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O/USSEA/M.Cadieux/PS

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October 1, 1963.

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MEMORANDUM FOR MR. BEESLEY (LEGAL DIVISION)

1964 Session of the I.L.C.

At the next main session of the I.L.C., in the spring of 1964, Sir Humphrey Waldock, the special rapporteur on the Law of Treaties, will submit his third major report dealing mostly with the effects of treaties.

2. Having read the previous special rapporteur's studies on this subject (they can be found in Volume II of the Yearbook of the I.L.C. for the years 1959 and 1960), I anticipate that the Commission will be faced, in discussing Sir Hymphrey's report, with a number of delicate issues:

3. The principle of the unity and continuity of the State. This is likely to stimulate a discussion as to what happens as to treaty obligations when revolutionary changes occur in the social and the political orders. Will we be satisfied to argue, as Sir Gerald does, that such cases should be dealt with in accordance with the provisions adopted by the Commission, in the course of its fifteenth session, in regard to fundamental changes of circumstances (art. 44).

4. Then, there is the principle of the supremacy of international law over domestic law. This problem was discussed in the Guardianship of Infants case and may be of particular importance to a country like Canada with a federal constitution and where the legislatures may enact provisions having the effect of frustrating the operation of treaties signed by Canada in regard to matters coming primarily under the jurisdiction of Parliament.

5. The question of non-performance by way of legitimate reprisals is a complex one involving attitudes as to the interpretation of the Charter (the limits of self-redress in relation to the use of force or the obligations involved under article 2 section 3) and one which may provide the occasion of long debates.

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6. The theory of the inherent character of certain treaties as creating an objective situation good erga omnes is bound to appeal to socialist states: they have already shown a disposition to treat as jus cogens treaties (the Austrian and the Laotian arrangements) in which they have an interest. Our interest in waterways may be significant in this context.

7. The stipulation pour autrui may also prove to be controversial.

8. It seems to me that it may be desirable, even at this early stage, to determine whether we have on our files any indications of Canadian state practice in regard to these various questions. We should then consider, in the planning committee, whether we have a national interest in any of these questions and whether certain tentative lines of approach should be developed.

M.C.

cc: Mr. Copithorne

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Mr. Cadieux's report

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REPORT ON THE 15th SESSION OF THE INTERNATIONAL LAW COMMISSION, GENEVA,

MAY - JULY, 1963

~~European Division~~ ~~U.N. Division~~ JBP

to see file on 5475-AX-40

Introduction

The International Law Commission held its fifteenth session in Geneva from May 6 to July 12, 1963. The following are the members of the Commission:

Name	Nationality
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartos	Yugoslavia
Mr. Herbert W. Briggs	United States of Ame rica
Mr. Marcel Cadieux	Canada
Mr. Erik Johannes S. Castren	Finland
Mr. Abdullah El-Erian	United Arab Republic
Mr. Taslim O. Elias	Nigeria
Mr. André Gros	France
Mr. Eduardo Jiménez de Aréchaga	Uruguay
Mr. Victor Kanga	Federal Republic of Cameroun
Mr. Manfred Lachs	Poland
Mr. Liu Chieh	China
Mr. Antonio de Luna	Spain
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. Angel M. Paredes	Ecuador
Mr. Obed Pessou	Dahomey
Mr. Shabtai Rosenne	Israel
Mr. Abdul Hakim Tabibi	Afghanistan
Mr. Senjin Tsuruoka	Japan
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Sir Humphrey Waldock	United Kingdom of Great Britain and Northern Ireland
Mr. Mustafa Kamil Yasseen	Iraq

All the members, with the exception of Mr. Kanga, attended the session of the Commission. I was present for the first week of the session and from the 6th to 10th weeks inclusive. A large number of members, including Amado, El-Erian, Elias, Lachs, Liu-Chieh, were present for only a part of the session. Mr. Aréchaga was elected President; Bartos and Tsuruoka were elected first and second Vice President respectively. Sir Humphrey Waldock, Special Rapporteur of the Law of Treaties, was elected general rapporteur. The following members were elected to the Drafting Committee under the Chairmanship of Vice-President Bartos: Ago, Briggs, El-Erian, Gros, Padilla Nervo, Rosenne, Tunkin and Waldock. I was asked to become a member but declined in view of my intended absence for a part of the session.

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2. The Commission approved the following agenda for its fifteenth session, as proposed in document A/CN.4/153 of February 5:

1. Law of Treaties
2. Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII))
3. State responsibility: report of the Sub-Committee
4. Succession of States and Governments: report of the Sub-Committee
5. Special missions
6. Relations between States and inter-governmental organizations
7. Cooperation with other bodies
8. Date and place of the sixteenth session
9. Other business

The order of consideration of the agenda items was adjusted to the work of the Commission on its major subject, the law of treaties. The law of treaties occupied almost the entire session. The subjects of state responsibility, state succession, special missions, relations between states and intergovernmental organizations and extended participation in general multilateral treaties of the League required approximately one meeting each for their consideration.

General Assessment

3. The present session of the Commission was a successful one. The large agenda was approached in a workmanlike and cooperative spirit by the members. As a result, the Commission succeeded in accomplishing a very large volume of work. The articles drafted by the Commission on the law of treaties at its present session probably constituted the most important part of the entire codification project on treaties and the Commission was outstandingly successful in resolving all differences and in drawing up a comprehensive set of rules. The Commission's work in the law of treaties covered the essential validity, the termination and effects of treaties. The basis of the Commission's work was a series of reports by the Special Rapporteur, Sir Humphrey Waldock, contained in documents A/CN.4/156, Add.1, 2 and Add.3. A very large measure of the credit for the successful work of the Commission on the law of treaties was due to Sir Humphrey Waldock. His remarkable gifts for conciliation and compromise, his flexibility of approach and his freedom from concern about "personal prestige" enabled him to follow the guidance of the members of the Commission without rancour or resistance. However, his original proposals were rarely out of line with the sentiments of the majority of the Commission. His prodigious capacity for work enabled him to take on the heavy burden of rewriting large portions of his report and of taking on whatever additional tasks the Commission thought necessary in order to work out solutions to problems. Sir Humphrey's draft articles were often long and involved and underwent major changes at the hands of the Drafting Committee. From detailed formulations of the law they became exceedingly short propositions which embodied only the essential aspects of the problem concerned. On a variety of potentially controversial rules there was wide similarity of views on the part of such diverse members as Gros, Ago, Tunkin, Lachs and El-Erian. While differences sometimes (although not often) appeared at the outset of the discussions, these were resolved by compromises which proved acceptable to virtually the entire Commission. The measure of success of the work of the Commission was the fact that, unlike at some sessions, almost all decisions

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were unanimously adopted. There was also evidence of a common approach to other matters on the agenda of the Commission. The reports of the Chairmen of the Sub-Committees on state responsibility and state succession proved acceptable to the Commission virtually without debate. There was unanimity concerning the approach to be taken regarding special missions and the question of multilateral treaties concluded under the League of Nations. The three Special Rapporteurs who were appointed at the present session, Lachs on state succession, Ago on state responsibility and Bartos on special missions, were elected unanimously. There were no votes on any items other than on the law of treaties. The atmosphere of the Commission was consistently harmonious. There prevails in the Commission a strong fraternal spirit which produces at almost all times a friendly and courteous atmosphere which is well suited to the largely technical tasks before the Commission. At its next session it will take up remaining questions concerning the law of treaties such as the effects on third parties, interpretation, application and effects of treaties and treaties of international organizations. When it has completed these additional topics next year the Commission will have had a first reading of the entire law of treaties and will be able to undertake a second reading of the work accomplished at the three sessions in the light of governmental comments. It seems likely that the work of the Commission at its present session will be regarded as that which enabled the entire subject to be codified.

4. Perhaps the most interesting aspect of the discussions on the law of treaties was the unexpected fact that on many of the key issues involved there was a general harmony of views among the members from various important countries with diverse and often conflicting interests. The communist members approached the subject of the law of treaties in a cautious and generally conservative manner. On most issues they were at one with the West. The "outsiders" were often some of the representatives of the newer states such as Tabibi of Afghanistan and Yasseen of Irak. The members of the newer states sometimes adopted positions which favoured greater freedom with respect to treaty obligations than that favoured by both Western and Communist members. Notwithstanding these differences, the newer members showed themselves willing on almost all issues to accept the compromise worked out by the Drafting Committee.

5. As in the past, the Drafting Committee played a key role in working out balanced compromises between the different views of the members. The Drafting Committee of the Commission is far more than a committee of redaction. Composed of some of the key members, the Drafting Committee is more of a steering committee where conflicting views are reconciled. At the present session the Committee was outstandingly successful in its task of presenting a common approach to the Commission as a whole. In all cases, they were able to recommend draft articles which bridged differences between the members.

6. The Commission was fortunate in having Jiménez de Aréchaga as President. He proved a highly competent and businesslike chairman who continually kept in mind the problems of timing and of administration which were before the Commission. He displayed great firmness in dealing with certain members (such as de Luna) who showed a tendency to give lengthy academic pronouncements on the law. His chairmanship was undoubtedly an important factor in the successful achievement of its work by the Commission at the present session.

The Law of Treaties

7. Attached to this report is a detailed summary of the discussions of all of the articles adopted at the present session. The articles were

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largely of a technical nature and the majority of them have little political content. They dealt primarily with the question of the essential validity of treaties, i.e. the question whether and under what circumstances treaties are void or illegal. The articles also dealt with the question of the termination of treaties. A large part of the articles merely formulated rules flowing from the agreement of the parties, but there were important rules adopted concerning the termination of treaties by operation of law.

8. For illustrative purposes several examples can be cited of the nature of the Commission's work. On the validity of treaties, the Commission adopted the following articles, all of which have considerable importance for state practice.

Article 5 provided that a state is not entitled to deny the validity in international law of an act of its representatives (such as ratification) merely because of some internal defect in its constitutional procedures. The Commission thus decided in favour of the "internationalist" approach as distinguished from the "constitutionalist" approach to the ratification of treaties. States are not entitled under the internationalist approach to deny the validity of their ratification merely because of some failure to comply with domestic constitutional requirements. This problem was one on which the previous Special Rapporteurs took distinctly different approaches. The present Commission, however, was virtually unanimous in adopting the "internationalist" viewpoint, limited only by the proviso that domestic constitutional requirements are valid when they are absolutely manifest to the other party or parties to the treaty.

The Commission also provided in Article 11 that treaties would be void if brought about through personal coercion. In this they restated traditional international law but they added an important element of progressive development in deciding in Article 12 that treaties would also be void if procured by the use of force against the state itself, contrary to the Charter of the United Nations.

Of even greater importance--and perhaps this was the most important rule which the Commission adopted--Article 13 provided that a treaty was void if it conflicted with a peremptory rule of general international law (ius cogens) from which no state is permitted to derogate. This rule means that states cannot enter into valid treaties which conflict with certain basic rules of international law such as the obligation to refrain from the use of force inconsistent with the Charter, and rules outlawing piracy, the slave trade, etc.

On the termination of treaties, an important rule was adopted in Article 16 to the effect that when a treaty does not contain provisions concerning termination, such a right can nevertheless be implied from the object of the treaty and the circumstances in which it was drawn up. This was one of the few articles where the Commission was not willing to go as far as the Special Rapporteur who had proposed recognizing an automatic right of termination in certain types of agreements such as commercial treaties and alliances.

Another key rule on which general agreement was reached was that contained in Article 22 on rebus sic stantibus. On this subject jurists have been divided in the past; many have denied the existence of such a rule and there has been widespread feeling that too broad an approach to the doctrine would jeopardize the sanctity of treaties. On this subject, both the communist and Western members showed a basic similarity of approach. They wished the rule to be confined to cases where a

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fundamental change had occured with regard to a fact or a situation existing at the time when the treaty was entered into, when the existence of that fact constituted an essential basis for the consent of parties and the effect of the change was to transform in an essential respect the character of the obligations undertaken in the treaty. However, members from the underdeveloped countries (Tabibi, Yaseen, Pal) were critical of this rule and wished it stated in a substantially broader manner so as to provide greater recognition of the effect of changed circumstances on treaty obligations. The common approach taken by the Western and Communist members provided little room for influence on the part of the newer members and the treaty was adopted in substantially the same restricted form as that proposed by Sir Humphrey Waldock.

On only two articles was the Commission unable to reach a clear and unambiguous agreement. The majority of the Commission had concluded that conflicting treaties gave rise to no problem of essential validity (supporting, in this respect, the Special Rapporteur). The Communist members were reluctant to agree to this principle and maintained that there might be earlier treaties, particularly those creating a status for a given area, such as neutrality in Laos, which could not be derogated from by a subsequent agreement of the parties. As a result, Tunkin was unwilling to agree to an article which stated that there was no problem of validity involved in the conflict of treaties other than that arising from a conflict with a peremptory rule of international law. In the circumstances, the Commission decided not to include any article on this subject in this year's draft and to take up the question again next year.

In Article 25, the Special Rapporteur had proposed a rather elaborate procedure which states would be obliged to follow if they wished to assert that a treaty was void or had terminated. The article did not propose compulsory settlement of disputes but would have prevented a party from unilaterally declaring that a treaty was void or terminated. It was designed essentially to prove the good faith of states wishing to deny the continued existence of treaty obligations. The proposal was misunderstood by both the newer members and the Communists. The latter perhaps thought that although compulsory settlement was not being advanced by Waldock, the article, in the form proposed by him, could have led ultimately to forms of compulsory arbitration. Since there was clearly no consensus in the Commission in favour of Waldock's approach, the most that could be achieved was an article which in general terms restated the obligations in Article 33 of the U.N. Charter requiring states to negotiate their differences in good faith. On the whole, the Western members (except Briggs) were reasonably satisfied with the final text of Article 25, which seemed to preclude any state from asserting that the rules contained in most of the articles could provide a unilateral basis for avoiding or terminating a treaty.

Position of Communist Members on Law of Treaties

9. The attitude of Tunkin, Lachs and Bartos deserves special comment. From the outset it was clear that Tunkin's attitude towards the law of treaties shared much in common with that of members from the Western powers. While in most of his interventions he was supported by Lachs and Bartos, there was often a noticeable difference in tone and in emphasis between their interventions and those of Tunkin. On the whole, Tunkin's attitude towards the law of treaties was reminiscent of the 19th century classical approach. His main interest seemed to be to ensure that treaty obligations could not lightly be set aside. From a strictly legal point of view, Tunkin's statements were generally sound and sometimes more conservative

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than those of the Western members. It was also surprising that Tunkin emphasized on more than one occasion that customary international law was, in his view, on the same footing as treaty law in that both were sources of equal general validity in international law. The acceptance by the Soviet Union of the principle of ius cogens (the existence of peremptory rules of international law from which states cannot derogate by agreement) seemed to amount to a recognition by the Soviet Union that norms can be binding in international law irrespective of consent (although Tunkin argued that customary rules are in general derived from consent). Examples of the conservatism of the Soviet view were: Article 17 (Tunkin was not willing to support Waldock's almost revolutionary proposal to allow a right of termination to be implied automatically in several types of treaties); Article 14 (the communist members were unwilling to agree to a rule which would allow states the right to enter into treaties inconsistent with earlier ones subject only to engaging international responsibility for so doing); Article 22 (Tunkin and Lachs firmly insisted on a narrow interpretation and application of the doctrine rebus sic stantibus); Article 26 (they strongly supported a rule of severance for removing parts of treaties which might be void or illegal, in order to save the treaty as a whole); Article 20 (Tunkin was critical of the proposed right of the parties to suspend or terminate a multilateral agreement in case of violation by a single party because he considered that such a rule would be prejudicial to the sanctity of multilateral treaties). A further example lies in the general insistence on the part of Tunkin and Lachs on the application of the principle of pacta sunt servanda. It is perhaps possible to be encouraged in the belief that the Communist members are now taking a more orderly and traditional attitude towards the subject of international law and are coming around to an approach which does not differ in nature from that of the West, although reflecting the different interests of the Soviet Union as a major power. However, it is too early and there is insufficient evidence to know whether the Communist attitude on the law of treaties heralds a significant change in attitude towards the entire subject of international law or only to certain specific branches which the Soviet Union believes will serve its interests. These encouraging signs were accompanied by certain negative ones as well. Very much in evidence was the continued opposition of the Communists to compulsory jurisdiction or arbitration. There was also some indication that the Soviet Union will not be slow to use the new rule proposed in Article 13 on ius cogens for maintaining that treaties are void if, in the Soviet Union's view, they violate any principle which happens to coincide with the interests of the Soviet Union. For example, Tunkin made clear that he considered that the rule of ius cogens means that so-called unequal treaties are void. No doubt the clause will also serve as a useful device for raising the principle of self-determination by alleging that agreements are illegal if they conflict with what the communists allege are the true wishes of the people concerned. No summary of the communist position would be complete without noting that they have great influence in the making of decisions in the ILC. It is rare that the Commission would adopt any rule which was inconsistent with Tunkin's position; at the most, any such rules or proposals would be postponed. The strong communist position in the Commission is due chiefly to Tunkin's personal prestige and to a lesser extent that of Lachs and to the shortcomings of the U.S. member.

State Responsibility

10. A report prepared by Professor Ago and approved by the Sub-Committee on state responsibility (contained in document A/CN.4/152 of January 16) was unanimously approved by the Commission. Those members of the Sub-Committee (Aréchaga, Briggs, Tsuruoka) who favoured the narrow approach to state responsibility (i.e. limited, at least in the first instance, to damage

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to aliens) did not speak at the meeting. The communists and Tabibi argued that first priority should be given to codification of rules relating to grave violations of international law concerning acts of aggression, violations of state sovereignty, etc. The Secretariat was asked to prepare an index of U.N. discussions on state responsibility and related subjects (e.g. permanent sovereignty over natural resources) and an annex of international decisions on state responsibility. It was decided that the outline of the programme of work contained in document A/CN.4/152 should constitute a guide for the Special Rapporteur but without prejudicing the position of any member on any point of substance and on the understanding that the report would not strictly bind the Special Rapporteur. Professor Ago was unanimously elected Special Rapporteur.

State Succession

11. Professor Lachs tabled document A/CN.4/160 containing the report of the Sub-Committee. The report was adopted at a meeting of the Sub-Committee in May with Lachs in attendance for the first time. (He was ill during the meetings of the Sub-Committee in Geneva in January 1963.) As a result of this further consideration of their work, the Sub-Committee, no doubt at Lachs' request, made two minor changes in the report which gave somewhat greater emphasis to codifying new developments in international law. A proposal was deleted from the earlier draft report that a decision be taken at the present session on whether the codification of the subject of state responsibility should include settlement of disputes. During the brief discussion in the Commission, there was unanimous support for the approach taken by the Sub-Committee. In particular, members agreed that the Special Rapporteur should concentrate on state rather than government succession and should give priority to succession in respect to the law of treaties. The report was approved on the same basis as the report of the Sub-Committee on state responsibility; the outline of the scope of the work contained in the document was not to bind the Special Rapporteur but to serve only as a general guide. Professor Lachs was unanimously elected Special Rapporteur. The ILC suggested that the deadline *

Special Missions

12. The Committee had before it a document on special missions prepared by the Secretariat (A/CN.4/155 of March 11) which contained a summary of the previous discussions in the Commission, in the General Assembly and at the 1961 Vienna Conference on Diplomatic Privileges and Immunities. There was general agreement on the approach to be followed on this subject. It was decided in the first place that a Special Rapporteur should be appointed; second, that he should confine his work to special missions and should not undertake to qualify the law of conferences held outside the framework of the U.N. organizations; third, the Commission affirmed its earlier decision to include within the scope of the subject itinerant missions; fourth, the Special Rapporteur was to base himself as much as possible on the Vienna Convention on Diplomatic Privileges and Immunities and previous work in the field; fifth, he was to draw up terse articles which should be as few as possible and should confine themselves to the essentials of the subject; sixth, it would be left until later to decide the form of the instrument, although the idea of a Protocol supplementing the Vienna Convention in 1961 was widely favoured.

13. There was some disposition on the part of certain members, including Sir Humphrey Waldock and Lachs, to have the Special Rapporteur of special missions undertake to codify the law of conferences outside U.N. organizations. On the other hand, I and certain others thought that if the subject was to be codified it would be more appropriate for this to be done by El-Erian

* for communication of comments by governments concerning law and practice on state succession should be prolonged to January 1, 1964.

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who is Special Rapporteur on relations between governments and intergovernmental organizations and whose report had proposed including in the scope of his subject international conferences held within U.N. organizations. Certain members (e.g. Bartos and Rosenne) emphasized that the subject of special missions was larger than that of diplomatic privileges and immunities since some missions had consular functions. Bartos made a lengthy statement at the outset of the debate indicating that he had spent much time and effort on this subject, from which the implication was meant to be drawn that he expected to be elected Special Rapporteur. While no great enthusiasm was evident for the appointment of Bartos as Special Rapporteur, his open candidacy for the position made it difficult for the Commission to avoid appointing him. Shortly before his election, I pointed out for the record that in the future the Commission should bear in mind the importance of the principle of geographical representation and of ensuring that Special Rapporteurs are appointed with regard to the various systems of jurisprudence which exist in the world.

Extending Participation in League of Nations Treaties

14. The question of extended participation in general multilateral treaties, concluded under the auspices of the League of Nations, was referred to the International Law Commission by the General Assembly in Resolution 1766 (XVII) adopted at the 17th session of the General Assembly. Sir Humphrey Waldock produced a study of the subject in document A/CN.4/162 of June 25, in which he pointed out that neither of the two methods for solving this question advanced at the 17th session of the General Assembly was satisfactory. Both the protocol method and the draft resolution submitted by Israel, Australia and Ghana had certain shortcomings; both procedures would be somewhat cumbersome, would require some time for their adoption and would not bind all of the members of the U.N. He drew attention to a point which appeared to have been overlooked in the General Assembly--that 21 of the 26 League treaties in question were meant to be open treaties in that they had a provision in their final clause for accession by any state to which the Council of the League of Nations sent a copy of the treaty. Consequently, he suggested that all that was necessary to open the treaties would be a resolution of the United Nations which would substitute a designated organ of the U.N. for the Council of the League as the organ empowered to send copies of the treaties to additional states not parties to the instruments. Sir Humphrey Waldock's approach was widely supported as offering a possible way out of the impasse in which the A ssembly had found itself in considering this subject. I gave strong support to Waldock's suggestion that this line of approach might be considered by the General Assembly as providing the best solution to the problem. A copy of my statement is annexed to this report. Certain members, in particular Lachs, were critical of the fact that the problem was posed in so abstract a way without knowing what treaties were in force, which were of any importance, which were in need of revision, etc. At the conclusion of the discussion, which was brief, and uncontroversial, it was decided to include a portion in the Special Rapporteur's report on this subject. The report would recommend that the General Assembly take steps to determine which treaties were in force and which needed revision and that the possibility of applying the method of amendment suggested by Sir Humphrey Waldock be examined.

15. During the debate there was a certain amount of implied criticism about the way in which the whole subject had been handled in the Assembly. It was widely thought that the problem was of a very minor character and involved only one or two treaties of any importance and that therefore the question should not have been approached in the abstract way that it was. Notwithstanding, Rosenne, one of the originators of the item in the General Assembly, expressed satisfaction with the Commission's conclusions.

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16. The following three paras from the Commission's draft report on this subject are given below for reference purposes:

> However, in the light of the arrangements which were made on the occasion of the dissolution of the League of Nations and the assumption by the United Nations of some of its functions and powers in relation to treaties concluded under the auspices of the League, the General Assembly appears to be entitled, if it so desires, to designate an organ of the United Nations to assume and fulfil the powers which, under the participation clauses of the treaties in question, were formerly exercisable by the Council of the League. This would provide, as an alternative to the other two methods, a simplified and expeditious procedure for achieving the object of extending the participation in general multilateral treaties concluded under the auspices of the League. It would avoid some of the difficulties attendant upon the use of other methods and would be administrative action such as was envisaged by the Commission in 1962.
>
> Even a superficial survey of the twenty-six treaties listed in the Secretariat Memorandum indicates that today a number of them may hold no interest for States. The Commission suggests that this aspect of the matter should be further examined by the competent authorities. Subject to the outcome of this examination, the Commission reiterates its opinion that the extension of participation in treaties concluded under the auspices of the League is desirable.
>
> Independently of the question of extending participation in the treaties, the Commission suggests that the General Assembly should take the necessary steps to initiate an examination of the general multilateral treaties in question with a view to determining whether any further action may be necessary to adapt them to contemporary conditions.

Relations Between States and Intergovernmental Organizations

17. This item proved more controversial than was expected. The item was introduced by the Special Rapporteur, El-Erian, who gave a summary of the main recommendations contained in his report A/CN.4/161. He had reached the conclusion that the subject should be classified into three groups of questions. The first comprised the general principles of juridical personality of international organizations and would cover legal capacity, treaty-making capacity and capacity to espouse international claims. The second was that of international immunities and privileges and would include three subjects: first, the privileges and immunities of international organizations themselves; second, the application of the institution of legation with respect to international organizations; and third, diplomatic conferences, regarding which very valuable experience had been gained in the two Geneva Conferences on the Law of the Sea, the 1961 Vienna Conference on Diplomatic Intercourse and Immunities and the 1963 Vienna Conference on Consular Relations. The third was that of special questions and comprised three subjects: first, the law of treaties with respect to international organizations; second, the responsibility of international organizations, and third, succession between international organizations. Of those special questions, El-Erian thought that perhaps that of the responsibility of international organizations had the greatest practical importance. It would arise, for example, with regard to the activities of the International Atomic Energy Agency and with regard to territories administered by the United Nations itself. Concerning priorities, El-Erian thought that the Commission should concentrate first on international organizations of a universal character, and then later examine whether the draft articles could be applied to regional organizations without change, or whether they would require modification. He thought that the study of regional organizations raised a number of problems, such as recognition by and relationship with

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non-member states; such problems would require the formulation of particular rules peculiar to those organizations. Consideration of the law of treaties with respect to international organizations, the responsibility of international organizations, and succession between international organizations should be deferred until the Commission had completed its work on those topics in relation to States. The Commission should also consider whether those aspects could be taken up more appropriately with its work on the subject of the law of treaties, state responsibility and succession of states. El-Erian also seemed to consider that the Commission should begin with the juridical personality of international organizations including their legal capacity, treaty-making capacity and capacity to espouse international claims. With regard to the title of the subject, he thought that it should refer to relations with international rather than intergovernmental organizations.

18. Speaking first, I congratulated the Special Rapporteur on his illuminating report and on the research and documentation he had compiled and presented methodically and lucidly. I expressed general support for the approach to the subject recommended by El-Erian. While a number of other members gave general support to El-Erian's general outline of work, several members were critical of the first group of subjects concerning general principles of juridical personality of international organizations. Tunkin seemed anxious to postpone altogether questions relating to the juridical personality of international organizations including questions of treaty-making capacity and capacity to espouse international claims. He thought attention should be focused on the second group of questions--those relating to international immunities and privileges, with the exception of diplomatic conferences which, in his view, should be left aside. Tunkin was supported by Lachs. Rosenne thought that the questions of legal personality and treaty-making capacity were "points of arrival" rather than "points of departure" for the analysis of legal principles. Ago expressed similar views and also thought that caution was required in approaching the subject of diplomatic conferences. Gros thought that the first group of questions proposed by El-Erian could be dealt with more or less as an introduction to the second group of questions concerning privileges and immunities. With regard to the second group of questions, Liang of the Secretariat appealed for great caution in developing generalizations about privileges and immunities of international organizations. The subject was exceptionally complex and varied depending upon the international organization concerned. Aréchaga thought that priority should be given to the second group of questions but that among these the privileges and immunities of international organizations as such and of their officials should be left aside since, as Dr. Liang pointed out, they were dealt with in the General Convention on the Privileges and Immunities of the U.N. and on the Privileges and Immunities of Specialized Agencies. Summing up, El-Erian, replying to Tunkin, said that, in his view, Article 104 of the U.N. Charter (providing for enjoyment by the U.N. in the territory of each member state of such legal capacity as might be necessary for the exercise of its functions) made it necessary to examine the nature of that legal capacity in the light of practice. With regard to Liang's comments, El-Erian said that only 39 states had ratified the Convention on the privileges and immunities of the specialized agencies; hence there was a real need to consider whether the Convention was adequate. He welcomed Gros' suggestion that some preliminary consideration might be given in an introductory character to the question of the juridical personality and legal capacity of international organizations because of the organic link between these questions and privileges and immunities.

19. The above discussion was not for the purpose of reaching any decision on general directives to be given to the Special Rapporteur since that will be done at the January 1964 session of the International Law Commission.

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Its sole purpose was to give members who already had a settled opinion on the matter an opportunity to put forward their preliminary views. These views seemed to indicate that El-Erian would have to adopt a narrower approach to his subject if it was to meet with the approval of the Commission as a whole.

Delayed Publication of Yearbook

20. At the suggestion of Rosenne, the Commission adopted the following paragraph in its report:

> The Commission has noted with concern that publication of the volume of the Yearbook is being subject to an increasing delay. The Commission expresses the hope that steps will be taken to ensure that in future the Yearbook will be published as soon as possible after the termination of each annual session.

Planning of the Work, Date and Place of the Next Session

21. The Commission agreed that the following subjects should be studied in 1964:

(1) Law of treaties (application, interpretation and effects, and treaties of international organizations)

(2) Relations between states and intergovernmental organizations (first report on the general directives (A/CN.4/161/Add.1) and second report with draft articles)

(3) Special missions (first report with draft articles)

(4) State responsibility (preliminary report, if possible)

(5) State succession (preliminary report on the aspect of treaties, if possible)

In view of the number of items involved, it was decided that a three-week winter session should take place at Geneva from the 6th to 24th January, 1964. During the winter session the Commission should consider the subject of special missions (draft articles) and first report and general directives to the Special Rapporteur on relations between states and intergovernmental organizations. If there was sufficient time, the draft articles to be submitted by this Special Rapporteur would also be considered.

22. The Commission was of the view that measures should be taken to arrange for a winter session in January, 1965 in order to continue consideration of special missions and relations with intergovernmental organizations.

23. This would allow for early completion of the codification of diplomatic law without detracting from the time required for the Commission's work on the law of treaties.

24. It was decided that the main session of the Commission would be held at Geneva from May 4 to July 10, 1964.

Cooperation with Other Bodies

25. It was decided that the Chairman of the Commission, Mr. Eduardo Jiménez de Aréchaga, would represent the Commission at the 18th session of the General Assembly and also at the meeting of the Asian-African Legal

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Consultative Committee in Cairo, February 15, 1964. There was criticism expressed during the session about inadequacies in exchanges of documents between the ILC and bodies with which it cooperates. The Commission expressed the hope in its report that the relevant regulations of the U.N. would be so adapted as to ensure improvements in exchanges of documentation. At the suggestion of Rosenne, the Commission decided to place on its agenda for the sixteenth session the question of increased cooperation with other organs.

Adoption of Draft Articles and of the Committee's Report

26. The commentaries to the various draft articles and other parts of the report covering the work of the ILC at its present session were adopted expeditiously (requiring only two and a half meetings) and without substantial controversy. The draft articles as finally revised and the report covering the work of the session were adopted unanimously.

Notes on Members

27. I have already referred to the outstanding contribution of Sir Humphrey Waldock. As at the last session, among the most active members of the Commission were Professors Ago, Gros, Tunkin. This group, together with the Special Rapporteur, were largely responsible for working out basic compromises in the Drafting Committee. Professor Briggs did not seem to develop either in influence or authority or in the quality of his interventions during the past session. As a result, he had little effect on the decisions taken in working out essential compromises. While admired for his human qualities, he remained a weak member of the Commission. Among the other Western European members, de Luna of Spain was perhaps the most active. His interventions were far too long and the effect of his statements was much reduced by the fact that he spoke too often, raised irrelevancies and did not know when to stop. Professor Verdross was less active this year than last year and seemed to show less interest in the working of the Commission. Among the Latin Americans, I have already observed that Aréchaga was an outstanding President. Amado was present for only part of the session during which he rarely spoke. His interventions were more humorous than constructive and, as usual, he continued to reveal a provocative and tempermental manner. Padilla Nervo came regularly to the meetings but almost never intervened. Paredes intervened less often than last year. The quality of his statements and his judgment were poor. Among the Africans and Asians, the most outstanding was El-Erian who showed consistent good judgment, intelligence, moderation and wisdom. The performance of Yasseen was more impressive this year than last year. He spoke well and argued persuasively in favour of rather unsound positions. Tabibi seemed to inspire universal distaste. His outlook was limited and parochial. He rarely spoke without mentioning the problems of the weaker and poorer countries and in doing so he often caused embarrassment to the other new members. Elias was present for only part of the session, during which he spoke well and made sensible observations on several issues. Rosenne intervened often. While usually making learned statements, he showed a tendency to concern himself with matters which appeared to be rather trivial or unimportant to other members. There is little to add to my earlier observations about the Communists. Although Bartos was elected Special Rapporteur of special missions, he seemed to have aged considerably and seemed unable to keep awake except for short periods.

M. Cadieux

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ANNEX

DRAFT ARTICLES on the Law of Treaties,

As DISCUSSED AND ADOPTED at its Fifteenth Session

The discussion of Sir Humphrey Waldock's articles occupied almost the entire session. The Special Rapporteur submitted four reports, contained in documents A/CN.4/156 & Add.1, 2 & 3. The first report (156) dealt with termination of treaties, addendum 2 with procedure for exercizing claims of invalidity and termination and addendum 3 dealt with effects of invalidity and termination. The Commission* discussed the articles in the general order contained in the reports, but did not take up Waldock's introductory articles (1-4) until after dealing with the others. The following summary of discussions on each article does not follow the order of discussion in the Commission, since the Commission took up the articles for the second and third readings in no particular order. The numbering of the articles was altered at the conclusion of the session so as to follow the sequence of numbers used for the draft articles on treaties adopted by the Commission at its 1962 session.

ARTICLE 2 (Presumption in favour of the validity of a treaty)

[Article 30] The Special Rapporteur explained that the article was meant to be linked with Section IV on procedure. Its main purpose was to indicate that the burden of proof is on the party which alleges that a treaty brought into force in accordance with Part I was invalid. Pal suggested that, if the article was of a procedural character, it should be dealt with in Section IV. Aréchaga criticized the article as attempting to define the rule of validity as a presumption, while it was only a rule of evidence. I said that if the treaty lacked validity under para. (a) or (b), there could not be said to be a presumption of validity; on the contrary, the treaty was valid. If it was wished to treat the article as one of presumption, the article should end at the conclusion of line 2 and the exceptions should be omitted. A number of members (Castren, Yasseen, Amado and Tunkin) favoured omitting the article altogether. Others (Gros, Verdross, de Luna) suggested omitting the words "presumed to be" in line 2. The article would then constitute a general article recognizing the validity of all treaties properly entered into, unless there was a lack of consent or it ceased to be in force. Tunkin thought that in that case the article would merely be a restatement of the rule pacta sunt servanda. The article was referred to the Drafting Committee for consideration in the light of comments made in the Commission. It submitted the following redraft:

> Presumption as to the validity, continuance in force and operation of a treaty
>
> Every treaty concluded and brought into force in accordance with the provisions of Part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or the suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the provisions of the present article.
>
> Subject to drafting modifications in the French text, the article was adopted by 16 votes in favour, none against with one abstention (Paredes). Paredes abstained on this and a number of other articles as a protest against the unavailability or late issuance of the Spanish text.

* in its first reading,

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ARTICLE 2 bis (Treaties which are constituent instruments of an international organization or were drawn up within an international organization)

[" 48]

The Drafting Committee submitted the following article concerning the constituent instruments of international organizations:

> "Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of Section III of this Part shall be subject to the established rules of the organization concerned."

The article was adopted by a vote of 15 in favour, none against with one abstention (Paredes).

ARTICLE 3 (Procedural Restrictions upon the Exercise of a right to avoid or denounce a treaty)

[Omitted]

During the very brief discussion of this article, it was agreed that it was unnecessary. The point could be dealt with in the commentary to one of the introductory articles.

ARTICLE 4 (Loss of a right to avoid or denounce a treaty through waiver or preclusion)

[Article 47]

In introducing this article, one of the more important ones considered at this session, the Special Rapporteur himself proposed certain changes and deletions. He suggested omitting para.(b) altogether (equating preclusion with acceptance of benefits or enforcement of obligations) and that the entire article should not apply to treaties that were void and not merely voidable. Thus, where a treaty violated ius cogens, or was procured by coercion or force contrary to the Charter, the plea of estoppel or preclusion could not be used to prevent the plea from being made. These introductory comments of Waldock's were instrumental in avoiding a lengthier debate on the article. A number of suggestions were made which found little or no support; e.g. that the article could not apply to the rule rebus sic stantibus (Yasseen); that the terms preclusion or estoppel should be defined (Elias); that para (a) should be confined to express waiver (Paredes). Surprisingly, Tunkin and Lachs argued for the retention of the two specific examples given in para.(b) (acceptance of benefits and enforcement of obligations). They argued that without para.(b) the general rule stated in para.(c) might be misunderstood and regarded as having too wide a field of application. Lachs and de Luna spoke of the need for caution in using the word "omissions" in para.(c) because of the various ways in which silence could be interpreted. I pointed out the advantages in the Special Rapporteur's suggestion to omit para.(b). That sub-paragraph raised a number of difficulties which would have to be closely examined if it were to be retained. For example, there was the time factor; might it not in some cases be unfair to apply (b) immediately after a state became aware of a right and before time for reflection? Would the right be waived even if a state accepted only a very minor or marginal benefit or enforced an obligation not related to the main purpose of the treaty? Would not these cases be covered by the general rule in para.(c)? The rule of estoppel or preclusion was a rule of good faith and it could be dangerous to be dogmatic or rigid and say that a state is precluded from exercizing a right in certain specific circumstances, particularly because the circumstances were bound to vary from case to case. The article was sent to the Drafting Committee to consider in the light of the debate.

The Drafting Committee submitted the following draft article:

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[Article 47]

Loss of a right to annul, terminate or withdraw from a treaty

A right to invoke the nullity of a treaty or to terminate or withdraw from a treaty in cases falling under Articles 5-8 and 20 and 22 shall no longer be exercisable if, after becoming aware of facts giving rise to such right, the State concerned shall have:

(a) waived the right;

(b) so conducted itself as to be debarred from denying that it has elected in the case of Articles 5-8 to consider itself bound by the treaty, or in the case of Articles 20 and 22 to consider the treaty as unaffected by the material breach, or by the fundamental change of circumstances, which has occurred.

This article was taken up again after considering Article 25. Some members (Gros, de Luna, Waldock) thought "claim" should be inserted before "to terminate" in para.1. Aréchaga and Lachs thought that the article should come at the end as a final article. Waldock agreed that the best wording would be "a right to invoke the nullity of a treaty or a claim to terminate etc.". Waldock thought the best place for the article was here, as a general provision.

The article was adopted unanimously.

ARTICLE 5 (Provisions of internal law regarding the procedures for entering into treaties)

[Article 31]

Three meetings were devoted to the first reading of this article. Notwithstanding its importance and the variety of conflicting views held by previous Special Rapporteurs, it was immediately apparent that there was a wide consensus in favour of the "internationalist" approach proposed by Waldock. Most members, including myself, expressed support for Waldock's general approach. Only a very few members supported the view that, as a general rule, internal constitutional limitations could be binding on the international plane (Yasseen, Paredes and Tabibi). The attitude of these members seemed based on the arguments that to ignore constitutional limitations on the international plane is to be anti-democratic, to prejudice the rights of the people, and endanger the principle of self-determination by giving to a government the power to act in such a way as might violate or contradict the will of the people as protected by constitutional processes.

These members were in a distinct minority and were not supported by any others with the exception of Tunkin. He and his communist colleagues were, however, prepared to endorse the Special Rapporteur's approach. Tunkin paid only lip service to the minority arguments by saying that there may be international limitations on the competence of national organs to enter into treaties which are not related to the question of defects in the exercize of constitutional authority. He posed the question whether the article should not be amended to recognize the principle that "the political fate of a people should be decided by the people itself". If a treaty dealt with the very existence of a state as a separate entity, there should be some international limitation on the exercize of such right. Tunkin posed this question on two occasions but did not press for a solution, although he rejected certain suggestions that the problem he raised was related more to Article 13 (ius cogens) than to Article 5.

The debate focussed largely on drafting matters and on the question whether the article, as Waldock proposed in paragraph 4, should limit the "internationalist" approach by providing that the general rule of the non-validity of constitutional limitations on the international plane should

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not apply if other parties were aware of the defective consent. While there was considerable support for this limitation, para.4 was drafted in such a broad and vague manner that it was very widely criticized and inspired many proposals for its rewording (e.g. by Verdross) or its omission altogether (e.g. by Ago and Gros, on grounds that the principle would be largely covered by Article 4 dealing with estoppel or the general principle which requires good faith in international relations). Others criticized para.4 for introducing the depository and of imputing his knowledge to the parties, and of failing to distinguish between bilateral and multilateral treaties. Many proposed the deletion of para.1 (which was merely introductory) and para.3(b) which allowed a defective exercize of constitutional authority to be withdrawn before the treaty came into force. The article was referred to the Drafting Committee to revise in accordance with the suggestions of members.

The Drafting Committee submitted the following draft article:

Provisions of internal law regarding
the procedures for entering into treaties

1. When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of Article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding the procedures for entering into treaties has not been complied with shall not affect the consent expressed by its representative, unless the violation of its internal law was absolutely manifest.

2. Except in a case of such a manifest violation of its internal law, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree.

Sir Humphrey Waldock explained that the phrase "unless the violation of its internal law was absolutely manifest" was a compromise between those who wanted no exception to the internationalist rule and those who favoured a broader exception including cases where the violation was or should have been known to any representative acting in good faith. Aréchaga, supported by Briggs, criticized this compromise as going against the prevailing view of the Commission that there should be no exception to the internationalist rule. He therefore proposed its deletion and this in turn was opposed by Tunkin and Rosenne as upsetting the Drafting Committee's compromise. I, Castren, Yasseen, Amado, Elias and de Luna criticized the use of the word "absolutely" as being unnecessary. I also criticized the use of the word "affect" as being vague, imprecise and not in keeping with the terminology of other articles which spoke of lack of consent and invalidity. De Luna argued that it was necessary either to accept the internationalist or constitutionalist approach but not both, as the Drafting Committee had done. Some members of the Drafting Committee explained their wish to retain the word "absolutely" in view of the emphasis it gave to the requirement that the violation must be clearly apparent. The revised article was approved but sent back to the Drafting Committee to revise on the understanding that it would consider substituting "signified" for "expressed" in para.1, line 1, and "nullify" for "affect" in para.1, line 5. The article was adopted by a vote of 18 in favour, none against, with three abstentions (Yasseen, Briggs and Ago).

The Drafting Committee submitted the following final article embodying some of the above drafting changes. It was adopted unanimously.

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Provisions of internal law regarding
the procedures for entering into treaties

When the consent of a state to be bound by a treaty has been expressed by a representative considered under the provisions of Article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding the procedures for entering into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree.

ARTICLE 6 (Lack of Authority to bind the State)

[A/32]

The purpose of this article was to cover two cases--first when the agent of a state lacked authority under Part I, Article 4; and where his authority under Part I, Article 4, was limited by specific instructions without being known to other parties. During the brief debate there were three views expressed: (a) the contents of the article were obvious and need not be stated (Briggs, Tsuruoka, Amado); (b) the article was really a part of formal validity and should be placed in Part I in close connection with Article 4 (Ago); the article was useful and should be retained subject to such drafting changes as may be necessary (myself, Rosenne, Aréchaga, Yasseen, Elias and Dr. Liang of the Secretariat). Among the last group, some members criticized the use of the word "ostensible" in line 1 of para.1 of Article 6. The views of the third group being in the large majority, the article was referred to the Drafting Committee on the understanding that the general approach taken by the Special Rapporteur would be retained.

The Drafting Committee submitted the following redraft:

Lack of authority to bind the State

1. If the representative of a State, who cannot be considered under the provisions of Article 4 of Part I as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not affect a consent to the treaty expressed by him in the name of the State, unless the restrictions upon his authority had been brought to the notice of the other contracting States.

There was virtually no debate on the article and it was adopted unanimously. I suggested, and it was agreed, that if the word "affected" was changed in Article 5, it should be considered whether to alter it in Article 6, para 2, in order to be consistent.

The Drafting Committee resubmitted the article in identical form, with the exception of the deletion of the word "affect" in the fourth line of para.2 and substitution of "invalidate".

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ARTICLE 7 (Fraud)

[Article 33] This article produced one of the lengthiest discussions during the session, perhaps because it was largely theoretical. Gros and Waldock were partly responsible for lengthening the discussion--Gros by arguing strenuously against dealing with the concept of fraud vitiating consent and Waldock because he doubted the value of his own article. Gros' arguments in defence of his proposal to drop the article("it's all just a question of who is the better negotiator") were rather undiplomatic but had little effect. Aside from Gros' extreme view (supported only by Amado) there were three additional schools.

(i) Fraud is a matter of great importance and should be treated (as Waldock proposed) in a separate article (Yasseen, Tabibi, Tunkin and Bartos, the latter two favouring a broad definition of the subject so as to cover all capitalist tricks.).

(ii) The subject is theoretical and not of great importance but should find a place in the draft article, possibly by inclusion in Article 9, provided it was defined narrowly (Elias, Ago, Rosenne).

(iii) The concept could be abused and was so potentially dangerous for the law of treaties that it should be recognized only if expressly connected with arbitration procedures or safeguards of the type proposed in section 3 of Waldock's report (Pal, Tsuruoka) or a discussion should be deferred until after consideration of later articles (Nervo).

After two meetings, a consensus was arrived at to refer the article to the Drafting Committee on the understanding that the concept of fraud would be retained; that it would be left to the Drafting Committee to decide whether to combine it with Articles 8 or 9 or deal with it separately; and that it should be defined more narrowly than proposed by Waldock in Article 7(ii).

The Drafting Committee submitted the following separate article:

"If a state has been induced to enter into a treaty by the fraudulent conduct of another contracting state, it may invoke the fraud as invalidating its consent to be bound by the treaty."

On submitting the new draft, the Special Rapporteur explained that since the article dealt with cases rare in practice, it was generally agreed not to try to define fraud but to limit the article to a brief statement of principle. Amado and Elias said they preferred the word "fraud" for "fraudulent conduct" in line 1 of Article 7. Bartos expressed reservations about the utility of so brief an article. I drew attention to the different terms used in the French text "la conduite frauduleuse" and "dol", and to the inconsistency between the French and English texts. Castren proposed an amendment to the French text which would use dol in the first line and refer to it in the second line as "this fact". Gros expressed a preference for the phrase conduite frauduleuse since the latter had less civil law implications than the phrase "conduite dolosive".

As no motions were put to a vote, the article was adopted by a vote of 19 in favour with two abstentions (Yasseen and Elias).

In its final form, the article contained a clause on separability. It was adopted by a vote of 19 in favour, none against with one abstention (Paredes) and read as follows:

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Fraud

1. If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

2. Under the conditions specified in Article [3]* the State in question may invoke the fraud as invalidating its consent only with respect to the particular provisions of the treaty to which the fraud relates.

ARTICLE 8 (Mutual Error), 9 (Unilateral Error) and 10 (Errors in Expression [Article 34] of Agreement)

The Commission was virtually unanimous that the first two articles should be combined. This reflected the fact that the distinction between mutual and unilateral error was derived from English internal law and had no counterpart in the continental system. Certain members (Verdross and Yasseen) argued against Waldock's view that error of law could never entitle a party to invoke the invalidity of the treaty. Pal and Castren supported the Special Rapporteur. The latter was agreeable to drop 8(i)(a) on the ground that it was in fact covered by para 8(i)(b). A few members (Briggs and Tsuruoka) thought that Waldock had gone too far by providing a unilateral right to declare a treaty void for want of consent (8(ii)(a)). There was no discussion of this point except a fairly general recognition that articles of this nature had implications for the sanctity of treaties as they could be abused. The first two articles were sent to the Drafting Committee on the understanding that they would be combined. The discussion left it uncertain whether fraud would be worked into the joint article or treated separately.

Waldock said the purpose of Article 10 was to draw attention to the fact that Articles 26 and 27 of Part I dealt with this problem and that errors of expression did not vitiate the treaty. Virtually all who spoke favoured deleting the article as unnecessary or treating it in the commentary, except for Tabibi who obviously misunderstood it. However, Waldock stood his ground and it was left to the Drafting Committee to decide whether to delete it or let it stand or treat it in the commentary.

The Drafting Committee submitted the following redraft of Articles 8, 9 and 10.

Error

1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time that the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

3. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error does not affect the validity of the treaty and Articles 26 and 27 of Part I then apply.

* (new article on separability, originally numbered Article 26)

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Introducing the redraft, Sir Humphrey Waldock explained that the Drafting Committee had decided to omit any definition of error. Para.2 was drafted so as to reflect closely the rule in the Temple Case. The third paragraph dealing with error in expression, in effect merely made reference to Articles 26 and 27 of Part I. Paredes made a strong attack against both para.1 and the exceptions contained in para.2. Subject to a few drafting changes suggested by Elias, the article was adopted by a vote of 18 votes in favour, one against (Paredes) with no abstentions.

In its final form, a new paragraph (3) was added on separability. It was adopted unanimously with Paredes abstaining. The article read as follows:

Error

1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

3. Under the conditions specified in Article [3],* an error which relates only to particular clauses of a treaty may be invoked as a ground for invalidating the consent of the State in question with respect to these clauses alone.

4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and Articles 26 and 27 of Part I then apply.

ARTICLE 11 (Personal Coercion) and 12 (Treaties procured by illegal threat of force against the State) [Article 35]

The discussion was surprisingly tame, notwithstanding general recognition that these were cardinal articles in the draft. Waldock's approach received wide support and he was saluted by such members as Amado and Bartos. A number of trivial objections were raised to both articles, often relating only to drafting. For example, it seemed to be the general sense of the discussion that Article 11(i)(b) and (c) should be deleted as being unnecessary. There was also the usual discussion whether the two articles should be combined, Ago seeming to lean in favour of that approach while Tunkin wished to keep the articles separate in view of the great importance of Article 12. The one main objection to the two articles that Tunkin and Bartos put forward was that the use of force was a matter of concern not only to the parties but to the entire international community and therefore it was not sufficient to provide that personal coercion or threat of force against the state merely made a [illegible] treaty voidable. The treaty should be regarded as void and (it seemed) third parties should have the right to assert this as well. It followed from this approach that it was wrong to provide in articles 11 and 12 that a treaty procured by coercion or force could be ratified.

* formerly Article 26 on separability.

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With regard to Article 11 (personal coercion), the Chairman decided that the Drafting Committee should take up the question of merger. He thought, however, that Tunkin's suggestion that coercion should make nullity "absolute" and not "relative" really related more to Article 12 but that the Drafting Committee could consider this point in connection with Article 11 as well.

During the discussion on Article 12, Tunkin's theory of total invalidity rather than voidability was strongly supported, especially by Ago and Gros. Gros also agreed that such a treaty could not be confirmed or ratified. The discussion of Article 12 was harmonious, with only one or two discordant notes being struck. One was by Briggs who proposed that the entire article be deleted as a matter really belonging to the United Nations political organs. He received no support. Bartos uttered a number of remarks about how important it was to protect the smaller countries from imperialists and that the article should certainly encompass economic blockade. However, a number of speakers pointed out, and Tunkin himself recognized, that Article 2(4) of the Charter could not really be improved upon by the International Law Commission and that what was the precise extent of the concept of the threat or use of force could hardly be defined by the Commission. Tunkin suggested that the wording of Article 2(4) of the Charter should be incorporated into para.1 of Article 12 and other suggestions were made to make the language closer to the Charter. Pal said that Article 12 was acceptable to him only if it was expressly connected with Article 25 on procedure. Others, such as Amado, Aréchaga, Tabibi and El-Erian, gave general support to the article and seemed to have no strong views on the question of voidability versus total nullity.

The Drafting Committee submitted the following redraft of Article 11.

Personal coercion of representatives of States

If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expressions of consent shall be without any legal effect.

Waldock introduced the redraft by explaining that it was the view in the Drafting Committee that personal coercion should make the consent void and not merely voidable. Verdross and Castren asked for clarification whether the article covered coercion against "members of an organ of a state" as originally proposed in Article 11, i.e. were such people covered by the phrase "individual representatives of a state"? Waldock pointed out that such cases could fall within Article 11 but were more probably covered by Article 12. The matter could be explained in the commentary. Paredes objected that the article was too narrow in scope. It was adopted by 19 in favour with one against (Paredes) and no abstentions.

The Drafting Committee submitted and the Commission adopted the same text of Article 12 as above, with the addition of a paragraph on separability (Paredes voting against).

Personal coercion of representatives of States

1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

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2. Under the conditions specified in Article [3]*, the State whose representative has been coerced may, if it thinks fit, invoke the coercion as invalidating its consent only with respect to the particular provisions of the treaty to which the coercion relates.

ARTICLE 12 (Coercion of a State by the illegal threat or use of force)

[" 36] Any treaty, the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.

Waldock explained that although some members wanted to spell out the principles of the Charter concerned, the view of the Drafting Committee was that the article should not indicate what particular principles were involved. Yasseen asked why, if coercion was condemned in general in Article 11, Article 12 was limited to "threat or use of force in violation of the principles of the Charter". Waldock replied that it would not really be possible to interpret the Charter and to discuss the forms of pressure (e.g. economic pressure) which might or might not be consistent with Article 2(4). The language of the Drafting Committee left open to U.N. organs to interpret the scope of Article 2(4). Yasseen replied that it was necessary to condemn all types of constraint and force. Tunkin thought that the article was broad enough to protect the smaller states. Bartos explained that he sympathized with the view of Yasseen and would therefore abstain from voting. Tunkin was satisfied with the article because the Commission could not interpret Article 2(4) of the Charter which was in any case not restricted to "armed" force. Yasseen finally indicated that he would vote for the article although he thought it did not go far enough. The article was adopted by a vote of 19 for, none against, with one abstention. (Bartos).

ARTICLE 13 (Treaties void for illegality)

[article 37] As might have been expected, the Commission waxed expansive on this article, devoting to it the better part of three meetings. Rather surprisingly there was, by and large, and give and take a little, general approval of Waldock's approach. There were many eulogies of the Special Rapporteur and many quibbled about drafting, e.g. whether to include certain parts of the article (paras 3.and 4) in the commentary or leave them out altogether, etc. The debate centred on two matters--the theory or concept behind the new notion of a public international order which states can not derogate from, even by treaty, and the question whether the specific examples in para.2 should be expanded or omitted altogether.

So far as the theoretical debate was concerned, it was--as everyone realized--largely irrelevant. However, of particular interest was Tunkin's explanation of how the USSR which, of course, regards consent as the basis of international law, could accept the principle that states cannot derogate from certain rules even by means of a consensual act. Tunkin gave a moderate--and for him--reasonably convincing exposition of Soviet theory. He said that he had been often misinterpreted as being of the view that treaties were the only source of international law. Consent was the basis, but consent could be expressed through custom (tacitly) as well as by agreement. The development of rules having the character of "ius cogens" was a new development in international law based on the tacit consent of states.

Tunkin argued that the examples in para.2 were incomplete because unequal treaties were not included. He suggested that "treaties, the objects of which involve manifest inequality of obligations of the parties, should be void" (wording based on a resolution of a 1958 Afro-Asian legal meeting).

* formerly Article 26 on separability. [Now 46]

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Tunkin had absolutely no support, except from Lachs. Pal went so far as to say that Tunkin's suggestion was invalid because the crucial test was not inequality but coercion and this was covered in Article 12. Furthermore, should not a treaty be valid between a rich powerful state and a poor one by which the former conferred benefits on the latter? Such an agreement might not create an equality of obligations. Probably realizing that there was no real support for his proposition, Tunkin himself hinted that the best solution might be for the Drafting Committee to decide to omit all specific examples of ius cogens. In his summing up, Waldock said that the list of examples would either have to be expanded or dropped. It was also generally agreed that the phrase "ius cogens" was somewhat recondite and obscure and should be replaced by some phrase such as "imperative" or "peremptory" rules of international law.

The Drafting Committee submitted the following redraft.

Treaties conflicting with a peremptory norm of general international law from which no derogation is permitted (ius cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no State is permitted to derogate and which can be modified only by a subsequent norm of general international law having the same character.

Waldock explained that the Drafting Committee decided to drop all examples. All of his original examples were of criminal acts and might therefore be misleading.

Verdross thought the words "from which no State is permitted to derogate" were superfluous. Castren suggested, and it was agreed, that the title of the article was too long and that the latter half should be dropped. Yasseen argued that the article was defective because the phrase "from which no State is permitted to derogate" would cover all rules of international law, unless qualified by such phrase as "by international agreement". It was agreed to reconsider the word "derogate" in the Drafting Committee. Subject to drafting changes, the article was adopted unanimously.

The final text of the article was as follows:

Treaties conflicting with a peremptory norm of general international law (ius cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Certain members (e.g. Yasseen) continued to argue that the phrase "from which no derogation is permitted" was ambiguous. The Special Rapporteur suggested adding after that phrase, the words "whether by agreement or otherwise". The amendment was rejected by a vote of 5 in favour, 5 against with 5 abstentions. The article was then adopted unanimously.

ARTICLE 14 (Conflict with a prior treaty)

Waldock's article placed the question of conflict with a prior treaty mainly on the level of interpretation, priority and termination

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rather than on essential validity. As the problem to him (unlike to his predecessors Fitzmaurice and Lauterpacht) was not one of validity, he thought the article probably did not belong in Section I of his report. He therefore seemed to be of the view that consideration of the article might be postponed until the question of effects of treaties was taken up next year. (The one aspect of the article where even Waldock conceded that questions of invalidity were involved--conflict with ius cogens, was dealt with in Article 13.)

Waldock's approach to this question was supported by the majority of the Commission, including such diverse members as Yasseen, de Luna, Rosenne and Elias. On the other hand, Tunkin, Lachs, Pal and Tabibi thought the article was insufficient. Tunkin said that in certain cases a second treaty in violation of an earlier one might be void--e.g. a treaty violating the 1962 Declaration on the neutrality of Laos. Most of the remaining parts of the article, according to Tunkin, were unnecessary and could be deleted. To Ago, the problem was generally one of international responsibility rather than one of validity. The questions raised by Tunkin and Lachs related to capacity which was not then under consideration. He therefore suggested that consideration of the article be "suspended", possibly reverting to it later in the session to see if it contained any element that ought to be retained. Ago's proposal was supported by Verdross (no problem of validity), Gros (problem concerns revision and termination) and Amado (whole article was redundant). Tunkin agreed with the proposal to revert to the article later but he was not convinced that treaties in violation of a previous agreement only raised problems of responsibility and not validity. Ago's proposal was then adopted. The Commission considered this article a second time towards the end of the session. An amendment of a substantial character was submitted by Pal and Aréchaga which would have changed the basic approach of the Special Rapporteur by providing that the parties to the first treaty could invoke the nullity of the second treaty if it was in direct conflict with the earlier treaty and would frustrate its object and purpose. In reintroducing the article, the Special Rapporteur referred to the problem in difficult cases such as that raised by the Austrian State Treaty and the Declaration on the Neutrality of Laos. Waldock seemed to suggest that such cases could be dealt with on the basis of whether or not the earlier treaty restricted the capacity of some of the parties to enter into a second treaty inconsistent with the first. Waldock intimated that he thought that a principle declaring null later treaties inconsistent with earlier ones was itself inconsistent with the priority principle contained in Article 103 of the Charter.

I supported in general terms the approach taken by the Special Rapporteur. Certain provisions seemed unnecessary and could be dispensed with, e.g. paras.1, 2(b)(ii), 3 and 4. Para.2(b) could be drafted in such a way as not to preclude the possibility that a tribunal could find the second treaty void because of lack of capacity, conflict with ius cogens or violation of the principle of good faith. The commentary could thus explain that the article would not preclude the possibility that a later inconsistent treaty could be void as a result of the application of other principles of international law or the law of treaties.

Tunkin continued to maintain that where the later treaty is a clear violation of the first, the second should be void. Waldock's priority approach could therefore be accepted as a general rule together with the Pal-Aréchaga amendment to cover cases where later treaties clearly violate the first and should be void on grounds of violation of pacta sunt servanda.

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A number of members did not support the amendment but continued to favour Waldock's approach (Castren, Tsuruoka, Rosenne, Yasseen, Briggs). Rosenne suggested that the Special Rapporteur's general solution could be accepted, treating separately the question of serious violations of certain types of treaties. This latter question should be considered in the context of breach of treaties, or studied independently of the general type of problem dealt with in Article 14. Rosenne, de Luna and Briggs thought that the article should be deferred until next year and taken up in the context of application of treaties.

Ago maintained his earlier view that the whole article was redundant as merely restating the obvious or involving questions of state responsibility or capacity (as in Tunkin's examples). Bartos supported Ago's statement, emphasizing aspects of responsibility and the importance of freedom of contract in the international field. Neutrality arrangements or regimes had the character of ius cogens. He seemed to indicate that this resulted from incapacity of states to derogate from the regime. Tabibi also supported Ago's statement, apparently because he appeared to favour giving greater recognition to the validity of later treaties at the expense of earlier ones. Such an approach was necessary in order to protect the interests of the new states.

In the light of the discussions, Tunkin agreed to postpone the whole article, not because he agreed with the criticisms of his position but because the time was not yet ripe to draw up an article based on present-day needs. The article could be further considered in connection with the application of treaties and on the second reading of this part of the Commission's work in two years' time. Aréchaga agreed with this although he recognized that to postpone the article prejudged unfavourably the argument that the article involved questions of validity. Waldock was in full agreement with the proposal to postpone the article until next year, particularly since it was related to effects of treaties on third states. The Commission thereupon agreed to postpone the article until next year.

ARTICLE 15 (Treaties containing provisions concerning their duration and termination)
[Article 38]

The entire Commission was of the view that the article was too long and largely superfluous. Castren tabled an amendment to delete everything except a clause saying that treaties containing express terms on the matter shall terminate according to their terms and a further clause to the same effect as para 4(e) of Article 15 (non-termination of a treaty only because the number of parties falls below the minimum number specified for its coming into effect). Verdross and a few others proposed an introductory article stipulating all the ways a treaty could terminate. Ago and de Luna favoured a slightly longer article than the two sentences proposed by Castren. It was decided that the Drafting Committee should substantially simplify the article. The Drafting Committee was to consider the possibility of a brief introductory article as well.

The Drafting Committee tabled the following revised article.

Treaties containing provisions regarding their termination

1. A treaty terminates:

(a) on such date or on the expiry of such period as may be fixed in the treaty;

(b) on the taking effect of a resolutory condition provided for in the treaty;

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(c) on the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party to a bilateral treaty has given notice of denunciation in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (a) When a party to a multilateral treaty has given notice of denunciation or withdrawal in conformity with the terms of the treaty, the treaty ceases to apply to such party as from the date upon which the denunciation or withdrawal takes effect.

(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force.

(c) A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force, unless the remaining parties shall so decide.

Waldock introduced the draft by pointing out that the most important part of the article was para.3. Castren, supported in part by Briggs, argued that the article was too long and reintroduced an earlier amendment to this article which contained only the two paragraphs mentioned above. Yasseen proposed deletion of the final phrase in 3(c) "unless the remaining parties shall so decide". Ago suggested combining 3(b) and (c). Tunkin and Aréchaga agreed with Castren that para.1 should be redrafted so as to provide that "treaties which contain provisions regarding their termination, terminate". Aréchaga and I agreed with Castren that the sub-paragraphs of para.1 might not be exhaustive, but others (Tunkin, Ago, Bartos) thought that they were. I said that unless it were clear that the list was exhaustive, it should be drafted in such a way as not to foreclose other possibilities of termination by agreement. Rosenne and I also maintained that it was important to decide whether titles were to be included in the articles. In view of their importance, the Commission should be consistent in its practice. Waldock was of the view that the articles could never be exhaustive as other cases might conceivably be thought of. However, the present draft article was satisfactory as it adequately covered termination under the provisions of the treaty and other possibilities were never excluded. El-Erian maintained that para.1(c) was covered by para.1(b). Gros proposed that 1(c) should read "or in any other way specified in the treaty". Aréchaga pointed out that as some writers maintained that if the treaty contains a provision, the provision might exclude some grounds under general international law, e.g. rebus sic stantibus. Therefore the article should be redrafted so as to avoid any implication that other grounds of termination under international law may be excluded by the express provisions.

It was agreed to return the article to the Drafting Committee and to consider changes in para.1 such as suggested by Castren and Gros. However, Waldock thought Gros' suggestion would change the "termporal" approach contained in the article and was therefore not satisfactory. The discussion seemed to him to show that (a), (b) and (c) covered all cases. He also thought a redraft submitted by Ago still left the implication which certain members were concerned about. Voting was postponed until the new revision was submitted.

The following revised final text was adopted unanimously, after certain drafting changes were agreed upon in the French text:

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Termination of treaties through the operation of their own provisions

1. A treaty terminates through the operation of one of its provisions which it contains regarding its duration or termination:

(a) on such date or on the expiry of such period as may be fixed in the treaty;

(b) on the taking effect of a resolutory condition laid down in the treaty;

(c) on the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party has denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (a) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation or withdrawal takes effect.

(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

ARTICLES 16 & 17 [article 39]

ARTICLE 16 (Treaties expressed to be of perpetual duration)

Almost the entire Commission was of the view that the article was not a felicitous one. One should not speak of perpetual treaties, but perhaps of treaties of indefinite duration. During the course of the brief discussion, a few members thought it was worth preserving the article or the principle formulated therein (e.g. Rosenne, Castren) while others (e.g. Ago, Briggs, de Luna) thought the whole article was unnecessary as the result provided for would follow from other articles. It was decided to postpone the article until after consideration of Article 17. (Later it was sent to the Drafting Committee without further comment.)

ARTICLE 17 (Treaties containing no provisions regarding their duration or Termination) [Article 39]

This was an important article where Waldock's general view was not generally supported. While recognizing as a general residuary rule (but in a rather indefinite way) that treaties can only be terminated by mutual consent, Waldock went considerably further than previous rapporteurs in providing for a number of exceptions where the treaty could be terminated unilaterally (commercial treaties, treaties of alliance, technical cooperation and arbitration treaties). Waldock's general position was that these types of treaties almost always contained clauses for unilateral termination and therefore one could generally be implied. His approach was supported by Pal, Yasseen and Rosenne. Strong opposition was voiced by Briggs, Gros, Castren, Tsuruoka, de Luna, Verdross, Bartos and Aréchaga. The more extreme members taking this view (e.g. Verdross) said that Waldock's article would destroy pacta sunt servanda. The more moderate (Aréchaga) thought that the article was too timid in proclaiming the residuary rule and too bold

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in enumerating exceptions. A third line was taken by Ago, Tunkin and Lachs. Ago's view was that the Special Rapporteur's position was not a bad compromise between the older rigid view and present needs but that the article would have to be considerably redrafted to place the residuary rule in a clear and categorical way at the beginning of the article. Exceptions could then be stated, drawing on para.3 of Waldock's draft. Para.4 (treaties where there is no right of withdrawal) would become redundant and could be omitted. (The Communist members appeared anxious to get rid of para.4 altogether.) Although Tunkin dealt rather kindly with the article, he said in very plain terms that both conventional and customary norms were not subject to any condition regarding their duration; when a treaty was silent, the principle was that it could be dissolved only by consent of the parties, express or tacit. In this, his position was precisely the same as Briggs, although he appeared to be more well disposed towards Waldock's draft.

Waldock agreed to submit a redraft of Article 17 following Ago's general approach; the residuary rule would be stated--termination can take effect only by agreement expressed or implied--and then exceptions would be provided for, with para.4 omitted. Waldock said it would be difficult to draw up the exceptions and this was certainly an understatement. At least half the members opposed any exception whatever. As to (i)--commercial treaties--Ago favoured this exception, while Tunkin, Bartos and Aréchaga opposed it. Concerning (ii)--treaties of alliance, Castren and Ago seemed to be opposed while Lachs and Tunkin supported it. Concerning (iii)--technical treaties, Amado favoured and Castren and Ago doubted it. As to (iv), arbitration treaties, Rosenne supported it while Amado, Ago, Aréchaga, Castren and Tunkin were against it. Everyone opposed the exception in 3(b) (international organizations).

ARTICLE 16 /formerly Article 17/

The Special Rapporteur later introduced the following redraft of Article 17. (The original Article 16 was omitted altogether.)

Article 16 /16 and 17/

Treaties containing no provisions regarding their termination

> A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation unless it appears from the nature of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties did not intend to exclude the possibility of denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the Depositary twelve months notice to that effect.

Verdross, supported by Lachs, suggested replacing "nature of the treaty" with "purpose of the treaty" in line 3. It was wrong to draft the implied right of denunciation in a negative fashion. The article should state that there was a right of termination implied from the circumstances. I proposed deletion in line 4, as unnecessary, of "or the statements of the parties", substitution of "right" or "faculty" for possibility in line 6 (supported by de Luna) and a substitution for the word "latter in line 6. Waldock said that "statements" were to cover not merely "the circumstances of its conclusion" but subsequent statements. Castren thought it was going too far to require the right of denunciation to be implied both from the nature of the treaty and from the circumstances of its conclusions. Lachs

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thought that the circumstances of the treaty might require a longer period than twelve months for denunciation. Briggs said he would not vote for the article as it ran counter to existing international law which provided that there was a right of denunciation only if granted by the treaty. The various criteria for presuming intent were too vague. If "statements of the parties" meant subsequent conduct, then these words should be used. On the other hand, he could support the article if the intent was expressed in positive terms, as Verdross proposed. Paredes expressed opposition to the article as it tended to create perpetual treaties, to which he was opposed. For similar reasons, Bartos and El-Erian said they would abstain from voting.

Waldock said that the changes did not impair the substance of the article. 'Object' could be substituted for 'nature' (but some members protested). The positive formulation could be accepted--i.e. "unless it appears etc. . . . that the parties intended to admit the possibility of withdrawal". Waldock preferred the twelve-months period as being more simple, although it might be possible to take into account the possibility of lengthening the period in certain circumstances. It was agreed that the Drafting Committee should consider changing "possibility" by "right" and "this" for "latter".

The article was sent back to the Drafting Committee for further redrafting along the above lines.

In the following revised final form, the article was adopted by a vote of 16 in favour with two against (Briggs and Paredes).

Treaties containing no provisions regarding their termination

> A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the Depositary not less than twelve months notice to that effect.

