned topics, it should be noted, were "spinoffs" from the Commission's treatment of the law of treaties and diplomatic intercourse and immunities respectively.

had achieved little.²³ But by 1971 the Commission had scored three major successes in important areas of the law, namely the law of the sea, diplomatic and consular law, and the law of treaties. Each of the Commission's drafts on those topics had been submitted to a diplomatic conference, and the resultant conventions had been very much based on the Commission's preparatory work. And since the resounding success of the 1969 Vienna Convention of the Law of Treaties was still fresh in the minds of international lawyers, it would not have been surprising to find that the 1971 Survey was a document imbued with an optimism for the future. Instead, it is possible to detect a matter-of-fact realistic approach on the part of the Survey's authors; absent were the lofty predictions and hopes that had characterised the 1948 Survey.²⁴ The general tone of the 1971

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23. Baxter argues that the Commission's work on the formulation of the Nurnberg principles had a destructive effect on the law: post, p. 14, footnote 35.
24. M.K. Nawaz, in an editorial comment on the 1971 Survey, remarked on the "modest approach" of the authors of the Survey; he also noted the absence of the "vigour and confidence" that had been the hallmark of the 1948 Survey: see (1972) 12 I.J.I.L. 71, 73-74.

It is ironic that Lauterpacht should have been optimistic in 1948 whereas the authors of the later survey were much more circumspect; one would have thought, for the reasons given on the three preceding pages of this paper, that the opposite might have been more appropriate. Undoubtedly the personal character of Lauterpacht plays a large part in explaining this paradox.

The Report of the Commission's twenty-fifth session had this to say of the 1948 Survey: "It was inspired by a confident optimism that reflected the codification ideals of an earlier period, rather than the practical difficulties experienced under the League of Nations:" (Yearbook, 1973, Vol II, p. 227, para. 152).

Similarly the fact that the 1971 Survey was written by a group of international civil servants explains to a large extent the circumspection of that document.

Survey was laudatory of the Commission's achievements, but guardedly so, ostensibly without a strong sense of optimism for the future. Rosenne, speaking during the Commission's 1141st meeting, described the Survey thus: "[It] is a sober balance-sheet because it does not fall into the trap of euphoria characteristic of some circles, at the success of the codification of the law of treaties, which was no doubt facilitated by a convenient political conjuncture."²⁵

Of the fourteen topics on the 1949 list five²⁶ remained virtually untouched by the Commission. A further topic (the juridical regime of historic waters, including historic bays) had been placed on the Commission's future programme of work in 1962 as a result of a request²⁷ by the General Assembly to commence study of the topic. In 1967 the Commission decided to defer active treatment of the subjects of historic waters and the right of asylum on the ground, inter alia, that the time had not yet come for their codification.²⁸ And in 1970, the Assembly had requested²⁹ that the Commission study the law relating to the non-navigational uses of international watercourses. Thus when the Commission began its twenty-third session in 1971 it had, in addition to its current programme of work, seven topics on its long-term programme.

By the end of 1970 the Commission had four³⁰ broad topics that were currently under study, and of these the subjects of succession and responsibility were very much major branches of international law. The topics were wide in scope and complex in nature, and the progress already made had been slow and painstaking. But what is significant is that it was generally recognised in 1971 that even if the Commission devoted every session to the study of state responsibility and succession of states and governments it would not finally dispose of those topics until

25. Yearbook, 1971, Vol I, p. 362, para 17.

26. Recognition of States and Governments; Jurisdictional immunities of States and their property; jurisdiction with respect to crimes committed outside national territory; treatment of aliens; right of asylum.

27. Resolution 1453 (XIV) of 7/12/58. The Assembly did not request priority.

28. 1967 Yearbook, Vol II, p. 369, para. 45.

29. Resolution 2669 (XXV) of 8/12/70.

30. Relations between States and international organisations; succession of States and Governments; State responsibility most-favoured-nation clause.

1978 or 1979 at the earliest.³¹ Against this background it is quite legitimate to ask the question whether there was in fact a need for a review of the Commission's long-term programme of work. This point will be the subject of later consideration in this paper.³²

In conclusion, then, by 1971 the Commission had completed with a fair amount of success the study of a large number of diverse topics; but much still remained to be done on both its current and long-term programmes of work.

2. The International Politico-Legal Order in 1971

By 1971 the dominant position of the U.N. organisation in world affairs had been established beyond doubt - its influence extended to virtually every conceivable aspect of international affairs. Peace and Security, human rights, international finance, pollution, disarmament, disaster relief, technology - all these and scores of other important contemporary issues were regulated to a greater or lesser extent by one or more of the many organs of the U.N. Unlike the League of Nations, which had not commanded universal support from states, the United Nations was composed of nearly every independent state in the world, each of which actively participated in decisions that affected everyday international intercourse. Military and diplomatic intervention in Palestine, Suez, Cyprus and the Congo had ensured the reputation of the U.N. organisation as an international force unequalled in history.

In short, when the 1971 Survey was written the U.N. network reigned supreme as the principal regulator of international affairs. This was in sharp contrast to 1948, when the post-war hopes of international peace and co-operation were being frustrated by East-West conflict in the forum of the United Nations. The state of international affairs in 1971 was significantly different from that that had existed twenty-three years earlier: this was partially due to the gradual "thaw" of the Cold War during the latter half of the 1960's, but there were several other factors, important in themselves, which together

31. One possible reason for the noticeable lack of enthusiasm in the 1971 Survey may have been the authors' tacit realisation that because the Commission's current programme was so extensive it was unlikely that a formal decision on the long-term programme would be made for at least several years, by which time many of the opinions expressed in the Survey might have become dated, and, in some cases, even obsolete.

32. post, pp. 77-78.

contributed to the development of what might be called a "new politico-legal order". The authors of the 1971 Survey noted in their introduction four such "developments on a wider scale which have broadly affected the evolution of international law over the last twenty to twenty-five years".³³

The first was the increased recognition of States of the need to fulfil the purpose set out in paragraph (1)(a) of Article 13 of the Charter, namely "[to promote] international co-operation in the political field and [to encourage] the progressive development of international law and its codification". This need, according to the Survey, was based principally on the "connexion between the maintenance of international peace and security ... and the development of international law."³⁴ It cannot be denied that States in 1971 generally appreciated this need; but it may perhaps be argued that the need was not an increased one. Ever since the emergence of nuclear weaponry and inter-continental ballistic missiles in 1945, the world had understood quite clearly the necessity for maintaining international peace - a nuclear war would, after all, have catastrophic consequences. Some might argue that by 1971 the likelihood of nuclear war had increased, whereas others might believe that the chances of such a happening had by then grown more remote, but it is submitted that in either case the need to maintain peace remained exactly as it was in 1948; that is, in both cases the need was seen as imperative. It is further submitted that the appreciated connexion between the maintenance of peace and international law had not altered significantly during the years between the Surveys: thus, in the first five years of the Commission's existence it was asked by the General Assembly to study the topics of the formulation of the Nurnberg principles, the definition of aggression, and the draft Code of Offences against the Peace and Security of Mankind, all of which topics were integrally related to the maintenance of peace and security.³⁵ Similarly, in the preamble to resolution 2625 (XXV)

33. 1971 Survey, para 7.

34. ibid., para. 8.

35. Significantly, not one of these three topics achieved much success at the political level after the Commission submitted its recommendations on the topics to the Assembly. The Commission's formulation of the Nurnberg principles, for instance, was considered by Baxter to be "law-destroying": "The Effects of Ill-Conceived Codification and Development of International Law", En Hommage à Paul Guggenheim (1968) 146, 165. Similarly, the General Assem-

of 24/10/70 the Assembly stated that it was "deeply convinced" that the adoption of the Declaration on Principles of Friendly Relations "would contribute to the strengthening of world peace and constitute a landmark in the development in international law and of relations among States, in promoting the rule of law and particularly the universal application of the principles embodied in the Charter."

Moreover, the principles of the Charter which relate to peace and security (paragraphs 3 and 4 of Article 2) obliged Member States equally in 1945 as in 1971.

In summary, then, it can be concluded that at the time the 1971 Survey was written there was a definite conviction amongst the international community that the connexion between international peace and international law should be strengthened. The question should be raised, though, whether the Commission ostensibly a purely legal body, should be entrusted to giving effect to that conviction.³⁶

The second development noted³⁷ in the Introduction to the Survey was "the growing degree of interdependence between States brought about by the ease of modern communications and the necessities of economic progress, which in turn has created demands for the development of international law in fields hitherto untouched."

bly chose not to adopt the Commission's draft Code of Offences against the Peace and Security of Mankind because the draft contained no comprehensive definition of aggression. Furthermore, the Commission was not able to agree on a definition of aggression when the topic was referred to it in 1951 - since that date several successive U.N. special committees were assigned the task of defining the term. This early lack of success of the Commission in codifying politically sensitive issues may thus add weight to the argument that the Commission is not an appropriate body to study such topics. With respect to the particular topic of the definition of aggression it should be noted that it was not until 1974 that one of the Special Committees entrusted to the task succeeded in producing a definition which was politically acceptable. Hence it is unwise to blame the Commission for its failure in this matter, because it took over 20 years of sporadic work by special committees (composed of representatives of States) before a compromise definition was finally arrived at.

36 ante, footnote 35.

37. 1971 Survey, para. 9

The truth of this statement cannot be denied, for, as the United States had realised by 1945, it is impossible in the modern world to remain isolationist and independent. The march of progress had demanded that States co-operate in matters that were not previously fields of international co-operation; and because of this increased need for co-operation, international organisations and ad hoc bodies had often been established to regulate and formulate the rules expedient to give effect to the spirit of co-operation. Consequently whole new bodies of legal rules became established "in fields hitherto untouched".

Related to this second factor, but not specifically mentioned in the introduction, has been the remarkable proliferation since 1945 of international organisations (both within and outside the United Nations umbrella). The evergrowing list of organisations may be classified into several types: permanent and temporary; intergovernmental and non-governmental; universal and regional. There is now virtually no facet of modern international life which is not regulated to some extent by at least one international organisation. The varied functions which these organisations serve illustrate the degree to which emphasis has been placed by states on international co-operation in many different fields. In the present context this recent "rise" of international organisations is important in two respects. First apart from the fact that there is hardly an area of international law which is not affected to some degree by a convention, agreement or treaty concluded by such organisations, it has now become clear that international organisations themselves are subject to rules of international law. Thus a chapter was included in the 1971 Survey entitled "the law relating to international organisations", though it is perhaps possible to discern a reluctance on the part of the authors of the document³⁸ as to whether the subject should have received the "status" of

38. "It would appear to be agreed that there is now a body of law relating to international organisations having, in many respects, its own characteristics and being in any case of a scale such as to require that reference be made to it in the present survey". *ibid.*, para. 340. This apparent reluctance, assuming it was real and not imagined, would be difficult to understand because most modern writers believe that there does exist a distinct law of international organisations. One possible explanation for this could be the fact that the writing of the Survey was supervised by a Soviet man - and since the official Soviet stance is that international organisations do not enjoy the same status as

a chapter of its own. Secondly, the proliferation of international organisations has markedly reduced the sphere of topics of law which the Commission may choose to codify, for it would be politically inexpedient for the Commission to choose to study a topic that is properly within the purview of another body. Thus, if the Commission chose, subject of course to the approval of the General Assembly, to study the topics of, say, air law or the law of economic development, it is submitted that the Commission, while acting within its legal mandate, would be exceeding its political mandate, for those topics are generally considered to be within the competence of ICAO, on the one hand, and of UNCITRAL, IBRD, IMF, GATT and UNCTAD on the other. This "quasi-jurisdictional" issue is more acute in the case of ad hoc committees established to regulate a specific activity. Thus, if in 1971 the Commission had chosen to include in its programme the topics of the law relating to the seabed and outer space law, the political repercussions of such a choice would have been far-reaching, for the simple fact that those topics were generally thought - even "assumed" - to be within the competence of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the limits of National Jurisdiction and the Committee on the Peaceful Uses of Outer Space, respectively.³⁹

States in international law (and therefore not deserving of a chapter in a review of international law), it is possible that his views may have been transposed into the discussion of the subject in the Survey.

39. In this context it is interesting to note the feeling amongst many members of the Commission that other U.N. organs and committees were usurping the role of the Commission by attempting to codify the legal rules of certain activities. Quentin-Baxter thus spoke for many when he said at the 1235th meeting "The Commission... has reason to feel some slight anxiety lest it be excluded from too many fields of law", Yearbook, 1973, Vol I, p.169, para 15. At the preceding meeting, however, Tsuruoka considered that the Commission was not being threatened by the existence of other U.N. bodies. The Commission, he argued, "should confine itself to the basic problems of international law. Consequently, the proliferation of bodies dealing with urgent and, in many cases, important matters is not a threat to the Commission's work." ibid., p. 165, para. 35

The third "development on a wider scale" to which the authors of the Survey made reference concerned the rapid progress made in the scientific and technological fields during the previous twenty or twenty-five years.

"Scientific and technological inventions have also played their part by producing a need for legal regulation of activities - such as those in outer space or on the sea-bed -⁴⁰ which, even twenty years ago, were beyond man's capacities".

Technological progress has had an impact on international law and on the function of the Commission in areas other than that mentioned by the authors of the Survey (i.e. the creation of new topics or sub-topics for regulation). First, it has confirmed the view that the codification of international law is the codification of a developing law that must take account not only of contemporary world conditions but also of anticipated changes in those conditions that scientific and technological progress may necessitate. It is pointless to codify rules that may in a few years be obsolete; there is thus a duty on the modern codifier, if he is to perform his task efficiently, to be familiar with the contemporary state of the technology relevant to the topic which he is attempting to regulate. A balance or "happy medium"⁴¹ must be struck between the rules of the past and those of the future.⁴² The already classic example of the obsolescence caused by the march of technological process on the work of the Commission has been in relation to the law of the sea; the convention on the continental shelf, the draft of which the Commission submitted to the General Assembly in 1956 (and which was subsequently adopted at the 1958 Conference in Geneva) had become obsolete within a few years - the law had stood still but progress had marched on.

40. 1971 Survey, para. 9.

41. Comment of Bartos, Yearbook, 1973, Vol I, p. 162, para 33.

42. Manfred Lachs, President of the International Court of Justice, in a commemorative speech delivered at a Special Meeting of the General Assembly on October 12 1973, said: "In law we must beware of petrifying the rules of yesterday, and thereby halting progress in the name of progress. If one consolidates the past and calls it law, he may find himself outlawing the future. If, on the other hand, one codifies rules that have not yet matured one postulates the future and calls it law; the present will not heed it and those rules will be still-born." cited in (1974) 14 I.J.I.L.1, at p. 3.

Secondly, the effect of scientific and technological advances on the conventions concluded at the Geneva Conferences on the Law of the Sea had made it abundantly clear long before 1971 that the revision of obsolete laws was an essential element of the successful codification process. The codification of international law, being in the modern world a task not merely of the registration of customary rules but principally of the progressive development of those rules, is clearly a continuing process that must take account of the international community's new needs. This need to revise from time to time the prior work of the Commission was adverted to in the Introduction to the Survey,⁴³ and during subsequent discussions of the Commission's long-term programme in the course of its twenty-third and twenty-fifth sessions many members echoed the view that topics previously disposed of should be revised when the passage of time had created a new legal situation.⁴⁴

The third consequence of rapid technological progress is that the question has been repeatedly asked whether the Commission is in fact a body suited to the study of topics that involve detailed scientific and technical aspects. It has also been asked whether the Commission is competent to deal with topics which import a large non-legal element. This would include such fields as the law of the sea-bed, air law, space law, environmental law and the law of economic development. The Commission after all is comprised of legal experts, not marine biologists, astronomers or economists; it is thus not surprising that many people consider that the treatment of technical subjects such as these should be left to recognised experts in those

43. 1971 Survey, para 20.

44. One member went so far as to consider that the Commission should as a matter of practice undertake a systematic revision of conventions it had prepared twenty years after the conclusion of codification treaties based on the Commission's preparation. His views, though, seem to be connected with a fear that if such revision did not take place other, more specialised bodies, would inherit that task, a task which in his opinion was properly that of the Commission: see the written observations of M. Reuter, Yearbook, 1972, Vol II, p. 208, para. 27. As a matter of logistics, Reuter's suggestion would be very difficult to effect by a Commission that always seems to have an extensive current programme of work.

fields. This view may derive a certain degree of support from the proliferation of ad hoc committees established to study and regulate certain technical activities - significantly those activities have not been entrusted to the Commission. The supporters of this view believe the Commission should confine its studies to the essentially legal topics - in short, to the primarily traditional chapters of international law. Members of the Commission were divided on this point when the Survey was discussed in 1973. Some⁴⁵ believed that the Commission would not be able to deal competently with technical matters, whereas others⁴⁶ were of the opinion that it would be "a real test of the Commission's strength"⁴⁷ to study technical subjects. It must be remembered, though, that the Commission retains the power, pursuant to Article 16(e) of its Statute, to consult with scientific institutions and individual experts - this power was in fact exercised (with what seemed at the time to be success) during the Commission's treatment of the law of the sea. The only bar, then, to the Commission's treatment of topics involving substantial technical considerations is a political one - that is, the deciding question would be whether or not it would be politically expedient for the Commission (as opposed to another body or organisation) to attempt to study such topics.

The fourth and final "development on a wider scale" noted in the Introduction was the greatly increased membership of the international community since 1945. The evidence of this increase - due principally to the decolonisation of Africa and Asia - was to be seen in the membership of the United Nations; whereas fifty-one States had signed the Charter at San Francisco there existed at the time the 1971 Survey was written no fewer than one hundred and twenty-seven signatories of the Charter.⁴⁸ These newly independent States, says the Survey, "have contributed new interests and aspirations to international law",⁴⁹

45. See the comments of Ago, *Yearbook*, 1973, Vol I, p. 166, para. 47; see also the written observations of Reuter, *ibid.*, 1972, Vol II, p. 207, para. 16.

46. See the comments of Ustor, *ibid.*, 1973, Vol I, p. 163, para. 5, and Martinez Moreno, *ibid.*, p. 174, para. 28.

47. Vallat, *ibid.*, p. 168, para. 6.

48. And since the membership of the U.N. has continued to rise (there are now 150 member States) the comments made on the point apply a fortiori in 1978.

