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COMMENTS ON THE FUTURE WORK OF THE INTERNATIONAL LAW COMMISSION

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The present work program of the International Law Commission is an impressive one. The subjects of state responsibility, state succession to treaties, state succession in respect of matters other than treaties, the law of treaties with respect to international organizations, and most-favored-nation clauses are of sufficient complexity to occupy the attention of the Commission for the next six to eight years. The question can legitimately be raised whether there is any point in attempting to choose additional fields of work when it may not be possible to give active consideration to new subjects for a number of years or perhaps even bring them to conclusion within the next ten to fifteen years.

To answer such a question would be difficult if the objective of a review of the Commission’s work were directed solely to the end of stockpiling items for future consideration. This would amount to nothing more than a kind of insurance that the Commission would not on some occasion or other find itself without some subject to take up. The major objective in considering the future program of work should be to determine what the primary needs of the international community are with regard to the codification and progressive development of international law during the next fifteen to twenty years. Once those needs have been established and adopted as the program of work which the Commission should accomplish during such a period, it will be possible to consider the further and equally important question of the means by which such a program of work can be carried through. This will require a review of the work patterns which have evolved in the Commission and the nature and extent of the resources currently and prospectively available to the Commission in discharging its responsibilities. If those work patterns and resources will not permit the Commission to meet the reasonable needs of the world community, then it will be necessary to consider what changes may be required in the Commission’s practices and procedures and what additional resources should be sought.

Consideration of a program of work is thus the first step in a larger process. The *Survey of International Law*\(^1\) produced by the Secretary General is admirably suited for the type of review suggested above because of its wide-ranging scope. While the *Survey* may not include every existing and prospective topic for work in the field of international law, it does substantially achieve universal coverage. Accordingly, the following comments are based upon the same plan of organization as is contained in the table of contents of the *Survey*.

I. **THE POSITION OF STATES IN INTERNATIONAL LAW**

A. **Sovereignty, Independence and Equality of States**

Any codification effort with regard to the principles of sovereignty, independence and equality of States would require interpreting the Charter of the United Nations.\(^2\) The Commission should not volunteer to assume a role as the interpreter of the Charter. The dismal fate of the Commission's early effort in this area—The Draft Declaration on Rights and Duties of States of 1949—is an indication of the pitfalls inherent in assuming such a role.\(^3\) Interpretation in the abstract is as often unwise as it is fruitless. The advisory opinion power of the International Court of Justice is the constitutional method of making interpretations of the Charter and should be employed as the need arises.\(^4\) In addition, the effort would largely duplicate that involved in preparing the Declaration of Principles of Friendly Relations.\(^5\)

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2. Cf. U.N. Charter, art. 2, paras. 1, 4 and 7. It might be noted that the Commission has never, in any of its drafts, attempted to define what is a "State" even though it uses the term continuously.
3. The General Assembly sought comments from States on the draft but received so few that in General Assembly Resolution 596 (VI) of December 7, 1951, it was decided to wait until a sufficient number of States replied before taking up the Draft Declaration. We are still waiting. *Work of the International Law Commission*, U.N. Publication 67.V.4, 18-19, and Annex 11, 61, (1967) [hereinafter referred to as *Int'L L. Comm'n*].
5. G.A. Res. 2625, 9 Int'l Leg. Mats. 1292 (1970). This Declaration proclaims, *inter alia*, the principles that States shall refrain from threats or use of force against other
B. Fulfillment in Good Faith of the Obligations of International Law Assumed by States

Nothing more than some variety of exhortation is likely to result from a codification exercise in this area. "Good faith," like "due process of law" or "ordre public" is not susceptible to capsulized definition. It is explored best in terms of the individual case. This was recognized in the *pacta sunt servanda* provision of the Vienna Convention on the Law of Treaties, Article 26, which maintains that the parties to a treaty in force must perform it "in good faith" and which attempts no further explication. The current President of the International Court of Justice, Manfred Lachs, in discussing the *pacta sunt servanda* principle in the 849th meeting of the International Law Commission on May 11, 1966, remarked that "the principle of good faith stood on its own feet and needed no explanation; any attempt to provide one would lead to casuistry."

*Greece v. The Federal Republic of Germany*, decided by the Arbitral Tribunal for German External Debts, January 26, 1972, is an example of the complex aspects of applying the good faith concept in the international context. It was necessary to determine the bounds established by a treaty commitment to negotiate that did not contain a requirement that an agreement be reached—in the Latin phrases *pactum de negotiando* rather than a *pactum de contrahendo*. The German government had rejected the Greek claims as being without legal foundation prior to making the commitment in 1953 to negotiate concerning those claims. The Tribunal held that the commitment gave rise to an obligation to negotiate in good faith, thus barring the German government from standing on its prior position, and requiring it to negotiate on the basis of willingness to make a settlement.