ARTICLE 18 (Termination or suspension of the operation of treaties by Agreement) [Article 40]

A lengthy discussion took place on this article although it was of limited importance. There was general support for Waldock's proposal that all the parties to the earlier treaty would have to agree to the subsequent instrument if it was to have a terminating effect. (Ago's suggestion for a possible two-thirds or other percentage rule found no support.) Waldock's proposal, de lege ferenda, to allow non-parties who drew up the treaty to have a say in any subsequent agreement to terminate was opposed by one or two members (e.g. de Luna) but the idea was widely supported. Contrary to what Waldock proposed in para.(1(b)), it was also the general view that all of the states-parties should have to agree to any terminating treaty, even if adopted within an international organization. As Lachs seemed unhappy about the rights of third-party beneficiaries which might be affected by a terminating agreement, it was agreed to say in the commentary that Waldock's report next year will deal with third-party rights. Paras.3 and 4 of the present draft article will probably be omitted or dealt with in the commentary. The article was left to the Drafting Committee to revise accordingly.

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The Drafting Committee submitted the following redraft.

Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(a) in an instrument drawn up in whatever form the parties shall decide;

(b) in communications made by the parties to the Depositary or to each other.

2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two-thirds of all the States which drew up the treaty; however, after the expiry of X years the agreement only of the States parties to the treaty shall be necessary.

3. The foregoing paragraphs also apply to the suspension of the operation of treaties.

The Drafting Committee decided to leave aside the question of treaties adopted within an international organization. There was no agreement that termination of such treaties would require, as Waldock proposed, that they be treated on a different basis from termination of treaties drawn up among the parties concerned or at an international conference. This discussion by the Drafting Committee led to a distinction between termination and drawing up of a treaty since different rules were laid down last year for drawing up a treaty within an international organization, and among the states concerned or at an international conference.

I suggested adding the word 'subsequent' to the title, to avoid conflict with the title of Article 15 and, supported by Lachs, also suggested qualifying para.1 to show that it did not conflict with para.2; for example, by adding to the beginning of para.1 such words as "except as provided in para.2, a treaty may be terminated at any time by agreement of all the parties". Verdross and Bartos expressed reservations about the rule proposed de lege ferenda, that non-parties could participate in discussions concerning termination for a certain length of time. Lachs raised the question concerning para.3, whether suspension should not be dealt with in a separate article.

Waldock agreed with my drafting suggestions. He also agreed with Lachs that "X" years in para.2 should not be too long but he thought it would be best to await the comments of states before becoming too specific. The question of how to treat suspension should be further considered. He doubted, however, whether the ideal situation was that suspension would be covered in one article.

The article was adopted unanimously in the form given above.

ARTICLE 19 (Implied termination by entering into a subsequent treaty)

[Article 41] The substance of para.1 (where all the parties to the first treaty are parties to the second) was accepted by the Commission. There were only a few contrary views. (Rosenne argued that the matter was one of interpretation only and Briggs maintained that there was no question of implied termination but supersession to the extent that the later treaty was inconsistent with the earlier one.) The consensus was that the Drafting Committee should take

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up and revise para 1 on the understanding that the article should provide for implied termination by subsequent treaty in the general circumstances discussed in Waldock's draft Article. It was decided to leave aside para 2 (involving the question of inter se revision) until Article 14 (conflict with a prior treaty) was dealt with by the Commission since the same basic problem was involved. The only point of interest in the debate was Tunkin's further explanation of his position on this subject. He said that Articles 14 and 19(2) could not be resolved simply on the basis that the later treaty prevailed among the parties to it except if the earlier one had the character of ius cogens. There were other treaty norms which were not ius cogens and which nevertheless could not be derogated from or terminated by a subsequent agreement between some of the parties--e.g. the prohibition of foreign military bases in neutral Laos. The concept of ius cogens should not be widened and should be confined to general norms of international law.

The Drafting Committee submitted the following redraft:

Termination implied from entering into a subsequent treaty

1. A treaty shall be considered as having been impliedly terminated if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject matter and either:

(a) the parties to the later treaty have indicated their intention that the matter should thereafter be governed by the later treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the latter treaty was intended only to suspend the operation of the earlier treaty.

Verdross proposed adding "exclusively" before "governed", to make clear that there must be an intention that the second treaty replace the first. Tunkin opposed adding this word because that would exclude general rules of international law. In response to a suggestion of Castren, Waldock agreed that the wording should ~~#~~ adequately reflect the fact that the intention must be that of the parties to both treaties to terminate the earlier treaty. Pal proposed deletion of the word "impliedly" in line 1 but Waldock and Lachs thought the word useful in emphasizing the character of the rule. Verdross suggested that the word "whole" precede "matter" in para.1(a). I said that while I would support the article, I did not think the addition of the word "whole" was an improvement as it might make the rule more rigid. Subject to drafting changes, the article was adopted by 15 in favour, none against, with one abstention.

ARTICLE 20 (Termination or suspension of the operation of a treaty as a consequence of its breach) [Article 42]

The discussion of this lengthy article extended over three meetings. Most of the interventions were of a minor nature and, in general, there was a definite consensus in favour of Waldock's draft (and Castren's simplified version of it) recognizing that a material breach can give rise to a right in the other party or parties to denounce, withdraw or suspend the treaty. There were only three members who took the view that Waldock's draft went too far--Briggs, Tsuruoka and Verdross. The latter two expressed support

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for Brigg's suggestion that in case of breach, the other party should have the right only to suspend his obligations, pending judicial termination. Waldock, Tunkin and El-Erian all argued that the rule should always be stated independently of the question of remedies. The Drafting Committee was asked to take up Waldock's and Castren's drafts as the basis for their revision and consider such suggestions as (1) that of Tunkin and Briggs to exclude from the scope of application of the article general multilateral treaties (Waldock was opposed to this); (2) that of Tunkin's that there could not be a right to terminate but only to suspend the application of a single clause of a treaty as distinguished from the treaty as a whole (Waldock favoured this proposal). Waldock's suggestion to omit para.5 (dealing with treaties which are the constituent instruments of international organizations) was widely favoured.

The Drafting Committee submitted the following redraft:

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground:

(a) for terminating the treaty; or

(b) for suspending the operation of the treaty in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) the other parties by mutual agreement either:

(i) to apply to the defaulting State the suspension provided for in sub-paragraph (a); or

(ii) to terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article a material breach of a treaty by one of the parties consists in:

(a) the unfounded repudiation of the treaty; or

(b) the violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

The Special Rapporteur pointed out that according to 1(b), severance applied only to suspension and not to termination. The article was not meant to apply to treaties which were the constituent elements of international organizations which would be covered by a separate article. Tunkin, supported by Briggs and Lachs, said he would support the article but he wondered whether the right given in para.2(b) for the parties to suspend a multilateral treaty might not go too far. Briggs also objected to 1(a) as giving a right of

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unilateral termination. He proposed an amendment deleting the clause, but was opposed by de Luna, Rosenne and others. In view of this opposition, the amendment was withdrawn. The question was raised whether in para.2(b) unanimous consent was required for termination and suspension (the paragraph provided for "mutual agreement"). In order to avoid confusion between suspension and termination, I suggested deleting 2(b)(i) and references to suspension in 2(b)(ii). Waldock explained that the article meant to apply the unanimity rule. While article 2(b)(i) was unnecessary, he thought there was value in emphasizing the agreement of the parties. The real purpose of 2(b) was in para.(ii) which required unanimity. It was finally decided to substitute "common" for "mutual" agreement.

The article was adopted by a vote of 12 in favour with 5 abstentions (Briggs, Bartos, de Luna, Paredes) and read as follows:

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) the other parties by common agreement either:

(i) to apply to the defaulting State the suspension provided for in sub-paragraph (a): or

(ii) to terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(a) the unfounded repudiation of the treaty; or

(b) the violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The right to invoke a material breach as a ground for termination or suspending the operation of part only of a treaty, which is provided for in paras. 1 and 2, is subject to the conditions specified in Article 3*.

5. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

The article, with the addition of a paragraph on separability, was adopted (at a second vote) by 18 in favour with one abstention (Briggs).

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ARTICLE 21 (Dissolution of treaty because of supervening impossibility or illegality of performance)

[Article 43]

The Commission decided to take up this article again after considering Article 22 (rebus sic stantibus). Several members (Ago, Castren, Briggs, Gros) thought that para. 1 (extinction of one of parties) should not be dealt with in the draft but left to the law of state succession. Tunkin and Waldock had doubts. There was general support for the rest of the article (re disappearance of subject matter) but some doubt as whether to transfer to Article 13 the final paragraph of Article 21 on supervening ius cogens.

The Drafting Committee proposed deletion of Article 21 and substitution of a new Article (21 bis), which would deal with supervening impossibility of performance but not through extinction of one of the parties, since the latter case involved problems of state succession.

ARTICLE 21 (bis) (Supervening impossibility of performance)

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the complete and permanent disappearance of the subject-matter of the rights and obligations contained in the treaty.

2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

On introducing this draft, Waldock said that he had found it impossible to submit a satisfactory formula on extinction of parties without becoming involved in questions of state succession. The Commission therefore agreed on the deletion of Article 21. Paredes objected to the phrase "complete disappearance of the subject-matter" in Article 21 (bis), para. 1. A river which is the subject of the treaty, might change its course and this would not involve complete disappearance of the subject matter. It would be better to provide for termination when it is no longer possible to continue the treaty. Lachs and Tunkin supported the point of Paredes but not his suggested wording. Tunkin suggested that the point could possibly be met by eliminating the word "complete" or substituting "an essential part of the subject-matter". Tunkin supported omitting the words "complete and permanent". He also suggested revising para. 2 to read "if it is not clear that the disappearance of the subject-matter is permanent". Verdross opposed using the words in para. 1 "a party may invoke"; it should be provided that the treaty ends automatically.

Waldock agreed to deletion of "complete" and adding "destruction" which would cover "wrecking". He opposed deleting "permanent" and providing that the treaty is void. It was agreed to delete "complete" and add "or destruction" in para. 1. Para. 2 was revised along lines proposed by Tunkin.

In its final form, the article was adopted by 17 votes to one (Paredes) and read as follows:

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.

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2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

3. Under the conditions specified in Article (3)*, if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only.

ARTICLE 22 (The doctrine of rebus sic stantibus)

[Article 44] The discussion of this article spread over four meetings. There was universal support for inclusion of an article on this subject. There was also universal support for the Special Rapporteur's novel proposal to apply the rebus sic stantibus doctrine to all treaties and not just those of unlimited duration, as Fitzmaurice had proposed. Beyond this point, the areas of agreement were less clear. The most basic difference was whether the doctrine should be limited as the Special Rapporteur proposed, to changes of facts the continued existence of which was assumed by the parties to be an essential foundation of the treaty, or whether, as others proposed, a more broad test should be applied referring mainly to the frustration of the objects and purposes of the treaty but without necessity of a change of facts assumed to be the essential foundation of the treaty at the time it was entered into. Within the broader approach there were two variations, one more extreme than the other. The positions of the various members in the discussion are summarized below under three categories: (a) supporters of the Special Rapporteur's view, sometimes with relatively minor variations; (b) supporters of a broader approach but emphasizing that the doctrine is a relatively narrow one; and (c) supporters of a very broad approach without real restrictive limitations.

(a) Supporters of the Special Rapporteur

The following are included in this category: Castren (who introduced a short revision of Waldock's article. Castren favoured deletion of exception 5(c) which provided that the doctrine could not apply to the constituent instrument of an international organization. Almost all speakers who referred to para 5 favoured either the deletion of this paragraph and treating it, if applicable, in a separate article on treaties which are constituent elements of international organizations); Tsuruoka, Rosenne (later shifting to a broader view); Amado, Pessou, Ago and El-Erian (except for doubts about para. 6 regarding procedures for applying the doctrine); Briggs (who favoured a more narrow doctrine than the Special Rapporteur but seemed willing to go along with Waldock's approach); Liu and Gros.

(b) Supporters of a Broader Approach

Lachs (favoured deletion of para. 3 which provided that a change in policies of a state does not constitute essential change in circumstances and was against the wording of para.5(a) "granting of territorial rights"); Tunkin (favoured deletion of para. 3, thought that the limitations in para. 4 were too broadly stated and that the tests in paras. 2(b) and (c) should be alternative and not cumulative). The effect of this approach would have been to enlarge the doctrine beyond the limited circumstances which the Special Rapporteur had in mind. Although he took a broader approach than the Special Rapporteur, it was difficult to tell whether Tunkin would press in the Drafting Committee

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alternative
for a separation of the criteria into/paras. 2(b) and (c), particularly in as much as he seemed to shift in his second intervention towards a more conservative view. He emphasized that the doctrine was a narrow one and should be strictly construed; Bartos (supported Tunkin's approach but thought that para. 4(a) was justified while para. 5 was not. Surprisingly, Bartos expressly favoured para. 6); Aréchaga (against para. 3 as too broad and categorical and in favour of deletion of para. 5 on the grounds that the exceptions listed in this paragraph were unnecessary since undoing a treaty would not undo its effects. Aréchaga called for a deletion of para. 2(c), thus favouring in this respect an even narrower definition of the circumstances in which the rebus doctrine was applicable).

(c) Supporters of the Broadest Approach

This included two groups--members from less developed countries and de Luna and Verdross. Tabibi (requested deletion of paras. 4 and 5 together as being prejudicial to small and weak states). Yasseen (supported deletion of paras. 3 and 4(b). Although he did not criticize other paragraphs, he seemed to think that a change in the foreign policy of a state would be enough to bring about application of the rebus doctrine); Elias (against paras. 3, 4(a) and 5. However, he did not seem to go as far as Yasseen or some of the others). Pal favoured deletion of paras. 3, 4(a) and 5. De Luna and Verdross supported an extraordinary amendment which provided that the validity of a treaty may be contested if unforeseen circumstances change the purpose and object of a treaty and the fundamental balance of their obligations. Verdross explained that the decisive test was always to ask: "Would the states have committed themselves?".

In the discussion that followed there was a certain drawing together of positions. For example, Professor Gros said that the reference in para. 5(a) to territorial rights need not be maintained. Professor Ago, while maintaining that para. 2(a) must stand, thought para. 2(b) was superfluous. Para. 3 was essential but the contents of para. 4 could go in the commentary. Tunkin, in his intervention, said that the doctrine was of no importance to the newer and smaller states and that it should be regarded narrowly. He seemed to show no inclination to support the Verdross/de Luna draft but he thought para. 2(c) should be deleted because it was too broad. His main point seemed to be that tests in para. 2(b) and (c) should be alternative and not cumulative. He made no criticism whatsoever of the exceptions in para. 5 and did not seem to pay much attention to para. 3. He also seemed well disposed to para. 6. Waldock ~~told me later that he~~ thought he could work out a formula which Tunkin could agree to.

In his summing up, Waldock said that there was a basic division in the Commission between those who regarded the doctrine as applicable when there had been a change in circumstance originally constituting an essential foundation of the treaty while others thought that the doctrine was an absolute one whereby subsequent changes could be invoked by a party as a ground for dissolution of the treaty, whether or not these changes related to the original basis of the contract. He thought paras. 2(a) and 2(b) might be reworded so as to omit some of the subjective elements which Verdross, Rosenne and a few others had criticized. He added that the division of opinion on para. 2 might be partially bridged by redrafting, although it would be very difficult to satisfy everyone. Para 2(c)(ii) could be omitted or made more rigorous. An effort should be made to redraft para. 3 to see whether a generally acceptable formula could be arrived at, e.g. possibly changes of policy could be regarded as a relevant factor in determining whether there was a change in circumstances. Paras. 4(a) and (b) could be covered in Article 4 or more acceptable draft worked out.

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Para. 5(b) and the last few words in para 5(a) ("or a grant of territorial rights") could be deleted. Para. 5(c) could be left aside to be covered in a general provision concerning constituent elements of international organizations. On para. 6, it seemed to be generally agreed that the doctrine should provide a right of termination (the treaty would be voidable, not void) properly circumscribed with necessary procedural safeguards.

The Drafting Committee submitted the following redraft.

Fundamental change of circumstances

1. Subject to the provisions of paragraphs 2 and 3, a change in the circumstances existing at the time when the treaty was entered into may not be invoked as ground for terminating or withdrawing from a treaty.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) the existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(b) the effect of the change is wholly to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 does not apply:

(a) to a treaty establishing a territorial settlement; or

(b) to changes of circumstances for which the parties have made provision in the treaty itself.

The revised article was generally supported by all members except Bartos, Paredes, Tabibi, Pal and Verdross. This group were particularly critical of the balance struck by the Drafting Committee between pacta sunt servanda and the need for change. Tabibi was ~~particularly~~ critical of the exception to the rule set out in 3(a) concerning territorial settlements. They proposed deletion of para. 1, as stating no rule but merely a doctrinal principle, deletion of "fundamental" in para. 2 and deletion of para. 3 altogether.

Strong support was expressed for the article from widely different quarters, including myself, Tunkin, Lachs, Gros, and El-Erian. I congratulated the Drafting Committee on their work, as striking a fair and acceptable balance between the various views expressed in the Commission. Supported by Briggs, I asked what was the relationship between Articles 22 and 25 concerning procedure. It was important to study closely the procedure to be adopted for settlement of disputes arising out of the interpretation of Article 22, which might easily lead to abuses.

Tunkin argued that para. 3(a) creating an exception for a treaty creating a territorial settlement was too wide; it should be limited to settlement of frontiers. 3(b) was meaningless and should be deleted; the parties could not make provision for a change of circumstances which completely transformed the character of the obligations undertaken. Gros agreed with Tunkin's proposal for redrafting 3(a) but thought that 3(b) was necessary.

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Economic treaties sometimes envisaged a change in the facts or economy of one of the parties and made provisions for dealing with the matter. Tunkin replied that such clauses would apply, but subject to para. 2 which would override the provisions of the treaty as a sort of ius cogens; as it was now drafted, 3(b) overruled para. 2. Briggs insisted on para. 3.

Waldock, summing up, said that the consensus seemed in favour of retaining "fundamental" in para. 2, since change was constant and could not in itself constitute a basis for terminating a treaty. The reference to para. 3 in para. 1 should be deleted (as I had suggested). With regard to 3(a), as further revised, the principle of self-determination is not really relevant as that principle is much wider than rebus sic stantibus and operates independently of treaty obligations. 3(b) should stand as well ~~and~~ as it would make no sense to apply /the article to contingencies foreseen by the parties. A vote should be postponed until a further revised text was submitted.

The article was referred back to the Drafting Committee which submitted the following final draft (adopted by a vote of 15 in favour with one abstention).

Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in this article.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) the existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(b) the effect of the change is wholly to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 does not apply:

(a) to a treaty fixing a boundary, or

(b) to changes of circumstances which the parties have foreseen and for the consequences of which they have made provisions in the treaty itself.

4. Under the conditions specified in Article (3)*, if the change of circumstances referred to in paragraph 2 relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only.

ARTICLE 22 (bis) (Supervening illegality of performance) [old 21 P4]

[Article 45] After considering Article 22, the Commission returned briefly to Article 21. The general view was that para. 4 on ius cogens should be made mandatory and either transferred to Article 13 or placed in a separate section together with that article. The Special Rapporteur was reluctant to combine

* formerly Article 26 on separability.

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the articles as 13 dealt with validity and 22(4) with termination.

The Drafting Committee submitted the following draft of an article (22 bis) relating only to ius cogens superveniens.

Supervening illegality of performance

A treaty becomes void and terminates if a new peremptory norm of general international law of the kind referred to in Article 13 is established and the treaty conflicts with that norm.

Verdross, Bartos and Castren criticized the phrase "a treaty becomes void and terminates"; it would be sufficient to say "terminates". Lachs suggested replacement of the word "if" by "when", to avoid the implication of voidness ex tunc rather than ex nunc. Waldock said that substituting 'when' for 'if' did not avoid the possible implication of original invalidity. The combination of "becomes void and terminates" was the best way of making clear that the treaty was not void ab initio. Also the word 'if' suggests the exceptional nature of the circumstances envisaged in the article. I raised the question whether the article on severance would not have to be related to this article, as the rule in Article 22 (bis) should not apply to a case where the ius cogens superveniens could be severed.

The Chairman said that in the vote on the final articles, members would be able to see the interrelation of each of the articles and vote accordingly. The article was adopted unanimously.

The article in final form (containing a paragraph on separability) was as follows:

Emergence of a new peremptory norm of general international law

1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in Article 13 is established and the treaty conflicts with that norm.

2. Under the conditions specified in Article (3)*, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void.

ARTICLE 23 (Authority to annul, denounce, terminate etc. a treaty)

[Article 19] There was very little discussion on the Rapporteur's proposal since it involved merely applying to authority to annul or terminate a treaty, the rules laid down in Part I, Article 4, agreed upon last year. A few minor points of a drafting character were referred to the Drafting Committee.

The Drafting group submitted the following new text:

Authority to denounce, terminate or withdraw from a treaty or suspend its operation

The rules contained in Article 4 of Part I relating to the authority to conclude a treaty also apply, mutatis mutandis, to the authority to denounce, terminate or withdraw from the treaty or to suspend its operation.

* formerly Article 26 on separability.

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The article was adopted without substantial debate. The following is the final text.

Authority to denounce, terminate or withdraw from a treaty or suspend its operation

The rules contained in Article 4 of Part I relating to evidence of authority to conclude a treaty also apply, mutatis mutandis, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation.

ARTICLE 24 (Termination, etc. under a right contained in the treaty)

[Article 50]

The debate centred on two provisions. Para. 3 (providing a right to revoke a notice of termination) was supported by those few who spoke on this article with the exception of Tsuruoka. Waldock's draft of para. 1 was worded rather broadly in that he listed four conditions for a notice to terminate to be effective. Tunkin and Yasseen argued that it could hardly be maintained that failure to comply with any one of them would make the notice invalid. Waldock agreed that the conditions contained in para. 1(c) and 1(d) should probably not be obligatory while those in 1(a) and (b) should be. The article was sent to the Drafting Committee, which submitted the following new draft.

Notice of termination, withdrawal or suspension under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty, must be communicated to every other party to the treaty either through the diplomatic or other official channel or through the depositary.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect.

The article was adopted unanimously without substantial debate. In its final form, the text was as follows:

Procedure under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty, must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect.

ARTICLE 25 (Termination, suspension, etc. under a right arising by operation of law)

[Article 51]

The debate on this important article covered about two and a half meetings and was at times very confused and unnecessarily broad. There were two debates, one procedural and the other substantive. Tunkin proposed at the outset of the discussion that the debate on the article be postponed until next year as the article concerned all provisions of the draft and not just those being considered this year. The only unqualified support he received was from de Luna. Gros and Briggs pointed out that if the article

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were postponed, decisions on a number of the articles on essential validity would also have to be postponed as the procedural checks contained in Article 25 were directly related to the new substantive rules being worked out on validity. Paredes, Rosenne and Amado, all called for discussion, whereupon Tunkin backed down. It was more or less understood that if agreement on Article 25 could not be reached it might be worthwhile to consider Gros' suggestion that the ILC should then postpone the articles concerning the validity of treaties as well as Article 25 and communicate to governments, as an advance text, the articles prepared and a note on the discussion on Article 25.

At the next meeting, Tunkin made a powerful attack against the concept of compulsory settlement of disputes. It described the usual struggle between reactionary and progressive forces, treaties imposed by colonial and imperialist powers, the great defects in the International Court and how Article 25 would be used to impose obstacles in the way of states liberating themselves from treaties imposed by force. The supporters of the Article were saying: you will have a rul e if you accept the compulsory jurisdiction of the International Court; otherwise you will have no rule. The whole problem should be left aside as forming a separate branch of international law--the settlement of disputes.

At the conclusion of his speech, Ago, Waldock, Gros, Aréchaga and others rushed in to say that Tunkin had made a mistake. The article did not call for compulsory settlement but only the obligation to offer mediation, conciliation or other means of peaceful settlement. After a spirited interchange and several clarifications by Waldock of what he meant, Tunkin said that if no compulsory settlement was envisaged then that changed the whole picture and that he agreed with Waldock that the article including para. 4(b)--the critical paragraph--could be considered in the Drafting Committee.

The discussion at the third and final meeting brought out some of the deep ambiguities in the article. Before terminating a treaty on grounds of operation of law, the claimant state had to offer a means of peaceful settlement under 4(b). What happened if the defendant state said: "We propose going to the International Court"? Was that a rejection of the claimant's offer, allowing the claimant to terminate the treaty? If not, then did not the article allow for compulsory jurisdiction via the back door? Ago strongly argued that the defendant state could not insist that his counter-proposal to go to the Court was a rejection of the claimant's offer to negotiate. Aréchaga argued the opposite.

The main point on which a consensus of some sort seemed to emerge was that there should be a provision (Article 25) which required a state seeking to avoid or declare void a treaty, to comply with Article 33 of the Charter, i.e. offer negotiation, conciliation or arbitration. As Waldock put it, the point of this provision was not to introduce compulsory arbitration, but to require the claimant state to show proof of his bona fides.

Although not strictly relevant in the light of Waldock's explanations, Briggs, Tsuruoka and especially Gros, gave spirited replies to Tunkin's (and Tabibi's) criticisms of the Court.

The Drafting Committee submitted the following revised text:

Procedure for annulling, terminating, withdrawing from or suspending the application of a treaty otherwise than under a right provided for in the treaty

1. A party invoking the nullity of a treaty, or a right to terminate, withdraw from or suspend a treaty otherwise than under a provision of

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the treaty shall be bound to notify the other party or parties of its claims. The notification must:

(a) indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Subject to Article 4, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or the right to terminate a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

Briggs thought the article was unclear and ambiguous. He criticized the word "right" in para. 1. The Drafting Committee should clarify it so as to ensure that there was no right of unilateral action under para. 3. If this was not done, then a number of articles would be inconsistent with pacta sunt servanda. Tunkin said that the Commission did want compulsory settlement of disputes and the Drafting Committee could not go beyond the Commission, nor the U.N. Charter itself. Pal, supported by Aréchaga and Ago, suggested substituting "asserting" for "invoking" and "claim" for "right" in para. 1, line 1. Waldock suggested "alleging" for "invoking". Aréchaga did not agree with Briggs that the article was ambiguous; para. 3 provided no right of unilateral action. Tunkin said interpretations of the article going beyond Article 33 of the Charter were without foundation. Sir Humphrey Waldock said he thought that the article constituted a valuable element of progressive development and that the article was a good one. Subject to the above changes, the article was adopted by a vote of 19 in favour, none against with one abstention (Briggs).

In its final form the article read as follows:

Procedure in other cases

1. A party invoking the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty shall be bound to notify the other party or parties of its claim. The notification must:

(a) indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

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2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Subject to Article 4, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity or of a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

ARTICLE 26 (Severance of treaties)

[Article 26] The discussion of this article was somewhat impeded by rather vague and unclear drafting on the part of the Special Rapporteur. While Waldock wished to apply the principle of obligatory severance, his draft left unclear a number of points which added confusion to the extended discussion.

The majority of the Commission, including myself, supported Waldock's approach. There were only a few members who took a distinctly different line, e.g. Pal and Rosenne. Pal favoured stating the general principle that normally a treaty is an indivisible whole. The exceptions would then follow; they could be based on the intention of the parties as an objective rule of law. Pal favoured the latter approach, as in rebus sic stantibus. He was against recognizing severance as an obligatory principle and also against applying the rule to cases of nullity (supported by Aréchaga on this point). The violating party could never demand severance. Rosenne also proposed avoiding a general article covering the whole field. Severance can arise not only with nullity and breach but also the application and interpretation of treaties. As the International Court had not pronounced any definite principle, the ILC should also avoid so doing, except to point out that decisions about severance can only be taken in the light of all the detailed circumstances of the particular case. He suggested that severance should not be obligatory except in cases of (a) breach (the injured state may react, by retaliation, to part of a treaty); (b) subsequent emergence of a rule of ius cogens and (c) where a single clause of a treaty was induced by improper pressure.

I made a general statement underlining that the most important criterion was the intention of the parties. There should be a presumption that if part of a clause was not an essential part, it must be severed, unless the parties intended otherwise. Paras. 3 and 4 could be combined in illustration of this principle and para. 1 (termination under an express or implied term) could be at the end of the article as an exception to the general rule. In cases of breach, severance should not apply if the violation was of a material character, while in the case of a breach of a non-material character severance should then apply, since it would not be open to a party to repudiate or withdraw from the treaty. Pal, Briggs, de Luna, Elias, Yasseen, Tunkin, Lachs and El-Erian were also favourable to the principle of severance. Lachs agreed that severance was an important method for saving treaties. De Luna agreed that the principle of severance should be stated only as a presumption. Elias favoured placing the article in next year's section on application and interpretation. Tabibi argued that the ILC must

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choose between inseparability and separability; it could not have both. Article 26 was defective because it failed to protect the injured party. An article on this subject should not be drafted at this time. Yasseen maintained that recourse should first be to the treaty and the intention of the parties to see if a clause was severable. Lachs argued that the article should be limited, by placing as the first principle the integrity of treaties. Exceptions could be based on the express or presumed intentions of the parties and on the character of the treaty. The article should be placed where Waldock proposed, as it was closely linked to termination. The criterion of a "self-contained" part was too narrow and therefore unacceptable. El-Erian also criticized this test as too rigid but completely rejected Tabibi's criticism. Tunkin suggested that additional criteria must be added to those proposed by Waldock.

Aréchaga favoured the piecemeal approach, dealing with the applicability of severance to each article. He was of the view that it would not apply except in a limited number of cases.

Waldock did not agree that the article would be better placed in connection with the interpretation and application of treaties. Severance was closely connected with problems of validity. It could certainly be applicable in cases involving error (as in the Temple case). He also strongly preferred a single article rather than dealing with severance in the context of each applicable article. In cases of breach, fraud, and possibly coercion, one party is a victim of a wrongful act. In those cases, severance would be a permissive right, and that is how it should be dealt with in cases of breach. In cases of fraud and possibly personal coercion also, severance should also be only a permissive right. In other cases of nullity, severance could be either permissive or obligatory; Waldock preferred the latter approach. The article could also be applicable to rebus sic stantibus and subsequent ius cogens. The Drafting Committee could consider the various drafting suggestions and other proposals for criteria for severance. The article on severance should probably appear before the other articles as it qualified their sphere of application.

Ago, supported by Aréchaga, suggested that Waldock should try drafting a different approach, relating severance to the particular types of cases in which it could arise. The Special Rapporteur indicated he would consider trying both solutions, on the understanding that the Commission would deal with the problem in the present report.

Waldock submitted the following revised article:

Article (3) /26/

Separability of treaty provisions for the purposes of the application of the present articles

1. Except as provided in the treaty itself or in Articles 7, 8, 11, 20, 21, 22 and 22 (bis), the nullity, termination or suspension of the application of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

2. The provisions of Article 7, 8, 11 20, 21, 22 and 22 (bis) regarding the partial nullity, termination or suspension of the application of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

(a) the clauses in question are clearly severable from the remainder of the treaty with regard to their operation; and

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(b) it does not appear either from the treaty or from statements made during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole.

The Special Rapporteur explained that it was suggested that the article should be brought forward to the first portion of this part of the draft articles and numbered Article 3, and that the word "separability" should be substituted for "severance", and that it was his intention to include provisions on separability in the various articles concerned. The article was then adopted unanimously.

ARTICLE 27 (Legal effects of the nullity or avoidance of a treaty)

[Article 52]

Waldock explained that he did not include an article on legal effects of suspension of a treaty because the effects seemed to be obvious. Castren proposed deletion of the exceptions in 2(a) and (b), the former because it was not sufficient to say that acts done under a void treaty should have no legal effect, as it might not be possible to undo the effects that had already occurred. Lachs suggested that it would be better to say that the legal effects should be treated upon the basis as if there never was a treaty. Lachs also suggested, supported by Yasseen, that para. (b) should not include the words "may be required to restore the other party to its previous position". "May" should be "must". Verdross proposed deletion of the latter half of para. 1 "and the States concerned shall be restored as far as possible to their previous position", since this clause deals with reparation. Aréchaga doubted that para. 2 would create satisfactory results in all cases, e.g. substantial error which only creates a right of avoidability. Rights granted by error perhaps should be void. Tunkin maintained that treaties subsequently voidable for ius cogens could not create rights which remain valid.

Waldock, summing up, said that para. 2 was meant to apply to cases where a party claimed, sometime after a treaty entered into effect, that it was voidable (e.g. for fraud). An elective right had also been provided for in the original articles on coercion and mistake induced by misrepresentation. But these proposals had disappeared from the articles. The new articl e on fraud was drafted as a right to invalidate a treaty, and did not imply that the treaty was valid at some period of time. Consequently, para. 2 could probably be deleted in view of the Commission's decisions on other articles. He himself had favoured giving recognition to the concept of voidable treaties which could be valid before avoided. But para. 2 would have to be omitted unless the Commission changed its approach. As to ius cogens and subsequent impossibility, Article 28 would apply as that deals with termination. The Drafting Committee could reconsider such phrases as "shall have no legal force or effect". Article 27 would thus be confined to a revised Article 1.

Ago and de Luna argued that Articles 27 and 28 should be combined into a single article.

The article was sent to the Drafting Committee on the understanding that the article could be combined with Article 28 if it proved necessary. It was understood that the Drafting Committee would consider whether to include or omit para. 2, since both Tunkin and Lachs were anxious to salvage it, if possible.

The Drafting Committee submitted the following redraft:

Legal consequences of the nullity of a treaty

1. Subject to paragraph 2, a treaty established to have been void ab initio has no legal force or effect; and the situation which would

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have existed if the treaty had not been concluded shall be restored as quickly as possible.

2. If the nullity of a treaty results from fraud or coercion imputable to one party, that party may not invoke the nullity of the treaty for the purpose of contesting the legality of acts done by the other party or parties in reliance upon the void instrument.

3. Paragraphs 1 and 2 also apply where a particular State's consent to a multilateral treaty is established to have been void.

It was agreed that "restored" in para. 1 was not the proper word, since a non-existent situation cannot be restored. The Drafting Committee was instructed to seek a better word. I pointed out certain disparities between the English and French texts. The article was adopted unanimously.

Waldock reintroduced a new draft towards the close of the session which was drawn up in a manner more designed to safeguard the position of parties which had relied in good faith on the validity of treaty. It was adopted by a vote of 15 in favour with one abstention and read as follows:

Legal consequences of the nullity of a treaty

1. (a) The nullity of a treaty shall not as such ~~not~~ affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

(b) The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed.

2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1.

3. The same principles shall apply with regard to the legal consequences of the nullity of a State's consent to a multilateral treaty.

ARTICLE 28 (Legal effect of termination of a treaty)

[Article 53] Verdross proposed deletion of the opening phrase "unless the parties otherwise agree", as it would not be possible to assume that a treaty that had ended could continue to bind the parties by any of its dispositions. Castren thought that the phrase would be acceptable if it were cast in the past tense. I said that the phrase would certainly be applicable in the case of multilateral treaties which continued in existence and to bind parties after the withdrawal of a party--e.g. Article 2(b) of the U.N. Charter.

General support was expressed for the article by the members who spoke. Some members pointed out and Waldock agreed that 1(b) would have to be drafted to cover adequately cases such as ius cogens interveniens.

Waldock did not accept Verdross' point, citing, as an example, Article 19 of the Liability of Operators of Nuclear Ships which provided for certain obligations to continue for a period after termination. The phrase covered primarily multilateral treaties. The article was sent to the Drafting Committee subject to comments made.

The Drafting Committee submitted the following:

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Legal consequences of the termination of a treaty

1. Subject to paragraph 2 and unless the treaty otherwise provides, the lawful termination of a treaty:

(a) shall release the parties from any further application of the treaty;

(b) shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. If a treaty terminated on account of its having become void under Article 22 (bis), a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

(a) that State shall be released from any further application of the treaty;

(b) the remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

(c) the legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 of this article shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law.

The article was adopted unanimously without discussion.

ARTICLE 29 (Suspension)

[Article 54] In response to several suggestions that it might be worthwhile to have a separate article dealing with the legal effects of suspension, the Drafting Committee submitted the following text:

Legal consequences of the suspension of the application of a treaty

1. Subject to the provisions of the treaty, the suspension of the application of a treaty:

(a) shall relieve the parties from any application of the treaty during the period of the suspension;

(b) shall not otherwise affect the legal relation between the parties established by the treaty.

2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the application of the treaty impossible.

Yaseen thought para. 2 was too absolute. It was agreed that it should be stated in the commentary that "juridical acts" were not covered.

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Lachs suggested adding a paragraph to the effect that suspension shall not affect the validity of earlier acts under the treaty. This was also agreed.

Subject to drafting changes, the article was adopted unanimously. The following was the final text:

Legal consequences of the suspension of the operation of a treaty

1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

(a) shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

(b) shall not otherwise affect the legal relations between the parties established by the treaty;

(c) in particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible.

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Legal/J.A.Beesley/PM/JL

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NATO SECRET

DRAFT numbered letter to Office of the High Commissioner for Canada, London

NOT SENT

Ref. Your telegram 1412 of April 16

Subject: Future Development of International Law

We are most interested in the British views on the implications of Goa, as set forth in your telegram under reference. We have ourselves made a study of some of the legal issues involved and we are attaching a copy of an excerpt of Legal Division's memorandum of January 30 on the question.

2. You may make use of the attached memorandum in discussions with the British in order to follow up their reply to your earlier approaches, but you should exercise caution in your use of it since it is merely a working paper which does not necessarily represent departmental thinking.

3. We agree with the British that it is likely that efforts will be made to link some of the concepts being put forth in justification of the Goan action with the item "Friendly Relations" on the Sixth Committee Agenda, and that we must consequently be prepared to reply appropriately wherever this thesis is raised, while avoiding if possible having the Sixth Committee Debate deteriorate into one on the Legal Aspects of Colonialism. We agree also that, if we should be pressed into a statement on Goa, our best line would be to point out that some of the doctrines being advanced in justification of India's action on Goa are inconsistent with the Charter, and that they would undermine the Rule of Law which the Charter, the U.N. and its members are intended to promote. If at all possible, of

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course, the discussions in the Sixth Committee should, we think, be steered away from Goa, so as to avoid a debate which might have serious implications for the future relations between the West and the uncommitted countries.

4. In our view the proposed initiative on the primacy of international law outlined in our telegram L-49 of April 20 (which crossed with your telegram under reference) could be utilized to good effect to advance constructive concepts without offending Afro-Asian sensibilities, and we should be interested to learn as soon as possible the British views on our suggestion.

Under-Secretary of State
for External Affairs

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Legal/J.A.Beesley/PM/JL

DRAFT CONFIDENTIAL

Excerpt from Legal Division's
memorandum of January 30,1962

Subject: Goa and the Anti-Colonial Movement

The Validity of the Arguments Advanced in Justification of India's Action

1. The Indian High Commissioner argues in support of India's action that "while the Charter does not adequately provide for anti-colonialism, it does touch on it in two important respects: (a) the denial of the use of force should be read in the light of the concept of justice; (b) the articles requiring peaceful settlement apply to the relations between sovereign states and not to the relation of a sovereign state with a colony".

2. Proposition (a) appears to superimpose upon the provisions of the Charter the theory of bellum justum, according to which a war is legal if undertaken as a sanction against an international wrong or delict, and in so doing to suggest that so long as the use of force is consistent with the concepts of justice, it is not proscribed by the Charter. Such an argument raises the whole question of the legality of the use of force under the Charter, and will be examined within the broad terms of reference.

3. Proposition (b) may be open to more than one interpretation, (I) but it appears to be an assertion that the restrictions of the Charter on the use of force do not

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(I) There is authority, for instance, that the provisions of the Charter prohibiting the use of force do not apply to force used by a state in the course of a revolt which has broken out within its own territory (Lauterpacht's Oppenheim, Vol. II, 7th Ed. at p.153) but presumably this is not the kind of situation to which the Indians are referring.

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apply at all on colonial questions; that is the interpretation which will be considered below.

4. The first proposition which will be considered is:

(a) The denial of the use of force should be read in the light of the concept of justice

There are two schools of thought as to the legality of the use of force under the Charter. According to one, the principles set forth in Article 2 of the Charter constitute legal obligations on its members which categorically prohibit the use of force by member-states in all cases except as expressly authorized in the Charter under Articles 51 and 107. (2)

5. The other and opposing view is that since one of the four principle aims of the Charter is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained", it is arguable that the obligations of member-states were undertaken on the understanding that effective measures for collective security could and would be adopted by the organization, and that in the light of the inability of the organs of the U.N. to bring about such conditions, either through the weakness of its own constitution or through the impact of technological development in the means of modern warfare, a de facto revision of the Charter has occurred, with the result that states are not forbidden in all circumstances by the Charter from resorting to force to establish such conditions. (3)

6. As to which of the two lines of argument is the more valid, we are inclined to the view that while the first may appear to be more in accord with Western foreign policy, and in particular the approach of most of the western nations to the role

(2) See ~~departmental~~ Legal Division working paper of Feb 20, 1957.

(3) See Legal Division's working paper of Jan 12, 1959

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of the U.N. in world affairs, the second may have considerable legal validity. It would seem sufficient, however, for the purposes of this memorandum, to point out that there are widely divergent interpretations of the Charter on this question and that it cannot be said that India's proposition (a) is wholly without legal foundation.

7.10. India's second proposition is that:

(b) The articles of the Charter requiring peaceful settlement apply to the relations between sovereign states and not to the relations of a sovereign state with a colony

This argument may be interpreted as incorporating or applying the argument that the denial of the use of force under the Charter is subject always to the overriding principles of justice; it may be intended as an assertion that the whole colonial concept is unjust per se, and hence colonial questions are automatically exempted (when the interests of the non-self-governing territory rather than the metropolitan power are at stake) from the obligation to refrain from the use of force. There would seem to be little purpose in attempting to examine in the abstract the validity of such a proposition, involving, as it does, issues which are more political than legal, but it may be surmised that there would be two fundamentally opposed positions on such a question, the one based on the "sacred trust" concept affirmed in the Charter, and the other on the "right to self-determination" also affirmed in it.

8.11. Leaving aside the question of the "justice" of the colonial system this argument seems open to attack on other grounds. Firstly, in the provisions of the Charter restricting the use of force, no distinction is made between the obligations of sovereign states and those of entities which,

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while possessing some degree of international personality, may not possess complete sovereignty. It would seem, on principle, that in determining the applicability of the peace-keeping provisions of the Charter to such entities the same reasoning should apply to non-self-governing territories, trust territories, or other entities lacking some of the essential elements of a juridical person in international law.(2) There may be some question legally, for instance, as to whether the political sub-divisions of a federal state may have for certain purposes and to a limited degree some form of international personality, but it is not arguable that the political sub-divisions of a federal state are, as a consequence, not subject to the same obligations as the state of which they form a part. India maintains, nevertheless, that the peace-keeping provisions of the Charter do not apply as between sovereign states and colonies, while admitting, implicitly, at least, that the peace-keeping provisions do apply (subject, always, presumably, to the proviso of justice) as between sovereign states. If, however, the colonies are subject to the sovereignty of the respective colonial powers, and colonial powers are bound by the peace-keeping provisions of the Charter, the colonies are also subject to these provisions. Consequently, in asserting such a proposition India is denying the sovereignty of the colonial powers over their colonies.

9. 12. India may be suggesting that colonies fall somewhere between the two categories, being something more than mere sub-divisions of a sovereign state, while falling short of the status of a sovereign state. Even so, however, other sovereign states are bound by <u>their</u> obligations under the Charter, (whatever element of doubt may exist as to their exact nature and extent), with respect to any "international disputes", (Article 2(3)), and in all its "international relations" (Article 2(4)). India must, therefore, be arguing also that a dispute involving a sovereign state and a colony is not international in character, and similarly, that the relations between the two are not international. It is difficult to see any basis on which this argument can be maintained except the very concepts of traditional international law which are being attacked, namely that there can be no international relations between a non-self-governing territory and a sovereign state since a non-self-governing territory, being subject to the sovereignty of the administering authority, is not a juridical person.

10. 13. It would seem to be a complete answer to India's second proposition to say that either a "colony" has attained the status of a juridical person, in which case it would normally be in its own right subject to the peace-keeping obligations of the Charter, or it has not, in which case it remains

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(2) While Protectorates might appear to be an exception, it is generally agreed that the State under a protectorate status is sovereign, and that only its capacity for international action is limited. The distinction is drawn between sovereignty and the exercise of sovereignty. Consequently, the Protectorate has "a position of its own as an International Person and a subject of International Law". (Lauterpacht's Oppenheim, Vol. I, 8th Ed. at p.193).

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under the sovereignty of a colonial power and is subject to the peace-keeping provisions of the Charter vicariously, in the same way as is a political sub-division of a federal state and that in either case other sovereign states are bound by their obligations under the Charter to refrain from the use of force. The Indian argument cannot be disposed of so easily, however.

11-14. It must be recognized that there are many non-self-governing territories (as well as trust territories) which do not fall neatly into either of the two categories mentioned. The very use of the phrase "not having attained a full measure of self-government" in Article 73 of the Charter suggests a recognition that there are degrees of self-government, and that a territory may be self-governing and yet not independent.(3) Such a distinction between self-government and independence is, for instance, found in British constitutional practice, whereby colonies pass from the non-self-governing stage through a self-governing stage, during which they are not yet internationally independent, to eventual independence. Article 73 does not settle the status of such a territory under the Charter.

12-15. It may not be possible to give categorical answers, based on traditional concepts of sovereignty, to some of the questions posed by India. In his penetrating separate opinion on the International Status of South West Africa, Sir Arnold McNair pointed out that the question of sovereignty is not relevant to an altogether new international system:

> "The mandates system (and the corresponding principles of the international trusteeship system) is a new institution - a new relationship between a territory and its inhabitants on the one hand and the government which represents them internationally on the other - a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system...What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the mandatory in regard to the territory being administered by it."

While his comments are directed to the trusteeship system, it can be seen that they could have application, almost to an equal extent, to the colonial system as a whole. (When so interpreted, they suggest that the legality of the use of force under the Charter, in such situations as that under discussion, could turn as much on the colonial powers' obligations under Article 73 of the Charter as on infringements of the colonial powers' sovereignty.)

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(3) The word "sovereignty" has been avoided. An interesting discussion of the problems in semantics involved in such expressions as "internal and external sovereignty", "internal and external independence", "independent sovereignty", and even "sovereign equality", as used in the Charter is given by Korowicz in his Introduction to International Law, 1959 Ed., at pp. 79-85.

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13. Considerable evidence can be found to support the suggestion that the colonial concept is no longer absolute. Chapters 11, 12 and 13 of the Charter, which spell out the extent to which a member of the U.N. accepts derogations of sovereignty over its non-self-governing or trust territories, can hardly be said to be consistent with traditional colonial sovereignty (except, ~~perhaps~~ as practiced by the British, and, more recently, the French in certain areas). It is necessary only to compare the terms of Article 22 of the Covenant (in which the term "self-determination is never used, and the concept seemingly embodied in the phrase ~~is~~ applied only to Type "A" Mandates) with the provisions in Article 73 (which according to some writers(4) establishes the principle of self-determination as a principle of international law) in order to detect signs of a legal as well as political evolution on this question.

14. It is arguable also that Chapters 11, 12 and 13 of the Charter cannot be reconciled with Article 2(7) of the Charter forbidding interference in domestic affairs, unless the negation of at least some of the elements of sovereignty over non-self-governing territories by the administering powers is admitted.

15. The series of anti-colonial resolutions passed by the various U.N. organs may have caused further inroads, beyond the original provisions of the Charter, upon the absoluteness of colonial sovereignty, resulting, perhaps, even in another instance of de facto revision of the Charter. On the basis of our knowledge of U.N. practice, the provisions of chapters 11-13 of the Charter would seem to be often applied against the wishes of and interpreted in ways contrary to the views of the colonial powers - particularly Portugal. The trend, if there is one, would seem to be towards more and more U.N. control over the administration of non-self-governing territories, as well as trust territories. This U.N. practice may, of itself, be of real significance in determining the status of traditional colonial concepts under contemporary international law.

16. It is not suggested that even in the case of the trusteeship system, sovereignty rests with the U.N. Several of the leading authorities on the interpretation of the Charter state categorically that in the case of trust territories the question of sovereignty is determined on the basis of the trusteeship agreements, and that those registered with the U.N. make clear that the administering authority is the territorial sovereign during the period of trusteeship.(5) There is some difference of views on the question, and one writer denies in categorical terms that sovereignty lies with the administering power, while not going so far as to suggest that sovereignty is conferred by the trust agreements on the U.N.(6) In the case of non-

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(4) M. Korowicz, op. cit. at p.285; Oppenheim, op. cit. at p.240; Kelsen, op. cit. at pp. 553 and 554.

(5) Kelsen, "The Law of the United Nations", at pp. 689 -692.

(6) Lauterpacht's Oppenheim, op. cit. at pp. 235-237.

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self-governing territories not under trusteeship, a leading authority states that while it is not possible to maintain that the U.N. has no jurisdiction whatsoever over them, the Charter does not authorize the organization to exercise sovereignty over a territory not under trusteeship.(7)

20. 17. It can be seen that the question of the sovereignty of colonial powers over their colonies falls into an area of the law which is undergoing considerable development and change. It is, consequently, to some extent, a matter of judgment as to what stage the process of erosion of colonial sovereignty has reached. It is submitted, however, that while it cannot be said that this aspect of the Indian argument is totally without foundation, there is insufficient evidence to establish that colonial powers are no longer sovereign over their colonies. It should be noted also that while it would seem necessary for India to establish that colonial powers no longer retain sovereignty over the "colonies" under their administration in order to establish that the peace-keeping provisions of the Charter do not apply to relations between sovereign states and colonies, proof of the latter proposition would not flow automatically from proof of the former.

21. 18. Quite apart from the question of sovereignty, there are other defects in the Indian argument. Presumably, it is not India's suggestion that any of the provisions of the Charter can be so interpreted as to specifically exempt the relations between sovereign states and colonies from the peace-keeping provisions of the Charter, but rather that there are no provisions regulating such relations. Such an argument ignores, however, the provision of the Preamble of Article 73, which includes non-self-governing territories in the "system of international peace and security established by the Charter", and that in Article 73(c), which requires the colonial powers "to further international peace and security".(8) It may be arguable that these provisions bind only the colonial powers. Admittedly, such an interpretation is consistent with the language of Article 73 - presumably, because it was generally understood at San Francisco that only the colonial powers need be so obligated, since the colonies were assumed to be subject to their sovereignty. India now seems to be denying this colonial sovereignty and, in so doing, taking advantage of the fact that the wording of Article 73 was based on this very concept of colonial sovereignty.

22. 19. Such an interpretation would, of course, render the relevant passages in Article 73 of the Charter meaningless and nonsensical. Obviously, little purpose would have been served in imposing on the colonial powers a unilateral obligation to refrain from the use of force in connection with their colonies in order to ensure "peace and security", while leaving all others who might be or consider themselves to be interested in any of the non-self-governing territories free

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(7) Kelsen, op. cit. at p.693.

(8) Kelsen seems to suggest that in the light of this provision the requirement in Article 73(c) on the part of the colonial powers "to further international peace and security" is redundant. (op. cit. at p.559.)

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of any such restriction. Presumably, the colonial powers would never have agreed at San Francisco to any such unjust and unworkable arrangement, and it may be wondered if they would be prepared to continue to belong to an organization imposing such an obligation.

23.20 Such an interpretation would also elevate the social, economic and political purposes of Article 73 above the essential peace-keeping provisions of the Charter, recognized in that Article, as well as elsewhere. ~~It may~~ It may be felt that the line of argumentation ~~developed in the attached memorandum of January 12, 1959~~ on the legality of the use of force under the Charter, ~~may be subject to~~ a somewhat similar criticism. There are important distinctions between the two questions, however: of degree, (in that ~~the attached memorandum~~ such an argument purports to show only that there may be certain exceptions to an otherwise binding rule, whereas the Indian theory asserts that there is no rule whatsoever); of kind, (in that ~~the attached memorandum~~ such an argument purports to show a direct causal and substantive relationship between the "vital change in circumstances" and the consequent legal effects, whereas India's theory attempts to deduce legal consequences, which are side effects, quite unconnected with the original cause); and of substance, (in that ~~the attached memorandum~~ such an argument attempts to reconcile the exceptions to the restrictions on the use of force with the basic purposes of the Charter, whereas the Indian argument explains the blanket exemption of non-self-governing territories from such restrictions merely on the basis of a hiatus in the Charter.)

24.21 Such an interpretation would also be inconsistent with the spirit and intent of the Charter. Whether or not it can be established that there has been a substantial erosion of colonial sovereignty, such a development would have no bearing on the question whether the non-self-governing territories should be brought within the peace-keeping provisions of the Charter, but for the accidental circumstance that the procedure selected for doing so was that of placing obligations to that effect upon the colonial powers. It is difficult to see why, on principle, the clearly expressed intention to bring the non-self-governing territories within the "system of international peace and security established by the Charter" should be frustrated as a result of a process (the alleged erosion of colonial sovereignty) not directed to, nor connected with, such an end result. It is difficult to reconcile such an interpretation either with the principles of justice which the Indians might invoke on other aspects of the case or the principle of self-determination which, presumably, would stand to benefit as much as would any of the other expressed purposes of the Charter from its peace-keeping provisions.

25.22 Such an interpretation would also be difficult to reconcile with the factual situation, since it ignores the various developments directed towards bringing and maintaining the non-self-governing territories within the peace-keeping provisions of the Charter. It may be assumed that many of the U.N. resolutions on self-determination might be found, on examination, to be directed as much towards peaceful

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methods of social and economic evolution as towards the evolution itself.

26. 23 Such an interpretation is also not compatible with the traditional or "universal" theory of state succession, which is founded on the notion of transmission of sovereignty from the predecessor state to the successor state, and with it all the consequent rights and obligations. Even on the basis of the "negative" theory, which admits of a theoretical hiatus between the expulsion of one sovereignty and the extension of another, and determines treaty rights and obligations of the successor state pragmatically, the Indians would seem to be applying such notions along novel and radical lines. (It may be worth noting also that India did not advance such theories when she was contending for membership in the U.N. as successor state to British India.)

27. It is difficult to see, on the basis of the most sympathetic interpretation of the Indian point of view, any real legal foundation for proposition (b). In our view it must be rejected as invalid.

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Original removed from file July 18, 1962 and handed to Comcentre to be repeated to NATO, Paris.

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FUTURE DEVELOPMENT OF INTERNATIONAL LAW

WE RECEIVED TODAY REPLY FROM FO ON QUESTIONS WE RAISED WITH THEM. IN VIEW OF TIME ELEMENT WE ARE,THEREFORE,REPEATING BELOW TEXT OF REPLY WHICH REPRESENTS CONSIDERED VIEWS OF UN AND LEGAL DEPTS FO.

2.WE GATHER THAT FO HAS NOT RPT NOT UNTIL NOW GIVEN TOO MUCH THOUGHT TO MATTERS UNDER CONSIDERATION IN OTT AS BRIT MEMBER OF INTERNATIONAL LAW COMMISSION,SIR HUMPHREY WALDOCK,HAS,AS YOU KNOW,PRIVATE STATUS AND USES HIS OWN INITIATIVE TO CONSULT FO WHEN HE DEEMS IT NECESSARY.FO WERE,HOWEVER,MOST GRATEFUL FOR OUR VIEWS WHICH HAVE APPARENTLY STARTED THEM THINKING AND HOPE THAT SIR HUMPHREY AND MR CADIEUX WILL WORK IN CLOSE CO-OPERATION.

3.TEXT OF FO REPLY FOLLOWS QUOTE WE HAVE BEEN ABLE TO GIVE SOME THOUGHT TO THE MEMO WHICH YOU LEFT AND I MAY SAY THAT IN GENERAL YOUR IDEAS ON THE SUBJECT OF THE FUTURE DEVELOPMENT OF INTERNATIONAL LAW COINCIDE WITH OURS.WE ARE NATURALLY VERY CONCERNED ABOUT THE WAY THINGS ARE GOING,AND IN PARTICULAR THE DEVELOPMENT OF SOVIET THEORY ABOUT QUOTE MODERN INTERNATIONAL LAW UNQUOTE. THE NEW QUOTE PRINCIPLES UNQUOTE OF INTERNATIONAL LAW WHICH ARE ACCEPTED BY CERTAIN COUNTRIES AS FUNDAMENTAL WERE CLEARLY REVEALED IN THE DEBATE ON GOA IN SECURITY COUNCIL LAST DEC18.THESE WOULD SEEM TO US TO BE:(1)THAT THE OCCUPATION OF ANY TERRITORY ACQUIRED BY CONQUEST IS ILLEGAL AB INITIO,AND CONTINUES TO BE ILLEGAL, HOWEVER LONG THE OCCUPATION LASTS;(2)THAT,IN CONSEQUENCE OF(1) ABOVE,IT CANNOT RPT NOT BE ACCEPTED THAT COLONIAL POWERS HAVE ANY SOVEREIGN RIGHTS OVER TERRITORIES WHICH THEY WON BY CONQUEST IN ASIA AND AFRICA;(3)THAT THE ORIGINAL OCCUPATION OF SUCH

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TERRITORIES HAS BECOME EVEN MORE ILLEGAL IN THE LIGHT OF RESOLUTION 1514(XV);(4)THAT THE PEOPLE IN ANY TERRITORY THUS QUOTE ILLEGALLY OCCUPIED UNQUOTE HAVE ALWAYS HAD AND STILL HAVE THE RIGHT OF REBELLION AGAINST THE OCCUPYING POWERS;AND THAT SUCH CONTINUED OCCUPATION CONSTITUTES PROVOCATION IN RESPONSE TO WHICH THE USE OF FORCE QUOTE IN SELF DEFENCE UNQUOTE CAN BE JUSTIFIED(JHA:S/PV 988 P52);(5)THAT QUOTE THE INEXORABLE PROCESS OF LIBERATION UNQUOTE MUST NOT RPT NOT BE INTERRUPTED OR RETARDED QUOTE BY MEANS OF ENDLESS NEGOTIATIONS AND COMPROMISES UNQUOTE(ZORIN:S/PV 987 P52); (6)THAT THERE CANNOT RPT NOT BE ANY QUOTE LEGAL FRONTIER UNQUOTE BETWEEN A TERRITORY QUOTE ILLEGALLY OCCUPIED UNQUOTE BY A COLONIAL POWER AND THE STATE OF WHICH IT IS NOW ALLEGED TO FORM PART:OR,TO PUT IT ANOTHER WAY,THAT QUOTE A COUNTRY CAN NEVER BE REGARDED AS DISMEMBERED OR SEVERED BECAUSE TWO OR MORE DIFFERENT COLONIAL POWERS HOLD PORTIONS OF IT BY FORCE UNQUOTE(MALALASEKERA: S/PV 987 P81);(7)THAT IF A TERRITORY IS RECOGNISED BY GENERAL ASSEMBLY TO BE A NON-SELF-GOVERNING TERRITORY(AS GOA WAS,FOR INSTANCE,IN RESOLUTION 1542(XV)),IT CANNOT BE PART OF THE MUNICIPAL TERRITORY OF A COLONIAL POWER OR EVEN(SEE BARNES,(LIBERIA) S/PV 987 P52,AND LOUTFI(UAR)LOC CIT P72-73)ANY PART WHATSOEVER OF THE TERRITORY OF SUCH A POWER;(8)THAT RESOLUTION 1514,STATING THAT QUOTE IMMEDIATE STEPS SHOULD BE TAKEN IN TRUST AND NON-SELF-GOVERNING TERRITORIES UNQUOTE IMPLICITLY SANCTIONS THE USE OF FORCE FOR THE RECOVERY OR LIBERATION OF SUCH TERRITORIES;(9)THAT A CLAIM BY A STATE THAT PART OF ITS TERRITORY HAS BEEN ILLEGALLY OCCUPIED BY A COLONIAL POWER IS SUFFICIENT TO WITHDRAW THE CLAIM FROM CONSIDERATION BY UN AS BEING A MATTER WITHIN THE JURISDICTION OF THE STATE CONCERNED.

IT SEEMS THAT THESE CONCEPTS MAY WELL RECEIVE A MUCH WIDER CURRENCY IN THE SIXTH CTTEE AT NEXT SESSION AND,UNDOUBTEDLY IF

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THE TREND IS FOLLOWED, EFFORTS WILL BE MADE TO LINK THEM WITH THE ITEM OF QUOTE PRINCIPLES OF INTERNATIONAL LAW RELATING TO FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF UN. UNQUOTE

AS YOU SAID, WE MUST BE PREPARED TO REPLY APPROPRIATELY WHEREVER THIS THESIS IS RAISED. WE SHOULD HOWEVER ALSO LIKE TO AVOID THE DEBATE IN THE VITH CTTEE DETERIORATING INTO ONE ON THE LEGAL ASPECTS OF COLONIALSIM. WE THINK THAT THE AIM SHOULD BE TO HAVE A SERIOUS GENERAL DEBATE ON THE ITEM AS A WHOLE AND WE SHOULD TRY TO KEEP ANY DISCUSSION ON COLONIALISM IN PROPORTION AND AS UNEMOTIONAL AS POSSIBLE.

WE FEEL THAT PERHAPS OUR BEST LINE TO TAKE IN REPLY TO THE CONTENTION THAT THESE DOCTRINES REPRESENT THE NEW INTERNATIONAL LAW IS TO POINT OUT THEIR UTTER INCONSISTENCY WITH THE CHARTER. THIS WILL HELP TO TAKE THE STING OUT OF THE ARGUMENT THAT WE ARE DEFENDING OUTMODED CONCEPTS OF INTERNATIONAL LAW. IT WOULD ALSO EXPOSE THE HYPOCRITICAL CHARACTER OF THE DOCTRINES IN QUESTION AND ENABLE US TO ATTACK THEM ON THE GROUNDS THAT NOT RPT NOT ONLY DO THEY BRING THE CHARTER AND UN INTO DISREPUTE BUT THAT THEY ALSO UNDERMINE THE RULE OF LAW WHICH THE CHARTER, UN AND ITS MEMBERS ARE INTENDED TO PROMOTE. WE ENTIRELY AGREE WITH YOU THTAT WE SHOULD HAVE CONSULTATIONS AMONGST THE WESTERN POWERS AND PERHAPS LATINAMERICANS AND SOME MIDDLEEASTERN COUNTRIES WITH THE OBJECT OF ACHIEVING A COMMON FRONT. WE SHOULD ALSO ATTEMPT TO INITIATE NEW DEVELOPMENTS OURSELVES. WE FEEL THAT THIS IS THE ONLY HOPE WHICH WE HAVE TO DEFEAT RUSSIAN EFFORTS TO DISTORT THE PRINCIPLES OF INTERNATIONAL LAW.

THE INTERNATIONAL LAW COMMISSION-STATE RESPONSIBILITY

WE ARE INCLINED TO DOUBT WHETHER IN FACT T E CTTEE WILL WISH TO DISCUSS THIS ITEM UNTIL THEY HAVE HAD A REPORT FROM A NEW

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RAPPORTEUR IN PLACE OF MR GARCIA AMADOR. IT SEEMS LIKELY THAT A NEW RAPPORTEUR WILL BE APPOINTED AT THE COMING SESSION AND THAT COMMUNISTS ARE ALMOST CERTAIN TO TRY TO OBTAIN THIS APPOINTMENT FOR ONE OF THEIR NOMINEES. SIR HUMPHREY WALDOCK IS WELL AWARE OF THIS DANGER AND, INDEED, OF OUR GENERAL POSITION ON THE SUBJECT AS A WHOLE. WE THINK THAT IT WOULD BE A GOOD IDEA IF MR CADIEUX COULD WORK IN CLOSE CO-OPERATION WITH HIM AND, OF COURSE, WITH OTHER WESTERN MEMBERS OF THE COMMISSION.

INTERNATIONAL LAW ASSOCIATION

WE SHARE YOUR GOVTS CONCERN ABOUT THE ATTEMPTS WHICH SOVIET BLOC HAVE BEEN MAKING TO CAPTURE THIS ORGANISATION. SO FAR WE HAVE NOT RPT NOT SENT ANY REPS TO IT BUT AGREE WITH YOU THAT THIS IS WELL WORTH CONSIDERING. WE ARE NOW LOOKING INTO IT AND I SHALL LET YOU KNOW OUR CONCLUSIONS AS SOON AS I CAN. UNQUOTE

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CANADIAN DELEGATION

DÉLÉGATION DU CANADA

PERSONAL AND CONFIDENTIAL

August 6, 1963

Annex circulated to European Div. for info + file on 5475-AT-40 P.C.

file

Dear Marcel,

I am attaching four copies of the final report of the Commission's fifteenth session. The attachment is not drafted as a letter but as a report for your signature if you approve. If you get a chance to read through it, there may be some changes which you would wish to introduce. I hope it will prove of some assistance to those in Ottawa who will be concerned with the submission of the Government's comments on the draft articles.

We had a very pleasant trip to Spain. There was lots of sunshine and the children enjoyed it immensely. The trip there and back was rather difficult but uneventful. The Costa Brava came as a great disappointment to me. The "developers" (or more appropriately "wreckers") seem to have made a first-class mess of the area. I saw it aptly described as a "littoral slum".

Not having heard from Personnel, I am hoping that they are agreeable to my staying on in Geneva until the spring of next year. General Burns will be sending off a telegram early next week on personnel plans for the Delegation during the autumn recess. (It seems likely that we will have one.) In accordance with Personnel's wishes, the arrangements seem to be that I will go to New York as adviser for the disarmament items in the First Committee. I hope I will have an opportunity to see you when I am on the other side.

May I say once again how much I enjoyed working with you in Geneva during the Commission and what a privilege I count it to have had the opportunity to be associated with you in your work in this

Mr. Marcel Cadieux,
Deputy Under-Secretary of State
for External Affairs,
Ottawa, CANADA.

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field. It was of great interest from the legal point of view and highly educational so far as one's knowledge of international law and international lawyers is concerned. What was most enjoyable was the opportunity of seeing you in Geneva and working together with you.

Yours sincerely,

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Copy for File No. 5475-AX-37-40
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5475-AX-37-A-40

July 31, 1963

MINUTES OF MEETING OF LEGAL PLANNING COMMITTEE

HELD ON JULY 26 1963

5475-AX-40
9

Present: Mr. Cadieux, Chairman
Mr. Kingstone) Legal Division
Mr. Copithorne)
Mr. Cole, U.N. Division
Mr. J.A. Beesley, Secretary

1. Canadian Position in the Sixth Committee on "Friendly Relations" (file 5475-AX-37-40)

The Chairman pointed out that the Canadian position had already been developed to the extent which had seemed feasible to all concerned in the comments drafted by the U.N. and Legal Divisions on the four principles to be studied at the 18th U.N.G.A.; these comments had now been approved by the Minister and forwarded to the Secretariat; our speeches in the Sixth Committee could therefore be largely based on the line taken in those comments.

Some discussion occurred on the question of setting up a sub-committee within the Sixth Committee to study and elaborate the four principles. There is some concern that the Soviet Bloc may calculate that the I.L.C. being fully occupied and the work of codification being urgent, it should proceed in the Sixth Committee or in a sub-committee, i.e. in a political rather than in a technical agency. An attempt should therefore be made to ensure that the respective functions of the Sixth Committee and of the I.L.C. be kept clearly in mind. If it transpires that new subjects are ready for codification, the Sixth Committee and the I.L.C. should consider the problem of priorities but not set up additional codification agencies. It was agreed that:

(a) it would be desirable to head off the appointment of such a committee, (which might tend to operate like a second string I.L.C.), if possible, but in any event to postpone its establishment until after the principles have been debated;

(b) the composition of the committee could raise problems;

(c) if and when such a committee is established it should report back to the Sixth Committee during the 18th Session, rather than at some subsequent date, in order to avoid the possibility of having it operate independently without direction; and

(d) if, as a result of the deliberations of such a committee some codification appeared desirable, then at that stage it would be appropriate to refer the subject to the I.L.C. for codification rather than have the Sixth Committee attempt it.

Mr. Wershof
U.N. Division
Mr. Kingstone
Mr. Copithorne

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It was agreed that pre-Assembly consultations with friendly Governments on these questions would be desirable.

2. Positions to be taken in the Sixth Committee on the I.L.C. Report (File 5475-AX-40)

It was agreed that the Canadian position should take into account the following considerations:

(a) Programme of work

Since the I.L.C. is heavily loaded with work for five years and is dealing with fundamental questions requiring [illegible] study, this work programme should not be disturbed unless a matter of considerable importance emerges. Moreover, the I.L.C. is working close to its maximum efficiency and an increase in its work load (through extending its sittings beyond the 10 weeks in the spring and 3 weeks in the winter just agreed to) would present excessive demands not only on the I.L.C. members, who require approximately a month's preparation for each month of meetings, but also upon the Governments of Member States of the U.N., who seem to be having difficulty coping with the flow of material already being presented for their consideration. The process of developing international law is going ahead as fast as is practicable at present.

(b) I.L.C. liaison with voluntary Organizations

The Soviet Bloc is pressing for exchanges of documents between the I.L.C. and voluntary organizations in an attempt to bypass Governments. U.N. Division should therefore do a study on the rules concerning recognition of voluntary organizations and circulation of their documents, so as to determine what guide lines have already been established in such matters, in order to meet the Soviet Bloc move.

(c) Remuneration of Special Rapporteurs

It was the Chairman's impression that the rapporteurs are receiving remuneration that is hardly more than nominal, and that the amount should be increased in order to properly recompense them for their efforts and also so as to ensure the high standard of work which could only be maintained if the necessary time is spent on the topics.

(d) Physical Facilities of I.L.C.

Although the translation services and handling of documentation has been made more efficient as a result of complaints made last year, the facilities provided to the I.L.C. are not adequate. This is another argument which might be used to meet those who would have the I.L.C. assume a heavier work load.

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3. Seminar on Technical Assistance Resolution on "Friendly Relations" (file 5475-AX-37-4-40)

The Chairman outlined the results of the two-day Seminar, which he considered to have been extremely useful. A number of suggestions had been incorporated into further comments which would be forwarded to our Mission in New York for their views before presentation to the Minister. It was agreed that the Memorandum to the Minister the point should be made that the exercise has proven so successful that next year, early in the academic term, the Department might consider bringing to Ottawa at departmental expense a group of professors to discuss legal questions on the U.N. agenda; apart from the direct assistance in formulating policy which might thereby be gained, the side effects of better relations with the universities, a more intimate knowledge by professors of international law about the practical problems facing the Department, and possible benefits in our recruiting programme, all provide reasons for giving serious consideration to this idea.

4. International Co-operation Year: Legal Aspects (file 5475-AX-40)

It was agreed that greater numbers of ratification of international instruments was highly desirable, but since Canada's own record was not impressive, due to the federal-provincial problem, it would not be appropriate for Canada to take an initiative on the matter, although we can support one by someone else.

5. Function of Legal Planning Committee (file 5475-AX-38-40)

It was agreed that although the Legal Planning Committee could not yet assume the function assigned to it by the Legal Services Committee, (a group of officials who had reviewed the Glassco Commission recommendations), nevertheless some preliminary steps may be taken, such as circulation of a letter to all other Departments and Crown Agencies asking for their co-operation in drawing up a list of international conferences which might lead to treaties, and bringing to their attention the need to keep the Department informed concerning agreements negotiated outside the Department of External Affairs.