49. 1971 Survey, para 9.

though it is not easy to assess the practical effect of this expansion on international law. Because of the generally accepted concept of equality of States, it is evident that international law affects all states equally, whether they be newly independent or not; thus the call that Third World States have a greater say in the codification of international law did not pass unheeded by the world community. Thus in 1961 the membership of the Commission was increased to twenty-five by General Assembly resolution 1647 (XVI), ostensibly to take into account the needs of the expanded world community. This greater representation does not, it is submitted, seem to have had a particularly significant effect on the Commission itself - the jurists from the Western countries still appear to dominate proceedings, for which reason it was perhaps not surprising to note that one member of the Commission expressed concern that the viewpoint of the Third World had not been accorded the weight he felt it deserved in the course of the Commission's work.⁵⁰ Whatever the contribution of the Third World members in the Commission, it is at conferences and in organisations where delegates sit in their capacity as representatives of states that the impact of the newly independent states has been most apparent. In such assemblies the voice of the Third World has been particularly loud in defending its rights and furthering its interests and aspirations; it is in 1978 safe to claim that the support of a majority of Third World states at a conference of plenipotentiaries is necessary before a convention can be successfully concluded. The Commission is of course aware of this, for it is a body that is sensitive to political realities to the extent that it knows that the fate of its completed drafts lies ultimately with the politicians in the General Assembly.¹

50. Ramangasoavina said, "[P]erhaps the opinions of members from new states do not carry enough weight in the Commission's deliberations." *Yearbook*, 1973, Vol I, p.173, para.9. It must be borne in mind, however, that members of the Commission sit in their personal, not representative, capacities; in theory, then, political differences should not be important. But because political and legal systems are so closely related the stance by one member in favour of a certain legal concept peculiar to his own national legal system would often necessarily import political considerations into the forum of the Commission. Rosenne, perhaps writing before the full impact of the increased Third World membership in the Commission could be assessed, considered that the danger of the national interests of each member being over-emphasised in the Commission had not in fact materialised: (1965) *Y.B.W.A.* 183.

1. Pursuant to Articles 16(j) and 20 of its Statute.

Its work, then, if it is to gain acceptance, must be accepted both in the "legal" arena of the Commission and in the "political" arena of the Assembly.

Ago, in the course of propounding the view that international law had to be re-examined in toto and cast in a new mould, had this to say of the impact of decolonisation on international law:

"[T]he world is undergoing the greatest revolution which international society has ever experienced, for two major continents which have never previously been anything more than the "object" of international relations have made their appearance in international society with a series of full subjects of international law, all with their aspirations, their genius, their traditions and their legal, religious, moral, social, economic and other ideas. These new subjects of international law intend not only to question the rules they find here, but also to participate in the formulation of the rules that will constitute the international law of the future."²

In so far as decolonisation has had an influence on international law, the rise of the newly independent states has greatly affected such areas as human rights and economic development, and, to the extent that the Commission has been directly affected, on the law of succession of States and Governments.³ The codification of the law of recognition of states and governments will no doubt be similarly influenced by the accession to independence of the Third World countries, though it is unlikely that the Commission will begin consideration of that topic for many years to come.⁴

A fifth development that may be remarked has been the upsurge since 1945 of what may be called a more pronounced concern for the individual on the part of the world community.⁵ The feeling that a State has a certain international accountability

2. Yearbook, 1971, Vol I, p. 376, para. 46.

3. See the Report of the Commission in Yearbook, 1973, Vol II, p. 228, para. 158.

4. ibid., pp. 230-231, para. 173.

5. This concern has been seen to be on occasion more political than humanitarian, as the consistent U.N. condemnation of apartheid in South Africa has demonstrated. This does not detract, though, from the overtly more humanitarian concerns expressed by States since the end of the Second World War.

not just for its treatment of aliens but also for its treatment of its own nationals has become more widespread since 1945. Hence the repeated call for abolition of racial, sexual, religious and economic discrimination. Though the roots of this concept were planted in the U.N. Charter and in the Universal Declaration of Human Rights, (both due in part to the international reaction to the Nazi persecution of the Jewish peoples) the very fact that there has evolved since the Second World War a distinct body of legal rules relating to human rights - worthy of separate treatment in the 1971 Survey - is a testament of sorts to this new international consciousness.⁶ As a result of this trend, some of the traditional chapters of international law (for example, the obligations of States to fulfil the obligations of international law, state responsibility, and international law relating to individuals) have had to be revised. A complement to this trend has been the increased international interest in relation to ecology and the environment - evidence for this may also be found in the 1971 Survey.⁷

In conclusion, the world politico-legal order that existed in 1971 was significantly different from that which had existed when the 1948 Survey was written. Gone were the bitter public confrontations between East and West - a renewed call for international peace based on co-operation in many diverse fields heralded the strengthening of the international legal order. This co-operation was being effected by a startling rise in the number of international organisations, through which the world community, composed of a greatly increased number of newly independent States, was seeking the regulation of activities not previously considered the domain of international law. Scientific and technological progress marched relentlessly on, creating new legal chapters and modifying some of the older ones. Finally, a new international consciousness had become more apparent.

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6. "Perhaps no other field has been of as much concern as human rights...", Weissberg, "United Nations Movements Toward World Law", (1975) 24 I.C.L.Q. 460, 491.
 7. with respect to the chapter dealing with the law of the environment, of course, but also in connexion with related topics like lawful acts and the law of international water-courses.

For these reasons alone - quite irrespective of the role of the Commission - it was thus most appropriate that the Secretariat produced in 1971 a document reassessing the position and direction of international law.

The first part of the document sets out the immediate historical background of the Survey. It also outlines the progress the Commission has made since its inception on the topics included in the 1948 list, as well as the progress made on other topics referred to the Commission.

The second part is the Introduction, which in sixteen revealing paragraphs explains the function of the Survey. The Introduction sets out its "terms of reference", its purpose, and its method of selecting topics for inclusion in the Survey. Furthermore, it discusses the main influences on international law in 1971, with particular emphasis on the changes in world society since the 1948 Survey was produced (e.g. the impact of decolonisation, rapid technological advances, the growth of international organisations, and the ever-increasing connection between the maintenance of international peace and security and the development of international law).

The third part is the Survey itself. Within the space of 90 pages (of the 1971 Yearbook, Vol II, Part III), the Secretariat reviews in seventeen chapters "the various topics into which international law as a whole may be divided", most of which chapters are divided into sub-topics. Included in each chapter is a discussion of the work already done in the codification process for each topic (whether by the Commission or by some other body), the work yet to be done, as well as the Secretariat's views on the most appropriate method of treatment, and, more importantly, the chances of successful completion of work by the Commission on each topic.

The 1948 Survey, however, is quite different in many respects from its successor twenty-three years later. The essential reason for the differences is that the former document was written before the Commission had held its first

3. 1971 Survey, para. 13.

CHAPTER 3

THE STRUCTURE OF THE 1971 SURVEY

The 1971 Survey is a document that may conveniently be divided into three parts. The first consists of the Preface, which in a few brief paragraphs sets out the immediate historical background of the Survey. It also outlines the progress the Commission has made since its inception on the topics included in the 1949 list, as well as the progress made on other topics referred to the Commission.

The second part is the Introduction, which in sixteen revealing paragraphs explains the function of the Survey. The Introduction sets out its "terms of reference", its purpose, and its method of selecting topics for inclusion in the Survey. Furthermore, it discusses the main influences on international law, in 1971, with particular emphasis on the change in world society since the 1948 Survey was produced (e.g. the impact of decolonisation, rapid technological advances, the growth of international organisations, and the ever-increasing connexion between the maintenance of international peace and security and the development of international law).

The third part is the *raison d'être* of the document - the Survey itself. Within the space of 90 pages (of the 1971 Yearbook, Vol II, Part II), the Secretariat reviews in seventeen chapters "the various topics into which international law as a whole may be divided"⁸, most of which chapters are divided into sub-topics. Included in each chapter is a discussion of the work already done in the codification process for each topic (whether by the Commission or by some other body), the work yet to be done, as well as the Secretariat's views on the most appropriate method of treatment, and, more importantly, the chances of successful completion of work by the Commission on each topic.

The 1948 Survey, however, is quite different in many respects from its successor twenty-three years later. The essential reason for the differences is that the former document was written before the Commission had held its first

8. 1971 Survey, para. 13.

meeting; it had no experience of the codification process in the post-World War II era from which to derive assistance;⁹ the authors of the 1971 Survey, on the other hand were able to review the results of over twenty years of codification by the Commission, as well as by other international bodies. Thus it is not surprising to learn that the 1948 Survey, in addition to the survey itself, contained several other chapters, namely "The Function of the Commission" and "the Selection of topics for codification", "The method of selection", "the character of the work of the Commission", and "Procedure of Codification". The 1948 Survey was above all, a "preparatory document";¹⁰ its author considered it necessary to include the above-named chapter headings in order to anticipate the Commission's work by providing an initial and impartial discussion of the Statute of the Commission.

The title of the chapter in the 1948 Survey dealing with the survey of topics is "A survey of international law in relation to codification". The significant word in this context is "codification", the contrast obviously being with the term "progressive development". The Secretariat, when it was asked to prepare the survey, was asked to review topics in relation to codification only. Before examining the definition of that term adopted by Lauterpacht in the 1948 Survey, it is appropriate to consider Article 15 of the Commission's Statute, which distinguishes "for convenience" codification from progressive development:

"In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice."

The "convenience" to which Article 15 refers is essentially one of procedure, because the succeeding articles prescribe differing rules of procedure for the two functions. But the

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9. The main source of codification work on whose experience Lauterpacht could rely on in 1948 was the work carried out under the auspices of the League of Nations, and in particular the work done by the Committee of Experts.
 10. 1971 Survey, para. 18.

different procedural rules are of considerable importance with respect to the power of initiative of topics for study by the Commission - thus, Article 18 was interpreted by the Commission in 1949 as giving it the right to initiate topics for codification,¹¹ even without the prior approval of the General Assembly. At its fourth session, the Sixth Committee, despite Soviet opposition, upheld this interpretation.¹² Article 16, on the other hand, was interpreted as giving only the Assembly the right to initiate topics for progressive development - and when the Assembly referred topics to it for development the Commission considered it was bound to proceed with the Assembly's proposals. And because the General Assembly has this right it is thus able to exercise a large measure of control over the work done by the Commission. It will be seen in the following pages that the statutory distinction between the two functions is for all practical purposes a dead letter¹³

It is clear that it is very difficult in practice to define with precision whether a topic is suitable for codification or for development. For instance, suppose the Commission is faced with a topic part of which has already been the subject of extensive State practice, precedent and doctrine, and part of which has not yet been sufficiently developed in the practice of States. Is that topic susceptible of codification? or of progressive development? It was to questions of this type that Lauterpacht addressed himself when he set out to define the term "codification" in the 1948 Survey.

11. Yearbook, 1949, p. 32.

12. A/C.6/331/Rev. 1.

13. Article 15 has been the subject of considerable doctrinal criticism on the grounds that it makes a distinction which is barely tenable in theory and not at all tenable in practice. The wording of Article 15 seems to have been the compromise result of divergent views between the Soviet delegate and the Western delegates in the Committee on the Progressive Development of International Law and its Codification: see Briggs, The International Law Commission, pp.129-141. Lauterpacht himself, writing in his personal capacity, was critical of the definition (1955) AJIL 16. It is perhaps a testament to the inadequacy of Article 15 that the Commission has in fact chosen to ignore the distinction established in the Article.

It was in the interests of the Commission that the term be defined as widely as possible, because of the different powers of initiative. For if codification were to be restricted to a mere restatement of agreed principles, from its very beginning the Commission would have been considerably constrained in the topics covered by its powers of initiative

"... the scope of its task would be reduced to a bare minimum. It would be reduced to matters of small compass the exclusive pre-occupation with which would impair from the very inception the stature and authority of the International Law Commission."¹⁴

In a very lucid and persuasive argument, Lauterpacht, deriving assistance from (a) the Statute of the Commission, (b) the discussions which preceded its adoption, and (c) the experience of the previous efforts at codification under the auspices of the League of Nations, established that codification could not be restricted to a passive registration of agreed principles - codification inevitably must include a degree of legislation, because in every effort at codification there are gaps and uncertainties which will be rectified by the codifier in the manner he thinks best." In this aspect of his work he will be suggesting legislation - he will be working on the lex ferenda, not the lex lata - he will be extending the law and not merely stating the law that already exists."¹⁵

The essence of the Lauterpacht thesis is that codification, in contrast to development, does not require a prior agreement by the international community on the rules of international law pertaining to a particular topic. What is required, according to Article 15, is that there be "extensive State practice, precedent and doctrine"; the fact of agreement or disagreement is irrelevant. And, continued Lauterpacht, because there had already been such "extensiveness" in nearly every field of international law, codification "embraces, in principle, the entire field of international law", apart from "urgent and novel questions demanding international regulation" which are included in the progressive development category.¹⁶ Thus Lauterpacht, when drawing up a list of potential topics for codification by the Commission, was able to draw on the whole field of international law.

14. 1948 Survey, para 11.

15. A/AC.10/30, p.3. Statement of Brierly, Rapporteur of the Committee on the Progressive Development of International Law and its Codification, May 20 1947.

16. 1948 Survey, para 23.

It has been necessary to examine the 1948 Survey's treatment of the expression "codification" because it provides a clue to one of the differences between the Survey of 1948 and that of 1971 - namely, that the topics in the latter survey covered not only codification but also progressive developments. Thus it was said in the Introduction, "The present Survey... does not attempt to categorise the topics dealt with into those suitable for codification and those suitable for progressive development, but simply provides a conspectus of the whole field of substantive international law."¹⁷ Both Surveys, then, were able to draw on the whole field of international law, but only the later document included within its purview what Lauterpacht called "urgent and novel questions".

In order to explain why the authors of the 1971 Survey included topics in the category of development, and in order to put the Commission's discussion of the 1971 Survey at its twenty-fifth session into perspective, it is worthwhile digressing slightly by explaining the breakdown of the distinction between the two functions prescribed in Article 15. In the Commission's early years, when it produced draft articles on topics which it had undertaken to codify, it would distinguish between those articles which it considered to be mere restatements of customary law, and those which it considered were legislative in character. This practice became increasingly difficult to apply until in 1956 the Commission decided to abandon it forever. In that year it submitted its final draft on the law of the sea to the General Assembly - it realised that what had begun as an exercise in codification (the topics regime of the high seas and regime of territorial waters were on the 1949 list) had in many ways ended as an exercise in legislation (notably the articles relating to the continental shelf). Thus the Commission stated in its annual report: "In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the Statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice", but also several of the provisions adopted by the Commission, based on "a recognised principle of international law", have

17. 1971 Survey, para. 18.

been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt as several do not wholly belong to either."¹⁸

Furthermore, the procedure adopted by the Commission for topics which are strictly within one of the two categories specified by Article 15 is generally the same (namely, the procedure prescribed for development by Article 16), even though the Statute prescribes differing procedural rules for each activity.

With respect to initiative, the distinction has also not proved to be important in practice. All of the topics studied by the Commission have come from either the 1949 list (which related to codification) or proposals referred to it by the General Assembly pursuant to Article 16 or by another body pursuant to Article 17 (only ECOSOC has availed itself of that Article) or "spin-off" topics related to topics already considered by the Commission (for example, the study of "the most-favoured-nation clause", generally considered to be part of the Law of Treaties). But never has the Commission sought on its own initiative to study a topic which could be said properly to belong to the progressive development category. It is extremely unlikely that the Commission would attempt to initiate such a topic; the reasons for this are political. Not only is the Commission a body which has often demonstrated its sensibility of political realities, but it must be remembered that the Commission is subject at all times to political influences - for instance, membership of the Commission is determined by voting in the General Assembly, governments are invited to submit comments on the Commission's provisional drafts, and, perhaps most important, the annual discussion of its report in the Sixth Committee informs the Commission of prevailing political attitudes to the Commission in particular and to various aspects of international law in general. Thus since most topics that are clearly more related to development than to codification (e.g. outer space, environment, economic development) are politically sensitive issues, it is unlikely that the Commission would attempt to initiate the treatment of such topics without the prior encouragement of the General Assmby. The possibility, though, that the Commission will one day initiate a topic for development still

18. Yearbook, 1956, Vol II, p. 256

remains - should that eventuality occur, the attitude of the Assembly when the Commission's recommendations are referred to it will be most interesting. But because the Sixth Committee has in the past generally shown a sympathy with the Commission's tasks, as well as having exercised a restraint in its dealings with the Commission,¹⁹ it is submitted that the Committee would probably sanction such a choice unless the topic was patently too "political" for the Commission to study.

When the Commission was considering its long-term programme during its twenty-fifth session it was clear that none of the members - not even the Soviet member - thought that they would be acting outside their powers if they recommended the inclusion in the long-term programme topics that were more in the development category than in the codification category (for example, the law of the environment, lawful acts, and the law of economic development). In other words, it can be concluded that the Commission's powers of selection of topics were considered to be identical in respect of both activities that is, the Commission had the power to select any topic it chose, which it would recommend to the General Assembly as being suitable for inclusion in its future programme. The Assembly, of course, had the final say. During the discussion Ustor summarised the practical consequences of the breakdown of the distinction between codification and progressive development: "[I]n attempting to draw up its future programme the Commission is not bound by the strict interpretation of articles 15, 16 and 18 of its Statute, but has complete liberty to survey the whole field of international law and to choose not only subjects from fields in which there has been extensive State practice, precedent and doctrine, but also subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".²⁰

The Commission in its report for the session upheld Ustor's view: "Taking into account [limitations of time and of the part-time nature of the Commission], there are no statutory restraints on the future tasks of the Commission, subject to the decision of the General Assmbly."²¹

19. see Briggs, The International Law Commission, p. 360

20. Yearbook, 1973, Vol I, p. 162, para. 3.

21. ibid., Vol II, p. 230, para. 167.

In other words, it can be seen that the discussions by the Commission at its twenty-fifth session represented a final confirmation that with respect to initiative the statutory distinction between codification and development was no longer important.

But it has been seen that twenty-five years previously the distinction was viewed by Lauterpacht as being of major importance. The twenty-two topics suggested in the 1948 Survey had a distinctly traditional look about them; none was a "new" topic of international law which had "arisen" during the course of, say, the century preceding 1948. All the topics were to be found in any contemporary comprehensive treatise on public international law.²² But this is by no means a criticism, for Lauterpacht firmly believed that "the ultimate task" of the Commission was the complete treatment of the entire field of international law.²³ To achieve this end, he considered it essential to codify first the most basic principles;²⁴ once this initial step was done, the Commission would be able to proceed to the more specialised topics until ultimately the whole of international law was codified. The Commission, however, did not wholly agree with Lauterpacht's views on this point; while it did not agree that the most basic principles in Chapter 1 of the Survey were appropriate for codification, it did agree that the ultimate aim was the codification of the whole of international law and that that aim was better achieved by a piecemeal step-by-step approach,²⁵ instead of by creating a rigid formulation into which topics could be placed as soon as they had been treated. In this context, it is worth noting the observation of Tammes at the 1233rd meeting of the Commission in 1973: "What has actually occurred is perhaps somewhat astonishing: the bulk of international law, as conceived in 1948 and delimited²⁶ in the long-term programme, is now practically codified ..." This view

22. Prof. R.Y. Jennings, when speaking of the 1949 list, which was derived from the 1948 Survey, said, "This list looks not unlike the chapter headings of a somewhat old-fashioned textbook": (1964) 13 I.C.L.Q. 385, 395.

23. 1948 Survey, para. 22.

24. For instance, the topics "Subjects of international law" "Sources of International Law" and "obligations of international law in relation to the Law of the State" were included in the 1948 Survey.