C. The Territorial Domain of the State

Codification of this topic faces formidable obstacles. If codification with regard to acquisition of territory is to be of substantial value, the Commission should be directed to the selection of...
rules for the purpose of settling territorial disputes. The adoption of such rules could result in providing a basis for settlement of a number of long-standing and vexatious disputes among nations. However, if the rules were drafted with sufficient particularity to dispose of the disputes, it is doubtful that they would be adopted on a broad enough basis to have any substantial effect upon existing trouble areas. For example, a very effective provision from the standpoint of settling disputes would be the establishment of a prescriptive period with regard to claims to territory. A party in possession of territory would be conclusively considered as sovereign over that territory upon expiration of some fixed number of years. Would it be possible to obtain general international agreement upon the length of time that should be controlling or upon the underlying assumption that the manner of acquisition was immaterial?

The records of the Vienna Conference on the Law of Treaties are a testament to the assiduity with which States pursue legal formulations favorable to their territorial claims and oppose those which appear unfavorable. Article 45 of the Convention, for example, provides in part that a State is barred from invoking grounds to claim a treaty invalid if, after becoming aware of the facts, it has by reason of its conduct been considered to have acquiesced in the validity of the treaty. An eight-power amendment to delete this provision was put forward and defeated. Five of the eight powers had more-or-less active territorial disputes. Spain, also concerned in a territorial dispute, tabled an amendment to the same end.

The Territorial Domain of the State undoubtedly deserves consideration for inclusion in a long-term work program for the Commission; however, the obstacles to producing a set of rules that will receive sufficient acceptance to justify giving the subject a priority status are formidable.

With regard to specific limits on the exercise of territorial sovereignty the conclusion in the Survey that most of the problems in this area fall within the scope of the law of treaties, including succession to treaties, justifies the conclusion that no action be taken. Article 29 in the draft Articles on Succession of States to Treaties, that the Commission adopted on first reading

at its 24th Session in 1972, deals with boundaries and boundary regimes established by a treaty. Article 30 deals with rights and obligations relating to the use of a specific territory or to restrictions upon its use established by treaty.\footnote{\text{\textsuperscript{11}}} The thrust of the Articles is negative. Succession of States \textit{per se} does not affect boundaries, rights and obligations relating to boundary regimes, and obligations relating to territories subject to specified limitations. Nonetheless, these articles will require consideration by the States of basic concepts in this area. The debate in the General Assembly on the report of the Commission indicated both considerable interest and considerable concern regarding Articles 29 and 30. It can be anticipated that the Commission will review comments on the draft articles at its 26th Session in 1974 and produce a revised set of draft articles for submission to the General Assembly and, probably, consideration by a diplomatic conference. It would seem advisable to delay any final judgment regarding work on these topics until the final results of this process become known.

\textbf{D. Recognition of States and Governments}

The basic issue, as the \textit{Survey} points out in paragraph 65, is whether recognition is to be treated as a political decision or whether a requirement should be laid down that recognition must be afforded if certain criteria are met. In the present state of world politics, agreement upon the latter point and upon what criteria should be governing does not appear attainable. States treat recognition as a political act.\footnote{\text{\textsuperscript{12}}} When, as in the case of the German Democratic Republic, the act of recognition involves political issues of the first magnitude, the act of recognition will result only from some degree of solution of the political problems and not from the application of legal principle. For better or worse, recognition is regarded as a tool of some consequence in the fabrication of international relationships; it is unlikely to be quickly discarded. Given this situation, there does not seem to be any great advantage in attempting to define the legal consequences of recognition and non-recognition. If recognition is to remain fundamentally a political decision, it would seem desira-


ble to permit States a substantial degree of tolerance in the range of actions which may be taken vis-a-vis the non-recognized State without attempting to categorize specific legal consequences that follow such acts. The absence of conventional requirements in this area, however, 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 to exacerbate them.

E. Jurisdictional Immunities of Foreign States and of their Organs, Agencies and Property

Paragraph 68 of the Survey understates the existing confusion with respect to State immunity when it remarks that the contents and application of the doctrine are far from clear. In practice, there appears to be little similarity between what one State has done and what another State may do in similar circumstances, and, on occasion, inconsistency in what the same State has done in two cases involving substantially identical facts. The courts of some States recognize immunity only on the basis of reciprocity while others do not; some grant immunity to political subdivisions of a State while others do not. In some jurisdictions a State trading organization is considered immune if it is not a separate entity, while in others this distinction is immaterial.

The major contributor to the confusion has been the continuing development of the distinction between acta jus gestionis and acta jus imperii, coupled with the lack of any generally accepted standards by which to judge whether a particular action is connected with political or commercial activities. For example, the Supreme Court of Austria denied a claim of sovereign immunity in the case of Holonbek v. United States on the theory that an

13. The basic principle that States and their property are immune from the jurisdiction of foreign courts, although generally recognized, has not been directly stated in a multilateral convention having a universal character. The obligation to grant jurisdictional immunity is grounded in the overriding legal duty to respect the independence and equal status of States. If the basic principle is generally recognized as flowing from 'customary law' or 'international comity', its contents and, particularly, its application to certain agencies of the State are far from clear. Survey at 36.