6. The Review of Empire Treaties

It was agreed that in the face of personnel shortages in the Department it was unlikely that it would be possible to assign someone to the task of reviewing Empire Treaties in the near future, and that accordingly it would be advisable to consult closely with Professor Lawford of Queens University so as to ensure that the results of his work on the question will be as complete and accurate as possible.

J.A. Beesley

J.A. BEESLEY,
Secretary.

001171

Document disclosed under the *Access to Information Act* -
Document divulgué en vertu de la *Loi sur l'accès à l'information*

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

FILE

TO: MR. GADBOIS, Chairman, Legal Planning Committee

FROM: J.A. Beesley, Secretary

REFERENCE:

SUBJECT: Meeting of Legal Planning Committee

Security CONFIDENTIAL

Date July 16, 1963.

File No. 5475-AX-38-40
c.c. 5475-AX-37-40
5475-AX-40
5475-AX-37-A-40
5475-GY-40

There are a number of questions which you might wish to have considered by the Legal Planning Committee at an early date, namely:

(1) Canadian Position in the Sixth Committee on "Friendly Relations"

As you will recall, we have received enquiries from such countries as Chile, Australia, and Tanganyika, and more recently the Netherlands, about the line we propose to take. The Minister has just given his approval to our proposed comments sent up to him by memorandum dated July 4, on the basis of which our position would presumably stress the peaceful settlement of disputes question and the need to develop procedures rather than to attempt further codification. We have not yet, however, consulted with other friendly countries on these matters. The questions to be considered, therefore, would seem to be:

(a) the elements of the preliminary Canadian position on the item; and

(b) what pre-Assembly consultation should be undertaken with other friendly governments.

(2) Positions to be taken in the Sixth Committee on the I.L.C. Report

The most important question is presumably that of treaties. It might be useful, however, to have a brief discussion on the problems which you consider might arise, and the position the Canadian Delegation might take on the I.L.C. Report.

(3) Seminar on Technical Assistance Resolution

As you know, the Canadian National Commission for UNESCO Seminar of International Law Experts on the implementation of Resolution No. 1816 of the 17th UNGA (Technical Assistance and International Law) will be held on July 25. Professors MacKay, St. John MacDonald, Morin, Pepin and Curtis will be attending as well as you, Mr. Sicotte, and myself, and, presumably, a representative from the Department of Justice, (although this last point has not yet been confirmed

/ ...2

CIRCULATION

Mr. Sicotte
Mr. Kingstone
Mr. Copithorne

Ext. 326A (6/56)

001172

Document disclosed under the
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The questions which might usefully be discussed by the Legal Planning Committee are:

(a) the proposed agenda for the Seminar; and

(b) the departmental position, if any, on the questions to be discussed.

(4) International Co-operation Year: Legal Aspects

As you will recall, Mr. Tremblay wrote to you on May 16 suggesting that an attempt be made to focus attention upon the need for ratification of multilateral instruments as an important element in the development of international co-operation. The Legal Planning Committee has not yet considered the advisability of proceeding with this suggestion, (which could develop into a minor Canadian initiative at the U.N.), and you may consider it worthwhile to discuss the question.

(5) Function of Legal Planning Committee

Mr. Sicotte has suggested that you may consider it useful to have a brief discussion on the new functions of the Legal Planning Committee to be undertaken as a result of the Glassco Commission recommendations.

2. Would you please indicate which subjects you would like raised, and when a meeting might be held.

J. A. Beesley

J. A. Beesley,
Secretary

001173

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TRANSMITTAL SLIP

TO: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS,
OTTAWA, CANADA (ATT'N LEGAL DIVISION)

FROM: THE PERMANENT MISSION OF CANADA,
GENEVA, SWITZERLAND

Security: UNCLASSIFIED

Date: May 13, 1963

Air or Surface: AIR

No. of enclosures: ✓

5475-AX-40
9 1

The documents described below are for your information.

Despatching Authority: A.E. Gotlieb/KE

Copies	Description	Also referred to:
to file	INTERNATIONAL LAW COMMISSION DOCUMENTS	
1	Information Circular No. 79, 8 May/63	
2	Press Release No. L/376, May 6/63	
2	A/CN.4/159, May 3/63	
2	A/CN.4/156/Add.1, April 10/63	
1	A/CN.4/156/Add.2, April 30/63	
2	A/CN.4/SR.673, May 6/63	
1	A/CN.4/SR.674, May 8/63	
1	Conf. Room Doc. No. 1, May 7/63	
1	Conf.Room Doc. No. 2, May 8/63	
2	A/CN.4/158, May 3/63	
2	A/CN.4/157, April 18/63	

L TO: Mr. Cohen MAY 13 1963 REGISTRY

for legal library

NC file

001174

Ext. 250 (Rev. 10/51) *(Instruction on Reverse Side)*

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INSTRUCTIONS

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UNITED NATIONS

Office of Legal Affairs
Codification Division

Information Circular No.79

8 May 1963

Fifteenth Session
of the
INTERNATIONAL LAW COMMISSION

DIRECTORY

I. MEMBERS OF THE INTERNATIONAL LAW COMMISSION

Name	Address and Telephone Number
AGO, Roberto	Hôtel des Bergues 32 29 00
AMADO, Gilberto	10 place du Grand Mézel 25 71 80
BARTOŠ, Milan *	Hôtel Atlantic 5 rue du Vieux Collège 25 04 24
BRIGGS, Herbert W. **	Hôtel Beau-Rivage 32 64 80 and 32 90 50
CADIEUX, Marcel	Hôtel du Rhône 31 42 50
CASTRÉN, Erik Johannes Sakari *	Hôtel Century 36 80 95 from 12.5.1963 : Century House 6 rue de la Flèche 36 80 95
EL-ERIAN, Abdullah	Hôtel Métropole 24 73 00
ELIAS, Taslim Olawale	Hôtel Beau-Rivage 32 64 80 and 32 90 50
GROS, André	Permanent Mission of France to United Nations Villa "La Pelouse" Palais des Nations 33 10 00
JIMÉNEZ DE ARÉCHAGA, Eduardo ø	5 chemin des Folies Bellevue 8 45 30

---

* Accompanied by wife
** Wife to arrive later
ø Accompanied by wife and daughter

GE.63-7116

001176

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Name	Address and Telephone Number
KANGA, Victor	(Not yet arrived)
LACHS, Manfred	(Not yet arrived)
LIU, Chieh	(Not yet arrived)
De LUNA, Antonio **	Hôtel des Bergues 32 29 00
PADILLA-NERVO, Luis	4 rue du Léman 31 28 69
PAL, Radha Binod	Hôtel International et Terminus 32 80 95
PAREDES, Angel Modesto ⌀⌀	Hôtel Suisse 32 66 30
PESSOU, Obed Richard **	67 route de Mategnin
ROSENNE, Shabtai *	Hôtel Adriatica 26 42 40
TABIBI, Abdul Hakim	4-6 rue du Lac (Apartment 24)
TSURUOKA, Senjin	Permanent Mission of Japan to United Nations 10 avenue de Budé 24 03 08
TUNKIN, Gregory *	Hôtel Mon Repos 32 11 83
VERDROSS, Alfred **	Hôtel Eden 32 65 40
WALDOCK, Sir Humphrey C.M. *	3 Cour St Pierre 25 65 89
YASSEEN, Mustafa Kamil **	Permanent Mission of Irak to United Nations 72 rue de Lausanne 31 13 30

---

* Accompanied by wife

** Wife to arrive later

⌀⌀ Accompanied by his daughter

001177

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II. MEMBERS OF THE SECRETARIAT

Name	Address and Telephone Number
LIANG, Yuen-li *	8 rue des Asters 33 16 15
BAGUINIAN, C. *	59 rue du Grand-Pré
RATON, Pierre	4 rue du Lac (Apartment 28)
TORRES-BERNARDEZ, Santiago	4 rue du Lac (Apartment 11)

III. SECRETARIES

SANDWELL, Miss M.K.	5 rue du Vieux Collège (Apartment 32) 25 08 27
CUSPINERA, Miss E.	Pension Cornavin 1 rue Pradier 32 59 48
SOLJER, Mrs. P.	25 rue du Vidollet 33 33 57

---

* Accompanied by wife

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UNITED NATIONS

INFORMATION SERVICE
European Office of the United Nations
Geneva

Press Release No.L/376
6 May 1963

(For use of information media; not an official record)

From 6 May to 12 July, at the Palais des Nations:

FIFTEENTH SESSION OF THE INTERNATIONAL LAW COMMISSION

Among the main subjects which the International Law Commission of the United Nations will examine during its fifteenth session, opening today at Geneva, are the Law of treaties, State responsibility and Succession of States and Governments. The Commission is thus continuing its work on the codification and development of international law. Its fifteenth session will end on 12 July.

The members of the Commission are not Government representatives but sit as experts. They are elected by the General Assembly from a list of candidates nominated by the Governments of the Member States of the United Nations.

The twenty-five present members of the International Law Commission are:

Mr. Roberto Ago (Italy), Mr. Gilberto Amado (Brazil), Mr. Milan Bartoš (Yugoslavia), Mr. Herbert W. Briggs (United States), Mr. Marcel Cadieux (Canada), Mr. Erik Castren (Finland Mr. Abdullah El-Erian (United Arab Republic), Mr. Taslim Olawale Elias (Nigeria), Mr. André Gros (France), Mr. Eduardo Jiménez de Aréchaga (Uruguay), Mr. Victor Kanga (Cameroun), Mr. Manfred Lachs (Poland), Mr. Liu Chieh (China), Mr. Antonio de Luna Garcia (Spain), Mr. Luis Padilla Nervo (Mexico), Mr. Radhabinod Pal (India), Mr. Angel Modesto Paredes (Ecuador), Mr. Obed Pessou (Dahomey), Mr. Shabtai Rosenne (Israel), Mr. Abdul Hakim Tabibi (Afghanistan), Mr. Senjin Tsuruoka (Japan), Mr. Grigory I. Tunkin (USSR), Mr. Alfred Verdross (Austria), Sir Humphrey Waldock (United Kingdom) and Mr. Mustapha Kamil Yasseen (Ira

The agenda of the fifteenth session of the International Law Commission has been issued as document E/CN.4/153.

Law of treaties

Continuing its work on the codification and progressive development of the law of treati the Commission will consider during its fifteenth session draft articles, with a commentary, on the validity and duration of treaties. This draft (A/CN.4/156) submitted by Sir Humphrey Waldock, the Commission's Special Rapporteur, follows up a previous draft dealing with other aspects of the law of treaties submitted by him last year.

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During its fourteenth session the Commission provisionally adopted 29 draft articles on the conclusion, entry into force and registration of treaties. These initial 29 articles are at present before the governments for comment.

The aim of the new articles presented by Sir Humphrey is to codify the subject and at the same time to introduce certain elements of progressive development.

Pursuant to resolution 1766 (XVII) of the United Nations General Assembly, the Commission will also examine "the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations".

State responsibility

Last year the Commission devoted much of its session to the question of its future work It set up two sub-committees to make preparatory studies to ease the way for its subsequent work on State responsibility and the succession of States and governments. They met at Geneva in January 1963.

On the first topic the Commission has before it the report of the Sub-Committee on State Responsibility (A/CN.4/152), whose Chairman was Mr. Roberto Ago. This document contains an indication - with a view to the codification of the topic - of the main points to be considered with regard to the general aspects of the international responsibility of the State; such indications may serve as a guide to the work of a future special rapporteur to be appointed by the Commission.

Succession of States and Governments

The work of the second Sub-Committee was presided over by Mr. Erik Castren, the Acting Chairman, owing to the absence of Mr. Lachs, the Chairman, due to illness. This Sub-Committee had before it three studies prepared by the Secretariat: "The succession of States in relation to membership in the United Nations (A/CN.4/149)"; "The succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150)"; and "Digest of the decisions of international tribunals relating to State succession (A/CN.4/151)".

Owing to the absence of its Chairman, this Sub-Committee has not yet approved its report to the International Law Commission, but is to do so during the Commission's present session.

The Sub-Committee's objectives are a survey and evaluation of the present state of the law and practice on succession and the preparation of draft articles on the topic. The Commission will probably appoint a special rapporteur for this topic during its present session.

Other business

In accordance with General Assembly resolution 1687 (XVI) the Commission will study further the subject of special missions. It has before it a preliminary survey of the topic prepared by the Secretariat (A/CN.4/155).

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A report on relations between States and inter-governmental organizations is to be submitted by Mr. Abdullah El-Erian, the Special Rapporteur for the topic, during the present session. The Commission will also have to decide the date and place of its next session - the sixteenth.

Lastly, it should be noted that on 22 April 1963 the United Nations Conference on Consular Relations, held in Vienna, adopted the following resolution (A/CN.4/158):

"The United Nations Conference on Consular Relations

Having adopted the Vienna Convention on Consular Relations on the basis of draft articles prepared by the International Law Commission,

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution to the codification and development of the rules of international law on consular relations".

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TRANSMITTAL SLIP

Dare - please register & return

TO: UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS

Attention: Legal Division

FROM: The Canadian Disarmament Delegation,

Geneva

Security...UNCLASSIFIED...

Date.....May 17, 1963.....

Air or Surface...Air.....

No. of enclosures. as stated.....

5475-AX+40
9 137

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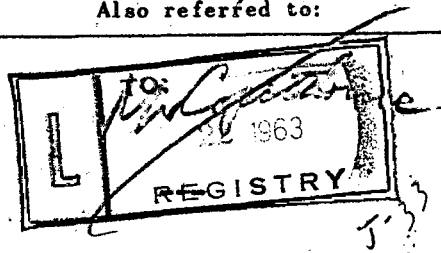
Copies	Description	Also referred to:
	International Law Commission, Fifteenth Session Provisional Summary Records.	
1	A/CN.4/SR.675 (French)	
1	A/CN.4/SR.676 (French)	
3	A/CN.4/SR.677 (2 English, 1 French)	
3	A/CN.4/SR.678 (2 English, 1 French)	
3	A/CN.4/SR.679 (2 English, 1 French)	
2	A/CN.4/SR.680 (1 English, 1 French)	
3	ILC(XV)CRD.3 (2 English, 1 French)	
1	ILC(XV)/DE.1 (French)	
1	GE.63-6626 (Second Report on the Law of Treaties) (English)	



File

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Finance/L.I. Sarrasin/lb

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA. *(FILE COPY)*

NUMBERED LETTER

TO: The Permanent Mission of Canada to the United Nations, New York.

Security: Unclassified

No: R- 226

Date: May 8, 1963

Enclosures: 5

Air or Surface Mail:

Post File No:

Ottawa File No. 5475-AX-40 "L"

FROM: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

Reference:

Subject: Reimbursement Voucher - 15th Session of the International Law Commission

FINANCE DIVISION FOR FILE
ACTION TAKEN
TELEGRAM
LETTER
MEMO
BY (Signature)
Date 9.5.63

References

Attached is a reimbursement voucher in the amount of $1,051.50 covering the cost of air transportation from Ottawa to Geneva and return for Mr. Marcel Cadieux, Canadian Representative to the United Nations International Law Commission.

2. We should be grateful if you would submit the enclosed forms to the proper authorities at the United Nations and deposit the refund, when received, to your Mission Account.

L.V.R.

Under-Secretary of State for External Affairs.

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C.T.O.

Distribution to Posts

Ext. 181B (Rev. 2/52)

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AIR FRANCE

THE WORLD'S LARGEST AIRLINE

COMPAGNIE NATIONALE AIR FRANCE

Ottawa, Ont.

Date April 10th 1963

Invoice No.

Ref.: 321/

Account No.

TO Departement des affaires extérieures,
Division des finances,
[illegible],
[illegible].

DATE	AIR FRANCE #	YOUR REFERENCE	DESCRIPTION	TOTAL
10/4/63	0573/19196601 19196602		Mr. M.Gadioux Ret. F.C. Mr Ottawa Geneva	can 1051.50
01-724-035-05-126			Please send payment to [illegible] 237 [illegible], Ottawa [illegible], Ont. [illegible]	

KINDLY ATTACH A COPY OF THIS BILL TO YOUR CHECK

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UNITED NATIONS

Press Services
Office of Public Information
United Nations, N.Y.

(For use of information media -- not an official record)

5475-AX-60
9 1-

Press Release L/1081
6 May 1963

INTERNATIONAL LAW COMMISSION OPENS FIFTEENTH SESSION IN GENEVA

(The following was received from the Information Service of the European Office of the United Nations, Geneva.)

The fifteenth session of the International Law Commission* began in Geneva this afternoon.

Eduardo Jimenez de Arechaga (Uruguay) was unanimously elected as Chairman; Milan Bartos (Yugoslavia) as First Vice-Chairman; Senjin Tsuruoka (Japan) as Second Vice-Chairman; and Sir Humphrey Waldock (United Kingdom) as Rapporteur.

All of the elections were by acclamation. The Commission also unanimously adopted its agenda (Doc.A/CN.4/153) and began discussion on its first substantive item -- The Law of the Treaties.

At this present session, the Commission plans to prepare a draft of articles covering the validity and duration of treaties.

* *** *

* Members of the International Law Commission, elected in their individual capacities, are from the following countries: Afghanistan, Austria, Brazil, Cameroon, Canada, China, Dahomey, Ecuador, Finland, France, India, Iraq, Israel, Italy, Japan, Mexico, Nigeria, Poland, Spain, USSR, United Arab Republic, United Kingdom, United States, Uruguay and Yugoslavia.

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Orig: 5475-AX-36-2

5475-AX-40
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DUPLICATE

FM DISARMDELGVE MAY2/63 RESTD

TO EXTERNAL 140 PRIORITY

REF OURLET12 FEB1 AND YOURTEL 167 MAY1

ILC

FOLLOWING FROM GOTLIEB

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FILE COPY

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Document divulgué en vertu de la *Loi sur l'accès à l'information*

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

DATE	FILE		SECURITY
MAY1/63	5475-AX-40		UNCLAS
	9	37	

FM: EXTERNAL - OTT

TO:	NUMBER	PRECEDENCE
DISARMDEL GENEVA L-67	PRIORITY	

INFO:

Ref.: YOUR LET NO.12 OF FEB1/63

Subject: I.L.C.

FOLLOWING FOR GOTLIEB

TEXT BEGINS: PLEASE LET US KNOW IF YOU HAVE COPIES OF THE PAPERS FORWARDED WITH YOUR REF LET. TEXT ENDS

LOCAL DISTRIBUTION NO STANDARD

ORIGINATOR	DIVISION	PHONE	APPROVED BY
SIG ..... NAME J. A. Beesley/pm	Legal	2-7917	SIG ..... NAME M. Cadieux

EXT. 18 (REV. 12/61)

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5475-AK-40

Orig. 5475-AK-38-40

MR. CADIEUX,
Chairman of the Legal Planning Committee

CONFIDENTIAL

April 9, 1963.

J. A. BEESLEY, Secretary

Meeting of Legal Planning Committee: 1963 Spring Session of I.L.C.

You have asked that a meeting of the Legal Planning Committee be held to complete consideration of all matters on the I.L.C. Agenda. The following subjects might, if you agree, be usefully considered by the Committee sometime this week.

(a) The "rebus sic stantibus" Principle and the effect of Duress on the conclusion of treaties

2. Mr. Copithorne has added conclusions to his paper of March 4. A copy of the revised paper is attached.

(b) Accession to League Conventions

3. The Sixth Committee has asked the I.L.C. to study the question of broadening participation in League of Nations Conventions. Attached is a copy of Mr. Copithorne's paper of April 8 discussing this question.

(c) Conflict of Treaties

4. The general question of conflict of treaties will be amongst those matters discussed by the I.L.C. during consideration of the second third of the proposed draft convention on treaties. A paper by Mr. Copithorne is now in a stage of final revision and will come forward separately tomorrow.

(d) State Responsibility and State Succession

5. As you know, the I.L.C. will not be giving substantive consideration to either of these questions during its next session, although some discussion may take place on the reports of the respective Sub-Committees. You may wish to have position papers prepared on the report on state responsibility, a copy of which you have, and the report on state succession not yet published but reported on in Geneva's letter No. 12 of February 1 (copy attached).

6. In addition to the foregoing subjects of direct relevance to the I.L.C., the Committee might, if you agree, consider the proposed government comments on the U.N. Friendly Relations Resolution No. 1815. (Attached are copies of U.N. Division's paper of March 1, 1963 and Legal Division's supplementary paper of April 2.)

/ ...2

Document disclosed under the *Access to Information Act* -
Document divulgué en vertu de la *Loi sur l'accès à l'information*

7. You may wish to indicate which subjects you would like to have discussed at the next meeting to be held at 3:00 p.m. on Tuesday, April 16.

J. A. Beesley

J. A. Beesley,
Secretary

Document disclosed under the *Access to Information Act* - Document divulgué en vertu de la *Loi sur l'accès à l'information*

File: 5475-AX-40

9 37

CONFIDENTIAL

Ottawa, March 27, 1963.

Dear Allan,

Mr. Cadieux has asked me to thank you on his behalf for your excellent report on the recent meetings of the I.L.C. Sub-Committee in Geneva (your letter No. 12 of February 1). We have found it both interesting and useful, particularly since much of the information would not otherwise have been available for some time.

You may be interested in knowing that arrangements have been made to hire Professor Morin for the summer months of 1963 to work on state succession. In outlining his terms of reference we would be able to draw on some of the information you had provided us without, of course, disclosing its source.

We are beginning to work on our comments on the Friendly Relations Resolution. Our plan is to emphasize our interest in the peaceful settlement of disputes question by announcing, at the time we file our comments, the Government's intention to file a new unconditional declaration of acceptance of compulsory jurisdiction of the International Court, assuming that no change in government policy occurs on this question before July 1, 1963 when the comments are due.

Law of the Sea is for the moment quiescent, and I'm hopeful it will remain so.

Yours sincerely,

J. A. Beesley

J. Alan Beesley

A. E. Gotlieb, Esq.,
First Secretary,
The Canadian Permanent Mission,
Geneva, Switzerland.

Document disclosed under the *Access to Information Act* -
Document divulgué en vertu de la *Loi sur l'accès à l'information*

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA.

NUMBERED LETTER

I32 fsb JB

Security: CONFIDENTIAL

No: 12

Date: February 1, 1963

Enclosures: ✓ as stated

Air or Surface Mail: Air

Post File No:

Ottawa File No.	
5475-AK-40	
37	37

TO: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

FROM: CANADIAN DISARMAMENT DELEGATION, GENEVA

Reference: Report on 14th Session ILC--July 3rd, 1962 from Permanent Mission, Geneva.

Subject: International Law Commission: Meeting of Sub-Committees in Geneva, January 7 to January 25, 1963.

References

Mr. Beesley

Mr Cadieux & see (with attachments) to return & me in due course Feb 8/63 JB

(1)

Internal Circulation

Distribution to Posts

PERMIS, N.Y. (without enc.)
PERMIS, Geneva (without enc.)

At its 637th meeting on May 6, 1962, the International Law Commission established two working groups, one on state responsibility and the other on the succession of states and governments. The working group on State Responsibility met in Geneva from January 7 to January 16, under the Chairmanship of Professor Roberto Ago of Italy with the following additional members present: Professor Briggs (USA), Professor Gros (France), Mr. Jiminez de Aréchaga (Uruguay), Mr. de Luna (Spain), Mr. Paredes (Argentina), Mr. Tsuruoka (Japan), Mr. Tunkin (USSR) and Mr. Yaseen (Iraq). The working group on Succession of States and Governments met from January 17 until January 25 under the Chairmanship of Mr. Castren (Finland) with the following members in attendance: Mr. Bartos (Yugoslavia), Professor Briggs (USA), Dr. Elias (Nigeria), Mr. Liu (China), Mr. Rosenne (Israel), Dr. El-Erian (UAR), Mr. Tabibi (Afghanistan) and Mr. Tunkin (USSR). Professor Lachs (Poland) was to have been Chairman of the sub-committee on succession but apparently took ill in Warsaw immediately prior to departure and as a result was absent from both committees. (Professor Lachs was one of the three members--along with Professor Briggs and Mr. Tunkin--who were members of both working groups.) In Professor Lachs' absence, Mr. Castren of Finland was elected Chairman of the Sub-Committee on State Succession, in recognition--we were informed--of his experience in this field.

2. The terms of reference of the Sub-Committee on State Responsibility were laid down by the International Law Commission at its 668th meeting on June 26. The Sub-Committee was to devote its time primarily to the general aspects of state responsibility and, on the basis of its discussions and memoranda to be submitted to the Secretariat by members of the Sub-Committee, its Chairman (Professor Ago) was asked to prepare a report on the results achieved, to be submitted to the International Law Commission at its fifteenth session in May 1963. The terms of reference of the working group on Succession were also established by the Commission on June 26. The members of this Sub-Committee were similarly requested to submit memoranda dealing with the approach and scope to be taken to this subject and its Chairman was asked to prepare, first, a working paper containing a summary of the various views expressed in individual memoranda, and second, a report on the results achieved by the Sub-Committee, for submission to the next session of the Commission.

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EXTERNAL AFFAIRS
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3. The Sub-Committee on State Responsibility received memoranda from the following six members: Mr. de Aréchaga--submitted on May 28, 1962--(ILC(XIV) SC.1/W.P.1), Mr. Paredes (ILC(XIV) SC.1/W.P.2, Add.1 and A/CN.4/W.P.7), Professor Gros (A/CN.4/SC.1/W.P.3), Mr. Tsuruoka (A/CN.4/SC.1/W.P.6)* The Sub-Committee adopted a draft report prepared by Professor Ago--A/CN.4/SC.1/R.1/Rev.1 of January 15, 1963.

* Mr. Yasseen (A/CN.4/SC.1/W.P.5), and by Professor Ago (A/CN.4/SC.1/W.P.6).

4. The Sub-Committee on State Succession received memoranda from the following members: Mr. Elias (ILC(XIV) SC.2/W.P.1 and A/CN.4/SC.2/W.P.4) and Mr. Bartos (A/CN.4/SC.2/W.P.5). Mr. Lachs submitted a working paper from Warsaw summarizing the views in the foregoing memoranda (A/CN.4/SC.2/W.P.7). The draft report submitted by Mr. Castren, as approved by the Sub-Committee, is contained in A/CN.4/SC.2/R.1 of January 24. The Sub-Committee also had before it three studies prepared by the Secretariat on: succession of States in relationship to U.N. Membership (A/CN.4/149); succession of States in relation to general multilateral treaties of which the Secretary-General is the depository (A/CN.4/150); digest of decisions of international tribunals relating to State succession (A/CN.4/151).

5. The Sub-Committee on State Responsibility decided that its draft report, together with the various memoranda submitted to it and summary records of its meetings would be published as a document and submitted to the members of the International Law Commission sometime prior to the meeting of the fifteenth session of the ILC. The Secretariat of the ILC (Dr. Liang and his deputy, Mr. Wattles) were unable to say when the document would become public. However, we were able to obtain confidentially (not from the Secretariat) copies of all the documents submitted to the Sub-Committee on State Responsibility (with the exception of Mr. Paredes' study, which, we understand, was of little or no assistance) and of the Sub-Committee's draft report. Copies of these documents are attached to this letter. We would like to emphasize that until the report is officially issued, it will be important to treat as confidential the contents of the attached documents and the fact that we possess them. The working group on State Succession did not apparently come to a firm decision regarding publication of its reports and various documents. It decided that the draft report submitted by Mr. Castren and approved by the Sub-Committee, together with the summary records, memoranda and working papers, should ultimately be made available to the Commission but in the first instance it was decided that the Sub-Committee would meet again with the participation of Professor Lachs at the beginning of the fifteenth session of the ILC in order to adopt the final report. It therefore appears that the various documents and reports will not be made public until sometime during the course of the fifteenth session of the Commission. However, the Secretariat were not entirely certain about this point; they thought that it was possible that the various documents (after seen by Professor Lachs) might also be issued publicly before that time. We also managed to obtain on a confidential basis copies of the various documents submitted to the Sub-Committee and of its report. We would therefore again ask that the contents of these documents and the fact that we possess them be treated confidentially until they are made public. We are not enclosing copies of the three studies made by the Secretariat as we assume that you received them from the Permanent Mission in New York.

6. On the arrival of the Secretariat in Geneva, we asked whether it would be possible for an observer from Canada to be admitted to the meetings. We informed Dr. Liang that Professor Lachs of Poland had earlier told us that he saw no objection to observers being admitted. The Secretariat said that they had received earlier enquiries in New York about the possibility of admitting observers and had taken the view that the Sub-Committees would probably decide not to do so. One of the requests for observer status had

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come from the West German Government which was apparently anxious to keep an eye on the work of the Sub-Committee on State Succession. It appears that enquiries for observership were also received from certain international and non-governmental organizations interested in problems of state responsibility, particularly in the economic field. At its first meeting, Professor Ago informed the Sub-Committee on State Responsibility that several enquiries had been received about the possibility of observing the meetings (he did not mention from what sources these came) and asked the views of the members on the matter. It was unanimously decided that since the work of the Committee was exploratory and informal, it would be better to exclude all observers. The Committee on State Succession adopted the same procedure.

7. Although we were unable to obtain copies, even confidentially, of the summary records, the scope and work of the two Sub-Committees and the conclusions reached by them can be clearly seen from its draft reports. In addition, the main outlines of the various views of certain members can appear in the memoranda submitted by them. We had informal discussions with certain members of the Commission and with the Secretariat in order to obtain additional information about the Sub-Committees' work and general atmosphere. We spoke on several occasions to Professor Briggs, Dr. El-Erian, Mr. Rosenne, Mr. Tabibi, Dr. Liang, Mr. Wattles and others about the work of the two Sub-Committees and about the forthcoming session of the Commission. Sir Humphrey Waldock, special rapporteur on the law of treaties, was not in Geneva for the work of these Committees and we were therefore unable to discuss treaties with him. The Secretariat told us that they had been in correspondence with Professor Waldock about when his next report will be ready. As it will be the basis for the Commission's work at its fifteenth session, the Secretariat are very anxious to receive and circulate the report in sufficient time for it to be available before the outset of the next session of the Commission. As Sir Humphrey had apparently not been keeping the Secretariat informed of the progress of his report, the Secretariat seemed rather uncertain about where it could be expected to be received.

8. Unfortunately we were unable to reach Professor Gros prior to his departure from Geneva. He was a member of the Sub-Committee on State Responsibility but attended only the first half of its work, leaving Geneva immediately afterward. We were informed by several persons that Professor Gros is likely to be the French candidate for the International Court of Justice at the elections at the next session of the General Assembly. The present French incumbent--Judge Basdevant--has apparently decided not to stand for re-election and it seems that Professor Gros is expected to be nominated by the French Government.

9. Professor Gros and Professor Ago are being mentioned as possibilities for the Chairmanship of the next session of the ILC as it is considered to be Western Europe's turn. The general consensus seems to be that Professor Ago is the most likely candidate. He informed several members that he has a number of conflicting engagements during the next Commission but did not indicate that he would be unavailable for the post. It appears that no consideration has yet been given to the question of who might be general rapporteur at the next session.

10. It is, of course, expected that the main part of discussions at the fifteenth session of the ILC will be given to the law of treaties. Probably later in the session a few days will also be given to consideration and approval of the two draft reports on state responsibility and state succession and appointment of rapporteurs for the subjects. It will be noted from the draft report of the Sub-Committee on State Succession that it recommended that a special rapporteur be appointed at the next ILC session. It seems to be a foregone conclusion that the chairmen of the two Sub-Committees on

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state responsibility and succession--Professors Ago and Lachs--will be named the special rapporteurs for these subjects. Dr. El-Erian told us that he would have ready for the next meeting of the Commission a draft study on relations between states and international organizations for which he is special rapporteur. Although we discussed the work of the next session with a number of members of the Commission and others, we were unable to obtain any views as to what would be likely to be the main controversial issues in Sir Humphrey Waldock's forthcoming report on the essential validity of treaties. It was generally expected that one of the main problems would arise in respect of termination of treaties and that, as at the last session of the General Assembly, the Communist members would give considerable emphasis to the problem of "unequal treaties" and seek recognition of this concept.

11. Both from reading the attached documents and from the reports we received from various persons, we had the impression that the work of neither Sub-Committee proved to be particularly controversial or unduly political in content, nor were the communist members particularly troublesome. Professor Lachs' absence reduced the Communist membership on the Sub-Committee on State Responsibility to one and on Succession to two. During the course of the Committee on State Responsibility Professor Tunkin appeared quite cooperative and did not press his views vigorously. (He did not submit a written statement.) In the Committee on Succession Professor Tunkin and Mr. Bartos were apparently often in disagreement on minor points. One particular matter on which they took different lines was the desirability of including within the terms of reference of the rapporteur of State Succession the subject of adjudicative procedures for the settlement of disputes, to be included as an integral part of the regime of succession. Professor Tunkin was strongly opposed to the rapporteur being asked to take up the matter, while, on the other hand, Mr. Bartos was apparently willing that this should be done. The opposing views of the members of the Sub-Committee on this question are described in paragraph 14 of the Sub-Committee's report and it is therein noted that it was decided to defer a final decision until the beginning of the next session. We understand that a vote was taken whether settlement of disputes should be included as a subject for study by the rapporteur and there were four votes in favour and four against so doing. Although we are not entirely certain, it appears that those in favour were Mr. Briggs, Mr. Rosenne, Mr. Castren and possibly Mr. Bartos. It is also our understanding that Mr. Tunkin, Mr. Tabibi and Mr. Erian were among those voting against. During the discussion on state succession, Mr. Tunkin (and Mr. Tabibi as well) gave considerable emphasis to the need for study of "colonial" questions and the subject of sovreignty over natural resources. It appears that these views did not receive support from other members. Some sort of compromise was reached in the formulation appearing in paragraph 6 of the Sub-Committee's report (SC.2/R.7) that there is need to pay special attention to matters of succession arising from the emancipation of many nations and the birth of many new states after World War II. It is also mentioned in the draft report (paragraph 7) that while some members wished to give special emphasis to self-determination and permanent sovreignty over natural resources, others thought that this would be superfluous in view of the fact that these principles are already contained in the U.N. Charter and in resolutions of the General Assembly. In fact, these matters are nowhere else mentioned in the Sub-Committee's report.

12. In the Sub-Committee on State Responsibility Mr. Tunkin was among those who were quite firmly opposed to giving priority to responsibility for injury to persons or property of aliens. He was supported by Mr. Yaseen and Mr. Paredes. Those in favour of giving priority to this topic were Mr. Briggs, Dr. Aréchaga and Mr. Castren. Professors Ago and Gros took a broader approach of a rather conceptual nature but not, of course, similar

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to that favoured by Mr. Tunkin. Professor Briggs told us he was surprised that Mr. Tunkin did not press harder for endorsement of his view that State Responsibility should include a study of responsibility for violation of international rules concerning the maintenance of peace. Professor Briggs thought that Mr. Tunkin's specific objective was possibly limited to ensuring that the Sub-Committee would not discuss responsibility for damage to aliens, and that Mr. Tunkin had no special interest in what the Special Rapporteur might do with the subject so long as he kept away from the problem of damage to aliens. Professor Ago's approach, while involving general principles, would not appear to lead directly to a consideration of the type of questions raised by Mr. Tunkin, although conceivably such matters might come up for discussion in connection with Professor Ago's final categories for study--forms of international responsibility,--the duty to make reparation and the question of sanctions. Dr. Liang, characteristically, thought that the whole draft report was so ambiguous and imprecise as to allow the Special Rapporteur to introduce whatever aspects of the subject he wished to. Certainly, the vague reference in the draft report to "possible repercussions which now developments in international law may have had on responsibility" might have satisfied Mr. Tunkin but would seem to have added nothing by way of precision.

13. For your convenience, the main decisions taken by the two Sub-Committees are described below.

14. The Sub-Committee on State Responsibility gave a general endorsement to the approach proposed by Professor Ago in his working paper (WP.6). Professor Ago's approach was of a broadly conceptual nature and seemed to have involved more an analysis of the formal aspects of the concept of state responsibility than of any specific substantive questions. After the problem of how to handle damage to aliens was dealt with, agreement seemed to have been rather easily reached in the Committee, and the meetings tended to be short and relatively non-controversial. We heard the question raised from more than one quarter on the utility of a study of the subject which would be primarily conceptual or theoretical in nature. Professor Briggs seemed to be of the view that it would lead nowhere and that that was why Mr. Tunkin did not appear to mind the fact that his own view was not endorsed. As will be noted, among the topics of study suggested by Professor Ago were those such as determination of an international wrongful act; abuse of rights; imputability of a wrongful act and indirect responsibility; question of ultra vires; degree and nature of responsibility necessary to engage liability, including question of requirement of fault; question of causal relationships; distinctions as to types of international wrongful acts and circumstances in which acts are not wrongful, such as consent, sanctions, self-defence and necessity, the duty to make reparation and the right of sanction. In supporting the final draft report, those members who wished to see primary emphasis given to damage to aliens presumably must have considered that an acceptable compromise was contained in the formulation in paragraph 5 of the draft report (SC.1/R.1 Rev.1) which, although giving priority to the "definition of the general rules governing international responsibility", recognized that there would be no question of neglecting the experience and material in certain special sectors, "specially that of responsibility for injuries to the person or property of aliens". Profess Briggs thought that the Special Rapporteur of the subject would thus inevitably deal largely with the jurisprudence of damage to aliens.

15. The Sub-Committee on Succession adopted a workmanlike approach to its task and seemed to have achieved a substantial measure of success in defining the work of the future rapporteur. For example, the Committee decided to give priority to the question of state succession; succession

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of governments would also be studied in so far as it was a necessary complement of the study of state succession. This was a compromise of various views given in the memoranda submitted to the Sub-Committee, for example that of Mr. Castren who wished to postpone the question of succession of governments; Mr. Tabibi who wanted a separate approach to each branch as a matter of priority; and Mr. Rosenne who wanted the subjects discussed together. The Sub-Committee also adopted an important decision in agreeing that succession in respect of treaties should be dealt with in the context of succession of states rather than that of the law of treaties. This appeared to represent the unanimous view of those writers who had submitted memoranda on the subject, and seemed, in fact, an inevitable consequence of taking up state succession as a subject for codification. Some of the memoranda submitted gave considerable emphasis to the various approaches to succession in respect of treaties, e.g. universal versus singular succession, the theory of tabula rasa, the theory of the right of option, the theory of the continuation of the right of renounciation and the theory of the right of a time limit for reflection. It is thus clear that succession in respect of treaties will be one of the principal tasks of the rapporteur of the Commission. The Sub-Committee also agreed that the approach to be taken by the rapporteur should embrace, in addition to succession in respect of treaties, succession in respect of rights and duties arising from other sources, and succession in respect of membership of international organizations. A further general division of the subject was also included in the report which, however, does not seem likely to be of great value. The Secretariat was asked to prepare three further papers which are noted on pages 5 and 6 of the draft report (SC.2/R.1).

16. On the whole, both Sub-Committees seemed to have achieved a rather surprising measure of agreement on the broad outlines of the approach to be taken to codification of the subjects by the special rapporteurs, when appointed. It therefore seems that the holding of these meetings may have proved a useful and worthwhile step in undertaking the difficult and important task of codifying these two branches of international law.

A. E. Gotlieb

Disarmament Delegation

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~~J. A. Beesley~~

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~~December 13, 1962~~

Chapter VI - 4

CONFIDENTIAL

~~SEVENTEENTH SESSION~~
~~SIXTH COMMITTEE~~
~~FINAL REPORT~~

ITEM NO. 76: Report of the International Law Commission on the Work of its Fourteenth Session

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INTRODUCTION

The International Law Commission (I.L.C.), newly increased from a membership of fifteen to twenty-four, considered four major questions during its fourteenth session in Geneva (April 24 to June 29, 1962): the future work of the Commission; the kind of treatment to be given to the topic of State Responsibility; the commencement of its studies on State Succession; and the first third of a proposed draft convention on the Law of Treaties. It was recognized that each of these questions contained potentially contentious aspects but it was generally assumed, in western consultations, that treatment of these questions would be relatively non-controversial. This did not prove to be the case, as each was raised in a contentious manner by Soviet bloc or by some of the uncommitted countries, such as Ghana and Indonesia. It proved possible, however, after several days of negotiations following the debate, to reach agreement on a compromise resolution which did not embody extreme points of view on any of these questions.

THE DEBATE

2. Future work of the Commission: no particular controversy occurred, and general agreement was reached on the wisdom of the Commission's decisions. (1)

(1) The law of treaties and state responsibility (Resolution 1686 (XVI); succession of states and governments (Resolution 1686 (XVI); relations between states and intergovernmental organizations (Resolution 1289 of December 5, 1958 (XIII); the right of asylum (Resolution 1400 (XVI) of November 21, 1959); the study of the juridical regime of historic waters (Resolution 1453 (XVI) of December 7, 1959); special missions (Resolution 1687 (XVI) of December 16, 1961).

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2. State Responsibility: The Soviet Bloc and certain of the uncommitted countries raised again the question whether the topic should involve a broad study of the general rights and duties between states, and hence, in their terms, co-existence, (as distinct from the narrower question of examination of the principles of the protection of the rights of aliens). This line was effectively resisted by Western powers in the course of debate, and in the Rapporteur's Report (see annex 1 attached) and the resolution (A/RES/1765 (XVII)) passed did not reflect this notion.

lower case → STATE SUCCESSION

3. A good deal was said by the Soviet Bloc and by some of the uncommitted nations concerning the general topic of "Unjust Treaties", clearly with the future topic of State Succession in mind. It eventually proved necessary for representatives of Western countries to reply forcefully to the allegations on this issue, some of which were irresponsible in the extreme. The courageous statements of the representative of the United Kingdom and Norway marked a turning point in the debate, which made the later task of reaching agreement on a compromise resolution considerably easier.

lower case → LAW OF TREATIES

4. The highly contentious "All States" question arose early in the debate. The I.L.C. approach to the right of states to accede to treaties to which they had not been parties was criticized by the Soviet Bloc and some uncommitted countries using the usual, "All States", arguments as being too narrow, and by Western countries as being too broad, taking the position also that it was premature to discuss this issue in substance, since governments' comments had been requested and not yet

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received. This issue remained unresolved at the close of debate.

lower case → RESOLUTIONS

5. Ghana, Indonesia and the Ukrainian SSR, introduced a resolution taking an extremely partisan line on all the above-mentioned issues; a competing resolution was introduced by the USA, Turkey, and Japan, which merely took note of and approved the International Law Commission's report. It was agreed that the two groups of co-sponsors would hold discussions to reach a compromise. This they did, together with representatives of the U.K. USSR and others, and agreement was eventually reached on a resolution which was passed unanimously in Committee and later in Plenary.

CANADIAN POSITION

6. The Canadian position was on all fours with that of the other Western nations, but because of the intention of the Canadian Delegation to play a major role in a later item on the Agenda, and its active involvement in it well before commencement of debate on it, the Canadian Delegation took no part in the discussions on this item. During the closing stage of the compromise discussions, however, the Canadian Delegation was able to exert some influence which several delegations later referred to as being decisive.

RECOMMENDATION FOR FUTURE ACTION

7. It seems clear, on the basis of this year's discussions on this item, that the Soviet bloc and certain of the neutralist nations such as Indonesia, Ghana and perhaps India will utilize this item to the greatest possible effect. A Canadian position should therefore be developed in some detail ahead of time on the various potentially contentious items such as "unjust treaties" and the "all states" question.

Annexes

1. Rapporteur's Report (A/5287) and (corr. 1 and 2).
2. Statement by Mr. Gilles Sicotte of December 3, 1962

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PRESS RELEASE L/1048
UNITED NATIONS, N.Y.

ILC AD HOC ADVISORY COMMITTEE ON PREVENTION OF CRIME AND TREATMENT OF OFFENDERS CONCLUDES SESSION IN GENEVA

(THE FOLLOWING WAS RECEIVED FROM THE INFORMATION SERVICE OF THE EUROPEAN OFFICE OF THE UNITED NATIONS, GENEVA.)

QUESTIONS RELATING TO CAPITAL PUNISHMENT AND THE ORGANIZATION OF THE THIRD UNITED NATIONS CONGRESS FOR THE PREVENTION OF CRIME AND TREATMENT OF DELINQUENTS WERE DISCUSSED IN THE SEVENTH SESSION OF THE AD HOC ADVISORY COMMITTEE ON THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, OF THE INTERNATIONAL LAW COMMISSION (ILC), WHICH CONCLUDED TODAY, 25 JANUARY, 1963, IN GENEVA.

THE SESSION, WHICH BEGAN ON 7 JANUARY, WAS PRESIDED BY TORSTEN ERIKSSON OF SWEDEN. THE BASIC CONCLUSION REACHED BY THE EXPERTS WAS THAT THE EFFECTS OF CAPITAL PUNISHMENT ON CRIME PREVENTION WAS NOT SUFFICIENTLY CLEAR, AND THAT FURTHER STUDIES WERE CONSIDERED NECESSARY. THE EXPERTS ALSO NOTED THE TENDENCY IN THE WORLD TO LIMIT RECOURSE TO THE DEATH PENALTY.

THEY ALSO RECOMMENDED THAT GOVERNMENTS BE INVITED TO CONDUCT RESEARCH INTO THE PREVENTIVE EFFECTIVENESS OF CAPITAL PUNISHMENT; THAT GOVERNMENTS ELIMINATE PENAL DISPOSITIONS FOR THE DEATH PENALTY IN ALL CASES WHERE THESE PROVISIONS WERE NOT ACTUALLY BEING PRACTICED; AND THAT THOSE SENTENCED TO DEATH BE THOROUGHLY EXAMINED FROM THE MEDICAL, PSYCHOLOGICAL AND SOCIAL POINTS OF VIEW, AND BE GIVEN SUFFICIENT LEGAL SAFEGUARDS.

THE THIRD CONGRESS FOR THE PREVENTION OF CRIME AND TREATMENT OF DELINQUENTS IS TO BE HELD IN LONDON IN 1965.

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PRESS RELEASE SOC/3136
UNITED NATIONS, N.Y.

SUBCOMMISSION CONCLUDES GENERAL DEBATE ON STUDY REGARDING RIGHT TO LEAVE A COUNTRY; QUESTION OF WALL IN BERLIN RAISED

THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINOTITIES CONCLUDED THIS MORNING ITS GENERAL DEBATE ON A STUDY ON DISCRIMINATION AGAINST ANY PERSON WISHING TO LEAVE A COUNTRY, INCLUDING HIW OWN, AND TO RETURN TO HIS COUNTRY.

THE 14-MEMBER SUB-COMMISSION THE BEGAN CONSIDERATION, CHAPTER BY CHAPTER, OF THE STUDY."" IT WAS PREPARED BY JOSE D. INGLES (PHILIPPINES), SPECIAL RAPPORTEUR ON THE SUBJECT.

STATEMENTS WERE MADE THIS MORNING BY THE CHAIRMAN, ARCOT KRISHNASWAMI (INDIA), WOJCIECH KETRZYNSKI (POLAND), MR. INGLES, BORIS S. IVANOV (USSR), C.C. FERGUSON (UNITED STATES), PIERRE JUVIGNY (FRANCE), HERNAN SANTA CRUZ (CHILE), FRANCESCO CAPOTORTI (ITALY), V.V. SAARIO (FINLAND) AND MOHAMMED AHMED ABU RANNAT (SUDAN).

COMMENTS WERE ALSO MADY BY MRS. ROSE KORN HIRSCHMAN OF THE INTERNATIONAL FEDERATION OF WOMEN LAWYERS AND BY MRS. ADELAIDE BAKER OF THE WOMENS INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM.

THE WALL ERECTED BETWEEN THE EAST AND WEST OCCUPATION ZONES OF BERLIN WAS THE SUBJECT OF DISCUSSION DURING THE MEETING.

REFERENCE TO BERLIN WALL OPPOSED

MR. IVANOV (USSR) TOOK ISSUE WITH A PARAGRAPH (12) IN THE STUDY WHICH STATES THAT "PEOPLE TRYING TO CORSS THE BARRICADE HAVE BEEN SHOT IN COLD BLOOD" IN BERLIN.
THE PARAGRAPH ALSO QUOTES LINES FROM PUSHKINS "BORIS GUDONOV," WHERE THE CZAR GIVES INSTRUCTIONS TO "TAKE STEPS AT THIS VERY HOUR THAT OUR FRONTIERS BE FENCED BY BARRIERS...THAT NOT A SINGLE SOUL PASS OER THE BORDER, THAT NOT A HARE BE ABLE TO RUN OR A CROW FLY..."

THE PARAGRAPH FURTHER STATES THAT "IT IS A TIMELY AND URGENT WARNING THAT AN ANCIENT AND BASIC RIGHT OF THE HUMAN BEING IS IN JEOPARDY. IT IS ALSO A CHALLENGE AND AN OPPORTUNITY FOR NATIONAL AND INTERNATIONAL ACTION TO GIVE MEANING AND SUBSTANCE TO ARTICLE 13, PARAGRAPH 2, OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS".

MORE

""DOC.E/CN.4/SUB.2/220.

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MR. IVANOV SAID THE PARAGRAPH IN QUESTION WAS NOT IN ACCORDANCE WITH THE TRADITION OF THE SUB-COMMISSION. IT WAS DETRIMENTAL TO THE REPORT, IT WAS NOT OBJECTIVE, AND HE WOULD LIKE TO SEE IT ELIMINATED FROM THE STUDY.

THE POSITION WAS SUPPORTED BY MR. KETRZYNSKI WHO SAID IT WAS HARD FOR THE RAPPORTEUR TO EXPRESS VIEWS AS TO WHAT WAS HAPPENING IN BERLIN. IF THERE WAS TO BE ANY EXPRESSION OF VIEWS, THEN THOSE OF THE DEMOCRATIC PEOPLES REPUBLIC OF GERMANY SHOULD BE HEARD.

THE QUESTION OF THE WALL IN BERLIN WAS NOT FOR DISCUSSION IN THE SUB-COMMISSION, HE SAID. AS TO THE "CHINESE WALL", REFERRED TO IN PARAGRAPH 12, HE SAID IT WAS BUILT AGAINST OUTSIDE AGGRESSION.

MR. FERGUSON SAID THAT, ALTHOUGH THE SUB-COMMISSION WAS NOT CONCERNED WITH FRONTIERS OR WITH THE QUESTION WHETHER OR NOT THERE WAS A LEGAL GOVERNMENT IN EAST GERMANY, IT WAS LEGITIMATE TO MAKE THE REFERENCE IN ITS PRESENT CONTEXT.
HE COULD NOT SEE HOW THE PARAGRAPH COULD BE CONSIDERED AS SUGGESTING SOLUTIONS FOR THE PROBLEM IN BERLIN. MR. FERGUSON STATED THAT THOS BARRICADES "ARE JUST AS ODIOUS IN BERLIN AS THEY ARE IN ATLANTA, GEORGIA".

MR. IVANOV SAID MR. FERGUSONS CONCLUSIONS WERE RATHER ARTIFICIAL AND THEY WOULD TEND TO COMPLICATE THE WORK OF THE SUB-COMMISSION. AS TO THE CONTENT OF THE PARAGRAPH IN QUESTION, HE SAID "WE CANNOT CALL IT AN HISTORICAL NOTE", AS HAD BEEN SUGGESTED. IT WAS "ABSURD" TO TAKE "BORIS GUDONOV" FOR HISTORICAL FACT. RUSSIAN HISTORY WAS BEING TWISTED BY THESE "BLASPHEMOUS" PHRASES.

IT WAS WELL-KNOWN, HE WENT ON, THAT THE WALL BUILT ON 13 AUGUST 1961 IN BERLIN WAS A MEASURE AGAINST "FASCISTS, SUBVERSIVES AND TERRORISTIC ACTIVITIES". THOSE WHO INTRODUCED THIS NOTE INTO THE STUDY WERE NOW LAMENTING THE END OF THOSE ACTIVITIES, HE DECLARED.

MR. IVANOV ADDED THAT THIS PARAGRAPH "PUTS A FLY IN THE OINTMENT" AND SPOILT IT. IT WAS PROPAGANDISTIC IN NATURE, AND HE APPEALED TO THE SPECIAL RAPPORTEUR, MR. INGLES, NOT TO DEPART FROM THE TRADITION OF THE SUB-COMMISSION.

NO POLITICAL MOTIFIATION, RAPPORTEUR STATES

IN REPLY, MR. INGLES STATED "CATEGORICALLY" THAT THERE WAS NO POLITICAL MOTIVATION TO THIS PARAGRAPH. THE WALL WAS AN HISTORICAL FACT, EVEN THOUGH OPINIONS MIGHT DIFFER ON JUSTIFYING ITS CONSTRUCTION.

WHEN THE SUB-COMMISSION ASKED HIM TO PREPARE THE STUDY, HE CONTINUED, HE WAS REPRESENTING HIS COUNTRY IN THE FEDERAL REPUBLIC OF GERMANY, AND HE KNEW BERLIN AND THE WALL FROM FIRST-HAND EXPERIENCE. WHEN HE WAS ASKED TO INCLUDE A CHAPTER ON HISTORICAL BACKGROUND, HE COULD NOT SEE HOW HE COULD OVERLOOK THE INCLUSION OF SUCHA A CONTEMPORARY FACT IN THE STUDY.

MORE

Document disclosed under the *Access to Information Act* -
Document divulgué en vertu de la *Loi sur l'accès à l'information*

MANY PERSONS HAD GIVEN THEIR LIVES TO CORSS THIS BORDER, HE DECLARED. THERE MIGHT BE OTHER BORDERS WHERE PEOPLE HAD PAID WITH THEIR LIVES IN CORSSING, BUT HE THOUGHT HE SHOULD BE ALLOWED TO CITE AN INSTANCE FROM PERSONAL KNOWLEDGE. HE HAD NO INTENTION OF CRITICIZING ANY GOVERNMENT INCLUDING MR. IVANOVS GOVERNMENT. IN HIS VIEW, THE LATTER GOVERNMENT WAS NOT INVOLVED IN THE ISSUE.

HOWEVER, HE SAID HE WOULD CONSIDER MR. IVANOVS APPEAL. MR. IVANOV SHOULD CONCEDE TO "MY GOOD FAITH", HE ADDED.

MR. IVANOV EXPRESSED APPRECIATION, STATING THAT MR. INGLES RESPONSE WAS A "GOOD OMEN" FOR THE FUTURE.

IN AN EARLIER COMMENT ON THIS QUESTION, MR. JUVIGNY (FRANCE) SAID A CAREFUL READING OF THE STUDY WOULD MAKE ONE UNDERSTAND THE SPECIAL RAPPORTEURS PURPOSE.

MR. SANTA CRUZ (CHILE) HELD THAT THE STUDY AND THE TEXT IN QUESTION WERE THE FULL RESPONSIBILITY OF THE SPECIAL RAPPORTEUR, WHO MIGHT OR MIGHT NOT ACCEPT THE SUGGESTED REVISIONS.

CHAIRMAN TERMS REVISIONS "TOO LATE"

EARLIER IN THE MEETING, THE CHAIRMAN, MR. KRISHNASWAMI (INDIA), SPEAKING OF THE STUDY OF DISCRIMINATION AGAINST A PERSONS RIGHT TO LEAVE A COUNTRY, PAID TRIBUTE THE SPECIAL RAPPORETUR FOR A "GREAT WORK". ANY SUGGESTIONS AT THIS TIME TO REVISE THE STUDY WERE ONE YEAR LATE, HE STATED. SUCH SUGGESTIONS SHOULD HAVE BEEN MADE LAST YEAR WHEN MR. INGLES PRELIMINARY REPORT WAS DISUCSSED.

THE PRESENT TEXT WAS THE FINAL ONE, HE CONTINUED, ADDING THAT HE DID NOT EXPECT THE AUTHOR TO MAKE ANY SUBSTANTIAL CHANGES AT THIS TIME. MR. KRISHNASWAMI HOPED THE COMMISSION ON HUMAN RIGHTS WOULD SANCTION THE REPORT.

SOME MEMBERS OF THE SUB-COMMISSION, SAID THE CHAIRMAN, HAD LEFT THE IMPRESSION THAT THE RIGHT TO LEAVE A COUNTRY AND THE RIGHT TO RETURN TO ONES OWN COUNTRY WAS NOT, AFTER ALL, SUCH AN IMPORTANT RIGHT. IT HAD ALWAYS BEEN A VERY IMPORTANT RIGHT, AND ITS IMPORTANCE HAD INCREASED SINCE WORLD WAR II, NOT ONLY FROM A QUALITATIVE BUT FROM A QUANTITATIVE STANDPOINT.

HUNDREDS OF THOUSANDS OF PERSONS IN INDIA, THE UNITED STATES AND OTHER COUNTRIES APPLIED EACH YEAR FOR PASSPORTS, HE WENT ON. THE TREND WAS TOWARD LESSENING RESTRICTIONS ON SUCH MOVEMENT. HE CITED THE EUROPEAN ECONOMIC COMMUNITY IN CONNECTION WITH SUCH EFFORTS. ITALIANS WERE NOW WORKING IN THE RHINELAND AND PUTTING MORE PROSPERITY INTO ITS ECONOMY, HE ADDED.

MORE

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RECALLING THE CRITICISMS MADE EARLIER THAT THE STUDY HAD NOT INCLUDED ECONOMIC CONDITIONS AS RESTRICTIVE FACTORS, MR. KRISHNASWAMI SAID THAT, IN ACTUAL FACT, IT WAS NOT SO MUCH THE RICH WHO MOVED ABOUT AS IT WAS THE "MIDDLE AND THE POOR". HE NOTED THAT THE POORER A PERSONS, THE MORE DIFFICULT IT WAS FOR HIM TO GO THROUGH THE HIERARCHY TO GET A PASSPORT.

ALL THAT MR. INGLES WAS SUGGESTING, HE CONTINUED, WAS THAT THE "AXE" SHOULD NOT BE APPLIED HARSHLY AGAINST PEOPLE WANTING TO LEAVE. HE QUOTED THOMAS JEFFERSON TO THE EFFECT THAT IF TOO MUCH POWER IS GIVEN TO A FUNCTIONARY, HE TENDS TO MAKE A HABIT OF DISTINGUISHING BETWEEN "GOOD AND BAD".

MR. KRISHNASWAMI OBSRRVED THAT, IN THE PRESENT "IMPERFECT" WORLD, THERE HAD TO BE LIMITATIONS ON MOVEMENT. HOWEVER, ONE HAD TO KEEP IN MIND THAT THERE WAS AN ELEMENT OF IMPRECISION IN THE DEFINITIONS OF NATIONAL SECURITY, PUBLIC ORDER AND OTHER REASONS GIVEN FOR SUCH RESTRICTIONS. IT WAS TRUE THAT IT WOULD TAKE TIME TO LESSEN RESTRICTIONS BUT A BEGINNING MUST BE MADE.

TURNING TO WHEN HE TERMED "REMEDIES" FOR THE PROBLEM, MR. KRISHNASWAMI STATED THAT SIMPLE MEASURES MUST BE FOUND WHICH WOULD PROTECT THE INDIVIDUALS RIGHT TO MOVE, WITHOUT LEAVING LOOPHOLES FOR THE AUTHORITIES, FOR IT SHOULD NOT BE FORGOTTEN THAT A BUREAUCRAT "IS A BIT OF AN EXPERT".

DEVELOPMENT DECADE OFFERS "INFINITE POSSIBILITIES"

MR. KRISHNASWAMI SAID HE HAD A FEELING THAT IN THE UNITED NATIONS DEVELOPMENT DECADE, WHICH WAS RECENTLY INITIATED, THERE WERE INFINITE POSSIBILITIES FOR THE MOVEMENT OF PEOPLE FROM ONE COUNTRY TO ANOTHER. TECHNOLOGICAL AND SOCIENTIFIC PROGRESS WOULD RESULT IN TRANSFORMING DESERTS INTO FERTILE FIELDS AVAILABLE FOR PEOPLE TO INHABIT. MUCH OF THE WORLDS POPULATION PROBLEM MIGHT ALSO BE SOLVED.

HE SAID HE HAD BEEN VERY OPTIMISTIC ABOUT THE SITUATION UNTIL A FEW MONTHS AGO, BUT THE "EXPANSIONISM OF CERTAIN POWERS", WHICH WAS NOTHING LESS THAN "IMMIGRATION BY CONQUEST", HAD LESSENED HIS OPTIMISM.

NO "HIERARCHY" IN HUMAN RIGHTS

REPLYING TO VARIOUS COMMENTS ON THE STUDY, THE SPECIAL RAPPORTEUR, MR. INGLES, SAID IT HAD BEEN SUGGESTED THAT THE RIGHT OF EVERYONE TO LEAVE A COUNTRY WAS LESS IMPORTANT THAN OTHER RIGHTS.

TO THIS, HE HAD ONLY ONE THING TO SAY: "LET US NOT TRY TO ESTABLISH HERE A HIERARCHY BETWEEN RIGHTS". THE EXERCISE OF ANY HUMAN RIGHT COULD NOT BE ENSURED UNLESS THE OTHER RIGHTS WERE ALSO ENSURED.

MORE

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HE RECALLED THAT CRITICISMS HAD BEEN MADE THAT, IN THE STUDY, HE HAD EXCEEDED HIS MANDATE. ARTICLE 2 (7) OF THE UNITED NATIONS CHARTER HAD BEEN QUOTED IN THIS RESPECT.

(THIS ARTICLE STATES: "NOTHING CONTAINED IN THE PRESENT CHARTER SHALL AUTHORIZE THE UNITED NATIONS TO INTERVENE IN MATTERS WHICH ARE ESSENTIALLY WITHIN THE DOMESTIC JURISDICTION OF ANY STATE OR SHALL REQUIRE THE MEMBERS TO SUBMIT SUCH MATTERS TO SETTLEMENT UNDER THE PRESENT CHARTER; BUT THIS PRINCIPLE SHALL NOT PREJUDICE THE APPLICATION OF ENFORCEMENT MEASURES UNDER CHAPTER VII".)

THIS WAS AN OLD ISSUE, MR. INGLES DECLARED, AND IT HAD BEEN RESOLVED A LONG TIME AGO BY THE CHARTER ITSELF IN ARTICLES 1 (3), 55 AND 56. THE UNITED NATIONS HAD TAKEN THE VIEW THAT HUMAN RIGHTS WERE A MATTER OF INTERNATIONAL CONCERN. IN THIS RESPECT, HE REFERRED TO UNITED NATIONS ACTION REGARDING APARTHEID AND THE STATUS OF PEOPLE OF INDIAN ORIGIN IN SOUTH AFRICA.

IT WAS TRUE THAT ECONOMIC CONDITIONS INFLUENCED MEASURES TAKEN BY GOVERNMENTS TO RESTRUCT THE RIGHT TO MOVE, HE CONTINUED, BUT THE ULTIMATE RESPONSIBILITY FOR THIS WAS UNQUESTIONABLY THAT OF THE GOVERNMENT.

(IN THIS RESPECT, PARAGRAPH 72 OF THE STUDY STATES: "DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY CAN ONLY RESULT FROM ACTION BY A GOVERNMENT OR BY PUBLIC AUTHORITIES... THIS FACT IS OF INCALCULABE IMPORTANCE. SINCE DISCRIMINATION IN THIS AREA IS NORMALLY OF THE GOVERNMENTS OWN MAKING, IT CAN BE ABOLISHED BY GOVERNMENTS AT WILL".)

ON THE QUESTION OF THE EFFECT OF COLONIALISM ON THE RIGHT, MR. INGLES SAID THERE WAS A SPECIAL SECTION IN THE STUDY ON THE EXERCISE OF THE RIGHT IN COLONIAL TERRITORIES. THAT WAS ALL THE STUDY WAS CONCERNED ABOUT, AND HE DID NOT AGREE THAT THIS WAS THE PLACE TO DWELL ON "THE EVILS OF COLONIALISM AND ITS LIQUIDATION".

DETAILED DISCUSSION CENTRES ON FOUR POINTS

THE SUB-COMMISSION THEN PROCEEDED TO TAKE UP THE STUDY CHAPTER BY CHAPTER. COMMENTS ON THE FIRST TWO CHAPTERS EVOLVED AROUND: (A) THE INCLUSION OF STATELESS PERSONS ALONG WITH OTHER PERSONS WHO MUST ENJOY THE RIGHT TO LEAVE A COUNTRY WITHOUT DISCRIMINATION; (B) THE REPRODUCTION IN THE STUDY OF A LIST OF BILATERAL AGREEMENTS THAT DEALT WITH THIS RIGHT; (C) THE QUESTION OF ELIMINATION OF A STATEMENT IN THE STUDY (PARAGRAPH 39) THAT THIS RIGHT "MAY VERY WELL BE REGARDED AS THE RIGHT OF PERSONAL SELF-DETERMINATION, A COROLLARY OF THE RIGHT OF SELF-DETERMINATION OF PEOPLES"; AND (D) THE QUESTION OF THE ULTIMATE RESPONSIBILITY OF GOVERNMENTS FOR ALL DISCRIMINATION IN TIS FIELD.

THE SUB-COMMISSION WILL MEET AT 10:30 A.M. TOMORROW, 18 JANUARY.

SM503P 17 JAN 63

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TRANSMITTAL SLIP

TO: Department of External Affairs,
OTTAWA, Canada

FROM: The Permanent Mission of Canada,
Geneva, Switzerland

The documents described below are for your information.

Despatching Authority L. Gauthier/KE

Security UNCLASSIFIED

Date January 17, 1963

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5475-AX-40
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Copies	Description	Also referred to:
3	ILC PRESS RELEASES Press Release No. L/373, January 7/63, re: Two ILC Sub-Committees to meet in January in Geneva.	cc: 5475-AX-36-40 " 5475-AX-39-40 L TO: B. Beesley JAN 22 1963 REGISTRY

Ext. 250 (Rev. 10/51) (*Instruction on Reverse Side*)

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UNITED NATIONS

INFORMATION SERVICE
European Office of the United Nations
Geneva

Press Release N° L/373
7 January 1963

(For use of information media, not an official record)

TWO ILC SUB-COMMITTEES TO MEET IN JANUARY IN GENEVA

In pursuance of decisions taken by the International Law Commission (ILC) at its fourteenth session in June 1962, two Sub-Committees of the Commission are meeting at the European Office in January 1963. The first, the Sub-Committee on State Responsibility, began its session today, 7 January 1963, under the chairmanship of Mr. Roberto Ago, of Italy. The session will last until 16 January. The second, the Sub-Committee on the Succession of States and Governments, will begin on 17 January under the chairmanship of Mr. Manfred Lachs, of Poland, and will end on or before 25 January.

The meetings of the Sub-Committees are in principle closed; the results of their work will be set out in reports by their Chairmen, which will be submitted to the Commission at its next session, beginning in May 1963.

(For background information, see also Report of the International Law Commission on the work of its fourteenth session - A/5209, and press release L/372 of 2 July 1962.)

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FM DISARMDELGVE JAN8/63 RESTD

TO EXTERNAL 5

REF OURTEL 1920 DEC18

TO: M. Bucley
REGISTRY

INTERNATIONAL LAW COMMISSION-SUB-CTTEE MTGS

FOLLOWING FOR CADIEUX: ON ARRIVAL IN GENEVA, ILC SECRETARIAT TOLD US THAT IN RESPONSE TO SEVERAL REQUESTS IN NY TO OBSERVE THESE MTGS (INCLUDING WESTGERMAN REQUEST TO OBSERVE STATE SUCCESSION SUB-CTTEE) THEY REPLIED THAT MTGS WOULD BE CLOSED TO NON-PARTICIPANTS. ON MENTIONING OUR CONVERSATION WITH LACHS (SEE REFTEL) LIANG SPOKE TO AGO WHO RAISED GENERAL QUESTION OF OBSERVERS AT OPENING MTG OF SUB-CTTEE ON STATE RESPONSIBILITY. SUB-CTTEE DECIDED THAT IN VIEW OF INFORMAL AND EXPLORATORY CHARACTER OF ITS WORK, IT SHOULD BE CLOSED. GROUP ON STATE SUCCESSION WILL UNDOUBTEDLY TAKE SIMILAR POSITION. WE WILL FORWARD REPORT TO YOU AT CONCLUSION OF MTGS BASED ON CONVERSATIONS WITH MEMBERS AND SECRETARIAT.•

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FM CANDELNY DEC18/62 UNCLAS

TO EXTERNAL 2689 PRIORITY

17TH UNGA:PLENARY CONSIDERATION OF 6TH CTTEE ITEMS.

ALL RESLNS RECOMMENDED BY 6TH CTTEE WERE ADOPTED UNANIMOUSLY IN

PLENARY TODAY.

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Thus endeth the good news

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FM DISARMDELGVE DEC18/62 RESTD

TO EXTERNAL 1920

FOLLOWING FOR CADIEUX

INTERNATIONAL LAW COMMISSION-SUB-CTTEE MTGS

LACHS TOLD GATLIEB THAT HE HAD NO RPT NO OBJECTION TO HIS OBSERVING MTGS OF SUB-CTTEE ON STATE SUCCESSION BEGINNING JAN17. IF AGO IS AGREEABLE, GOTLIEB WILL ALSO OBSERVE MTGS OF SUB-CTTEE ON STATE RESPONSIBILITY BEGINNING JAN10.*****

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

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OUTGOING MESSAGE

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DATE	FILE		SECURITY
DEC11/62	3475-AX-40		UNCLASS
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FM: EXTERNAL OTT

	NUMBER	PRECEDENCE
TO: PERMISNY	L-160	
INFO:		

Ref.: MR. BARTON'S MEMO FOR ADVISERS OF SEP10.

Subject: PREPARATION OF GEN ASSEMBLY FINAL REPORTS.

FOLLOWING FROM SICOTTE. BRIEF SUMMARY FOR QUOTE ROUND-UP UNQUOTE OF ITEMS 73 AND 74 FOLLOW HEREUNDER.

2. BEGINS. ITEM 73: QUESTION OF PUBLICATION OF A UN JURIDICAL YEARBOOK. THE SIXTH CTTEE HAD HAD UNDER CONSIDERATION FOR SOME YEARS PROPOSAL FOR THE PUBLICATION OF A UN JURIDICAL YEARBOOK. AT ITS FIFTEENTH SESSION THE ASSEMBLY APPROVED IN PRINCIPLE THE IDEA OF PUBLICATION AND AN AD HOC CTTEE WAS ASSIGNED AT THE CURRENT SESSION TASK OF MAKING SPECIFIC RECOMMENDATIONS FOR CONTENT AND FORMAT OF A SUITABLE PUBLICATION, TAKING ACCOUNT OF THE ORGANIZATION'S BUDGETARY LIMITATIONS.