25. Yearbook, 1949, p. 280, para. 14.

26. Yearbook, 1973, Vol I, p. 159, para. 6.

it is submitted, seems too optimistic: in 1973 the Commission had disposed of only seven of the 14 topics on the 1949 list, and at least seven or eight years would be required before the completion of the two main topics then under consideration (state responsibility, and succession of States and governments). Nevertheless by the time the 1971 Survey was produced much progress had been made towards the "ultimate objective".²⁷

The 1971 Survey, on the other hand, could not be said to be conservative in its choice of topics. Included were most of the topics that one would expect to find in any major review of public international law, e.g. recognition of states and governments, jurisdictional immunities of foreign states, state responsibility, succession, diplomatic and consular law, the law of treaties and the law relating to individuals. But it contained other topics which were not so traditional: the law of outer space is the conspicuous example, as it represented a field of law that had emerged only during the twenty or so years prior to 1971. Further examples abound: the topics dealing with the environment, economic development, and international organisations did not in themselves represent "new" topics of international law; instead their inclusion in the Survey represented the increasing general feeling amongst the members of the international community that those matters should be regulated by international law. Similarly, international criminal law was considered worthy of a whole chapter to itself in the 1971 Survey (it had received only a passing mention in the 1948 Survey) - the inference that can be drawn from this is that the role of international law was seen to be extending to areas previously not regulated on an international scale. Moreover, one would not expect to find the topic of the law relating to international watercourses included as a separate chapter in a review of international law. This subject was included partly because of its topicality, yet it is a subject that is not of universal concern - the majority of states do not border on

27. The Tammes view was echoed by Castaneda, the Chairman of the Commission for its 25th Session, who said when introducing the Report of that Session to the Sixth Committee: "~~W~~hat is striking is not so much the fact that the Commission has renounced the codification of the whole of international law, but that in practice it has come so close to that ultimate aim outlined in the original long-term programme." 6th Committee 1973, GAOR, 28th Session. A/C.6/SR 1396, p. 6, para. 16.

international watercourses and, if they do, in most cases bilateral treaties regulate the legal rules applicable to those waterways.

The 1971 Survey, then, consisted of a melange of the old and the new. On the one hand there were the topics that had been considered cornerstones of public international law for well over a hundred years - the significance of each of those was considered by the Secretariat in the light of the world as it existed in the early 1970's, adapted to modern conditions; and on the other hand, there were one or two topics that were decidedly "new", and there were others which had existed for hundreds of years but which had only recently been perceived by the international community as being topics worthy of inclusion in a survey of international law.

As one might expect, the 1971 Survey included within its spectrum all of the topics included in the 1948 Survey. The one exception is the subject of "Sources of International Law" which was given special mention in the earlier survey under the heading "The General Part of International Law"; the 1971 Survey, however, did not include it as a separate topic but instead considered it in appropriate cases in relation to specific topics. As the authors explained in their introduction, "As regards the question of the sources of international law more generally it should be noted that this matter - which was dealt with in the 1948 Survey under a single heading - has, in the present study, been referred to in connexion with specific topics, and not on an overall basis"²⁸

The above quotation illustrates a problem which the authors of both surveys had to face: namely, which category should a certain topic be placed in? In many cases the answer was obvious, but in equally as many other cases the solution was not so clear. The problem was more acute in 1971 than in 1948 because of the apparently increasing interdependence of the branches of international law. It was becoming increasingly difficult to consider many topics purely in the abstract without considering also the relevance of those topics to other, more specific, topics. For instance, the subject of State Responsibility for internationally wrongful acts can be considered in general terms,²⁹ but it cannot stand alone;

28. ibid, para. 17.

29. This is in fact the method of treatment chosen by the Commission for its current work on the topic.

it has a connection with such smaller topics as inter alia the law of outer space, the responsibility for lawful acts, the law of the sea, the rights and duties of states and the treatment of aliens and their property. In fact, Lauterpacht in the 1948 Survey had treated the subject of treatment of aliens as a separate topic under the general heading "The individual in international law"; the authors of the 1971 Survey, however, considered that the topic was more appropriate to the subject of State Responsibility than to the law of individuals, and accordingly they included it within the ambit of responsibility, though a passing mention was made to the topic under the heading of human rights (para. 380).

Another example of the problem of categorisation can be seen from a quick glance at the first chapter of the 1971 Survey, "The Position of States in International Law". Of the six topics listed under that chapter, two³⁰ come from the first chapter of the 1948 Survey ("The general part of international Law"), one³¹ from the second ("States in International Law"), and three³² from the third ("the Jurisdiction of States"). Similarly, the topics of regime of the high seas and regime of territorial waters were considered under the general heading of "the Jurisdiction of States" in the 1948 Survey; in the 1971 study the Law of the Sea received separate treatment.

Not too much attention, then, should be paid to the categorisation adopted by the authors of the 1971 Survey. The authors themselves realised that "different opinions may be advanced ... on whether a particular topic should come under one or another heading".³³ And further, "the practice

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30. Sovereignty, independence and equality of states; fulfilment in good faith of the obligations of international law assumed by states.
 31. Recognition of States and Governments.
 32. Territorial Domain of States; Jurisdictional Immunities of foreign States and their organs, agencies and property; Extra-territorial questions involved in the exercise of jurisdiction by States.
 33. 1971 Survey, para. 15.

of the Commission has consistently shown that the headings of main chapters of international law should not be identified.. Even within a general chapter, the study of a particular topic necessarily implies the delimitation of its scope and the leaving aside of a certain number of issues which may themselves eventually require treatment, either as distinct topics or as aspects of a more widely defined subject, possibly encompassing elements to be found in various branches of the law"³⁴

The 1971 Survey should thus be viewed as a survey of international law as a whole, separated for the sake of convenience into many interrelated and interdependent chapters and subdivisions.

But on the other hand the varying categorisation of topics may have important consequences with regard to the future codification of those topics. The fact that in the 1971 Survey a topic was not accorded separate treatment but was instead mentioned from time to time in connection with other subjects may have the effect of relegating that topic into the background, which in turn may have the practical effect that that topic will not be codified at all in the foreseeable future. An example is the subject of "Sources of International Law" which, though it received a separate treatment in the 1948 Survey, received only a general piecemeal treatment in the 1971 Survey - the subject has never been treated in isolation by the Commission (it was not placed on the 1949 list) and the fact that it received only occasional passing mention in the 1971 Survey may have the effect that the topic may not be considered as codifiable in the years to come, notwithstanding the fact that the topic - which goes to the very essence of international law - has never been satisfactorily codified (though Article 38 of the Statute of the International Court of Justice seems to have been interpreted as a convenient definition of the sources of international law). Similarly with the topic of the relationship of international law and domestic law - the practice of inserting international conventions clauses to the effect that party States are obliged to carry out their obligations under the convention by introducing legislation in their national legislatures has meant that the importance of the broader topic

34. ibid., para. 20.

of the relationship between international law and municipal law has noticeably diminished. Thus during the Commission's 1971 and 1973 sessions not one member recommended that the Commission codify this topic in the future.

Similarly with the topic of pollution. Though the Survey deals with this subject principally under the heading of the law of the environment, the subject is also dealt with under the headings of lawful acts and the law relating to international watercourses. But because it will be seen that the Commission generally expressed more support during its twenty-fifth session for the codification of the latter two topics than for the treatment of the law of the environment, it is likely that the Commission will not attempt to codify environmental law in the foreseeable future. Already in 1978 the topics of international watercourses and lawful acts are on the Commission's current programme - as has been noted, both topics include aspects of environmental law, and it is unlikely that the broader subject of the law of the environment will be considered until the more specific aspects of the subject in the two other topics are disposed of. Thus one can expect a certain fragmentation of the subject if and when the Commission finally begins the codification of the law of the environment. One result of this fragmentation may be that the substance of the topic may be affected - the aspects of pollution (mainly water pollution) which will be dealt with by the Commission under the topics of lawful acts and international watercourse will be codified from the angle of those two broader topics, an angle which may result in different emphases being placed on the various aspects of pollution than would have been the case had the subject of pollution been considered wholly from the standpoint of the law of environment. To this extent the eventual substance of the completed work may be affected.

The discussion in the above two paragraphs is predicated on the assumption that the production of the Survey - and its varying treatment of topics - will influence the future work of the Commission. It is difficult to assess the validity of this assumption, but because the members of the Commission and the Sixth Committee consistently referred to the Survey during the 1973 discussions of the Commission's future work - indeed, occasional references to the document were still being made in both bodies as late as 1977 - it is not unsafe to

claim that the viewpoints and treatment of topics expressed in the Survey will influence the final decisions on the future work made in the Commission and the Sixth Committee.

The authors of the 1971 Survey stated in their introduction to the document that the topics listed in the Survey represented what would generally be considered to be the main branches of public international law at the present time.³⁵ It is worthwhile examining the accuracy of this statement.

To the extent that the Survey included all the topics that had traditionally been considered to be the main subjects of international law, it cannot be denied that the claim is accurate. Apart from the topic of "sources of international law"³⁶ which did not receive separate treatment - all the traditional topics of international law were included in the 1971 Survey. Admittedly, many of the names were different (for example, two topics in the 1948 Survey, "Subjects of International Law" and "Fundamental Rights and Duties of States", were included in the 1971 study under different headings but the substance of the topics of old, as viewed in 1971, was included in the Survey.

But it has already been remarked that the Survey contained many topics that could not be considered to be "traditional". Were these topics some of the "main branches" of international law in 1971? However, were there any other topics that could be considered to have satisfied that formula, yet which were not mentioned in the Survey?

It is difficult - and unwise - to be dogmatic in attempting to answer either of these questions, because many of the topics in the Survey had not been generally considered to be subjects of international law; without doubt they were topics that directly affected international intercourse in the widest sense, yet they were not necessarily considered as being matters to be regulated by law. Examples are the law relating to the environment and to economic development; these were (and are) subjects of considerable importance in everyday international life, but it is admitted that in 1971 the international community did not necessarily look upon these two topics as being matters that should be regarded as subjects of international law. Without doubt it was clear that international regulation of some sort was required for these two topics, but the question remains whether States viewed these fields as being properly within the domain

35. 1971 Survey, para. 15.
36. ibid., p. 34.

CHAPTER 4

THE CHOICE OF TOPICS IN THE 1971 SURVEY

The authors of the 1971 Survey claimed in their Introduction to the document that the topics listed in the Survey represented "what would generally be considered to be the main branches of [public international law] at the present time".³⁵ It is worthwhile examining the accuracy of this statement.

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But it has already been remarked that the Survey contained many topics that could not be considered to be "traditional". Were these topics some of the "main branches" of international law in 1971? Moreover, were there any other topics that could be considered to have satisfied that formula, yet which were not mentioned in the Survey?

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35. 1971 Survey, para. 15.

36. ante, p. 34.

of international law. They were not, for instance, in the same category as topics like the law of treaties, or state responsibility, both of which have always been looked on with a lawyer's eye.

Unfortunately the authors of the Survey did not explain in clear terms why certain of the "new" topics were included in their list; thus it is necessary to read between the lines as much as is possible in order to determine some of the criteria for selection of the topics. The authors went to considerable lengths to emphasise the fact that the 1971 Survey was a modern document - it was a study that reflected the contemporary conditions. This continual reminder pervaded the Introduction, which could partly explain the choice of some of the topics. Some recent events had had a profound effect on the international community; for example, man had recently landed on the moon for the first time, the wreck of the oil tanker "Torrey Canyon" had caused havoc to the environment of the English Channel, there had been a spate of aerial hijackings, there had been several terrorist attacks on diplomats, and more and more countries were showing the signs of becoming "nuclear" powers. A feeling that these matters should be made the subject of definable international law can perhaps be deduced from the Introduction to the Survey, in which the authors emphasised the developing state of world affairs.³⁷ The rise of an independent Third World, rapid scientific and technological advances, the proliferation of international organisations, and above all the omnipresent need to maintain international peace and security - all these pointed to an increasingly hectic and complicated world environment, a situation which it could be argued could be alleviated, if not remedied, by international regulation. This is the inference that the writer derives from the Introduction, namely that because certain matters were of great topicality in international affair it was appropriate that those matters should be placed into the international legal context. It is thus submitted that it is a misnomer to consider topics such as the law of outer space, of the environment, of economic development and even of international organisations as being "main branches" of international law. While these subjects were of undoubtedly greater significance in

37. 1971 Survey, paras. 8-9.

1971 than, say, twenty-five years earlier, it does not follow in the writer's opinion, that for that reason they should have achieved the status of "main branches" of the law.

This argument derives support from a consideration of certain other subjects of equal importance to the maintenance and operation of international intercourse yet which did not have the political impact of the four topics mentioned in the above paragraph. Matters dealing with, for example international health law, labour law, maritime transport, meteorology, postal communications, telecommunications, culture, science and technology and intellectual property³⁸ - each of these subjects could not be said to have been "new" in 1971, for they had existed in various stages of development and sophistication for many decades previously. But it is significant that the authors of the 1971 Survey did not consider these subjects to be worthy of the status of being "main branches" of international law - accordingly, apart from occasional references in relation to other topics, the Survey ignored the topics listed in the previous sentence. But a strong argument can be put forward for the view that these topics should to a greater or lesser extent have received equivalent treatment from the authors of the Survey as was afforded for subjects dealing with the environment, outer space and economic development. It cannot be denied that the subjects in both lists were of major importance to the continued functioning of world affairs; without co-operation in matters dealing with weather predictions, for instance, or international trade agreements, or exchanges of scientific information, the economic social and scientific progress of the world would be severely retarded. In short, international co-operation in these matters has come to be essential. And for the optimum efficiency and economy of the operations involved in these spheres of co-operation it is clear that some form of regulation is both expedient and necessary. Whether the regulation is best achieved in each particular case by bilateral agreement, or by multipartite treaty, or is instead regulated by unwritten customary rules, is immaterial in this context - what is important is that States have recognised the need for agreement on an international scale in matters that affect the international community. Hence there have been attempts at achieving

38. Admittedly, though, some of these areas are considered to be principally under the aegis of organisations and bodies outside the United Nations network. Perhaps it was for this reason that the Secretariat did not include these topics in the Survey.

consensus in all the fields mentioned in this paragraph. Most of these agreements have been reached in the form of conventions concluded under the auspices of a special organisation which has been created specifically for the purpose of achieving uniform international rules in a certain field. Hence the profusion of conventions emanating from such bodies as the Universal Postal Union, the International Telecommunication Union, the Inter-Governmental Maritime Consultative Organisation, the International Labour Organisation, the World Health Organisation, the World Meteorological Organisation and the World Intellectual Property Organisation, to name but a few of an ever-growing list of international organisations.

What is it, then, that makes the fields of activity covered by the abovementioned organisations separate from a field like the environment, or economic development? There seem to be no reasons of principle why the one group should have been excluded from the Survey whereas other specific topics of a similar ilk were included. One reason that immediately suggests itself is that the fields of activity excluded from the Survey were fields properly under the aegis of their respective organisations, and therefore it was deemed not appropriate for the International Law Commission even to consider the possible treatment of those subjects. Thus, according to this argument, matters dealing with patents and copyrights were properly the responsibility of WIPO, health for WHO, labour for ILO, and weather for WMO. However this argument is unsatisfactory if one glances at some of the topics included in the Survey which in 1971 were considered to be the chief responsibility of a certain organisation or an ad hoc committee. The law of economic development, for example had traditionally been considered to be the domain of such diverse bodies as UNCITRAL, UNCTAD and UNIDO on the one hand, and GATT, IBRD and IMF on the other. Similarly, air law had been principally the child of ICAO since 1944, though not all aspects of the topic were within the purview of ICAO. The law of the seabed was in 1971 being considered by the Committee on the Peaceful Uses of the Sea-bed and the Ocean-Floor beyond the limits of National Jurisdiction.³⁹ Further, the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space had

39. The inclusion of the topic relating to the law of the Sea-bed can be defended on the ground that its inclusion "completed" the broader topic of the law of the sea.

been dealing with the law of outer space.⁴⁰ Thus the fact that other specialised agencies existed should not be considered to have been the reason for the inclusion in the Survey of some topics whereas other topics were excluded.

One might also argue that some topics were excluded because they were already the subject of international agreement in the form of a convention duly concluded at an international conference.⁴¹ This explanation is similarly invalid, for if it were true then it would follow that all the topics included in the 1971 Survey were not already covered by existing international conventions. This, of course, is not true - many of topics in the 1971 Survey were already the subject of conventions concluded as a result of the preparatory work either of the Commission itself (for example, the law of Treaties, diplomatic and consular law, and the law of the Sea) or of other specialised agencies (for example, ICAO and air law, and UNCITRAL and economic law). Yet these topics were included in the Survey. Besides, some of the topics not included in the 1971 Survey were under the umbrella of a specialised agency and were regulated by international conventions but were not the subject of uniform agreement amongst states. The example of the topic of the law of intellectual property will suffice to illustrate this point. Various conventions have been concluded on this topic in the past, the two most notable being the World Copyright Convention of 1952 and the Stockholm Convention of 1967, in each of which conventions a substantial measure of agreement was reached. Yet there is still a considerable degree of disagreement amongst states - for instance, a patent registered in

40. The inclusion of the topics of air law and outer space law can be defended on the ground that they completed what might be called the "geographical" branches of international law. Subjects like territorial domain of state and the law of the sea were included (as well as the law of international watercourses), and hence it could be argued that the presence of topics dealing with air and space rounded off the "geographical" subjects. Moreover, the topic of air law is inextricably linked with that of the law of the sea and with territorial domain; similarly there is an obvious connexion between air law and space law. This "interdependence" of topics illustrates the point that the inclusion of one topic in the Survey may provide a useful background to the issues raised in another. For example, the "geographical" subjects provide a relevant source of material for a consideration of topics such as lawful acts and environmental law.

41. This was a reason put forward by Lauterpacht in the 1948 Survey. "[This] memorandum does not attempt to cover field already covered by existing international conventions such

State X will not necessarily be recognised in State Y. Thus, despite ostensible international agreement evidenced by conventions, it is evident that the law of intellectual property is by no means settled. In 1971, however, the authors of the Survey, for reasons that are not readily discernible, chose to ignore this topic.⁴²

In conclusion, then, it is submitted that the fact that a particular topic had already been "allotted" to a specialised agency, or had already been the subject of an international convention was not the determining factor in the decision by the Secretariat when it selected its topics for inclusion in the 1971 Survey.⁴³ Of course, the fact that a subject was already regulated by a convention, or was considered to be the domain of another body, would clearly affect the Commission's decision whether or not that subject was "ripe" for treatment.

It must be remembered that the Commission is primarily a legal body - its members sit in their personal capacity as

as those in the fields of air law or of international postal communications." para. 25.

42. It is of interest to note that Charles S. Rhyne, in a book entitled International Law (U.S.A., 1971) devotes a whole chapter to the subject of intellectual property.

It can of course be argued with some force that this topic is not a "main branch" of international law, and accordingly should not have been included in the 1971 Survey. But it is not easy to reconcile the exclusion of this topic with the inclusion of a topic such as environmental law - the latter certainly had a more prominent international role in world affairs in 1971, but that does not necessarily mean that the latter was ipso facto a "main branch" of international law whereas the former was not so considered.