14. See the cases summarized in 6 Whiteman, Digest of International Law 554-674 (1968).

15. Id. at 566.
act under private law may be distinguished from an act of sovereignty since "... [A]n act under private law may be assumed if the State performs through its organs such activities as can also be performed by private persons." The case was one in which an official vehicle of the American Embassy, while engaged in collecting mail for the Embassy, crashed into Holonbek's auto.

Existing uncertainties regarding the scope and application of the doctrine of sovereign immunity give rise to friction among States that could be reduced, even if not completely avoided, by codification of the law in this field. The problem is basically a legal one in that it concerns claims that are normally subject to judicial determination. The subject should be included in the future work program of the Commission.\textsuperscript{16} The application of the doctrine of sovereign immunity, however, should not include the question of immunities granted with respect to the armed forces of one State which are stationed in the territory of another State (discussed in paragraphs 77 \textit{et seq.} of the Survey). As the Survey points out, problems of this character are almost invariably covered by treaty arrangements.

\textbf{F. Extra-territorial Questions Involved in the Exercise of Jurisdiction by States}

Paragraph 80 of the Survey questions the value of codification with respect to matters having an extra-territorial element and widely recognized by the international community as a basis for the exercise of jurisdiction by a State which does not have one of the generally accepted bases for jurisdiction in the matter

\textsuperscript{16} The United States Departments of State and Justice jointly announced on December 29, 1972, that they were in the course of submitting to the Congress draft legislation to regulate the jurisdictional immunities of foreign States in the United States. State Department Press Release No. 321 (1972). The proposed legislation which would \textit{inter alia} make more specific the "restrictive theory of sovereign immunity," eliminate in large part the existing immunity from execution, and provide for the method of definition of \textit{jus gestionis}, is broad and has certain long-arm aspects. There is no immunity in a case

\ldots in which the action is based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act has a direct effect within the territory of the United States. \textit{Id.}

In addition, immunity is excluded in respect of tort actions rising out of the negligent or wrongful act or omission in the United States of a foreign State or any official or employee thereof.
(e.g., place of occurrence of the act, nationality of the accused person, etc.). This is especially true in criminal cases. Standard examples of instances in which some aspects of universal jurisdiction have been found to exist are war crimes, piracy, slave-trading and narcotics traffic. The question might be phrased more pertinently as whether it is more efficacious to deal with matters of this kind on an ad hoc basis. Any effort to draw up such a code would entail an attempt to forecast the international requirements for protection against criminal activities for a substantial period of time in the future. Ten years ago it would have been difficult to predict the dramatic upsurge in the hijacking of airplanes or the politically-motivated attacks upon diplomats which have now become of great concern to the world community. In addition to this problem of foretelling the future, there are advantages to tailoring protective measures to the specific problem as it arises. The Commission encountered substantial difficulties in producing the draft articles on the protection and punishment of crimes against diplomatic agents and other internationally protected persons in the course of its 24th Session, particularly in regard to the definition of the offenses to be included, delimitation of the victims of the offenses, and scope of the jurisdiction to be established.18 An attempt to produce an International Criminal Code would require a vast expenditure of the Commission’s limited time with the distinct possibility, based upon immediate experience, that the product would be less valuable than specific conventions drafted to deal with specific problems of international crime. It does not appear desirable at this stage to contemplate the development of the general codification instrument suggested in paragraph 80 of the Survey.

The reasons put forward in paragraph 95 against the Commission’s taking up such matters as the extra-territorial effects of tax legislation and of “antitrust” legislation lead to the conclusion that these subjects should not be taken up.19 Bilateral or

17. A central issue is to what extent could a general codification, couched in broad terms, assist in implementing and improving the means of enforcement in cases where the international community already accepts a degree of international jurisdiction by individual States. Survey, supra note 1, at 46.


19. The Survey, in discussing aspects of the problem, notes that national economic regulation has a variety of international repercussions, particularly where a foreign element is involved or where restrictive trade regulations are applied. A state may generally tax alien or foreign income if it can claim some interest in the income in question. Survey,
multilateral conventions with a limited number of parties appear more likely to produce efficacious results than an endeavor to draft a general codification convention.

The activities of various international organizations, in the field of judicial assistance, such as the Hague Conference on Private International Law, and in particular the Hague Conventions on Service Abroad of Judicial and Extrajudicial Documents and Taking of Evidence Abroad, indicate that there is no pressing need for the Commission to move into this field. This is underscored by the interest displayed by regional organizations in promoting wide acceptance of conventions along these lines. The Organization of American States, for example, has incorporated both of these subjects on the agenda of its upcoming conference on private international law.

II. THE LAW RELATING TO INTERNATIONAL PEACE AND SECURITY


This item raises questions of the desirability of Charter interpretation by the Commission and of the duplication of work that has been done in other bodies. The objections to the Commission's taking such action are similar to those raised regarding The Sovereignty, Independence and Equality of States, and are equally valid here.