3. AD HOC CTTEE PROPOSED A PUBLICATION NOT TO EXCEED 250 PAGES IN THE THREE WORKING LANGUAGES OF THE UN CONSISTING OF THREE PARTS MADE UP AS FOLLOWS:

/HERE REPRODUCE ANNEX TO RESOLUTION A/C.6/L.523/.

4. THE ASSEMBLY APPROVED UNANIMOUSLY THE WORKING GROUP'S RECOMMENDATION AND

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LOCAL DISTRIBUTION NO STANDARD

MR. LEE (PROTOCOL) DIV.) NOT DONE IN CONSULAR DIV. CONFERENCE

ORIGINATOR	DIVISION	PHONE	APPROVED BY
SIG ..... NAME G.Sicotte/hf	Legal	2-2728	GILLES SICOTTE SIG ..... NAME Gilles Sicotte

EXT. 18 (REV. 12/61)

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INSTRUCTED THE SECGEN TO PUBLISH FIRST VOLUME OF THE YEARBOOK IN 1964. ENDS.

5. BEGINS: ITEM 74: CONSULAR RELATIONS. AT ITS SIXTEENTH SESSION THE GEN ASSEMBLY HAD RECOMMENDED

(A) THE CONVENING OF AN INTERNATIONAL CONFERENCE AT VIENNA IN EARLY 1963.TO DRAW UP A CONVENTION ON THIS TOPIC BASED ON DRAFT ARTICLES PREPARED BY THE INTERNATIONAL LAW COMMISSION AS MODIFIED BY ANY VIEWS OF GOVTS ON THESE; AND

(B) CONSIDERATION OF THE DRAFT ARTICLES AT THE CURRENT - SEVENTEENTH - SESSION FOR THE PURPOSE OF PROVIDING MEMBER-STATES WITH AN OPPORTUNITY TO EXCHANGE VIEWS ON THE SUBJECT IN PREPARATION FOR THE CONFERENCE OF VIENNA.

THE CONSIDERATION OF THIS ITEM IN THE SIXTH CTTEE CONSISTED IN A NUMBER OF STATEMENTS BY SEVERAL REPS - INCLUDING CDA'S - WHO MADE KNOWN THEIR RESPECTIVE GOVTS' POSITION IN REGARD TO THE PRINCIPAL ISSUES RAISED BY THE CONSULAR DRAFT. IN ADDITION, THE UK DELEGATION PROPOSED, IN A RESOLUTION WHICH WAS UNANIMOUSLY ADOPTED, THAT GOVTS WHO WERE TO PARTICIPATE IN THE CONFERENCE SHOULD FORWARD TO THE SECGEN, FOR THE INFO OF OTHER PARTICIPANTS, BY FEB10, 1963, ANY AMENDMENTS WHICH THEY INTENDED TO TABLE TO THE TEXT OF THE DRAFT PREPARED BY THE INTERNATIONAL LAW COMMISSION. ENDS.

6. COMPLETE FINAL REPORT FOR THESE ITEMS LEAVING BY BAG TOMORROW.

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FM CANDELNY NOV20/62 CONFD

TO EXTERNAL 2304

17TH UNGA:6TH CTTEE;ITEM 56 ILC REPORT

THE REPORT OF THE ILC ON THE WORK OF ITS 14TH SESSION WAS TODAY APPROVED UNANIMOUSLY IN PLENARY NO ROLE CALL BEING TAKEN AFTER REPORT OF THE 6TH CTTEE HAD BEEN AMENDED IN SEVERAL RESPECTS AS A RESULT OF REPRESENTATIONS BY WESTERN NATIONS.THER REPORT AND ITS CORRECTIONS WILL BE FORWARDED BY BAG.

(2)

Pol C-
Mr Cadieux
Gen Div
file

21.XI.62

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L | TO: Mr Kingstone REGISTRY

FM CANDELNY NOV5/62 UNCLAS

TO EXTERNAL 2054

REF OURTELS1988 OCT29 AND 2032 NOV1

17TH UNGA:6TH CTTEE-ITEM74:ILC REPORT:REOPENING OF LEAGUE CONVENTIONS

FOLLOWING RESOLUTION WAS ADOPTED ON FRI(NOV2)76 IN FAVOUR,NONE AGAINST AND ONE ABSTENTION(URUGUAY)AFTER A COMPROMISE HAD BEEN REACHED BETWEEN SPONSORS OF RESOLUTION WHICH WOULD REOPEN LEAGUE CONVENTIONS(AUSTRALIA GHANA AND ISRAEL)AND SPONSORS OF RESOLUTION WHICH WOULD DEFER QUESTION TO NEXT SESSION(INDIA AND INDONESIA).

TEXT BEGINS:

UNGA,

TAKING NOTE OF PARA10 OF COMMENTARY TO ARTICLES8AND9 OF DRAFT ARTICLES ON LAW OF TREATIES CONTAINED IN REPORT OF INTERNATIONAL LAW COMMISSION COVERING WORK OF ITS 14TH SESSION,

DESIRING TO GIVE FURTHER CONSIDERATION TO THIS QUESTION,

1.REQUESTS INTERNATIONAL LAW COMMISSION TO STUDY FURTHER QUESTION OF EXTENDED PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER AUSPICES OF LEAGUE OF NATIONS GIVING DUE CONSIDERATION TO VIEWS EXPRESSED DURING DISCUSSIONS AT 17TH SESSION OF UNGA AND TO INCLUDE RESULTS OF STUDY IN REPORT COVERING WORK OF 15TH SESSION OF COMMISSION;

2.DECIDES TO PLACE ON PROVISIONAL AGENDA OF ITS 18TH SESSION QUESTION OF EXTENDED PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER AUSPICES OF LEAGE OF NATIONS.TEXT ENDS.

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TO EXTERNAL 2032 PRIORITY

REF OURTEL 2022 NOV1

17TH UNGA-6TH CTTEE-ITEMS 74(ILC REPORT:RE-OPENING OF LEAGUE CONVENTIONS)AND ITEM 75(FRIENDLY RELATIONS)

ANOTHER DEBATE(AS YET UNRESOLVED)DEVELOPED THIS MORNING ON QUOTE ALL STATES UNQUOTE ISSUE ARISING OUT OF A RES BY INDONESIA AND INDIA WHICH WOULD REQUEST VIEWS OF ILC ON PARTICIPATION OF QUOTE NEW STATES UNQUOTE IN LEAGUE CONVENTIONS AND SHELVE PROPOSAL TO RE-OPEN THEM UNTIL 18TH UNGA.FRIENDLY RELATIONS DEBATE WILL THEREFORE BEGIN MORNING OF MON NOV5(INSTEAD OF TOMORROW AFTERNOON.)WE SHOULD BE GRATEFUL FOR YOUR COMMENTS BY MON ON OUR DRAFT STATEMENT TEXT OF WHICH FOLLOWS. BEGINS: MR CHAIRMAN

INTRODUCTORY COMMENTS.

ON OPENING DAY OF OUR DEBATE IN THIS CTTEE I MADE CLEAR IMPORTANCE WHICH MY GOVT ATTACHES TO THIS ITEM ENTITLED-QUOTE CONSIDERATION OF PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH CHARTER OF UN UNQUOTE. IT IS NOT RPT NOT FOR THIS REASON ONLY HOWEVER THAT I HAVE ASKED TO BE INSCRIBED AS FIRST SPEAKER ON THIS QUESTION SINCE I AM WELL AWARE THAT MANY OTHER DELS SHARE MY VIEWS AS TO ITS IMPORTANCE IS WITNESSED FOR INSTANCE BY FACT THAT TWO RESOLUTIONS HAVE BEEN FILED PRIOR EVEN TO OPENING OF DEBATE-SURELY AN ALMOST UNIQUE EXPERIENCE IN HISTORY OF THIS CTTEE.MY PURPOSE IN SPEAKING EARLY IN DEBATE IS RATHER TO MAKE CLEAR AT OUTSET VIEWS OF MY DEL AND OF COSPONSORS OF RESOLUTION NO. L507 OCT31 THAT QUITE APART FROM INTRINSIC IMPORTANCE OF THIS TOPIC IN THAT IT PRESENTS 6TH CTTEE WITH AN OPPORTUNITY TO MAKE A REAL CONTRIBUTION TO LEGAL THOUGHT AND TO PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW IT ALSO PRESENTS US WITH CLEAR CHOICE OF ATTEMPTING TO DISCUSS QUESTION AS LAWYERS SEEKING WORKABLE SOLUTIONS TO PROBLEMS OR OF FOLLOWING A LESS CONSTRUCTIVE APPROACH. I WOULD NOT RPT NOT OF COURSE SUGGEST THAT THIS CTTEE IS PRECLUDED FROM DISCUSSING POLITICAL ISSUES BUT RATHER THAT WE SEE LITTLE MERIT

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IN A HIGHLY POLITICAL DISCUSSION FOR ITS OWN SAKE IN THIS CTTEE WHICH IS AFTER ALL LEGAL CTTEE OF UN.WITH THIS IN MIND COSPONSORS OF DRAFT RESOLUTION L507 HAVE TAKEN CONSIDERABLE PAINS TO TRY TO PLACE RESOLUTION ON A BASIS THAT MIGHT FIND BROAD ACCEPTANCE IN THIS CTTEE.IN SO DOING WE HAVE NOT RPT NOT HOWEVER CONSIDERED THAT OUR APPROACH IS ONLY ONE WHICH CAN BE FOLLOWED ON THIS TOPIC.OUR HOPE IS INDEED THAT COSPONSORS OF RESOLUTIONS EMBODYING OTHER APPROACHES WILL BE ABLE TO AGREE WITH US THAT OURS IS NOT RPT NOT ANTAGONISTIC TO THEIRS NOR THEIRS INCOMPATIBLE WITH OURS.I CAN BEST EXPLAIN HOW THIS CAN BE SO BY OUTLINING BASIS OF DRAFT RESOLUTION L507.

PURPOSES OF RESOLUTION.

IN DEVELOPING THIS RESOLUTION MAJOR CONSIDERATION WHICH COSPONSORS HAVE HAD IN MIND IS TO PROVIDE A FIRM BASIS UPON WHICH 6TH CTTEE COULD IN COURSE OF ITS DISCUSSIONS ON THIS ITEM ACHIEVE CONCRETE AND POSITIVE RESULTS.IT WILL BE RECALLED THAT THERE HAS FOR SOME TIME BEEN A FEELING AMONGST MANY DELS THAT 6TH CTTEE HAS NOT RPT NOT BEEN LIVING UP TO ITS POTENTIAL.IT HAS BEEN OUR VIEW THAT WHAT IS REQUIRED IN ORDER TO CURE THIS MALAISE IS AN INITIATIVE WHICH WOULD PROVIDE CTTEE WITH A CONSTRUCTIVE ROLE IN PROGRESSIVE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW WHILE NOT RPT NOT OVERLAPING OR INTERFERING WITH ACTIVITIES OF INTERNATIONAL LAW COMMISSION. (AS WE ALL KNOW THAT BODY HAS ENOUGH WORK ON ITS AGENDA TO KEEP ITSELF BUSY FOR SEVERAL YEARS.)

WE HAVE GIVEN CONSIDERABLE THOUGHT AND STUDY TO THIS QUESTION AND HAVE CONCLUDED THAT THESE PURPOSES COULD BEST BE FULFILLED THROUGH A PROPOSAL BASED ON ESSENTIALLY LEGAL CONSIDERATIONS AND AVOIDING CONTENTIOUS POLITICAL ISSUES AS MUCH AS POSSIBLE WHILE NOT RPT NOT IGNORING POLITICAL REALITIES.

WE ARE AWARE THAT THERE MAY BE A DESIRE ON PART OF SOME DELS THAT AN ATTEMPT BE MADE TO ENUMERATE GENERAL PRINCIPLES UNDER RUBRIC OF FRIENDLY RELATIONS.I DO NOT RPT NOT PROPOSE TO COMMENT IN DETAIL ON OTHER RESOLUTIONS EMBODYING SUCH AN APPROACH BEFORE THEIR SPONSORS HAVE HAD AN OPPORTUNITY TO PRESENT THEM.I SHOULD SAY FRANKLY HOWEVER THAT II IS OUR VIEW THAT MORE FRUITFUL APPROACH IN LIGHT

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OF HISTORY OF PAST ATTEMPTS TO PRODUCE GENERAL STATEMENTS OF PRINCIP-
LE GOVERNING RELATIONS BETWEEN COUNTRIES WOULD BE FOR 6TH CTTEE TO
COMMENCE UPON AN EMIIRICALLY-BASED STUDY OF SPECIFIC AREAS OF LAW
IN NEED OF DEVELOPMENT AND CODIFICATION.IT IS OF COURSE FOR THIS
REASON THAT WE HAVE EMBODIED LATTER APPROACH IN DRAFT RES L507.

I MIGHT EXPLAIN THAT IN ATTEMPTING TO SELECT AREAS OF LAW FOR STUDY
WE HAVE HAD IN MIND TWO MAIN CONSIDERATIONS:FIRSTLY FACT THAT OVER
LAST 12 YEARS--SINCE TIME IN OTHER WORDS OF 1949 INTERNATIONAL LAW
COMMISSION DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES--SOME
50 NATIONS HAVE ATTAINED MEMBERSHIP IN UN AND THAT THESE NATIONS
ARE ENTITLED TO BE HEARD ON THESE QUESTIONS.WE HAVE THEREFORE ATTEM-
PTED TO SELECT AREAS OF PARTICULAR INTEREST TO NEW NATIONS.

OUR SECOND MAJOR CONSIDERATION HAS OF COURSE BEEN TO SELECT AREAS
OF LAW WHICH DIRECTLY RELATE TO TOPIC ON AGENDA.

WITH THESE CONSIDERATIONS IN MIND WE HAVE CONCLUDED THAT TWO FUND-
AMENTAL PRINCIPLES UNDERLYING FRIENDLY RELATIONS AND COOPERATION
AMONG STATES-AND ONES FROM WHICH IN OUR VIEW ALL OTHERS FLOW ARE
RESPECT FOR TERRITORIAL INTEGRITY AND POLITICAL INDEPENDENCE OF
STATES AND OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS.IT IS
VIEW OF COSPONSORS THAT WHILE OTHER PRINCIPLES ARE OF GREAT IMPORT-
ANCE IN REGULATING RELATIONS BETWEEN STATES IN AN ORDERLY FASHION
IT IS THESE TWO WHICH COMPRISE ESSENCE OF FRIENDLY RELATIONS.

IT IS OUR FURTHER VIEW THAT UNDERLYING PURPOSE OF UN--NOT RPT NOT
MERELY IN 6CTTEE BUT ESPECIALLY IN 6TH CTTEE--IS TO WORK TOWARD
DEVELOPMENT OF RULE OF LAW AMONGST NATIONS.WE HAVE THEREFORE FOUNDED
OUR RESOLUTION UPON THAT CONCEPT.

TURNING TO RESOLUTION I SHOULD LIKE TO OFFER A FEW BRIEF EXPLAN-
ATORY COMMENTS.RESOLUTION BEGINS BY DRAWING ATTENTION TO PARAMOUNT
IMPORTANCE OF CHARTER OF UN IN CONTINUING DEVELOPMENT OF RULE OF LAW
AMONGST NATIONS.WHILE CHARTER IS NOT RPT NOT ONLY LAW-MAKING TREATY
IN EXISTENCE IN FIELD OF CONTEMPORARY INTERNATIONAL LAW IT IS SURE-
LY MOST FAR REACHING MOST BROADLY BASED MOST FUNDAMENTALLY SIGNIFICA-

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NT LAW-MAKING INSTRUMENT DEVISED IN HISTORY OF MAN.WITH ALL ITS IMPERFECTIONS OF WHICH WE AS LAWYERS ARE AWARE CHARTER OF UN HAS ACHIEVED MORE IN REGULATING AFFAIRS OF NATIONS THAN ANY OTHER TREATY OR PERHAPS EVEN THAN TOTALITY OF ALL OTHER TREATIES.AMONGST REASONS WHY THIS IS SO ARE THAT AS POINTED OUT IN DRAFT RESOLUTION CHARTER RECORDS DETERMINATION OF PEOPLES OF UN TO PRACTISE TOLERANCE AND LIVE TOGETHER IN PEACE WITH ONE ANOTHER AS GOOD NEIGHBOURS.THERE CAN HARDLY BE A MORE FORWARD LOOKING DECLARATION EVEN THOUGH CONCEIVED NEARLY TWO DECADES AGO.OBVIOUSLY HOWEVER MERE EXISTENCE OF IT IS OF ITSELF NOT RPT NOT SUFFICIENT TO BRING ABOUT DEVELOPMENT OF RULE OF LAW AMONGST NATIONS.IF I MAY REFER AGAIN TO LANGUAGE OF RESOLUTION FULFILLMENT BY MEMBER STATES OF THEIR DUTY TO COOPERATE ACTIVELY WITH ONE ANOTHER THROUGH UN AND TO RESPECT INTERNATIONAL RIGHTS AND PERFORM IN GOOD FAITH TREATY AND OTHER INTERNATIONAL OBLIGATIONS IS ESSENTIAL FOR CREATION OF CONDITIONS OF STABILITY AND WELL BEING NECESSARY FOR ACHIEVEMENT OF PEACEFUL AND FRIENDLY RELATIONS AMONG STATES.EVEN STRICT ADHERENCE TO TREATY RIGHTS AND RULES OF CUSTOMARY INTERNATIONAL LAW IS HOWEVER NO RPT NO LONGER SUFFICIENT IN WORLD IN WHICH WE LIVE.IT IS BECOMING INCREASINGLY EVIDENT THAT THERE IS A CLOSE RELATIONSHIP BETWEEN PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ULTIMATE ESTABLISHMENT (THROUGH PROMOTION OF INTERNATIONAL COOPERATION IN ECONOMIC SOCIAL CULTURAL EDUCATION AND HEALTH FIELDS AND THROUGH REALIZATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOM FOR ALL WITHOUT DISTINCTION AS TO RACE SEX LANGUAGE OR RELIGION)OF CONDITIONS UNDER WHICH JUSTICE AND RESPECT FOR OBLIGATIONS ARISING FROM TREATIES AND OTHER SOURCES OF INTERNATIONAL LAW CAN BE MAINTAINED.IT IS CLEAR OF COURSE THAT MANY OF THESE ACTIVITIES HIGHLY DESIRABLE AS THEY ARE DO NOT RPT NOT FALL WITH DOMAIN OF 6TH CTTEE.IT IS EQUALLY CLEAR HOWEVER THAT CERTAIN AREAS OF INTERNATIONAL LAW ARE AS STATED IN THIS RESOLUTION IN NEED OF CLARIFICATION AND PROGRESSIVE DEVELOPMENT IF LAW IS TO MAKE A FULLER CONTRIBUTION TO SOCIAL PROGRESS BETTER STANDARDS OF LIFE AND FRIENDLY RELATIONS AND COOPERATION AMONG STATES.THIS INCREASINGLY COMPELLING

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NEED IS CLOSELY RELATED TO EMERGENCE OF MANY NEW STATES WHO ARE IN A POSITION AS STATED IN RESOLUTION TO MAKE SUBSTANTIAL CONTRIBUTIONS TO PROGRESSIVE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW. NEW NATIONS EMERGE INTO AN ALREADY EXISTING SOCIAL POLITICAL AND ECONOMIC ORDER BASED ON MANY WELL SETTLED RULES AND PRINCIPLES OF CONDUCT BETWEEN NATIONS IN THESE SEVERAL SPHERES. IT IS NOT RPT NOT ENOUGH HOWEVER TO SAY TO SUCH NATIONS THAT THESE RULES AND PRINCIPLES WHICH UNTIL NOW YOU HAVE HAD LITTLE OPPORTUNITY TO HELP FORMULATE ARE BECAUSE THEY ARE WELL FOUNDED NEVERTHELESS SETTLED FOR ALL TIME.

RULE OF LAW.

WHILE RULE OF LAW IS BASED AND PRODUCT OF STABILITY IT IS NOT RPT NOT AND CANNOT RPT NOT EVER BE MERELY AN AFFIRMATION OF STATUS QUO. THOSE NATIONS FAMILIAR WITH COMMON LAW PROCESS NEED NOT RPT NOT BE REMINDED THAT ITS BEST CHARACTERISTIC IS ITS FLEXIBILITY AND ITS ADAPTABILITY TO CHANGING CONDITIONS. IF INTERNATIONAL LAW IS ALSO SEEN IN THIS LIGHT IT IS READILY APPARENT THAT RULE OF LAW CANNOT RPT NOT BE AN AFFIRMATION OF STATUS QUO BUT IS RATHER ANTITHESIS OF IT. RULE OF LAW REPRESENTS THEREFORE AT ONCE A DILEMA AND A PARADOX SINCE WHILE IT MUST BE FLEXIBLE IT CAN ONLY BE EFFECTIVE IF IT IS PRODUCTIVE OF AN ORDERLY REGULATION OF CONDUCT AMONGST NATIONS. HENCE INTIMATE RELATIONSHIP BETWEEN RULE OF LAW AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW.

IMPORTANCE WHICH MY GOVT ATTACHES TO THIS CONCEPT OF RULE OF LAW IN INTERNATIONAL AFFAIRS CAN BE CLEARLY SEEN FROM FOLLOWING EXCERPTS FROM AN ADDRESS GIVEN BY RT. HONOURABLE PRIME MINISTER OF CDA MR JOHN G DIEFENBAKER TO A RECENT ANNUAL MTG OF CDN BAR ASSOCIATION IN VANCOUVER BC. QUOTE:

THIS MOMENT OF HISTORY PRESENTS A POINT OF DEPARTURE TO A NEW EPOCH AND POSSIBLY A POINT OF NO RPT NO RETURN. AS NEW FORCES ARE UNLEASHED WHICH MEAN EITHER WORLD DESTRUCTION OR REALIZATION OF MANS IDEALS AND LONGINGS INTERNATIONAL COMMUNITY OF NATIONS IS PRESENTED WITH A

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CHOICE DIRECT AND SIMPLE WHICH CAN NO RPT NO LONGER BE POSTPONED.IT IS A CHOICE FUNDAMENTAL TO SOCIETY ITSELF AND EVEN TO SURVIVAL OF MANKIND.IT IS CHOICE BETWEEN HIGHWAY OF RULE OF LAW AND THAT UNCERTAIN PATH WHICH HAS NO RPT NO LAWS TO GUIDE OR CONTROL SELFISH AND ARBITRARY WILLS OF MEN OR TO RESOLVE CONFLICTS WHICH BESET THEM. FUTURE FOR WHICH MANKIND STRIVES CAN BE ATTAINED ONLY IN PEACE THROUGH LAW EACH BEING FUNCTION AND PRODUCT OF OTHER.

QUOTE IN DOMESTIC LEGAL SYSTEM OF STATES IT IS FUNCTION OF RULE OF LAW AND COURTS WHICH APPLY IT TO REGULATE CONDUCT BETWEEN MAN AND MAN--BY PROCLAIMING WHAT IS PERMISSIBLE AND WHAT IS NOT RPT NOT BY PRESCRIBING PRINCIPLES OR NORMS OF HUMAN BEHAVIIOUR AND THUS PREVENTING DISPUTES FROM ARISING AND BY ADJUDICATING ON AND SETTLING CONFLICTS WHEN THEY ARISE.

QUOTE IN LARGER SPHERE OF CONDUCT AND RELATIONS BETWEEN STATE AND STATE CREATION AND INTERPRETATION OF LAW MUST REGULATE RELATIONS BETWEEN STATES NOT RPT NOT BY ANY ONE OR SEVERAL STATES BUT BY ALL STATES IN COMMON CONSENSUS AND WILL.

QUOTE APPLICATION OF RULE OF LAW INTERNATIONALLY IS FUNDAMENTAL BASIS AND ASSURANCE OF PEACE AND ONE OF MOST CARDINAL MSGS WHICH LAWYERS THROUGHOUT WORLD MUST CARRY TO MANKIND IS THAT RULE OF LAW IS SYNONYMOUS WITH PEACE.

QUOTE FORWARD STEPS HAVE BEEN TAKEN TOWARDS THIS OBJECTIVE FOR MANY GENERATIONS AND IN THIS CENTURY ONE OF SIGNIFICANT YET UNDRAMATIC DEVELOPMENTS IN RELATIONS OF STATE AND STATE HAS BEEN EVOLUTION OF RULE OF LAW IN INTERNATIONAL SPHERE AS FORMULATED AND LAID DOWN BY INTERNATIONAL COURT OF JUSTICE AND ITS PREDECESSOR PERM COURT OF JUSTICE.END OF QUOTE.

WITH THESE GENERAL CONSIDERATIONS IN MIND DRAFT RESOLUTION OF WHICH MY DEL HAS HONOUR TO BE A COSPONSOR BEGINS IN ITS FIRST OPERATIVE PARA BY MAKING A CLEAR AFFIRMATION THAT RULE OF LAW IS ESSENTIAL FOR ACHIEVEMENT OF PURPOSES OF UN PARTICULARLY DEVELOPMENT OF FRIENDLY RELATIONS AND COOPERATION AMONG STATES BASED ON RESPECT

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FOR PRINCIPLES SET FORTH IN CHARTER OF EQUAL RIGHTS AND SELF-DETERMINATION OF PEOPLES AND OF SOVEREIGN EQUALITY OF ALL MEMBER STATES.

SECOND OPERATIVE PARA MAKES CLEAR CUT AFFIRMATION OF CHARTER AS FUNDAMENTAL STATEMENT OF PRINCIPLES OF INTERNATIONAL LAW GOVERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATESNOTABLY OBLIGATION TO RESPECT TERRITORIAL INTEGRITY AND POLITICAL INDEPENDENCE OF STATES AND OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS:WILL LEAVE IT TO MY COSPONSORS TO DEVELOP THIS THEME MORE FULLY BUT I SHOULD LIKE IF I MAY TO INDICATE IMPORTANCE WHICH MY GOVT ATTACHES TO PEACEFUL SETTLEMENT OF DISPUTES BY FOLLOWING EXCERPTS FROM PREVIOUSLY MENTIONED ADDRESS BY PRIME MINISTER OF CDA.

QUOTE HISTORY OF INTERNATONAL ARBITRATION AND OF PACIFIC SETTLEMENT OF DISPUTES IN THIS CENTURY HAS SHOWN THAT IF A WORLD ORDER WITH RULE OF LAW AS ITS BASE IS TO BE BROUGHT INTO BEING THERE MUST BE SOMETHING MORE IN EXISTENCE THAN MACHINERY FOR SETTLING INTERNATIONAL DISPUTES.

QUOTE 15 JUDGES OF INTERNATIONAL COURT HAVE BEEN MEN OF CAPACITY AND ABILITY BUT ONLY 30 CONTENTIOUS CASES HAVE BEEN SUBMITTED TO COURT SEVERAL OF WHICH WERE STRICKEN FROM ITS LIST FOR LACK OF JURISDICTION AND IN ADDITION 10 ADVISORY OPINIONS HAVE BEEN GIVEN.

QUOTE 85 STATES ARE PARTIES TO STATUTE OF INTERNATIONAL COURT OF WHICH 38 STATES HAVE ACCEPTED COMPULSORY JURISDICTION OF COURT.OF THESE 13 HAVE ACCEPTED UNCONDITIONALLY OR SUBJECT ONLY TO CONDITION OF RECIPROCITY;9 HAVE ACCEPTED SUBJECT ONLY TO RECIPROCITY AND WITH RESPECT TO THOSE DISPUTES WHICH AROSE AFTER DECLARATION CAME INTO BEING;16 STATES HAVE MORE RESTRICTIVE CONDITIONS.

QUOTE JURISDICTION IS KEY SINE QUA NON FOR EXISTENCE OF UNIVERSAL RULE OF LAW--AND BY THAT I MEAN COMPULSORY JURISDICTION.FOR THIS REASON GOAL OF ALL PEACE-LOVING STATES SHOULD BE DIRECTED TO BRING ABOUT ACCEPTANCE OF COMPULSORY JURISDICTION OF INTERNATIONAL COURT OF JUSTICE BY MEMBERS OF INTERNATIONAL COMMUNITY OF NATIONS AS A WHOLE.

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QUOTE COURT AS JUDICIAL ARM OF UN NEEDS TO HAVE OPPORTUNITY TO PLAY A LARGER AND MORE DYNAMIC ROLE.WHAT I WISH TO EMPHASIZE IS THAT ANYTHING WHICH INTERNATIONAL COMMUNITY OF NATIONS DOES TO STRENGTHEN INTERNATIONAL COURT OF JUSTICE WILL STRENGTHEN RULE OF LAW ITSELF AND AS A PRELIMINARY STEP UNGA OF UN MIGHT WELL GIVE CONSIDERATION TO A COMPREHENSIVE STUDY OF WIDER USE OF COURT BY ALL MEMBER STATES.END OF QUOTE:

IMPLEMENTING PROVISIONS

RETURNING AGAIN TO RESOLUTION PARAS 3,4 AND 5 GO ON TO SPELL OUT MEANS WHEREBY 6TH CTTEE MIGHT ATTEMPT TO DEVELOP AND CODIFY THESE TWO CARDINAL PRINCIPLES THROUGH ENSCRIBING THEM AS SEPARATE TOPICS ON AGENDA OF 18TH SESSION AND REQUESTING SECGEN TO INVITE MEMBER STATES TO SUBMIT COMMENTS CONCERNING THESE TOPICS AND TO COMMUNICATE THEM TO MEMBER STATES PRIOR TO 18TH SESSION.

SUMMARY.

IN SUMMARY IT CAN BE SEEN THAT DRAFT RESOLUTION L505 ATTEMPTS TO CONFINE TERMS OF REF OF THIS CTTEE TO WORKABLE DIMENSIONS AND TO POSTULATE A CLEAR CUT COURSE OF ACTION SUSCEPTIBLE OF CONCRETE AND POSITIVE RESULTS NAMELY STUDY OF PRINCIPLES OF OBLIGATION TO RESPECT TERRITORIAL INTEGRITY AND POLITICAL INDEPENDENCE OF STATES AND OF OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS.IT IS EARNEST HOPE OF COSPONSORS OF THIS RESOLUTION THAT THESE COURSES OF ACTION WILL COMMEND THEMSELVES TO MEMBERS OF THIS CTTEE.

I SHOULD LIKE IF I MAY TO CONCLUDE WITH ON FUTHER QUOTATION FROM SPEECH BY RT HONOURABLE PRIME MINISTER OF CDA JOHN G DIEFENBAKER WHICH SUMMARIZES APPROACH OF CDN DEL OF THIS WHOLE QUESTION:QUOTE IN STABILIZING INFLUENCE OF LAW AND IN MAINTENANCE OF SPIRITUAL THINGS OF FREEDOM PEACE WITH JUSTICE WILL BE ATTAINED.IN STRICT REGARD BY ALL NATIONS TO INTERNATIONAL OBLIGATIONS AND IN A MUTUAL DESIRE TO COOPERATE BY ALL NATIONS MANKIND WILL BE ABLE TO TAKE FIRST FALTERING STEPS TO DISARMAMENT AND TO ULTIMATE PEACE.

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QUOTE THERE WILL BE THOSE WHO WILL CONTEND THAT BLUEPRINTS FOR PEACE HAVE BEEN DRAWN IN PAST AND HAVE FAILED.THEY WILL TELL YOU THAT IN 115 YEARS THERE HAVE BEEN 73 WARS--THAT IN 3 CENTURIES THERE HAS BEEN A WORLD WAR EVERY 23 YEARS.ALL THESE THINGS ARE TRUE. PACTS IN THEMSELVES ARE NOT RPT NOT SUFFICIENT AND WILL ONLY SUCCEED WHEN JUSTICE UNDER LAW AND PACTS ARE BUILDED TOGETHER.
QUOTE BY UPHOLDING SANCTITY OF RULE OF LAW BY PROMOTING RESPECT FOR LAW BY VIGOROUSLY DOING ALL WE CAN TO ACHIEVE AND MAINTAIN FREEDOM UNDER LAW LAWYERS WILL BE CONTRIBUTING TO REALIZATION OF NEW ORDER WHERE PEACE AND RULE OF LAW ARE INEXTRICABLY LINKED WHERE PEACE IS SECURED THROUGH LAW AND WHERE LAW ILL BECOME TRUE AND FINAL SECURITY FOR ALL MANKIND.END OF QUOTE.

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TO: Mr Jungalone
OCT 30 Recd
REGISTRY

5475-AX-40
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FM CANDELNY OCT29/62 CONFD

TO EXTERNAL 1988 PRIORITY

REF OURTELS 1945 AND 1955 OF OCT26

17TH UNGA: SIXTH CTTEE ITEM 74 ILC REPORT:REOPENING OF LEAGUE CONVENTIONS

AMENDED RESOLUTION REFERRED TO IN OUR REFTEL WAS YESTERDAY DEBATED BY 15 SPEAKERS,ALTHOUGH CONSIDERABLE SUPPORT WAS VOICED FOR IT TWO CRITICISMS WERE MADE BY SEVERAL DELS(A) ITALIAN AUSTRIAN AND CHILEAN REPS WHILE IN FAVOUR OF PURPOSES OF RESOLUTION DOUBTED WHETHER LACK OF RESPONSE WITHIN ONE YEAR BY MAJORITY OF PARTIES TO LEAGUE CONVENTION COULD BE LEGALLY EFFECTIVE AS ACCEPTANCE OF ACCESSION. ITALIAN REPIINFORMALLY SUGGESTED SUBSTITUTING QUOTE CONSENT UNQUOTE FOR QUOTE OBJECT UNQUOTE OPERATIVE PARA ONE AND SIMILAR CHANGES IN PARA2;(B)HUNGARY AND POLAND WHILE ALSO SUPPORTING PURPOSES OF RESOLUTION WANTED TO WIDEN IT TO INCLUDE QUOTE ALL STATES UNQUOTE REGARDLESS OF UN MEMBERSHIP. GHANA REP AS COSPONSOR FOUND HIMSELF OBLIGED TO EXPLAIN THAT WHILE FIRMLY IN FAVOUR OF QUOTE ALL STATES UNQUOTE SOLUTION HE CONSIDERED IT INAPPLICABLE TO THIS SITUATION ON BASIS OF PARA10 ILC REPORT. AT SUGGESTION OF UAR REP LEGAL COUNSEL OF SECRETARIAT WILL PREPARE PAPER OUTLINING PARTICULARS OF CONVENTIONS IN QUESTION AND DEBATE ON THIS ITEM WILL CONTINUE WHEN PAPER IS PREPARED.

Refer } Mr Cochrane
Mr Scott
Mr Copithorne
UN Sec & file

Hcl
31/10/62

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TO: Mr Kingstone
OCT 26 Recd
REGISTRY

ACTION

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FM CANDELNY OCT26/62 CONFD

TO EXTERNAL 1945 PRIORITY

17TH UNGA:6TH CTTEE-ILC REPORT ITEM 75

FOLLOWING RESOLUTION(A/C.6L.504)WAS TABLED THIS MORNING BY AUSTRALIA GHANA AND ISRAEL:QUOTE:

UNGA,

NOTING PROBLEM RAISED IN REPORT OF ILC ON WORK OF ITS 14TH SESSION (A/5209)RELATING TO ACCESSION OF NEW STATES TO GENERAL MULTILATERAL TREATIES CONCLUDED IN PAST,

DESIROUS OF FACILITATING PARTICIPATION BY MEMBERS OF UN AND MEMBERS OF SPECIALIZED AGENCIES IN CERTAIN CONVENTIONS CONCLUDED UNDER AUSPICES OF LEAGUE OF NATIONS FOR WHICH SECGEN EXERCISES DEPOSITARY FUNCTIONS IN ACCORDANCE WITH UNGA RESOLUTION 24(I)OF FEB12/46,

1. REQUESTS SECGEN TO ASK PARTIES TO CONVENTIONS LISTED IN ANNEX (THIS ANNEX CORRESPONDS TO LIST CONTAINED IN DOCU A/C.6L.498)TO THIS RESOLUTION TO STATE WITHIN A PERIOD OF TWELVE MONTHS FROM DATE OF INQUIRY WHETHER THEY OBJECT TO OPENING OF THOSE OF CONVENTIONS TO WHICH THEY ARE PARTIES FOR ACCESSION BY ANY STATE MEMBER OF UN OR MEMBER OF ANY SPECIALIZED AGENCY;

2. AUTHORIZES SECGEN IF MAJORITY OF PARTIES TO A CONVENTION HAVE NOT RPT NOT WITHIN PERIOD REFERRED TO IN PARA(1)OBJECTED TO OPENING THAT CONVENTION TO ACCESSION TO RECEIVE IN DEPOSIT INSTRUMENTS OF ACCESSION THERETO WHICH ARE SUBMITTED BY ANY STATE MEMBER OF UN OR MEMBER OF ANY SPECIALIZED AGENCY;

3. RECOMMENDS THAT ALL STATES PARTIES TO CONVENTIONS LISTED IN ANNEX OF THIS RESOLUTION RECOGNIZE LEGAL EFFECT OF INSTRUMENTS OF ACCESSION DEPOSITED IN ACCORDANCE WITH PARA(2);

4. FURTHER RECOMMENDS THAT OTHER DEPOSITARIES OF GENERAL MULTILATERAL CONVENTIONS TO WHICH NEW STATES WISH TO BECOME PARTIES BUT FIND IT IMPOSSIBLE TO DO SO BECAUSE OF RESTRICTIVE PARTICIPATION CLAUSES SHOULD TAKE STEPS TO CONSULT PARTIES TO THOSE CONVENTIONS WITH A

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VIEW TO OPENING THEM TO ACCESSION BY SUCH NEW/STATES.TEXT ENDS.

2.OUR PRELIMINARY REACTION(AND THAT OF OUR USA AND BRIT COLLEAGUES) IS THAT UP TO AND INCLUDING THIRD PARA RESOLUTION PRESENTS NO RPT NO DIFFICULTY.WE ARE PUZZLED HOWEVER BY PARA 4 INCLUDED AT INSTANCE OF SECRETARIAT WHICH SEEMS TO RAISE QUOTE ALL STATES UNQUOTE QUESTION QUITE GRATUITOUSLY.

3.WE HAVE SUGGESTED INFORMALLY TO COSPONSORS THAT THEY CONSIDER FOLLOWING AMENDMENTS TO PARA 4 WHICH MIGHT MAKE RESOLUTION MORE ACCEPTABLE:(A)INSERT IN LINE 2 PARA 4 AFTER QUOTE NEW UNQUOTE WORD QUOTE MEMBER UNQUOTE AND AFTER QUOTE STATES UNQUOTE WORDS QUOTE OF UN UNQUOTE;(B)INSERT IN LAST LINE PARA 4 AFTER QUOTE NEW UNQUOTE WORD QUOTE MEMBER UNQUOTE.AUSTRALIAN AND ISRAELI SPONSORS ARE AGREEABLE TO CHANGE;GHANAIAN REP WOULD PREFER NOT RPT NOT TO MAKE THEM UNLESS ALL STATES BECOMES AN ISSUE.IT SEEMS LIKELY RESOLUTION WILL REACH A VOTE ON MON.WE SHALL CONSULT CLOSELY WITH OUR FRIENDS ON THIS QUESTION AND KEEP YOU INFORMED.

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FM CANDELNY OCT26/62 CONFD

TO EXTERNAL 1955 PRIORITY

REF OURTEL 1945 OCT26

17TH UNGA: SIXTH CTTEE-ITEM 75-ILC REPORT: RE OPENING OF MULTIL-
ATERAL TREATIES RESOLUTION

PARA 4 OF DRAFT RESOLUTION REFERRED TO IN REFTEL HAS BEEN WITH-
DRAWN AND IS NOW BEING RE-DRAFTED BY COSPONSORS.

TO: Pol Division
OCT 26 Recd
REGISTRY

5475-AX-40
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L TO: Mr Kingstone OCT ... REGISTRY

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FM CANDELNY OCT26/62 CONFD

TO EXTERNAL 1953 PRIORITY

REF OURTEL 1901 OCT23

17TH UNGA:SIXTH CTTEE-ITEM 75:ILC REPORT

COMPROMISE RESOLUTION REFERRED TO IN OUR REFTEL PASSED TODAY 74 VOTES IN FAVOUR NONE AGAINST.

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Legal/HCKingstone/no

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Mr. Cadieux

FROM: Legal Division

REFERENCE: Canadian Delegation (New York) telegram 1940 of October 25, 1962

SUBJECT: UNGA 6th Committee Item 75 - ILC Report

Security: CONFIDENTIAL

Date: October 26, 1962

File No. 5475-AX-5-40

The proposed compromise resolution set out in the attached telegram appears to be a resolution which the Canadian Delegation can support and the Canadian Delegation has, in fact, made this assumption (see first paragraph of the above mentioned telegram) indicating that it will support the resolution unless it hears from us to the contrary. It is proposed therefore, if you agree, to allow the Canadian Delegation to proceed on this basis.

yes/C

Legal Division

CIRCULATION

U. N.

Mr Ritchie
To see also

Ext. 326 (6/56)

26.10.74(US)

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FM CANDELNY OCT25/62 CONFD

TO EXTERNAL 1940 PRIORITY

REF 1901 OCT23

UNGA 6TH CTTEE ITEM 74 ILC REPORT

THE TWO GROUPS OF COSPONSORS TODAY AGREED AFTER TWO DAYS OF NEGOTIATIONS ON THE WORDING OF A COMPROMISE RES WHICH WILL BE SPONSORED BY AUSTRALIA AUSTRIA CZECHOSLOVAKIA HUNGARY INDIA INDONESIA ISRAEL JAPAN MONGOLIA POLAND TURKEY UK UKRANIAN SSR AND USA.

WE ASSUME THAT IN THESE CIRCUMSTANCES THERE WILL BE NORPT NO OBJECTION TO OUR SUPPORTING THE RES IN SPITE OF CERTAIN IMPERFECTIONS IN IT.TEXT IS AS FOLLOWS:

UNGA

HAVING CONSIDERED THE REPORT OF THE INTERNATIONAL LAW COMMISSION COVERING THE WORK OF ITS FOURTEENTH SESSION,

RECALLING RES 1686(XVI)DEC18 1961 BY WHICH THEUNGA RECOMMENDED THAT INTERNATIONAL LAW COMMISSION CONSIDER ITS PROGRESS OF FUTURE WORK AND REPORT ITS CONCLUSIONS TO UNGA

EMPHASIZING THE NEED FOR THE FURTHER CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW WITH A VIEW TO MAKING IT A MORE EFFECTIVE MEANS OF IMPLEMENTING THE PURPOSES AND PRINCIPLES SET FORTH IN ARTS 1 AND 2 OF THE CHARTER OF THE UN,

NOTING THAT AS REGARDS STATE RESPONSIBILITY AND SUCCESSION OF STATES AND GOVTS THE COMMISSION IN ORDER TO EXPEDITE ITS WORK HAS ESTABLISHED TWO SUB-CTTEES TO MEET IN GENEVA IN JAN 1963 AND TO REPORT TO THE COMMISSION AT ITS NEXT SESSION,

BEARING IN MIND THAT THE SUB-CTTEE ARE TO STUDY THE SCOPE OF AND APPROACH TO THESE TOPICS AND THAT THE WORK OF THE SUB-CTTEE ON STATE RESPONSIBILITY IS TO BE DEVOTED PRIMARILY TO THE GENERAL ASPECTS OF THAT TOPIC,

1.TAKES NOTE OF THE REPORT OF THE INTERNATIONAL LAW COMMISSION COVERING THE WORK OF ITS FOURTEENTH SESSION

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2. EXPRESSES ITS APPRECIATION TO THE COMMISSION FOR THE WORK ACCOMPLISHED AT ITS FOURTEENTH SESSION ESPECIALLY WITH REGARD TO THE LAW OF TREATIES;

3. RECOMMENDS THAT THE COMMISSION:

(A) CONTINUE THE WORK OF CODIFICATION AND PROGRESSIVE DEVELOPMENT OF THE LAW OF TREATIES TAKING INTO ACCOUNT THE VIEWS EXPRESSED AT THE SEVENTEENTH SESSION OF THE UNGA AND THE COMMENTS WHICH MAY BE SUBMITTED BY GOVTS IN ORDER THAT THE LAW OF TREATIES MAY BE PLACED UPON THE WIDEST AND MOST SECURE FOUNDATIONS;

(B) CONTINUE ITS WORK ON STATE RESPONSIBILITY TAKING INTO ACCOUNT THE VIEWS EXPRESSED AT THE SEVENTEENTH SESSION OF THE UNGA AND THE REPORT OF THE SUB-CTTEE AND GIVING DUE CONSIDERATION TO THE PURPOSES AND PRINCIPLES ENSHRINED IN THE CHARTER OF THE UN;

(C) CONTINUE ITS WORK ON SECCESSION OF STATES AND GOVTS TAKING INTO ACCOUNT THE VIEWS EXPRESSED AT THE SEVENTEENTH SESSION OF THE UNGA AND THE REPORT OF THE SUB-CTTEE WITH APPROPRIATE REF TO THE VIEWS OF STATES WHICH HAVE ACHIEVED INDEPENDENCE SINCE THE SECOND WORLD WAR;

4. REQUESTS THE SECGEN TO FORWARD TO THE INTERNATIONAL LAS COMMISSION THE RECORDS OF THE DISCUSSION AT THE SEVENTEENTH SESSION OF THE UNGA ON THE REPORT OF THE COMMISSION;

5. FURTHER REQUESTS THE SECGEN TO PROVIDE THE NECESSARY TECHNICAL SERVICES TO THE COMMISSION REFERRED TO IN PARA 84 AND 85 OF ITS REPORT.

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FM CANDELNY OCT25/62 CONFD

cc: 5475-AX-8-40

TO EXTERNAL 1940 PRIORITY

AX-36-40

REF 1901 OCT23

AX-39-40

UNGA 6TH CTTEE ITEM 73 ILC REPORT

THE TWO GROUPS OF COSPONSORS TODAY AGREED AFTER TWO DAYS OF NEGOTIATIONS ON THE WORDING OF A COMPROMISE RES WHICH WILL BE SPONSORED BY AUSTRALIA AUSTRIA CZECHOSLOVAKIA HUNGARY INDIA INDONESIA ISRAEL JAPAN MONGOLIA POLAND TURKEY UK UKRANIAN SSR AND USA. WE ASSUME THAT IN THESE CIRCUMSTANCES THERE WILL BE NORPT NO OBJECTION TO OUR SUPPORTING THE RES IN SPITE OF CERTAIN IMPERFECTIONS IN IT.TEXT IS AS FOLLOWS:

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UNGA

HAVING CONSIDERED THE REPORT OF THE INTERNATIONAL LAW COMMISSION COVERING THE WORK OF ITS FOURTEENTH SESSION,

RECALLING RES 1686(XVI)DEC18 1961 BY WHICH THEUNGA RECOMMENDED THAT INTERNATIONAL LAW COMMISSION CONSIDER ITS PROGRESS OF FUTURE WORK AND REPORT ITS CONCLUSIONS TO UNGA

EMPHASIZING THE NEED FOR THE FURTHER CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW WITH A VIEW TO MAKING IT A MORE EFFECTIVE MEANS OF IMPLEMENTING THE PURPOSES AND PRINCIPLES SET FORTH IN ARTS 1 AND 2 OF THE CHARTER OF THE UN,

NOTING THAT AS REGARDS STATE RESPONSIBILITY AND SUCCESSION OF STATES AND GOVTS THE COMMISSION IN ORDER TO EXPEDITE ITS WORK HAS ESTABLISHED TWO SUB-CTTEES TO MEET IN GENEVA IN JAN 1963 AND TO REPORT TO THE COMMISSION AT ITS NEXT SESSION,

BEARING IN MIND THAT THE SUB-CTTEE ARE TO STUDY THE SCOPE OF AND APPROACH TO THESE TOPICS AND THAT THE WORK OF THE SUB-CTTEE ON STATE RESPONSIBILITY IS TO BE DEVOTED PRIMARILY TO THE GENERAL ASPECTS OF THAT TOPIC,

1.TAKES NOTE OF THE REPORT OF THE INTERNATIONAL LAW COMMISSION COVERING THE WORK OF ITS FOURTEENTH SESSION

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2. EXPRESSES ITS APPRECIATION TO THE COMMISSION FOR THE WORK ACCOMPLISHED AT ITS FOURTEENTH SESSION ESPECIALLY WITH REGARD TO THE LAW OF TREATIES;

3. RECOMMENDS THAT THE COMMISSION:

(A)CONTINUE THE WORK OF CODIFICATION AND PROGRESSIVE DEVELOPMENT OF THE LAW OF TREATIES TAKING INTO ACCOUNT THE VIEWS EXPRESSED AT THE SEVENTEENTH SESSION OF THE UNGA AND THE COMMENTS WHICH MAY BE SUBMITTED BY GOVTS IN ORDER THAT THE LAW OF TREATIES MAY BE PLACED UPON THE WIDEST AND MOST SECURE FOUNDATIONS;

(B)CONTINUE ITS WORK ON STATE RESPONSIBILITY TAKING INTO ACCOUNT THE VIEWS EXPRESSED AT THE SEVENTEENTH SESSION OF THE UNGA AND THE REPORT OF THE SUB-CTTEE AND GIVING DUE CONSIDERATION TO THE PURPOSES AND PRINCIPLES ENSHRINED IN THE CHARTER OF THE UN;

(C)CONTINUE ITS WORK ON SECCESSION OF STATES AND GOVTS TAKING INTO ACCOUNT THE VIEWS EXPRESSED AT THE SEVENTEENTH SESSION OF THE UNGA AND THE REPORT OF THE SUB-CTTEE WITH APPROPRIATE REF TO THE VIEWS OF STATES WHICH HAVE ACHIEVED INDEPENDENCE SINCE THE SECOND WORLD WAR;

4. REQUESTS THE SECGEN TO FORWARD TO THE INTERNATIONAL LAS COMMISSION THE RECORDS OF THE DISCUSSION AT THE SEVENTEENTH SESSION OF THE UNGA ON THE REPORT OF THE COMMISSION;

5. FURTHER REQUESTS THE SECGEN TO PROVIDE THE NECESSARY TECHNICAL SERVICES TO THE COMMISSION REFERRED TO IN PARA 84 AND 85 OF ITS REPORT.

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cc. 5475-EW-40

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FM CANDELNY OCT23/62 CONFD

TO EXTERNAL 1901 PRIORITY

REF OURTEL 1841 OCT19

UNGA:6TH CTTEE ITEM 74 ILC REPORT

IT IS THE AGREED ASSESSMENT OF OUR USA AND BRIT COLLEAGUES AND OURSELVES THAT THE DISCUSSIONS IN THE 6TH CTTEE ON THE COMPARATIVELY INNOCUOUS QUESTION OF THE INTL LAW COMMISSION REPORT ILLUSTRATE CLEARLY THE EXTENT TO WHICH BOTH THE SOVIET BLOC AND CERTAIN OF THE UNCOMMITTED NATIONS(IN PARTICULAR THE INDONESIAN AND GHANAIAN DELS)ARE PREPARED TO TREAT INTL LAW AS AN INSTRUMENT OF POLICY.MOROVER BY COUCHING THEIR SOCIAL AND POLITICAL THEORIES IN LEGAL TERMS AND EXPOUNDING THEM IN LEGAL FORUMS THEY ARE ACHIEVING SOME SUCCESS IN ADDING TO AND ALTERING THE BASE OF INTL LAW.THE BEST EXAMPLE WOULD SEEM TO BE THE QUESTION OF STATE RESPONSIBILITY WHICH THROUGH THE DETERMINED EFFORTS OF THE SOVIET BLOC AND SOME AFROASIAN NATIONS IS NOW GENERALLY AGREED TO ENCOMPASS THE BROAD QUESTIONS OF STATE TO STATE RESPONSIBILITY RATHER THAN PROTECTION OF THE RIGHTS O ALIENS,(THE MEANING GENERALLY ATTACHED TO THE TERM AT THE TIME WHEN THE UNGA AGREED TO REFER THE QUESTION TO THE INTL LAW COMMISSION.)

2.THE PRESENT THRUST APPEARS TO BE ON THE QUESTION OF QUOTE UNJUST TREATIES UNQUOTE WHICH IT IS ALLEGED SHOULD BE DECLARED ILLEGAL BY THE ILC IN ITS DRAFT ARTS ON THE LAW OF TREATIES.IT MAY BE OF SOME RELEVANCE FOR INSTANCE THAT PREMIERS CASTRO AND BEN BELLA EXPRESSED CONFIDENCE THAT USA RIGHTS TO GUANTANAMO NAVAL BASE WOULD BE ENDED NOT RPT NOT BY FORCE BUT BY INTL LAW.SIMILARLY THE USA TREATY WITH PANAMA HAS BEEN REFERRED TO BY THE USSR REP IN THE SEIXTH CTTEE AS AN UNJUST TREATY AND THE PANAMANIAN REP SPEAKING LATER MADE A HEATED ATTACK ON UNJUST TREATIES AS SUCH WITHOUT BEING MORE SPECIFIC.AS ANOTHER ILLUSTRATION AT THE NY UNIVERSITY

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SEMINAR ON FEDERALISM LAST WEEKEND THE NIGERIAN JURIST GODFREY AMACHREE(ATTACHED TO CONGO OPERATION UN)RAISED THE QUESTION OF UNJUST TREATIES IN REFERRING TO AN EXCHANGE OF LETS QUOTE OVER OUR HEADS UNQUOTE RELATING TO THE CONTINUANCE IN FORCE OF CERTAIN TREATIES CONCLUDED BY THE BRITS(SUCH AS ONE FORBIDDING THE SALE OF LIQUOR TO NIGERIANS)AND IN ENQUIRING AS TO FRENCH AND USA TREATY FISHING RIGHTS IN CDN WATERS.THE STRONG EMPHASIS BEING GIVEN IN VARIOUS QUARTERS TO THE QUESTION OF UNJUST TREATIES SUGGESTS THAT IT MAY PROVIDE MUCH OF THE BASIS FOR FUTURE ATTACKS ON NEO COLONIALISM;AS USED BY SOVIET BLOC SPEAKERS THE TERM WOULD SEEM TO COVER CONCESSION AGREEMENTS.IT MIGHT BE APPLIED ALSO TO THE BERLIN AGREEMENTS.

3.WITH THESE CONSIDERATIONS IN MIND WESTERN REPS RESPONDED VIGOROUSLY IN YESTERDAYS SIXTH CTTEE DEBATE TO ATTEMPTS TO HAVE A SEEMINGLY INNOCUOUS RES PASSED WHICH WOULD IN FACT APPEAR TO DIRECT THE ILC TO WRITE THE SOVIET VIEWS ON QUOTE UNJUST TREATIES UNQUOTE INTO THE DRAFT ARTS ON TREATIES STUDY PEACEFUL COEXISTENCE WHEN CONSIDERING STATE RESPONSIBILITY AND UNDULY EMPHASIZE THE VIEWS OF NEW STATES ON QUESTIONS OF STATE SUCCESSION.

4.THE UK REP MADE A HARDHITTING STATEMENT IMPRESSIVE BOTH IN ITS FRANKNESS AND ITS SCHOLARLY APPROACH TO THE QUESTION.(WE WILL BE FORWARDING A COPY BY BAG).THE NORWEGIAN REP MADE AN EQUALLY FORTHRIGHT STATEMENT AND WAS SCATHING IN HIS TECHNICAL CRITICISMS OF THE GHANAIAN RES.THE THAI REP WENT EVEN FURTHER.(PERHAPS TOO FAR) IN CRITICIZING THE RES AND THE MOTIVES BEHIND IT.THE CONSIDERABLE IMBALANCE IN THE RECORDS OF THE SIXTH CTTEE HAS THEREFORE BEEN RIGHTED TO A CONSIDERABLE EXTENT.

5.TODAYS DISCUSSIONS CONTINUED IN A SOMEWHAT LOWER KEY AND CONCLUDED WITH AN AGREEMENT BY BOTH GROUPS OF CO-SPONSORS(NOW INCLUDING INDIA IN CASE OF RES 501)TO MEET TO ATTEMPT TO WORK OUT JOINT RES.CTTEE WILL NOT RPT NOT MEET AGIAIN UNTIL FRI WHEN DEBATE ON

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RES WILL CONTINUE UNLESS AGREEMENT HAS BEEN REACHED.

6. WE HAVE SPOKEN TO BOTH THE USA AND BRIT REPS ALONG THE LINES OUTLINED IN YOURTEL L 138 OF COT18 AND HAVE ALSO HAD MORE GENERAL CONVERSATIONS WITH THE INDIANS AND THE GHANAIANS(EACH OF WHOM HAS TAKEN SOLE CREDIT FOR HAVING ACHIEVED MUCH MORE MODERATE RES THAN HAD BEEN INTENDED BY THE UKRAINE REP)BUT WE ARE LEAVING THE DISCUSSIONS TO THE SPONSORS OF THE TWO COMPETING RESOLUTIONS. IT IS NOT RPT NOT YET CLEAR WHAT KIND OF RES WILL EMERGE BUT THERE IS GOOD REASON TO ASSUME THAT ONE MORE ACCEPTABLE TO THE WESTERN COUNTRIES THAN THAT PROPOSED BY INDONESIA GHANA AND UKRAINE WILL DEVELOP FROM THESE DISCUSIONS. WE HAVE NOT RPT NOT SPOKEN AS YET AND ARE HOPEFUL IT WILL NOT RPT NOT BE NECESSARY TO DO SO.

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cc: 5475-EW-40

L TO: Mr ~~[illegible]~~ BROSSARD OCT 19 Recd REGISTRY

Refer to UN Div. & file. Oct 22/62

FM CANDELNY OCT19/62 CONFD

TO EXTERNAL 1841 PRIORITY

REF YOURTEL L138 OCT18

17TH UNGA 6TH CTTEE-ITEM 74:ILC REPORT

6TH CTTEE ADJOURNED AFTER YESTERDAY AFTERNOONS DISCUSSIONS UNTIL MON OCT22 BUT NOT RPT NOT BEFORE BOTH RES WERE INTRODUCED.INDONESIANS AND GHANAIANS SPOKE IN FAVOUR OF THEIR RES(IN TERMS RATHER CRITICAL OF ILC IN CASE OF INDONESIAN REP)AND TURKEY AND CHINA IN SUPPORT OF AMERICANS RES.

2.GHANAIANS HAVE ALREADY HAD SOME DISCUSSION WITH USA ABOUT POSSIBLE COMPROMISE AND INDICATIONS ARE THAT ONE MAY BE REACHED. (ROSENNE TOLD USA REP THAT HE WOULD RESIGN FROM ILC IF INDONESIAN RES PASSES ALTHOUGH THIS WILL NOT RPT NOT BE STATED IN CTTEE, STORY IS GOING ROUNDS AS AN INDICATION OF ATTITUDE OF MEMBERS OF ILC).USA REACTION TO SUGGESTIONS OUTLINED IN YOUR REFTEL IS THAT THEY ARE HOPEFUL IT WILL NOT RPT NOT BE NECESSARY TO GO THAT FAR IN REACHING COMPROMISE.WE WILL CONTINUE TO CONSULT WITH OTHER DELS ON THIS QUESTION AND WILL KEEP YOU INFORMED OF DEVELOPMENTS.

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Legal/G.Sicotte/hf

CONFIDENTIAL

October 18, 1962

Mr. Beesley phoned today to tell developments further to telegram 1813 and the first change is that they are having in New York a meeting this afternoon in addition to having one Friday. There are three speeches to be made this afternoon and this may mean that they may go on with this topic. Therefore the tempo is faster. There is no reason, he thought, for us to be "in the front" soon on this because some of our friends will likely make some of the points that need to be made and also there is a possibility of a modification to the Resolution which would avoid the necessity of a battle so that we don't need to say anything today but probably ~~yes~~ tomorrow. He wanted to add that irrespective of any agreement that there will be probably pressure within "other" ⊕ delegations to have their own people talk to "right the balance"

He also said that, as we will have noticed, tel 1813 "steers clear of substance" and he didn't know whether it would in fact remain possible to keep it that way in the debate — and what would we think ---

⊕ confirms, it seems, the attitude manifested on the part of some of the delegations in N.Y.'s recent numbered letter

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

DATE	FILE		SECURITY
	5475-40		
OCT18/62	37	37	CONFD

FM: EXTERNAL OTTAWA

NUMBER	PRECEDENCE
L-138	OPIMMEDIATE

TO: CANDELNY

M. CADIEUX

INFO:

Ref.: YOURTEL 1813 OCT17

Subject: 17TH UNGA 6TH CTTEE ILC REPORT

WE AGREE WITH VIEWS EXPRESSED IN YOUREFTEL.

2. OBVIOUSLY ADOPTION OF RESOLUTION ALONG LINES OF RESOLUTION TO BE INTRODUCED BY JAPAN TURKEY AND USA PROPOSING MOSTLY THAT UNGA NOTE REPORT OF ILC AND EXPRESS APPRECIATION FOR WORK DONE WOULD BE THE IDEAL SOLUTION. IT IS ASSUMED THAT EXTENSIVE INTERDELEGATION CONSULTATIONS ARE TAKING PLACE TO DETERMINE WHETHER THIS RESOLUTION CAN COMMAND REQUIRED AMOUNT OF SUPPORT.

3. IF THESE CONSULTATIONS MAKE CLEAR THAT RESOLUTION MORE ALONG THE LINES OF SEPARATE RESOLUTION TO BE INTRODUCED BY GHANA, INDONESIA AND UKRAINE IS LIKELY TO WIN OUT, THEN EVERY EFFORT SHOULD BE MADE TO SECURE AMENDMENTS IN THE FOLLOWING SENSE TO THIS ALTERNATIVE RESOLUTION. (1) PARA 3(A)

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EXT. 18 (REV. 12/61)

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OF THE GHANA RESOLUTION SHOULD BE AMENDED SO AS TO END WITH THE WORDS BEGIN QUOTATION BE PLACED ON THE WIDEST AND MOST SECURE FOUNDATIONS END QUOTATION. THIS IN EFFECT MEANS DROPPING FINAL WORDS OF THIS PARAGRAPH BEGIN QUOTATION BASED ON STRICT RESPECT FOR PRINCIPLES OF SOVEREIGN EQUALITY OF STATES END OF QUOTATION FOR REASON THAT THESE WORDS ONLY REFER TO ONE ASPECT OF THE INTERNATIONAL LAW PRINCIPLES INVOLVED, AN ASPECT UPON WHICH SOVIET BLOC STATES HAVE, OF COURSE, PUT GREAT EMPHASIS. (ii) PARA 3(B) OF THE GHANAIAN RESOLUTION IS NOT ACCEPTABLE AND EFFORTS SHOULD BE MADE TO HAVE IT REPLACED BY A PARA ALONG THE FOLLOWING LINES BEGIN QUOTATION (B) TO CONTINUE TO EXPLORE THE SUBJECT OF STATE RESPONSIBILITY BEGINNING WITH THE GENERAL ASPECTS OF SUBJECT WITH SUCH STUDY TAKING INTO ACCOUNT IN PARTICULAR BASIC PRINCIPLES OF INTERNATIONAL LAW RELATING TO MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY AND FUNDAMENTAL HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS FOR ALL. (iii) PARA 3(C) OF THE GHANAIAN DRAFT SHOULD, IF POSSIBLE, BE CAST IN MORE GENERAL TERMS TO READ AS FOLLOWS BEGIN QUOTATION (C) TO TAKE UP THE SUBJECT OF STATE SUCCESSION AS A MATTER OF PRIORITY END OF QUOTATION. AS AN ALTERNATIVE TO THIS WORDING AN ATTEMPT SHOULD BE MADE TO SECURE SUPPORT FOR A TEXT FOR PARA 3C IN THE FOLLOWING SENSE BEGIN QUOTATION TO TAKE UP THE SUBJECT OF STATE SUCCESSION AS A MATTER OF PRIORITY AND TO TAKE INTO ACCOUNT WHEN ELABORATING ON THE SUBJECT OF STATE SUCCESSION THE EXPERIENCE OF UNITED NATIONS, THE SPECIALISED AGENCIES AND OTHER INTERNATIONAL ORGANIZATIONS IN THIS FIELD END OF QUOTATION. AS YOU POINTED OUT IN YOUREFTEL PARA 3(C), BY REFERENCE TO VIEWS OF NEW STATES, DOES NOT REPEAT NOT TAKE INTO ACCOUNT RECENT ENLARGEMENT OF ILC IN ORDER TO GIVE NEW STATES ADEQUATE REPRESENTATION.

4. IT WOULD ALSO BE DESIRABLE FOR THE GHANAIAN DRAFT

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TO INCLUDE A PROVISION WHICH WOULD HAVE UNGA NOTE WITH APPROVAL THE COMMISSION'S DECISION TO ESTABLISH TWO SUB-COMMITTEES TO ASSIST IT IN CONNECTION WITH ITS WORK ON TOPICS OF STATE RESPONSIBILITY AND SUCCESSION OF STATES AND GOVERNMENTS.

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FM CANDELNY OCT17/62 CONFD

TO EXTERNAL 1813 OPIMMED

ACTION COPY

REF OURLET709 OCT15

17TH UNGA;6TH CTTEE-ILC REPORT

ISSUES MENTIONED REFLET NOW COMING TO HEAD THROUGH INTRODUCTION OF RES BY JAPAN TURKEY AND USA PROPOSING MOSTLY THAT UNGA NOTE REPORT OF ILC AND EXPRESS APPRECIATION FOR WORK DONE AND OF SEPARATE RES BY GHANA INDONESIA AND UKRAINE DOING SIMILARLY BUT GOING ON TO SAY AS FOLLOWS.QUOTE

3.RECOMMENDS INTERNATIONAL LAW COMMISSION:

(A)TO CONTINUE CODIFICATION WORK IN FIELD OF LAW OF TREATIES TAKING INTO ACCOUNT VIEWS EXPRESSED DURING DISCUSSION IN 6TH CTTEE AT 17TH SESSION OF UNGA AS WELL AS COMMENTS WHICH MAY BE SUBMITTED BY GOVTS AND RECENT DEVELOPMENTS IN THIS FIELD IN ORDER THAT LAW OF TREATIES BE PLACED UPON WIDEST AND MOST SECURE FOUNDATIONS BASED ON STRICT RESPECT FOR PRINCIPLES OF SOVEREIGN EQUALITY OF STATES;

(B)TO ADOPT A BROADER APPROACH TO CODIFICATION OF RULES OF STATE RESPONSIBILITY,INCLUDING IN ITS STUDY THOSE GOVERNING RESPONSIBILITY CONSEQUENT UPON VIOLATION OF BASIC PRINCIPLES OF INTERNATIONAL LAW RELATING TO MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY;

(C) TO TAKE INTO ACCOUNT WHEN ELABORATING ON SUBJECT OF STATE SUCCESSION VIEWS OF NEW STATES WHICH HAVE RECENTLY BECOME MEMBERS OF INTERNATIONAL COMMUNITY;

4.REQUESTS SECGEN TO PROVIDE NECESSARY TECHNICAL SERVICES TO COMMISSION,AS REFERRED TO IN PARAS84 AND 85 OF ITS REPORT.UNQUOTE

2.DEBATE ON FOREGOING RES MAY BEGIN AFTERNOON OF FRI(OCT19)AFTER REMAINING THREE SPEECHES CONCLUDE.WE WILL BE CONSULTING WITH OTHER DELS BUT IN MEANTIME IN LIGHT OF MR CADIEUXS MEMBERSHIP ON ILC WE SHOULD BE INTERESTED IN HIS VIEWS ON FOLLOWING VERY PRELIMINARY IDEAS FOR INCORPORATION IN STATEMENT ON THIS ISSUE SHOULD YOU CONSIDER ONE DESIRABLE.

(A)PARA3 AMOUNTS TO INDICATION OF LACK OF CONFIDENCE IN ILC;AND

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(B)IS A NEW DEPARTURE,CONTRARY TO NORMAL PROCEDURES OF 6TH CTTEE,TO ATTEMPT TO TIE HANDS OF ILC TO SUCH AN EXTENT;

(C)PARA3(A)IS MISLEADING IN THAT MANY DELS DID NOT RPT NOT COMMENT ON 29 DRAFT ARTICLES BECAUSE IT IS PREMATURE TO DO SO WHEN THEIR GOVTS COMMENTS ARE BEING AWAITED;

(D)PARA3(B)IS VIRTUALLY MEANINGLESS(IE BROADER THAN WHAT?)AND MOREOVER ATTEMPTS TO GIVE INSTRUCTIONS ON A MATTER WHICH IS IN A SENSE SUB JUDICE(BEING NOW STUDIED BY WORKING SUBCTTEE ON STATE RESPONSIBILITY);AND

(E)PARA3(C)SEEMS PARTICULARLY OPEN TO ATTACK ON BASIS OF POINT(A) ABOVE AND DOES NOT RPT NOT TAKE INTO ACCOUNT RECENT ENLARGEMENT OF ILC MADE IN ORDER TO GIVE NEW STATES ADEQUATE REPRESENATION.

3.IT WOULD BE HELPFUL TO HAVE SOME INDICATION OF YOUR THINKING BY FRI NOON.WE WILL KEEP YOU INFORMED ON VIEWS OF OTHER DELS ON TACTICS AND LIKELY VOTING AS WE LEARN THEM.

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cc on 5475-AX-36-40

cc on 5475-AX-39-40

FM CANDELNY OCT17/62 CONFD

TO EXTERNAL 1813 OPIMMED

REF OURLET709 OCT15

17TH UNGA;6TH CTTEE-ILC REPORT

ISSUES MENTIONED REFLET NOW COMING TO HEAD THROUGH INTRODUCTION OF RES BY JAPAN TURKEY AND USA PROPOSING ~~MOSTLY~~ merely THAT UNGA NOTE REPORT OF ILC AND EXPRESS APPRECIATION FOR WORK DONE AND OF SEPARATE RES BY GHANA INDONESIA AND UKRAINE DOING SIMILARLY BUT GOING ON TO SAY AS FOLLOWS. QUOTE

3. RECOMMENDS INTERNATIONAL LAW COMMISSION:

(A) TO CONTINUE CODIFICATION WORK IN FIELD OF LAW OF TREATIES TAKING INTO ACCOUNT VIEWS EXPRESSED DURING DISCUSSION IN 6TH CTTEE AT 17TH SESSION OF UNGA AS WELL AS COMMENTS WHICH MAY BE SUBMITTED BY GOVTS AND RECENT DEVELOPMENTS IN THIS FIELD IN ORDER THAT LAW OF TREATIES BE PLACED UPON WIDEST AND MOST SECURE FOUNDATIONS BASED ON STRICT RESPECT FOR PRINCIPLES OF SOVEREIGN EQUALITY OF STATES;

(B) TO ADOPT A BROADER APPROACH TO CODIFICATION OF RULES OF STATE RESPONSIBILITY, INCLUDING IN ITS STUDY THOSE GOVERNING RESPONSIBILITY CONSEQUENT UPON VIOLATION OF BASIC PRINCIPLES OF INTERNATIONAL LAW RELATING TO MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY;

(C) TO TAKE INTO ACCOUNT WHEN ELABORATING ON SUBJECT OF STATE SUCCESSION VIEWS OF NEW STATES WHICH HAVE RECENTLY BECOME MEMBERS OF INTERNATIONAL COMMUNITY;

4. REQUESTS SECGEN TO PROVIDE NECESSARY TECHNICAL SERVICES TO COMMISSION, AS REFERRED TO IN PARAS84 AND 85 OF ITS REPORT. UNQUOTE

2. DEBATE ON FOREGOING RES MAY BEGIN AFTERNOON OF FRI(OCT19)AFTER REMAINING THREE SPEECHES CONCLUDE. WE WILL BE CONSULTING WITH OTHER DELS BUT IN MEANTIME IN LIGHT OF MR. CADIEUXS MEMBERSHIP ON ILC WE SHOULD BE INTERESTED IN HIS VIEWS ON FOLLOWING VERY PRELIMINARY IDEAS FOR INCORPORATION IN STATEMENT ON THIS ISSUE SHOULD YOU CONSIDER ONE DESIRABLE.