43. It is appropriate at this point to consider the role of the Secretariat in the U.N. Organisation. Because it is a central U.N. organ, it is important that it does not favour some subsidiary organs and specialised agencies at the expense of others. This feeling of impartiality was perhaps a factor in the preparation of the Survey, for if the document had included a topic which had been traditionally the preserve of a certain specialised agency, that agency may have expressed pique and resentment. This may explain why subjects historically the "property" of WHO, ILO, WMO, etc were not included; it does not, however, explain why the topics dealing with air law, outer space law and economic law were included.

"persons of recognised competence in international law",⁴⁴ and despite the fact that the members are elected as a result of a political vote in the General Assembly and that States have ample opportunity to influence the Commission's proceedings by making submissions on its drafts and, above all, by debating its reports in the Sixth Committee, it is as independent jurists that the members of the Commission conduct their sessions. Other U.N. bodies, however, are not so non-political; whereas a few resemble the Commission to the extent that they are composed of experts in a particular field sitting as independent persons, most bodies are comprised of representatives of States acting in that capacity. Thus bodies such as ILO, ECOSOC, WHO, GATT and UNESCO are essentially political bodies. Because of this fundamental difference of character between the Commission and other U.N. bodies, it is quite possible that the authors of the 1971 Survey chose not to include certain topics because they were clearly not suitable for treatment by the Commission and were instead more properly the domain of a political body. The topic of disarmament and the use of nuclear weapons may be cited in this context. The Survey made two references to this topic, one in relation to "the prohibition of the threat or use of force"⁴⁵ and the other in connexion with "the prohibition and limitation of the use of certain methods and means of warfare"⁴⁶, yet in each case it is possible to infer a certain reluctance on the part of the authors of the document in including the topic at all. It seems to the writer that the subject of disarmament was included in the Survey purely because it conveniently slotted into the general framework of the two broader topics "The law relating to international peace and security" and "The law relating to armed conflicts" - had the subject been omitted there would have been a noticeable gap in the Secretariat's treatment of the broader topics. For it is very clear that the topic of disarmament and the use of nuclear weapons is one that the Commission would not even have considered working on, certainly not in 1971 and probably not in the foreseeable future. The reason is simply that the topic is too politically sensitive for an essentially legal body like the Commission. The authors of the

44. Article 2(1) of the Statute of the Commission.

45. 1971 Survey, para. 25-28.

46. ibid., paras 428-432.

Survey made this point in clear terms: "[T]he history of [the attempts to prohibit the threat or use of force] over the past twenty-five years suggests that they are more likely to be successful, at least in the sense of receiving the eventual broad approval of governments, if they are made in bodies which are composed of representatives of states"⁴⁷

It is thus possible that the authors of the Survey chose to exclude certain topics⁴⁸ because they considered that those topics were clearly appropriate for treatment by a political body. In the absence of any evidence, however, either of such topics or of the intention of the authors, it is no doubt preferable to give the writers of the Survey the benefit of the doubt by concluding that they did not omit topics because of their political sensitivity but instead because they did not consider them to be "main branches" of international law.

There seems nothing exceptionable about the inclusion in the Survey of the other topics not mentioned earlier in this paper. One might argue that in some cases certain topics received more emphasis than would be expected, whereas others received little more than a passing mention, but it should be remembered that the authors of the Survey made it clear⁴⁹ that the differing degrees of emphasis should not be given undue weight, for the essential purpose of the 1971 review was merely to list with explanatory comments the main branches of international law.

However, one might argue that the topic of the law relating to international watercourses was not a "main branch" of international law, and therefore was not deserving of the status of being a separate chapter in the Survey. The topic had obvious connexions with several other topics in the Survey (for example, territorial domain of States, the law of economic development, lawful acts, and environmental law) and it is possible that the subject could have been more effectively treated as an element of those broader topics, instead of by according it separate treatment.⁵⁰ Perhaps the real reason for the inclusion of this topic was that by 1971 it had become progressively more topical in the eyes of the international community.

47. ibid., para 119.

48. and in so doing, the authors would have pre-empted the Commission's decision on the desirability of selection of topics for treatment.

49. 1971 Survey, para. 15.

50. Most comprehensive studies of international law, for instance, omit reference to the law relating to international watercourses.

Ten years previously, when the Sixth Committee had been debating the Commission's future work, only three states (Argentina, Iran and the Netherlands) had suggested that the Commission study the topic.¹ In 1970, however, following reports produced on the subject by the Secretariat, and following the adoption in 1966 by the International Law Association of the Helsinki Rules on the law of international drainage basins, the General Assembly adopted a resolution² recommending that the Commission should study the law of the non-navigational uses of international watercourses. In other words the international community considered in 1970 that during the previous decade the state of this subject had progressed sufficiently to a position where the law of international watercourses was "ripe" for treatment by the Commission. For that reason alone it was expedient that the topic should be included in the 1971 Survey. A question remains, though, whether the topic was in fact "generally considered to be a main branch" of international law.

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1. A/C.6/SR.713-780, GAOR, 16th Session, 1961, Sixth Committee.
 2. Resolution 2669 (XXV) of December 8 1970.

CHAPTER 5

INDIVIDUAL TOPICS IN THE SURVEY

It is proposed now to consider several of the topics included in the Survey in order to evaluate the reasons given in the Survey and during the discussions in the Commission for and against the codification and progressive development of these topics. Obviously it is not practicable in this paper to look at every topic - rather, the topics selected are those which attracted the most support during the Commission's discussion of its long-term programme at its twenty-fifth session.³ No attempt to examine the substance of the topics is made, though where appropriate reference is made to the substantive law in order to explain the reasons why or why not a topic should be included in the Commission's programme. The following discussion of the chosen topics is much more than a mere evaluation of reasons for and against a topic's susceptibility of codification - inextricably linked are wider issues, many of which are considered to a greater or lesser extent elsewhere in this paper for example, the relationship between the Commission and governments; the Commission's ability to tackle technical subjects, or politically sensitive ones, or matters already being treated by other bodies; the distinction between codification and progressive development; and the Commission's methods of work, particularly in relation to the question whether or not a topic should always be studied as a preparation for a draft international convention. No significance should be attached to the order in which the following nine topics are examined.

1. Recognition of States and Governments:

Recognition is dealt with in the 1971 Survey in only twelve paragraphs (paras. 55 to 66) - reference is made to efforts to regulate the subject on an international scale since 1933, and the basic doctrinal viewpoints on the topic are summarised. It is undeniable that the topic of recognition of States and governments is one that is fraught with political difficulties - State practice, and doctrine, on the subject is so varied from State to State and from region to region that it would be difficult, if not impossible, to deduce a common denominator at the international level. In the words of Lauterpacht, "The view

3. post, p.80.

is widely held⁷ that questions of recognition pertain to the province of politics rather than of law."⁴ Yet the view is also widely held that recognition - "one of the central and most frequently recurring aspects of international law and relations"⁵ - is a subject of undoubted importance. For this reason the Commission decided in 1949 that the subject should be placed on its long-term programme as a topic susceptible of future codification but the Commission has yet to undertake a study of the topic.

On several occasions, though, questions of recognition have arisen incidentally in relation to other subjects, but on each occasion without success. Thus at the Commission's first Session, during its work on the draft Declaration on Rights and Duties of States, it declined to insert an article which provided that "Each State has the Right to have its existence recognised by other States" on the grounds that "the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration."⁶

Another example cited in the 1971 Survey of the Commission's incidental treatment of recognition occurred in 1967 when the Commission included Article 7 paragraph 2 in its draft articles on special missions - that paragraph was: "A State may send a special mission to a State, or receive one from a State, which it does not recognise".⁷ What is significant is that the following year the Sixth Committee decided to delete the paragraph⁸ - not only did this represent a departure from the Committee's usual practice of not altering the Commission's completed drafts⁹ (though in this case the draft was not referred to a diplomatic conference - instead it was adopted by the Assembly in 1969 as the Convention on Special Missions) but, more importantly, it demonstrated quite clearly that recognition is a subject upon which international agreement is very difficult to achieve.

4. 1948 Survey, para. 42.

5. ibid

6. Yearbook, 1949, p. 289, para. 50.

7. Yearbook, 1967, Vol II, p. 350.

8. GAOR, Twenty-third session, Sixth Committee, 1048th meeting, para. 43.

9. Briggs, The International Law Commission, p. 360.

The authors of the 1971 Survey separated the subject of recognition into two distinct parts (para. 66): on the one hand there is the act of recognition, and on the other hand there are the legal consequences of recognition. The first is generally considered to be a matter of discretion for each State (the "freedom of choice" doctrine), which in turn implies that there are really no legal rules susceptible of codification, and even if it is not considered to be a matter of discretion agreement on any one practice would be difficult to attain. With respect to the second, though, the authors of the Survey were more optimistic that specific aspects of the subject might be suitable for codification - e.g., modes of recognition, and the retroactive effect of recognition. During the Commission's discussion of its long-term programme in 1971 and 1973, two members¹⁰ favoured the codification of the second part of the subject, though Kearney argued¹¹ that if the first part was not susceptible of codification there would not be any advantage in attempting to define the legal consequences of recognition or non-recognition. But apart from two members¹² who considered that the subject would soon be "ripe" for codification, the general feeling in the Commission was that the topic of recognition, notwithstanding its important place in the field of international law, was not codifiable because of its related political difficulties.

Should the subject be codified because of its importance, or should its codification be deferred because of its political implications? The latter course seemed to be the wiser decision, because if the Commission were to attempt to codify the topic it is unlikely that the Commission's draft (assuming it could agree on a workable draft) would receive the approval of the General Assembly or of a diplomatic conference - the experience of the paragraph in the draft on special missions is a strong indication of this. But all of the above discussion is tied to the assumption that if the Commission were to attempt codification of recognition it would try to prepare a draft convention - but because of the formidable political obstacles

10. Yearbook, 1971, Vol I, p. 373, para. 14, (Bedjaoui); ibid. p. 379, para. 14 (Eustathiades).

11. ibid., 1971, Vol II, p. 209, para. 9.

12. ibid., 1973, Vol I, p. 160, para. 19 (Hambro); ibid., p. 170, para. 24 (Calle y Calle).

connected with the adoption of a convention it may be possible that the Commission could produce a code or a formulation of legal rules pertaining to recognition not to be adopted by way of convention but instead merely to recommend to the world community what the Commission's views on the most expeditious rules relating to recognition are. In this respect, after a period of time it is possible (though unlikely in such a politically sensitive area) that the Commission's work could influence the actions of some governments and eventually contribute to the formation of customary rules in the area of recognition. Kearney would appear to support this view when he wrote, "The absence of conventional requirements in this area would tend to permit mitigation of the consequences, whatever they may be, of non-recognition and thus contribute to reduction of international tensions, rather than exacerbate them".¹³

Rosenne has consistently argued¹⁴ that the preparation of a draft convention should not necessarily be the Commission's main aim when it undertakes its codification work, an argument which is supported by its Statute: a draft convention is not prescribed as the function of the Commission's work on codification (unlike progressive development) under Article 15, and the deliberate flexibility of its methods of work has meant that the Commission is able to tailor its work to suit the requirements of the international community. A draft convention may thus not always be appropriate. Ago, in contrast, believes that "in the world of today, written rules have to be stated in the form of conventions."¹⁵

But in any case it is unlikely that the time is yet "ripe" for the undertaking of the codification of the subject of recognition of States and governments. The political obstacles seem overwhelming, and since the subject is a large one (the codification of which would take many years) it would probably be improvident for the Commission to embark on treatment of the subject (or even of specific aspects of it) without the encouragement of the General Assembly.

By way of postscript it is worth noting that the planning group of the Enlarged Bureau of the Commission considered at the Commission's twenty-ninth session the viability of the treatment of several of the topics on the 1949 list, including recognition, which have yet to be codified. By selecting

13. Yearbook, 1972, Vol II, p. 209, para. 9.

14. see, for example, ibid. ., 1971, Vol I, p. 362, paras . 17-18

15. ibid., p. 376, para. 47.

jurisdictional immunities as being suitable "for active consideration in the near future" the planning group implicitly indicated that recognition is not yet thought to be susceptible of codification.¹⁶

2. Economic Development:

The Survey devotes chapter III to the topic "The Law Relating to Economic Development", in paras. 150-167. The topic as such was not included in the 1948 Survey, but because it has obvious connections with other branches of international law (for example, the law of treaties and the most-favoured-nation clause and rights and duties of States, and the law relating to individuals) the subject has occasionally arisen in the course of Commission's work. Perhaps the two main features of the subject are, first, that the law relating to economic development is an emerging and developing body of law, and, secondly, that there is a remarkable number of organisations and other bodies already regulating to some degree the rules applicable to most aspects of the subject. With respect to the first-mentioned, several members¹⁷ of the Commission expressed doubts on the wisdom of trying to "freeze" developing law - against this argument, though is the view (implicitly shared by the authors of the Survey) that the law is sufficiently developed for regulation on an international scale to be expedient. Moreover, several United Nations organisations have been regulating aspects of the subject for many years, with apparent success; thus, generally speaking, it is erroneous to say that the law of economic development, or at least a large part of it, is not yet susceptible of codification and progressive development.¹⁸

From the Commission's point of view, the outstanding characteristic of the regulation of the law of economic development is that that regulation has been and is being carried out by other specialised organisations and ad hoc committees. Thus, during the Commission's formal discussion of its long-term programme it was obliged to ask itself the question whether it could profitably study any aspects of the subject, mindful of the facts that it did not possess a specialised knowledge of the technical side of economic law and that the subject was for the most part being regulated by other bodies. Though there was no

16. A/CN.4/L.262/Add.1, para. 15 (Draft Report, Chapter V, Section E).

17. for example, Yearbook, 1973, Vol I, p.160, para.17 (Hambro)

18. Indeed, the authors of the Survey speculated that there may

consensus on the point, the majority opinion was that the Commission should not attempt to study any part of the subject.

In relation to the technical side of the subject, many members were of the opinion that the Commission was not sufficiently qualified to undertake a study of the law relating to economic development. Thus Ago said, "[I]t would be unwise to take up the study, however interesting it might be, of questions such as the law relating to economic development..., which require highly specialised knowledge and for which other bodies might be better qualified. The Commission would do better to concentrate on tasks whose scope was better adapted to its abilities."¹⁹

Ustor, on the other hand, while admitting that a topic like economic development was linked with highly technical questions, was of the opinion that the Commission's success in overcoming the technical problems associated with its study of the law of the sea was a sufficient rebuttal to Ago's viewpoint.²⁰ Ustor, however, did not refer to the fact that other bodies had what could be called a jurisdictional monopoly of the regulation of the law relating to economic development. It is probable that the Commission does have the intellectual and practical ability to codify and develop such a subject - its work on the law of the sea is a sufficient reference - especially in view of the fact that by Article 16(e) of its Statute it is encouraged to consult experts where appropriate; but it is perhaps legitimate to question whether a draft produced by the Commission would have as much international prestige as one composed by experts in the economic field, for it is a widely held view that the Commission should restrict itself to "legal" subjects. On the other hand there is the view that the Commission, composed of independent Members, and cognisant of political realities, could effect as good a draft as any other body.

But the principal objection to the Commission's study of the law relating to economic development is that other bodies are already heavily involved in the field of its regulation. Many members of the Commission were of the opinion that it would be pointless to duplicate work done by other bodies. In the

be emerging a body of customary, general law in relation to the sub-topic of economic assistance given by developed States to the underdeveloped ones: para. 166.

19. Yearbook, 1973, Vol I, p. 166, para. 47.

20. ibid., p. 163, para. 5.

words of Kearney, "There does not appear to be any demonstrable need for the Commission to enter a field that has been pre-empted by other organisations, particularly when, in the field which is traditionally its own, there remain so many unsatisfied demands."²¹

There is a great deal of cogency in this view - not only is it a waste of resources to study a topic already studied by another organisation, but it might also be diplomatically inexpedient to do so to the extent that those "usurped" bodies might express resentment that their jurisdiction has been undermined.²² The Secretariat expressed no opinion on this matter in the 1971 Survey, though it is possible to discern by reading between the lines, a muted plea that the Commission should not attempt to encroach into the area of economic development.

Several members of the Commission urged the Commission to include the topic in its long-term programme - they stressed the importance of the subject, especially with regard to the question of economic assistance to the developing States. Not surprisingly, these members²³ were generally from the developing countries themselves. But the fact remained that in 1973 most aspects of economic development capable of regulation were covered by other bodies - the General Assembly, for instance, had adopted several resolutions on the subject, and bodies such as the Committee on Natural Resources, ECOSOC, GATT, UNDP, UNCTAD and UNCITRAL were actively engaged in promoting international co-operation of economic matters. Nawaz, writing in the Indian Journal of International Law, suggested that "the Commission might consider including in its future work-programme the legal regulation of hydrocarbons - a subject of increasing legal significance to the welfare of peoples in developing countries,"²⁴ but it would seem incongruous were the Commission, and not a specialised body, to study that question, especially since political questions would be in issue in so far as the majority of the world's supply of hydrocarbons is concentrated in a mere handful of States.

21. *ibid.*, 1972, Vol II, pp. 210-211, para. 22.

22. For the other side of the coin, *ante*, p. 17, footnote 39.

23. Bedjaoui (1971); and Sette Camara, Tabibi and Calle y Calle (1973).

24. M.K. Nawaz, (1972) 12 IJIL 71, 75.

3. The Law Relating to the Environment:

There are many similarities between this and the preceding topic - both are developing subjects, and thus more in the category of progressive development than of codification; neither received separate treatment in the 1948 Survey; each is to some extent being regulated on an international scale by specialised organisations; the study of each would involve technical questions; each (especially environmental law) is related to other branches of international law; and the regulation of each topic would involve certain political considerations. Thus much of what was said in relation to the law of economic development is of equal relevance in relation to this topic.

The Survey covered this topic within the space of only five paragraphs (paras. 335-339) - the authors placed their emphasis on the fact that the law relating to the environment is essentially "new" law, since the international awareness of the need to take preventive measures to preserve the environment had become prominent only during the previous decade, technological developments having played a large part in the increased consciousness. The authors also pointed out that, because the law was developing constantly, "The full ramifications of the issues raised cannot easily be defined" (para. 336). In fact it is possible to infer a not very subtly expressed indication that the Secretariat would not be in favour of the Commission's treatment of environmental law, at least not for a long time: "Having regard, however, to the importance of the subject and the sizeable growth in the body of relevant law which may be expected to occur during the years which the Commission's future programme may cover, it has been thought that the Commission's attention should at least be called to this area". (para. 337, emphasis added).

One reason for this reticence may have been that the United Nations Conference on the Human Environment was due to convene at Stockholm the following year - perhaps the Secretariat did not want to divert any of the attention on the law of the environment away from the political arena before the Conference had begun.