B. The Prohibition of the Threat or Use of Force

Insofar as an attempt to deal with the threat or use of force is concerned, the record of the endeavors to define aggression under the aegis of the United Nations demonstrates the wisdom of leaving the task to the Special Committee currently charged with the problem.

22. OAS Doc., OEA, Sec'y Gen., Cp/RES.83 (89/72) 20 December 1972.
23. See p. 556 supra.
24. The Special Committee on Defining Aggression was established by General Assembly Resolution 2330 (XXII) of 18 December 1967 to consider and submit proposals on
C. The Law Relating to the Peaceful Settlement of Disputes

The law relating to the peaceful settlement of disputes clearly concerns a matter of essential legal content and of fundamental importance. The issue, however, is not whether the Commission should take action to promote the peaceful settlement of disputes, but the manner in which it should do so.

The record relating to the Commission’s proposals with respect to Arbitral Procedure set forth in paragraph 134 of the Survey, as well as the existing impasse in the General Assembly with respect to the item “Review of the Role of the International Court of Justice” underline the difficulties of attempting to deal with this subject as a separate problem. The sharp split of opinion regarding the extent to which third-party settlement procedures should be used in the settlement of international disputes militates against the Commission’s dealing with the matter as a separate topic.

The definition of aggression to the General Assembly in 1968. It was unable to reach agreement on a definition and so reported to the Twenty-Third Session of the General Assembly. Its mandate was renewed with instructions to report in 1969. The pattern has continued from year to year. The Twenty-Seventh Session of the General Assembly has instructed the Committee to renew its Sisyphian labors in 1973. For a succinct account see The United Nations and Related Agencies Handbook, Publication 435, New Zealand Ministry of Foreign Affairs 35 (1972). For those interested in examining the existing range of disputed issues see Report of the Special Committee on Defining Aggression, 28 U.N. GAOR Supp. 19.

25. In 1953 the Commission submitted to the General Assembly draft articles on arbitral procedure and proposed that they form the basis for an international convention. The articles were a superb piece of draftsmanship and effectively blocked the loopholes through which States could escape from an inconvenient commitment to adjudicate. The articles suffered the normal fate of perfection in an exceedingly imperfect world. The General Assembly sent them back for consideration in light of the numerous expressions of concern. The Commission then redrafted the articles as a set of Model Rules on Arbitral Procedure and recommended to the General Assembly that it adopt the report by resolution. The General Assembly backed away from even this mild endorsement and confined itself to taking note of the proposals and bringing them to the attention of Member States. See H. Briggs, The International Law Commission, 287-91 (1965).

26. In 1970 a proposal was put before the General Assembly to authorize a review of the role of the International Court of Justice. This was done at the urging of a group of States which, concerned at the poverty-stricken state of the Court’s docket, wished to establish a group of experts to explore what ways and means might be found of “further enhancing the effectiveness of the Court.” The initial result was Resolution 2723 (XXV) inviting States to submit “views and suggestions concerning the role of the Court.” At the Twenty-Sixth Session there was a renewed effort to establish the group of experts but the substantial opposition of the Communist group of States joined by a number of others has prevented further action. See U.N. GAOR, Report of the Secretary-General on the Role of the International Court of Justice, U.N. Doc. A/8382 (1971); 27 U.N. GAOR, Report of the Sixth Committee, Agenda Item 90, U.N. Doc. A/8967 (1972).
Nevertheless, the Commission should pursue the objective of promoting the peaceful settlement of disputes. With this purpose in mind the Commission should, as a matter of standard procedure, take up in each of the draft conventions which it prepares, the question of what methods of dispute-settlement would be best suited to the particular topic dealt with in the draft convention. The Commission should then include such provisions in the draft.

For any dispute-settlement procedure to be effective in a convention that is designed for world-wide acceptance, the proposed procedure should represent a substantial consensus of view. Conciliation procedures along the lines of those contained in the Commission’s draft convention on the representation of States in their relations with international organizations (Article 82)\(^27\) are

\[27. \text{It is necessary to read both Articles 81 and 82 for a complete picture of this dispute-settlement procedure. It should be noted that while the international organization concerned plays a part in consultations to dispose of a dispute under Article 81, it can not become a party in the conciliation proceedings under Article 82. Instead it may perform certain essential procedural activities. Article 81 provides:}]

\textbf{Consultations between the sending State, the host State and the Organization}

If any dispute between one or more sending States and the host State arises out of the application or interpretation of the present articles, consultations between (a) the host State, (b) the sending State or States concerned, and (c) the Organization or, as the case may be, the Organization and the conference, shall be held upon the request of any such State or of the Organization itself with a view to disposing of the dispute.

\textbf{Article 82 provides:}

\textbf{Conciliation}

1. If the dispute is not disposed of as a result of the consultations referred to in article 81 within three months from the date of their inception, it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may be established in the Organization. In the absence of any such procedure, any State party to the dispute may bring it before a conciliation commission to be constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations.