(A) PARA3 AMOUNTS TO INDICATION OF LACK OF CONFIDENCE IN ILC; AND

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(B)IS A NEW DEPARTURE,CONTRARY TO NORMAL PROCEDURES OF 6TH CTTEE,TO ATTEMPT TO TIE HANDS OF ILC TO SUCH AN EXTENT;

(C)PARA3(A)IS MISLEADING IN THAT MANY DELS DID NOT RPT NOT COMMENT ON 29 DRAFT ARTICLES BECAUSE IT IS PREMATURE TO DO SO WHEN THEIR GOVTS COMMENTS ARE BEING AWAITED;

(D)PARA3(B)IS VIRTUALLY MEANINGLESS(IE BROADER THAN WHAT?)AND MOREOVER ATTEMPTS TO GIVE INSTRUCTIONS ON A MATTER WHICH IS IN A SENSE SUB JUDICE(BEING NOW STUDIED BY WORKING SUBCTTEE ON STATE RESPONSIBILITY);AND

(E)PARA3(C)SEEMS PARTICULARLY OPEN TO ATTACK ON BASIS OF POINT(A) ABOVE AND DOES NOT RPT NOT TAKE INTO ACCOUNT RECENT ENLARGEMENT OF ILC MADE IN ORDER TO GIVE NEW STATES ADEQUATE REPRESENATION.

3.IT WOULD BE HELPFUL TO HAVE SOME INDICATION OF YOUR THINKING BY FRI NOON.WE WILL KEEP YOU INFORMED ON VIEWS OF OTHER DELS ON TACTICS AND LIKELY VOTING AS WE LEARN THEM.

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA.

NUMBERED LETTER

TO: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

FROM: Canadian Delegation to the United Nations, NEW YORK

Reference:

Subject: 17th GENERAL ASSEMBLY: SIXTH COMMITTEE
ILC Report

Security: CONFIDENTIAL

No: 709

Date: October 15, 1962

Enclosures:

Air or Surface Mail: Air

Post File No:

Ottawa File No. 5475-AX-40
~~5475-EW-40~~

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TO: Mr Gingras
OCT 16 Pedd
REGISTRY

References

Mr Cochrane
~~UNESCO~~
+ file

cc on 5475-AX-36-40

As the debate on this item continues, an increasing number of references are being made to the "all states" and reservations questions, to "unjust treaties", and to the scope of state responsibility. The Czech representative, Pechota, has made the most effective Soviet bloc statement to date in a hard-hitting but scholarly presentation, (a copy of which we have requested), not as yet answered by any Western speaker, although the Australian representative has made a telling reply on state responsibility. (The British and Thai representatives have also commented on this point, first raised by us.)

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2. The USA appraisal continues to be that, while there is an increasing imbalance in the discussions on these questions, there is no need as yet for a separate intervention in reply.

file

W.H. Barton
The Delegation

Internal Circulation

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TO: Mr Wright
REGISTRY

FM CANDELNY OCT5/62 CONFD

TO EXTERNAL 1678 PRIORITY

REF YOURTEL L132 OCT4

17TH UNGA: ITEM76-REPORT OF ILC

AS YOU WILL HAVE NOTED FROM PRESS RELEASE GA/L/962 OCT3 USA REP REFERRED TO CERTAIN ARTICLES(WHICH HE SPECIFIED)AS RAISING QUOTE HIGHLY CONTROVERSIAL UNQUOTE ISSUES ON WHICH HIS GOVT WOULD COMMENT AFTER QUOTE CAREFUL REFLECTION UNQUOTE. PERHAPS IN RESPONSE TO THIS STATEMENT HUNGARIAN REP TODAY WENT INTO QUOTE ALL STATES UNQUOTE AND RESERVATIONS QUESTIONS IN SOME DETAIL IN CONGRATULATING COMMISSION FOR ITS WORK ON THESE ARTS. HIS PRESENTATION WAS RELATIVELY DETACHED ANDSCHOLARLY HOWEVER AND USA DEL APPRAISAL AT THIS TAGE IS THAT THEY NEED NOT RPT NOT REPLY IF FURTHER SOVIET OC STATEMENTS ARE IN SIMILAR VEIN. WE HALL CONTINUE TO KEEP U INFORMED AND IN MEANTIME ASSUME INSTRUCTIONS PARA ONE YOUR TEL REMAIN UNALTERED.

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FILE
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DIV

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

DATE	FILE		SECURITY
OCT4/62	5475-AX-40	37	CONFD

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c.c. 5475-AX-8-40
" -AX-36-40
" AX-37-40

NUMBER	PRECEDENCE
L-132	OPTIMUM GILLES SICOTTE

TO: CANDELNY

INFO:

Ref.: YOURTEL 1650 OCT3

Subject: 17TH UNGA: ITEM 76 - REPORT OF ILC

IF THERE IS A STRONG MOVE IN FAVOUR OF SUBSTANTIVE DISCUSSION AT THIS TIME OF THE FIRST TWENTY-NINE ARTICLES OF LAW OF TREATIES, THE INCLUSION IN YOUR DRAFT STATEMENT OF A RESERVATION TO SPEAK LATER WOULD OFFSET POSSIBLE INFERENCE THAT WE FAVOURED THE STIFLING OF DEBATE. HOWEVER, IF SUCH A DISCUSSION APPEARS UNLIKELY, EXPRESSION OF SUCH A RESERVATION MIGHT BE COUNTER PRODUCTIVE AND NEEDLESSLY AROUSE INTEREST IN A SUBSTANTIVE DISCUSSION AT THIS TIME. DEPENDING ON TENOR OF DEBATE WE SHOULD THEREFORE PREFER THE FOLLOWING OPERATIVE PARA. QUOTE IN OUR OPINION, IT IS PREMATURE AT THIS STAGE FOR MEMBERS OF THE CTTEE TO MAKE SUBSTANTIVE COMMENTS ON THE FIRST TWENTY-NINE DRAFT ARTICLES OF THE LAW OF TREATIES, AS THIS INITIAL SECTION IS TO BE SUBMITTED TO OUR RESPECTIVE GOVTS FOR COMMENTS AND

.... 2

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STANDARD

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SIG ..... NAME MDCopithorne/ho	Legal	2-5406	GILLES SICOTTE SIG ..... NAME [redacted]

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IS TO BE CONSIDERED AGAIN BY THE COMMISSION IN THE LIGHT OF THESE COMMENTS UNQUOTE.

2. SUB-COMMITTEE ON STATE RESPONSIBILITY IN ACCORDANCE WITH ITS TERMS OF REFERENCE AS SPELLED OUT IN ILC REPORT IS TO CONFINE ITS DEBATES TO QUOTE GENERAL ASPECTS OF STATE RESPONSIBILITY UNQUOTE. SUGGEST YOUR STATEMENT BE AMENDED BY DELETING ALL AFTER QUOTE OF THIS SUBJECT UNQUOTE AND SUBSTITUTING QUOTE AND IS TO CONFINE ITS DEBATES TO THE GENERAL ASPECTS OF STATE RESPONSIBILITY UNQUOTE.

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TO: Kingston
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FM CANDELNY OCT3/62 CONFD

TO EXTERNAL 1650 OPIMMED

REF OURTEL 1542 SEP21 PARA2(D)

17TH UNGA:ITEM 76-REPORT OF ILC

USA REP DOES NOT RPT NOT NOW INTEND TO RAISE CONTENTIOUS QUOTE ALL STATES UNQUOTE QUESTION NOR RESERVATIONS ISSUE AND PROPOSES TO SPEAK EARLY IN HOPE THAT OTHER DELS WILL FOLLOW HIS LEAD. GRATEFUL FOR YOUR COMMENTS ON OPERATIVE PARA OF OUR STATEMENT ON THIS POINT READING AS FOLLOWS QUOTE WHILE IT IS PREMATURE AT THIS STAGE FOR MEMBERS OF CTTEE TO MAKE SUBSTANTIVE COMMENTS ON DRAFT ARTICLES ON LAW OF TREATIES WHICH ARE TO BE SUBMITTED TO OUR RESPECTIVE GOVTS FOR COMMENTS MY DEL RESERVES ITS RIGHT TO DISCUSS ON A FUTURE OCCASION SHOULD IT SO DESIRE 29 DRAFT ARTICLES ON BROAD TOPIC OF QUOTE CONCLUSION OF TREATIES UNQUOTE (INCLUDING) QUOTE ENTRY INTO FORCE UNQUOTE AND QUOTE REGISTRATION UNQUOTE OF TREATIES. UNQUOTE.

2. ON QUESTION OF TREATMENT OF STATE RESPONSIBILITY BY ILC OUR IMPRESSION OF EXPLANATORY STATEMENT BY CHAIRMAN PAL MON AFTERNOON OCT1 WAS THAT IT WAS SUGGESTIVE OF LINE THAT CONSIDERATION OF GENERAL QUESTION OF STATE RESPONSIBILITY IS IN EFFECT CONSIDERATION OF PRINCIPLES OF PEACEFUL COEXISTENCE. (WE HAVE REQUESTED VERBATIM TEXT THROUGH LIANG). WE SHOULD BE GRATEFUL FOR YOUR COMMENTS ON OPERATIVE PARA OF OUR PROPOSED STATEMENT ON THIS POINT READING AS FOLLOWS QUOTE I SHOULD LIKE TO PLACE ON RECORD MY UNDERSTANDING OF DECISION REACHED BY COMMISSION NAMELY THAT SUBCTTEE IS TO MAKE RECOMMENDATIONS TO COMMISSION AT ITS NEXT SESSION ON SCOPE AND APPROACH OF FUTURE STUDY OF THIS SUBJECT AND THAT COMMISSION HAS IN NO RPT NO WAY PREJUDGED THESE QUESTIONS.

3. CTTEE WILL MEET THIS AFTERNOON AND TOMORROW MORNING. WE WOULD BE PREPARED TO SPEAK TOMORROW OR FOLLOWING DAY SUBJECT TO APPROVAL OF FOREGOING PASSAGES.'

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FM CANDELNY SEP21/62 CONFD CDN EYES ONLY

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Orig: 5475-EW-40

TO EXTERNAL 1542 PRIORITY

INFO WASHDC

REF OURTEL 1513 SEP19

17TH UNGA-CONSULTATIONS ON 6TH CTTEE ITEMS

IN DISCUSSIONS WITH BRIT AND USA DELS YESTERDAY WE REACHED AGREEMENT ON GENERAL BASIS OF APPROACH TO ITEM74(FRQENDLY RELATIONS)AND ALSO ON SPECIFIC TACTICS ALONG LINES OUTLINED IN OUR PART TWO COMENTARY.OUR IMPRESSION HOWEVER IS THAT IN THE IMPLEMENTATION OF OUR AGREED PLAN OF OPERATIONS AMERICANS AND BRIT MAY BE LESS POSITIVE THAN WE HAVE HOPED FOR;THEY SHOW SIGNS,FOR INSTANCE,THAT THEY MIGHT WANT TO CLING TO OPENING POSITIONS TOO LONG AND IN SO DOING GIVE THE IMPRESSION OF BEING DRAGGED ALONG TO A COMPROMISE POSITION INSTEAD OF ATTEMPTING FROM THE BEGINNING TO SHOW A MORE POSITIVE APPROACH.IN OUR VIEW EVEN IF WE ARE SUCCESSFUL IN ACHIEVING AGREEMENT ON SPECIFIC TOPICS FOR STUDY,CTTEE MAY NEVERTHELESS WISH TO ATTEMPT A CODIFICATION OF GENERAL PRINCIPLES,SINCE THE TWO APPROACHES ARE NOT RPT NOT MUTUALLY EXCLUSIVE.WE ARE THEREFORE CONSULTING WITH USA AND UK DELS ABOUT POSSIBLE TERMS OF FALL-BACK POSITION WHICH MIGHT HELP TO MEET WISHES OF THOSE WHO FAVOUR SOME ATTEMPT AT CODIFICATION OF GENERAL PRINCIPLES.

2.FOLLOWING POINTS ALSO EMERGED FROM OUR DISCUSSION:

(A)BRIT DEL OPPOSE HAVING CONSULAR RELATIONS CONSIDERED FIRST AND SUPPORT USA DEL EFFORTS TO HAVE ILC REPORT FIRST;BOTH HAVE AGREED HOWEVER AT OUR URGING TO PROPOSE A SPECIFIC DATE(ABOUT MIDWAY IN CTTEE DEBATE)FOR DISCUSSION OF FRIENDLY RELATIONS IN ORDER TO FORESTALL SUGGESTION WE ARE FEARFUL OF ITEM;

(B)USA DEL WILL TODAY ARRANGE TO SPEAK FIRST IN SIXTH CTTEE ON PRIORITY OF ITEMS TO PROPOSE SPECIFIC DATE FOR FRIENDLY RELATIONS.IN ORDER TO ENSURE AGAINST LEAKAGE THIS MOVE WILL NOT RPT NOT BE TOLD TO ANY DELS OTHER THAN BRIT AND OURSELVES;

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(C)BRIT DEL STRONGLY FAVOUR OUR SUGGESTED SPECIFIC TOPIC OF STUDY

(D)USA DEL MAY WISH TO RAISE QUOTE ALL STATES UNQUOTE QUESTION ON TREATY PART OF ILC REPORT;UK DEL JOINED US IN EXPRESSING RESERVATIONS ABOUT ADVISABILITY OF DOING SO AT THIS STAGE;

(E)ON ILA USA REP OLMSTEAD INTENDS TO ATTEND OCT27 MTG OF EXECUTIVE COUNCIL,HAS WRITTEN TO LORD MACNAIR ASKING THAT PEACEFUL COEXISTENCE BE STRICKEN FROM AGENDA!AND GIVEN HIS REASONS..(SCHWEBEL WILL ALSO BE WRITING TO MACNAIR.)OLMSTEAD MAY ALSO WRITE TO OTHER MEMBERS OF EXECUTIVE COUNCIL PUTTING FORTH HIS POINT OF VIEW.

3.FURTHER CONSULTATIONS WILL BE HELD ON AFTERNOON OF SEP25 INCLUDING NATO,OLD COMWELTH DELS PLUS SWEDEN JAPAN IRELAND AND PERHAPS SOME OTHER AT USA MISSION UNDER JOINT USA/BRIT/CDN AUSPICES TO REACH AGREEMENT ON PROPOSED COURSE OF ACTION.IF YOU HAVE ANY FURTHER INSTRUCTIONS OR COMMENTS,WE SHOULD BE GRATEFUL TO RECEIVE THEM BEFORE THEN.

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LEGAL DIV / JM - FRASER / PM

SEVENTEENTH SESSION
SIXTH COMMITTEE
PROVISIONAL AGENDA
ITEM

AX
5478-AX-40
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PART II

cc: 5478-AX-40
AX-8-40
AX 36-40
AX 39-40

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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FOURTEENTH SESSION

Background Documents

A/CN.4/148, July 3, 1962	- Report of the I.L.C. on its Fourteenth Session
A/CN.4/L.101/Add. 2 and Add. 3	- Draft report on the future work of the Commission
A/CN.4/144	- Rapporteur's report on the Law of Treaties

Report of Mr. Cadieux on work of I.L.C.'s 14th Session

Future Work of the Commission

Issues Facing the Session

The I.L.C. decided to limit the number of topics on its agenda and to establish priority for three of these, the law of treaties, state responsibility and succession of states and governments. A procedural change is also to be noted, i.e., the establishment of two working groups to meet in January to undertake the necessary preparatory work on the topics of state responsibility and succession.

Attitude of Interested Parties

Members of the Commission generally recognized that desirable as it might be to include additional topics in the work of the Commission, its present agenda offered little opportunity to introduce new subjects. (It is possible that some delegations may consider that the Commission should also deal with other items on a priority basis.)

The establishment of working groups on state responsibility and succession and the suggestion to defer for the time being the appointment of special rapporteurs to deal with these topics originated with a communist member of the Commission who may have hoped for additional influence on the treatment of these topics. While several members of the Commission were opposed to the establishment of these sub-committees, no open opposition is expected to arise in the Sixth Committee during consideration of this topic.

Instructions

Our preliminary view is that the Delegation could note with approval the decisions of the Commission with regard to future work. Before taking a definite position, however, it would be wise to consult with friendly delegations on the likely positions to be taken.

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State Responsibility

Main Issue

In discussions of state responsibility in the I.L.C., the main issue was whether to give priority to the question of responsibility for damage to aliens on the territory of a foreign state, or to split the topic into two parts generally corresponding to the broad question of the general scope and nature of state responsibility and the more limited question of responsibility for damage to aliens. The Commission approved a suggestion that the working group on this subject should give priority to the more general aspects of state responsibility.

Attitude of Interested Parties

The decision to emphasize general aspects of state responsibility in a study of this subject represented an important measure of success for communist representatives, who have consistently held that the question of violation of rights of States is much more important than the question of violation of rights of individuals and that consequently the scope of the topic of state responsibility encompasses the "fundamental principles of the new international law" of the right to peace, to sovereignty, to exploration of a country's own national resources, to territorial integrity and to self-determination of people (many of the principles, in other words, put forth as fundamental to the notion of "peaceful co-existence").

Many of the other members of the Committee were of the opinion, however, that priority should be given to the subject of responsibility for damage to aliens on grounds that the General Assembly and other United Nations organs looked upon the problem as a pressing one and expected the Commission to face up to its responsibilities of codifying and developing the law on a subject of crucial importance.

Instructions

It is not expected that there will be any substantive discussion of state responsibility in the Sixth Committee until the Commission has discussed the report of the working committee on this topic. However, it would be desirable to obtain the informal views of delegates on this subject.

Succession of States and Governments

Main Issue

The main questions raised in relation to state succession were whether there were general rules governing the subject which could be deduced from state practice, what its relationship was to various aspects of the law of treaties and state responsibility whether the topic should be split and whether succession of governments was a proper subject for codification.

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Likely Course of Events

The working group agreed that the Secretariat should solicit reports from governments by circulation of a questionnaire on state succession and prepare a background study. Until the Commission has received this report and studied the question further, a discussion of this subject is unlikely in the Sixth Committee.

Instructions

The delegation should welcome the decision to elicit views of governments on the subject of state succession.

Law of Treaties

The Commission has this year completed work on approximately one-third of the draft articles of a Convention on the Law of Treaties. This group of articles is now to be transmitted to member-states for comments. In the meantime, the Rapporteur is working on a second group of articles for consideration by the Commission at its 1963 session. It is not expected that there will be any substantive discussion in the Sixth Committee of this subject because the Commission's work is not yet finished. Should such a discussion appear likely to arise, it should be resisted on the grounds that the views of member-states are not yet known and that the work of the Commission on this subject is not complete. If, however, a substantive discussion does arise, instructions should be sought from the Department.

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P.A. Item No.75

SEVENTEENTH REGULAR SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

Provisional Agenda Item No.75: Report of the International Law Commission on the Work of its Fourteenth Session.

Introduction

The International Law Commission held its Fourteenth Session in Geneva from 24 April to 29 June 1962, and the report of its work during this session has been published as Document A/CN.4/148. The Report contains five chapters. Chapter I comprises an introduction summarising the work of the session; Chapter II contains the draft provisional articles on the conclusion, entry into force and registration of treaties, with commentaries. Chapter III relates to the future work of the Commission in the field of codification and progressive development of international law; Chapter IV concerns the organisation of the Commission's work at its next session, and Chapter V contains other decisions taken by the Commission.

The Commission took up all the items on its 1962 Agenda except Item 3 (Question of Special Missions). Most of its time was devoted to the discussion of a fresh report (A/CN.4/144) on the Law of Treaties submitted by the Special Rapporteur on this subject, Sir H. Waldock, resulting in the draft Articles and commentaries contained in Chapter II of the present report. The Commission also devoted some nine or ten meetings to substantive discussion of its whole programme of future work. This topic is dealt with in Chapters III and IV of the Report.

On the basis of established practice, the Law Commission's Report will no doubt be taken as the first item on the Agenda by the Sixth Committee, and although the provisional draft articles on treaties (Chapter II) have been circulated too late (the Report was received here on 14 September 1962) to enable Governments to make a detailed study of them, it can be expected that general discussion of these articles and of Chapters III and IV of the Report will provide the main substance for the Committee's debate on this item.

Chapter II - provisional draft articles concerning conclusion, entry into force and registration of treaties.

The item "Law of Treaties" has been on the International Law Commission's "active" list of topics since its first session in 1949, but although four special rapporteurs have presented over the years a total of 11 reports covering all aspects of the subject, circumstances have prevented the Commission from giving concentrated attention to this topic. A concise summary of the Commission's work on this topic so far, may be found in the introduction to Chapter II of the present report.

The latest set of draft articles which formed the basis for the Commission's 1962 discussions was prepared by the Special Rapporteur, Sir H. Waldock in terms of the following general decisions taken by the Commission in 1961 as to its work on treaties:-

(i) That the Commission's aim would be to prepare draft articles on the law of treaties intended to serve as a basis for a Convention;

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/(ii) That

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P.A. Item No.75

(ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its Special Rapporteurs;

(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years (para. 17 Commission's Report).

On the basis of Waldock's report, the Commission has adopted the provisional draft articles (together with commentaries) set out in Chapter II. In accordance with what has become its established practice it decided (para. 19) to transmit this draft, through the Secretary-General, to Governments for their observations.

Convention or Code

As the present report itself observes (para. 17), by the first of the 1961 decisions noted above, the Commission has changed the scheme of its work on the law of treaties from a mere expository statement of the law (in the form of a code) to the preparation of draft articles capable of serving as a basis for a multilateral convention. "In doing so, it had two considerations principally in mind. First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties, through a multilateral convention, would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundation."

The New Zealand brief on this item for the Sixteenth Session of the General Assembly expressed our doubts about the switch from a code in favour of a convention. Since that time, we have had an opportunity of studying the summary records of the 1961 International Law Commission debate on this question (A/CN.4/SER.A/1961; 620th Meeting). It is clear from this debate that the great majority of States are now in favour of the draft articles on treaties being prepared as the basis for a convention.

For our part, we still see some pitfalls in this approach; thus there is much in Waldock's remark that one can envisage the nightmare situation in which States might make reservations to Section III of the present draft, (which lays down the rules about reservations), to such an extent that it could become almost impossible to determine the obligations of any two States claiming participation in any treaty finally embodying these draft articles. On the other hand, we appreciate the strength of the argument that, while a codification has its uses, it is not necessarily the best way of handling a draft, such as the present one, which consists not only of the mere restatement of existing rules but the formulation of certain new rules (cf. article 19 etc.). Again, we have noted the views expressed by, inter alia, the Italian and Brazilian members of the Law Commission to the effect that the convention device is the best means of recognising the wish of newly independent States (which now make up almost half of the international community) to participate in the formulation of the rules of international law actively, rather than vicariously through the work of the Law Commission.

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Having regard to all these considerations, the delegation should not advert in the debate to our doubts about the merits of the "convention approach" except in the unlikely event that there is a respectably supported move to re-examine this question. The delegation could, however, discuss informally with other friendly delegations:-

(1) Our feeling that the tendency of the Commission to embody its work in conventions represents a concession to those Afro-Asian states (Ghana) which are reluctant to accept the principle that they are bound by rules of international law established before their inception.

(2) Our doubts about the impact on international law of a convention on the law of treaties which would be subject to many reservations and restrictions.

New Zealand observations on specific draft articles

The customary late arrival of the Law Commission's Report has made it impossible to attempt any very profound study of Chapter II. The following few observations are, therefore, to be regarded as our initial reactions on a first reading of the draft articles:-

(1) Article 3 - deals with the capacity to conclude treaties and commences with the statement - "Capacity to conclude treaties under international law is possessed by States and other subjects of international law". Paragraph 2 of the commentary to this article explains that the term "State" is used here with the same meaning as in the Charter of the United Nations, i.e. it means a State for the purposes of international law.
We have considerable sympathy with the view (noted in paragraph 1 of the commentary to article 3) that the inclusion of an article on the question of capacity of States admits the whole law concerning the "subjects" of international law (along with the inevitable cold war dispute over recognition of States) and that this article should therefore be deleted. In view of the last mentioned aspect, the delegation should canvass this question informally with other friendly delegations rather than advert to it in the course of any debate.

(2) Article 8 - Participation in treaties. Under paragraph 1 of this article "every State may become a party to a multilateral treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organisation". It can be expected that the exception to the general rule formulated here will provoke criticism by the Soviet bloc States whose established policy is to oppose the device, formulated by the Western bloc, of limiting the right to become party to modern multilateral treaties to States members of the United Nations and related organisations, or to any State whose admission is agreeable to a two-thirds majority of the parties to the treaty in question. Formulas of this kind, which are supported by New Zealand, make it a great deal more difficult for States or entities not generally recognised as such to gain legal acceptance in the international community.

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The argument advanced by the Soviet bloc is, briefly, that it is for the general good that all States should become parties to multilateral treaties. In our view, however, this argument is not strong enough to obliterate the fundamental right of States to determine for themselves the extent to which they are prepared to enter into relations with other States. As the commentary to this article points out, recent multilateral treaties, (e.g. Single Convention on Narcotics, 1961, and the Geneva Law of the Sea Conventions), evince a clear indication on the part of States to maintain this principle, and we cannot therefore concede that the time is ripe for a rule making all treaties automatically open to participation by all States.

(3) Article 4. It is noted that while article 4 recognises the authority of Foreign Ministers and Heads of Government to negotiate, sign, ratify, etc. treaties, paragraph 7 of the commentary to this article indicates that the signature of instruments of ratification etc. by such persons, as distinct from Heads of State, is exceptional. In New Zealand's case, of course, such documents have for many years been executed by the New Zealand Minister of External Affairs, even though the Queen is in fact our Head of State.* Similar practice obtains in other Commonwealth countries (apart from the United Kingdom) which also recognise the Queen as Head of State. The practical advantages of this procedure are obvious; not only are geographical considerations involved, but independent Commonwealth countries frequently negotiate bilateral and multilateral treaties with each other, and while it is now generally accepted that the Crown is divisible for the purpose of international agreements as between members of the Commonwealth (cf. Christmas Island Agreement 1958) nevertheless, in actual fact, the practice of negotiating treaties at the "governmental" level has, for convenience, become firmly entrenched. It may therefore be worth discussing with other Commonwealth delegations whether mention of this practice might justifiably be made in the Committee's discussions.

(4) Article 17 provides that States which take part in the negotiation, drawing up or adoption of treaties are under an obligation of good faith to refrain from acts calculated to frustrate the obligations of the treaty if and when it comes into force, unless and until they have signified that they do not intend to become party.
This rule represents a considerable amplification of the generally recognised (and reasonable) principle that a State which has gone so far as to sign a treaty subject to ratification (and hence shown its general sympathy with the treaty) should

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* The normal method today is for plenipotentiaries to be issued with Full Powers under the signature and seal of the New Zealand Minister of External Affairs; the instruments of ratification of such treaties are signed and sealed likewise. Recourse to the Queen is made only on the very rare occasions (there have been none for many years now) where a full powers or ratification is needed for a treaty actually drawn in "Heads of State" form.

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refrain from acts designed to frustrate the obligations of the treaty. The Commission however now - on no very discernible reasoning - extends the same sort of moral obligation to all States which have been associated with the treaty drafting process. Everything turns, of course, on what variety of activities is deemed to be covered by the nebulous expression "acts directed to frustrate the obligations of the treaty"; and it may be worth seeking some elucidation of this point. Prima facie, however, it seems inequitable (to take an obvious example) that a State (or a group of States) which has taken part in the drafting of a treaty with the strongest reservations, both during the drafting process and as to the final text, should be considered as bound to the extent shown in draft Article 17. Further, it seems possible that article 17, 1 could be used, in the same way as the obligation to report on the status of conventions drawn up under the auspices of the I.L.O., i.e. to pressure States into accepting conventions with which they may have little sympathy. While we feel that such pressure is perhaps justified in the case of I.L.O. conventions we could not regard it as justified as a general practice.

(5) Section III - reservations. The articles and lengthy commentaries in this section reflect a shift of opinion in the Commission from the support which it gave in 1951 to the traditional concept "that no reservation is valid unless it has been accepted by all contracting parties without exception". The Commission now takes the view that the principle of "compatibility with the object and purpose of the treaty" should be adopted as a general criterion of the legitimacy of the reservations to multilateral treaties and objections to them, in all cases where the treaty itself is silent on the question of reservations.
The principal reason for this change in view can be attributed to the feeling (expressed in para. (12) of the commentary on this section) that "when today the number of negotiating states may not be far short of one hundred states with very diverse cultural, economic and political conditions, it seems legitimate to assume that the power to make reservations without the risk of being totally excluded by the objections of one or even of a few states may be a factor in promoting a more general acceptance of multilateral treaties .... in the present era of change and of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community".

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It may well be that these reasons are in fact decisive considerations in favour of abandoning the retention of a "collegiate" system* of reservations under which the reserving State would only become a party to a particular treaty if its reservations to the treaty were accepted by all or a good proportion of the other States concerned. We appreciate also that the rule applies only to those cases where the treaty itself is silent on the question of reservations, and that in the case of treaties negotiated in future, difficulties can be avoided by including specific provisions prohibiting or permitting reservations.

Nevertheless we are a little concerned about the underlying assumption in these draft articles that the admission of a considerable number of new states to the international community necessarily requires the "watering down" of the established law of treaties in order to ensure that some degree of international order can be maintained in this field.

We appreciate that international law has been developed mainly by the Western states and may therefore fail to reflect adequately the views of the new members of the International Community but we feel that care must be taken lest our concern to admit new States to full participation in the codification and development of international law will materially depreciate the stability provided by the traditional rules.

This "half a loaf" or "something is better than nothing" approach adopted by the Commission in the draft articles perhaps represents a short term means of dealing, in the technical field of treaty law, with the uncomfortable settling down process which many new States are undergoing, but we are not necessarily convinced that it is the best way of handling international law rules governing treaties. The commentary to this article suggests that the position of States under the proposed rules is protected by two well established principles:-

(a) That a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State...

(b) that a State which assents to another State's reservation is nevertheless entitled to object to any attempt by the reserving State to invoke against it the obligations of the treaty from which the reserving State has exempted itself by its reservations (para. B of the Commentary to Section III).

Quite apart from the disadvantages outlined in the Report we view with some dismay the prospect of a multiplication of relationships in which States A and B may have rights and obligations under a treaty in relation to States C and D, but not to each other. The Commentary to Section III of the draft articles suggests in paragraph (12) that the effect of reservations on the general integrity of the treaty is minimal even if a few relate to

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* This system is favoured privately by Sir S. Fitzmaurice, and has been put forward by Sir H. Lauterpocht for consideration - see Waldock's Report at p.17 of Appendix. The same system has been proposed by the British Government for a reservations article in the draft Covenant on Civil and Political Rights (see Second Part of this year's New Zealand brief on that item), and in several United Nations multilateral Conventions, e.g. the Convention concerning Customs Facilities for Touring, signed at New York on 4 June 1954.

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substantive provisions of the convention, and further, that even if a number of States make reservations relating to important provisions of the treaty, the treaty remains the master agreement between other participating States. While this is technically true, the Commission's approach would be put into better perspective by saying that, under it, a multilateral treaty is reduced to being merely a legal frame of reference within which an almost infinitely variable series of bi- tri- quadri- etc. legal relationships can be formed. Apart from the alarming complexities which this legal kaleidoscope will create, one wonders what use it will be in future, if the system advocated by the Commission is followed, to spend much time drafting multilateral treaties. If no other reservations system is devised for a particular treaty and the general principle is - "take your pick out of the final result", there will be little incentive in drafting to do more than throw together a collection of thoughts from which ratifying States may later, literally, "take their pick". This sort of approach also has disadvantages in that under it a treaty can too readily be exploited for propaganda ends. This can be illustrated by the draft Convention on Consent to Marry, Minimum Age of Marriage and Registration of Marriage which is to be discussed in the Third Committee this year (P.A. Item No.43). It is possible that this Convention will not contain any provision on the subject of reservations. If article 18,1 (d) of the present draft on treaties were to be accepted as the general rule, unrestricted reservations to the above Convention would be admissible. In the case of a Convention of such narrow scope and minimum provisions, the effect of reservations by the Moslems to the substantive clauses would effectively destroy the whole purpose of the Convention, while at the same time it would enable those countries to obtain the propaganda benefits of claiming acceptance of the Convention itself. We agree also with other objections, to the type of system which the Law Commission favours, as set out in an article by Sir G. Fitz-maurice; a copy of this is being forwarded for the delegation's information and use.

Article 19, which requires express objections to be made to particular reservations, raises a number of difficulties for New Zealand. It has been our practice (along with some other Western countries) in the case of the 1948 Safety of Life at Sea Convention, for example, to remain silent when advised by the treaty depository that a regime which New Zealand does not recognise purports to accede to this Convention. This practice has been designed to secure the practical advantages of the application of the Safety of Life at Sea Convention by those unrecognised regimes, while avoiding any suggestion that New Zealand acknowledges the regime in question. At a first reading of article 19, 3 therefore, it would appear that we may have to give serious consideration to discontinuing this practice in a case where an unrecognised regime makes a reservation on accepting any multilateral Convention which New Zealand has signed and/or accepted by ratification or accession. Otherwise in the event that the regime is finally acknowledged by New Zealand we could find ourselves open to the claim that our silence on the whole question of admission of that regime to the Convention constituted acceptance of an unacceptable reservation. It may be that we are here seeing difficulties that do not in fact exist, and the delegation should obtain the informal views of other friendly delegations on the point.

/Article 23.

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P.A. Item No.75

Article 23. The immediate difficulty for us in respect of article 23 (c) (which recognises the established procedure of making entry into force of a Convention conditional on a stipulated number of ratifications etc.) arises out of article 19 (reservations). Article 19 would permit a State A to object to a reservation made by State B and to deny that State B is a party to the treaty. It is arguable that this rule could give rise to difficulties in the case where the entry into force of the treaty in question is conditional on the deposit of a certain number of ratifications. Under article 29 of these draft articles, all that a depository could do in such circumstances would be to draw the dispute over the effect of the ratification to the attention of interested states, or to the relevant competent organ of an international organisation, for consideration. Unless the treaty itself provides a swift procedure for the determination of this sort of problem, the matter could drag on for months, during which time there would be uncertainty regarding the effective operation of the treaty. In the case of a technical or administrative type of treaty, this could have unfortunate consequences. Perhaps the answer is that the depository would follow the normal United Nations Secretariat practice which is to accept all ratifications as valid for the depository's purposes (i.e. including the question of entry into force), and leave it to particular Contracting States to raise objections (and regard the ratifying State as not a party) if they wish. In such a case, however, what happens if all the other Contracting States decide to regard the latest "ratifier" as not a party?

The delegation should, in its discretion, discuss these few observations with other friendly delegations and, if appropriate, could refer to them in the general debate on Chapter II of the Report.

Future Work in the Field of Codification and Progressive Development of International Law

This question was placed on the Agenda of the Fourth Session of the International Law Commission pursuant to operative paragraph 3 of General Assembly reservation 1686 (XVI):-

> "The General Assembly, ...
>
> 3. Recommends the International Law Commission:
>
> (a) To continue its work in the field of the law of treaties and of State responsibility and to include on its priority list the topic of succession of States and Governments;
>
> (b) To consider at its fourteenth session its future programme of work, on the basis of sub-paragraph (a) above and in the light of the discussion 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 Assembly at its seventeenth session on the conclusions it has reached. ...";

and the Commission held 9 or 10 meetings to discuss this topic. A summary of these discussions may be found in Chapters III and IV of the Commission's Report.

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So far as paragraph 3(a) of reservation 1686(XVI) was concerned the Commission, in brief, has agreed to:-

Law of Treaties

(1) Continue to give priority to the study of the law of treaties. It is planned* to prepare a draft of a further group of articles at its next session covering the validity and duration of treaties, to be followed in turn by draft articles covering the application and effect of treaties. The question of the final treatment of all the drafts, i.e. should they be incorporated in a single convention or a series of conventions, is left over for decision when all the drafts are completed (cf. para. 18 of Chapter II).

New Zealand comments

This procedure seems eminently sensible. Sir H. Waldock's first report on treaties makes it clear that it is unrealistic to attempt to cover the whole subject in two years as was contemplated by the Commission in 1961.

(2) State responsibility. The idea that this topic should receive priority was unanimously approved by the Commission, but the usual divergence of opinion arose regarding the issues which this study should cover. Some members (we assume including the Soviet) pressed for an examination of all aspects of the question, arguing that the traditional problem of the treatment of aliens was today less important than the responsibility of States for acts which endangered international peace such as aggression, denial of national independence etc. Other members considered that if the Commission intended to study only one aspect of the question of State responsibility, it could not choose a more appropriate aspect than the responsibility for damages caused to aliens.

This not unexpected conflict of views had its effect on the Commission's discussion of the best method of handling this work. In the upshot, the Commission rejected the usual method of appointing a Special Rapporteur to study the topic, on the grounds that the subject was so complex and ill-defined that a a Sub-Committee** should be appointed to submit a preliminary report dealing with the scope of the future study of State responsibility (para. 47). This Sub-Committee met during the Commission's session and submitted a number of suggestions on the basis of which the Commission adopted the decisions set out in paras. 68 and 69 of its 1962 Report. In particular, the Commission agreed that further debates by the Sub-Committee should be confined to the general aspects of State responsibility (para. 48).

/(3)

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* On the basis of further reports prepared by the Special Rapporteur on this topic.

** This Sub-Committee consisted of the following ten members: Mr Ago (Italy) (Chairman), Mr Briggs (U.S.A.), Mr Gros (France), Mr de Arechaga(Uruguay), Mr. Lachs (Poland), Mr. deLuna(Spain), Mr. Paredes, (Ecuador), Mr. Tsuruoka (Japan), Mr Tunkin(U.S.S.R.), and Mr. Yasseen(Iraq).

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P.A. Item No.75

(3) Succession of States and Governments. The Commission (which agreed in principle that this topic should be included in its list of work priorities), handled this topic in the same way as the subject of State Responsibilities, i.e. it was concluded that the complexity of the subject matter necessitated preliminary study by a specially constituted Sub-Committee.* This Sub-Committee's suggestions (which were drawn up during the Commission's session), were then considered by the Commission with the resulting decisions noted in paras. 72 and 74 of the 1962 Report.

New Zealand Comments

This method of handling these two complex topics seems an essentially practical one, and is entirely in accord with article 19, 1 of the Commission's Statute which provides that the Commission should "adopt a plan of work appropriate to each case". We were pleased to see that the Nigerian member of the Commission has been included in the Sub-Committee on Succession of States and Governments. Obviously these Committees could reach conclusions with which we might not be entirely happy, e.g. by enlarging the scope of State responsibility to include aggression and self-determination, and if the delegation, after consultation with other old Commonwealth delegations, considers it appropriate, it could register our hope that unprofitably contentious topics could be avoided.

Operative paragraph 3(b) of Resolution 1686 (XVI) noted above, was considered by a sub-committee of eight** on the basis of a working paper submitted by the Secretariat (A/CN.4/145). On the recommendation of this sub-committee, the Commission agreed to limit the future programme of work to the three main topics to be studied pursuant to operative paragraph 3(a) of Resolution 1686 (XVI) namely, law of treaties, State responsibility and succession of States and Governments. It decided to include in this programme four additional topics of more limited scope, which had been referred to it by earlier General Assembly resolutions:-

(i) Question of special missions (resolution 1687(XVI));

(ii) Question of relations between States and inter-governmental organisations (resolution 1289(XIII));

(iii) Right of asylum (resolution 1400(XIV));

(iv) Juridical regime of historic waters, including historic bays (resolution 1453(XIV)).

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* This Sub-Committee was composed of the following members: Mr Lachs (Poland)(Chairman), Mr Bartos (Yugoslavia), Mr Briggs (U.S.A.), Mr Castren (France), Mr El-Erian (UAR), Mr Elias (Nigeria), Mr Liu (China), Mr Rosenne (Israel), Mr Tabibi (Afghanistan), and Mr Tunkin (USSR).

** This Sub-Committee consisted of: Mr Amado (Brazil)(Chairman), Mr Ago (Italy), Mr Bartos (Yugoslavia), Mr Cadieux (Canada), Mr Castren (Finland), Mr de Arechaga (Uruguay), Mr Pessou (Dahomey), Mr Tunkin (USSR).

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The Commission has made the point that in drawing up its future programme of work it is obliged to take account of its resources. The above three main topics alone, are likely to keep it occupied for several sessions, and it is considered inadvisable for the time being to add anything further to the already long list of topics on its agenda.

New Zealand has always considered that the Law Commission is best fitted to assess its working capabilities and fix its list of priorities. The above programme seems adequate, and we would therefore be opposed to any attempt to interfere with its present decision. One related point which may be taken up by delegations (Soviets) who are particularly critical of the Secretariat, is the complaint made in paragraph 84 of the Report about the alleged poor servicing of the Commission with documents, summary records, etc., in the working languages of the Commission.

In the absence of any summary records of the Commission's discussions at its 1962 session, we are unable to form any appreciation of the merits of this complaint. We would hope, however, that every allowance would be made for the administrative problems of the Secretariat in servicing an ever increasing body of multilingual committees. The delegation could, therefore, depending on its assessment of the grounds of complaint, and bearing in mind the fact that New Zealand is not represented on the Commission and therefore has no first-hand knowledge of its working difficulties, speak in defence of the Secretariat, if this seems appropriate.

Future meetings of the Commission

Under the terms of operative paragraph 2(d) of the five year "pattern of conferences" established by General Assembly resolution 1202(XII), the annual session of the Law Commission is to be held at Geneva without overlapping with the summer session of ECOSOC. In spite of this decision, the Commission, after consultation with the Secretary-General, has fixed on the first Monday in May 1963 as the most convenient date for the opening of its next session because, although this date overlaps the ECOSOC Summer session, it reduces the difficulty experienced by several members of the Commission in securing release from professional duties to attend the Commission's meetings. It can be expected that the Secretariat will draw the attention of the Fifth Committee to this departure from previous practice in any consideration by that Committee of the future "pattern of conferences" (P.A. Item 64).

For lack of knowledge of the Commission's operating difficulties we find it awkward to form any assessment of the pros and cons of the change sought by the Law Commission; if the matter is raised in the Sixth Committee the delegation should concert action with other old Commonwealth delegations.

Conclusion

It is usual for the Sixth Committee debates on this item to conclude with the adoption of a resolution noting the Report and asking the Secretary-General to forward to the Commission the summary records of the Sixth Committee's discussions.

/Instructions

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P.A. Item No.75

Instructions

(1) The New Zealand delegation could, in its discretion and having regard to the comments made in this brief (particularly those relating to Chapter II of the Commission's 1962 Report) participate in any general discussion of the Commission's 1962 Report.

(2) The delegation should vote in favour of the usual form of resolution noting the Report of the Commission.

Department of External Affairs,
Wellington.
3 October 1962.

001271

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TRANSMITTAL SLIP

TO: MARCEL CADIEUX, ESQ.,
LEGAL ADVISRE., DEPT. OF EXTERNAL AFFAIRS.

FROM: THE CANADIAN DELEGATION TO THE UNITED
NATIONS, NEW YORK

Security. UNCLASSIFIED

Date. SEPTEMBER 19, 1962

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5475-AX-40
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The documents described below are for your information.

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Ext. 250 (Rev. 10/51) *(Instruction on Reverse Side)*

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SEVENTEENTH SESSION
SIXTH COMMITTEE
PROVISIONAL AGENDA
ITEM

5475-AX-40
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PART II

~~5475-EW-40~~
" -AX-8-40
" -AX-36-40
" -AX-39-40

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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FOURTEENTH SESSION

Background Documents

A/CN.4/148, July 3, 1962 - Report of the I.L.C. on its Fourteenth Session

A/CN.4/L.101/Add. 2 and Add. 3 - Draft report on the future work of the Commission

A/CN.4/144 - Rapporteur's report on the Law of Treaties

Report of Mr. Cadieux on work of I.L.C.'s 14th Session

Future Work of the Commission

Issues Facing the Session

The I.L.C. decided to limit the number of topics on its agenda and to establish priority for three of these, the law of treaties, state responsibility and succession of states and governments. A procedural change is also to be noted, i.e., the establishment of two working groups to meet in January to undertake the necessary preparatory work on the topics of state responsibility and succession.

Attitude of Interested Parties

Members of the Commission generally recognized that desirable as it might be to include additional topics in the work of the Commission, its present agenda offered little opportunity to introduce new subjects. (It is possible that some delegations may consider that the Commission should also deal with other items on a priority basis.)

The establishment of working groups on state responsibility and succession and the suggestion to defer for the time being the appointment of special rapporteurs to deal with these topics originated with a communist member of the Commission who may have hoped for additional influence on the treatment of these topics. While several members of the Commission were opposed to the establishment of these sub-committees, no open opposition is expected to arise in the Sixth Committee during consideration of this topic.

Instructions

Our preliminary view is that the Delegation could note with approval the decisions of the Commission with regard to future work. Before taking a definite position, however, it would be wise to consult with f endly delegations on the likely positions to be taken.

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State Responsibility

Main Issue

In discussions of state responsibility in the I.L.C., the main issue was whether to give priority to the question of responsibility for damage to aliens on the territory of a foreign state, or to split the topic into two parts generally corresponding to the broad question of the general scope and nature of state responsibility and the more limited question of responsibility for damage to aliens. The Commission approved a suggestion that the working group on this subject should give priority to the more general aspects of state responsibility.

Attitude of Interested Parties

The decision to emphasise general aspects of state responsibility in a study of this subject represented an important measure of success for communist representatives, who have consistently held that the question of violation of rights of States is much more important than the question of violation of rights of individuals and that consequently the scope of the topic of state responsibility encompasses the "fundamental principles of the new international law" of the right to peace, to sovereignty, to exploration of a country's own national resources, to territorial integrity and to self-determination of people (many of the principles, in other words, put forth as fundamental to the notion of "peaceful co-existence").

Many of the other members of the Committee were of the opinion, however, that priority should be given to the subject of responsibility for damage to aliens on grounds that the General Assembly and other United Nations organs looked upon the problem as a pressing one and expected the Commission to face up to its responsibilities of codifying and developing the law on a subject of crucial importance.

Instructions

It is not expected that there will be any substantive discussion of state responsibility in the Sixth Committee until the Commission has discussed the report of the working committee on this topic. However, it would be desirable to obtain the informal views of delegates on this subject.

Succession of States and Governments

Main Issue

The main questions raised in relation to state succession were whether there were general rules governing the subject which could be deduced from state practice, what its relationship was to various aspects of the law of treaties and state responsibility whether the topic should be split and whether succession of governments was a proper subject for codification.

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Likely Course of Events

The working group agreed that the Secretariat should solicit reports from governments by circulation of a questionnaire on state succession and prepare a background study. Until the Commission has received this report and studied the question further, a discussion of this subject is unlikely in the Sixth Committee.

Instructions

The delegation should welcome the decision to elicit views of governments on the subject of state succession.

Law of Treaties

The Commission has this year completed work on approximately one-third of the draft articles of a Convention on the Law of Treaties. This group of articles is now to be transmitted to member-states for comments. In the meantime, the Rapporteur is working on a second group of articles for consideration by the Commission at its 1963 session. It is not expected that there will be any substantive discussion in the Sixth Committee of this subject because the Commission's work is not yet finished. Should such a discussion appear likely to arise, it should be resisted on the grounds that the views of member-states are not yet known and that the work of the Commission on this subject is not complete. If, however, a substantive discussion does arise, instructions should be sought from the Department.

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cc: 5475-AX-37-40

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ACTION COPY

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TO EXTERNAL 1901 PRIORITY

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REF OURTEL 1745 JUL19 ?

17TH UNGA : DISCUSSION IN NATO: PRINCIPLES OF INTERNATIONAL LAW

THE ACTING SECGEN TOLD ME THIS MORNING THAT HE THOUGHT THE PROPOSALS CONTAINED IN THE PAPER WE CIRCULATED COULD SUITABLY BE DISCUSSED IN COUNCIL ON FRI, AUG17. IF YOU HAVE ANY FURTHER CONSIDERATIONS TO ADVANCE WE SHOULD BE GLAD TO BE BRIEFED AS FAR IN ADVANCE AS POSSIBLE.

ADVANCE

Refer to UK - desire advance August 8/62

AUG 7 1962

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Legal/H.C. Kingstone/bjk

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Mr. Cadieux

August 1, 1962

H. C. Kingstone

File

Request for International Law Commission Drafts

In response to your request this morning, attached are the following documents:

1. Draft Report of the International Law Commission covering the work of its Fourteenth Session - Chapter I
2. Ibid. - Chapter II
3. Ibid. - Chapter III
4. Ibid. - Chapter IV
5. Ibid. - Chapter V
6. Ibid. - Chapter V, Corrigendum
7. Ibid. - Chapter V, Add. 5
8. Draft Article on the Law of Treaties - Conference Room Document No. 1

...

Mr. Sicotte
Mr. Beesley

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9. Ibid. - Conference Room Document No. 2
10. Ibid. - Conference Room Document No. 3
11. Ibid. - Conference Room Document No. 4
12. Ibid. - Conference Room Document No. 5
13. Ibid. - Conference Room Document No. 6
14. Ibid. - Conference Room Document No. 7
15. Ibid. - Conference Room Document No. 8
16. Ibid. - Conference Room Document No. 8/Rev. 1
17. Ibid. - Conference Room Document No. 9
18. Ibid. - Conference Room Document No. 10
19. Ibid. - Conference Room Document No. 11
20. Ibid. - Conference Room Document No. 12
21. Ibid. - Conference Room Document No. 13
22. Ibid. - Conference Room Document No. 14
23. Ibid. - Conference Room Document No. 15
24. Ibid. - Conference Room Document No. 16
25. Ibid. - Conference Room Document No. 18
26. Ibid. - Conference Room Document No. 19
27. Ibid. - Conference Room Document No. 20
28. Ibid. - Conference Room Document No. 21
29. Provisional Draft Articles on the Law of Treaties - Working Paper No. 1
30. Ibid. - Working Paper No. 2
31. Ibid. - Working Paper No. 6

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32. Ibid. - Working Paper No. 9

33. Havana Convention on Treaties

34. Draft Convention on the Law of Treaties - May 10, 1962

35. Draft Articles on the Law of Treaties - May 22, 1962

It is hoped that this covers the information that you require. Should you, however, need additional material, I will naturally pursue this matter further for you.

H. COURTNEY KINGSTONE

H. Courtney Kingstone

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Legal Division/M. Fraser/el

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United Nations Division

UNCLASSIFIED

July 25, 1962.

Legal Division

Report of the International Law Commission

Attached please find the Part I Commentary on the Report of the International Law Commission on the work of its Fourteenth Session.

GILLES SICOTTE

Legal Division.

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Legal Division/M. Fraser/ol

DRAFT

July 25, 1962.

Part I
Chapter VI

Unclassified

Part I
Commentary

Report of the International Law Commission on the Work of Its Fourteenth Session

The ILC was established by the General Assembly on November 21, 1947 to promote the progressive development of international law and its codification. The Commission originally had fifteen members, increased in 1956 to twenty-one and in 1961 to twenty-four. The members serve for five years, not as representatives of governments but in their individual capacity as experts in international law. It was provided by the General Assembly resolution that "representation of the main forms of civilization and of the principal legal systems of the world should be assured" in the ILC At the sixteenth session of the General Assembly in 1961, Mr. Marcel Cadieux, Legal Adviser to the Department of External Affairs, was elected to the Commission; the other members are:

M. Roberto Ago	Italy
M. Gilberto Amado	Brazil
M. Milan Bartos	Yugoslavia
M. Herbert W. Briggs	United States
M. Erik Johannes S. Castren	Finland
M. Abdullah El-Erian	U.A.R.
M. Taslim O. Elias	Nigeria
M. Andres Gros	France
M. Eduardo Jimenez de Aréchaga	Uruguay
M. Victor Kango	Cameroun
M. Mandred Lachs	Poland
M. Liu Chieh	China
M. Antonio de Luna	Spain

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M. Luis Padilla Nervo	Mexico
M. Radhabinod Pal	India
M. Angel M. Paredes	Ecuador
M. Obed Pessou	Dahomey
M. Shabtai Rosenne	Israel
M. Abdul H. Tabibi	Afghanistan
M. Senjin Tsuruoka	Japan
M. Girgory I Tunkin	U.S.S.R.
M. Alfred Verdross	Austria
Sir Humphrey Waldock	United Kingdom
M. Mustafa K. Jasseen	Iraq

The fourteenth session of the Commission was held from April 24 - June 29, 1962 in Geneva. Two main questions were discussed, the future work of the Commission (in response to a request made by the General Assembly in Resolution 1686, December 16, 1961), and the Law of Treaties.

I Future Work of the Commission

The Commission discussed both procedural and substantive questions in reviewing its future work. It was generally recognized that it would be difficult to include new items in the Agenda as the Commission would be fully involved for many years with work already undertaken at the request of the General Assembly. The topics under study are:

The law of treaties and state responsibility (Resolution 1686 (XVI)); succession of states and governments (Resolution 1686 (XVI)); relations between states and inter-governmental organizations (Resolution 1289 of December 5, 1958 (XIII)); the right of asylum (Resolution 1400 (XIV) of November 21, 1959) the study of the juridical regime of historic waters (Resolution 1453 (XIV) of December 7, 1959); special missions, (Resolution 1687 (XVI) of December 16, 1961).

The draft report on the future work of the Commission (A/CN.4/L.101/Add. 2 and Add. 3) included sections on state responsibility and succession, which were discussed during the session.

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a) State Responsibility

There was considerable discussion of the method to be followed in codifying and developing the law on state responsibility. Some members favoured dividing the subject into two parts with as much emphasis on the broad principles underlying state responsibility as on the more limited question of responsibility for damage to aliens. This would allow a study of questions of state responsibility in maintaining international peace and security arising from acts of aggression and violations of the U.N. Charter, obligation to grant independence to colonial peoples, and other topics which Professor Tunkin of the U.S.S.R. states to be covered by the "new international law".

Other members argued that priority should be given to the subject of responsibility for damage to aliens, as the General Assembly and other U.N. organs looked upon the problem as a pressing one. The elaboration of responsibility for damage to aliens would furthermore involve a study of the broad scope and principles of responsibility. This approach was set aside by the Commission, which has decided to give priority to the general principles of state responsibility.

b) Succession

The working group on this subject agreed that the Secretariat should solicit reports from governments on state succession as the basis of a background study of that subject. The committee discussed (without reaching a decision) the question of whether the subject should be codified, whether general rules on succession could be deduced from state practice, and what was its relationship to various aspects of the law of treaties and state responsibility.

II Law of Treaties

This subject has been on the agenda since the Commission's first session in 1949. At this session, the Commission based its work on the report of the rapporteur, Sir Humphrey Waldock, which dealt with the conclusion, entry into force and registration of treaties. The Commission agreed that its plan would be to prepare a further group of articles at its 1963 Session covering the validity and duration of treaties, and a further group of articles at its 1964 Session covering the application and effect of treaties. The Commission left open the question whether all

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the draft articles should be amalgamated to form a single convention or should constitute a series of related conventions. In accordance with its usual procedure, the Commission decided to transmit its draft articles on the conclusion, the entry into force and registration of treaties through the Secretary-General to governments for their observation.

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CONFIDENTIAL

July 23, 1962.

NOTE FOR FILE No. 5475-AX-40 - cc. File No. 5475-AX-37-40

SUBJECT: Peaceful co-existence and the Sixth Committee: Discussions in Washington.

On July 17, at 10:30 A.M. a meeting was held in the office of the Legal Adviser to the State Department to discuss the general question of an appropriate course of action in the Sixth Committee on the item "consideration of principles of international law relating to friendly relations and cooperation among states in accordance with Charter of U.N.", and in particular the Canadian proposal set out in our telegram L-49 of April 20. Present at the meeting were: Mr. Chayes, Legal Adviser, State Department, Mr. Meeker, Assistant Legal Adviser, Mr. Berman, Assistant Legal Adviser U.S. Disarmament Delegation, and Messrs. Gardner, Jackson, Schwebel, Kerley and Carlson of State Department; Mr. Rettie and Mr. Harman of Canadian Embassy, Mr. Parry of Candel New York and Mr. Beesley of Legal Division, Ottawa.

2. It became apparent early in the discussion that a U.S.A. position had not yet been worked out on the matters under consideration and that the meeting was serving to some extent to correlate various notions held in different U.S.A. bureaus and agencies as well as to carry out an exchange between Canadian and U.S.A. officials. In other words, one of the major purposes we had in mind in beginning the exercise, (stimulating the U.S.A. and others to begin well ahead of time to work out their policy on this question) was clearly achieved. Quite apart from this, however, a very interesting and useful exchange of ideas occurred. A summary of the discussions follows:

3. Mr. Meeker suggested that the meeting begin with an outline of Canadian thinking on the question and Mr. Rettie invited Mr. Beesley to begin. Mr. Beesley outlined briefly some of the considerations which officials in Ottawa had in mind in sending out our letter of February 12 discussing the dangers to future development of international law arising out of:

a) direct attacks by the Soviet Bloc upon Western concepts of international law;

b) state practice of certain countries;

c) lack of co-ordinated response by the West;

and outlined briefly the proposal set out in our telegram

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L-49 for a declaration on the primacy of international law which would list and subsume a number of Western oriented principles of international law in a progressive manner in order to take the initiative away from the Soviet Bloc on this item and avoid being placed on the defensive. Mr. Beesley also mentioned the British proposal which had crossed with ours and might be looked on either as an alternative or as an important aspect of our general approach to the question, and concluded by explaining that we were not wedded to our particular proposal and had advanced it as a basis of discussion as much as anything else, and were therefore most interested in U.S.A. views.

4. Mr. Meeker then spoke; he began by outlining very carefully and cautiously the situation in the Sixth Committee as he saw it. He concurred with the idea of basing our position on the primacy of international law but suggested that it be treated as much as possible as implicit in the charter and in our whole position rather than make a specific issue. He suggested also that we confine ourselves in the Sixth Committee discussions to specific areas of the law where there was great need for development, rather that embark on a general discussion of the basis of international law. The two areas of the law needing attention which he suggested as the basis for the western approach were:

a) non-intervention (i.e. subversion);

b) restrictions on the use of force for the alteration of territorial boundaries;

5. Mr. Gardner spoke next and began by explaining that his bureau felt free to disagree with their lawyers on occasions and did to some extent on this question. To begin with he was not happy at the choice of the phrase non-intervention and preferred the term subversion. He also mentioned that non-intervention had been used by some of the Afro-Asians at the recent I.L.O. conference to oppose the enforcement of I.L.O. regulations. His two main points, however, were that:

a) we should stress that international law protected smaller states and was therefore more needed by them than by the larger states;

b) that we should avoid giving the appearance of being merely in favor of the statu quo and should try to adopt a progressive and dynamic posture.

He offered as a specific suggestion the proposal that we develop an initiative which would "make international law operational" by giving technical assistance through the U.N. in legal field; e.g. donations of law libraries, assisting in training of international lawyers both through scholarships and training schemes in our various foreign countries, etc. He stressed that in his view, based on his experience in the recent I.L.O. discussions

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in Geneva, the Afro-Asians were often against international law in theory, because of their belief that it merely buttressed colonialism, whereas in fact when it got down to specific issues they found little to oppose and much to accept.

6. Mr. Chayse spoke next. He indicated very briefly his recognition of the validity of the points made by Gardner and suggested that he would like to speak again later.

7. Mr. Jackson spoke next and made two points:

a) that we should bear in mind the U.S.A. legal initiatives on disarmament; and that

b) consideration be given to making a start in implementing the far reaching U.S.A. proposals by developing a phasing process which could conceivably begin with the Sixth Committee.

He seemed to have in mind that the disarmament question might be used as a basis for the Western approach in the Sixth Committee because of the relationship between peace keeping and international law. Mr. Jackson seemed to see the problem on a very long-range basis and envisaged merely making a beginning at the forthcoming session and developing much of our approach at future sessions. (This notion had also been implicited in Meeker's comments).

8, At this point, Mr. Chayes asked Mr. Berman of U.S.A. Disarmament Delegation to comment. He pointed out that the U.S.A. had been fighting to have the disarmament discussions continued in Geneva, and that he thought it unadvisable to do anything that might weaken this position. He recognized, however, the potential value of the phasing notion. He wondered, however, whether the question of compulsory jurisdiction of the international court of justice might serve as a possible link between the U.S.A. disarmament position and the line we might take in the Sixth Committee. He recognized that there were differences of views in the U.S.A. administration on this question and had seen a memorandum of Mr. Chayes opposing a greater acceptance of compulsory jurisdiction, but felt that this was a question to which consideration might be given.

9. Mr. Rettie interjected at this point that one of the main principles outlined in our proposal had been this very point about acceptance of compulsory jurisdiction.

10. Mr. Chayes then commented that apart from possible domestic difficulties he saw as the main reason against attempting to base our position on International Court the fact that few countries were actually prepared to submit disputes to the Court. In his view the nature of most of the disputes between states ruled out submission to the Court. He cited the Law of the Sea Optional

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Protocol as an example where the U.S.A. had been unable to agree to further acceptance of jurisdiction.

11. Mr. Beesley suggested that another approach on this question might be to seek to strengthen the Court through persuading more countries to accept the Court's jurisdiction and, in the process, through increasing the confidence in the Court, bring about wider use of it.

12. Mr. Chayes replied that in his view the difficulty was not the lack of confidence in the Court but the unwillingness to submit disputes to it because of the nature of the disputes. He agreed, however, that further thought could be given to this very question.

13. Mr. Schwebel spoke next and made two points:

a) that the suggestions on "making international law operational" would have to be carefully handled to avoid appearing to be condescending in the eyes of the nations needing instruction in international law; perhaps such suggestions would have to come from one of the smaller countries;

b) he felt that in addition to the need to take a positive approach to this question, we must be aware of the negative side i.e. that the Soviet Bloc were no doubt prepared to try and make some headway on this question and we had to give thought to our answer to their arguments.

He mentioned also that we could suggest that the rights and duties of states had been discussed in 1949 and the draft declaration had been quite adequate, and that the defects in such a codification approach are indicated by the lack of response of states in commenting on the declaration.

14. Mr. Rettie commented that Mr. Schwebel's point about meeting the Soviet challenge had been one of the main considerations underlying our proposed line of action. Mr. Beesley confirmed that we had wanted to avoid being placed on the defensive. Mr. Parry commented that in his view the Soviet Bloc probably felt they had scored a substantial victory in having the item placed on the agenda and there was very little doubt that they would try and take advantage of it at the forthcoming session.

15. Mr.Kerley then spoke and pointed out that the item could be interpretated in two ways i.e. judicial basis of peaceful relations or ways in which international law could be used to promote peace relations. He felt that both possible interpretations should be borne in mind and that perhaps we should not try develop a position exclusive of either interpretations. Mr. Beesley spoke next and began by concurring with Mr. Kerley's comments. The discussions as far seem to have been directed to two parallel approaches both of which seem worth developimg. The "operational" approach was an extremely interesting notion and seem well worth developing. We should also bear in mind, however, that the Soviet Bloc might simply approach the problem as one of codification or listing of principles and we would have to meet this situation.

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16. A brief discussion on procedure then occurred. No firm conclusions were reached as to how the Soviet Bloc would play this one or how the West should respond. The suggestion was made, however, that the West should be prepared to take a vigorous line early on in the discussions (essentially the approach suggested in our telegram L-49).

17. Mr. Beesley also mentioned that in a sense we were all preaching to the converted in our discussions since we were generally agreed on the problems and the need to develop ways of coping with them, but we should bear in mind that we would be faced not only with the Soviet Bloc but with the Afro-Asians. With this in mind Mr. Beesley added some personal reservations about the approach suggested by Mr. Meeker, in that non-intervention might appear to be a cold war initiative pure and simple to the Afro-Asians, who might not be impressed at our fears for them being subverted. The other question suggested, the use of force for alteration of territorial boundaries, raised the issue of Goa, at least implicitely, and we might find little response from the Afro-Asians on this question.

18. Mr. Chayes in reply said that he felt both these points were well taken, and intimated that it conformed with his personal impressions. He mentioned also that he had wondered from time to time whether we might not in some occasions make use of the argument (familiar to common law lawyers) that the customary law creating process is a subtle and effective method of producing changes in the law based on day to day needs. Mr. Beesley interjected this comment that one advantage of stressing the importance of the customary law creating process as we understand it, is that it hits at the root of Soviet legal theory, (which denigrates customary law), while at the same time it might appeal to a number of Afro-Asians countries who have evolved through the Commonwealth process and have some knowledge of the common law approach. A further advantage might be that it could be used as a "peaceful change" argument which might be a preferable way of handling the problem raised by Mr. Meeker of the use of force in alteration of frontiers.

19. Mr. Chayes replied that one of the difficulties in any event about the use of force argument is that history makes it fairly clear that there have been very few occasions of alteration of frontiers other than by the use of force, and that consequently it might be somewhat unrealistic to put forth the arguments against the use of force.

20. Mr. Kerley then mentioned that there were a number of arguments against attempting a codification approach other than the theoretical ones concerning ossification or premature action, based on essentially political grounds, or, to put it differently, that there were a number of objections to embarking on a kind of general codification project. Several of those present indicated agreement.

21. Mr. Rettie then referred again to the Canadian proposal and explained that it had been developed with many of the considerations being discussed at the meeting in mind. Mr. Rettie was particularly struct by Mr. Chayes'

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suggestion as to the customary law creating process, which he thought could well be made one of the main basics, together perhaps with the Charter itself, and the related notion of the primacy of international law, of the approach we might take. Mr. Rettie commented also that while Mr. Jackson's views on the need for phasing seemed sound, we must recognize that at the session now facing us there might be no opportunity for phasing, and we might be facing the prospect of package proposal being put forth by the Soviet Bloc which would be discussed and decided on at that session. We should therefore give consideration to our specific technique should that kind of debate develop. He referred again to the Canadian proposal which was developed to take care of this kind of situation. Mr. Parry pointed out that this was what had occurred last year on the Declaration of Colonialism when the Soviet Bloc had presented a resolution and left it with the Afro-Asians to alter and the West was then placed on the defensive in having to take a negative attitude on the Declaration. He envisaged the possibility of the same situation recurring on the "friendly relations question", and thought we should base our technique on the assumption that the Soviet Bloc might proceed this way.

22. Mr. Kerley drew an explanation between purely exploratory discussions which he felt should be proceeded with in an immediate future, and an exchange of views leading to development of policy, which probably would have to await the early days of the 17th Session of U.N.G.A.

23. Mr. Rettie stated his view that the exchange of views had been extremely useful and suggested that perhaps we should each give further consideration separately to the problem before conferring again.

24. The suggestion was made several times by the American group that the Brussels I.L.A. meeting be utilized for further consultations.

25. At one stage of the conversation, Mr. Beesley mentioned that Canada might not be able to take an active role in the Sixth Committee due to being deeply committed elsewhere on the Soviet colonialism item. Mr. Chayes enquired as to whether it was definite that we intended to pursue this item in the line of some of the reactions received and Mr. Beesley confirmed that it was his understanding that we intended to do so. Mr. Gardner suggested that in such event the question might be raised in the Sixth Committee under the item "friendly relations" basing our position on Article 24 of the Charter. Mr. Beesley expressed some personal interest in this possibility since it might also provide a way of bringing forward the U.S.A. views on non-intervention.

26. The meeting then adjourned for lunch, during which informal discussion continued on the items in question and also on the question of permanent sovereignty, of national state responsibility, the O.E.C.D. Convention investment, I.L.C. activities and proposed meeting of the I.L.A. in Brussels.

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27. In summary, neither the American nor the Canadian approach appear to have been fully developed on permanent sovereignty: the U.S.A. position on the O.E.C.D. Convention is fairly negative, based on the feeling that the countries who drafted it are preaching to the converted, and the under-developed countries are unlikely to accept it since it is too one-sided on state responsibility; there seems to be no definite conclusion on the U.S.A. side and it was suggested, on a personal basis, by Mr. Beesley, that the question may prove to be one on which the West and the Soviet Bloc may have to "agree to disagree".

28. Mr. Beesley passed on something of Mr. Cadieux's views in general terms concerning the I.L.C., and in particular mentioned that although the Soviet Bloc had achieved success on one or two important questions, they had not had it their own way altogether. Also, they had not shown a disposition to turn the I.L.C. discussions into a political debate, perhaps as a result of their previous success in the Sixth Committee.

29. It may be worth noting also that Mr. Chayes made the point several times in passing that the U.S.A. had not been strongly opposed to the inclusion on the Sixth Committee agenda of the item in question since they felt they had little to fear from such a discussion.

30. One amusing side-line is that Mr. Rettie mentioned at one point that he was surprised that the U.S.A. had not taken more credit for having originated the "five principles of peaceful co-existence", and when Chayes expressed puzzlement Mr. Rettie produced a copy of the paper handed by Cordel Hull to the Japanese just before Pearl Harbour, suggesting as the basis for the relations between the two countries four of the "five principles" and, in effect, the fifth also. The surprise and amusement on the American side was very marked. (Mr. Rusk had made an appearance shortly beforehand and departed after a brief stay, and Mr. Chayes had mentioned that Mr. Rusk might have been able to make use of this argument in explaining to Congressmen the inclusion of co-existence in the Laos Declaration. Shortly afterwards, Mr. Rusk re-appeared and Mr. Chayes mentioned the matter to him, and Mr. Rusk asked for the piece of paper on the subject).

J.A. Beesley

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA.

NUMBERED LETTER

TO: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

FROM: The Canadian Embassy
Rome, Italy

Reference: Your letter L207 of June 11, 1962

Subject: Future Developments of International Law: Sixth Committee Initiative

Security: Confidential

No: 415

Date: July 23, 1962

Enclosures:

Air or Surface Mail:

Post File No:

Ottawa File No.	
5475-AX-40	
37	37

TO: Mr Beesley
REGISTRY

References
Done July 31/62

On Friday, July 20, we called on Minister Majoli, head of the U.N. office at the Foreign Ministry, to see what progress had been made in reviewing the questions relating to the future development of International Law and particularly the Sixth Committee initiative on the primacy of International Law proposed in your letter under reference which we had earlier submitted for consideration.