Not only is the law relating to the environment essentially new law, but it is also very wide in scope. It is directly related to many other aspects of international law, notably the "geographical" topics (laws of the sea, air, outer space, and international watercourses) and the topics dealing with State responsibility for both wrongful and lawful acts. Thus, in practical terms, it would be a very difficult subject to study in its entirety without duplicating any of the work the

Commission had already done or would do in the future. For this reason no member of the Commission recommended the treatment of the whole topic - those members who did favour any involvement by the Commission in the regulation of environmental law suggested that only a few aspects of the subject would be suitable.

Castaneda, for instance, was of the opinion that "the question of the environment could lend itself to useful action by the Commission, [which] might well endeavour to identify five or six legal principles on the protection of the environment."²⁵

Similarly, Martinez Moreno believed "that the law relating to the environment was a suitable topic for inclusion in the Commission's programme and that the General Assembly would welcome a suggestion to that effect. The practical and political aspects of the topic justified its consideration by the Commission. It was true that the topic presented many technical problems, but they could be rendered more manageable by dealing with only one or two aspects of that very complicated branch of law to begin with."²⁶

The general feeling in the Commission at its twenty-fifth session was that, notwithstanding the increasing importance of the subject, the law relating to the environment should not be placed on the long-term agenda. Some believed that the law was developing so rapidly that it would be dangerous to try to "freeze" it. Sette Camara, for instance, considered that "it could not be said that there are already international rules that are ripe for codification."²⁷ Others believed that it would be inappropriate for the Commission to study a topic that had already been referred to a specialised body.²⁸

The only positive proposal to emerge from the Commission's discussion of the codifiability of environmental law came from

25. Yearbook, 1973, Vol I, p. 165, para. 30.

26. ibid., p. 174, para. 29.

27. ibid., p. 178, para. 5.

28. The Governing Council of the United Nations Environment Programme had recently been established. Interestingly, in the report of the Council's first session it had included the following passage: "So far as the topic of the international law regarding the environment was concerned, the suggestion was made that the General Assembly should be invited to consider the codification and progressive development of environmental law and possibly to refer the topic to the International Law Commission.": GAOR, 28th Session, Supplement No. 25 (A/9025), para. 60.

Nothing seems to have come of that proposal in so far as the Commission is concerned.

Calle y Calle, who recommended that the Declaration adopted by the Stockholm Conference should be translated into legal rules determining the rights and duties of States.²⁹ But in view of the Commission's earlier lack of success in attempting to reformulate the rules in the Nurnberg judgment it is perhaps not surprising that no other member echoed Calle y Calle's suggestion.

In any case, it may have been considered out of place had the Commission chosen to add the topic to its long term programme - notwithstanding the existence of a few legal principles in the jurisprudential and treaty fields,³⁰ any treatment by the Commission would necessarily be to a great extent lawmaking. Thus it is most unlikely that the Commission would have chosen to study the topic without the prior encouragement of the General Assembly.

4. Succession of Governments:

The 1948 Survey dealt with the topics of succession of States and succession of Governments separately. Lauterpacht stressed the importance of the codification of the former,³¹ but with respect to the latter topic he was not so confident of successful treatment by the Commission: "It is clear that any attempt to formulate the principles - and their qualifications - in question would raise problems of great legal and political complexity. However, this need not necessarily constitute a decisive argument against including it within the scheme of codification."³²

Both topics were included in the 1949 programme of future work under the heading of Succession of States and Governments, though active study on the topic did not begin until 1963, when the Commission appointed a Special Rapporteur for the topic. In that year the Commission decided that priority should be given to the study of the question of succession of States, with the question of governmental succession to be considered only to the extent that it overlapped with the other topic. This is in fact what has happened, with the work on State succession substantially completed at the time of writing. The subject of

29. Yearbook, 1973, Vol I, p. 169, para. 22.

30. 1971 Survey, para. 338.

31. 1948 Survey, para. 46.

32. ibid., para. 47.

Succession of States and Governments has since 1963 remained on the Commission's current programme, though the Commission has never attempted to study the topic of succession of governments in isolation.

Chapter V of the 1971 Survey was devoted almost entirely to a precis of the Commission's work on State succession. But in the last two paragraphs of the Chapter the question of codifying succession of governments was raised; the authors expressly refused to pass comment on the codifiability of this topic. Instead they recommended that a decision should not be made until the final draft articles on the subjects of succession in respect of treaties and succession in respect of matters other than treaties had been completed, which would then provide a basis for deciding whether or not a separate study of governmental succession was desirable (para. 218).

As the authors of the Survey pointed out in para. 197, the process of decolonisation during the previous twenty years, and the consequent rise in the number of new States, had contributed much to the increased political awareness of the need to regulate the rules pertaining to succession. But by 1971 this process had slowed down markedly - the character of the international political order was becoming more stable, which perhaps might be a reason for the Survey's reticence in recommending a separate study of the topic of succession of governments. It is worth noting that the General Assembly has never recommended that the Commission study the topic of governmental succession; it may thus be inferred that the codification of the topic has never been viewed as politically pressing.

Nevertheless during the Commission's discussion of its future programme at its twenty-fifth session four members recommended that the topic should be considered in the near future. Significantly, not one of the four was from one of the "new" States - again, this might indicate that the Third World was generally not interested in the codification of the topic of governmental succession. The main reason advanced in favour of its treatment was that it represented a natural continuation of the study of State succession. Thus Vallat stated that his first preference of the topics that the Commission should tackle was "succession of governments, which would be a natural development of the Commission's work on succession of States. In practice, problems concerning succession of governments occur much more often than those concerning succession of States."³³

33. Yearbook, 1973, Vol I, p. 168, para. 9.

But is the fact that one topic is a "natural development" of another a sufficient reason for codifying it? Since all but four members of the Commission made no mention of the topic it can be inferred that the majority of the Commission believed that it was not a good reason. But there are other reasons which militate against the study of the topic in the near future. First, the lack of interest shown by the General Assembly in respect of the treatment of succession of governments may have acted as a discouragement against the topic's being removed from the long-term programme to the current programme. Related to this is the fact that the Sixth Committee favoured other topics (e.g. international watercourses) during the 1971-1973 period - and the Commission, mindful of the need to remain attuned to the calls of the General Assembly, would not have wanted to begin work on a subject which attracted little support from the majority of States. Secondly, other political considerations would be material. The possibilities of agreement at an international conference on a draft convention on the law relating to governmental succession were by no means clear in 1973 - the subject is one that is politically sensitive, especially for those States whose governments seized power by way of coups or revolutions, and those governments would generally have different views from those governments elected by democratic means. Thus if the Commission were to take up a study of the succession of governments it may well be that the preparation of a draft convention to be concluded at a diplomatic conference would not be the most appropriate method of treatment.³⁴ Another procedure - such as a code of principles - would probably not have much appeal to the Sixth Committee. Moreover, it would probably be difficult for the Commission itself to achieve agreement on some of the more sensitive areas of the topic.

Thus it will probably not be for a long time that the Commission finally begins a separate study of the law relating to succession of governments.³⁵

34. *ibid.*, 1972, Vol II, p. 207, para. 13.

35. Significantly, the planning group of the Enlarged Bureau established in 1975 has so far shown no interest in the codification of the succession of governments.

5. Extradition:

Lauterpacht was sceptical that it would be possible for the Commission to codify the topic of extradition on the ground that divergent national stances were so entrenched that it would be impractical to include the topic "within the general scheme of codification".³⁶ At its first session the Commission generally agreed that the most appropriate regulation of extradition was by way of regional or bilateral treaties³⁷ - accordingly the topic was not placed on the 1949 list.

The 1971 Survey was not so pessimistic about the susceptibility of the topic for codification. After noting the number of regional treaties on extradition which had been concluded since the 1948 Survey was written, "many of [which] consist of generally similar clauses",³⁸ the authors said, "One can accordingly raise the question whether the reasons given for the Commission's decision in 1949 are now valid. The common interest in providing for the return and prosecution of alleged offenders would appear to be a major factor in the thinking of governments"...³⁹

Of the six members of the Commission who addressed themselves to the question of extradition during the formal discussion of the long-term programme, all but one considered that the "time had come" for the inclusion of the topic in the future programme, especially because of its connexion with the topical issues of international criminal acts (e.g. aerial hijacking). But in relation to the method of work that the Commission might adopt there was considerable disagreement. Calle y Calle, for instance, envisaged the preparation of a multilateral convention which would help to bring order into the field of extradition and which would help to improve judicial co-operation concerning the punishment of criminals.⁴⁰ Eustathiades, on the other hand, speculated on the advantage of "a text in the nature of a recommendation which States could take as a basis for their extradition treaties".⁴¹ Tammes suggested that extradition could be examined in the light of a revision of the Draft Code of

36. 1948 Survey, footnote 5, p. 506.

37. Yearbook, 1949, p. 47, paras. 1-4.

38. 1971 Survey, para. 369.

39. ibid., para. 370.

40. Yearbook, 1973, Vol I, p. 170, para. 26.

41. ibid., 1971, Vol I, p. 379, para. 11.

Offences against the Peace and Security of Mankind.⁴²

Kearney's was the lone view: "The substantial obstacles to [the conclusion of a general extradition treaty] which led the Commission not to include this subject on its agenda in 1949 have not disappeared. The Commission should not devote scarce time and resources to the subject until more favourable prospects appear."⁴³

As Kearney noted, the principle obstacle to any multilateral treaty or convention on the subject of extradition is that political considerations would make agreement very elusive. Admittedly there is considerable agreement within some regions, but it is unlikely that agreement on an international scale could be reached in the foreseeable future. Is there merit, then, in Eustathiades' suggestion? Again it is difficult to be optimistic of the feasibility of a text such as he suggested, because most States already have clearly defined stances on extradition, and it is doubtful whether those States would be influenced greatly by an exhortatory text produced by a group of jurists, even if that text was approved by the General Assembly. In time, though, it is possible that such a text could lead to the formation of a customary rule of international law, and to this extent Eustathiades' suggestion might prove productive.

Despite the fact that the increased use of aerial transport and the increased "internationalisation" of many crimes have led to the more widely held view that a more comprehensive basis for extradition agreement is desirable, it is significant that the General Assembly has never recommended that the Commission should study the topic. This in itself is a sufficient reason for not placing extradition on the long-term programme. Moreover, the Assembly has also chosen not to refer to the Commission the topics of international criminal jurisdiction and the draft code of offences (both of which topics, especially the former, have a close connection with extradition), even though a definition of aggression has since been approved by the Assembly.⁴⁴ It seems, then, that, for the time being at least, the General Assembly does not wish the Commission to study the topic of extradition.

42. *ibid.*, 1971, Vol I, p. 379, para. 11.

43. *ibid.*, 1972, Vol II, p. 213, para. 46.

44. see 1971 Survey, paras 441, 450.

Nawaz, for reasons already expressed in the preceding pages considered that the time had come for including the topic in the Commission's long-term programme because it was "imperative to expedite the movement for a common law of extradition".⁴⁵

6. Unilateral Acts:

The writers of the 1971 Survey acknowledged that the codification and development of the topic of unilateral acts would involve many problems, mainly of a methodological nature. The first problem would be to determine the scope of the topic. Obviously it would be pointless to attempt to study all unilateral acts - for instance, on the assumption that a bilateral treaty consists of the two unilateral acts of offer and acceptance, there would be little use in codifying parts of the topic that had already been studied elsewhere. Thus only some unilateral acts would be, from the Commission's point of view, susceptible of treatment. And would it be better to deal only with the unilateral acts of States, or with the acts of other subjects of international law as well, such as those of international organisations? The authors of the Survey recommended the former course,⁴⁶ though it may be that the influence of the Soviet supervisor of the writing of the Survey was showing through on this point. Moreover, the Commission would have to decide what form its final product would take - a draft convention or not? In para. 283 the Secretariat suggested that the adoption of a convention might not necessarily be the most suitable aim of the Commission's treatment of the topic of unilateral acts - instead it recommended "a series of definitions of the main forms of unilateral acts and their respective legal effects under international law, together with a succinct commentary, [which] might prove to be of considerable practical value to States in their dealings with one another... . The work of the Commission in this field might thus provide, or come to provide, a measure of authoritative clarification in this branch of the law, irrespective of the formal status of the text."

As will be seen, this proposal received a substantial degree of support from those members of the Commission who favoured the inclusion of the topic in the long-term programme.

Another, more fundamental, problem noted in the Survey (in para. 281) would be to determine the relationship of unilateral

45. (1972) 12 IJIL 71, 80.

46. para. 282.

acts to the accepted sources of international law. In other words, if the Commission opted to study the topic it would have to ask itself such questions as the extent to which customary rules of international law can be based on a series of unilateral acts. Since the sources of international law have never been satisfactorily codified (except, possibly, in Article 38(1) of the Statute of the International Court) it might well be provident to precede the treatment of the topic of unilateral acts with the treatment of sources. Kearney doubted whether it would be feasible for the Commission to consider the latter topic, and accordingly recommended that any study of unilateral acts should concentrate not on the acts themselves but on the legal consequences arising from those acts.⁴⁷

Another discouragement to an early study of the topic of unilateral acts was voiced by Quentin-Baxter: "It should be approached with caution, ... since it impinged on many other fields of law in which there had been dynamic developments in recent times, such as the law of the sea."⁴⁸

No doubt this was a reference to the recent practice by some States of extending their territorial seas unilaterally. Furthermore, the subject of unilateral acts is closely linked with other topics of international law, such as the law of treaties, and recognition, and it would thus be imperative for the Commission to establish at the outset exactly what direction the study of the topic of unilateral acts should take.

But all of the above problems are of a substantially methodological character - these did not deter several members of the Commission from recommending that the topic be placed on the long-term agenda since there was an abundant source of State practice and doctrine on the subject. Most members who mentioned the topic at the twenty-third and twenty-fifth session stressed its importance and emphasised that a treatment of the topic would be "of great practical value".⁴⁹ Others viewed unilateral acts as "a logical sequel to multilateral acts, or treaties".⁵⁰

Not one member disagreed with the proposal that a series of definitions might be a better aim than a convention. The reason

47. Yearbook, 1972, Vol II, p. 212, paræ. 30-32.

48. ibid., 1973, Vol I, p. 168, para. 12.

49. e.g. ibid., 1971, Vol I, p. 363, para. 30 (Tammes);
ibid., p. 365, para. 44 (Castren).

50. ibid., 1973, Vol I, p. 166, para. 48 (Ago).

for this would probably be political - the eventual international acceptance of a draft convention would be by no means assured because of the large element of self-interest in every unilateral act by a State. Thus a State would be unlikely to accept a clause in a convention which provided that, say, the unilateral extension of the territorial sea has no effect, if that State had already exercised its powers to that effect. Unilateral acts are by their very nature political acts in the sense that their exercise often varies from State to State - consequently agreement would be difficult to achieve, especially in a world order that was undergoing a rapid change of character as a result of the decolonisation process. The new States, anxious to shake off the legacy of their colonising powers, would not be well disposed to a draft convention that, say, attempted to attach legal consequences to unilateral acts that those States did not consider had legal effects at all. The Secretariat was thus subtly alluding to political factors when it recommended that the most appropriate method of treatment might be a series of definitions.

Because of the "depoliticised" nature of a series of definitions, two members¹ recommended that some organisation other than the Commission might undertake the study of the topic of unilateral acts. Kearney mentioned the International Law Association and the Institut de droit International. The significant point to note in this context is that those two bodies are academic in nature, unlike the Commission which is inside the umbrella of the political United Nations Organisation. In other words, Kearney and Vallat were both implying that the Commission should not undertake the study of topics which would not progress ultimately to a political entity (such as the General Assembly or a diplomatic conference). Put in positive terms, both members seemed to imply that the Commission should study only those topics which could be formulated into a convention; it should not indulge merely in academic exercises.

Significantly the General Assembly has not expressed interest in the possible study of unilateral acts by the Commission. During the 1973 Sixth Committee debate on the Commission's

1. ibid., 1972, Vol II, p. 212, para. 33 (Kearney); ibid., 1973, Vol I, p. 168, para. 8 (Vallat).

report, only a very few delegations² recommended that a study of the topic should be undertaken. It would probably be too indelicate on the part of the Commission to undertake the treatment of unilateral acts without the active encouragement of the General Assembly - the subject is too politically complex (and more in the nature of progressive development than of codification) for work to begin without a substantial measure of prior political support.

7. Treatment of Aliens:

The 1971 Survey did not include a topic specifically entitled "the treatment of aliens" - instead the topic was covered briefly under the headings of State responsibility and human rights. This was in marked contrast to the 1948 Survey, which had devoted a separate heading to the treatment of aliens under the general heading of the Individual in International Law. At first glance one might think that the topic of treatment of aliens had diminished in importance. But this is clearly not the case; in fact, if anything the topic has grown in stature since 1948. The reason, of course, is the dramatic post-war upsurge in the subject of human rights, the seeds of which were sown in the Universal Declaration of 1948, and as a result of the upsurge "a distinct body of law relating to human rights has emerged, as a separate branch of international law."³ Consequently the writers of the 1971 Survey devoted a separate treatment to the subject of human rights, a subject which Lauterpacht had accorded only a passing mention in 1948.⁴

The main emphasis in each of the chapters of State responsibility and human rights in the 1971 Survey was on the work done since World War II by the Commission with respect to the former topic and by the whole of the United Nations network and regional organisations with respect to the latter. The question of treatment of aliens received mention only in passing; the Secretariat made no comment on the desirability or otherwise of the Commission's possible future treatment of the topic.

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2. e.g. GAOR, Twenty-Eighth Session, 1973, Sixth Committee, 1397th meeting, para. 4 (Iraq); ibid., 1400th meeting, para 5 (Netherlands). Contra: ibid., 1405th meeting, para. 49 (Spain).
 3. 1971 Survey, para. 380.
 4. 1948 Survey, para. 81-82.

The Commission placed the topics of State responsibility and the treatment of aliens on its 1949 list. When the former topic was placed on the current programme in 1955, the Commission decided to study the subject mainly in relation to the responsibility of the State for injuries caused in its territory to the person and property of aliens. The reasons for this were two-fold: first, the treatment of aliens comprised the most obvious example of the application of the law of State responsibility; and secondly, the main issues of responsibility had been highlighted in cases involving the treatment of aliens. As a result of the 1955 decision the Special Rapporteur produced six reports during the succeeding years principally on the subject of the State responsibility for injuries to aliens.⁵ Little progress was made, however; at its fifteenth session the Commission decided to change the emphasis of its treatment of State responsibility, and decided to concentrate on the general rules of responsibility, which in turn meant that the specific rules relating to the treatment of aliens were pushed somewhat into the background. The "general" approach to responsibility has been followed by the Commission ever since, though reference has been consistently made to the specific rules on the treatment of aliens during the Commission's present study of State responsibility.

Thus at the time the 1971 Survey was written the subject of the treatment of aliens remained on the long-term programme, but there were no immediate prospects of its codification as a separate topic. However, unlike the other topics outstanding on the 1949 list much preparatory work on the subject had already been done.