2. A conciliation commission will be composed of three members, of whom one shall be appointed by the host State, and one by the sending State. Two or more sending States may agree to act together, in which case they shall jointly appoint the member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time limit referred to in paragraph 2, the chief administrative officer of the Organization shall appoint such members within a further period of one month. If no agreement is reached on the choice of the chairman within four months of the written notice referred to in paragraph 1, either side may request the chief administrative officer of the Organization to appoint the chairman. The appointment shall be
illustrative of the manner in which procedures to promote dispute-settlement can be tailored to the requirements of a particular set of problems. It would be desirable for the Commission to maintain a flexible approach to the procedures that might be adopted with respect to any particular topic. In this respect the compromise solution of limited recourse to the International Court of Justice, plus generally applicable conciliation procedures contained in Article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto, furnish a precedent of substantial value. 28

III. THE LAW RELATING TO ECONOMIC DEVELOPMENT

As the Secretary General’s Survey points out, this topic was

made within a period of one month. The chief administrative officer of the Organization shall appoint as the chairman a qualified jurist who is neither an official of the Organization nor a national of any State party to the dispute.

4. Any vacant shall be filled in the same manner as the original appointment was made.

5. The Commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. If so authorized in accordance with the Charter of the United Nations the Commission may request an advisory opinion from the International Court of Justice regarding the interpretation or application of these articles.

6. If the Commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the Organization. The report shall include the Commission’s conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months’ time limit may be extended by decision of the Commission.

7. Nothing in the preceding paragraphs shall preclude the establishment of another appropriate procedure for the settlement of disputes arising in connection with the conference.

8. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States or between States and international organizations.

28. Part V of the Vienna Convention on the Law of Treaties contains exhaustive and exclusive provisions regarding the invalidity, termination and suspension of the operation of treaties. Article 65 lays down the procedures to be followed with regard to a claim that a treaty is invalid or should be terminated or suspended on grounds such as rebus sic stantibus or breach. Article 66 provides procedures for judicial settlement, arbitration and conciliation if such a claim is disputed and the parties cannot settle the dispute through such means as negotiation or mediation. Under Article 66 disputes over a claim that a treaty is or has become void under Articles 53 or 64 (the jus cogens articles) may be taken to the International Court of Justice unless the parties agree to arbitrate. All other disputes over claims of invalidity, terminations or suspension may be submitted to a conciliation procedure basically like the one set out in the preceding footnote.
not discussed in the Lauterpacht *Survey* of 1948. The discussion in the Secretary General’s *Survey* points out the growing emphasis upon economic development law and the desirability of taking an overall look at this field before reaching a decision to include the topic in the Commission’s future work program. In so doing, the *Survey* indicates that basic responsibilities in this field have been allotted to a variety of United Nations organs including the United Nations Conference on Trade and Development, the United Nations Industrial Development Organization, the United Nations Commission on International Trade Law, the International Bank and its associated agencies, the International Monetary Fund; to specialized agencies such as the Inter-Governmental Maritime Consultative Organization; and to other instrumentalities such as the General Agreement on Tariffs and Trade. In addition to these organizations, regional economic organizations and specialized organization such as the International Institute for the Unification of Private Law are active in various aspects of what might be called international economic law. There does not appear to be any demonstrable need for the Commission to enter into a field that has been preempted by other organizations, particularly when, in the field which is traditionally its own, there remain so many unsatisfied demands.

IV. STATE RESPONSIBILITY

The law of State responsibility is actively under study by the Commission, which in accordance with its decision in 1963, is defining the general rules governing the international responsibility of States.29 In considering a long-range program of work, the major consideration that should be borne in mind is that completion of a convention on the general principles giving rise to responsibility will only be the foundation for the Commission’s

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29. The Commission has been wrestling, albeit sporadically, with the subject of State responsibility since 1955. It proved impossible for the Commission to reach sufficient agreement upon what rules governed national treatment of aliens and alien-owned property to permit codification of this aspect of the subject, even though available legal materials regarding State responsibility, as reflected in judicial and arbitral decisions, State practice and commentaries, were largely concentrated thereon. The Committee established a subcommittee to review the problem and seek a way out of the impasse. The subcommittee proposed that the Commission concentrate on defining the general rules that underlie the responsibility of States, and the Commission adopted the proposal. Work in the field has been proceeding with some deliberate speed since that time. The first report of the special reporter, Professor Roberto Ago, was submitted in 1969 and has been followed by several others. *Survey, supra* note 1, at paras. 84 et seq.
work in the field. It will be necessary to build on this foundation more specific rules relating to State responsibility in specific areas. It is at this stage that the Commission may find it necessary to consider subjects such as limitations on the exercise of territorial sovereignty and prohibition of the threat or use of force to the extent they relate specifically to responsibility.

It would be premature to attempt a complete list of such areas at this stage in the consideration of the general principles of responsibility. As part of its long-range work program, the Commission should plan for continuing activities in the field of State responsibility as soon as the codification of general principles has reached an advanced stage. Nevertheless, it is suggested that the most appropriate area to consider initially would be responsibility for violation or impairment of treaty commitments. Article 73 of the Vienna Convention on the Law of Treaties quite properly laid the question aside, but neither the law of treaties nor the law of State responsibility could be considered as adequately codified unless this subject is dealt with.