2. Majoli said that the problem was being studied by Prof. Riccardo Monaco, head of the Legal Service in the Foreign Ministry, and by Prof. Ago, Italian member of the International Law Commission. Majoli hoped to have their views in the near future.

3. In the meantime he asked whether there was any connection between this proposed initiative and the Canadian proposal that the question of Soviet colonialism be raised at the Seventeenth Session of the General Assembly. He observed that while Italy had not taken a definite position at the recent NATO meeting to discuss U.N. affairs, he had obtained the impression that a number of countries viewed the proposed initiative on Soviet colonialism with certain reserve.

4. We informed Majoli that the proposed initiative on the primacy of International Law was separate and was the result of careful legal studies made over a period of time. It was not primarily directed towards scoring some immediate propaganda or political advantage in the assembly but was motivated by an increasing awareness of the necessity for protecting and reasserting the traditional concepts of International Law.

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA. *(DUPLICATE)*

[redacted] F1-1-03

NUMBERED LETTER

TO: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

FROM: The Canadian Embassy, Brussels

Reference: Your telegram to Washington No. L80 of June 8, 1962.

Subject: Departmental representation at International Law Association Meeting.

Security: CONFIDENTIAL

No: 388

Date: July 20, 1962

Enclosures: —

Air or Surface Mail: air

Post File No:

Ottawa File No.	
5475-AX-40	
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References

Orig: 11647-A-40

While we have been informed that two legal officers from the Department will be attending the ILA Conference in Brussels from August 19 to 25 as observers, we have as yet received no further details. We should therefore be glad to receive more specific information as soon as possible if we are to be called upon to make reservations or provide any other form of service.

[redacted] GILMOUR

The Embassy.

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original on 5475-DW-82-X
cc 5475-AX-37-X

FM NATOPARIS JUL20/62 CONFD

TO EXTERNAL 1746 PRIORITY

INFO PERMISNY WASHDC EMBPARIS LDN

REF OURTEL 1665 JUL12

17TH UNGA-DISCUSSION IN NATO-GENERAL

SECOND COUNCIL MTG ON UN MATTERS WHICH HAD NOT RPT NOT BEEN FULLY DISCUSSED LAST WEEK(OUR REFTEL)TOOK PLACE ON JUL19.WE HAVE ALREADY REPORTED(OURTEL 1745 JUL19)ON OUR INTERVENTION ON ITEM OF SIXTH CTTEE AGENDA CONCERNING PRINCIPLES OF INTERNATIONAL LAW AND WE SHALL REPORT SEPARATELY ON EACH OF ITEMS WHICH WERE DISCUSSED DURING THIS MTG.IN ADDITION SOME REMARKS OF A GENERAL NATURE WERE MADE WHICHH ARE REPORTED IN THIS TEL.

2.ITALIAN PERMREP SAID THAT HIS AUTHORITIES REALIZED THAT UN WAS AN IMPERFECT INSTRUMENT AND THAT IT WOULD TAKE TIME TO IMPROVE IT CONSIDERABLY.FUNCTION OF UN,HOWEVER,REMAINED IRREPLACEABLE AND ON WHOLE ITALIAN GOVT AGREED WITH USA POLICY VIS-A-VIS UN AS SET OUT BY MR CLEVELAND LAST WEEK.WESTERN WORLD SHOULD NOT RPT NOT OPPOSE AN ACTIVE FUNCTION FOR UN BUT SHOULD TRY RATHER TO CHANNEL OR CONTROL IT.WESTERN WORLD COULD NOT RPT NOT ALLOW THAT ITS DESTINIES BE DIRECTED BY YOUNG COUNTRIES WITH LITTLE EXPERIENCE.ON OTHER HAND IT SHOULD BE KEPT IN MIND THAT THESE YOUNG COUNTRIES DID NOT RPT NOT ALWAYS ALIGN THEMSELVES WITH SOVIET BLOC.WEST SHOULD THEREFORE HAVE A CONSTRUCTIVE POLICY IN UN AND THIS COULD BE DONE THROUGH CONSULT-ATION IN NATO PARTICULARLY ON SUBJECTS VITAL TO ALLIANCE AS MENTIONED BY UK PERMREP LAST WEEK.ITALIAN AUTHORITIES HOPED THAT NATO COUNTRIES COULD AS FAR AS POSSIBLE HAVE A COMMON POLICY VIS-A-VIS UN.

3.TURKISH PERMREP SAID THAT THEIR GENERAL ATTITUDE TOWARDS NATO WAS SAME AS ITALIAN AND USA AS GIVEN LAST WEEK BY MR CLEVELAND.

4.USA PERMREP READ A SHORT TEL FROM SECRETARY RUSK TO EFFECT THAT HE HAD BEEN GRATEFUL FOR LAST WEEKS INTERESTING DEBATE ON UN MATTERS

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IN COUNCIL AND HOPED THAT IT WOULD BE FOLLOWED UP.USA PERMREP THEREUPON SUGGESTED THAT COUNCIL MIGHT HOLD ANOTHER MTG TO FIND OUT HOW MUCH OF A CONSENSUS COUNCIL HAD OBTAINED ON VARIOUS ITEMS DISCUSSED. HE MADE CLEAR THAT WHAT HE HAD IN MIND WAS NOT RPT NOT AN INTERGOVTL CONSENSUS,WHICH COULD ONLY BE OBTAINED IN NY,BUT RATHER HOW MUCH OF A COMMON VIEW HAD BEEN REACHED ON A PERSONAL BASIS.HE ALSO EXPRESSED WISH THAT PERMREPS WOULD BE KEPT INFORMED OF WHAT HAPPENED IN NY DURING ASSEMBLY AND THAT ANOTHER DEBATE AT SOME LATER DATE DURING ASSEMBLY MIGHT BE USEFUL.

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ACTION COPY

Please refer to UN & European & DL 2 Divs, Wash, Ldn, Permis N.Y. and Disarmament Geneva & file

Done - July 23/62

5475-AX-40

cc: 5475-AX-37-40

FM NATOPARIS JUL19/62 CONFD

TO EXTERNAL 1745 PRIORITY

REF YOURTEL L87 JUL18

17TH UNGA-DISCUSSION IN NATO-PRINCIPLES OF INTERNATIONAL LAW

AS INSTRUCTED WE TAISED THIS MORNING IN COUNCIL ITEM OF UNGA SIXTH CTTEE AGENDA ENTITLED QUOTE CONSIDERATION OF PRINCIPLES OF INTERNATIONAL LAW RELATING TO FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH CHARTER OF UN UNQUOTE.WE EXPLAINED ON BJSIS OF YOUR REFTEL CDN CONCERN REGARDING SOVIET DISTORTIONS OF INTERNATIONAL LAW AND TOLD COUNCIL THAT CDN DEL WOULD CIRCULATE A MEMO ON SUBJECT.WE ALSO STRESSED POINT THAT OUR THINKING ON THIS COMPLEX AND IMPORTANT PROBLEM WAS ONLY AT OFFICIAL LEVEL AND THAT MEMO WHICH WE WOULD CIRCULATE SHOULD BE CONSIDERED AS REPRESENTING ONLY PRELIMINARY VIEWS.

2.AS YOURTEL CAME IN ONLY A FEW MINUTES BEFORE COUNCIL MTG WE ARE NOW PREPARING MEMO AND HOPE TO CIRCULATE IT SOMETIME TOMORROW.

3.OUR PROPOSAL WAS RECEIVED WITH GREAT INTEREST PARTICULARLY BY USA PERMREP AND SECGEN.TIMING OF RAISING THIS SUBJECT SEEMED ALSO WELL CHOSEN AS SEVERAL PERMREPS HAD COMPLAINED OF LACK OF DISCUSSION ON CONCRETE PROPOSALS RELATED TO UN MATTERS.

4.WE SHALL KEEP YOU INFORMED OF COMMENTS AND DEVELOPMENT ON OUR PROPOSAL

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Orig: 5475-AX-37-40

FM EXTERNAL OTT JUL18/62 CONFD

TO NATOPARIS L87 OPIMMED

REF YOURTEL 1698 JUL16

DISCUSSION IN NATO OF AGENDA OF 17TH UNGA

ONE ADDITIONAL TOPIC HAS COME TO OUR ATTENTION WHICH SHOULD WE THINK BE RAISED IN COUNCIL MTG OF JUL19,NAMELY ITEM ON UNGA 6TH CTTEE AGENDA ENTITLED QUOTE CONSIDERATION OF PRINCIPLES OF INTERNATIONAL LAW RELATING TO FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH CHARTER OF UN UNQUOTE.HIS ITEM HAS BEEN USED BY COMMUNIST DELS TO CONVINCE NON-ALIGNED COUNTRIES THAT RISE OF SOCIALIST REGIMES IN LAST DECADES HAD BROUGHT ABOUT QUOTE NEW INTERNATIONAL LAW UNQUOTE BASED ON PRINCIPLES OF QUOTE PEACEFUL COEXISTENCE UNQUOTE.ASSUMING THAT HAVING NOW SET STAGE THEY WILL WANT TO DEVELOP THIS THEME,IT WOULD SEEM DESIRABLE TO BE PREPARED TO MEET THEIR INITIATIVE.OUR PRELIMINARY OFFICIAL LEVEL VIEWS ON MEANS TO ACHIEVE THIS WERE PUT TO SOME OF OUR NATO PARTNERS IN APR (SEE PARTICULARLY TEL L49 APR20 TO LDN,WASHDC,OSLO AND ROME,BEING REPEATED TO YOU SEPARATELY).ANOTHER LINE OF ARGUMENT IS DEVELOPED IN LDN TEL 1412 OF APR16,(ALSO REPEATED TO YOU)WHICH CROSSED WITH OURTEL L49.(OTHER POSSIBLE LINES OF APPROACH PUT FORTH IN INFORMAL DISCUSSION WE HAD WITH STATE DEPT IN WASHDC YESTERDAY HAVE NOT RPT NOT YET BEEN FORMULATED IN SPECIFIC TERMS).

2.THIS QUESTION MAY NOT RPT NOT EASILY LEND ITSELF TO DISCUSSION IN THE NATO COUNCIL AT THIS TIME(ESPECIALLY SINCE SOME MEMBERS WILL NOT RPT NOT HAVE BEEN FULLY BRIEFED ON NATURE AND IMPLICATIONS OF OUR THINKING ON SUBJECT AND MAY HAVE TO SEEK INSTRUCTIONS). WOULD YOU HOWEVER DRAW ATTENTION TO PROBLEM LIKELY TO ARISE IN 6TH CTTEE AND SUGGEST AN EXPRESSION OF VIEWS(PERHAPS IN SUBSEQUENT DISCUSSIONS)ON HOW SOVIET BLOC LINE SHOULD BE MET.

3.AS REGARDS YOURTEL 1687 JUL13,WE HAVE MISGIVINGS ABOUT THE UK EFFORT TO FORMALIZE CONSULTATION WITHIN NATO TO THE EXTENT OF

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OF REACHING AN AGREED LINE FOR ALL MEMBERS ON SUCH SUBJECTS AS DISARMAMENT AND THE SO-CALLED QUOTE NUCLEAR ISSUES UNQUOTE. AS YOU ARE WELL AWARE, QUESTIONS IN THIS CATEGORY HAVE FREQUENTLY RAISED PROBLEMS FOR NATO WHICH COULD NOT RPT NOT BE RESOLVEDIN A UNIFORM WAY AND WHICH DID NOT RPT NOT LEND THEMSELVES TO NATO GROUP VOTING. WITH THIS IN MIND AND IN VIEW OF OUR GENERAL OPPOSITION TO NATO APPEARING AS A BLOC IN THE UN, WE WOULD WISH TO RESERVE OUR POSITION IF THERE WERE ANY ATTEMPT DURING THE CURRENT NATO DISCUSSIONS TO TAKE DECISIONS ALONG THE LINES OF UK SUGGESTIONS.

4. ACCORDINGLY, FIF THERE IS ANY FURTHER DISCUSSION OF THE UK IDEAS, YOU SHOULD APPROPRIATELY EXPLAIN CDAS POSITION AS REGARDS CONSULTATION. WE HAVE NO RPT NO OBJECTION TO INFORMING OUR NATO ALLIES ABOUT POLICIES ND ATTITUDES TO BE FOLLOWED AT UN BUT WE CONSIDER IT UNDESIRABLE AND IMPRACTICABLE TO SEEK AN AGREED POLICY LINE FOR ALL MEMBERS. YOU ARE SUFFICIENTLY AWARE OF OUR VIEWS IN THIS REGARD SO THAT WE NEED NOT RPT NOT ELABORATE THE POINT.

5. AS REGARDS ANY FURTHRER DISCUSSION OF SOVIET COLONIALISM, YOU MAY WISH TO INFORM YOUR NATO COLLEAGUES THAT IN VIEW OF THEIR REACTION TO THE VIEWS EXPRESSED BY YOU ON JUL11(YOURTEL 1690 JUL13), WE HAVE GIVEN FURTHER CONSIDERATION TO THE TACTICS OF PRESENTING A CDN RESOLUTION AT THE 17TH UNGA, PERHAPS BY INTRODUCING THE RESOLUTION IN THE COURSE OF THE ASSEMBLY DEBATE UNDER THE EXISTING ITEM ON COLONIALISM. THIS WOULD PLACE THE DISCUSSION OF SOVIET DOMINATION IN THE CONTEXT OF THE DISCUSSION OF TRADITIONAL COLONIALISM AND WOULD PROBABLY UPSET SOME AFRICAN-ASIANS BUT TACTICALLY SUCH A MOVE MIGHT BE MORE ACCEPTABLE TO OUR FRIENDS. A FINAL DECISION ON TACTICS HAS NOT RPT NOT BEEN MADE. IN THE CIRCUMSTANCES, WE SEE NO RPT NO REASON FOR YOU TO REOPEN THE QUESTION UNLESS OTHER COUNCIL MEMBERS APPEAR TO BE SEEKING A FURTHER EXPLANATION OF CDN VIEWS

ROBERTSON

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FM EXTERNAL OTT JUL18/62 CONFD

TO NATOPARIS L87 OPIMMED

REF YOURTEL 1698 JUL16

DISCUSSION IN NATO OF AGENDA OF 17TH UNGA

ONE ADDITIONAL TOPIC HAS COME TO OUR ATTENTION WHICH SHOULD WE THINK BE RAISED IN COUNCIL MTG OF JUL19,NAMELY ITEM ON UNGA 6TH CTTEE AGENDA ENTITLED QUOTE CONSIDERATION OF PRINCIPLES OF INTERNATIONAL LAW RELATING TO FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH CHARTER OF UN UNQUOTE.HIS ITEM HAS BEEN USED BY COMMUNIST DELS TO CONVINCE NON-ALIGNED COUNTRIES THAT RISE OF SOCIALIST REGIMES IN LAST DECADES HAD BROUGHT ABOUT QUOTE NEW INTERNATIONAL LAW UNQUOTE BASED ON PRINCIPLES OF QUOTE PEACEFUL COEXISTENCE UNQUOTE.ASSUMING THAT HAVING NOW SET STAGE THEY WILL WANT TO DEVELOP THIS THEME,IT WOULD SEEM DESIRABLE TO BE PREPARED TO MEET THEIR INITIATIVE.OUR PRELIMINARY OFFICIAL LEVEL VIEWS ON MEANS TO ACHIEVE THIS WERE PUT TO SOME OF OUR NATO PARTNERS IN APR (SEE PARTICULARLY TEL L49 APR20 TO LDN,WASHDC,OSLO AND ROME,BEING REPEATED TO YOU SEPARATELY).ANOTHER LINE OF ARGUMENT IS DEVELOPED IN LDN TEL 1412 OF APR16,(ALSO REPEATED TO YOU)WHICH CROSSED WITH OURTEL L49.(OTHER POSSIBLE LINES OF APPROACH PUT FORTH IN INFORMAL DISCUSSION WE HAD WITH STATE DEPT IN WASHDC YESTERDAY HAVE NOT RPT NOT YET BEEN FORMULATED IN SPECIFIC TERMS).

2.THIS QUESTION MAY NOT RPT NOT EASILY LEND ITSELF TO DISCUSSION IN THE NATO COUNCIL AT THIS TIME(ESPECIALLY SINCE SOME MEMBERS WILL NOT RPT NOT HAVE BEEN FULLY BRIEFED ON NATURE AND IMPLICATIONS OF OUR THINKING ON SUBJECT AND MAY HAVE TO SEEK INSTRUCTIONS). WOULD YOU HOWEVER DRAW ATTENTION TO PROBLEM LIKELY TO ARISE IN 6TH CTTEE AND SUGGEST AN EXPRESSION OF VIEWS(PERHAPS IN SUBSEQUENT DISCUSSIONS)ON HOW SOVIET BLOC LINE SHOULD BE MET.

3.AS REGARDS YOURTEL 1687 JUL13,WE HAVE MISGIVINGS ABOUT THE UK EFFORT TO FORMALIZE CONSULTATION WITHIN NATO TO THE EXTENT OF

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OF REACHING AN AGREED LINE FOR ALL MEMBERS ON SUCH SUBJECTS AS DISARMAMENT AND THE SO-CALLED QUOTE NUCLEAR ISSUES UNQUOTE. AS YOU ARE WELL AWARE, QUESTIONS IN THIS CATEGORY HAVE FREQUENTLY RAISED PROBLEMS FOR NATO WHICH COULD NOT RPT NOT BE RESOLVEDIN A UNIFORM WAY AND WHICH DID NOT RPT NOT LEND THEMSELVES TO NATO GROUP VOTING. WITH THIS IN MIND AND IN VIEW OF OUR GENERAL OPPOSITION TO NATO APPEARING AS A BLOC IN THE UN, WE WOULD WISH TO RESERVE OUR POSITION IF THERE WERE ANY ATTEMPT DURING THE CURRENT NATO DISCUSSIONS TO TAKE DECISIONS ALONG THE LINES OF UK SUGGESTIONS.

4. ACCORDINGLY, FIF THERE IS ANY FURTHER DISCUSSION OF THE UK IDEAS, YOU SHOULD APPROPRIATELY EXPLAIN CDAS POSITION AS REGARDS CONSULTATION. WE HAVE NO RPT NO OBJECTION TO INFORMING OUR NATO ALLIES ABOUT POLICIES ND ATTITUDES TO BE FOLLOWED AT UN BUT WE CONSIDER IT UNDESIRABLE AND IMPRACTICABLE TO SEEK AN AGREED POLICY LINE FOR ALL MEMBERS. YOU ARE SUFFICIENTLY AWARE OF OUR VIEWS IN THIS REGARD SO THAT WE NEED NOT RPT NOT ELABORATE THE POINT.

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File No. 6-5-2

CONFIDENTIAL

July 18, 1962.

MEMORANDUM FOR FILE

Legal Questions at
17th UNGA

Discussions were held at State Department on July 17, 1962. The participants were:

CANADA	UNITED STATES
J.O. Farry, Permanent Mission, N.Y.	Abram Chayes, Legal Adviser
J.A. Beesley, Legal Division	Leonard C. Meeker, Deputy Legal Adviser
G.R. Harman, Canadian Embassy	Stephen M. Schwebel, Assistant Legal Adviser for UN Affairs
E.R. Rettie, Canadian Embassy	Ernest L. Kerley, Office of Legal Adviser for UN Affairs
	Richard N. Gardner, Deputy Asst. Secretary for International Organization Affairs
	Elmore Jackson, Special Asst. for UN Planning, Bureau of IO Affairs
	William H. Berman, Deputy General Counsel, Arms Control and Disarmament Agency
	Delmar R. Carlson, Officer in charge of Canadian Affairs

Most of the discussion centered on objectives and tactics to be pursued in relation to the 12-power item entitled "Juridical Aspects of Friendly Relations and Co-operation Among States". The following general conclusions could be drawn:

(a) Both sides expounded useful ideas meriting further analysis and development;

(b) Further consultations should be held:

(1) To explore further with other interested Western countries in the near future lines along which Western initiatives might usefully proceed;

(2) Ultimately to explore the likely attitude of key non-committed and non-Western countries in the expected debate on peaceful coexistence in the Sixth Committee.

(c) Consultations in (b) (1) above might most usefully be held at the meeting of the International Law Association in Brussels, when it is expected that officials of the main countries concerned (United States, Canada, Britain, France, Italy and possibly Norway) would be in attendance.

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(d) In the meantime United States and Canadian officials might give further thought to the ideas discussed at the meeting, and possibly exchange informally a listing of these ideas that might form the basis for discussion with other Western officials at Brussels.

2. The main emphasis in the Canadian position during the meeting was on the exploratory nature of our approach to the State Department. It was made clear that we were not committed to a particular course of action in the Sixth Committee, nor, indeed, committed to a vigorous prosecution of our suggestion for means of countering the expected Soviet bloc exploitation of the peaceful coexistence question. Much would depend on the attitude of other Western countries and on an assessment of likely attitude of non-committed countries. Also, Canadian officials recognize the existence of other approaches than that involving a declaration concerning the primacy of international law. Canadian officials had, for instance, been informed by British officials that the Foreign Office was thinking in terms of reliance on specific passages of the United Nations Charter as the appropriate source for a rebuttal of the expected Soviet position. Canadian officials were satisfied that a major Soviet bloc campaign should not be allowed to go by default. No Canadian governmental position had yet been adopted on policy and tactics in the Sixth Committee, and Canadian officials were anxious at this stage simply to explore views of State Department.

3. Meeker, leading off for the United States side, also made clear that no United States, or even State Department position, had been adopted. He hoped the discussions could be pursued informally and that perhaps, in due course, further discussions would lead to development of a precise strategy to which governments could agree. Meeker conceded that the Canadian suggestion for action, based on the primacy of international law, seemed to have much merit. He was less sure, however, that any attempt should be made to embody this concept in a resolution or declaration in Sixth Committee. His doubts were on the grounds of feasibility rather than desirability. In a negative sense he was concerned at the possibility that a failure of the Committee to adopt a formal statement embodying this concept might strengthen the Soviet bloc's hand. In a more positive sense he thought that the primacy of international law could be regarded as axiomatic and not an appropriate subject for affirmation or reaffirmation by the UNGA. On the other hand he thought that the concept was fundamental to the Western approach and that discussions of, and contributions to, this concept, by all shades of opinion in the Sixth Committee, would be helpful.

4. Meeker also thought that there was much to be said for Western efforts to focus attention on areas of substantive interest to a wide range of member countries. Discussion of substantive points would point up the value and relevance of the concept of primacy of international law as well as permitting some actual progress to be made on substantive problems involved. Examples of the substantive problems in mind could be found in two areas:

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(1) The area of non-interference in internal affairs of other countries--in Africa, Latin America and Asia there were problems of subversion and external aid to dissident elements. A wide range of members could feel that this was an area in which international legal concepts could make some contribution to the cause of stability. The theme to pursue would be that of "the national independence" of countries that might be involved. There might also be emphasis on the contribution that the United Nations could make to the cause of stability.

(2) The area of national boundaries and the use of force to effect changes therein--here again Meeker thought that member countries such as India, Kuwait and many African states could feel that practical problems existed which it was in their interest to explore in a legal context.

5. Meeker did not regard the problems shortly to be faced by the Sixth Committee as amenable to final solution at an early date. We might have to face discussion of them over a considerable period of time. It would be unwise to decide prematurely where this process might lead. In the immediate future, however, he thought consultations with other countries would be necessary and that ultimately these must be broadened to cover countries holding different views and facing different situations.

6. Gardner, pointing out that the new countries tended not to accept traditional international norms at face value, noted that a major Western imperative was to avoid falling into the trap of simply defending the status quo. For instance a legitimate Western effort to defend means of protecting foreign investments was likely to be regarded by many of the newer countries as simply a desire to maintain the status quo. He thought, therefore, Western efforts in the Sixth Committee might embrace two main lines:

(1) The Western participants must strive to show that international legal norms such as pacta sunt servanda and the supremacy of international law operate in the interests of the newer less-developed countries, as well as in the interests of the old-established countries. Recipients of foreign assistance and primary exporters also benefitted from traditional international legal rules. What had to be made clear was that international law, as developed by the West, was a part of a dynamic progressive international society and could be developed consistently with the interests of the newer countries.

(2) Western countries should also find ways of giving less-developed countries a sense of participation in the development of the principles of international law. For example, technical assistance in the legal field might be provided, or a library services in the field of international law might be established. The authorities of less-developed countries might be "locked into" the International Law Commission on a continuing and longer-term basis. He quoted Sir Humphrey Waldock as saying

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recently that, in his experience, the polemics of officials from the LDCs were clearly directed against the Western concept of international law, but when they were forced to consider the scope and application of specific principles of international law, they were generally inclined to accept their inherent logic and relevance.

6. Gardner agreed with Meeker that the primacy of international law concept should be regarded as "one of the givens" and that it was not something which ought to be litigated each session of the UNGA. However, he entertained some reservations on Meeker's first given example of a practical subject matter on which the West might suggest specific action, i.e., the principle of non-interference in internal affairs. In the first place, he thought that it ought to be called by some other name, i.e., "Principles for Eliminating Subversion". Whatever it is called, the principle also could open up the way for attacks on the primacy of international law because non-interference was interpreted very loosely by some of the newer countries as ruling out any kind of external limitation of national sovereignty. In many cases it had been used to justify unfettered control of foreign assets within the national jurisdiction, without regard to ultimate external interests involved. In fact, Gardner thought that in the modern world what was needed was more mutual intervention and mutual affectation, rather than less, and that the principle of non-interference or non-intervention could all too easily be used as a shield against the desirable development of mutual intervention.

7. Berman expressed interest in the substantive points raised by Meeker, especially his first point. He agreed that this was a most complex and crucial problem, as well as that concerning the protection of existing national boundaries. The Legal Office of ACDA was interested in these questions also in the context of peace-keeping machinery, such as ACDA officials believed would be necessary when the appropriate stage had been reached in the disarmament process. ACDA had not reached any general conclusions on these questions, except to the extent of setting forth certain general concepts in the United States draft outline of basic provisions for a treaty on general and complete disarmament in a peaceful world. The relationship between the United Nations and an "international disarmament organization" was also a relevant question. At the moment the only fairly precise suggestion that might be put forward by ACDA was that a study might be suggested at the UNGA of the prospects for an extension of the jurisdiction of the International Court of Justice. He recognized that there were internal difficulties on the United States side which might inhibit such action. In a more general vein he thought that there should not be undue emphasis on the codification of international law: there might, instead, be some effort directed towards the establishment of an international equitable tribunal which would aim at the development of international law rather than its codification.

8. On the point of an extension of ICJ jurisdiction, Berman thought that the objective ought to be to make gradual progress, i.e., not to do away with the Connally amendment all at once. Perhaps something could be done, however, to start a general movement towards the acceptance of ICJ jurisdiction over all treaties. In this process it would, of course, be desirable to move along with, rather than ahead, of the LDCs.

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Chayes commented that there was an obvious need for more cases for the ICJ, not "temple cases" like that involving Thailand and Cambodia, which had really been a rather trivial affair with trivial consequences. Gardner commented that as he saw it, most of the "real issues" in the world today were not susceptible of judicial treatment. Chayes agreed that there was a good deal to this point of view, certainly to the extent that it was very difficult to find justiciable issues that countries were prepared to refer to the ICJ. He had scoured the State Department for such issues, but all had been ruled out on one ground or another. He conceded in respect of a Canadian comment, however, that although the ICJ might not be currently in a position to make much contribution, it was desirable to maintain and develop efforts to increase confidence in the ICJ. To the extent that it had been effective, the ICJs opinions had earned a considerable amount of respect. Chayes also thought that further recourse might be had to the advisory function of the ICJ: not least of all because this was the quickest and easiest way of bringing out ICJs capacity to exert a useful influence.

9. Jackson expressed the hope that efforts would be made to pursue the extension of the compulsory jurisdiction of the ICJ. He also welcomed Gardner's suggestions for making the whole field of international law more "operational", i.e., showing the LDCs how international law could ultimately be made to work in their interests. It should be the objective to involve the newer countries in this process to the maximum extent. He wondered, incidentally, how many of the foreign offices of the newer countries actually had legal advisers. Could the UN stimulate international legal activities of newer countries, perhaps creating an international institute for legal training? (Jackson told me at lunch that the Bureau of International Organization Affairs was developing specific proposals for some kind of an international institute interested in the field of training in international relations. Both governments and private foundations might be interested in such a project. Eventually such an institution might expand by establishing a specific branch to impart training in the field of peace-keeping machinery.)

10. Schwebel agreed that the suggestions for "operational" advances in the field of international law had merit. However, he wondered whether the United States, or even the West generally was in the best position to originate such ideas publicly. He thought the Secretary General might be a more acceptable exponent of such thoughts. In a broader vein he agreed that there was a need for a forthcoming and positive approach by the West to the issues to be faced in the Sixth Committee. At the same time he did not wish the more negative aspect of these problems to be overlooked, i.e., the need to react in some way to the distortion of Western-developed international law by the Soviet bloc. He was inclined to agree with the Canadian assessment that the Soviet bloc might well mount a major campaign in the Sixth Committee to exploit the concept of peaceful coexistence. As to tactics for dealing with the anticipated Soviet campaign, he thought that Western representatives might try to draw out the Soviet bloc representatives in the Committee by enquiring as to the interpretation they placed on peaceful coexistence; avoid stating any objections to declaratory formulations of the concepts of peaceful coexistence; and ultimately equate a reasonable interpretation of these concepts as no more and no less than what had already been developed by the West as the basic concepts of international law. The Committee could be reminded, for instance, of the existence of a Draft Code on the Rights and Duties of States which member countries could adhere to if they so wished.

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11. In response to the canard that traditional international law was obsolete, Western representatives could stress the positive and dynamic aspects of the Western approach to international law and offer to examine specific areas in which progress might be made. Incidentally, Schwebel mentioned that his office had already started on a study of Soviet positions on the legal background of peaceful coexistence which he hoped at some stage might contribute to Western discussions.

12. Kerley, of Schwebel's office, suggested that the debate in the Sixth Committee could theoretically follow one of two directions. The emphasis could be on the legal concepts involved in peaceful coexistence, or it could attempt to identify areas of practical concern in which to make specific progress. The former course was really an exercise in codification. The Draft Code on the Right and Duties of States was an example of this line of procedure but it had never been widely accepted and underlined the sterility of abstract discussion. He suggested that it was necessary to regard the Sixth Committee not just as a conduit for feeding new projects to the ILC. Furthermore, unlike the ILC, which was composed of private individuals, the deliberations of the Sixth Committee presuppose a knowledge of national positions on international legal questions. Esentially the Sixth Committee was equipped to deal with political questions of a quasi-legal nature and the objective should, therefore, be to deal in practical fashion with such problems in the Sixth Committee rather than in attempting the codifying function of the ILC. As a purely practical matter the ILC had enough projects to keep it going for some time.

13. Chayes agreed that it was a good idea, as the United States had attempted to establish last year, to elevate the status of the Sixth Committee. Gardner was concerned to point out, however, that a fundamental division between the codification and the development of international law did not really exist. Chayes and Kerley disowned any such distinction, pointing out rather that the fields of the ILC and the Sixth Committee were distinguished rather by their respective technical and political subject matters.

14. Jackson thought that the discussion of the respective fields of the two bodies underlined the role that the Sixth Committee could play in preparing the ground for the "peaceful world" referred to in the United States position on disarmament. He envisaged the work of the Committee as preparatory to a "phasing in" in due course of the sort of peace-keeping machinery being studied by ACDA. He wondered whether Berman would agree that the UNGA would be an appropriate place to start laying the groundwork. Berman was reluctant to agree to a change of venue. He thought that the United States disarmament proposal were a complete package from which it would be unwise to separate peace-keeping machinery with a view to its discussion in the UNGA. We suggested that a distinction might be drawn between peace-keeping arrangements in a disarmed world and the many ground rules for international conduct (many of them unconnected with peace-keeping as such) which would have to be subsumed in the international legal regime in a disarmed world.

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15. After this preliminary "round robin" exchange of views, there ensued a general discussion bringing out a few additional points. Some ideas also were brought up subsequently at a luncheon given by Mr. Chayes. The following might be mentioned:

(a) Much of the morning's discussion failed, in our view, to focus on the point of departure which we had developed, i.e., that the Soviet bloc countries would have an initial advantage in debate on peaceful coexistence. Most representatives of Afro-Asian LDCs would probably have fairly wide discretion to go along with high-sounding generalizations embracing the five principles. The Soviet bloc tactics would no doubt be to set this in the context of a slanted Soviet approach to international law. Thus, whatever "positive" initiatives might be developed by the West on specific topics, the problem would still remain of countering or neutralizing the anticipated Soviet campaign to distort the broad context of the debate. These ideas had been, to some extent, recognized by earlier participants on the United States side, and further discussion seemed to elicit broad acceptance that there was a real problem to be faced. In particular the United States side appeared to agree that the likelihood of Afro-Asian support of broad, and perhaps, dangerous, generalizations, was great.

(b) Some thought was given to the need for advance consultation with key non-committed and non-Western countries. The opinion of United States participants seemed to be that exploratory consultations, and, if feasible and desirable, the promotion of Western ideas, might have to take place in capitals. In view of the time available, however, this might prove difficult. The alternative seemed to be to delay, for a reasonable time, the inception of debate in the Sixth Committee in order to allow some spade-work to be done in New York among both favourably-disposed and doubtful delegations. There was also some discussion of the possibility that exploration of the position of Afro-Asian and Latin American countries might be parcelled out to appropriate Western governments.

(c) The United States representatives stressed that in view of the difficulties envisaged in the Sixth Committee there should be emphasis on the desirability of high-level representation by at least Western countries.

(d) There was some rather inconclusive discussion of the procedural and tactical problems that might have to be faced in the Sixth Committee. It seemed to be agreed that exploration of non-Western views ((b) above) would be important in coming to any conclusions on these. In general, however, it was agreed that Western representatives would not be impoverished in their approach to problems of coexistence and that the principal danger to be avoided was an appearance of Western preoccupation

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with cold war issues. There was some discussion in this sense of the particular topics mentioned by Meeker (paragraph 4 above). Meeker stressed that these were examples chosen at random.

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ACTION REQUEST

TO: Mr. M. Cadieux | DATE: July 12/62

LOCATION: (Through U.N. Division)

FROM: Legal/J.A. Beesley/hpl | RE FILE NO.:

FOR:

	ACTION		NOTE & FORWARD
	APPROVAL		NOTE & RETURN
	COMMENTS		P.A. ON FILE
	DRAFT REPLY		REPLY DIRECTLY
	INFORMATION		REPLY, PLEASE
	INVESTIGATE AND REPORT		SEE ME, PLEASE
	INVESTIGATION	X	SIGNATURE
	MAKE.....COPIES		TRANSLATION
	MORE DETAILS		YOUR REQUEST
	NOTE AND FILE		.....

PREPARE MEMO TO:.....

REPLY FOR SIGNATURE OF:..... Signed 13.7.62

REMARKS 1 telegram for your signature, if you agree, please.

(Mr Parry has confirmed by telephone that it can go)

JB

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

DATE	FILE		SECURITY
Jul 12/62	5475-AX-40		RESTRICTED
	57	57	

FM: EXTERNAL OTT

NUMBER	PRECEDENCE
L-85	PRIORITY

TO: PERMISNY

INFO: WASHDC

Ref.: OURTEL L-82 of JULY 6 AND PARRY BEESLEY TELEPHONE CONVERSATION

Subject: FUTURE DEVELOPMENT OF INTERNATIONAL LAW: SIXTH COMMITTEE DISCUSSIONS

THIS WILL CONFIRM THAT IT WILL NOT BE POSSIBLE TO HAVE AN OFFICER FROM U.N. DIV. ATTEND THE JULY 17 MEETING IN WASHINGTON AND WHAT WE SHOULD LIKE TO HAVE PARRY MADE AVAILABLE FOR THIS PURPOSE.

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cc repeat to Washington UNDel Miss Frash

Original for 5475-AX-40

3 July, 1962

[cc on 5475-AX-A-8-40]

REPORT ON THE INTERNATIONAL LAW COMMISSION - 14TH SESSION - GENEVA, APRIL 24-JUNE 29, 1962.

5475-AX-40

The following is a summary of the work of the International Law Commission at its past session, together with comments on a number of aspects of its work. The report prepared by the Commission on its work, including the texts of all agreed draft articles and commentaries, will be air-mailed to you as soon as it is available. An index of the various topics discussed in the letter is contained in Annex I to this letter.

INTRODUCTION:

2. The International Law Commission at its 14th Session discussed two principal questions: the future work of the Commission (in response to a request made by the General Assembly in Resolution 1686, December 16, 1961), and the Law of Treaties. Although it was widely expected before the convening of the Commission that Professor Ago of Italy would be elected President of the Commission, some behind the scenes manoeuvering by Professor Tunkin (USSR) resulted in the election of Mr. Radhabinod Pal (India) as President of the Commission, notwithstanding the fact that he had served in this capacity at an earlier session. M. André Gros of France was elected First Vice-President; Mr. Gilberto Amado (Brazil), Second Vice-President; and Professor Manfred Lachs (Poland) was elected Rapporteur. This was the first meeting of the Commission following its enlargement pursuant to General Assembly Resolution 1647 (XVI) of November 6, 1961. In addition to myself, the following are the members of the Commission:

M. Roberto Ago	Italy
M. Gilberto Amado	Brazil
M. Milan Bartos	Yugoslavia
M. Herbert W. Briggs	United States
M. Erik Johannes S. Castren	Finland
M. Abdullah El-Erian	U.A.R.
M. Taslim O. Elias	Nigeria
M. André Gros	France
M. Eduardo Jiménez de Aréchaga	Uruguay
M. Victor Kanga	Cameroun
M. Manfred Lachs	Poland
M. Liu Chieh	China
M. Antonio de Luna	Spain
M. Luis Padilla Nervo	Mexico
M. Radhabinod Pal	India
M. Angel M. Paredes	Ecuador
M. Obed Pessou	Dahomey

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M. Shabtai Rosenne	Israel
M. Abdul H. Tabibi	Afghanistan
M. Senjin Tsuruoka	Japan
M. Grigory I. Tunkin	U.S.S.R.
M. Alfred Verdross	Austria
Sir Humphrey Waldock	United Kingdom
M. Mustafa K. Yasseen	Iraq

While the great majority of these members were in attendance for the full Session, there were a number of absentees. Mr. Kanga of the Cameroun was absent for the entire Session and Mr. Padilla Nervo, Mr. Tabibi, Mr. Elias, and Mr. J. de Aréchaga were absent for several weeks. The participation of some members was also limited by their activities at other meetings which took place in Geneva at the same time. Mr. El-Erian and Mr. P. Nervo were both delegates to the 18-nation Disarmament Conference; Mr. Ago participated, as in the past, in the International Labour Conference; Professor Tunkin was the representative of the Soviet Union in the Outer Space Legal Sub-Committee and Professor Lachs was Chairman of that Committee, and a member of the Polish Delegation to the Disarmament Conference.

DISCUSSION OF THE COMMISSION'S METHOD OF WORK:

3. The first two weeks of the Commission's discussions were devoted to a consideration of its future work as requested by the General Assembly at its last Session, and there was also a substantial amount of discussion about the methods of work of the Commission. On this latter subject, a variety of views were again expressed similar to those advanced in earlier sessions, e.g. regarding the possibility of meeting more often during the session (Mr. Tabibi); obtaining outside assistance (Mr. Castren); electing members for a longer period than five years (Mr. Tabibi); staggering the expiration of the term of office of members along the lines followed by the International Court of Justice (Mr. Pal); arranging for the first reading of reports in a sub-committee (Mr. de Luna, Mr. Verdross); making the ILC a permanent body (Mr. Pal); dividing the ILC into two sub-commissions (Mr. Castren); appointing more than one rapporteur per subject (Messrs. Tabibi, Castren), etc. As in the past sessions, the discussion was general and diffuse and none of these suggestions found much support in the Commission. The Commission made, however, an important innovation in its method of work by creating three sub-committees or working groups to deal with the future work of the Commission and the subjects of state responsibility and succession of states and governments. There was a sharp divergence of views on the desirability of establishing sub-committees of the type finally agreed upon on state responsibility and succession of states and governments. The suggestion that such working groups be created was made by Professor Tunkin who clearly saw in this procedure the possibility of Soviet influence being brought to bear on the treatment of these topics. The preference of a large number of members, including Messrs. Gros, Waldock, Verdross, Ago, Elias, Aréchaga and myself was for appointing special rapporteurs at the present session with either no special committees being established or their creation as consultative groups in order to advise the special rapporteur on the general guidelines of his work. While no vote was taken, it was clear that the decision to defer the appointment of special rapporteurs for these subjects and to create committees with general exploratory functions, was due less to the general wishes of the majority of members than to the determination of the Chairman and the Soviet bloc representatives. Of particular interest is the fact that this was the first time in the history of the Commission that a decision was taken to establish working groups of this sort. The decision that the working groups should meet in Geneva outside the normal session of the Commission (see paragraph 4 below) is a further innovation, as neither the Commission nor its members have ever met officially outside the normal session. It is likely that these decisions will constitute an important precedent with regard to the future work of the Commission.

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CONSTITUTION OF WORKING GROUPS:

4.(a) An eight-member sub-committee was established under the Chairmanship of Mr. Amado of Brazil with the function of drawing up a list of topics and recommendations regarding the Commission's future work, pursuant to the General Assembly request in Resolution 1686 (XVI) of December 18, 1961. The members of the sub-committee were: Messrs. Ago, Bartos, Castren, Aréchaga, Pessou, Tunkin and myself. This committee held one meeting towards the end of the session which was sufficient for the achievement of its work. It was agreed by all members that the Commission would be fully involved for many years with work already undertaken at the request of the General Assembly or which the Assembly had asked the Commission to undertake in the future. (See footnote below). In the brief discussions in the sub-committee on this subject, I expressed my agreement with the realistic approach taken by the sub-committee to this subject and with the view that, time permitting, it would be desirable to take up at the Commission's next session, the subject of special missions. The Commission approved the sub-committee's recommendations and also decided to take up at its next session, if time permitted, the subject of relations between states and inter-governmental organizations. It appointed Mr. El-Erian rapporteur of this subject and requested that he submit a preliminary report to the Commission at its next session.

(b) A sub-committee or working group of ten members was established on the subject of state responsibility under the Chairmanship of Mr. Ago, with the following additional members: Messrs. Tunkin, Lachs, Gros, Briggs, Aréchaga, de Luna, Tsuruoka, Parades and Yasseen. The function of this committee is to study and to lay down general instructions on the scope of state responsibility for the guidance of the special rapporteur or rapporteurs who are to be appointed at the next session in 1963. This committee held one meeting during the course of this session. Mr. Ago reported that it was unanimously agreed by the Committee to try to determine what are the essential principles of state responsibility. This pursuit should be divorced from the earlier approach taken by the Commission which was to concentrate on responsibility for damage to aliens. After receiving a statement of financial implications from the Secretariat (Document A/CN.4 L.100 Rev. 1) the committee decided that it would meet on January 7, 1963, in Geneva, for a period of approximately one week. All members of the working group were asked to submit in writing their general views to the Secretariat before December 1, 1962. Mr. Ago said that Mr. Paredes and

(Footnote: The following are the seven topics contained in the various General Assembly requests: the Law of Treaties and state responsibility (the Commission is continuing its work on this subject in accordance with Resolution 1686 (XVI)); succession of states and governments (the same resolution requested priority for the codification of this subject); relations between states and inter-governmental organizations (the Commission was invited to give consideration to this question by Resolution 1289 (XIII) December 5, 1958); the right of asylum (the Commission was requested to undertake the codification of this subject in Resolution 1400 (XIV) of November 21, 1959); the study of the juridical regime of historic waters (the Commission was requested to undertake this study in Resolution 1453 (XIV) of December 7, 1959); special missions (a further study of the subject was requested in Resolution 1687 (XVI) of December 16, 1961).

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Mr. Aréchaga had already given to him written memoranda on their views. It was also agreed that the Chairman of the working group should prepare a report on the results of its deliberations, for submission to the Commission at its next session. While the Commission took no decision on the approach of the working group, it is clear that the latter Committee is proceeding on the basis that the codification of general principles of state responsibility should receive priority over treatment of the subject of responsibility for damage to aliens.

(c) A sub-committee or working group of ten was also establishe on the succession of states and governments under the Chairmanship of Mr. Lachs with the following additional members: Messrs. Bartos, Briggs, Castren, Liu Chieh, Elias, Tabibi, Tunkin, Rosenne and El-Erian. The terms of reference and the time of reporting of the work of the sub-committee are the same as those of the sub-committee on state responsibility. Professor Lachs reported to the Commission that the working group had held two meetings at which the members first suggested a series of topics for inclusion in the general subject of succession of states and governments. However, the sub-committee decided that it would be premature to draw up a list of the constitutive elements and that the most important matter, at the present stage, was to discuss the general approach to be taken to and the general scope of the subject as a whole. The sub-committee decided to meet on January 17 until January 25, if necessary. The Secretariat will prepare a series of preparatory documents comprising:

(i) a questionnaire for circulation to governments requesting certain essential information with regard to state practice;

(ii) a paper on succession of states in the UN;

(iii) a paper on UN experience with regard to succession as a depository of general multilateral conventions, and

(iv) a digest of decisions of international tribunals.

Members of the working group were requested to submit their written views on the scope of the subject and approach to be taken. On the basis of these views, the Chairman will prepare a working paper summarizing the various views and providing some guidance for the working group at its January meeting. It was intended that the Chairman should prepare a report on the basis of the work of the sub-committee in time for the 1963 session of the International Law Commission.

SUBSTANTIVE DISCUSSION OF STATE RESPONSIBILITY:

5. There was also a considerable discussion in the Commission on the scope of state responsibility and succession, although this discussion was often closely related to the procedural discussion of the method of work on these subjects. On the subject of state responsibility many members (including Mr. Verdross, Mr. Ago, Mr. Tunkin, Mr. Lachs, Mr. Yasseen, Mr. Bartos and others) supported the view that the subject should be split into two or more parts. A majority of those wishing to divide the subject envisaged this division as generally corresponding to the broad question of the general scope and nature of state responsibility and the more limited question of responsibility for damage to aliens on the territory of a foreign state. Many suggestions were made as to the main headings of the general principles of state responsibility, among which Professor Ago's formulation was perhaps the most comprehensive. He

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considered that the subject included: nature of an unlawful act under international law; question of its imputability to states; question of the time when a breach of an international rule produces international responsibility; direct and indirect responsibility; circumstances of exoneration; consequences of responsibility; reparation and enforcement measures. Mr. Rosenne thought that two aspects of the subject were so complex as to require separate treatment - exhaustion of remedies, and rules relating to the nationality of a claim. On the other hand, there were several members of the Commission (including Messrs. Gros, Aréchaga, Briggs, Sir Humphrey Waldock and myself) who emphasized the close inter-relationship between the subject of status of aliens and the general principles of state responsibility and the desirability of designating a special rapporteur to consider the questions of the treatment of the subject and to make recommendations on whether and how it might appropriately be divided.

6. I pointed out at the 633rd meeting of the Commission that, in my view, the general principles were essentially rules relating to various aspects of the concept of responsibility for damages to aliens and therefore the study of the latter would necessarily embrace a consideration of the broader principles. For this reason I believed that an appropriate way to approach the subject was through the elaboration of responsibility for damage to aliens. On the other hand, Professor Tunkin argued on several occasions that the general principles of state responsibility were not merely those implicit in the subject of responsibility for damage to aliens, but concerned mainly the responsibility of states under the "new international law", embracing such questions as state responsibility in relation to maintenance of international peace and security arising from acts of aggression and violations of the UN Charter and of the obligation to grant independence to colonial peoples.

6.(a) A particularly cogent statement in favour of the narrower approach to the subject was made by Mr. Aréchaga, who pointed out that modern practice, even of the communist states, often recognized in bilateral agreements, that lump-sum payments should be made for nationalization and expropriation. He considered that the subject of responsibility of damage to aliens could be approached through a study and elucidation of the principles of unjust enrichment, which all states recognized. He also made a strong plea for priority to be given by the Commission to the subject of responsibility for damage to aliens on grounds that the General Assembly and other UN organs looked upon the problem as a pressing one and expected the Commission to face up to its responsibilities of codifying and developing the law on a subject of crucial importance to both capital importing and exporting states.

SUBSTANTIVE DISCUSSION OF SUCCESSION:

7. On the subject of state and government succession there was general agreement that priority should be given to it as requested by the General Assembly, but many questions were raised on the substance of the subject, including the following: whether there were general rules governing the subject which could be deduced from state practice (Sir Humphrey Waldock, Messrs. Rosenne and Verdross); what its relationship was to various aspects of the law of treaties and state responsibility (Sir Humphrey Waldock, Mr. Rosenne) whether the topic should be split; and whether succession of governments was a proper subject for codification (Messrs. Gros, Bartos and Rosenne). The view was also widely expressed that in view of the paucity of existing material on the subject, the Secretariat should solicit reports from governments by circulation of a questionnaire (a practice followed by the League of Nations) on state succession [illegible], and should prepare a background study. (As noted above, the working group on this subject agreed that this should be done). The

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working group on succession discussed but took no decision on the question whether succession of states should embrace also succession of governments or whether the subjects should be split.

GENERAL SUMMARY OF DEBATE ON FUTURE WORK OF THE COMMISSION:

8. In general the members of the Commission adopted a realistic view to the question of their future work. It was generally recognized that desirable as it might be to include additional topics in the work of the Commission its present agenda allowed very little opportunity to the Commission to introduce new subjects. Notwithstanding the wide variety of subjects proposed by various governments in response to the Secretary-General's questionnaire sent out pursuant to General Assembly Resolution 1505 (XV) and notwithstanding the specific request of the General Assembly in 1686 (XVI) that the Commission should consider its future programme of work, the members of the Commission showed very little disposition to press for inclusion of additional subjects. The communist representatives, Messrs. Tunkin, Lachs and Bartos, shared this approach and their interventions during the debate on the future work of the Commission were restrained and their advocacy of the "new international law" was generally in a rather low key. Debates on the future work of the Commission did not reveal any significant degree of political content and the communist representatives showed no disposition to introduce the subject of peaceful co-existence as a separate topic on the agenda of the Commission. However, they strongly maintained their general arguments in favour of an approach to state responsibility which would seem capable of embracing a rather similar range of topics, and they achieved an important measure of success in the decision of the working group on state responsibility to give priority to the question of general principles of state responsibility.

REPORT OF THE COMMISSION ON ITS FUTURE WORK:

9. In the final hours of the Commission's work, a section of the draft report was submitted to the Commission (A/CN.4/L.101/Add 2 and Add 3) covering its future work including state responsibility and succession. That portion of the report which related to the substantive discussion of state responsibility presented an unbalanced summary and one which strongly favoured the communist position (the general rapporteur, Mr. Lachs, had re-worked the Secretariat's first draft to produce this result). In the Commission I drew attention to this imbalance in the report and suggested that in addition to certain specific changes, a new paragraph be added reflecting the views of those members who regarded responsibility for damage to aliens as the most urgent aspect of the subject and of greatest importance to both developing and developed states. I received the support of Professor Briggs and Mr. Gros and my suggestions were accepted. The biased presentation of the Commission's debate on this subject was one of a number of illustrations of the way in which the communist representatives, through Professor Lachs and through the influence of Professor Tunkin on the Chairman, Mr. Pal, made their influence felt in a manner far exceeding their number.

LAW OF TREATIES - INTRODUCTION AND BACKGROUND:

10. The International Law Commission discussed the Law of Treaties from its 637th meeting on May 7 until its final meeting on June 29. The Commission received, around the beginning of May, Sir Humphrey Waldock's first report on the Law of Treaties (A/CN.4/144). The subject had been on the agenda of the International Law Commission since its first session in 1949 and Waldock was the fourth rapporteur to be appointed, having been preceded in this position by Professor G. L. Brierly, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice. The Commission had not,

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until its present session, met with notable success in its treatment of this subject, due partly to the change of rapporteurs, partly to pressure of other subjects and partly to inconsistencies in approach. For example, in 1950 the Commission decided that the Law of Treaties should be drawn up in conventional form and should include agreements to which international organizations are parties. However, in 1951 the Commission reversed its earlier decision and decided to leave aside the question of the capacity of international organizations to make treaties. As will be seen below, the Commission has also been inconsistent in the past about the form its work should take on this subject.

10.(a) In 1952, Professor Brierly resigned his membership; the Commission thought it inadvisable to discuss his articles and elected Professor Lauterpacht to succeed him. Both in 1953 and 1954, the Commission was unable to take up Professor Lauterpacht's reports, due to other commitments and in the meantime he resigned from the Commission on his election as Judge at the International Court of Justice. In 1955 the Commission elected Sir Gerald Fitzmaurice as special rapporteur, and from 1956 to 1960 Fitzmaurice presented five reports covering: (a) the framing, conclusion and entry into force of treaties; (b) the termination of treaties; (c) essential and substantial validity of treaties; (d) effects of treaties, and (e) treaties and third states. However, the Commission's time was largely taken up with the law of the sea and diplomatic and consular intercourse and immunities so that it was not until its 11th Session in 1959 that it was able to devote some 26 meetings to Fitzmaurice's first report, which was not sufficient to enable the Commission to complete its series of draft articles on this part of the law of treaties. The Commission at the same time revised its earlier decision on the form of its work and decided that it should not take the form of one or more international conventions, but rather a code of a general character. The basis for this decision appeared to have been that much of the law of treaties was not especially suitable for framing in a conventional form. In 1960 Fitzmaurice retired on his election to the International Court. In 1961, at its thirteenth Session, the Commission elected Sir Humphrey Waldock to succeed him and for the third time changed its position on the form of its work on this subject by deciding that the aim of the Commission would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention. The Commission also decided that the special rapporteur should re-examine the work previously done in the field, should begin with the question of the conclusion of treaties and proceed with the remainder of the subject covering the whole topic if possible in two years. The reasons for the Commission's change of view on the appropriate form of its work were based largely on the view that a code, however well formulated, lacked the authority of conventional articles and that the consolidation of this subject was of particular importance at a time when many new states were entering the international community.

SCOPE OF THE SPECIAL RAPPORTEUR'S REPORT:

11. Sir Humphrey Waldock's report (A/CN.4/144) on the conclusion, entry into force and registration of treaties was the basis for the Commission's work at its present session. The Commission agreed that its plan would be to prepare a further group of articles at its 1963 Session covering the validity and duration of treaties, and a further group of articles at its 1964 Session covering the application and effect of treaties. The Commission left open the question whether all the draft articles should be amalgamated to form a single convention or should constitute a series of related conventions. In accordance with its usual procedure, the Commission decided to transmit its draft articles on the conclusion, the entry into force and registration of treaties through the Secretary-General to governments for

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their observations.

12. Sir Humphrey's 27 draft articles covered the broad topic of the "conclusion of treaties", which comprised entry into force, participation in treaties, reservations, registration, correction of errors, and the appointment and functions of a depository. There was some discussion whether the scope of the articles should include provisions concerning treaties of international organizations. The Commission reaffirmed its decisions of 1951 and 1959 to defer until a later stage the examination of treaties of international organizations. While confining the present draft articles to the treaties of states, the Commission indicated in its commentaries that international agreements of international organizations fall within the scope of the law of treaties.

GENERAL TREATMENT OF THE DRAFT ARTICLES BY THE COMMISSION:

13. In general, the Special Rapporteur's work was well received by the members of the Commission. Sir Humphrey adopted a generally realistic approach and one which constituted a reasonable balance between existing practice and the progressive development of international law. Perhaps in the area where the greatest innovations were involved - reservations - Sir Humphrey's proposals were supported by a majority of the Commission. In this controversial area where various positions had been adopted by previous rapporteurs and where an agreed approach had always proved elusive, Waldock was particularly successful in that, although his own approach was a new one, it commended itself to a majority of the Commission, including the newer states, the Latin American states and the communist group. Perhaps the main fault in the Special Rapporteur's report was a rather diffused manner of drafting. His articles tended to be lengthy and sometimes involved formulations of rather obvious points. This lead a number of members (especially Professor Briggs) to spend considerable effort suggesting revisions and abridgements of Sir Humphrey's drafting. The Special Rapporteur proved to have some rather remarkable qualities which became more and more impressive as the discussions developed. He showed himself unusually flexible, open-minded and ready to drop his own preferred solution where necessary and to adopt the views of others as a compromise. He showed almost no disposition to press unduly for his own formulations or phraseology, and demonstrated time and again that his main purpose was to reach agreement on draft formulations acceptable to the members as a whole. There was almost totally absent any disposition on his part to personalize the discussions or to allow his own "prestige" or position as special rapporteur to become involved. The success of the Commission in drawing up draft articles covering the entire scope of the subject was largely due to Sir Humphrey's flexible and generous approach. However, there is no question that these qualities of the Special Rapporteur tended to be exploited by the communists in that Sir Humphrey's gentlemanly behaviour permitted them on a number of occasions to challenge his authority with impunity and to reject many of his objective and balanced formulations.

14. In general, the Special Rapporteur's draft articles underwent considerable change and revision as a result of discussions in the Commission and scrutiny by the Drafting Committee (consisting of Mr. Gros, as Chairman, Waldock, Ago, Aréchaga, Tunkin, Lachs and Yasseen) which played a major role in their reformulation. A number of these articles were largely technical in content and many suggestions and amendments were made of a drafting nature. It is not intended in this report to provide a summary of the discussions on each of the articles in view of their essentially technical nature. A full account of the Commission's work on each article will be found in the Commission's final report which will be airmailed to you when available. The

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articles on which we are not commenting are the following (the numbering is that contained in Waldock's report A/CN. 4/144):

> Article 6 (authentication of the text); Article 8 (signature and initialling); Article 12 (legal effects of ratification); Article 15 (legal effects of accession); Article 21 (legal effects of entry into force); Articles 24 and 25 (correction of errors where there is or is not a depository); Article 26 (depository of treaties).

A number of the other articles are touched on in this report only insofar as they illustrate the discussion of certain basic principles of the law of treaties or involve points of special interest.

15. The consideration of several of the Special Rapporteur's articles raised a number of fundamental and far-reaching issues of general interest for the Law of Treaties and with possible implications in other fields as well. While a large part of the Commission's work related to codification of existing law, it was particularly in fields where general principles were involved that there was an important element of the progressive development of international law. The Commission showed a clear and demonstrable tendency to modify the historical conception of treaties which was based on the principle of unanimity in respect of virtually all decisions of a procedural or substantive character. The Commission adopted rules which made universal the right to participate in treaties of a general multilateral character and which overturned the doctrine that unanimity is required for the acceptance of reservations. The majority of the Commission also favoured an approach which limited profoundly the scope of the unanimity rule in respect of several other aspects of the Law of Treaties.

15.(a) The articles of a more routine nature which the Commission adopted will undoubtedly be of great assistance to many states, particularly newer ones, as they spell out in detail the legal procedures and requirements involved in the process of agreeing/to and ratifying or approving treaties. Much of this information has hitherto been less precise, much less comprehensive, and open to conflicting interpretations.

16. The approach and decisions of the Commission are discussed under the following headings: definitions (article 1); capacity to become a party to treaties (article 3); the distinction between bilateral, plurilateral and multilateral treaties (the special rapporteur's articles 1, 5, 7, 11, 13, 17, 18, 19, 20, 26); states entitled to sign the treaty (article 7); participation in a treaty by accession (article 13); treaties subject to ratification (article 10); the rights and obligations of states prior to the entry into force of the treaty (article 19bis as adopted); power to formulate and withdraw reservations, consent and objection to reservations (articles 17 to 19); the functions of a depository (article 27); other decisions concerning the Law of Treaties.

DEFINITIONS:

17. Article 1 of Sir Humphrey Waldock's report contained twelve definitions of various terms used in the draft articles. Article 1, in the form adopted by the Commission, contained only seven definitions as it was considered that a number of other terms were sufficiently defined in the articles themselves. Perhaps the major source of discussion under Article 1, as well as under Article 2 defining the scope of the Articles, was on the definition of a "treaty". As finally agreed, the terms "treaty", "treaty in simplified form" and "general multilateral treaty" were defined. The essential points in the definition of treaty are as follows:

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(1) a treaty, as defined, means any international agreement;

(2) it must be in writing (oral agreements fall outside the scope of the articles);

(3) it can be embodied in a single or in two or more agreed instruments;

(4) its designation is not relevant, i.e. it can be called treaty, convention, protocol, concordat, exchange of notes, etc.;

(5) it must be concluded between two or more states;

(6) or other subjects of international law, e.g. international organizations;

(7) it must be governed by international law (i.e. treaties are excluded which apply domestic law).

A treaty in simplified form was defined to include treaties concluded by the exchange of notes or letters or by agreed minute, memorandum, joint declaration, etc. A general multilateral treaty was defined to be one which concerns general norms of international law or which deals with matters of general interest to states as a whole. As will be seen below, the definitions of treaty in simplified form and of general multilateral treaties are important as such treaties are often regulated by different rules.

CAPACITY TO BECOME A PARTY TO TREATIES:

18. Article 3 of the Special Rapporteur's draft on this subject was lenghty and detailed. It was meant to define virtually all types of entities which have capacity under international law to enter into treaties. The discussion on this article immediately showed that the Special Rapporteur's article involved questions of a political character. For example, Waldock's article contained a paragraph on the capacity of dependent states; this paragraph brought forth a discussion of whether under the "new international law" the concept of a "dependent state" could be recognized. This draft included a detailed provision on the question of the capacity of the constituent elements of a confederation or a union. Many comments, suggestions and arguments were put forward on whether or not and in what circumstances it would be appropriate to cover such entities in the draft articles. There were some members (Professor Briggs and Mr. Aréchaga) who argued for the deletion of the entire article on the grounds that it would involve the Commission in the consideration of a separate topic - subjects of international law. The view of the majority of the Commission including myself was that it would be appropriate to include a short article on capacity which enunciated very general principles and avoided reference to specific problems. The draft article was revised several times by the drafting committee and, as finally adopted, is limited to three brief paragraphs. The first paragraph provides a general definition covering all cases: capacity to conclude treaties under international law is possessed by states and by other subjects of international law. The second paragraph of the article (adopted by a vote of 9 to 7) provides that in a federal state the capacity of the member states to conclude treaties depends on the federal constitution. A third paragraph (adopted by 9 votes to 8) provides that the capacity of an international organization to conclude treaties depends on its constitution. A fourth paragraph was deleted from the article by a majority of one vote. This paragraph provided that capacity to conclude treaties may be limited by the provisions of a treaty relating to that capacity; it thus raised the complicated jurisprudential question whether a state could, by means of a treaty, limit its sovereignty in a particular field in such a way that it would henceforth lack capacity in that particular field or whether such treaty, while giving rise to an

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international responsibility for its breach, would not actually deprive a state of the capacity, so to speak, to violate it and so to regain the jurisdiction which the earlier treaty purported to take away.

SPECIAL RAPPORTEUR'S DISTINCTION BETWEEN BILATERAL, PLURILATERAL AND MULTILATERAL TREATIES:

19. Throughout the Special Rapporteur's draft, a distinction was drawn between bilateral and plurilateral treaties on the one hand and multilateral treaties on the other. The general scheme of the Special Rapporteur was to retain the unanimity rule for all decisions in respect of bilateral and plurilateral treaties, the latter term being defined to cover treaties open to a restricted number of parties and the provisions of which deal with matters of concern only to them. On the other hand, in the case of multilateral treaties, the two-thirds majority rule was proposed for most substantive questions. For example, in Article 5 of Sir Humphrey's draft (concerning the adoption of the text of a treaty), it was proposed that for bilateral and plurilateral treaties the adoption would be by the unanimous consent of all parties unless they decided otherwise; in the case of a multilateral treaty other than one drawn up within an organ of an international organization, the two-thirds majority rule would apply to the adoption of the text. In this particular article, the Special Rapporteur's approach was adopted by the Commission but the term "plurilateral" was dropped through the entire draft articles. Article 5 underwent a number of other changes from the original draft, and as approved, assimilated the case of a treaty adopted by an international conference convened by the states concerned and convened by an international organization. The assimilation of these two types of international conference appears throughout many of the articles, as finally approved. In other articles, such as the Special Rapporteur's Article 11 (dealing originally with the procedure of ratification but later modified to include acceptance and approval), the distinction between plurilateral and multilateral treaties was not found to be useful and was eliminated. The most important articles in which the distinction between the plurilateral and multilateral treaties appeared were the Special Rapporteur's Article 13 on accession and 17 to 19 concerning reservations. The concept was further modified in these articles, as will be seen from the discussion below. The distinction between plurilateral and multilateral was eliminated from the Special Rapporteur's Article 20 which, in its original form, contained a rather elaborate procedure with regard to multilateral treaties to determine when they would come into force in the absence of a special provision.

STATES ENTITLED TO SIGN THE TREATY AND PARTICIPATION BY ACCESSION:

20. These articles were the most controversial ones discussed during the session and the decision taken on them by the Commission was of a far-reaching nature. The Special Rapporteur's Article 7 laid down the general rule that only those states participating in the adoption of the text of a treaty could be admitted to signature. In the case of multilateral treaties, it was provided that states invited to participate in negotiations could also sign in the absence of any contrary provisions. A other supplementary provision proposed, de lege ferenda, that states could also participate in the treaty under a rather complicated procedure which required for such a decision the consent of two-thirds of the parties to the treaty, if it was in force and more than four years elapsed since its adoption. (If the treaty was in force but less than four years had elapsed or if the treaty was not yet in force, then two-thirds of the states participating in the Conference could determine what other countries had the right to sign). The Special Rapporteur took a similar approach regarding Article 13 on accession. In an elaborate series of

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articles, Waldock proposed that in the case of a "plurilateral" treaty, states could accede only with the unanimous consent of all the parties to the treaty except that prior to the expiration of four years the consent of all the negotiating states was necessary. In the case of multilateral treaties drawn up at international conferences convened by the states concerned, a two-thirds majority could decide who could accede (with similar refinements with regard to the right of all participating states and not merely the parties to determine who might accede prior to the lapse of four years from the signing of the treaty). The right of accession with regard to multilateral treaties drawn up in an international organization or at an international conference convened by an international organization was to be left to the decision of the competent organ of the organization concerned. Elaborate procedural rules were also laid down as to how the two-thirds consent was to be sought. Sir Humphrey Waldock thus envisaged the continuation, after the conclusion of the drawing up of the treaty, of the conference rule that substantive questions should be determined by a two-thirds majority; the conference was to continue its life so to speak for the sole purpose of deciding on accessions by a two-thirds majority.

21. These articles met with rather heavy weather in the Commission, partly because they were too elaborate, partly because to some they were too revolutionary (e.g. to Professor Gros) and to others because they did not go far enough (to Messrs. Tunkin and Lachs). After lengthy discussion in the Commission the articles were referred to the Drafting Committee which did not accept the communist position that all states have a right (a natural right so to speak) to accede to any general multilateral convention. Rather surprisingly (in the light of the Commission's subsequent discussions) the Drafting Committee followed Professor Waldock's approach but simplified it. His two articles were divided into three: Article 7 on participation in a treaty provided simply that a treaty is open to participation to every state expressly provided for in the treaty or which took part in the adoption of the text, or which was invited to attend the Conference. Article 7bis (opening of a treaty to participation of additional states) and Article 11 (accession) adopted Waldock's approach with some minor variations concerning treaties restricted to a small group of states where unanimity was required of either the parties or negotiating states. With regard to general multilateral treaties, the Drafting Committee adopted the "collegiate" or two-thirds rule, as proposed by Waldock, for determining what additional parties could participate in a treaty except in the case where it was drawn up in an international organization or a conference convened by such organization in which case the decision was to be left to that organization.

22. However, when Articles 7 and 11 came before the Commission as a whole, the Drafting Committee's approach based on Waldock's articles was not accepted by the Commission. Professor Tunkin launched a successful assault on the so-called restricted approach to participation and in favour of the alleged theory of the right of all states to participate. Mr. Elias (Nigeria) proposed an amendment, immediately supported by the communists, providing that general multilateral treaties should be open to all states. Mr. de Luna (Spain) proposed a similar amendment with the proviso that this rule applied in the absence of a contrary provision in the treaty. Mr. Elias accepted Mr. de Luna's slightly more restricted approach and, as modified, the Commission adopted Mr. Elias's proposal by a vote of ten in favour (Messrs. Bartos, Castren, El-Erian, Lachs, de Luna, Pal, Paredes, Tunkin and Yasseen), seven against (Messrs. Briggs, Ago, Amado, Cadieux, Gros, Waldock and Tsuruoka) with three abstentions (Messrs. Pessou, Rosenne and Verdross). I argued strongly that such a rule was undesirable both on political and legal grounds. I emphasized that in the first place, the proposal impinged on the complex problem of recognition with all its political implications - a problem which had not even

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b[illegible]n studied by the committee. If instead of endorsing United Nations practice the Commission allowed itself to be influenced by political considerations, advantage would be taken of this fact by states opposing UN practice and the Commission's prestige would suffer. The proposal posed special difficulties for members who were legal advisers to their governments as support for the proposal might be interpreted as committing their governments to a certain view concerning recognition. Legal advisers could hardly disassociate themselves from their governments' official policy. On technical grounds the proposal was at variance with the basic principle of the Law of Treaties, which was respect for the will of the parties. It was not conceivable that states which as part of their general policy did not recognize certain entities would, for the purposes of certain treaties, allow them to become parties. The Commission had to recognize the practice of the UN and the majority of states. In conclusion I emphasized that the proposal was inopportune, unjustified for technical reasons, objectionable for political reasons and I would therefore vote against it.

22.(a) Messrs. Gros, Briggs and Sir Humphrey Waldock also all argued strongly against it on similar grounds and because of the extraordinary responsibility that it would place on depositories as to the determination of who was a state. At a subsequent meeting, the Commission took up Articles 7 and 7bis and decided that the two-thirds rule as to who had the right to participate in the treaty should be preserved as a rule <u>supplementary</u> to the principles stated in Article 7 that all states had the right to participate. Article 7bis thus has the effect that even where a treaty contains a specific provision prohibiting accessions the participating states can by two-thirds majority change their views at a later date and decide to admit additional parties to the treaty. Article 7 was revised so as to make it inapplicable where the rules of an international organization do not allow participation or accessions by non-members of the organization. This latter provision was inserted to meet Professor Ago's arguments that Article 7 did not take into account the constitutions of international organizations such as the ILO. In view of this revision of Article 7, Professor Ago, Mr. Rosenne and Mr. Verdross all supported it. I stated that Article 7 was still entirely unacceptable for the reasons I had indicated earlier. I pointed out that the broad definition of "general multilateral agreements" in Article 1 made it possible for states to have a right to accede to treaties between only a few states if it concerned a matter of general interest. I asked for my opposition to be recorded in the summary records. Article 7 was subsequently adopted by a vote of 12 in favour and 5 against (myself, Briggs, Waldock, Tsuruoka, Gros). Article 7bis was adopted with only Professor Gros opposing and Mr. Tsuruoka abstaining.