During the Commission's formal discussion of its future programme in 1973 only six members made reference to the topic, and of those only three recommended that the treatment of aliens should be studied in the future. None suggested an early study of the topic. Ago, for instance, placed the topic at the bottom of his proposed future programme, "Lastly, the Commission will sooner or later certainly have to study the status of aliens but it should not do so too soon, so as not to re-introduce confusion between international responsibility and the law of aliens, after having done everything possible to dispel it."⁶

5. 1971 Survey, footnote 221, para. 173

6. Yearbook, 1973, Vol I, p. 166, para. 48.

As Special Rapporteur for State responsibility Ago no doubt had a vested interest in so saying, but there is a certain amount of cogency in his suggestion that the treatment of aliens should not be studied at least while the general rules of responsibility are on the Commission's current programme - another change in emphasis of the method of treating the subject of State responsibility could have disastrous effects on the codification of the topic in particular and on the whole codification work of the Commission in general. Martinez Moreno⁷ and Castaneda⁸ both referred to the importance of codifying the law relating to aliens.

By 1971 several international organisations were already active in attempting to regulate the treatment of aliens by foreign states, particularly in the human rights field. For example, the Commission on Human Rights, the Committee on the Elimination of Racial Discrimination and the General Assembly itself have all to a greater or lesser extent participated in the promotion of human rights; in addition, such bodies as ECOSOC, UNESCO and UNCTAD have contributed to the international regulation of the rules pertaining to aliens. One might then ask whether the law relating to the treatment of aliens has been substantially claimed as the "property" of these other organisations. Reuter was of this opinion: "~~T~~he law relating to individuals has been absorbed by the machinery for the⁹ protection of human rights and the prevention of discrimination". For the same reason Bilge even doubted whether the treatment of aliens should remain on the Commission's programme.¹⁰

In 1978 the subject still remains on the Commission's long-term programme, though no steps have been taken which will lead to its codification in the near future. The lack of support that it gained during the Commission's twenty-fifth session - not to mention the Sixth Committee's silence on the matter - is probably a strong indication that a study of the topic, if any is undertaken, will not eventuate at least until the present study of the general rules of State responsibility is completed and even then only to the extent that the subject has not already

7. ibid., pp. 174-5, para. 31.

8. ibid., p. 165, paras 25-26.

9. ibid., 1972, Vol II, p. 207, para. 19.

10. ibid., 1973, Vol I, p. 175, para. 38.

been regulated by some other international organisation.

It is worthwhile noting that the planning group of the Enlarged Bureau considered at the Commission's twenty-ninth session the possibility of beginning work in the near future on one of the subjects outstanding on the 1949 list, including the treatment of aliens. Significantly, the group opted for another topic, jurisdictional immunities.¹¹

8. Lawful Acts:

The subject of international responsibility for lawful acts is one of the developing branches of international law, its rise to international prominence being related directly to the rapid technological advances made since the end of the Second World War. For instance, the invention and subsequent expansion of nuclear weaponry has led to the dangers of injury from nuclear fallout and radiation; the development of machines capable of space travel has given rise to the possibility of space accidents; and the carriage by sea of vast quantities of oil has led to the possibilities of extensive pollution of the marine environment. The growing international feeling has been that there should be some sort of international responsibility for such activities as these which, though not wrongful in themselves, are dangerous in nature.

Lawful acts - like the treatment of aliens - did not receive a separate treatment in the 1971 Survey; it too was considered under the heading of State responsibility. The whole chapter in the Survey of State responsibility consisted of no more than a summary (without comment) of the work done by the Commission in this area. Thus the Secretariat passed no comment on the desirability or otherwise of the Commission's possible future study of the topic of lawful acts.

In 1970, when the Commission reappraised its future work on State responsibility, it decided to defer the question of responsibility arising from certain lawful acts until its programme of work permitted.¹² The general feeling at the Commission's twenty-second session was that the study of the responsibility for lawful acts was desirable at some time in the future, though most members agreed that the topic should be kept separate from the study of responsibility for wrongful acts. The possibility of a simultaneous but separate treatment of the two topics was not ruled out.

11. A/CN.4/L.262/Add. 2, para. 15.

12. Yearbook, 1970, Vol II, p. 178, para. 6.

During the debate on the Commission's report of that session the possibility of a study of the topic of lawful acts received the support of many representatives in the Sixth Committee, though it was difficult to discern agreement on the possible scope of the topic.¹³ At the end of the debate the Chairman of the Commission promised the Sixth Committee that the Commission would consider the question at its next session.¹⁴

No fewer than nine members of the Commission at its twenty-fifth session expressed approval for the idea that the subject of lawful acts should be studied. The reasons given most often were that, first, the study of the subject would be a logical sequel to the work being carried out on responsibility for wrongful acts, and secondly, the subject was "of especial interest to States owing to the problems it presented daily".¹⁵ It was clear, though, that each member generally had a different conception of the potential scope of the topic if it were to be placed on the programme. This was evident from the varying names given to the topic. Hambro spoke of "ultra-hazardous activities"; Ustor of "acts not wrongful under international law"; Castaneda, Tsuruoka, Ramangasoavina and Bilge mentioned "lawful acts"; Ago referred to what he called "acts not yet prohibited by the international law in force"; and Yasseen referred to the subject as "risk". It became clear, then, that a study of the topic would necessitate a thorough evaluation of its scope.

As a result of a series of General Assembly resolutions beginning in 1973 the subject was placed on the Commission's long-term programme in 1974 and on its current programme in 1978.¹⁶

The authors of the 1971 Survey gave little indication of the chances of successful treatment of the topic. The subject is clearly one which is not "rich" in State practice, and thus any study of the topic will to a considerable extent be more in the nature of progressive development than of codification. Moreover,

13. GAOR, Twenty-fifth Session, Annexes, document A/8147, para. 104 (Report of the Sixth Committee).

14. *ibid.*, Summary Records, A/C.6/SR.1193, para. 47.

15. *Yearbook*, 1973, Vol I, p. 165, para. 31 (Castaneda).

16. *post*, pp. 84-89.

it may well be that the law relating to the responsibility for lawful acts is developing at a pace that may make it unwise to attempt to "freeze" the law; certainly it is evident that the Commission will have to anticipate future technological developments in order that its work does not become obsolete. Furthermore, if, as is likely, the Commission chooses to study the topic by way of preparation of a draft convention to be concluded by State representatives it is equally clear that the draft will have to be of a type acceptable to the majority of States - and political agreement may well be elusive. For instance, it is unlikely that at present the governments of France and New Zealand would agree on the rules of international law pertaining to the responsibility for nuclear fallout. It is thus an ambitious task which the Commission is undertaking when it begins its study of lawful acts.

9. Jurisdictional Immunities:

This subject has always been considered to be one of the cornerstones of public international law. Because of its day-to-day importance in the sphere of international intercourse there has grown up a wealth of State practice on the jurisdictional immunities that may be enjoyed by foreign States. Under the heading of "Jurisdiction over Foreign States", Lauterpacht wrote: "There would appear to be little doubt that the question in all its aspects - of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere...have added to the urgency of a comprehensive regulation of the subject."¹⁷

The Commission placed the topic of jurisdictional immunities of States and their property on the 1949 list.

At the time the 1971 Survey was written the Commission had not placed the topic on its current programme of work, though on several occasions previously aspects of the topic had been regulated in the course of codification of other topics. Thus the whole of the Conventions on Diplomatic and Consular Immunities, Article 9 of the Convention on the High Seas, and Articles 21 and 22 of the Convention on the Territorial Sea and the Contiguous Zone concerned the subject of State immunities from jurisdiction. But the larger subject - of the jurisdictional immunities of foreign States and their property - had yet to be tackled.

17. 1948 Survey, para. 52.

It is generally recognised that there is a "basic principle"¹⁸ that States and their property are immune from the jurisdiction of foreign courts, but States are not unanimous in their view of the scope of that immunity. Socialist States, for instance, generally incline to the view that immunity extends to the activities of State-owned ships operating solely for commercial purposes; the general trend amongst most other States is that immunity does not extend to such activities. In addition to this divergence of substance, there are several procedural issues upon which States are divided.¹⁹ Notwithstanding these difficulties, which are in many cases mitigated by an abundance of regional treaties and specific agreements, the Secretariat was optimistic of the chances of successful treatment of the subject by the Commission: "But it may be suggested that the differences are not in all cases large, although they can nevertheless cause friction and uncertainty; that, as was said in the 1948 Survey, it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic, commanding general acceptance; and that its day-to-day importance makes it suitable for codification and progressive development."²⁰

Nine members of the Commission at its twenty-fifth session shared this optimism, though not all were of the opinion that the differences were as "small" as the Secretariat claimed. Kearney for instance, claimed that the existing uncertainties and divergent State practices were of considerable significance, though he conceded that the problem was basically a legal one, and hence suitable for codification.²¹ Most members who favoured the retention of the topic on the long-term programme spoke of its practical day-to-day importance, an importance which was seen to be increasing as the economic activities of States in foreign spheres increased. Castaneda, however, while stating the subject was suitable for codification, was of the view that it was "not perhaps especially important or urgent".²² He did not elaborate on that comment, though it was probably a

18. 1971 Survey, para. 68.

19. ibid., para. 74.

20. ibid., para. 75.

21. Yearbook, 1972, Vol II, p. 209, paras. 10-11.

22. ibid., 1973, Vol I, p. 164, para. 25.

reference to the fact that he considered other topics more pressingly in need of codification; or it may have been that he viewed the present international law on immunities as being unsatisfactory yet not so unsatisfactory as to require urgent codification. Vallat noted that there had been in recent years "a growing divergence in the practice of States with respect to immunities, and it was highly desirable that the Commission should attempt to find suitable solutions".²³ Quentin-Baxter saw the subject as a counterpart to the Commission's work on diplomatic and consular immunities.²⁴ There was thus substantial support for the view that the topic should be studied in the not-too-distant future, though no one recommended that the subject be placed on the Commission's current programme.

The main obstacles to a successful consideration of the topic by the Commission would probably be political factors, for it is difficult to predict to what extent States with rigid stances on the subject (i.e. those States who adhere strictly to either the "absolute" or the "restrictive" views of jurisdictional immunities) would be prepared to compromise in the event of a conference being convoked to conclude a convention based on a draft by the Commission. The Survey was optimistic, as were several members of the Commission at its twenty-third and twenty-fifth sessions; so too, were several delegations (for example, Austria, Ghana, Indonesia, Iraq, Spain and Zaire) at the Sixth Committee's twenty-eighth session. Nawaz, also, considered it "an eminently suitable topic for codification on a priority basis."²⁵

During the Commission's twenty-ninth session in 1977 the planning group of the Enlarged Bureau recommended for selection the question of the "Jurisdictional immunities of States and their property" "in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development. Moreover, as the "Survey of international law", prepared in 1971 by the Secretary-General, points out, "it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic".²⁶

The Commission adopted the Enlarged Bureau's suggestion, and in the same year the General Assembly approved the choice of topic. In 1978 a Special Rapporteur was appointed to begin work on the subject.

23. *ibid.*, p. 168, para. 9.

24. *ibid.*, para. 13.

25. (1972) 12 *IJIL*, 71, 78.

26. A/CN.4/L.262/Add.2, para. 15 (Draft report, Chapter V,

CHAPTER 6

THE TREATMENT OF THE SURVEY

1. 1971:

The Survey was published on the 23rd April 1971, approximately two months prior to the first meeting of the Commission's twenty-third session, of which Agenda item 7 was entitled "Review of the Commission's long-term programme of work (A/CN.4/245)". Some members, however, expressed concern that by the time the item was considered they had not had sufficient opportunity to make a detailed study of the document. This was one of the reasons why the Commission confined itself to an essentially general consideration of its long-term programme though some members made specific suggestions on the desirability or otherwise of the Commission's future treatment of some of the topics included in the Survey.

During the three meetings²⁷ of the twenty-third session devoted to Agenda item 7, each of the members who spoke was effusive in his praise of the content of the Survey and of its preparation and treatment by the Secretariat. While some measure of congratulation was to be expected simply as a matter of diplomacy, the reaction of the members of the Commission was genuinely sincere in its appreciation of the work done by the Secretariat. The following are some of the comments made: "as remarkable as the 1948 Survey in its day",²⁸ "the most comprehensive and at the same time most concise source of information on new trends in international law now available to the legal profession",²⁹ "the epitome of modern international law, ... a lucid statement of the needs of the international community"³⁰ "valuable document, ... richly documented",³¹ "a remarkable piece of scholarship",³² and "a first-rate working tool".³³ The document, then, was praised for its comprehensiveness, its conciseness, its up-to-date nature, its lucidity, its scholarship and its practical value to the Commission. The Secretariat

Section E). It is interesting to note that the Survey is still being used as a reference source six years after its publication.

27. the 1141st, 1143rd and 1144th meetings.
28. 1971 Yearbook, Vol I, p. 362, para. 16 (Rosenne).
29. ibid., p. 363, para. 29 (Tammes).
30. ibid., p. 372, para. 2 (Bedjaoui).
31. ibid., p. 377, para. 62 (El-Erian).
32. ibid., p. 380, para. 17 (Elias).
33. ibid., p. 381, para. 27 (Ushakov).

thus had cause for pride in producing such "a milestone in the history of the Commission".³⁴

But the Commission did not restrict itself merely to comments about the worth of the Survey. After an opening address from Stavropoulos, Legal Counsel of the United Nations, (in which he gave in effect a precis of parts of the Introduction to the Survey³⁵), fourteen members of the Commission spoke successively on various matters raised by the document. Some reiterated the changes in the international politico-legal order since the 1948 Survey was written; most emphasised the heavy programme with which the Commission was currently burdened; many questioned the ability of the Commission to cope successfully without a change in its methods of work; some emphasised the need to revise the Commission's completed work after a period of time had elapsed; most stressed what they individually saw as the appropriate criteria for determining the selection of topics; accordingly, most suggested specific topics for consideration in consonance with their stated criteria.³⁶ One or two members noted that the present session would be the last of the Commission as it was presently constituted - it was thus considered inappropriate that the present Commission should "tie the hands"³⁷ of its successor by making affirmative decisions which would affect the latter. This view prevailed,³⁸ and as a result the Commission,

34. ibid., Vol II, Part I, p. 351, para. 125 (Report to the General Assembly).

35. Interestingly, Stavropoulos spoke of what he saw as "a series of Surveys", which would be produced at approximately twenty-year intervals. He hoped "that in the 1990s a further Survey would again be undertaken by the Secretariat": ibid., Vol I, p. 361, para. 13.

36. Only one member (Rosenne) discussed the substance of the Survey; he disagreed with some of "the far-reaching doctrines" advanced by the Secretariat on the subject of the inviolability and protection of diplomats: ibid., p. 362, para. 21. Rosenne did not elaborate on his reservations, but it is possible that he was alluding to the Israeli stance on this subject, a stance which does not attract the support of a majority of States.

37. ibid., p. 377, para. 61 (Tabibi).

38. The assumption underlying this view may be questioned, because it was evident in 1971 that the Commission's current programme would not be finally disposed of until well after the succeeding Commission had been reconstituted (i.e. the next election would be in 1976, the "new" body to convene in 1977). Only after the current programme was substantially completed could work begin on topics on the long-term programme. Thus any decision by the 1972-76 Commission would tie the hands of its successor, and so on.

"conscious of the need for further reflection", concluded that "the definitive task of reviewing its long-term programme of work should be left to the Commission in its new composition".³⁹

Consequently, at the end of its twenty-third session the Commission decided to place on the provisional agenda of its next session an item - the same item as item 7 in 1971 - entitled "Review of the Commission's long-term programme of work: 'Survey of International Law' prepared by the Secretary-General (A/CN.4/245)". It also decided to invite members of the Commission to submit written comments on this item.⁴⁰

During the Sixth Committee's debate on the Commission's Report of its twenty-third session (Item 88 of the former's agenda), representatives of most governments made reference to the Survey and to the Commission's long-term programme. As was to be expected, plaudits of the kind made by the members of the Commission were echoed in the chamber of the Sixth Committee. Similarly, each representative who spoke stated his or her government's recommendations on the appropriate criteria for selection of topics, and, more importantly, on which topics should be included in the long-term programme. No consensus was reached on the desirability of the inclusion of one particular topic at the expense of others - indeed the views of governments were so varied that at one time or another virtually every topic included in the Survey was mentioned as being immediately susceptible of codification by the Commission. The topics of the law of international watercourses and the protection and inviolability of diplomats, though, received considerable support from some delegates.

The Sixth Committee was, however, able to agree on the text of its draft resolution to the General Assembly on the report of the Commission. Accordingly, the Assembly, by resolution 2780 (XXVI) of December 3rd 1971, "approved" the Commission's decision to place the item dealing with the Survey on its provisional agenda for 1972.

2. 1972:

By the time the newly-constituted Commission convened in

39. Yearbook, 1971, Vol II, Part I, p. 351, para. 127.

40. ibid., para. 128.

Geneva two members (Reuter and Kearney) had responded to the invitation in the 1971 Report by submitting written observations on the subject of the long-term programme of work.⁴¹ Those written comments constituted the only progress made by the Commission at its twenty-fourth session on the subject of its long-term programme - notwithstanding the fact that the item was on its agenda, the Commission devoted its ten week session entirely to the completion of draft articles on two of its priority topics, succession of States with respect to treaties and the protection of diplomats.⁴² Consequently the Commission lamely concluded in its report that it would consider its long-term programme during its next session.

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41. Yearbook, 1972, Vol II, pp. 205-214, document A/CN.4/254. The Chairman of the 1233rd meeting of the Commission, Castaneda, made a mysterious reference to the three members who had submitted written comments: ibid., 1973, Vol I, p. 159, para 1. This writer, however, could find no reference whatsoever in any U.N. publications to support the view that a third submission was made. Thus it seems that, if three submissions were in fact made, the third was not published officially. Much of Reuter's written observations, unlike those of Kearney, was written in the first person plural (i.e. "we"). It is therefore possible that the observations attributed to him personally were in fact those of his State of nationality, France.
42. The General Assembly, by resolution 2780, had requested the Commission to study this topic, and the Commission, at its 1149th meeting, decided to give it priority for its twenty-fourth session. The procedure adopted by the Commission in relation to this topic was in many ways remarkable. First, the proposal that the Commission draft legal rules on the inviolability and protection of diplomats arose in the General Assembly - traditionally the Assembly had referred topics to it which had been first mooted in the Commission. Second, the methods of work adopted by the Commission were unprecedented - after deciding to give priority treatment to the topic for its twenty-fourth session, it succeeded in producing its draft articles on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons by dispensing with the usual practice of appointing a Special Rapporteur; instead it appointed a Working Group, and disregarded the traditional two-readings procedure. In this manner, the topic was begun and completed in the one session, with substantial final approval from the General Assembly when the draft articles were referred to it. The Commission thus proved that it could act very quickly in urgent situations and that it could successfully codify politically sensitive subjects.

Several members⁴³ of the Sixth Committee expressed regret that the Commission had not had an opportunity to discuss the item, though most States sympathised with the rigorous schedule the Commission had been working to during its twenty-fourth session. By resolution 2926 (XXVII) of November 28 1972 the General Assembly approved the Commission's decision to place discussion of its long-term programme of work on the agenda for its 1973 session.