Responsibility for breaking a treaty would undoubtedly be the core element involved. There remain, however, many other important issues such as rules for allocating residual rights and obligations in cases of termination, for example, on grounds of impossibility or rebus sic stantibus, and what rules should be applied to disentangle the existing situation when a treaty is terminated on grounds of error. The advantage of taking up this subject is that there will be in existence a solid foundation of treaty law upon which to build these specific principles of liability. By the time the Commission would be taking up this topic, hopefully it can be anticipated that the Treaty on Treaties will have been ratified by a substantial number of States.

Another subject of equal importance in the area of State responsibility is the question of rules to govern the calculation of damages. This issue was one of the major stumbling blocks in adoption of the Convention on International Liability for Damage Caused by Space Objects. A question here is whether rules on calculation of damages can be formulated on a general basis or

31. Id., art. 48 at 697-98.
32. See Article XII of the Vienna Convention for the agreed solution. 10 INT'L LEG. MATS. 968 (1971).
whether, for the rules to be more than ambiguous generalities, it is necessary to relate the damage to particular categories of responsibility. The issue is of sufficient importance to merit discussion by the Commission.

V. Succession of States and Governments

The Secretary General's Survey suggests, in addition to the present work regarding succession of States in respect to treaties and in respect to matters other than treaties, that the Commission's future work on succession also include consideration of matters with regard to treaties concluded between States and other subjects of international law. The subject should certainly be included in the long-term work program of the Commission. The issue is whether it would be desirable to have the matter dealt with in connection with the existing project on the law of treaties with respect to international organizations or as a separate topic. A decision on this point might be appropriate after receipt of the comments of States on the draft articles on succession of States in respect of treaties.

With regard to other aspects of the law of succession, the suggestion in paragraph 218 of the Survey that the topic of "Succession of States and Governments" be retained on the long-term work program is a sound one which will permit later consideration of the need, if any, to take up the topic "Succession of Governments". 33

VI. Diplomatic and Consular Law

In light of completion at its 1972 session of the draft convention concerning crimes against persons entitled to special protection under international law, the work of the Commission in the field of diplomatic and consular law is substantially complete. However, the continued review of the Vienna Convention on Diplomatic Relations 34 and the Vienna Convention on Consular Relations 35 in the course of the Commission's work on special mis-

33. The Commission decided that an attempt to deal with succession of both States and Governments in the context of treaties would lead to unnecessary complications. Int'l L. Comm'n Report, supra note 11, at 19-20.
sions and representation of states in their relations with international organizations established that there was a substantial number of minor problems in the formulation of those conventions and the possible existence of major omissions or flaws. Nevertheless, in the absence of a showing of substantial difficulties arising in the implementation of the conventions there would not be sufficient reason to incorporate a proposed revision of these conventions in the long-term work program.

On the other hand, the rate of change in the area of international relationships eliminates any possibility that the rules contained in the Vienna Diplomatic and Consular Conventions could enjoy more than a fraction of the immutability accorded to the Vienna Reglement of 1815. The same factors are bound to affect to a greater or lesser degree any other convention that the Commission has sired. It seems reasonable to consider as an element of the Commission's long-term program of work the establishment of a system for reviewing its conventions on a regular basis in order to determine whether there is an existing need for study and possible revision.

VII. THE LAW OF TREATIES

As the question of treaties concluded between States and international organizations or between two or more international organizations and the "most-favored-nation" clause are both on the active agenda of the Commission, the only subject raised in the Survey which requires comment is the question of participation in a treaty. This question is primarily political rather than legal. As the matter is currently before the General Assembly, hopefully it will be settled in that context.

VIII. UNILATERAL ACTS

A decision to take up the topic of unilateral acts would require consideration of the entire subject of the sources of international law. This is so because it would be necessary to express the relationship of unilateral acts to the accepted sources of international law that appear in Article 38, paragraph 1 of the Statute of the International Court of Justice. Difficulties might be expected to arise in expressing the relationship of unilateral acts not

only to "international custom, as evidence of a general practice accepted as law" but also to "the general principles of law . . . ."37

The Commission decided in 1949 that the topic of the sources of international law (which was included in the Lauterpacht Survey) ought not to be placed in the list of topics suitable for codification. This decision appears as valid now as it did in 1949.38 The Survey in paragraph 280 raises the more specific question whether the subject of unilateral acts should be taken up by the Commission in the context of "unilateral acts with definite legal consequences emanating from a single subject of international law, and of which the main examples are recognition, protests, estoppel, proclamations or declarations, waivers and renunciations . . . ." The Survey continues by suggesting in paragraph 283 that the product of the Commission might well not be a draft convention but in effect a legal study, and points out that no such study currently exists to which reference can easily be made. Accepting the importance of the subject, the question arises as to whether such a study could not be undertaken by some organization other than the Commission—e.g., the International Law Association or the Institute de Droit International. It would then be possible to determine whether additional work by the Commission itself was necessary in this field.