23. The Drafting Committee had earlier revised Article 11 so as to state briefly that a state could accede to a treaty in conformity with provisions of Article 7 and 7bis.

<u>TREATIES SUBJECT TO RATIFICATION</u>:

24. The Special Rapporteur in Article 10 proposed that the general residual rule should be that ratification was necessary subject to a number of exceptions, such as where intention to dispense with ratification could be inferred from the treaty or where it was in a simplified form, i.e. exchange of notes or letters, agreed minute, memorandum of agreement, etc. In formulating this residual rule in favour of ratification, the Special Rapporteur departed from the approach taken by Sir Gerald Fitzmaurice who had proposed in his draft code that ratification was not necessary unless it was specifically provided for or where circumstances required it. Waldock emphasized that in most treaties an express clause could be found either calling for or dispensing with ratification, so that the scope of operation of the residual rule could not be expected to be large. Waldock's approach received the support of the large majority of the

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Commission (including myself) who shared his view that having regard to the constitutional practice of many states, the safer and more generally accepted rule would be to require ratification subject to exceptions. The Drafting Committee substantially reduced the length of Sir Humphrey's article but maintained his general approach in conformity with the views of the Commission. The article was adopted without vote subject to the reservations of Messrs. Tunkin, Rosenne and Castren, who believed that the residual rule should provide that ratification was not necessary except where it was expressly or impliedly called for.

THE RIGHTS AND OBLIGATIONS OF STATES PRIOR TO ENTRY INTO FORCE OF THE TREATY:

25. In the Special Rapporteur's draft articles there were certain paragraphs which, de lege ferenda, proposed that a certain obligation of good faith be recognized on states which had signed and ratified a treaty, but which was not yet in force. These paragraphs dealing with the obligation of good faith were contained in Article 9, paras 2(b) and (c) (concerning the legal effects of full signature) and Article 12, para 3(b) (concerning the legal effects of ratification). Sir Humphrey, basing himself on the views of Sir Hersch Lauterpacht, proposed that a signatory state be under an obligation to examine the question of ratification in good faith with a view to submission of the treaty to the competent organs of the state for ratification. After considerable discussion this proposal was defeated by a close vote. Those opposing the paragraph, including Professor Briggs and myself, considered that it went too far towards creating an obligation on states to examine the question of ratification. The Commission was of the unanimous view that all the other provisions on this question should be dealt with in a separate article. As finally adopted, the Commission decided (in Article 19bis) that, where a state takes part in the adoption of a treaty or has signed it subject to ratification, it is under an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty until such time as the state has signified its intention not to become a party. The same obligation was stated to apply to a state which had already ratified, acceded or accepted a treaty which had not yet come into force. Although this obligation is an "imperfect" one in that no sanctions are provided for its violation, nevertheless it was the unanimous view of the Commission that an article of this nature would make a useful contribution to the progressive development of the law of treaties.

RESERVATIONS:

26. The Special Rapporteur's articles on this subject (Articles 17, 18 and 19) were of a far-reaching nature. The Commission had dealt with this question several times in the past but had never been able to achieve an agreed approach. The Commission first took up the problem in 1951 at the request of the General Assembly. The International Court of Justice in its advisory opinion on reservations to the Genocide Convention had not applied the principle (generally regarded as the traditional rule) that reservations can be accepted only with the consent of all parties to the treaty. The Court laid down that with respect to the Genocide Convention (and by implication general multilateral conventions of a similar character) reservations were permissible if not prohibited by the treaty and if they were compatible with its object and purpose. However in its 1951 discussion the Commission reaffirmed the unanimity rule. This view did not, however, meet with unanimous favour in the General Assembly's discussion of this subject in the same year. The General Assembly at that time directed the Secretary-General to continue to act as depository for documents containing reservations or objections without passing upon their legal effect; to circulate the text; and to count such an instrument for the purpose of determining whether a sufficient number of ratifications had been received for bringing the treaty into effect. In 1959 the Sixth

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Committee of the General Assembly, during the discussion of reservations to the IMCO Convention, affirmed this practice of the Secretary-General and extended it to all conventions for which the Secretary-General is depository, including those entered into prior to 1952.

27. The Special Rapporteur proposed a solution which had not been accepted in the past by the Commission nor adopted by any of the earlier special rapporteurs. Basing himself on the practice of the Secretary-General and of the Organization of American States he proposed that for general multilateral conventions, where there were no express clauses to the contrary, reservations would be acceptable if compatible with the purpose and object of the treaty and that the unanimous consent of all parties to the treaty was not required for their acceptance. (Article 17). In Article 18 on consent, the Special Rapporteur recommended that consent to a reservation be presumed after one year in the absence of an objection on the part of a particular state. In Article 19 he proposed that except ~~that~~ for so-called "plurilateral" treaties, where the unanimity rule would apply, the effect of an objection to a reservation was to prevent a treaty from coming into force only between the objecting and reserving state.

28. During the discussions in the Commission, the main opposition to this approach came from Professors Briggs, Ago and Gros, whose general arguments were along lines that the adoption of the Latin American rule tended to weaken the integrity of the treaty. Professor Gros argued strongly that universality was not desirable at the expense of the integrity of the treaty; it was better to have 50 states accept treaties without reservations than 100 states with reservations. These members also argued that the juridical effect of the Latin American rule was to provide for the creation of a number of bilateral agreements within the framework of a multilateral treaty. Mr. Aréchaga (Uruguay) strongly criticized the special rapporteur for failing to apply the Latin American rule to treaties restricted to a group of states such as the Organization of American States on whose practice the special rapporteur's proposals were based. Certain members, such as Professor Briggs, expressed themselves in favour of a rule which had received some support in the General Assembly discussions in 1951 - that the acceptability of a reservation should be determined by a "collegiate decision", i.e. by a two-thirds majority of the parties. Professors Gros and Ago gave special emphasis to the need for the negotiating states to insert into every treaty a clause dealing with the permissibility of reservations.

29. I pointed out that the Commission would have to choose between the rule stating that reservations were generally admissible except in certain instances and the contrary rule that they were allowed only by exception. I emphasized that while the former rule had greater regard for the will of the parties, treaties were often the outcome of a delicate process of negotiation and compromise was necessary and that therefore the alternative rule could prove arbitrary. I, accordingly, thought that the special rapporteur's solution was an acceptable compromise between these two approaches. (See A/CN.4/SR.651, page 15). At the 653rd meeting (see A/CN.4/SR.653, page 20) I again emphasized my preference for a flexible system in the matter of reservations, particularly since such a system was especially useful to federal countries like Canada and to the newly independent states who were not as yet certain what their future social evolution was going to be; reservations offered them a degree of flexibility which afforded a safeguarding of their future position.

30. In conformity with the view of the majority of the Commission, the Drafting Committee adopted the special rapporteur's approach but reformulated his three articles into five. The main substantive changes introduced by the

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Drafting Committee were as follows:

(i) An objection to a reservation is allowable only on the grounds that the reservation is contrary to the object and purpose of the treaty (the special rapporteur's articles proposed the inclusion of this rule based on the International Court of Justice advisory opinion on reservations to the Genocide Convention, but his articles were not clear on the question of the relationship between an objection to a reservation and its compatibility with the treaty; he seemed to have envisaged that a state could object to reservations on other grounds than non-compatibility.

(ii) With regard to reservations to a treaty concluded between a small group of states, the unanimity rule is to be applied unless the treaty provided otherwise or the group is an international organization applying a different rule. This latter addition was introduced to meet Mr. Aréchaga's concern about the practice about the Organization of American States;

(iii) An objecting state can at its discretion decide whether or not it wished to regard the treaty as not coming into force between the reserving state and itself.

31. The articles in question were adopted without vote. Professor Gros and Professor Ago, notwithstanding their reservations about the wisdom of this approach, did not request a vote on the article. Professor Briggs placed his opposition to these articles in the record.

THE FUNCTIONS OF A DEPOSITORY, ARTICLE 27:

32. The special rapporteur proposed three articles concerning the establishment, duties and functions of a depository. These articles largely broke new ground in view of the absence of any provisions covering them in earlier draft codes. Considerable discussion took place on Article 27 concerning the functions of a depository in which the Special Rapporteur rejected the "post office rule" under which the depository has functions only of a routine nature. The Special Rapporteur proposed that the depository should have such duties as verifying that reservations submitted to it were not expressly prohibited or impliedly excluded by the treaty; that the state concerned was one entitled to become a party; and that notifications of consent or objections were in order and properly formulated in accordance with the treaty and present draft articles. A number of members of the Commission, particularly Tunkin and Lachs, expressed some concern that these articles would allow the depository to exercise a discretionary function and to become involved in political considerations.

33. Some members such as Messrs. Yasseen and Castren thought that the Special Rapporteur's articles did not sufficiently show that the view of the states parties would always be overriding and the depository's determinations were of a provisional and non-binding nature. Others such as Messrs. Rosenne and Aréchaga wished to ensure that the depository was required to act impartially as a trustee for the parties. Mr. Tunkin emphasized that it would be wrong for a depository to refuse to accept an instrument of ratification on the grounds of non-recognition of the state concerned. For such reasons, he strongly supported the view that the depository had to act as a trustee for all the parties. Subject to these views, the article was referred to the Drafting Committee which provided that the depository should exercise its functions of custodian "on behalf of all states parties to the treaty" and that

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therefore "a depository is under an obligation to act impartially in the performance of these functions". The wording of Sir Humphrey's draft was modified so as to make clear that the depository's functions were not to make any binding determinations with regard to the form or admissibility of reservations. The Drafting Committee proposed that the depository's functions would be to "examine" rather than to verify whether reservations were in conformity with the treaty and present articles, etc. As modified these articles were unanimously adopted by the Commission subject to a further addition, introduced on the initiative of Mr. Barthos, which provided that in the event of difference between a state and a depository on the performance of its functions, the depository should bring the question to the attention of the other interested states if the depository itself or the state concerned considered it necessary. However the Commission did not even attempt to deal with the question of how differences between the depository and the reserving state should be resolved.

OTHER DECISIONS CONCERNING THE LAW OF TREATIES

UNILATERAL DECLARATIONS:

34. In the Special Rapporteur's Article 2, on the scope of the articles, it was stated that unilateral declarations were excluded from the present report but that this would not in any way affect such legal force as they might have under international law. Examples were given by Professor Bartos and myself of the fact that unilateral declarations may in certain circumstances qualify as binding international agreements. I cited the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro in September 1947, imposing obligations for the maintenance of peace and security in the American continent, in the drawing up of which Canada had not participated, and emphasized that the status of unilateral declarations was not clear, and the Commission should avoid giving any impression that its decision that they would not be covered by the draft implied any legal judgment as to their nature.

35. The Commission decided not to include any reference to unilateral declarations in this article. It was considered that the definition of international treaties in Article 1 was wide enough to cover cases where unilateral declarations constituted international agreements. This point is stated in the commentary to Articles 1 and 2 where the Commission pointed out that agreements might be concluded by means of "declarations" made separately but related to each other. The Commission did not, however, agree to the suggestion that the optional clause of the statute of the International Court of Justice (Article 36 of the statute) should be mentioned in the commentary as an example.

AUTHORITY TO ISSUE PROVISIONAL FULL POWERS:

36. In Article 4, concerning authority to negotiate, sign, ratify, accede to or accept treaties, the Commission agreed to a proposal by the Special Rapporteur that recognition should be given to the practice of Heads of Diplomatic Missions in the countries where the treaty is being negotiated and permanent representatives to international organizations issuing provisional full powers, subject to the production in due course of an instrument of full powers executed in proper form. Although the view was expressed that such notification constituted merely a notice of intention to send full powers rather than a provisional grant, the Commission considered that it was consonant with modern practice to state the rule along the lines proposed by the Special Rapporteur.

PRESUMPTIVE PARTIES TO A TREATY:

37. In various articles (Article 9, concerning legal effect of signature, and Article 12, concerning legal effects of

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ratification) the Special Rapporteur proposed the use of a term "presumptive parties" to a treaty to describe the situation where a state definitively expressed its consent to be bound by a treaty which has not yet come into force. While recognizing that in such cases certain obligations of good faith were imposed on the states concerned (see sub-paragraph 25 above) the Commission did not agree that it would be useful to adopt the terminology of "presumptive parties".

INSTRUMENTS OF RATIFICATION AND ACCESSION:

38. In Articles 11 and 14, the Special Rapporteur set out the essential characteristics of the instruments of ratification and accession. The Commission decided that these and other related articles should be included in one comprehensive provision (revised Article 13) concerning the procedure of ratification, accession, acceptance and approval. The article specified (a) that the instrument must be in written form; (b) it must apply to the treaty as a whole unless the treaty contemplates otherwise; (c) it must specify the text to which the instrument refers if there is a choice between two different texts. However, the Commission did not include a description of further necessary elements in such instruments, since Article 1 contains a comprehensive description of signature, ratification, accession, acceptance and approval, which indicates that in each case the act so named "establishes on an international plane the consent of a state to be bound by a treaty".

39. In Article 14 the Special Rapporteur had proposed that recognition be given to the possibility that an instrument of accession could be made subject to ratification on the grounds that there were many examples of this in recent practice. However, the Drafting Committee, basing itself on the views of a number of members, decided to revise Article 13 so not to include accession subject to ratification, particularly since the UN Secretary-General regards such instruments as only constituting a notification of the intention of the government concerned to become a party and, accordingly, does not notify other states of receipt of such an instrument. The concept of accession subject to ratification does not appear in the articles as approved.

ACCEPTANCE AND APPROVAL:

40. The Special Rapporteur proposed that a separate article (16) be included on participation in a treaty by acceptance in cases where the treaty provides for this procedure. The Special Rapporteur also proposed that "approval" be regarded as an equivalent to "acceptance". The Drafting Committee called the revised article "acceptance or approval" and the Commission explained in its commentary that it was desirable to give recognition to this procedure for becoming a party to a treaty in that the term was introduced into recent treaty practice in order to provide a simplified form of adherence by which governments can become parties without submitting the treaty to such constitutional procedures as may be required for ratification. While considerable doubt was expressed in the Commission on whether the term "approval" should be attributed the same legal significance as acceptance, the Commission recognized that this term was increasingly used recently as an alternative to acceptance in order to facilitate states becoming parties to it by means of simplified constitutional procedures.

ENTRY INTO FORCE AND PROVISIONAL ENTRY:

41. In revised Article 20 the Commission laid down various rules relating to entry into force of treaties. The Commission approved the Special Rapporteur's proposal that retroactive effect of ratification to the date of signature should not be recognized, unless retroactive effect is clearly stipulated in the treaty.

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42. In Article 21 the Special Rapporteur recognized that in some cases treaties provide that they may come into force provisionally until some express term of the treaty is fulfilled which brings it into full force. The Special Rapporteur also proposed that in case the entry into full force was unreasonably delayed the party might give notice of termination. The Commission agreed that a provision should be included (revised Article 21) which recognized the possibilit of a provisional entry into force. However, the Commission did not agree to include any provision giving a party the right to terminate its participation if there was unreasonable delay in its coming into full force.

REGISTRATION AND PUBLICATION:

43. The Special Rapporteur proposed a rather elaborate article on registration and publication of treaties which the Commission considered too detailed and undesirable on the grounds that it re-stated UN practice under General Assembly regulations which might in future be revised. The Commission decided to include one brief Article (22) which extended the procedures for registration and publication of treaties under Article 102 of the UN Charter to treaties of non-members of the UN. The Commission recognized it could not apply to non-UN members "the sanction of nullity" for non-registration contained in Article 102 of the Charter, as the General Assembly would have to revise its regulations on registrations adopted pursuant to Article 102 of the Charter.

COMMENTS ON MEMBERS OF THE INTERNATIONAL LAW COMMISSION:

44. At the close of my first session as a member of the International Law Commission, it may be useful if I were to record my impression of the performance of some of my colleagues.

45. As the most active and effective members of the Commission I rank the following: Ago, Waldock, Tunkin and Gros. Ago is the best rounded member of this very active team. He is completely bilingual in French and English. He has a thorough knowledge of the subject and on top of this he has the great gift of expressing his thoughts in a very clear and persuasive manner. He is respected by all members of the Commission and his interventions are usually most successful. He bides his time carefully, lets other members of the Commission state their point of view, and he usually tried to sum up the debate and to take a position which appeals to the majority as a broadly acceptable compromise. There is a tendency perhaps in Ago to seek popularity unduly and to be rather too flexible ~~xx~~ in regard to strict principle to achieve personal ends. This is a weakness and for this reason I am inclined to be very reserved in supporting him while I have great admiration for his talents as a performer.

46. Next to Ago, I would rank Professor Waldock. My initial impression of Professor Waldock was not too favourable, but in the course of the session his stature has increased. For a professor he is remarkably realistic and flexible. He is always moderate in his views and makes an obvious and constant effort to be reasonable and to meet objections. It is largely due to his very good report on the Law of Treaties that the Commission has been able to complete its work on a first important chapter in this field. Professor Waldock is hard-working and he is completely on top of his subject. In the course of the session he has managed not only to attend meetings of the Drafting Committee and of the full Commission, but he has been able to produce, while this was going on, elaborate comments on the articles as they were adopted.

47. Professor Tunkin is also an extremely influential member of the Commission. He has considerable knowledge of the subject and he has an infallible sense of purpose. He never misses an opportunity to advance Soviet interests and he is all the more successful in doing this in that he speaks in reasonable terms and gives the impression of operating merely as a specialist in international law. While in the course of this session Professor Tunkin was not able

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to stir up much enthusiasm on the subject of peaceful co-existence, he scored a major success in getting the Commission to agree that multilateral conventions of general interest are open to all states. Part of Professor Tunkin's success is due to the fact that he has been a member of the Commission for some time and also to the other fact that he takes advantage shrewdly of the atmosphere of camaraderie which he and other communist members of the Commission do their best to foster. There is a feeling that communist representatives have to do their chores and that it is not good form to check them when they do so. The result is that the Professors take theoretical positions, disregard the political implications and, rather naively, play right into the hands of the Soviet bloc. This is the more galling in that privately some of these professors voice reservations and often very strong objections to the decisions made by the Commission on these political issues, and yet on such issues, for the sake of being good sports not to spoil the atmosphere of the Commission, they either abstain or vote for the Soviet position.

48. Professor Gros is also quite influential, but in a less direct and obvious way. In the course of this session, as Chairman of the Drafting Committee, he played a very active role. In the Commission itself he has a good deal of personal influence over Ago and many of Ago's most successful interventions have been made at the instigation of Professor Gros. Behind the scenes, Gros has developed personal relations of a friendly nature with most members of the Commission and his points of view carry a great deal of weight. In the Commission, when he intervenes directly, Gros is less effective than he deserves to be. His statements are usually most powerfully reasoned and put forward with great vigour. The trouble is that Gros has consciously allowed himself to become a symbol of what I would call the classical approach to international law. This unfortunate identification of Gros and "reaction", tends to weaken the impact of his powerful reasoning on the members of the Commission who represent new countries and who are easily swayed by appeals to formulate progressive rules and to keep up with recent developments in the international community. In spite of these handicaps, because of his intellectual strength and of his personality, I rank Gros among the best members of the Commission.

49. There is another group of members, some eight in number, who are less influential or active than the first four I have mentioned. These are: Jimenez de Aréchaga, Verdross, Briggs, Bartos, Castren, Lachs, de Luna and Rosenne. The best of the second group, in my opinion, is de Aréchaga. He is not only the most articulate, but I think that he is one of the outstanding members of the Commission. His interventions are carefully prepared and they are full of good sense. De Aréchaga is willing to make allowance for progressive development, but he is not swayed by the appeals of Tunkin and Lachs. He has enough good sense to develop moderate and useful proposals of his own to meet the requirements of emerging situations. I think that this man will go far and we should keep an eye on him.

50. Professor Verdross' performance is uneven. His statements are usually very short and to the point. However, he is now getting old and on occasions one has the impression that he does not fully grasp the situation. Furthermore, I have the feeling that the old professor is also a bit of a politician: he tries to retain popularity at the expense of principle, by endorsing, perhaps too readily, proposals from Tunkin, his neighbour to the left. While members of the Commission make a great play of their respect for Professor Verdross and his reputation, and often refer to him as the "eminent master" or our "very learned colleague", in fact they tend to give short shrift to some of his more pedantic or idealistic schemes.

51. Professor Briggs hardly makes this second group. It is not that he is not learned nor that he does not work very hard. The problem is that he seems to be without experience in a commission of this kind and he is either unwilling or unable to get involved in the occasional scraps which develop. My own guess is that Professor Briggs is more at ease as a compiler than as a deep thinker

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in the field, and that the give and take of an argument in the Commission disconcerts him. Instead of advancing a reasoned statement in support of a case like Ago does, he tends to put on the table an alternative text without adequate explanation. Hisanalysis of the material put before the Commission is usually shrewd and sound, but there is no doubt that his influence in the Commission represents only a small percentage of that of either Tunkin or Waldock. Professor Briggs does not seem to be politically experienced and I think that he feels that he is out of his depth when political arguments develop in the Commission. It is unfortunate that the representative of the leading country in the West should be so severely handicapped. This no doubt facilitates considerably the task of Tunkin and of his partners.

52. Speaking of Tunkin's partners, I should mention Professor Bartos. His knowledge of international law is really very extensive. He has a penetrating mind and his observations are usually to the point. He has, however, a very boorish manner in argumentation and many of his points lose because of this, some of their effectiveness. In most cases, Bartos supports Soviet bloc positions and on one occasion, when he diverted from the Soviet line, it was amusing to see Professor Tunkin call him to order and Bartos backtracking very rapidly. I still rate Professor Bartos as one of the most knowledgeable and capable members of the Commission. Whenever he intervenes in a controversy, very careful attention has to be given to his line of argument.

53. Professor Castren from Finland is also very learned. His contributions, however, tend to be unduly dry and pedantic. His points are usually well taken, but they never go very deep nor very far. In the narrow sense of the word, Professor Castren is a good technician, but he does not have the imagination, the breadth of vision, the intellectual vigour that are characteristic of the more spectacular members of the Commission, like Gros and Ago.

54. Lachs leaves the impression of being a good general practitioner with a great deal of intellectual agility. His personal manner is extremely pleasant, but his interventions are all the more effective in support of the Soviet line. He supplies what Tunkin may lack in subtlety and finesse and I have seen him again and again appeal most successfully to the prejudices of the representatives of the new countries.

55. Professor de Luna is somewhat erratic. Occasionally he speaks good sense but most of the time his interventions are confused. He has also a most peculiar sense of humour and his jokes are not always apt or very amusing. I also get the impression that Professor de Luna thinks that the days of Franco are numbered and that it may be wise for him not to identify himself unduly with narrow Western positions. He likes to suggest that he is as progressive as the most liberal-minded members of the Commission. This has had unfortunate results when votes were taken on some of the more important political issues.

56. Dr. Rosenne is also a very good member of the Commission. He is hard-working, very learned and quite good at expressing his thoughts without notes in a debate. Having said this, however, I confess that I am somewhat puzzled by his attitude. In private Rosenne is always full of praise for the Soviet line. He usually votes with the representatives of the neutrals and of the new countries. While I can understand the latter, I am somewhat at a loss to see the reason for the former. Dr. Rosenne conveys an impression of earnestness and yet of some lack of sincerity, which, I suspect, has weakened the influence he might have achieved in the Commission on the basis of his purely technical qualifications. What bothers me is that while he makes a great show of being a thorough specialist in his field, many of his statements and attitudes are obviously dictated by other considerations. It is this discrepancy, I believe, between his opportunistic performance and the academic impression that he tries to convey that is disquieting concerning Dr. Rosenne.

57. There is a third group of members that are only moderately active. These are the Japanese, Tsuruoka, the Iraqui, Yasseen and

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the Brazilian, Amado. Of these three, Tsuruoka is the best. He speaks French very fluently and the points he makes, although not numerous, are extremely penetrating. He is not particularly learned, but he has a good deal of practical experience and common sense. Yasseen is a promising member of the Commission. He is subtle and, on the whole, fairly moderate. He does his best to avoid controversy and tries instead to look for areas of potential agreement.

58. As to Amado, he is very much a fading star. He intervenes occasionally, mainly to display certain traits of his personality, and his interventions are mostly ineffectual and beside the point. He is vain like an old actress. He craves compliments but his role in the work of the Commission tends to be very modest.

59. A fourth group of members of the Commission are almost inactive. These are: Pessou, Liu Chieh, Tabibi, Paredes and Pal.

60. Finally, I should say perhaps a word about the last group which have been either away for the whole session like Kanga and Elias, or taken up almost the whole time by the work of the Disarmament Conference, for instance El-Erian and Padilla Nervo.

61. The Chairman, Pal, deserves special comments. He may have been good, but this must have been a long time ago. He is now very old and he has a very imperfect grasp of what is going on in the Commission. Furthermore, his manner as Chairman is most unfortunate. He is arbitrary and abrupt in suggesting courses of action or in summarizing the discussion. The members have been reluctant to challenge his rulings, but there is no doubt that there is a great deal of dissatisfaction with his management of the Commission's affairs Furthermore, Pal displays a shocking degree of partiality towards Soviet bloc representatives and in particular towards Tunkin. Other members like myself will raise their hand in vain, seeking authority to speak, while Pal will invite Tunkin who has not even raised his hand to give his opinion on a point which may be under discussion. Similarly, Pal will let Tunkin, Lachs and Bartos make their points again and again, but will appeal to the rest of us not to prolong the discussion and to accept solutions which are obviously unsatisfactory. My strong feeling about Pal is that as Chairman, he was not impartial and he was not effective.

62. My general impression of the Commission is that the average calibre is high. Furthermore, I would say that as specialists in international law most members of the Commission are well qualified, except perhaps for Pessou, Tabibi, Elias and Liu Chieh. The atmosphere of moderation and friendliness which has been developed in the Commission is, in itself, a good thing, but as I indicated above in my comments concerning Tunkin, I am afraid that the representatives of the Soviet bloc in the Commission have not been above taking advantage of this for their own purposes; the unfortunate thing is that some of the more idealistic professors and some of the less scrupulous neutrals have been willing to let the Soviet representatives get away with this.

63. The Soviet bloc representatives are all legal advisers to their own governments, while on our side this is not the case for the U.K., for the United States, for Italy and for a number of other key countries. The case for the West is often presented and fought in a very loose fashion, even in disarray, without regard to the political implications, while the Soviet side operates as a tight, well integrated and powerful political instrument.

COMMISSION'S COMMENTARY ON THE LAW OF TREATIES:

64. The Commission devoted most of its final week to approving Sir Humphrey Waldock's draft commentaries on the revised articles. On the whole, Sir Humphrey's commentaries were comprehensive, well balanced and extremely fair to the various points of view expressed on controversial issues. Professor Tunkin showed a disconcerting tendency to ask for the deletion of virtually any reference which, for whatever conceivable reason, did not support or agree with the Soviet view of international law. Professor Tunkin's performance

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was a good example of the Soviet approach to the writing of history; no matter how objective Waldock's comments might be, Tunkin requested its deletion if he did not approve the concept or point in question. For example, in Waldock's commentaries on reservations, Professor Tunkin objected to a very fair summary of the decision in the advisory opinion of the International Court of Justice on reservations to the Genocide Convention. Another example of Tunkin's approach was his request for deletion of certain references to the authority of Western commentators and experts in international law. Because the Chairman was "in the pocket" of Professor Tunkin, he generally got his way in these requests. Towards the end of the session, Tunkin's proposals for deletions had become so numerous and so evidently based on biased considerations that on more than one occasion I intervened to support the Special Rapporteur's formulations and comments. For example, when Professor Tunkin objected to Waldock's account of the Genocide Convention case, I pointed out that what was involved was essentially a question of fact on which the Special Rapporteur's knowledge and judgment should be supported. As a result the reference was allowed to stand. In the discussion on capacity (article 3) I thought it appropriate to apply Professor Tunkin's own technique to a statement in the commentary which was rather favourable to the Soviet position. I proposed the deletion to a reference to the component states of the Soviet Union as examples of units of a federal state which had international treaty-making power. Like Professor Tunkin, I did not give any particular reasons for my request for deletion but based the request simply on the fact that it was not desirable to give specific examples of this nature. My request for deletion was accepted without debate. On the whole, Sir Humphrey Waldock's complete and learned commentaries should serve as a useful guide both to governments and to experts in international law.

COMMUNIST TACTICS AND POSITION DURING THE SESSION:

65. I have already discussed in several contexts the Soviet tactics and position during this session. At this point I wish only to emphasize the fact that the communists were highly effective at this past session. The reasons for this are based on the following factors:

(a) the Commission was a newly constituted one with a number of inexperienced members;

(b) Professor Tunkin's adroitness, experience and personal influence on a number of members;

(c) the partiality of the Chairman in favour of the Soviet position;

(d) the appointment of a communist rapporteur (Poland);

(e) the weakness and inexperience of the American member of the Commission (Professor Briggs);

(f) the tendency of a number of professors such as Verdross, de Luna and Castren and certain legal advisers such as Rosenne to support the communists on some important political issues such as participation in a general multilateral treaty, (for reasons either of naivety, "camaraderie" or to "prove" that they were not merely "Western" international lawyers but experts whose viewpoint transcended merely political considerations).

66. I should like to emphasize that, in my opinion, the situation in the Commission can conceivably prove to be a somewhat dangerous one and it is possible that on some future political issues the communists may succeed in obtaining majority support. This situation requires careful thought on the part of Western members and consultations with a view to presenting the Western case more effectively and checking or neutralizing the tendency of a few members of the Commission to lend support to the communist line on some occasions.

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TECHNICAL DIFFICULTIES EXPERIENCED BY THE COMMISSION CONCERNING PRODUCTION OF DOCUMENTS AND REPORTS:

67. The Commission was perhaps for the first time in its history seriously handicapped by grave inadequacies on the part of the Secretariat in producing summary records and documents and reports. The English to French translation was so bad that the French texts of various documents were sometimes not available until weeks after the English text was distributed. The French-speaking members of the Commission were quite rightly disturbed by this situation. It was apparently caused by a number of factors, the main ones being the fact that the Disarmament Conference, the Outer Space Conference and the ILO Conference were all taking place at the same time as the Commission was meeting and for one reason or another the Secretariat's servicing of the Commission did not receive a very high priority. At the end of the session, the Commission decided to include a paragraph in its report which drew the attention of the competent organs of the UN to the inadequate facilities relating to the production of summary records and translations put at the Commission's disposal. The Commission put on record its hope that proper arrangements would be made to avoid the repetition of these inadequacies in future and that it would have appropriate resources at its disposal. During the numerous discussions of these inadequacies, I intervened to point out that the criticisms which were being made in the Commission did not in any way reflect on the competence of the members of the Secretariat working for the Commission but that it related to a question of the adequacy of the resources provided by the organization to the Commission. (I hope that our representative on the Fifth Committee will be in a position to support Secretariat proposals to provide necessary facilities).

AGENDA FOR THE 1963 SESSION OF THE COMMISSION:

68. The Commission decided to convene its session somewhat later than this year, i.e. in the first week of May in order not to conflict with the UN Conference on Consular Relations, to be held in Vienna in the spring of 1963. At its next session the main work of the Commission will continue to be the law of treaties. Sir Humphrey Waldock will present a second report on the validity and duration of treaties. This will involve a number of complicated and sometimes delicate points and it will be necessary for a careful study to be prepared in Ottawa on Canadian practice on this subject. I would hope that this study can begin as soon as possible.

69. The Commission will also receive reports from the chairmen of the working groups on state responsibility and succession of states and governments. A discussion will, therefore, take place on the important subject of the scope of these topics and on the general guide lines to be laid down for the special rapporteur. In addition, it will be necessary to elect rapporteurs for these two subjects. Since the report of the working group will probably be largely determinative of the future course of the treatment of these subjects by the Commission, careful study will have to be given to the reports of the working groups when they become available next spring.

70. The Commission will also, if time permits, give consideration to the subjects of special missions and to the subject of relations between states and inter-governmental organizations and will receive Mr. El-Erian's report on this latter subject. It will, therefore, be necessary for background work on these subjects to be prepared in Ottawa.

QUESTIONS ARISING AT PRESENT SESSION REQUIRING PARTICULAR ATTENTION BY CANADIAN AUTHORITIES:

71. I have already pointed out that the Commission took an important political decision in formulating Article 7 so as to provide that general multilateral conventions should be open to participation by all states. The effect of this rule would be, if approved, that a significant step would be taken towards the achievement of recognition of countries such as East Germany,

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North Korea, North Vietnam and perhaps communist China. There is no question that Article 7 therefore has immediate political implications which go to the heart of current east-west issues. I therefore think it is essential that when governments are asked to comment on the draft articles of the International Law Commission they point out in strong terms the unacceptability and inappropriateness of Article 7. Steps will have to be taken to ensure that a number of states members of the UN are made aware of the political implications of this decision and frame their comments in accordance with their policy in the UN on questions involving recognition of these particular states. Such comments would help to provide a basis for seeking a reversal of this decision when the matter comes up for re-consideration in the International Law Commission at a future date. If the article stands in its present form there is no question that the task of resisting its adoption when the subject of the law of treaties comes before an international conference will be made much more difficult than if it can be satisfactorily revised in the International Law Commission itself at some future date.

GENERAL ASSESSMENT:

72. While the communists exercised considerable influence during this session of the International Law Commission, it is nevertheless clear that/the whole the Commission completed a generally satisfactory session and achieved a reasonable measure of useful work.

73. In the first place the Commission succeeded in adopting for the first time a comprehensive series of draft articles on the conclusion and entering into force of treaties, a matter of very great practical importance in the current life of all states as they are continuously involved in the process of making agreements with each other and ~~xxxxxxxx~~ the numerous international organizations to which they belong. These articles will undoubtedly be of considerable assistance to legal advisers in that they spell out in detail various requirements relating to the adoption and ratification of treaties. As much of the information has been difficult to obtain and imprecise, there is no question that the Commission's work will prove very valuable. The Commission's success in achieving this was, in my opinion, a considerable accomplishment.

74. Second, the communists made little headway in the field of the "new international law" or "peaceful co-existence". Perhaps because the Commission consisted of a relatively sophisticated group of experts, the communist members did not make any major effort to advance their theories with regard to these subjects and it is possible that the Commission, during the term of office of its present members, will not become involved in subjects which are mainly political in content or of a propaganda nature. It is however of significance that while the communists are doing their best to achieve political victories, score propaganda points and to raise incidentally problems relating to "peaceful co-existence", they are, on the whole, co-operating effectively and substantially in all undertakings, which is bound to have a stabilizing effect on the world community. One has only to contrast their attitude in this Commission and on the conference on outer space to realize how forthcoming they are in regard to the former.

75. Third, while the Commission set aside the approach of the early rapporteur on state responsibility (Garcia Amador) who gave emphasis to the subject of responsibility for damage to aliens on the territory of a foreign state, and while it is clear that the general principles of state responsibility will now be given priority, nevertheless the future development of this topic in the International Law Commission can be expected to progress in a reasonably satisfactory manner. This is particularly true since the Special Rapporteur is likely to be Professor Ago, Chairman of the working group on this subject, who is an exceedingly able jurist who is likely, in whatever he produces, to maintain a high professional

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standard and to make a considerable contribution to the development of this subject. Codification of the general principles of this subject, as prepared by a competent and objective repporteur, may constitute another useful and an important development in international law. Consequently, while the communists achieved some measure of support for their approach in favour of the wider view of the subject of state responsibility, the West is likely to achieve what is perhaps more important - the probable selection of a rapporteur who is western orientated and with a fine sense of balance and moderation. Ago is unlikely to disregard in drafting his report the very large body of cases relating to the treatment of aliens from which, practically, the theory of state responsibility originated. While the prognosis may not be equally favourable in the field of state succession where Professor Lachs of Poland may well be selected as rapporteur, nevertheless there is no reason to believe that the Commission will not adopt a sensible and moderate approach to this subject.

76. Fourth, while the communists scored a limited success in regard to the principle of the universal right of accession to general multilateral treaties, nevertheless, in the long run, the consequences of this may not be contrary to western interests. Even if this rule is maintained by the International Law Commission after re-consideration at a future session, it will be some time before it comes before an international conference for adoption. It may not then achieve the necessary two-thirds support. It is possible also that in time certain cold-war problems will be closer to being solved, and that the essence will thus lose some of its importance. There is the further consideration that in the long run it is perhaps in the interests of the West that all entities claiming to be states be encouraged to accept the legal principles involved in universal law-making treaties. Thus the adherence of East Germany and Communist China to important treaties laying down common standards of behaviour (for example on diplomatic and consular relations) could help to achieve a moderating influence on them. Consequently even though the effect of the acceptance of the communist position on this question is contrary to the western position at this time and open to theoretical objections, the case is not one-sided and there is probably something to be said for the view that it might not be contrary to the long-term interests of the West if such a rule were followed ultimately.

77. I believe that, on balance, the work of the Commission was generally of a constructive nature and several useful decisions were taken which should help in some measure to contribute to the development of international law and to progress in international relations.

M. Cadieux,
Member of the International
Law Commission.

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ANNEX I

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Excerpt from "Reports of the International Law Commission, Chapter II, Survey of international law and selection of topics for codification"

"13. In undertaking a survey of the whole field of international law with a view to selecting topics for codification, in accordance with article 18, paragraph 1, of the Statute, the Commission conceived the task as one calling for a general review of the topics of international law. The primary purpose was to select particular topics the codification of which the Commission considered necessary or desirable; the survey of the whole field of international law was merely the logical means of making the selection. In this connextion, the Commission had before it a memorandum entitled "Survey of International Law in relation to the Work of Codification of the International Law Commission"[1], submitted by the Secretary-General. This memorandum surveys the field of the international law of peace and, in the opinion of the majority of the Commission, enumerates in a comprehensive and satisfactory way topics in that field.

THE QUESTION OF A GENERAL PLAN OF CODIFICATION

14. The Commission discussed the question whether a general plan of codification, embracing the entirety of international law, should be drawn up. Those who favoured this course had in view the preparation at the outset of a plan of a complete code of public international law, into the framework of which topics would be inserted as they were codified. The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration.

TOPICS OF INTERNATIONAL LAW CONSIDERED BY THE COMMISSION

15. Using the memorandum of the Secretary-General as a basis of discussion, the Commission reviewed, consecutively, the following topics:

(1) Subjects of international law;
(2) Sources of international law;
(3) Obligations of international law in relation to the law of States;
(4) Fundamental rights and duties of States;

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(5) Recognition of States and Governments;
(6) Succession of States and Governments;
(7) Domestic jurisdiction;
(8) Recognition of acts of foreign States;
(9) Jurisdiction over foreign States;
(10) Obligations of territorial jurisdiction;
(11) Jurisdiction with regard to crimes committed outside national territory;
(12) Territorial domain of States;
(13) Regime of the high seas;
(14) Regime of territorial waters;
(15) Pacific settlement of international disputes;
(16) Nationality, including statelessness;
(17) Treatment of aliens;
(18) Extradition;
(19) Right of asylum;
(20) Law of treaties;
(21) Diplomatic intercourse and immunities;
(22) Consular intercourse and immunities;
(23) State responsibility;
(24) Arbitral procedure;
(25) Laws of war.

TOPICS OF INTERNATIONAL LAW PROVISIONALLY SELECTED BY THE COMMISSION

16. After due deliberation, the Commission drew up a provisional list of fourteen topics selected for codification, as follows:

(1) Recognition of States and Governments;
(2) Succession of States and Governments;
(3) Jurisdictional immunities of States and their property;
(4) Jurisdiction with regard to crimes committed outside national territory;
(5) Regime of the high seas;
(6) Regime of territorial waters;
(7) Nationality, including statelessness;
(8) Treatment of aliens;
(9) Right of asylum;
(10) Law of treaties;
(11) Diplomatic intercourse and immunities;
(12) Consular intercourse and immunities;

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(13) State responsibility;
(14) Arbitral procedure.

17. It was understood that the foregoing list of topics was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.

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INTERNATIONAL LAW COMMISSION

THIRTEENTH SESSION

PROVISIONAL SUMMARY RECORD OF THE SIX HUNDRED AND SIXTEENTH MEETING

held at the International Labour Office, Geneva,
on Thursday, 22 June 1961, at 10.10 a.m.

CONTENTS:

N.B. Participants who wish to have corrections to this provisional summary record incorporated in the final summary record of the meeting are requested to submit such corrections in writing, preferably on a copy of the record itself, to the Languages Division, Room C.550, Palais des Nations, Geneva, within three working days of receiving the provisional record in their working language.

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Present:

Chairman:	Mr. Grigory I. TUNKIN
Rapporteur:	Mr. Ahmed MATINE-DAFTARY
Members:	Mr. Roberto AGO
	Mr. Gilberto AMADO
	Mr. Milan BARTOŠ
	Mr. Douglas L. EDMONDS
	Mr. Nihat ERIM
	Mr. J.P.A. FRANCOIS
	Mr. F.V. GARCIA AMADOR
	Mr. André GROS
	Mr. Shuhsi HSU
	Mr. Eduardo JIMENEZ de ARECHAGA
	Mr. Luis PADILLA NERVO
	Mr. A.E.F. SANDSTRÖM
	Mr. Radhabinod PAL
	Mr. Senjin TSURUOKA
	Mr. Alfred VERDROSS
	Sir Humphrey WALDOCK
	Mr. Mustafa Kamil YASSEEN
	Mr. Jaroslav ZOUREK
Secretariat:	
Mr. Liang	Secretary to the Commission

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PLANNING OF FUTURE WORK OF THE COMMISSION (A/CN.4/138) (item 6 of the agenda) (continued)

1. The CHAIRMAN invited further comment on the planning of the Commission's future work in the light of General Assembly resolution 1505 (XV).

2. Mr. GROS said that the Commission alone was able to inform the governments and the General Assembly, through the summary records of its discussions, how the work of codification proceeded. He wholeheartedly shared Mr. Ago's views on what codification of international law was, was not, and could be. Nearly all members had supported Mr. Ago. As an organ of the General Assembly, the Commission was in duty bound to give it the technical data requisite for any discussion of codification.

3. There were two myths with regard to codification. First, it was believed that codification was a fairly simple process and consisted simply in compiling collections of the existing laws on the subject to be codified and summarizing them. Secondly, it was believed that the realities of international life had to be taken into account and the body of law rewritten accordingly. Both concepts were wrong. Codification had been a human concern ever since the birth of society and had never been either simple or rapid. That was a self-evident truth to jurists, but politicians often tended to overlook it. For example, in the past fifty years French legal experts had been asked to assist many governments in the codification of municipal law, in the revision of civil and commercial codes. They had spent years on the work, but had never been blamed for tardiness. The revision of the French Civil Code itself had been going on for fifteen years. It was often not realized that it took years merely to assemble the material.

4. Furthermore, codification needed more than mere information. A body of existing law must be rethought in terms of contemporary facts. The progressive development of law was an integral part of codification; otherwise, the codification would be a dead letter from the outset. On the other hand, it was not possible to regard all the pre-existing law as obsolete and to create a completely new body. The source of international law was nothing but the assent of the States concerned. Any newly created body of law would, without the assent of the international community, remain merely municipal or local law; it would not be international law. The method of codification employed by the Commission was, therefore,

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essential, the General Assembly should be clear about that. Codification was not a mechanical process. If the General Assembly believed that the codification of international law should be one of the primary tasks of the United Nations, both the United Nations and the Commission would have to have a new structure.

5. For the purpose of codifying international law it was essential both to have a thorough knowledge of the existing law and to keep in constant touch with contemporary realities. The Commission owed its success in codification to the comprehensive and tolerant spirit displayed by representatives of very different legal systems. If the members of the Commission were able to accept a compromise, there would be a good chance that the States would be able to do likewise. If codification was left to political representatives, such compromises would have little chance of acceptance because they would not be the mature products of thorough discussion among experts.

6. The topics of the law of treaties and of State responsibility represented the sum of the daily experience of every State - France, for example, concluded a treaty every two days. A State engaged its responsibility by every act it took in international life. If the Commission was able to complete its work on the conclusion and application of treaties and on the ways in which the responsibility of the State was engaged, no jurist, at least, would complain of undue delay.

7. It was true that newly independent States feared that they might be subjected to rules of law in the making of which they had not participated. That was one reason why codification should take the form of the preparation of generally acceptable rules, in keeping with the spirit which prevailed in the Commission. Even if the work was not completed at the next session, it was inconceivable that the General Assembly would wish the Commission to abandon the two keystones of the structure of international law and devote itself to subsidiary topics. The Commission's record should not fail to show clearly the almost unanimous agreement on the nature of its tasks.

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8. Mr. PADILLA NERVO said it was agreed that General Assembly resolution 1505 (XV) did not ask the Commission to select new topics for codification, nor did it express an opinion as to the aspects of codification or progressive development of international law to which special attention should be paid. The resolution was not an expression of political differences in the Commission, but did reflect the feelings of States which the Commission itself could not ignore. Extreme political concern certainly existed and found expression through many channels, one of which - the Assembly - was of considerable importance to the Commission, which, as a body of experts sitting in a personal capacity, was perhaps the Assembly's principal non-political organ. It was true that the same might be said of the International Court of Justice, but its comments had a different significance; many of the newer countries felt that they had not participated in framing the rules that would be applied to them by the Court. The Commission, on the other hand, reflected the views of experts from countries and regions with widely differing social and political structures and legal systems. The opportunity should therefore be taken to use the Commission's undoubted authority to allay the misgivings certainly entertained by many States.

9. Undoubtedly, at the sixteenth or seventeenth session of the General Assembly many States would suggest topics of international law for codification and possible progressive development. The Commission should take note of the uneasiness felt by some States and should express its opinion on the topics suggested and the difficulties they might present. It should also express its opinion that many of the concerns felt by the States could be overcome by a study of the more specific items on the Commission's agenda. It would, however, be preferable to refrain from expressing an opinion until governments had made their suggestions at the General Assembly. The Commission would then be able to take those suggestions as a basis and voice any reservations it might have, with added authority.

10. The Mexican Government would probably suggest a number of topics. One might be the study of the legal consequences of the peaceful co-existence of States with differing political, economic and social structures. Peaceful co-existence itself was, of course, a political idea and could not therefore be codified, but the economic, political and cultural relations between different systems would have international legal consequences in e.g. trade and international services.

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11. The Mexican Government would probably also suggest a study of the succession of States and governments. That was a topic of special importance, owing to the emergence of so many new States and its study would involve such problems as the validity of treaties, the problem of nationality, acquired rights, compensation and even certain problems relating to membership of international organizations.

12. Another topic might be the permanent sovereignty of States over natural resources, which was of particular interest to Mexico. The principle was being gradually accepted in practice by States and in the international organizations. It might be dealt with within the framework of State responsibility, if that were given a broader scope. Resolution 1A, addressed to the General Assembly through the Economic and Social Council, of the Commission on Permanent Sovereignty over Natural Resources (E/3511-A/AC.97/13, annex) specifically requested the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly. The first paragraph of the preamble and sub-paragraphs 2 and 4 of the first operative paragraph would be of particular concern to the Commission.

13. Another possible subject was the study of the international consequences of land reform. The comments made in connexion with the permanent sovereignty over natural resources were partly relevant to land reform also. Land reform might also be studied as a separate topic; although essentially a matter of domestic concern, it undoubtedly had international consequences.

14. An attempt might be made to formulate certain basic legal rules for the control of outer space. That might contribute to the study of political and military topics. The competent committee of the United Nations was at present studying procedure and had come to the conclusion that decisions should be taken not by majority vote but by general agreement. The question had so many aspects apart from the scientific that a legal study of the implications of the use of space might well be studied with a view to finding certain moral and non-mandatory rules before the political and military aspects made such a study far more difficult. Other studies connected with international relations, such as the study of neutrality, should be carried out in the light of recent international instruments and recent changes in those relations. Another suggestion for the General Assembly which might act as a guide for the Commission might be a study of the sources of international law in the light of resolutions adopted by international organizations which had a strong impact on international law, directly or indirectly. The legal aspects of the consequences of nuclear explosions might also be examined.

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15. Probably, many other subjects would be suggested and the Commission's opinion on them would be very useful, especially if it could convince governments that many of their apprehensions concerning the application of international law might be allayed if the Commission continued to give priority to the topics already on its programme and were given the means to speed up its work on those topics. The Commission might even say that the codification of such topics would require a change in the Commission's methods of work and even of its Statute.

16. With better means at its disposal, the Commission might in time be able to give advisory opinions, in addition to continuing its work on the codification and progressive development of international law. It might work out draft treaties for such matters as disarmament and the cessation of nuclear tests. Such legal studies of political matters would not be misplaced, since the Commission was composed of individual experts, not of political representatives.

17. The Commission should therefore continue with its present programme, but should be given more facilities. It should not adopt any specific position on the matters raised in General Assembly resolution 1505 (XV) until after hearing what had transpired at the General Assembly's sixteenth session.

18. Mr. TSURUOKA observed that nobody had contested the view that codification involved both the statement of existing law and its systematic and progressive development. The existence of international law presupposed the existence of customary law. Codification since the nineteenth century had only been possible when dominated by extra-legal considerations. Nevertheless, the Commission should jealously maintain its position as an expert independent body, though it should naturally pay due attention to new facts as they emerged.

19. The law of treaties and State responsibility should be given priority for codification for the reasons given by Mr. Ago and Mr. Gros. Some of the suggestions put forward in the Sixth Committee in 1960 were covered by the codification of those two topics. The Commission might well add to its programme the topic of succession of States and governments.

20. So far as his experience went, it would hardly be possible to improve the Commission's work unless the Commission was prolonged. Its work would, however, be facilitated if States, instead of awaiting a report, submitted their comments as soon as it began to study a particular topic. A legal library might also be formed to help the special rapporteurs in their work.

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21. With regard to relations between the Commission and the General Assembly, all the Assembly's apprehension should be allayed. The Commission should, of course, pay careful attention to the Assembly's legitimate wishes, but it should also make great efforts to ensure that the Assembly appreciated the Commission's endeavours to carry on its work efficiently. That might be done partly by statements by the Commission's members who sat in the Sixth Committee and partly by personal contacts between them and government representatives in the General Assembly.

22. Mr. EDMONDS said it was unfortunate that Sir Humphrey Waldock's suggestion for a special statement addressed by the Commission to the Sixth Committee (see 615th meeting) had not been acted on owing to shortage of time and the pressure of work. In order that the views of each member should be presented in full, he would propose formally that the sound recordings of the meetings on item 6 be transcribed and be made available to the members of the Commission and to members of the Sixth Committee.

23. Mr. LIANG, Secretary to the Committee, explained that according to the regulations only the principal organs of the United Nations were entitled to verbatim records. It would not therefore be feasible to issue verbatim records for certain meetings of the Commission. Members' statement might be recorded more fully than usual in the summary records.

24. Mr. YASSEEN requested that the statements made in the debate on item 6 should receive fuller treatment than usual in the summary records.

25. Mr. AMADO said that some members spoke extemporaneously and perhaps in a more picturesque style than was suitable in an official record and indeed relied to some extent on subsequent interpretation. For example, Mr. Gros had stated in more formal language what he (Mr. Amado) had phrased in a somewhat exotic manner.

26. The CHAIRMAN said that naturally all members listened with the greatest interest to everything said by every other member of the Commission, but the summary record would be sufficient to convey to the Sixth Committee the essence of the views stated in the discussion. Fuller treatment than usual might well be given in the summary records.

27. Mr. MATINE-DAFTARY, Rapporteur, suggested that a detailed account of the discussion might be given in the Commission's report.

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28. Mr. JIMENEZ de ARECHAGA said he agreed with the general tenor of the statements made by previous speakers. Plainly, the General Assembly had the original competence under Article 13 of the Charter to promote the codification and progressive development of international law. Since the Assembly had not delegated that responsibility, it was quite logical for it to take a decision ex novo on the topics to be codified, particularly at a time when the composition of the Commission was about to be changed, and when certain members might be unable to complete the tasks allotted to them as special rapporteurs.

29. In his opinion, the Commission's work went far beyond pure codification and its achievements already had historical value. Owing to the change of its membership, the Commission could not establish a definite line for its future work but, as Mr. Ago had pointed out, whatever topics were selected, the last word should rest with the Commission itself, for it alone was competent to decide whether the topics concerned were ripe for codification. The two main items on the Commission's existing agenda - the law of treaties and State responsibility - were likely to yield positive results. With regard to the disagreement on the scope of the study of State responsibility at the Commission's twelfth session (566th and 568th meetings), he thought it wise to limit that scope to the international law affecting injuries to aliens in the territory of the State. All States now recognized the principle of their obligations towards States whose nationals were affected by measures taken in their territories. The question was not one of acquired rights, but of the principle that, if a State was enriched by capital belonging to nationals of another country, the latter must be compensated for losses incurred as a result of expropriation or nationalization. He cited certain recent treaties concluded amongst themselves by socialist countries, which recognized the principle of compensation for the nationalization of property; accordingly, the progressive development of international law could be ensured even within the limited framework upon which the Commission had decided.

30. He considered that the topics suggested by certain members, especially by Mr. Padilla Nervo, were most interesting, but thought that if too many subjects were proposed, the Commission would have difficulty in completing detailed drafts on each one. With regard to Sir Humphrey Waldock's suggestion made at

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the previous meeting he pointed out that the General Assembly had not asked the Commission for any recommendation; it was therefore questionable in what form a statement of the kind suggested by Sir Humphrey could be submitted to the Sixth Committee. Finally, he had no suggestions to make for the improvement of the method of the Commission's work, but had been most impressed by Mr. Pal's statement on the subject at the previous meeting.

31. The CHAIRMAN, speaking as a member of the Commission, said that criticisms of General Assembly resolution 1505 (XV) were unjustified and were motivated by considerations foreign to the codification and progressive development of international law. The Commission should be grateful to the General Assembly and to the States which had sponsored a resolution drawing the attention of governments to the importance of international law in international relations and envisaging the reconsideration of the whole subject in the light of new developments throughout the world.

32. The first question to be considered in connexion with the codification and progressive development of international law was which of the branches of international law should receive priority. It was obvious that they should be the branches most closely connected with the maintenance of peace and security and with friendly relations among nations.

33. The resolution itself stated that the programme of codification should take into account the need to promote friendly co-operation among States. Several members had rightly pointed out that the subjects concerned were vast; they included, for example, codification of the principles of peaceful co-existence, of State responsibility and of the succession of States. That did not mean, however, that other branches of international law should be neglected. There seemed to be no difference of opinion in the Commission on that score, and although Mr. François had expressed the view that more restricted topics should be dealt with, he would surely not object to giving priority to the most important subjects.

34. The question was obviously one of approach, rather than of fundamental disagreement. Certain doubts had been voiced concerning passages of the General Assembly resolution which mentioned the possibility of a broader approach towards the selection of subjects for codification and the establishment of the programme in the light of recent developments in international law. The

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Commission's existing programme was over ten years old and the main question to be answered was whether any developments had in fact taken place which would warrant its reconsideration. He was convinced that a review of the programme was fully justified, firstly, because it was generally useful to reconsider a programme from time to time and, secondly, because important changes had in fact taken place in international society. It was enough to mention the disintegration of the colonial system and the emergence of new States during the past fifteen years; that fact could not fail to have serious repercussions on the development of international law. The important changes that had taken place in the past few decades had not yet been fully digested, even by international lawyers, and it could be said with certainty that not all the necessary conclusions had yet been drawn from those changes. For example, so far as the subject of State responsibility was concerned, fundamental changes had taken place in consequence of the establishment of the prinicples of non-aggression, the prohibition of the use and threat of force and the principles of peaceful co-existence. The establishment of those principles had completely transformed the international law relating to State responsibility. He could not agree with the Secretary to the Commission that State responsibility in the broad sense did not exist in international law, but was dispersed among all its component branches. In his opinion, a violation of the principles he had mentioned directly involved State responsibility; the fact that the Commission had for a number of years been confusing the subject of State responsibility as a whole with that of responsibility for injury to aliens did not mean that the topic in its broad sense did not exist as such in international law. The new concept of State responsibility followed from the new principles and practices of States and was reflected in the post-war settlements, but not as yet in the doctrine of international law or in the work done by the Commission on the subject. There were, however, definite new trends from which logical consequences must follow. The Commission should pay the utmost attention to new developments and should draw the necessary conclusions.

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35. With regard to the programme of the Commission's work, he agreed with previous speakers who had stressed the fact that the codification and progressive development of international law required much patience and was necessarily a slow process. The whole complex of international relations was involved and, as Mr. Gros in particular had exphasized, the work of codification in itself was extremely complicated. The Commission was agreed that it should always present drafts of high quality, embodying its best efforts to contribute to the maintenance of peace and of friendly relations among States. It should therefore heed the recommendations of the Sixth Committee, and some practical steps might be taken to draw the Committee's attention to specific remarks made in the Commission. The Secretariat might supply the Commission with a comprehensive paper summarizing the relevant observations made during the debate of the Sixth Committee and the Chairman should report to the Commission on the discussion of its report in the General Assembly. Moreover, the Commission should be modest and should concede that its work was not absolutely impeccable. It had been suggested that its sessions should be prolonged, in order to increase the volume of its production; he very much doubted the necessity and advisability of such a course, since some members were unable to attend sessions in their entirety, even when they lasted for a mere ten weeks.

36. In his opinion, the Commission's work might be best expedited by a thorough preparation of its drafts. In that connexion, it was most important that the special rapporteurs should know in advance what the Commission expected of them. On many occasions, the instructions given to special rapporteurs had been so vague that they had been obliged to rely on their own judgement only. It was only if all the members of the Commission agreed on the instructions that a proper basis for discussion could be achieved. Mr. Zourek had said at the previous meeting that it would take the Commission seven years to deal adequately with the subject of the law of treaties. A considerable amount of work had already been done on the subject, but the absence of specific instructions made it doubtful whether a draft suitable for submission to States could be produced even in that time. It had been suggested that non-members of the Commission

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could be appointed as special rapporteurs; in the five years during which he had been a member of the Commission, there had always been enough members willing to undertake the study of various topics and, moreover, the Secretary had pointed out that it was inadmissible for administrative reasons to call in outside assistance. He was sure that contacts between special rapporteurs and regional juridical bodies studying the same subject could be extremely valuable and endorsed Mr. Verdross's suggestion that either two special rapporteurs or a committee of three members might be appointed to examine certain topics.

37. Mr. ZOUREK drew attention to the view put forward at the previous meeting that the subject of State responsibility was so vast that it could hardly be dealt with otherwise than from the restricted point of view of injury to aliens in the territory of a State. There could be no doubt that such material injuries in violation of international law were regrettable and could cause friction between States; but the violation of fundamental rules of international law, especially those established with the purpose of maintaining international peace and security, had even more regrettable consequences and, as experience had shown, could lead to the infliction of incalculable losses on mankind. Accordingly, in establishing the general rules governing State responsibility, the Commission was in duty bound to approach that broad aspect of State responsibility first. Moreover, its studies might be based on work already undertaken in the field: in particular, he had in mind the codification of the principles recognized in the Charter and Judgement of the Nürnberg Tribunal.

38. Mr. AGO thought that the main question before the Commission was how it could best inform the General Assembly of the tenor of its debates. All members would agree that the summary records might be expanded by careful correction; but all the members of the Sixth Committee could not be expected to read those records with the attention they deserved. The Commission should therefore ask the Chairman, in presenting the Commission's report to the Sixth Committee, to interpret its views on the subject, in order to remove all misunderstandings and to convey to the General Assembly the Commission's appreciation of the renewal of interest in international law as a factor of peace and co-operation among nations. The General Assembly's attention might also be drawn to the fact that the work of

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codification was of necessity long and slow. Moreover, that work did not end in the Commission, but was continued at plenipotentiary conferences. Thus, despite the many years of hard work that the Commission had expended on the law of the sea, no final results had yet been achieved, although two conferences had been held on the subject. The codification of the international law of diplomatic relations had culminated in the signature of the Vienna Convention; that success, achieved in a relatively short time, was due to the careful preparation of the draft in the Commission. He agreed with the Chairman that it was possible to improve the Commission's work by giving more precise instructions to special rapporteurs. So far as the prolongation of the Commission's sessions was concerned, that course had both advantages and disadvantages, and it was not for the Commission to make any recommendations on the subject. But the General Assembly could not expect miracles to be performed in a mere ten weeks' session annually, although, of course, priority must be given to the most important topics.

39. The CHAIRMAN said he would do his best to convey the views of the Commission to the Sixth Committee.

40. Mr. LIANG, Secretary to the Commission, replying to the Chairman's remarks on the question of State responsibility, said that he did not disagree with him in theory. He had merely pointed out that the principle of State responsibility in the widest sense was implicit in every branch of international law; the whole field of international law must be applied in the light of those principles, just as constitutional law was governed by the principle of governmental responsibility. Taken in that sense, State responsibility would be an extremely broad subject, and he wondered whether it was practical to codify it in all its ramifications. For that reason, past attempts at codification had been limited to the topic of injury to aliens in the territory of a State.

41. Mr. GARCÍA AMADOR said that he had examined with care the records of the Sixth Committee's discussions, in the course of which some criticisms had been expressed regarding the extent and scope of the reports submitted by him as Special Rapporteur on the subject of the international responsibility of States.

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42. He wished to explain that his first report (A/CN.4/96) had dealt with the subject of State responsibility as a whole. In his subsequent reports (A/CN.4/106, 111, 119, 125 and 134), he had dealt only with the problem of the responsibility of the State for injuries caused in its territory to the person or property of aliens. He had done so not by his own choice but in pursuance of the Commission's wishes and in deference to the views expressed by its members (A/3623, chapter III, para.17). During the five years which he had devoted to the study of the question of the international responsibility of the State for injuries to aliens, there had been no objection to that limitation of the subject by any member of the Commission; nor had there been any criticism from the Sixth Committee or the General Assembly.

43. In the circumstances, he could not therefore understand the objections voiced in the Sixth Committee at the fifteenth session of General Assembly. Much had been said about the need for the Commission to deal with certain important subjects. There could be no doubt that matters affecting property rights as a result of measures of expropriation and nationalization, matters for which considerable enthusiasm had been shown, were directly connected with the international responsibility of States for injuries to aliens. Indeed, long before that enthusiasm had become manifest, he had devoted a considerable portion of his reports to a detailed study of those particular matters. In doing so, he had taken into account not only the traditional principles of international law but also the new trends and recent developments in the matter.

44. A tendency had been apparent during the Sixth Committee's discussion to criticise his reports for not having taken sufficiently into account new developments in international law. Those criticisms would have been more helpful if specific reference had been made to a particular development, explaining how he had omitted to take it into account. As a matter of fact, none of the critics had mentioned a single such development. In reality, the one leading recent development in the matter had been the impact of the progressive internationalization of human rights on the whole subject of the international law of State responsibility and the treatment of aliens. He had, of course, devoted considerable attention in his reports to that new development, but regretted to note that the criticisms to which he had referred came from those quarters least sympathetic to the concept of international human rights as accepted by the United Nations as a whole.

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45. Lastly, it had been said that he had not taken into consideration problems of violations of territorial sovereignty. In fact, those problems were dealt with in the Charter of the United Nations itself. He wondered whether his critics would have had the same enthusiasm for the study of the problem of the violation of a country's sovereignty by means of infiltration and subversion by States pursuing a policy of expansion.

46. The CHAIRMAN said that the subject of State responsibility was not being dealt with by the Commission at the current session; some members had referred, in the course of the discussion on the Commission's future work, to the fact that the two subjects of State responsibility and the rights of aliens had become somewhat intermingled.

47. He declared the discussion on item 6 closed.

CONSULAR INTERCOURSE AND IMMUNITIES (A/4425; A/CN.4/136 and Add.1 to 11, A/CN.4/137) (item 2 of the agenda) (resumed from the 614th meeting)

48. The CHAIRMAN invited the Commission to consider on second reading the draft articles on consular relations.

Article 1 (Definitions)

49. The CHAIRMAN said that the following (partly new) text had been prepared by the Drafting Committee for article 1.

"1. For the purpose of the present draft, the following expressions shall have the meanings hereunder assigned to them:

(a) "Consulate" means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

(b) "Consular district" means the area assigned to a consulate for the exercise of its functions;

(c) "Head of consular post" means any person in charge of a consulate;

(d) "Consular official" means any person, including the head of post, entrusted with the exercise of consular functions in a consulate;

(e) "Consular employee" means any person who is entrusted with administrative or technical tasks in a consulate, or belongs to its service staff;

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(f) "Members of the consulate" means all the consular officials and consular employees in a consulate;

(g) "Members of the consular staff" means the consular officials, other than the head of post, and the consular employees;

(h) "Member of the service staff" means any consular employee in the domestic service of the consulate;

(i) "Member of the private staff" means a person employed exclusively in the private service of a member of the consulate;

(j) "Consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the consulate;

(k) "Consular archives" means all the papers, documents, correspondence, books and registers of the consulate, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

2. Consular officials may be career officials or honorary consuls. The provisions of section III of chapter II of this draft apply to officials who are career consuls; the provisions of chapter III apply to honorary consuls as well as to career officials who are assimilated to honorary consuls under article (54 bis).

3. The particular status of members of the consulate who are nationals of the receiving State is governed by article 50 of this draft."

50. The CHAIRMAN invited comments on paragraph 1 (a) to (k).

Paragraph 1(a) was adopted.

Paragraph 1(b) was adopted.

51. Mr. LIANG, Secretary to the Commission, referring to paragraph 1(c), pointed out that the expression "person in charge" suggested that the situation envisaged was temporary in character. The language of the provision was not consistent with the terms of article 16 on acting heads of post.

52. Mr. ZOUREK, Special Rapporteur, said that probably the expression used in English was too broad. Perhaps the language of article 16 might be adjusted to avoid any inconsistency.

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53. Sir Humphrey WALDOCK said that the expression "person in charge" was no broader than the French personne qui dirige.

54. The CHAIRMAN said that under article 19 of the Vienna Convention on Diplomatic Relations the acting head of a diplomatic mission was deemed to be head of the mission.

Paragraphs 1(c) to (k) were adopted.

Paragraph 1, as a whole, was adopted.

55. The CHAIRMAN invited comments on paragraph 2.

56. Mr. BARTOŠ said that there was a discrepancy between the English "career officials or honorary consuls" and the corresponding French fonctionnaires de carrière ou honoraires.

57. Sir Humphrey WALDOCK said that there was no difference in substance. It would have been awkward to refer to "honorary officials".

58. Mr. AMADO said that the French fonctionnaires honoraires was equally awkward.

59. Mr. ZOUREK, Special Rapporteur, said that the expression "honorary consuls", which was one of long standing, had been replaced by "honorary consular officials" in deference to an observation by the Netherlands Government (A/CN.4/136/Add.4). In view of the difficulties of translation, he thought perhaps the best solution would be to revert to the use of "honorary consuls" and to explain in article 54 that the expression covered also persons who served as subordinate consuls in an honorary capacity.

60. The CHAIRMAN suggested that paragraph 2 should be redrafted to read:

"2. Consular officials may be career officials or honorary. The provisions of section III of chapter II of this draft apply to officials who are career officials. The provisions of chapter III apply to honorary consular officials, as well as to career officials who are assimilated to them under article (54 bis)."

Paragraph 2, as so amended, was adopted.

61. The CHAIRMAN invited comments on paragraph 3.

62. Mr. ERIM asked what was the purpose of paragraph 3. Article 50 already specified the status of members of the consulate who were nationals of the receiving State.

63. Mr. ZOUREK, Special Rapporteur, said that by drawing attention to article 50 in the definitions article, the Commission would avoid having to include in a large number of articles a reference to the status of persons who were nationals of the receiving State.

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64. The CHAIRMAN, speaking as a member of the Commission, said that the paragraph was a useful one. If a provision of that type had been included in the draft on diplomatic relations, many doubts and uncertainties would have been dispelled and much discussion avoided at the Vienna Conference.

65. Mr. BARTOŠ said that it was particularly useful to have in article 1 an indication of the status of a whole category of members of the consulate.

Paragraph 3 was adopted.

Article 1, as amended, was adopted as a whole.

66. Mr. AGO, speaking as Chairman of the Drafting Committee, said that the titles of chapter I and section I, like all the titles, were provisional. The Drafting Committee would take a final decision on those titles when all the articles had been adopted. The same was true of the order in which the articles were placed.

67. The CHAIRMAN said that the Commission would do well to defer its decision on the placing of the articles and the titles until it had adopted all the draft articles, when comments of members on these points would be taken into account.

Article 2 (Establishment of consular relations)

68. The CHAIRMAN invited comments on article 2, for which the Drafting Committee had prepared the following text:

> "1. The establishment of consular relations between States takes place by mutual consent.
>
> 2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.
>
> 3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations."

Paragraph 1 was adopted.

69. Mr. ZOUREK, Special Rapporteur, said that he had no objection to paragraph 2. It was, however, his opinion that, if the receiving State refused to accept the establishment of consular relations, it could not be said to maintain diplomatic relations but only political relations with the other State.

Paragraph 2 was adopted.

Paragraph 3 was adopted.

Article 2, as a whole, was adopted.

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Article 2 bis (Exercise of consular functions)

70. The CHAIRMAN said that the following text had been submitted by the Drafting Committee for article 2 bis:

"Consular functions are normally exercised by consulates. They are also exercised by diplomatic missions within the limits of their competence."

71. Mr. ZOUREK, Special Rapporteur, proposed the deletion of the word "normally". He had examined the practice of States very carefully in the matter and had found, for example, that all Swiss diplomatic missions exercised consular functions and that the districts of consulates independent of diplomatic missions invariably excluded the place where the diplomatic mission was situated. The same was true of the practice of other countries.

72. If the word "normally" were left in the first sentence the impression might be given that consulates had some sort of priority, even where there existed a diplomatic mission. The reverse was true, and there were even some other arrangements which deserved to be noted: for example, in some cases, the embassy's consular section in the capital dealt with all important matters and the consulates throughout the receiving State had to refer those matters to that consular section.

73. The CHAIRMAN, speaking as a member of the Commission, supported the proposal that the word "normally" be deleted. The word suggested that the exercise of consular functions by diplomatic missions, referred to in the second sentence, was in some way not normal.

74. Mr. FRANCOIS said that he had no objection to the deletion of the word "normally", but thought that the concluding words of the second sentence "within the limits of their competence" were ambiguous. That phrase would certainly have to be explained in the commentary.

75. Mr. ZOUREK, Special Rapporteur, said that he would explain the phrase in the commentary. He recalled the terms of article 3, paragraph 3, of the Vienna Convention:

"Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission".