3. 1973:

Item 5 of the Commission's agenda for its twenty-fifth session was divided into two parts: the first dealt with the Survey and the long-term programme of work, and the second dealt with the priority to be given to the topic of the law of the non-navigational uses of international watercourses.⁴⁴ Each member of the Commission, when he spoke, addressed himself to both these questions successively. Five meetings⁴⁵ were devoted to discussion of the item and in all nineteen members of the Commission participated, some of them speaking twice. The comments were far more specific than had been the case two years earlier - individual preferences of topics were expressed by all the speakers, though yet again it was difficult to discern any common denominator of agreement from the various speakers with respect either to the criteria to be applied for the selection of topics or to the actual topics themselves.

As a preliminary point, many members questioned the value of drawing up a long-term programme at all. The current workload was considered sufficiently extensive to last until 1980 at the very least before it was completed,⁴⁶ and because of the fact that the General Assembly was always able to refer topics to it for urgent treatment most members recommended caution in the selection of topics for future treatment. The views on the desirability of a long-term programme were varied - on the one hand, Ushakov pointed out that "no-one could say what topics would be considerable for codification or would require it in

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43. For example, see the comments of the delegates of Iraq, Spain and Saudi Arabia at the 1317th, 1320th and 1327th meetings respectively.
44. By resolution 2669 (XXV) of December 8 1970 the General Assembly had recommended the Commission to study this topic "as soon as the Commission deems it appropriate".
45. the 1233rd to the 1237th.
46. "The Commission's present programme of work is already a long-term programme", Yearbook, 1973, Vol I, p. 166, para. 46 (Ago)

10 years' time".⁴⁷ Consequently he recommended that the Commission should not draw up a list, but instead should merely submit to the Assembly its recommendations of the topics the codification of which it considered important.⁴⁸ On the other hand, Tsuruoka thought that the need to review the Commission's long-term programme was "undeniable" because of the greatly changed international situation since 1949.⁴⁹ Yasseen preferred a middle course - he stated that there was no urgent need to consider the future programme, "but it would be useful to do so in order to be prepared, if only psychologically, to take up other topics when the time came".⁵⁰

It was generally agreed amongst members that the Commission's existing programme should remain unamended; furthermore, any additions to the long-term programme would be without prejudice to the current programme. Most members also agreed that if any topics were to be added to the long-term programme, the number of those topics could be no more than three or four, the reason for this suggestion being of course the estimated time it would take to complete three or four topics.¹ Thus it was that each member who spoke recommended as a general rule only three or four topics for inclusion in the long-term programme.

But if it was possible to extract a consensus of sorts on the above preliminary point, it was not possible to deduce any majority agreement on either the topics to be selected or the criteria to be employed in selecting topics for inclusion. With respect to the latter, the varying criteria suggested varied from member to member. Some members² suggested that the Commission should study the remaining "great projects" and "traditional chapters" of international Law. Some³ suggested

47. *ibid.*, p. 167, para. 49.

48. Ushakov's suggestion was in fact adopted by the Commission at the end of the session.

49. *Yearbook*, 1973, Vol I, p. 165, para. 34.

50. *ibid.*, p. 181, para. 25.

1. "20 years or so" in the opinion of Reuter, *ibid.*, p. 161, para. 30.

2. Tammes, Tsuruoka, Ago, Vallat and Quentin-Baxter.

3. Tammes, Sette Camara, Bartos, Calle y Calle.

those topics which were already rich in State practice; others⁴ disagreed. Hambro suggested the "serious" topics; he also suggested that the Commission should not include topics the codification of which would "freeze" developing law. Some⁵ suggested that the Commission should not select topics which were charged with political implications making agreement impossible. Castaneda, in addition to warning against the inclusion of topics which would not attract the interest of a majority of countries, recommended against the codification of topics which could be better regulated by representatives of States. Some members⁶ considered that the Commission should not select topics which were properly the domain of other bodies. Two members⁷ expressed doubts on the Commission's ability to handle difficult technical questions; Ustor disagreed. Several⁸ suggested that the paramount criterion should be the needs of the international community. Some⁹ saw the topics of "practical importance" as being the most appropriate. Two members¹⁰ expressed support for the inclusion of topics that were "urgent"; Tsuruoka supported the opposite view. Quentin-Baxter disagreed with Calle y Calle when he recommended that the Commission should not study topics which were already subject to agreement. Martinez Moreno called for the inclusion of topics that were of international interest, and not merely of regional interest. Bilge and Kearney favoured the selection of topics which were raised incidentally by the topics in the current programme. Finally, Ushakov adopted the view of the strict constructionists when he considered that it was for the General Assembly, and not for the Commission, to select topics for inclusion in the latter's programme of work.

Because of the above divergence of direction it was inevitable that a majority of members would not be able to agree on the desirability of inclusion of even one topic. Reuter's hope

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4. Kearney and Castaneda.
 5. Hambro, Sette Camara, Ustor, Tsuruoka and Bilge.
 6. Reuter, Tsuruoka, Ago, Yasseen and Martinez Moreno.
 7. Ago and Martinez Moreno.
 8. Kearney, Castaneda, Tsuruoka, Ustor, Tabibi and Calle y Calle.
 9. Castaneda, Calle y Calle and Yasseen.
 10. Castaneda and Calle y Calle.

for the ascertainment of a "general feeling"¹¹ amongst members of the Commission which would indicate a priority for two or three topics was thus frustrated. Nevertheless, it became evident during the discussion that some topics were more "popular" than others. While some members qualified their approval of certain topics, the following is a list, compiled by the writer from the Summary Records of the twenty-fifth session and from the written observations of Reuter and Kearney, of the topics that derived the support (qualified or unqualified) of two or more members of the Commission, in descending order of popularity: jurisdictional immunities of foreign States and their property¹²; liability for possible injurious consequences arising out of the performance of certain lawful activities¹³; unilateral acts¹⁴; extradition¹⁵; succession of governments¹⁶; the law of the environment¹⁷; treatment of aliens¹⁸; the law relating to economic development¹⁹ and the recognition of States and governments.²⁰

At a meeting held before the 1237th meeting of the Commission, at which the officers and former chairmen of the Commission were present, it was decided, not unnaturally, that consensus had not been achieved during the preceding meetings.

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11. Yearbook, 1973, Vol I, p. 161, para. 30.
 12. supported by Bartos, Reuter, Vallat, Quentin-Baxter, Calle y Calle, Kearney, Castaneda, Bilge and Yasseen.
 13. supported by Hambro, Ustør, Tsuruoka, Ago, Bilge, Yasseen, Reuter, Castaneda and Ramangasoavina.
 14. supported by Tammes, Hambro, Ago, Quentin-Baxter, Yasseen and Calle y Calle. contra: Kearney and Vallat.
 15. supported by Tsuruoka, Calle y Calle, Reuter, Ramangasoavina and Tammes. contra: Kearney.
 16. supported by Hambro, Vallat, Bilge and Kearney.
 17. supported by Castaneda, Kearney, Martinez Moreno and Calle y Calle. contra: Hambro, Yasseen, Quentin-Baxter, Sette Camara and Reuter.
 18. supported by Castaneda, Ago and Martinez Moreno. contra: Bilge, Kearney and Reuter.
 19. supported by Sette Camara, Calle y Calle and Tabibi. contra: Castaneda, Kearney, Ago, Reuter and Ustor.
 20. supported by Hambro and Calle y Calle. contra: Bilge, Kearney, Castaneda and Tsuruoka.

It was also decided that it would be undesirable to adopt a list by voting. Accordingly at the 1237th meeting the Chairman recommended "that the report to the General Assembly should include a passage giving a detailed account of the Commission's discussion. The passage would record the fact that some members had stressed the importance of certain topics; it would also note that none of the members had suggested the inclusion of some other topics, such as the right of asylum and the recognition of States and governments, which remained outstanding from the 1949 list."²¹ The proposed passage would begin with a paragraph stating... the Commission's current agenda..., which would take up much of the Commission's time in the years ahead. The passage would not constitute a decision, but would simply inform the General Assembly of the discussion held, leaving it to the Assembly to decide which topics should be included in the Commission's long-term programme of work and to lay down priorities."²² (emphasis added)

The Commission adopted the Chairman's suggestions without any comments, and the subsequent report substantially repeated his suggestions.

The extract underlined indicates the Chairman's belief that the Commission was not making a decision; yet in a way it was making a decision, namely to pass the onus of choosing topics to the Assembly. It was perhaps a little unfortunate that the Commission did not make a more concrete decision on this matter by actually suggesting one particular topic for inclusion in its long-term programme. The main reason for this would have been political, because the Commission is a body that has often been criticised for being too slow, too conservative, too out of touch with political reality, and above all for being too cautious and indecisive; it is submitted that it may have improved its standing in the eyes of the international community if it had made a positive proposal on the question of inclusion of topics in its long-term programme. While it must be admitted that it would have been impractical to add a topic to the programme (because of the extensive current workload), it is submitted that by not doing so the Commission may have unwittingly

21. This was in fact not true. Hambro, for instance, favoured the Commission's treatment of recognition, "which would soon be ripe for codification": Yearbook, 1973, Vol I, p. 160, para. 19. Similarly, Calle y Calle favoured both recognition and the right of asylum: ibid., p. 169, para. 20; p. 170, para. 24.

22. ibid., p. 182, para. 38.

provided its detractors with fuel for criticism. The topic of responsibility for lawful acts - or "risk" - would have been ideal in this context - nine members had actively proposed it, and none had expressly opposed its inclusion in the long-term programme. Furthermore, because that topic was not already on the 1949 list (unlike some of the other topics that some members of the Commission had favoured, namely jurisdictional immunities the treatment of aliens, and recognition of States and governments) its inclusion in a new list would have represented to the outside world a positive suggestion on the part of the Commission which in turn would have conveyed an ostensible sense of purpose and enthusiasm. The Commission, however, chose not to make any concrete suggestion at all.²³ It may be though, that the Commission considered the topic of lawful acts too "hot" to study without encouragement from the Assembly, because in 1973 the subject of liability for risky activities was one of political concern - marine pollution and the litigation concerning the French Nuclear Tests in the Pacific were topical issues of world interest.

A further positive decision which the Commission might have seen fit to make was an alteration to the topics on the 1949 list which still remained virtually untreated by the Commission. The topics of recognition and the right of asylum, for instance, had received negligible support during the discussions of the twenty-fifth session - had those two topics been removed from the long-term programme,²⁴ the Commission could have replaced the label "the 1949 list" with "the 1973 list", which would have indicated that some concrete progress had been made on the subject. Besides, the term "the 1973 list" has an infinitely more confident and purposeful ring to it in a period of rapidly developing legal situations.

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23. In this context it is worth noting the comment by Vallat, who had interpreted the paragraphs of General Assembly resolution 2926 (XXVII) "as meaning that the General Assembly expected the Commission to produce some positive proposal for the future in the broad field of codification": *ibid.*, p. 168, para. 4.
24. It will be recalled that when the Commission had called for a new Survey during 1968 and 1969, it expressed that it intended to review its long-term programme by, inter alia, "discarding those topics on the 1949 list which were no longer suitable for treatment": 1969 *Yearbook*, Vol II, p. 235, para. 91.

In its report for its 1973 session the Commission substantially repeated what it had said it would include in the report. It cited twelve topics which one or more members had favoured during the discussion of the item, and concluded, "The Commission decided it would give further consideration to the foregoing proposals or suggestions in the course of future sessions".²⁵

The Sixth Committee devoted twelve sessions to discussion of the Commission's report of its twenty-fifth session. Castaneda, Chairman of the Commission, introduced the report by urging members of the Committee to submit their comments. Members responded to his call by suggesting their governments' favoured criteria for the selection of topics; they also suggested individual topics which in their opinion should be included in the Commission's future programme. Yet again, no consensus was reached during the course of debate as to which topics should be included in the programme, though the topics of unilateral acts, the treatment of aliens, lawful acts and the law of the environment received a substantial amount of support from many quarters. In addition, most delegates supported the proposition that priority should be given to the subject of the non-navigational uses of international watercourses. The only discordant note was struck by the Israeli representative, the redoubtable Rosenne, who expressed disappointment that the Commission had not achieved any positive proposals during its discussion of its long-term programme. After stressing the importance of a long-term programme, he made the valid point that "a lengthy forward-looking programme also enables non-official and academic organs to investigate whether they can profitably undertake researches which might later come to be used by the international community and its organs."²⁶

This point had been overlooked during the Commission's discussion of the Survey. Rosenne concluded by expressing an opinion that no doubt was in the minds of many of the delegates: "The Survey of International Law of 1971, whatever its value, has in fact

25. ibid., p. 231, para. 174. With respect to the related item of the priority to be given to the topic of the law of the non-navigational uses of international watercourses, the Commission again chose not to commit itself to a definite decision. It deferred a formal decision on the subject until members had had an opportunity to review a supplementary report on international watercourses produced by the Secretariat; ibid., p. 231, para. 176.

26. A/C.6/SR. 1404, para. 18. GAOR, 1973, Sixth Committee.

not yet proved to be a satisfactory basis for drawing up a new long-term programme".²⁷ This was unquestionably true; for the Survey had not yet led to the adoption of a new long-term programme, though it was perhaps a little unfair of Rosenne to imply that the Survey was "unsatisfactory".

Rosenne's voice was a lone one, however, and when the Sixth Committee was composing its draft resolution on the report of the Commission its tone was appreciative of the work done by the Commission during the latter's twenty-fifth session. By General Assembly resolution 3071(XXVIII), adopted on November 30 1973, on the recommendation of the Sixth Committee, the Assembly "welcomed" the decision of the Commission to give further consideration to proposals and suggestions made in connexion with the review of the Commission's long-term programme of work on the basis of the 1971 Survey. By the same resolution, the Assembly also "recommended" that the Commission undertake "at an appropriate time" a separate study of the topic of international liability for injurious consequences arising out of the performance of activities that were not internationally wrongful in themselves.

It was ironic, then, that the Assembly should have made a decision that the Commission itself could have made; but because the Commission's current programme was so extensive in 1973 it was clear to the Assembly that many years would elapse before codification of the topic of lawful acts would be commenced.²⁸ The question must thus be asked; why did the Assembly, mindful of the Commission's existing programme, choose to add the topic to the latter's long-term programme?

The answer to this can be deduced from the Sixth Committee's Summary Records. Most delegates when they spoke on the subject of the Commission's report addressed themselves to the topic of lawful acts not in connection with the Commission's long-term programme but instead in connection with the draft articles on State responsibility. Because many delegates had stressed the "great importance" and "urgency" of the question of lawful acts, and because there was an obvious relationship between that topic

27. ibid., para. 19.

28. In fact, a Special Rapporteur (Quentin-Baxter) was appointed for the topic of lawful acts during the Commission's 1978 session.

and State responsibility,²⁹ the possibility that the two topics be studied sumultaneously was favoured in many quarters. Most members agreed, though, that the two subjects should be studied separately.³⁰ The chief ground of dissent in the Sixth Committee was whether or not the two subjects should be studied simultaneously. Thus Miss Flouret, of Argentina, who introduced the draft resolution³¹ on behalf of its sponsors, said, "With regard to the question of State responsibility, ... to achieve a balance between the various views expressed on the subject, the sponsors have wished to recommend, in very flexible language, that the Commission should undertake a separate and possibly simultaneous study of the topic of liability for risk."³² (emphasis added).

Notwithstanding the facts that the word "recommend" (not "request") was used, and that the draft resolution was expressed in very flexible language, some representatives expressed reservations that the resolution as it stood might not allow the Commission latitude to begin treatment of the topic when it saw fit. Accordingly, the East German delegate, Goerner, proposed an amendment deleting the words underlined - the proposal was accepted narrowly.³³ The draft resolution, as amended, was passed unanimously.³⁴

It is appropriate to pause briefly to consider the 1973 debates in both the Commission and the Sixth Committee of the topic of treatment of lawful acts in a wider perspective, for the discussion perfectly illustrates the complementary relationship between the two bodies. It has been seen that several members of the Commission actively supported the proposal that in the near future it should begin work on the topic, yet it did not attempt to commit itself to a definite course of action

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29. the former concerned the international responsibility for lawful acts, the latter for wrongful acts.
 30. Castaneda, introducing the Report, had stressed that the two topics were quite distinct: GAOR, 28th Session, Sixth Committee, 1973, p. 8, para. 30.
 31. "Its purpose is to reflect the broad majority trends which have emerged during the debate. Account has also been duly taken of the views of the Commission itself ..." ibid., p. 84, para. 1.
 32. ibid., para. 3.
 33. 42 votes for, 40 against, 21 abstaining.
 34. 92-0-12.

instead, it merely reported its discussion to the General Assembly. It might thus be deduced that the Commission was seeking to gain some broad political support before it chose to add the topic to its programme of work, especially since the topic of lawful acts was in 1973 a subject of not inconsiderable political sensitivity, and more in the category of progressive development than of codification. Similarly, it has been seen that the Sixth Committee, taking into account the views of the Commission, generally encouraged the idea that the latter should soon begin work on the subject, but the Committee did not request the Commission to begin work on the topic - it merely made a recommendation to that effect. The unamended draft resolution also recommended "a possibly simultaneous" treatment of lawful acts with State responsibility for wrongful acts. Those words were hardly coercive, and yet an amendment to delete them was passed. In other words, the Sixth Committee was giving political approval to the Commission's mooted future consideration of the subject, yet it deliberately chose not to give any impression of overt influence over the topic's treatment. The amended resolution left the final decision to the Commission. Thus the Sixth Committee recognised once more that the Commission should be allowed a certain amount of autonomy in its work.

Moreover, the Sixth Committee was well aware of the Commission's extensive current programme, and it would have been improvident to add a topic to that programme.

The Commission ended its formal discussion of the Survey at its twenty-fifth session, but in the succeeding sessions it has continued to consider the question of its long-term programme. Thus in 1974 the Commission decided to place on its "general programme"³⁵ the topic of lawful acts, pursuant to the recommendation contained in General Assembly resolution 3071 (XXVIII).³⁶ Agenda item 8 of the Commission's twenty-sixth session was entitled "Long-term programme of work", but because of other pressures the Commission was unable to discuss that item.

35. During its twenty-sixth session, the Commission began speaking of the "general programme" and the "active programme" instead of the "long-term programme" and "current programme" respectively. Hereafter the terms are used interchangeably.

36. Yearbook, 1974, Vol II, Part One, p. 305, para. 163 (Report).

In the same year, many members of the Sixth Committee again stressed the importance of the Commission's treatment of the topic of lawful acts. Consequently, by resolution 3315 (XXIX) the General Assembly recommended that work be commenced on the topic "as soon as appropriate".

A significant development in relation to the long-term programme occurred during the course of the Commission's twenty-seventh session. Acting on a proposal raised by Kearney,³⁷ the Commission established a planning group (of five members of the Commission) within the Enlarged Bureau to study the methods and functioning of the Commission and to formulate suggestions regarding the Commission's future work. The main asset of this planning group was that it was able to meet outside regular Commission meeting times, which meant that the Commission was able to continue work on the draft articles of its priority topics without spending valuable time on the subject of its future programme. The planning group put forward goals which the Commission should strive to achieve - for example, it was hoped that the Commission could complete the second reading of the articles on the question of treaties concluded between States and international organisations or between two or more international organisations by or prior to 1981.³⁸ The establishment of the planning group, said one delegate in the Sixth Committee, "may well prove to be the most important development of the last session of the Commission".³⁹ During its twenty-seventh session, though, the Commission made no decisions on the subject of its future programme.