IX. THE LAW RELATING TO INTERNATIONAL WATERCOURSES

The subject of the "Law of the Non-Navigable Uses of International Watercourses" has been referred to the Commission by the General Assembly and may thus be considered part of the Commission's agenda.39 The formulation of the General Assembly resolution, however, raises substantial practical problems. The exclusion of navigable uses from the Commission's consideration

37. Article 38, paragraph 1 of the Statute of the International Court of Justice reads: The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. International custom, as evidence of a general practice accepted as law; c. The general principles of law recognized by civilized nations; d. . . . [J]udicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.


prevents a balanced study of this subject. For example, if a downstream riparian decides to use a navigable river for hydroelectric production, the construction of the necessary dam will eliminate navigation for upstream riparians unless that construction is accompanied by the building of locks to carry vessels around the dam. On the other hand, if an upstream riparian decides to use waters for irrigation purposes it may well reduce stream flows to such an extent that it interferes with the established navigational uses of downstream riparians.

Apart from the foregoing practical problems there is a serious question whether it is possible to produce a draft set of provisions regarding the uses of international watercourses that would not be at such a level of generality as to be of limited utility. The variations between river basins are sufficiently substantial so as to make what might be a reasonable set of rules for the control of one river basin, unreasonable for that of another. An example would be the difference between the Rhine River basin and the Tigris and Euphrates system. This distinction may well account for the very general character of the provisions in the Helsinki Rules on equitable utilization of the waters of an international drainage basin. The two rules that would be relevant to most riparian disputes are Article 6, which denies preference to any use or category of uses, and Article 8, which provides that an existing reasonable use may continue in operation unless on balance it is reasonable to conclude that it should be modified or terminated so as to accommodate a competing incompatible use. These principles will have a limited value in resolving conflicting claims between upstream and downstream riparians.

The Helsinki Rules provide reasonably detailed and effective provisions in three areas: in Chapter 3 with respect to pollution, in Chapter 4 with respect to navigation and in Chapter 5 with respect to timber-floating. This greater degree of definition undoubtedly stems from the fact that differences among river basins do not substantially affect the rules required to insure a reasonable regime in order to prevent pollution and to control navigation and timber-floating.

As the General Assembly has expressed a preference that the Commission not take up navigational uses at the first stage of its study of international waterways and as it would be fruitless to

40. INT'L L. ASSOC., REPORT OF THE 52ND CONFERENCE 484 et seq. (Helsinki, 1966). The key provisions on uses are Articles four through eight.
consider timber-floating without taking navigational uses into account, the principal area in which the Commission could perform useful work would be with respect to pollution of international waterways. The ever-increasing concern demonstrated with respect to environmental problems generally emphasizes the overall importance of the topic of water pollution. Intensive international, regional and national efforts are being made to deal with the subject.

The Declaration on the Human Environment of the Stockholm Conference is the initial effort to formulate, on a world-wide basis, defenses against the continuing degradation of the environment. Principles 21, 22 and 23 are of special significance with respect to the pollution of international river basins:

21. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

22. States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.

23. Without prejudice to such general principles as may be agreed upon by the international community, or to the criteria and minimum levels which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Summary review of these principles indicates the formidable amount of work that will be necessary to convert the principles into practical application to meet particular problems. The complexity of the problem is illustrated by the joint efforts which a group of countries has found to be necessary in order to deal with one important aspect of pollution—though minor in terms of the

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overall dimension of the problem. Ten European States have entered into an agreement to establish a joint research project on "Sewage Sludge Processing". 42

Principle 25 of the Stockholm Conference provides that "... States shall ensure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment." 43 The International Law Commission, with its character as a body of independent experts, would be an excellent forum in which to work out legal principles for application to the problem of the pollution of international watercourses. The task would be a complicated one because the problems of pollution are complex and their solutions even more complex. Economic, financial and scientific studies are an essential adjunct to the formulation of workable legal requirements in this area. As a consequence of the Stockholm Conference, however, it may be anticipated that United Nations studies will be carried out in these fields and will ultimately supply the necessary technical information for the Commission's consideration of river pollution. It may well be necessary for the Commission to set up working arrangements with other United Nation's bodies in order to secure appropriate technical advice and assistance. Despite all the complications that may arise in dealing with this subject, however, the Commission should include it on the long-term agenda and should give it substantial priority among the items on that agenda.