76. It was one of the functions of a diplomatic mission, by virtue of article 3, paragraph 1(b), of the Vienna Convention, to protect in the receiving State the

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interests of the nationals of the sending State. For that purpose, and therefore within the normal limits of their competence, diplomatic missions could exercise consular functions.

77. Mr. AMADO criticized the phrase "within the limits of their competence". He agreed to the deletion of the word "normally". The whole article could, with advantage, be revised to read:

> "Consular functions are exercised by consulates. They may also be exercised by diplomatic missions."

78. Mr. PADILLA NERVO said that by including the phrase "within the limits of their competence" the intention had been to cover much the same ground as in article 3, paragraph 3, of the Vienna Convention. In the circumstances, consideration might be given to including in article 2 bis of the draft under discussion the actual words of article 3, paragraph 3, of the Vienna Convention.

79. Mr. LIANG, Secretary to the Commission, agreed that it was advisable to delete the word "normally".

80. As to the phrase "within the limits of their competence", it did not appear to fulfil the purpose for which it had been intended. Questions of competence were implicit in all the provisions of the draft, and a phrase of that type could be used almost anywhere.

81. Mr. ZOUREK, Special Rapporteur, said that the purpose of the phrase under discussion was to indicate that a diplomatic mission did not need to be invested with new functions in order to carry out consular duties.

82. The language of article 3, paragraph 3, of the Vienna Convention was well suited to an instrument on diplomatic relations, but in the draft on consular intercourse it would be necessary to be more explicit; a purely negative formula of that type would not meet the case.

83. Mr. BARTOŠ said that he had no objection to article 2 bis, but considered that it would have been desirable to make the question of the exercise of consular functions by diplomatic missions the subject of a separate section.

The meeting rose at 1.10 p.m.

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PLANNING OF FUTURE WORK OF THE COMMISSION (A/CN.4/138) (item 6 of the agenda) (continued)

1. The CHAIRMAN invited continued debate on item 6 of the agenda, with special reference to General Assembly resolution 1505 (XV).

2. Mr. EDMONDS said that such subjects as State responsibility and the law of treaties, with which the Commission had already begun to deal, should be kept on its agenda, as Mr. Erin had said at the previous meeting. On the other hand, he saw considerable merit in Mr. François's argument that either the Commission should undertake more restricted topics or that its sessions should be prolonged. Because the Drafting Committee's draft texts were submitted to the plenary Commission late in each session, it was impossible to discuss them as thoroughly as they deserved. He realised that the prolongation of the Commission's sessions would run into serious difficulties, but thought that, if at least part of the Drafting Committee's drafts could be submitted earlier, the Commission would have more time to consider them and produce more careful thought out instruments.

3. Mr. YASSEN said that, having been present at the Sixth Committee's discussion of the text which had become General Assembly resolution 1505 (XV), he wished to clarify some points and to dispel certain doubts. He did not believe that the resolution needed much justification. The competence of the General Assembly with regard to the codification and progressive development on international law was clearly based on Article 13(a) of the Charter, and the Assembly had not abdicated its competence to propose topics for the Commission and suggest its programme of work. The Commission, moreover, was a subsidiary organ and a creature of the General Assembly. He would not wish his remarks to be construed as in any way minimising the competence and prestige of the Commission; it had the undoubted right to choose the topics it wished to codify. Nevertheless, it should be borne in mind that, although the codification of international law had technical aspects, the political aspects also existed. The Sixth Committee was composed of jurists who also represented States; and Mr. Amado had on one occasion rightly stated that international law was not the work of professors, but of statemen and diplomats. The Sixth Committee's discussion of future work in the field of the codification and progressive development of international law had been

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most valuable and had shown the great interest taken in the subject by a number of States. The resulting resolution had, in his opinion, established a reasonable method of work, and many representatives had stressed that it implied no criticisms whatsoever of the Commission's work. The idea of the resolution had first been put forward by the Yugoslav delegation, which had proposed the establishment of a special committee, in the belief that the preparation of a new list of topics for codification raised political problems which should preferably be considered by government representatives (cf excerpts from Sixth Committee's report quoted in A/CN.4/138). Another group of delegations had thought, on the contrary, that the International Law Commission was better qualified to select new topics and that a special committee would merely duplicate the Commission's work (ibid.). The final draft resolution, reconciling those two points of view, had been sponsored by twenty-four delegations[1/] and had been adopted unanimously. He believed that the resolution reflected the anxiety of all States to promote the cause of the codification and progressive development of international law and that the General Assembly was to be congratulated on it.

4. Mr. HSU said that he, too, had attended the debates in the Sixth Committee which had culminated in the adoption of General Assembly resolution 1505 (XV); he regarded that text as a concession to certain criticisms of the Commission's work made during the debate. As some representatives had pointed out, the resolution was, in a manner of speaking, a reflection on the methods used by the International Law Commission; nevertheless, the Sixth Committee had been relatively considerate, and had not included in the resolution any recommendation for the establishment of a special committee: operative paragraph 1 simply stated that the question should be placed on the provisional agenda of the sixteenth session of the General Assembly. It was noteworthy that no government had as yet submitted any views or suggestions on the question to the Secretary-General in response to operative paragraph 2.

1/ Afghanistan, Argentina, Brazil, Canada, Ceylon, Colombia, Denmark, Ethiopia, Ghana, Indonesia, Iran, Iraq, Lebanon, Liberia, Mexico, Morocco, Netherlands, Pakistan, Thailand, Tunisia, Turkey, United Arab Republic, Venezuela, Yugoslavia.

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5. Thirteen years previously, the Secretariat had made a special study of the whole field of international law from the point of view of its codification, and the General Assembly had recommended a list of topics for the Commission to work on. In his opinion, that study was still valid; but it might be a good idea if a small committee reviewed the enumeration and decided which of the topics not yet discussed should receive priority. A notable omission from the original list was, however, the international law of war. Some might think that since war had been outlawed, it should not be endowed with the dignity of a code; it would be naïve, however, to assume that human nature had changed and that no more wars would take place simply because the concept had been outlawed. Indeed, the United Nations itself had gone to war against North Korea in 1950. Over the past three or four hundred years, a great deal of attention had been paid to the subject, and there would be no lack of precedents and rules for codification.

6. The Commission had acquired a great deal of experience in the thirteen years of its existence. One of the greatest difficulties it had encountered was that of the quinquennial change of membership and the consequent anxiety as to whether or not topics entrusted to certain Special Rapporteurs might have to be shelved. Mr. François had even gone so far as to express the view that the Commission should not undertake to deal with topics which it could not complete in five years. But in that case, when would the Commission be able to deal with important and vast topics? Perhaps individual special rapporteurs might be replaced by a small body of experts, not necessarily members of the Commission. That solution would, of course, involve a revision of the Commission's Statute, but the General Assembly might agree to make the amendment. In that way, much of the preliminary work could be done outside the Commission and the area for government observations would be reduced. Moreover, members of the Commission were prone to speak at some length for the record; if part of the preliminary work were done beforehand, lengthy debate would no longer be necessary. He was sure that the method of entrusting certain topics to bodies of special rapporteurs would help to remove the causes for much of the criticism that had been levelled at the Commission in the Sixth Committee.

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7. Mr. BARTOŠ, commenting on the relations between the General Assembly and the Commission, said that the Commission was a subsidiary body of the Assembly and that, under the Charter, the codification and progressive development of international law was a prerogative of the General Assembly, which must take the initiative in the matter. Nor was that hierarchical subordination the only consideration; the Commission provided the technical basis for the consideration of topics at the political level. Mr. Yasseen had rightly pointed out that the question of the selection of topics for codification was both political and technical; the political aspect was the establishment of priorities to meet the needs of the international community, while the technical aspect was to ascertain whether certain topics were ripe for codification and for progressive development. Accordingly, the Sixth Committee and the International Law Commission must work hand in hand.

8. The Sixth Committee seemed to believe that the Commission was unduly conservative in its approach and that it laid down academic rules, rather than codifying customary rules of international law. The Commission had also been criticized for not paying enough attention to developing the principles of the Charter into rules of international law. He thought there was some ground for that criticism, which should be borne in mind when considering the future work of the Commission. It was essential that the Commission should be realistic in its choice of subjects. For example, when the third and fourth drafts of the Convention on Fishing and Conservation of the Living Resources of the High Seas had been prepared, the question of fisheries had had to be settled not in accordance with established legal principles, but in the light of the need to safeguard certain interests. The Commission would make progress by accepting institutions which might not be confirmed in theory but which were necessary in practice. It should not balk at considering questions which might be of less importance to some countries than to others, such as the succession of States and the legal status of new States. The General Assembly had in effect asked the Commission very politely to take a more realistic view of its work. The criticisms made in the Sixth Committee should be accepted, particularly since the Assembly had made no categorical demands on the Commission. The Assembly's requests should be studied closely, and a somewhat different approach adopted,

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so that sooner or later the Commission would be able to deal with the kind of topic suggested in resolution 1505 (XV).

9. The Commission had selected only a few topics from a relatively long list. Of course, it could hardly have done otherwise, in view of the short time at its disposal every year. He agreed with Mr. François that in principle it was unwise to undertake subjects which would take more than five years to deal with, but did not think that that rule should be applied strictly. It was conceivable that a topic might be handed on to a group of new members, even if all the work done by the special rapporteur concerned could not be used.

10. On the occasions when the Commission had dealt with such political subjects as the code of offences against the peace and security of mankind, the declaration on the rights and duties of States and the definition of aggression, the General Assembly had received the relevant drafts without any great enthusiasm, but had merely taken note of the Commission's work, recommended that it should be taken as a guide or had set up special committees to work on the subjects concerned. That attitude was different from that taken by the General Assembly at its fifteenth session. On the one hand, the Assembly seemed to be encouraging the Commission to study political questions, and on the other hand, it did not seem to take the results of that work seriously. The Commission was thus placed in the invidious position of having to familiarize itself with new trends in international law and yet retaining its strictly juridical character. In any case, the Commission in its new composition should begin its work by examining the list of topics which had been drawn up thirteen years previously and which had been added to by the General Assembly. It should then choose at least five topics at a time which were ripe for codification, for example, the recognition of States, the succession of States, questions of relations in respect of technical and economic assistance, and others for which there were certain rules laid down in multilateral conventions, in resolutions of the General Assembly and in the day-to-day application of the Charter.

11. In conclusion, he said that there seemed to be a misunderstanding between the General Assembly and the Commission, attributable to the fact that current political trends were viewed in a more conservative way by the Commission than by the Assembly. It did not appear, however, that the General Assembly really

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wished the Commission to study more political topics. On the other hand, the Commission should be less reluctant to deal with more difficult questions, which were governed by few rules acceptable to all States. It was the Commission's duty to help other United Nations organs by showing them the correct trend of the development of principles of international law.

12. Mr. PAL said he did not think that the records of the debate in the Sixth Committee showed any mistrust of the Commission or any misunderstanding between the Commission and the General Assembly. From the list of topics submitted to the Commission at its first session, it had selected the subjects it could deal with; it had also been obliged to give priority to new topics chosen by the General Assembly. Accordingly, the Commission's inability to deal with all the subjects on its list was not due to any laxity on its part.

13. The Commission's Statute drew a sharp distinction between the progressive development of international law and its codification. Nevertheless, experience had shown that it was difficult to keep the work of codification within the limits laid down in article 16 of the Statute, and that progressive development was often also introduced. The General Assembly had shown no dissatisfaction with that method of operation, but it seemed to feel that State representatives, who knew exactly where the area of the greatest tension lay, were the most competent to select topics for codification. It had been pointed out that there was no such thing as pure codification without progressive development of international law. Members of the Commission, and particularly special rapporteurs, should have expert help and, in the circumstances, it was most desirable that a politically aware body should select topics for both codification and progressive development.

14. With regard to the methods of dealing with various topics, he wished to point out to Mr. François that the Commission could in fact take up any subject. In the first year of its term, it appointed a Special Rapporteur and gave him a year in which to submit a report; the Commission considered that report at the next session, and the third and fourth years were taken up by the comments of Governments; thus, the Commission completed its work in the last year of its term. In those rather difficult circumstances, the Commission was to be congratulated for having accomplished as much work as it had done. He would

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advocate turning the Commission into a permanent body, like the International Court of Justice - which in any case dealt only with specific cases, whereas the Commission had to keep up with the life of the international community. He would go even further, and would recommend that the Commission should be enabled to re-elect its special rapporteurs, so as to retain them in office until their work was completed.

15. He would not suggest any specific topics for discussion, but agreed generally with the principles set forth by Mr. Verdross at the previous meeting. He also considered that the topics of the succession of States, the structure of the United Nations and rules of law governing the interrelationship of States should be taken up as soon as possible.

16. Mr. AGO said that much had been said during the discussions in the Sixth Committee on the need to revise the programme of work of the International Law Commission. The suggestion that the Commission's whole programme should be overhauled was a new one; in the past, the General Assembly had been content to add on occasion a further subject to the original list of topics drawn up at the inception of the Commission's work.

17. Much had also been said of the need to take into account new trends and developments in the field of international law and to favour the development of international co-operation and friendly relations among nations. Some of the ideas which had been put forward had been somewhat confused; some even not very well informed. Nevertheless, the opinions voiced were of great interest, particularly in so far as they expressed the aspirations of new States to participate in the formulation of the rules of international law.

18. Hopes had also been expressed for the development of international justice. Indeed, perhaps the most interesting part of the discussion had been that concerning the role of the International Court of Justice. The reluctance to submit cases to that Court was plainly due not to any lack of confidence in the Court, but rather to a feeling of uncertainty regarding the rules of international law which the Court would apply. In many instances, the exact content of those rules was unknown; in addition, the new States considered that they had had no part in the formation of the rules of customary international law over the centuries.

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19. In the circumstances, the feeling that the International Law Commission should codify more of the rules of international law was a natural one. Also, it was true to say that the task of codifying international law had become much more urgent. In normal circumstances, he preferred the rules of law to develop naturally and gradually and had no great enthusiasm for codification per se. In a revolutionary situation, however, codification became an imperative necessity and the situation facing the international community, in particular as a result of the doubling of the number of sovereign States, was indeed revolutionary.

20. Codification was, however, a long, slow and arduous process. The German Civil Code, which was an excellent one, was the result of one century of work. The Commission was expected to cope with the enormous task of codifying international law in only ten weeks annually, and the General Assembly should take that fact into consideration.

21. The General Assembly had discussed the question whether to set up a special Committee to select new topics for codification, or to entrust the International Law Commission with that task. In the end, it had been decided that the General Assembly would undertake the task itself, on the basis of Government comments. As yet the response from Governments had not been very encouraging, but it was in any case rather strange to see so technical a question taken up by a political body like the General Assembly.

22. Of course, the Commission had no choice but to accept the General Assembly's decision, but it should give the Assembly its views. The Commission should recognize that the General Assembly was best qualified to deal with the political implications of the choice of topics for codification. The General Assembly, for its part, should leave it to the International Law Commission to decide whether a topic had a legal character or not. The Secretary to the Commission had read at the previous meeting a long list of subjects, and he (Mr. Ago) had noticed that some of the subjects had barely any legal implications. In addition, it should be left to the Commission to decide whether a topic was ripe for codification or not. Much had been said of new topics, but many of those topics were not ripe for codification. International conventions could be entered into in relation to those new topics but the formulation of general rules of international law thereon would be premature; the International Law Commission could not be expected to invent in effect new rules of international law.

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23. The General Assembly was thus in a position to make useful suggestions for new topics but the Commission should have the final decision on the question of priorities. If a political body were to be left to draw up a list of topics, the inevitable result would be that the list would be too long, with the consequence that the Commission would be given a task which it would be unable to perform.

24. He agreed with Mr. François that the Commission's time was short, in particular if it was remembered that its members were elected for only five years. He could not, however, subscribe to the conclusion that the Commission should only undertake small subjects. Future generations would remember the Commission for its achievements in connexion with great subjects, in particular the codification of the law of the sea and of the rules governing diplomatic and consular relations. And it was precisely to Mr. François that the Commission and the world owed a debt of gratitude for his outstanding contribution to the study of the law of the sea, a subject on which the Commission's labours had met with a very broad measure of success.

25. It was his considered opinion that the Commission should concentrate on a small number of important subjects, of which State succession, which had been mentioned in the discussion, could well be one. There were, however, three important subjects which stood in need of codification and which called for special priority: the law of treaties, State responsibility and the international law relating to the treatment of aliens.

26. Unless those three subjects were first codified, any attempt to codify other smaller subjects would be vain. Moreover, practically all the international legal problems which arose were connected in some way or another with the law of treaties, State responsibility or the treatment of aliens.

27. The General Assembly should be urged to enable the Commission to carry out its essential task of codification in regard to those three important subjects. The codification of those topics would give to the new States confidence in international law and hence in international justice.

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28. He did not believe that there was any opposition between a so-called conservative approach on the part of the Commission and a more progressive one on the part of the General Assembly. It was simply a question of the method of work to be adopted. The General Assembly could rest assured that it was precisely in connexion with the three great subjects which he had mentioned that significant new developments had taken place in international law. There was no conflict of views between the General Assembly and the Commission; the General Assembly wanted the Commission to perform certain tasks and the Commission, which was the competent technical body, should be given the time and the means to carry out those tasks and should have the last word in deciding the order of priority in which the topics would be taken up.

29. Mr. MATINE-DAFTARY pointed out that resolution 1505 (XV) of the General Assembly was not directly addressed to the Commission. Members had, however, discussed in the course of the current debate the functioning of the Commission and he accepted the idea that something should be done in the matter.

30. The Commission had no doubt done remarkable work in the past but it was perhaps true that it might have done more. One important reason why it had not was the inevitable lack of continuity in regard to special rapporteurs. For the topic of the law of treaties, the Commission had recently appointed the fourth Special Rapporteur; in the circumstances, it was difficult to complete the work on that topic.

31. Some more permanent solution would have to be found for the problem of special rapporteurs. One solution might well be to appoint eminent international lawyers from outside the Commission. If necessary, the Statute of the Commission should be amended in order to make that possible. There were some eminent international jurists, qualified to act as special rapporteurs, who were debarred from membership of the Commission because they had the same nationality as one of its members.

32. If the Commission should continue to operate as before, it would have to concentrate on a few subjects but it could then hardly be fulfilling the function assigned to it by the General Assembly in pursuance of Article 13 of the Charter.

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33. Article 13 of the Charter gave expression to an imperative need of the national community. It was the duty of States members of the United Nations, under Article 33 of the Charter, to settle their disputes by peaceful means, including arbitration and judicial settlement. It was difficult, however, for States to accept judicial settlement when the content of international law was unknown. Hence the need for the codification and development of that law.

34. By virtue of Article 38, paragraph 1(b) of its Statute, the International Court of Justice was called upon to apply the rules of customary international law. It followed that those rules needed definition. The Court had not yet built up a sufficient body of precedents to clarify international custom.

35. Another problem arose in connexion with the provisions of Article 2, paragraph 7, of the Charter, concerning "matters which are essentially within the domestic jurisdiction" of States. Many States had not accepted the jurisdiction of the International Court of Justice in all the legal disputes specified in Article 36, paragraph 2 of the Statute of the Court. Others, like the United States of America, had accepted that jurisdiction subject to a reservation regarding matters essentially within their domestic jurisdiction and some had even gone so far as to reserve to themselves the right to determine what matters came within that jurisdiction. It was clear that States were reluctant to submit their disputes to the Court so long as the exact scope and meaning of Article 2, paragraph 7, of the Charter remained undefined.

36. It was therefore apparent that the work of codification of international law would have to be advanced in order to give States more confidence not only in international law but also in international justice. The United Nations had a judicial organ but one which depended for its operation on the will of States. The failure of that organ to function normally was due to the inadequacy of the legislative process within the United Nations system.

37. The General Assembly should give the International Law Commission the means of carrying out the tasks entrusted to it. He suggested that a small committee should be set up to prepare, in the light of the Commission's thirteen years' experience, proposals to the General Assembly on the revision of the Commission's Statute.

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38. Mr. AMADO said that the Sixth Committee and the General Assembly should be told emphatically that a Commission of scholars took four days to formulate a rule of international law governing a specific diplomatic or consular immunity.

39. He had been a member of the Committee which had drafted the Statute of the International Law Commission. It had not been the intention to draw in that Statute a clear-cut distinction between the codification of international law and its progressive development. A codification should fill any gaps which might appear; the rules had to be arranged, clarified and if necessary amplified. The task of codification and that of development of international law could not therefore be separated.

40. One of the most important phenomena of the modern world was the appearance of new States, eager to participate in the formulation of the rules by which international society was governed. He had consistently argued that international law was made by States and not by jurists.

41. He regretted that he could not accept Mr. François's suggestion that the Commission should devote its attention only to small subjects. He did, however, believe that the Commission should concentrate on the practical aspects of important subjects, leaving aside theoretical questions.

42. Thus, the subject of the law of treaties had been chosen for codification not because of its general theoretical aspects but because of the desire to clarify the rules of international law governing new types of international agreements which were becoming increasingly important. For example, a new type of treaty, which did not need to be ratified in order to enter into force, had made its appearance and it was important to determine how far the traditional rules governing the law of treaties applied to that type of instrument.

43. The law of treaties and that of State responsibility were both vast subjects and it was therefore essential to extract from them those portions which could usefully be codified.

44. Lastly, it was essential to inform the General Assembly that the Commission did not have the necessary time to carry out fully the immense task which was expected of it.

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45. Mr. ZOUREK said that General Assembly resolution 1505 (XV) was very welcome since it showed the Assembly's interest in the codification and progressive development of international law and rightly stressed its increased importance in developing friendly and co-operative relations among nations. It was in fact the sole existing basis for the settlement of disputes by peaceful means between States of differing economic structures and for solving the problems arising from their rivalries. The resolution also stressed the importance of international law for the maintenance of international peace, a fact which had not always been recognized in the early years of the United Nations. Peace would in fact be assured by strict and undeviating observance of Articles 1 and 2 of the United Nations Charter by all governments.

46. The question of the future programme of codification should be viewed in that light. The General Assembly had raised the question what topics should be codified. The Commission had established its programme in 1949 and additions had been made by the General Assembly from time to time, and no doubt it would make further additions. Of the fourteen subjects originally selected for codification (A/925, chapter II, para. 16) six had already been codified. The Commission's record was quite creditable in view of the difficulty of reviewing the jurisprudence and practice of international law. The General Assembly would, however, certainly ask what priority should be given in codification. If there was no change in the Commission's structure, it would be able to examine only a few topics, since if it had too many items on its agenda, the reports would pile up, the Commission would not have time to look at them and the special rapporteurs would in due course cease to be members.

47. The Commission should select only the most important subjects. Three were already on its programme: the law of treaties, State responsibility, and the subsidiary topic of the responsibility of the State for injuries caused in its territories. Other important topics had been suggested, in particular, the succession of States, but the list should not be extended too far.

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48. While it was, of course, for the General Assembly to decide on the best way of dealing with such topics, the Commission might with propriety suggest how they might, for practical purposes, be sub-divided. Such subdivision would be inevitable if the work was to progress. When the Commission had examined only a small sector of the law of treaties at its eleventh session, he had privately computed that at least seven full sessions would be needed to deal with all the matters suggested by the special rapporteur on the subject.

49. Lack of time had hampered progress of the work on the topic of State responsibility. The Commission had been able to hold only a general discussion at its eighth session, and, even then, considerable differences of opinion had emerged. Several members had expressed considerable opposition to the basic concepts in the Special Rapporteur's first report (A/CN.4/96). The Special Rapporteur had been asked to continue his series of reports, but to take special account of the criticisms expressed during the discussion. The Special Rapporteur had complained of criticisms made by certain delegations in the Sixth Committee of the General Assembly at the fifteenth session; but every delegation was entitled to express its opinion, and it was not inconceivable that the reports had been open to criticism, just as the first report had been criticized by members of the Commission itself.

50. The report should, in his own view, concentrate first on the general principles of State responsibility, if a proper perspective was to be obtained, and deal with the international responsibility for breaches of rules of international law which were basic for the maintenance of international peace and security, as laid down notably in Articles 1 and 2 of the United Nations Charter. The detailed application might be examined subsequently.

51. Mr. SANDSTRÖM said that there could be no objection to the General Assembly's indicating to the Commission topics for codification, since it had given the Commission the right to use its discretion in their selection. It was worth recalling that only three or four of the thirteen or fourteen topics for codification had been selected for priority treatment by the Commission itself: the law of the sea, arbitral procedure, the law of treaties and possibly consular immunities, as a corollary to diplomatic intercourse and immunities. The Commission had always taken the view that it wished to undertake primarily work which did not have undue political implications.

A/CN.4/SR.615

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52. It had been suggested that the Commission's method of work should be reviewed. He agreed with all that had been said by Mr. François and Mr. Ago. The suggestion of Mr. Hsu that Assistant special rapporteurs might be recruited from outside the membership of the Commission was worth pondering.

53. Sir Humphrey WALDOCK said that he had studied the records of the Sixth Committee's debates at the fifteenth session and agreed with Mr. Ago that there was not and should not be any basic divergence between the views of the Commission and those of the General Assembly. He also agreed that the General Assembly might be unable to appreciate the technical difficulties inherent in the Commission's work. The General Assembly undoubtedly had a political interest in the list of topics which the Commission should undertake, but political representatives might not always understand the difficulties of drafting in legal terms the practices which they themselves had established.

54. The Commission had an absolute right to give an expert view on the technical aspects of codification and it would be of real advantage if it did so, lest the General Assembly should ask it to undertake projects which could not be brought to fruition for technical reasons.

55. There was a definite limit to what the Commission could produce in a session of ten weeks. Although it might be suggested that the Commission should speed up its methods of work, that could be done only to a very slight extent. The pace of work was dictated by the subject and the very process of codification. Unless there was a very full exchange of views, it would be impossible to obtain a synthesis of the opinions held in various parts of the world. The Commission should be a forum for concerting differing views. The idea that it should, in certain cases, break up into sub-commissions (A/3859, chapter V, para. 60, footnote 33) was therefore not feasible. He agreed that an excessively long list of topics would create difficulties, because it would result in a lack of focus. Fundamental topics must certainly be tackled, however much work that entailed. Many of them corresponded with the concern of the Sixth Committee; for example, the law of treaties. That might seem a dull subject, but the work of the International Court of Justice showed that the law of treaties was an important branch of international law and of the greatest relevance to the maintenance of international peace.

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56. The Chairman had stated that the discussion would be merely for the record and that the Commission was not asked to take any action. After Mr. Ago's statement, however, it might be thought that it should attempt to draft an agreed statement on some of the technical difficulties involved in connexion with the planning of the Commission's future work, since that was the best way to make an impression on the Sixth Committee.

57. The CHAIRMAN reminded Sir Humphrey that, when the Commission had decided to deal with item 6 of its agenda, it had been made clear that it could do no more than record an expression of members' views on the subject. The Commission had not been instructed to submit any statement to the General Assembly. There would in any case hardly be time to draft such a statement at the current session.

58. Sir Humphrey WALDOCK observed that so much general agreement had been expressed that it was to be hoped that it would not be hard to draft the statement.

59. The CHAIRMAN replied that that idea had been discussed on many previous occasions and the Commission had always found almost insuperable difficulties in arriving at agreed conclusions.

60. Mr. LIANG, Secretary to the Commission, said he would first comment on some points of an organizational nature raised in the discussion.

61. The Commission was not unaware of the difficulties of continuing its treatment of a topic if a special rapporteur was not re-elected. It had in fact taken a decision on that subject at its fifth session (A/2456, para. 172). If a special rapporteur was re-elected, he would continue his work unless and until the Commission, as newly constituted, decided otherwise.

62. The suggestion that outside help should be recruited in the form of assistants to special rapporteurs raised a different question, which had been discussed very thoroughly when the Commission's Statute had been drafted. At that time it had been decided that the system would not be feasible, since these assistants could not be supervised if they were not members of the Commission or of the Secretariat. The suggestion also raised the very delicate question of the area from which such assistants should be recruited. Unless the General Assembly saw fit to reverse its decision, it would therefore not be feasible to recruit from outside the United Nations.

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63. The suggestion that associate special rapporteurs who were also members of the Commission be appointed was however workable, and arrangements for such a system might be examined later.

64. The Secretariat had issued a document for the Commission's first session in 1949 (A/CN.4/1/Rev.1, cited in report on the Commission's first session, A/925, chapter II, para. 13), listing topics for codification. That document had not, of course, been exhaustive. Comments had been made with regard to the stage of ripeness for codification, but the Commission had not spent much time in discussing each subject, and the Chairman, Judge Manley O. Hudson, had taken the initiative, with the Commission's consent, of proposing the four main subjects which had been before the Commission ever since. There remained, however, an almost embarrassing choice of topics to be undertaken.

65. It was the Secretariat's experience with regard to the selection of topics that in most cases they could not be compartmentalized. But there were subjects which by their nature were broad in scope. State responsibility and the law of treaties were cases in point. He himself had ventured on previous occasions to urge that the larger subjects should be broken up. When State responsibility had originally been placed on its agenda, it had been understood that the Commission's work would, at the outset at least, be limited to the question of the responsability of the State for injuries caused in its territory to aliens. If the topic of State responsibility were to include the violation of State sovereignty and other rules of international law, it would be virtually equated with the whole field of international law. Certain subjects must therefore be treated separately. The international legal aspects of land reform, for example, which he had mentioned at the previous meeting, might be regarded as an aspect of State responsibility, but might equally be taken as a limited subject in itself. Such restricted treatment might also be given to certain aspects of the law of treaties.

66. The CHAIRMAN said that, in view of the short time remaining at the Commission's disposal, he wished to close the list of speakers.

67. Mr. AGO asked that the list should be left open, as points were likely to be raised that required a reply.

68. The CHAIRMAN replied that members could hardly speak twice on the same subject, but perhaps they might make short explanatory statements.

The meeting rose at 1.10 p.m.

A/CN.4/SR.615

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United Nations Division/R. Harry Jay/G

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Mr. Sicotte

PERSONAL
NATO SECRET

June 15, 1962

G.S.Murray

Future Development of International Law

I am commenting in a personal vein to you about the attached material since I would not wish to stand in the way of your sending your proposed letter and its enclosures to London if you believe it would be helpful to do so. Perhaps, however, the observations I am about to make may suggest to you the desirability of following a different course.

2. Having examined London telegram 1412 of April 16, I find myself very much in accord with the letter and the spirit of the Foreign Office approach to the problem of preventing objectionable new concepts from creeping into international law. Therefore I share your desire to convey to the Foreign Office our gratification that Canadian and United Kingdom views on a complex and tactically very difficult matter seem to coincide.

3. At the same time I am less confident of the desirability of attaching the three divisional manuscripts and suggesting that these should be used rather specifically in further conversations with the Foreign Office persons who have already taken the trouble to set out the reasoned position conveyed in London telegram 1412. You may agree with me that as a matter of departmental practice there is an intrinsic hazard in using, in this way, material that has been cleared only at the divisional level. This inherent difficulty is, it seems to me, distended almost to unacceptable proportions when the material in question comprises some two score pages and includes not only research assessments but action recommendations impinging on political issues the possible gravity of which has not yet been carefully weighed by the Department.

4. For my own part, I should not have thought the Foreign Office reply called for a further exchange with Canada House so much as for a renewed determination to co-operate between the individuals of the two countries likely to be associated with one another in legal bodies in the United Nations. For that purpose, or indeed for use by Canada House, should you still think it desirable to send material to them, it might be preferable to send

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a very concise distillation of the principal points intended to form the cornerstone of Canadian thinking in regard to the matter at issue. In this regard, I am attracted to the conclusion in paragraphs 22, 23 and 24 of your memorandum of February 20, 1957. I also think that Legal officers in the Foreign Office might be glad to see some of the middle portions of your memorandum of January 30, 1962 which examine into a number of significant legal issues.

6. To conclude, I wonder about the value of turning to a Portuguese statement in NATO for complimentary evidence either for or against any legal thesis we might be trying to prove. Should this be deemed really desirable, is it necessary to send to Canada House the whole copy of a NATO secret paper? This raises the security classification of your communication to a level which does not au fond relate to the degree of delicacy of your subject matter.

7. I understand that Harry has already discussed the tenor of this memorandum with you and with Allan and that our observations are not likely to give rise to any misunderstanding. Since the above was prepared, we have also had an opportunity of seeing Commonwealth Division memorandum of June 1 to you in which much the same position as our own has been conveyed.

G.S. MURRAY

G.S. Murray.

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Mr Schotte & occ
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FM LDN JUN8/62 CONFD

TO EXTERNAL 2084

INFO GENEVA WASHDC

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REF OURTEL 1412 APR16

cc: 5475-AX-37-40
5475-EW-40
11647-A-40

FUTURE DEVELOPMENT OF INTERNATIONAL LAW:BRIT REPRESENTATION AT CONFERENCE,INTERNATIONAL LAW ASSOCIATION,BRU,1962

WE HAVE NOW RECEIVED FOLLOWING LET FROM UN DEPT FO:QUOTE

I PROMISED IN MYLET UN 1641/3 APR13 ABOUT DEVELOPMENTS IN THE FIELD OF INTERNATIONAL LAW TO LET YOU KNOW OUR CONCLUSIONS ABOUT THE POSSIBILITY OF OUR SENDING REPS TO THE AUG MTG OF THE INTERNATIONAL LAW SOCIETY IN BRU.

I AM GLAD TO BE ABLE TO TELL YOU THAT WE INTEND TO DO OUR BEST TO SEND ONE OF THE FO LEGAL ADVISERS.UNQUOTE.'''

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DEPARTMENT OF EXTERNAL AFFAIRS

CROSS REFERENCE SHEET

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Type of Document....Telegram.... No....L-80....Date....June 8/62....

From....~~Washington~~ External....

To....Washington....

Subject:
Departmental representation at meeting of I.L.A. in Brussels Aug. 19-25/62.

Original on File No....11647-A-40....

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Other Cross Reference Sheets on....

Prepared by....E.Logan....

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Mr Beesley —
Legal Div

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PRESS RELEASE L/1008
UNITED NATIONS, N.Y.

INTERNATIONAL LAW COMMISSION OPENS SESSION IN GENEVA

(THE FOLLOWING HAS BEEN RECEIVED FROM THE INFORMATION SERVICE OF THE EUROPEAN OFFICE OF THE UNITED NATIONS, AT GENEVA.)

THE INTERNATIONAL LAW COMMISSION TODAY BEGAN ITS FOURTEENTH SESSION IN GENEVA BY ELECTING RADHABINOD PAL (INDIA) AS CHAIRMAN. OTHER OFFICERS ELECTED WERE ANDRE GROS (FRANCE), FIRST VICE-CHAIRMAN; GILBERTO AMADO (BRAZIL), SECOND VICE-CHAIRMAN; AND MANFRED LACHS (POLAND), RAPPORTEUR. ALL ELECTIONS WERE BY ACCLAMATION.

AT ITS MEETING TOMORROW, THE COMMISSION WILL BEGIN ITS SUBSTANTIVE WORK WITH CONSIDERATION OF ITS FUTURE WORK IN THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW. THIS IS ONE OF THE MAJOR TOPICS TO BE TAKEN UP BY THE 25-MEMBER BODY AT THE CURRENT SESSION, SCHEDULED TO CONTINUE UNTIL 29 JUNE.

AMONG OTHER THINGS, THE COMMISSION HAS BEFORE IT PROPOSALS FOR STUDIES ON THE LAW OF SPACE, THE LAW OF INTERNATIONAL ORGANIZATIONS, THE DRAFTING OF A CONVENTION FOR THE DEFENSE OF DEMOCRACY, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS BY THE CREATION OF AN INTERNATIONAL COURT, THE INDEPENDENCE AND SOVEREIGNTY OF STATES, AND THE USE OF INTERNATIONAL RIVERS.

A WORKING DOCUMENT PREPARED BY THE SECRETARIAT LISTS ABOUT 30 POSSIBLE SUBJECTS, INCLUDING THOSE CITED ABOVE, AS SUITABLE TOPICS FOR CODIFICATION.

OUTGOING CHAIRMAN ADDRESSES MEMBERS

IN AN ADDRESS OF WELCOME TODAY, THE OUTGOING CHAIRMAN OF THE COMMISSION, GRIGORY I. TUNKIN (USSR), NOTED THAT THE GENERAL ASSEMBLY HAD RAISED THE NUMBER OF COMMISSION MEMBERS TO 25"" WHICH, HE SAID, IMPROVED THE SITUATION, BUT STILL DID NOT SOLVE THE PROBLEM OF REFLECTING THE GREAT CHANGES NOW GOING ON IN THE WORLD.

THE WORLD GRAVITATED TOWARD UNIVERSALITY WHICH WAS THE BASIS FOR PEACEFUL COEXISTENCE, MR. TUNKIN DECLARED. HE SPOKE IN PARTICULAR ABOUT THE IMPORTANCE OF INTERNATIONAL LAW, AND THEREFORE OF THE COMMISSION'S WORK, TO THE MAINTENANCE OF PEACE AND UNIVERSAL COOPERATION.

(FOR BACKGROUND ON THE COMMISSION'S SESSION, SEE PRESS RELEASE L/1007.)

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""LAST YEAR THE ASSEMBLY DECIDED TO AMEND THE STATUTE OF THE COMMISSION TO INCREASE THE MEMBERSHIP FROM 21 TO 25.

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Feb 2nd
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cc: 5475-AX 37-40
cc: 11647-A-40

L | TO: Mr Bailey | REGISTRY

PEACEFUL COEXISTENCE IN INTERNATIONAL LAW

YOUR MOST INTERESTING TEL CONCENTRATING ON SOVIET APPROACH TO COEXISTENCE AND SOVIET DOCTRINE OF INTERNATIONAL LAWS WHICH TEND TOWARDS QUOTE BIPOLARIZATION OF WORLD COMMUNITIES UNQUOTE. POLISH APPROACH AND DOCTRINE SEEMS AS USUAL MORE FLEXIBLE. SEE ARTICLE BY PROFESSOR LACHS LEGAL ADVISOR TO FOREIGN MINISTRY IN JAN EDITION OF POLISH PERSPECTIVES, COMMENTED UPON BY OURLET 237 MAR21. SOME OF HIS OBSERVATIONS SEEM CLOSER TO WESTERN THAN TO SOVIET POSITION EG THERE IS QUOTE ONE WORLD WIDE SYSTEM OF INTERNATIONAL LAW WHICH IS COMMON HERITAGE OF MANS CIVILIZATION UNQUOTE

SOUTHAM

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FM GENEVA MAY8/62 CONFD

TO EXTERNAL 887

INFO PERMISNY LDN WASHDC

BAG OSLO FM LDN

INTERNATIONAL LAW COMMISSION-14TH SESSION GENEVA-FUTURE WORK

ILC DEVOTED ITS FIRST TWO WEEKS TO A CONSIDERATION OF ITS FUTURE WORK PURSUANT TO REQUEST MADE BY UNGA IN RES 1686(XVI)OF DEC18/61.PAL (INDIA)WAS ELECTED CHAIRMAN,WITH GROS(FRANCE)AND AMADO(BRAZIL)AS VICE-CHAIRMEN AND LACHS(POLAND)AS RAPPORTEUR.THE COMMISSION HAD BEFORE IT DOCU A/CN/4/145 PREPARED BY SECRETARIAT SURVEYING THE PAST AND EXISTING WORK OF THE COMMISSION AND PROPOSALS MADE IN UNGA FOR FUTURE WORK.COPY OF THIS DOCU AND OF PROVISIONAL SUMMARY RECORDS OF MTGS TO DATE(A/CN.4/SR/628-636)WERE AIRMAILED TO YOU MAY8.COMMISSION HAS NOW CONSLUDED PRESENT STAGE OF DISCUSSIONS ON ITS WORK AND HAS BEGUN CONSIDERATION OF LAW OF TREATIES.WALDOCKS REPORT ON TREATIES WAS DISTRIBUTED TO MEMBERS END OF LAST WEEK(DOCU A/CN/4/144 CONTAINING REPORT WAS AIRMAILED TO YOU ON MAY4 AND ADDENDUM TO REPORT (A/CN/4/144/ADD.1)WAS AIRMAILED MAY8).IT IS EXPECTED THAT REMAINDER OF WORK OF PRESENT SESSION WILL LARGELY BE DEVOTED TO LAW OF TREATIES.

2.THE DEBATE ON WORK OF COMMISSION WAS A BROAD ONE WITH A WIDE VARIETY OF VIEWS BEING EXPRESSED ON THE THREE MAIN QUESTIONS CONCERNING FUTURE WORK OF COMMISSION-STATE RESPONSIBILITY(ILC WAS ASKED TO CONTINUE ITS WORK ON THIS BY UNGA RES 1686(XVI)PARA3(A));SUCCESSION OF STATES AND GOVTS(SAME RES ASKED ILC TO INCLUDE THIS SUBJECT ON ITS PRIORITY LIST);AND ITS FUTURE PROGRAMME OF WORKBKCONCERNING WHICH ILC WAS ASKED TO REPORT TO UNGA AT ITS NEXT SESSION). IT WAS CLEARLY THE GENERAL VIEW OF COMMISSION THAT ITS MAIN WORK OVER THE NEXT FIVE YEARS WOULD BE ON SUBJECT OF LAW OF TREATIES AND THAT A VERY LARGE PART OF COMMISSIONS TIME WOULD HAVE TO BE GIVEN TO THISSSUBJECT.

3.IN VIEW OF FACT THAT IT WOULD HAVE BEEN DIFFICULT TO REACH AGREEMENT ON SCOPE OF SUBJECTS OF STATE RESPONSIBILITY OR STATE

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SUCCESSION WITHOUT A PROLONGED DEBATE IN COMMISSION,CHAIRMAN PRESSED FOR ACCEPTANCE OF A PROPOSAL OF TUNKIN FOR CREATION OF CTTEES TO STUDY SCOPE OF STATE RESPONSIBILITY AND OF SUCCESSION OF STATES AND GOVTS.AFTER A LENGTHY PROCEDURAL DEBATE COMMISSION AGREED TO ESTABLISH FOLLOWING FOUR CTTEES(1)A SEVEN-MEMBER DRAFTING CTTEE UNDER CHAIRMANESHIP OF GROS(FRANCE)WITH FOLLOWING ADDITIONAL MEMBERS:WALDOCK(UK),AGO(ITALY),ARECHAGA(URUGUAY),TUNKIN(USSR), LACHS(POLAND),YASSEEN(IRAQ);(2)AN EIGHT-MEMBER CTTEE UNDER CHAIR-MANSHIP OF AMADO(BRAZIL)WHOSE FUNCTION IS TO DRAW UP A LIST OF TOPICS FOR WORK OF COMMISSION AND REPORT TO ILC AT ITS PRESENT SESSION WITH A VIEW TO COMMISSION DECIDING ON CERTAIN SPECIFIC TOPICS FOR FUTURE CODIFICATION.(ADDITIONAL MEMBERS ARE AGO,BARTOS (YUGOSLAVIA),MYSELF,CASTREN(FINLAND),ARECHAGA,PESSOU(DAHOMEY)AND TUNKIN;(3)A CTTEE OF TEN ON STATE RESPONSIBILITY UNDER CHAIRMAN-SHIP OF AGO WITH FOLLOWING ADDITIONAL MEMBERS:TUNKIN,LACHS,GROS, BRIGGS(USA),ARECHAGA,DE LUNA(SPAIN,TSURUOKA(JAPAN),PAREDES(ARGEN-TINA)AND YASSEEN.FUNCTION OF THIS CTTEE IS TO STUDY AND LAY DOWN GENERAL INSTRUCTIONS ON SCOPE OF SUBJECT OF STATE RESPONSIBILITY FOR GUIDANCE OF SPECIAL RAPPORTEUR OR RAPPORTEURS(TO BE APPOINTED AT NEXT SESSION IN 1963).CTTEE WOULD BEGIN WORK AT PRESENT SESSION, CONSULT BY CORRESPONDENCE BEFORE NEXT SESSION AND DRAW UP REPORT AT BEGINNING OF NEXT SESSION FOR CONSIDERATION BY ILC NOT RPT NOT LATER THAN BYSEND OF ITS NEXT SESSION;(4)A CTTEE OF TEN ON SUCC-ESSION OF STATES AND GOVTS UNDER CHAIRMANSHKP OF LACHS WITH FOLL-OWING ADDITIONAL MEMBERS:BARTOS,BRIGGS,CASTREN(FINLAND),LIU(CHINA) ELIAS(NIGERIA),TABIBI(AFGHANISTAN),TUNKIN,ROSENNE(ISRAEL),EL-ERIAN (UAR).TERMS OF REF AND TIME OF REPORTING OF WORK OF CTTEE IS SAME AS THAT OF CTTEE ON STATE RESPONSIBILITY.SPECIAL RAPPORTEUR OR RAPPORTEURS WILL,AS IN CASE OF STATE RESP[redacted]Y,BE CHOSEN AT NEXT SESSION AFTER CTTEE PRESENTS ITS [redacted]

4.WHILE THERE WAS UNAN[redacted] EST[redacted] CTTEE AND OF CTTEE ON FUTURE[redacted]RP

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DIVERGENCE OF VIEWS ON DESIRABILITY OF ESTABLISHING CTTEES OF THE TYPE FINALLY AGREED UPON ON STATE RESPONSIBILITY AND SUCCESSION. THE PREFERENCE OF A LARGE NUMBER OF MEMBERS(INCLUDING GROS,WALDOCK, MYSELF,VERDROSS,AGO,ELIAS,ARECHAGA AND OTHERS)WAS FOR APPOINTING SPECIAL RAPPORTEURS AT PRESENT SESSION WITH EITHER NO RPT NO SPECIAL CTTEES BEING ESTABLISHED OR THEIR CREATION AS CONSULTATIVE GROUPS IN ORDER TO ADVISE THE SPECIAL RAPPORTEUR ON GENERAL GUIDELINES OF HIS WORK.DECISION TO DEFER APPOINTMENT OF SPECIAL RAPPORTEURS AND TO ESTABLISH CTTEES WITH RESPONSIBILITY FOR INVESTIGATING GENERAL SCOPE OF STATE RESPONSIBILITY AND SUCCESSION WAS DUE IN LARGE MEASURE TO PERSISTENCE OF CHAIRMAN WHO CONTINUALLY PRESSED FOR ADOPTION OF SUGGESTION OF TUNKIN FOR ESTABLISHMENT OF THESE CTTEES. WHILE NO RPT NO VOTE WAS TAKEN,IT WAS CLEAR THAT DECISION TO CREATE (FOR THE FIRST TIME SINCE THE INCEPTION OF COMMISSION)CTTEES WITH GENERAL EXPLORATORY FUNCTIONS WAS DUE LESS TO GENERAL WISHES OF MAJORITY OF MEMBERS THAN TO DETERMINATION OF CHAIRMAN AND SOVIET BLOC REPS.

5.WHILE NO RPT NO DECISION WAS TAKEN WITH REGARD TO APPOINTMENT OF SPECIAL RAPPORTEURS FOR THESE TWO SUBJECTS IT WAS GENERALLY UNDERSTOOD THAT THEY WOULD BE DESIGNATED FROM AMONG MEMBERS OF EACH CTTEE AND IT SEEMS LIKELY THAT AGO WILL BE ELECTED AT 1963 SESSION AS SPECIAL RAPPORTEUR FOR STATE RESPONSIBILITY,AND LACHS WILL BE ELECTED SPECIAL RAPPORTEUR FOR SUCCESSION OF STATES AND GOVTS.

6.THERE WAS CONSIDERABLE DISCUSSION OF SCOPE OF THESE TWO SUBJECTS AS WELL AS OF OTHER FUTURE WORK OF COMMISSION.ON SUBJECT OF STATE RESPONSIBILITY,MANY MEMBERS(INCLUDING VERDROSS,AGO,TUNKIN,LACHS, YASSEEN,BARTOS AND OTHERS)SUPPORTED VIEW THAT SUBJECT SHOULD BE SPLIT INTO TWO OR MORE PARTS-CORRESPONDING IN GENERAL TO BROAD QUESTION OF GENERAL SCOPE AND NATURE OF STATE RESPONSIBILITY AND THE MORE LIMITED QUESTION OF RESPONSIBLITIY FOR DAMAGE TO ALIENS ON TERRITORY OF A FOREIGN STATE.ON THE OTHER HAND,SEVERAL OTHER MEMBERS(INCLUDING GROS,ARECHAGA,BRIGGS,WALDOCK

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AND MYSELF)EMPHASIZED THE CLOSE INTERRELATIONSHIP BETWEEN THE TWO TOPICS AND DESIRABILITY OF DESIGNATING A SPECIAL RAPPORTEUR TO STUDY QUESTION IN ITS ENTIRETY WITH A VIEW TO MAKING RECOMMENDATIONS ON HOW AND WHETHER THE SUBJECT SHOULD BE DIVIDED.IN ADDITION TO THESE TWO GENERAL LINES OF APPROACH,THE COMMUNIST REPS ARGUED THAT THE CONCEPT OF STATE RESPONSIBILITY HAD BECOME MODIFIED BY THE QUOTE NEW INTERNATIONAL LAW UNQUOTE AND NOW CONCERNED MAINLY RESPONSIBILITY IN RELATION TO MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY ARISING IN PARTICULAR FROM AGGRESSION AND VIOLATIONS OF UN CHARTER AND OF THE OBLIGATION TO GRANT INDEPENDENCE TO COLONIAL PEOPLES ETC.

7.ON SUBJECT OF STATE AND GOVT SUCCESSION,THERE WAS GENERAL AGREEMENT THAT PRIORITY SHOULD BE GIVEN TO IT,AS REQUESTED BY UNGA,BUT MANY VIEWS WERE EXPRESSED ON:QUESTION WHETHER OR NOT RPT NOT THERE WERE GENERAL RULES GOVERNING SUBJECT WHICH COULD BE DEDUCED FROM STATE PRACTICE;WHAT ITS RELATIONSHIP WAS TO LAW OF TREATIES AND STATE RESPONSIBILITY;WHETHER TOPIC SHOULD BE SPLIT OR WHETHER SUCCESSION OF GOVTS WAS A PROPER SUBJECT FOR CODIFICATION,ETC.THE VIEW WAS WIDELY EXPRESSED THAT IN VIEW OF PAUCITY OF EXISTING MATERIAL ON SUBJECT THE SECRETARIAT SHOULD SOLICIT REPORTS FROM GOVTS(POSSIBLY BY CIRCULATING A QUESTIONNAIRE)ON STATE PRACTICES AND SHOULD PREPARE A BACKGROUND STUDY.

8.ON QUESTION OF FUTURE WORK OF COMMISSION,GENERAL VIEW SEEMED TO BE THAT SUBJECTS OF TREATIES,STATE RESPONSIBILITY AND STATE AND GOVT SUCCESSION WOULD MORE THAN FILL UP THE TIME OF THE COMMISSION OVER THE NEXT FIVE YEARS.AS ADDITIONAL PRIORITY TOPICS,SEVERAL MEMBERS EXPRESSED A PREFERENCE FOR AD HOC DIPLOMACY(WHICH SEEMS LIKELY TO BE TAKEN UP AT NEXT YEARS SESSION IN ADDITION TO LAW OF TREATIES) AND FOR OTHER TOPICS REQUESTED IN EARLIER UNGA RESOLUTIONS IE HISTORIC BAYS CONCERNING WHICH SECRETARIAT WILL DISTRIBUTE A STUDY IN JUNE,ASYLUM AND RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS.HOWEVER,GENERAL VIEW WAS

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WOULD BE DESIRABLE(AND NECESSARY UNDER UNGA 1686(XVI))TO DRAW UP A STAND-BY LIST(A CTTEE BEING ESTABLISHED FOR THIS PURPOSE)AND TO SUBMIT THIS TO NEXT UNGA SESSION,EVEN THOUGH ITS PRACTICAL VALUE SEEMED RATHER LIMITED IN VIEW OF HEAVY WORKLOAD OF COMMISSION OVER NEXT FIVE YEARS.

9.THERE WAS ALSO A CONSIDERABLE AMOUNT OF DISCUSSION ABOUT FUTURE METHOD OF WORK OF ILC.A VARIETY OF VIEWS WERE AGAIN EXPRESSED SIMILAR TO THOSE ADVANCED IN EARLIER SESSIONS(EG REGARDING POSSIBILITY OF MTG MORE OFTEN DURING SESSION(TABIBI),OBTAINING OUTSIDE ASSISTANCE(CASTREN),ELECTING MEMBERS FOR A LONGER PERIOD THAN FIVE YEARS(TABIBI),STAGGERING EXPIRATION OF TERMS OF OFFICE ALONG LINES FOLLOWED BY ICJ(PAL),HAVING A FIRST READING OF REPORTS IN A CTTEE (DE LUNA)VERDROSS),MAKING ILC A PERMANENT BODY(PAL),DIVIDING ILC INTO TWO SUB-COMMISSIONS(CASTREN),APPOINTING MORE THAN ONE RAPPORTEUR PER SUBJECT(TABIBI,CASTREN),ETC.HOWEVER AS IN PAST SESSIONS THE DISCUSSION ON THIS LATTER TOPIC WAS GENERAL AND DI AND NO RPT NO DECISIONS WERE TAKEN.

10.ON THE WHOLE THE COMMUNIST MEMBERS WERE RATHER SURPRISINGLY RESTRAINED IN THEIR INTERVENTIONS AND EVEN THEIR ADVOCACY OF QU NEW INTERNATIONAL LAW UNQUOTE WAS IN LOW KEY.BEYOND THE OCCASIO REF TO PEACEFUL COEXISTENCE AND COLONIALISM THE DEBATES HAVE NO NOT HAD TO DATE ANY SIGNIFICANT DEGREE OF POLITICAL CONTENT THE COMMUNIST MEMBERS HAVE NOT RPT NOT SOUGHT TO INTRODUCE OF PEACEFUL COEXISTENCE AS A SEPARATE TOPIC ON AGENDA OF I ALTHOUGH THEY HAVE OF COURSE MAINTAINED THEIR GENERAL AGRUM FAOUR OF AN APPROACH TO STATE RESPONSIBILITY WHICH WOULD SEEM CAPABLE OF EMBRACING A RATHER SIMILAR RANGE OF TOPICS.

11.SUMMARIES OF MY THREE MAIN INTERVENTIONS ON WORK OF COMMISSI AND ON PROCEDURES FOR DEALING WITH STATE RESPONSIBILITY AND ST AND GOVT SUCCESSION ARE CONTAINED IN DONUS A/CN.4/SR.630,632 AN

12.AS IT IS NOW ESTABLISHED THAT THE THREE MAIN TOPICS OF THE IL OVER NEXT FIVE YEARS WILL BE LAW OF TREATIES,STATE RESPONSIBILIT

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001401

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TRANSMITTAL SLIP

TO: THE UNDER-SECRETARY OF STATE
FOR EXTERNAL AFFAIRS, OTTAWA

FROM: THE CANADIAN EMBASSY,
OSLO, NORWAY

Security: CONFIDENTIAL

Date: May 9, 1962

Air or Surface: By Bag

No. of enclosures: 2

5475-AX-40
37 | 37

The documents described below are for your information.

Despatching Authority: J. G. Hadwen/kd

Copies	Description	Also referred to:
1	Note dated May 9, 1962 to the Royal Norwegian Ministry of Foreign Affairs	XREF: 5475-AX-37-40 5475-AX-36-40 5475-EW-40
L	Aide Memoire dated May 9, 1962 delivered to the Foreign Ministry	
	Re: Your Letter L-145, April 24/62 Yourtel L-64, May 2/62	L TO: REGISTRY Refer: UN Div European Div July 23/62

Ext. 250 (Rev. 10/51) (*Instruction on Reverse Side*)

001402

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INSTRUCTIONS

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2. This form should *NOT* be used to cover documents requiring action.

3. The name of the person responsible for authorizing the despatch of the material should be shown opposite the words "Despatching Authority". This may be done by signature, name stamp or by any other suitable means.

4. The form should bear the security classification of the material it covers.

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1962 MAY 18 AM 10:44

001403

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CONFIDENTIAL

Oslo, May 9, 1962.

The Canadian Embassy presents its compliments to the Royal Norwegian Ministry of Foreign Affairs and has the honour to attach a draft of the oral statement which is to be made by the Canadian representative at the hearings of the International Court on U.N. Peace-keeping Operations. Also enclosed is a copy of the draft Canadian written statement which has been prepared for submission to the International Court as a preliminary to the oral proceedings.

Both these statements are in a preliminary form and will doubtless be changed before delivered or presented.

The Canadian authorities would appreciate receiving any comments the Ministry may wish to make on these statements and on the general subject of the reference to the International Court concerning U.N. Peace-keeping Operations.

Since the attached copies are the only ones available to the Embassy, it would be appreciated if they could be returned in due course.

The Canadian Embassy avails itself of this opportunity to renew to the Royal Norwegian Ministry of Foreign Affairs the assurances of its highest consideration.

The Royal Norwegian Ministry of
Foreign Affairs,
Oslo, DEP.

001404

Document disclosed under the Access to Information Act
Document divulgué en vertu de la Loi sur l'accès à l'information

TRANSMITTAL SLIP

TO: USSEA Ottawa

FROM: Permanent Mission of Canada
Geneva

Security: Unclassified

Date: May 2, 1962

Air or Surface: air

No. of enclosures:

5475-AX-40
57 | 37

The documents described below are for your information.

Despatching Authority: A.E. Gotlieb/dr

Copies	Description	Also referred to:
3	ILC Document Press Release No. L/371 24 April 1962	TO: MW Beesley MAY 8 Rec'd REGISTRY cc: 5475-AX-2-40

Ext. 250 (Rev. 10/51) *(Instruction on Reverse Side)*

001405

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UNITED NATIONS

INFORMATION SERVICE
European Office of the United Nations
Geneva

Press Release No. L/371
24 April 1962.

(For use of information media: not an official record)

INTERNATIONAL LAW COMMISSION
Fourteenth Session

At the Palais des Nations, Geneva

OPENING OF THE FOURTEENTH SESSION OF THE INTERNATIONAL LAW COMMISSION

Mr. Radhabinod Pal elected Chairman

The fourteenth session of the International Law Commission of the United Nations opened this afternoon at Geneva. Mr. Radhabinod Pal, of India was elected Chairman.*/

This was the first meeting held by the Commission since the General Assembly of the United Nations decided at its last session in New York to increase the number of members of the Commission from 21 to 25. At its last session also the General Assembly elected the members of the Commission who will serve for a period of five years as from 1 January 1962.

The fourteenth session will continue until 29 June 1962.

*

* *

The meeting was opened by Mr. I. Tunkin, Chairman of the thirteenth session, who drew attention to the decisions of the General Assembly which are referred to above. In his opinion the new arrangements reflected, though still inadequately, the great changes that are taking place at the present time.

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*/ The members of the Commission serve in a personal capacity as experts. They are not government representatives. Basic information on the fourteenth session (including a list of members of the Commission with their nationalities) is given in Press Release L/370 of 19 April 1962.

001407

Document disclosed under the *Access to Information Act* -
Document divulgué en vertu de la *Loi sur l'accès à l'information*

International law, said Mr. Tunkin, is becoming more universal and is serving the cause of peaceful co-existence. The importance of international law for the maintenance of peace has as a corollary the importance of the work of the Commission. Mr. Tunkin expressed the hope that the members of the Commission would show a spirit of co-operation in order that decisions might be taken that would be acceptable to all States. He then declared open the fourteenth session.

Mr. Abdul Hakim TABIBI proposed that Mr. Radhabinod Pal, of India, should be elected Chairman. Mr. Pal was elected Chairman by acclamation.

Mr. PAL took the chair, thanked the members of the Commission and invited them to elect the remaining officers.

Mr. Herbert W. BRIGGS proposed that Mr. André Gros, of France, be elected First Vice-Chairman. This was agreed by acclamation.

Mr. Senjin TSURUOKA proposed that Mr. Gilberto Amado, of Brazil be elected Second Vice-Chairman, and Mr. Amado was also elected by acclamation.

Sir Humphrey WALDOCK proposed that Mr. Manfred Lachs, of Poland be elected rapporteur. Mr. Lachs was elected general rapporteur by acclamation.

Mr. Yuen-Li LIANG, Secretary of the Commission and representative of the Secretary-General, speaking also on behalf of the Director of the European Office of the United Nations, welcomed the members of the Commission.

After an exchange of views, the Commission decided to examine first item 2 of the agenda, "Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI))". The provisional agenda (A/CN.4/142) was adopted with this change.

The Commission will begin its main work at the next meeting, tomorrow 25 April at 10 a.m.

The Information Service will issue a summary of the work of the fourteenth session as soon as it is concluded.

001408

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UNITED NATIONS

INFORMATION SERVICE
European Office of the United Nations
Geneva

Press Release No. L/371
24 April 1962.

(For use of information media: not an official record)

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001409

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ACTION REQUEST

TO: Mr. Wershof

DATE: May 2,1962.

LOCATION: (through European, Disarmament and U.N. Divisions)

FROM: Legal/J.A.Beesley/pm

RE FILE NO.

FOR:

	ACTION		NOTE & FORWARD
	APPROVAL		NOTE & RETURN
	COMMENTS		P.A. ON FILE
	DRAFT REPLY		REPLY DIRECTLY
	INFORMATION		REPLY, PLEASE
	INVESTIGATE AND REPORT		SEE ME, PLEASE
	INVESTIGATION		SIGNATURE
	MAKE ..... COPIES		TRANSLATION
	MORE DETAILS		YOUR REQUEST
	NOTE AND FILE		.....

PREPARE MEMO TO: .....

REPLY FOR SIGNATURE OF: .....

REMARKS: One telegram for your signature, please.

Re para 5. Is it really necessary to include a speculative comment of this kind using Disarmament discussions as a vehicle?

Re para 6. I hope the arguments would be [illegible] by our Disarmament Delegation

KPM. Divisn. Div.

001411

CGSB 6-GP-12 P.P.&S. CAT. 3433

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FILE COPY

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

DATE	FILE		SECURITY
MAY 2/62	5475-AX-40		CONFD
	57	37	

FM: EXTERNAL - OTT

NUMBER	PRECEDENCE	COMCENTRE USE ONLY	
L-63	PRIORITY		

TO: PERMIS GENEVA

INFO:

Ref.: YOUR TEL 802 OF APRIL 30.

Subject: SOVIET VIEW OF INTERNATIONAL LAW -DISARMAMENT- WAR PROPAGANDA.

WE ARE MOST INTERESTED TO LEARN OF ZORIN'S STATEMENT AFFIRMING QUOTE THE RULE UNIVERSALLY ACCEPTED BY ALL STATES THAT ANY INTERNATIONAL UNDERTAKING HAS AT ALL TIMES PRIORITY OVER NATIONAL TRADITIONS AND NORMS UNQUOTE. WE SHARE YOUR DOUBTS THAT IT INDICATES ANY DEPARTURE FROM THE TRADITIONAL U.S.S.R. LINE ON SOVEREIGNTY, AS DISCUSSED IN YOUR TEL 725 OF APR25. WE DOUBT ALSO WHETHER IT MAY BE TAKEN AS AN INDICATION OF AN ABANDONMENT OF THE FUNDAMENTAL PRINCIPLE IMPLICIT IN THE WHOLE SOVIET APPROACH TO INTERNATIONAL LAW OF THE PRIMACY OF MUNICIPAL LAW OVER INTERNATIONAL LAW. INDEED, ACCORDING TO OUR UNDERSTANDING OF SOVIET LEGAL THEORY AND TACTICS IT IS POSSIBLE TO MAKE SUCH STATEMENTS PRECISELY BECAUSE OF THAT PRINCIPLE.

2. AS YOU MAY RECALL, TUNKIN, IN HIS 1958 LECTURES AT THE HAGUE, STATED THAT QUOTE CONTRADICTIONS BETWEEN THE FOREIGN POLICY OF A STATE AND INTERNATIONAL LAW SHOULD BE DECIDED, OF COURSE, IN FAVOUR OF INTER- /...2

LOCAL DISTRIBUTION

(10 EXTRA COPIES)

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SIG..... NAME J.A.Beesley/pm	Legal	2-7917	SIG..... NAME M. Wershof

001412

EXT. 18 (REV. 12/56)

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NATIONAL LAW, IN SO FAR AS EVERY STATE HAS TO COMPLY WITH ITS OBLIGATIONS UNDER INTERNATIONAL LAW UNQUOTE. THE ESSENCE OF SOVIET LEGAL THEORY, HOWEVER, WOULD SEEM TO BE FOUND IN HIS IMMEDIATELY SUCCEEDING STATEMENT THAT QUOTE RULES OF INTERNATIONAL LAW CREATED BY AGREEMENT BETWEEN STATES CAN BE CHANGED ONLY BY A NEW AGREEMENT BETWEEN THEM UNQUOTE. THE KEY POINT HERE WOULD SEEM TO BE THE EMPHASIS ON AGREEMENT AS THE BASIS FOR RULES OF INTERNATIONAL LAW. AS YOU KNOW, THE U.S.S.R. STRESSES THE SANCTITY OF TREATY COMMITMENTS, EXCEPT IN THE CASE OF COMMITMENTS MADE PRIOR TO A GENUINE SOCIAL REVOLUTION (AS DISTINCT FROM A COUNTER-REVOLUTION). SIMILARLY, THE U.S.S.R. DOES NOT DENY THE VALIDITY OF CUSTOMARY LAW, EXCEPT THOSE NORMS OF CUSTOMARY LAW NOT EXPLICITLY ACCEPTED BY THE U.S.S.R. THE SOVIET THEORY OF THE NATURE OF THE CUSTOMARY LAW CREATING PROCESS (AS EXPOUNDED BY TUNKIN IN HIS 1958 LECTURES AT THE HAGUE AND REITERATED IN HIS ARTICLE IN THE CALIFORNIA LAW REVIEW, VOL.49, AUG. 1961) EXPLAINS BOTH CUSTOMARY AND CONVENTIONAL INTERNATIONAL LAW ON THE BASIS OF AGREEMENT BETWEEN STATES, FROM WHICH IT FOLLOWS THAT THE VALIDITY OF A NORM OF CUSTOMARY LAW IS CONFINED TO THOSE STATES RECOGNIZING IT AS BINDING. ON THE BASIS OF THESE THEORIES IT IS QUITE POSSIBLE TO MAKE SUCH STATEMENTS AS ZORIN'S SINCE THE LIKELIHOOD OF CONTRADICTIONS BETWEEN SOVIET MUNICIPAL LAW AND INTERNATIONAL LAW WOULD SEEM TO BE MINIMAL, WHEN ANY PURPORTED PRINCIPLE OF INTERNATIONAL LAW WHICH CONFLICTS WITH SOVIET POLICY IS NOT ACCEPTED BY THE U.S.S.R. EITHER IN THEORY OR PRACTICE, AND, HENCE, ACCORDING TO THE U.S.S.R. DEFINITION, IS NOT A NORM OF INTERNATIONAL LAW.

3. IT MAY BE TOO THAT ZORIN DID NOT HAVE IN MIND THE DISTINCTION BETWEEN TREATY OBLIGATIONS AND MERE DECLARATIONS OF PRINCIPLES NOT INTENDED TO COMPRISE TRANSACTIONS OUT OF WHICH FOLLOW RIGHTS AND DUTIES FOR ITS SIGNATORIES, ALTHOUGH IT SEEMS RATHER MORE LIKELY THAT HE MAY HAVE USED THE PHRASE QUOTE INTERNATIONAL UNDERTAKINGS UNQUOTE TO MEAN QUOTE INTERNATIONAL OBLIGATIONS UNQUOTE.

4. ZORIN'S STATEMENT,BY ITS VERY AMBIGUITY, SEEMS TO CONFIRM THE DESIRABILITY OF OUR PROPOSED INITIATIVE IN THE SIXTH CTTEE (SEE OUR TEL L-49

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REFERRED TO YOU) WHICH SHOULD PROVIDE A USEFUL OPPORTUNITY OF DEFINING THE FUNDAMENTAL DIFFERENCES BETWEEN SOVIET AND WESTERN LEGAL THEORY, AND, IN SO DOING, EMPHASIZING THE SUBSTANTIAL IDENTITY OF VIEWS BETWEEN THE WEST AND THE NEUTRALISTS. (IT IS POSSIBLE TO BE MISLED BY THE SENSITIVITY OF THE NEUTRALISTS CONCERNING THEIR SOVEREIGNTY INTO THINKING THAT THEY SHARE SOVIET VIEWS ON SOVEREIGNTY WHEREAS IN FACT, OF COURSE, THE MARKED DIFFERENCES BETWEEN THE STATE PRACTICE OF THE NEUTRALISTS AND THE SOVIET BLOC ARE INDICATED, FOR INSTANCE, BY THEIR DIVERGENCIES ON THE QUESTION OF ACCEPTANCE OF THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE. AS YOU KNOW SUCH KEY NEUTRALIST COUNTRIES AS INDIA AND THE U.A.R. ACCEPT THE COURT'S JURISDICTION WHILE NONE OF THE SOVIET BLOC STATES DOES. SIMILARLY, THE U.A.R. ACCEPTED, ALBEIT WITH SOME RELUCTANCE PERHAPS, THE STATIONING OF UNEF TROOPS ON TERRITORY WHICH IT CONSIDERED TO BE AN INTEGRAL PART OF EGYPT, AND INDIA SUPPORTED BOTH THE UNEF AND CONGO OPERATIONS (THE LATTER AT A TIME WHEN IT MIGHT HAVE FAILED WITHOUT INDIA'S SUPPORT) IN SPITE OF THE PRECEDENT THEREBY INVOLVED, WHILE THE SOVIET BLOC OPPOSED BOTH OPERATIONS, AND STILL DOES.)

5. IT MAY BE THAT THE DISARMAMENT DISCUSSIONS WILL SERVE TO FURTHER ILLUSTRATE THAT THE U.S.S.R.,WHILE PREACHING, FOR OVER A DECADE, THE PRINCIPLE OF EQUALITY OF STATES AS ONE OF THE FIVE PRINCIPLES OF CO-EXISTENCE,HAS CONSISTENTLY REFUSED TO ACCEPT COMMITMENTS WHICH WOULD LESSEN THE EXISTING INEQUALITY OF STATES. (AS KELSEN POINTS OUT, THE CHARTER CONFERS CERTAIN PRIVILEGES UPON THE FIVE GREAT POWERS, WITH THE CONSENT OF ALL THE CONTRACTING POWERS, AND THUS ESTABLISHES A MATERIAL INEQUALITY AMONG THE MEMBERS OF THE COMMUNITY CONSTITUTED BY IT.)

6. THE GENERAL QUESTION OF THE TACTICAL ADVISABILITY OF PUTTING FORTH THE FOREGOING ARGUMENTS AS WELL AS THOSE DISCUSSED IN PARA 7 OF YOUR TEL 768 OF APR26 WILL BE DISCUSSED IN A SEPARATE TEL.

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