In the Sixth Committee's debate on the report of that session, it was clear that most representatives were impressed not only with the good progress made by the Commission at its 1975 session, but also with the establishment of the planning group. Some members, though, chose to recommend possible topics for the future study of the Commission - for example, one member suggested that "when the Commission is composed of new members [in 1977], it will have to decide which subjects it

37. *ibid.*, 1975, Vol I, pp. 2-3, para. 32.

38. *Yearbook*, 1975, Vol II, p. 184, para. 145 (Report).

39. A/C.6/SR.1548, GAOR, 1975, Sixth Committee (Mansfield of New Zealand).

wishes to consider. Subjects should be selected which are politically important, otherwise the work will be purely academic. However they should be of such a character that they are fit for legal formulation. They should have reached a certain state of maturity, yet still be capable of progressive development."⁴⁰

The same delegate went on to recommend such subjects as lawful acts, international organisations, jurisdictional immunities, succession of governments, recognition of States and governments, and extradition. But the general feeling in the Sixth Committee was that the Commission's hands were full and that there would be little merit in adding a further topic to the Commission's programme. Accordingly by resolution 3495 (XXX) - adopted in the Sixth Committee without a vote - the General Assembly made no mention of the Commission's future programme, except to reiterate its recommendation that work begin on the study of liability for lawful acts "as soon as appropriate".

The Commission reconstituted the planning group for its twenty-eighth session, but no formal decisions were made regarding the long-term programme. In the Sixth Committee many delegates stressed the increasing importance of the need for regulation of the rules relating to liability for lawful acts, and some were impatient that the Commission had not yet taken any steps toward the consideration of that topic. By resolution 31/97 of December 15 1976 the General Assembly recommended that work begin on the topic "at the earliest possible time".⁴¹ Earlier, by resolution 31/76 the Assembly had requested that the Commission should study the item "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".⁴²

40. A/C.6/SR.1540, GAOR, 1975, Sixth Committee, para. 52 (Hambro of Norway).

41. It is interesting to compare the various phrases used by the Assembly in recommending the treatment of the topic of lawful acts. In 1973, it used "at an appropriate time"; in 1974 and 1975, "as soon as appropriate"; and in 1976, "at the earliest possible time". Each recommendation was more foreful than the preceding one, yet it was in keeping with the Sixth Committee's usual practice of maintaining a certain degree of detachment that it did not use the word "request" or "priority" in any of the resolutions.

42. This topic, like the topic of inviolability and the protection of diplomats five years previously, arose in the Sixth Committee, and not from discussions in the Commission. By adopting methods similar to those used during its twenty-

At its twenty-ninth session, the planning group recommended the Commission's treatment of the topic of jurisdictional immunities; it also mooted the possibility that the Commission should revise the Draft Code of Offences against the Peace and Security of Mankind. In turn, the Sixth Committee strongly supported the Commission's recommendation of an early treatment of the question of jurisdictional immunities, but the Committee did not favour the reconsideration of the topic of the draft Code of Offences.

Accordingly, at the Commission's thirtieth session in 1978 the topics of lawful acts and immunities were placed on the active programme of work - a Special Rapporteur was appointed for each topic. During the same session the planning group (now effectively a permanent institution during each session of the Commission) also recommended that a review of treaty-making procedure be undertaken in the near future.

Thus five years after the Commission's formal discussion of its programme of work the two topics most favoured by members as suitable for codification and progressive development have been placed on the current programme. It is difficult to assess the role the 1971 Survey may have played in those decisions, but because considerable reliance on the opinions and information expression in the Survey was placed by the Commission during the 1971 and 1973 discussions, it is perhaps not too unsafe to claim that the Survey did affect the opinions of at least some members of the Commission in their decision to favour the treatment of the topics of lawful acts and jurisdictional immunities.

fourth session, the Commission began and finished its treatment of the topic at its thirtieth session in 1978, thereby demonstrating its efficiency in studying urgent topics.

CHAPTER 7

THE USEFULNESS OF THE SURVEY

The 1971 Survey had two express aims - one was "to provide a review of the state of international law, as it exists at the present time";⁴³ the other was "to assist the Commission in its task"⁴⁴ of bringing up to date its long-term programme of work. Merely because the latter aim was not immediately fulfilled in a concrete manner (that is, the Commission did not in the end amend its long-term programme as a result of its formal discussion of the Survey) is not a satisfactory reason for concluding that the Survey was ultimately a failure. It was unfortunate that the twenty-fifth anniversary of the Commission coincided with a cripplingly heavy current programme, because of which the Commission felt it unwise to add any topics to its future programme, but this should not detract from the fact that the Survey was in fact of immeasurable value to the Commission when the item was considered during the 1971 and 1973 sessions. Every member expressed profound gratitude and sincere admiration to the writers of the document, and every member who addressed himself to the question of revision of the long-term programme consistently made reference to the Survey - that in itself is testimony to its value.⁴⁵ Moreover, delegates in the Sixth Committee equally consistently referred to the Survey during the debate on the Commission's report - they too expressed gratitude for the assistance they had derived from the Secretariat's review.

But if the Survey did not immediately act as the expected catalyst to the re-casting of the Commission's long-term programme, it cannot be denied that its first avowed aim was achieved with outstanding success. For the 1971 Survey will be remembered for what it was - namely, a contemporary review of the state of international law. The Survey was quite unlike any other document that had been produced in the past; even the 1948 Survey, its closest equivalent, - which was written for

43. 1971 Survey, para. 7.

44. ibid., para. 3.

45. Its "value" is increased when one considers that the Commission's planning group was still making reference to the Survey as recently as 1977: ante, p. 72.

substantially the same reasons as the 1971 paper - was quite unlike it in scope, content and emphasis. The earlier Survey, for instance, made no claim to be exhaustive in its choice of topics;⁴⁶ not did the 1971 Survey, yet the latter was significantly more comprehensive than the former. Included were new and developing subjects of international law, none of which was considered worthy of a place alongside the traditional chapters of international law in Lauterpacht's review. Similarly the 1971 Survey contained reference to relevant State practice and previous international agreements wherever appropriate; the 1948 Survey, on the other hand, concentrated more on the doctrinal aspects of each topic. Furthermore, the later Survey relied extensively on the work of a variety of regulating bodies and organisations, whereas the 1948 Survey deliberately excluded from its purview subjects which were already covered by existing international agreement. Above all, though, the emphasis of the 1948 Survey was doctrinal - the 1971 Survey was in contrast a practical document. Lauterpacht stressed the intellectual aspects of his subject, and in so doing proffered his personal views on the topics included in his review; the authors of the 1971 Survey remained substantially aloof from conflicting doctrinal standpoints (without entirely ignoring them)⁴⁷ and instead set out impartially the practical problems that a codifier might face with respect to each topic.

As an example of the comprehensive nature of the 1971 Survey it is worthwhile looking at one of the "smaller" topics in some detail in an attempt to illustrate the way in which the authors of the document approached their task. The law relating to international watercourses provides a fine microcosm of the whole. Within the space of only eight paragraphs⁴⁸ the authors

46. 1948 Survey, para. 25.

47. One reason for this absence of doctrinal discussion was no doubt that the Survey was prepared by a group of ostensibly impartial international civil servants - the writers were principally from the Western countries, though under the supervision of a Soviet man. Thus any opinion that appeared to favour either the Western or Eastern tradition of international law would have looked out of place. Consequently doctrinal discussion was kept to a minimum.

48. paras 285 - 292.

referred to the essential information on the subject which would be required by a potential codifier to assist him in the decision whether or not to codify the topic.⁴⁹ The first paragraph briefly summarises the most important sources of the law relating to international watercourses. Next, after mentioning the increasing importance of the subject, the authors look at the history of the suggestions to codify the law of watercourses under the auspices of the United Nations. Conflicting views in the Sixth Committee of the "ripeness" of the topic for treatment by the Commission are summarised. A condensed description of the content of the work done by the Secretary-General is provided. Reference is then made to the existing legislative enactments and treaties relevant to the topic, with particular reference to two conventions recently adopted. The reasons put forward by the Finnish government in 1970 for suggesting that the Commission is the most appropriate body for the treatment of the law relating to watercourses are reiterated - the reader of the Survey thus had the opportunity of evaluating those reasons. The last paragraph concludes with an extract from the report of the Sixth Committee's 1970 session.

In short, the authors provide the reader with an outline of the references to all the up-to-date information relevant to the practical decision whether or not the Commission should or should not codify that topic. The same is true of the other chapters in the Survey - the emphasis and detail varies from topic to topic, but the general gist (that is, the provision of a practical contemporary guide to the topic) is present in every field.

The twin aspects of comprehensiveness and practicality are the hall-marks of the document - while one might quibble that certain subjects are not included,⁵⁰ if one compares it to any other major treatise of international law the latter generally

49. It should be noted that the authors made no claim to be exhaustive of all the material references in respect to each topic. Instead the authors chose to confine their study to a "description of the nature and extent of the law in each area": para. 14.

50. ante, Chapter 4.

suffers by comparison, for it is a rare book that includes all of such topics as those dealing with outer space, international watercourses, the environment, economic co-operation and international peace and security. Similarly, other treatises generally emphasise the doctrinal aspects of international law - the 1971 Survey instead stressed the current state of the subject, with particular emphasis on contemporary political, legal and technological developments and the effect they have had on efforts made at the international level to regulate the subject both within the umbrella of the United Nations (i.e., in the Commission, in the General Assembly, and in other U.N. bodies) and outside that umbrella. The authors made clear the problems that the Commission might encounter should it attempt to codify a certain topic - for example, political difficulties in arriving at consensus, technical difficulties, doctrinal controversies and the problems of trying to "freeze" developing law. All these were the very pieces of information that the members of the Commission needed to know if they were to make an informed decision on the alteration of their future programme of work. In this respect the 1971 Survey performed its function admirably

It is the Survey's contribution to international legal scholarship, then, for which it will be remembered in the future. For no other contemporary document of its size contained such a comprehensive coverage of the broad range of international law and of the efforts being made at the international level to regulate that broad range in an era of rapid political, legal and technical change.

The Usefulness of the Commission's Treatment of the Survey:

Just as it is erroneous to say that because the Survey did not lead to an immediate alteration of the Commission's long-term programme it was a failure, it is similarly misleading to say that the Commission's discussion of the document during its twenty-third and twenty-fifth sessions, because it did not generate any positive proposals, was futile. For the Commission achieved much, though the fruits of its discussion were not as tangibly recognisable as would have been the case had a formal revision of its long-term programme been adopted.

The outstanding feature of the Commission's discussion of its long-term programme was its current programme, against which all the discussion had to be put into perspective - that programme was so onerous that it was considered that the Commission would in all probability not be able to begin work on new topics for almost a decade. Thus it was not at all surprising that the Commission chose not to amend its long-term programme formally. But in an informal way the long-term programme was in fact altered - the lack of support for two of the topics outstanding on the 1949 list (namely, the right of asylum, and the recognition of States and governments) indicated the firm belief that those topics would not be considered by the Commission in the near future. In other words, it is submitted that those two topics were notionally, if not formally, removed from the long-term programme. Similarly, the topic of unilateral acts (which received the positive approval of six members of the Commission at its twenty-fifth session¹) was in 1973 notionally added to the long-term programme as being "ripe" for codification in the not-too-distant future. To this extent the discussion of the Survey was productive.

Balanced against this is the possibility that the Commission may have lost a little of its hard-earned prestige by not being seen to have made any positive decisions on the subject of revision of its long-term programme. The Commission, like all United Nations bodies, has always had its share of detractors, and the fact that it deliberately chose not to alter its programme, especially in the year of its twenty-fifth anniversary,² may have provided ammunition for those people who attack the Commission for being basically ineffective. After all, the preparations of the Survey began as far back as 1967 - it was not until 1974 that the Commission chose to add a topic to its programme. It was thus unfortunate that the Commission did not, for its own sake and for the sake of its international credibility, make a positive amendment to its long-term programme at the

1. ante., p. 80, footnote 18.
2. One of the reasons for the production of the Survey and its accompanied discussion of the long-term programme was to commemorate (at first) the Commission's 20th anniversary and (later) its 25th anniversary: Yearbook, 1967, Vol II, p. 369, para. 49., ibid., 1970, Vol II, p. 309, para. 87.

end of its twenty-fifth session.

The Survey was of use to the Commission in more ways than merely listing various topics potentially susceptible of codification, for the document raised wider issues to which the members of the Commission addressed themselves during their discussion of the long-term programme. In three major respects the Survey itself served as a basis for the consideration of other questions related to the revision of the Commission's long-term programme.

First, the discussion of its long-term programme allowed the Commission the opportunity to sit back and study the development of international law as a whole and to assess the role the Commission was playing in that development. Most members when they spoke emphasised the rapidly changing character of modern international law, and the way in which each member saw the appropriate role of the Commission in that metamorphosis was reflected in his choice of the most suitable criteria to be applied to the selection of topics for future codification. Not since the Commission's previous discussion of its long-term programme at its fourteenth session had it had the chance to take a long balanced look at this broader question, because the Commission's usual method of work (working on one topic at a time) meant that the focus of the Commission was directed at the state of the law in relation only to the topic under consideration, and consequently did not afford the opportunity to consider international law as a whole in perspective.

Secondly, the production of the Survey (which summarised all the work the Commission had undertaken since its inception) permitted the members of the Commission - indeed, all readers of the document - to assess the degree of success or failure which the Commission had achieved during its first twenty-five years. Most members spoke of what they saw as "substantial progress" and "real achievements", in support of which statements they cited the Commission's three notable successes at the diplomatic ^{level} ~~legal~~ (the law of the sea, diplomatic and consular law and the law of treaties). It was generally a case of mutual back-slapping. One member disagreed with the general feeling in the Commission when he said that its achievements had been "rather slight".³ Nevertheless, it is clear that every member

3. ibid., 1973, Vol I, p. 173, para. 6 (Ramangasoavina).

wanted to further the success that had already been achieved and the proposal of certain topics for which there was a belief there would be successful completion by the Commission was a material element of this hope for continued success.

Integrally related to the question of the long-term programme and to the above two "broader issues" was the question of the Commission's methods of work. At every session since 1949, the question of improving the methods of work had always been raised by at least one member of the Commission. The twenty-fifth session proved to be no exception - every one who spoke on the subject of the long term programme also suggested possible means of streamlining the Commission's methods in order to make it more efficient. Longer sessions, longer terms of office, greater use of sub-committees and working groups, the strengthening of the Codification Division of the Office of Legal Affairs, a greater consultation with experts, the revision of topics already codified, the use of codes and formulations instead of articles for conventions concluded at international conferences all these were various possibilities raised from time to time during the twenty-third and twenty-fifth sessions.⁴ But despite the general view that some form of procedural improvement was required the Commission ultimately did not make any recommendations on this point.⁵ It has been seen that the planning group was established in 1975.

The Commission, then, saw itself at its twenty-fifth session as being "at the opening of a new era in [its] existence".⁶ Consequently it was appropriate that it should have considered the Survey from a wider angle than the agenda item called for, by looking backward and forward, and by assessing its own role in the international law-making order.

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4. See especially ibid., 1973, Vol I, p. 174, paras. 17-21 (Tabibi).
 5. The Commission did, however, repeat the recommendation which it had made at its twentieth session to increase the staff of the Codification Division of the Office of Legal Affairs; ibid., Vol II, p. 231, para. 176 (Report).
 6. ibid., p. 229, para. 163.

CONCLUSION

The 1971 Survey and its subsequent discussion in the Commission illustrated yet again that international law is above all a developing law, a fluid body of rules continually being modified by changes in the world situation. This was why the 1971 Survey was so different in character and substance from the 1948 Survey - the later document incorporated the product of two decades of remarkable political and technological change; whole new topics of international law had emerged, and the older topics had to be reconsidered in the light of recent developments. Consequently whole new chapters - some of which Lauterpacht would not even have dreamed of in 1948 as being subjects of international law - were included in the Survey.

During the discussion of the long-term programme it was clear that every member of the Commission was well aware of the continuing metamorphosis of international law. While some expressed preference for the codification of the traditional subjects of international law, and while others preferred the newer, politically important topics, no member disagreed that the Commission's role was in the forefront of the development of international law. Emphasis was repeatedly placed on the need to revise the old rules to bring them up to date with recent developments.

But it became equally clear that the Commission would not attempt to study any of the developing subjects of international law without the active encouragement of the General Assembly. This went far beyond the distinction established in the Statute between codification and progressive development - it represented the view that, in accordance with Article 13(1)(a) of the Charter, politics and law are to a large extent indissoluble and that the best means for discharging the Commission's task is for the lawyers (the Commission) and the politicians (the Sixth Committee) to work in harmony. This became evident during the discussion of the long-term programme - each body treated the other with a respect that seemed almost wary; neither wanted the Commission to adopt a course of work that the Commission would consider improvident; in short, both bodies were working together toward the common goal of the codification and progressive development of international law. Hence the Commission at the end

of its twenty-fifth session merely recorded its suggestions of topics suitable for future treatment - in effect it was saying to the General Assembly: "These are the subjects which we prefer. You tell us which ones we ought to study." In reply, the Sixth Committee recommended that the Commission should study one of the two topics that had attracted most support in the latter body. It did not request the study of responsibility for lawful acts; instead it recommended a study in the near future, leaving the decisions of when work on the topic should begin and how it should be approached to the Commission itself. Four years later the process was repeated with the subject of jurisdictional immunities.

The Secretariat also recognised the Commission's position. In its comments in the Survey on the susceptibility or otherwise of the codification of various topics it deliberately refrained from expressly advising against the study of certain subjects that the Commission in any case would probably choose not to study. On occasions the Secretariat hinted that the treatment of a certain topic would be inexpedient, but rarely did it express views that might have been considered coercive. To this extent, then, the Secretariat, like the Sixth Committee, recognised that the Commission should have a certain amount of autonomy in its work. From this paper it can thus be seen that the chief feature of the relationships between the Secretariat and the Commission, on the one hand, and the Commission and the Sixth Committee on the other, is one of co-operation.

The Commission too was aware of its role in the United Nations law-making process. It appreciated the assistance given it by the Secretariat when it discussed the Survey. Similarly, it appreciated the ostensible independence granted it by the General Assembly. But during the Commission's 1971 and 1973 discussions on the long-term programme it also demonstrated its awareness of its position in the whole United Nations codification effort, to the extent that subjects already covered by other bodies, or subjects that imported a large non-legal element, generally received little support as potential topics for future treatment.

The 1971 Survey, like its predecessor in 1948, will probably go down in international legal history as a remarkable document that comprehensively reflected contemporary world conditions. But in its own time it will be remembered for the practical and scholarly assistance it provided for the reassessment of the Commission's long-term programme of work.

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