X. THE LAW OF THE SEA

As the law of the sea is currently within the purview of a special committee, the Commission need not make any decision with respect to the subject at the present time. 44

44. The Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction was created by G.A. Res. 2750c (XXV) December 17, 1970 to prepare for a diplomatic conference to deal with the establishment of international machinery to protect the seabed, ocean floor, and underlying subsoil of the sea beyond the limits of national jurisdiction. Preparatory work by the 86-member Committee commenced in 1971 and is continuing. See Report of the Committee, 27 U.N. GAOR Supp. 21, U.N. Doc. A/8721 (1972).
XI. The Law of the Air

The International Civil Aviation Organization has established its jurisdiction with respect to the law of the air and it would be inappropriate for the Commission to take up subjects normally handled by that body.45

XII. The Law of Outer Space

The legal subcommittee of the Outer Space Committee has been dealing satisfactorily with the law of outer space in general and there does not appear to be any need at present for proposing changes in this method of dealing with the subject.46

XIII. The Law Relating to the Environment

One aspect of environmental problems has already been touched upon in the discussion regarding pollution of international waterways. From the broader point of view, the efforts to preserve reasonable environmental living conditions will require the cooperation of every competent international agency. Whether or not the fears of universal disaster expressed by some ecologists are accurate, there can be no doubt that enormous international action will be required to safeguard against the possibility of disaster. The Commission should participate in this work. Taking up the problem of river pollution will be a substantial first step. Participation in the development of world environmental law should be included in the long-term agenda of the Commission.47

XIV. The Law Relating to International Organizations

This is a topic that has special significance for the Commission in view of its own nature. The work now being carried on with respect to the application of the law of treaties to international organizations should serve as a foundation for future consideration of other fundamental legal problems in this area.48 Possibly


46. The Committee on the Peaceful Uses of Outer Space was created in 1959 by the General Assembly, replacing an ad hoc committee. See Survey, Supra note 1 at para. 331.

47. Id. at paras. 173 et seq.

48. Id. at paras. 176 et seq.
the subject raised under point 2 in the Survey, the privileges and immunities of international organizations, and of entities and officials under their authority, should be taken up as the next subject in this field when the work on treaties is completed. This might be followed by a study of the responsibility of such organizations. As a part of that study, certain of the problems raised in point 1 of the Survey discussion regarding the legal status of international organizations, such as contractual capacity, capacity to engage in legal proceedings, and the like, could be included.

XV. INTERNATIONAL LAW RELATING TO INDIVIDUALS


As to the first, nationality, it appears unlikely that substantial progress could be made in this area given the past history as recounted in the Survey. 49

The Survey suggests that it may be possible to agree to multilateral treaty provisions on extradition in respect to certain offenses. In the context of specific multilateral conventions dealing with specific offenses of general concern to the international community it has been possible to incorporate provisions involving extradition. 50 It seems doubtful, however, whether this fact supports the conclusion that it would be possible to conclude a general extradition treaty. The substantial obstacles to such a treaty which led the Commission not to include this subject on its agenda in 1949 have not disappeared. The Commission should not devote its scarce time and resources to the subject until more favorable prospects for success appear.

The third subject, right of asylum, appears too controversial to take up at this time. The difficulties are implicit in Article 14, 51

49. The Commission prepared a draft convention on the elimination or reduction of future statelessness in 1954 which was considered by a diplomatic conference in 1959 and in 1961. The convention, as finally adopted, "attempts to reduce the causes of statelessness by a series of provisions regarding conditions for the granting and loss of nationality." The convention has never come into force, not having been ratified by the required six States. Survey, supra note 1, at paras. 187-88.

paragraph 2, of the Universal Declaration of Human Rights, which specifies that a right of asylum may not be invoked in case of prosecutions for non-political crimes or for acts contrary to the purposes and principles of the United Nations. This formulation leaves any State substantially free to grant or withhold asylum as it sees fit. There is little likelihood that any more meaningful definition might be proposed by the Commission that would be widely accepted.

Point 4, human rights, is generally within the purview of the Commission on Human Rights. There does not appear to be any urgent reason for the International Law Commission to move into this area.

XVI. THE LAW RELATING TO ARMED CONFLICTS

As the Survey points out, the Commission considered whether the law of war should be included on its original agenda and decided against taking up the subject. While the reason for that decision, that such action might indicate lack of confidence in the ability of the United Nations to maintain peace, may not at the present moment appear overly persuasive, there are substantial reasons for not reversing the decision. Principal among these is that the International Committee of the Red Cross is currently dealing with most important aspects of this subject and a major international diplomatic conference may be expected on the basis of the preparatory work initiated by the International Committee. Insofar as matters not being dealt with in this context are concerned, other major issues are being dealt with in the Conference of the Committee on Disarmament. There are minor issues, such as have surfaced in the course of the Commission’s consideration of the law of treaties and of the Vienna Convention on Diplomatic Relations, but to the extent they have not been settled in such conventions, they are not of sufficient urgency to be placed on the long-term agenda of the Commission.

52. Survey, supra note 1, at paras. 205 et seq.
XVII. INTERNATIONAL CRIMINAL LAW

The discussion of this subject in the Survey establishes that topics in this area are best dealt with on an ad hoc basis as the need arises.\(^{53}\)

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\(^{53}\) Id. at paras. 433 et seq. The principles of international law recognized in the Charter of the Nuremberg Tribunal for the trial of German leaders at the close of hostilities in World War II, and the judgement of that tribunal, have been unanimously affirmed by the General Assembly and the work of the Commission has been limited to formulation of those principles.