

SIXTH COMMITTEE

PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION:
REPORT OF THE COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF
INTERNATIONAL LAW AND ITS CODIFICATION

REPORT AND DRAFT RESOLUTION ADOPTED BY SUB-COMMITTEE 2

Rapporteur: Prof. J. P. A. FRANCOIS (Netherlands)

1. At its ninety-first meeting on 23 September 1947 the General Assembly referred the report of the Committee on the Progressive Development of International Law and its Codification (hereinafter referred to as the REPORT) (document A/331) to the Sixth Committee.

After a general debate at its thirty-seventh and thirty-eighth meetings held on 25 and 26 September, the Sixth Committee referred the REPORT to its Second Sub-Committee. The Sub-Committee elected Mr. LIU CHIEH, representative of China, as Chairman and Prof. J. P. A. FRANCOIS, representative of the Netherlands, as Rapporteur.

2. At its first meeting the Sub-Committee pronounced itself unanimously in favour of the establishment of an "International Law Commission" (hereinafter referred to as ILC), as recommended by the Committee on the Progressive Development of International Law and its Codification, a recommendation which had already been accepted by the full Committee.

On the other hand the Sub-Committee was divided on the question whether the election of members of the ILC should be held during the present session of the General Assembly or postponed until next year's session. It considered it advisable to consult the full Committee on this important matter before it went any further.

On the basis of the Interim Report submitted by the Sub-Committee on 1 October (document A/C.6/150), the Sixth Committee at its fortieth meeting held on 2 October 1947 decided, without proceeding to a vote, that the statute of the ILC should be adopted during the present session of the General Assembly; it decided by thirty-three votes to fourteen that the election of the members should be postponed until the next session.

Following upon this decision, the Sub-Committee continued its work and devoted fifteen meetings to a study of the REPORT.

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The Sub-Committee has been assisted by draft resolutions and amendments to the REPORT submitted by several delegations.

4. In the Sub-Committee's Interim Report, reference was made to two of the Sub-Committee's decisions concerning the nature of the functions of ILC members and the number of members, respectively. As these two questions have not yet been considered by the Sixth Committee, they will also be dealt with in the present report.

The first question was whether the ILC should consist of members who would devote the whole of their time to this work, as the Committee on the Progressive Development of International Law and its Codification had decided by nine votes to five. Whilst recognizing that such a composition of the Commission would have its advantages, the Sub-Committee was of the unanimous opinion that, in view of the imperative necessity for the greatest possible reduction in the United Nations budget, this proposal could not be accepted. Moreover, the Sub-Committee considered that such a composition would make the acceptance of membership more difficult for the outstanding jurists who would be needed for the work of codification of International Law.

As regards the second question, namely the number of members of the ILC, some delegations expressed the opinion that the membership of fifteen proposed in the REPORT was too large. They considered that a smaller commission would be more likely to work efficiently and to arrive rapidly at concrete results. They therefore proposed that the number be reduced to nine or eleven. Other delegations thought that fifteen members, a number also adopted in the Statute of the International Court of Justice (Article 3), should be considered as a minimum, if it was desired to ensure that the main forms of civilization and the principal legal systems of the world should be represented in the Commission. The Sub-Committee supported a membership of fifteen by thirteen votes to two.

5. The Sub-Committee unanimously agreed that the term of office of members of the ILC should be three years, in accordance with the proposal contained in the REPORT.

6. The REPORT had proposed that each Government should nominate as candidates not more than two of its own nationals and not more than eight persons of other nationalities. The Sub-Committee supported this proposal, but reduced the latter number from eight to two. This amendment, which was adopted unanimously, was based on the view that a number of eight candidates of other nationalities would be likely to increase the difficulties of Governments both as regards the nomination of candidates and the selection of the members.

A difference of opinion arose as to the date by which the names of
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candidates should be submitted. On the one hand it was pointed out that, if a long time were allowed, it would increase the difficulties caused by deaths and withdrawals after the lists had been sent in. On the other hand it was argued that, if the period were too short, it would not give Governments enough time to examine the lists and, consequently, would nullify the advantages expected from the postponement of the elections until the next General Assembly. The following regulation was finally adopted by eleven votes to four:

"The names of the candidates shall be submitted in writing by the governments to the Secretary-General by the first of June of the year in which an election is held, provided that a government may in exceptional circumstances substitute for a candidate whom it has nominated before the first of June another candidate whom it shall name not later than thirty days before the opening of the General Assembly."

The question was raised whether the right of amending the lists of candidates should not be given to Governments without requiring thirty days' notice before the opening of the General Assembly. However, the majority of the Sub-Committee considered that it would be dangerous to make it possible for candidates to be put forward at the last moment. The Sub-Committee unanimously agreed that it would be impossible to insert in the rules a complete list of reasons for which candidates could be replaced; and it considered that the expression "exceptional cases" could not be defined.

7. The method of electing the members of the ILC and of filling casual vacancies took up a good deal of the Sub-Committee's time. The Committee on the Progressive Development of International Law and its Codification had considered two methods of election: 1. The election by the International Court of Justice; 2. The election jointly by the General Assembly and the Security Council as provided by the Statute of the International Court of Justice for the election of judges (Articles 8 and 9).

The Sub-Committee did not, however wish to adopt these methods. It considered that the International Court of Justice was a special case which should not serve as a precedent for the appointment of the ILC. The Sub-Committee considered that there was no reason to associate the Security Council with the work of codifying international law which, under Article 13 (1) (a) of the Charter, was entrusted to the General Assembly. The Sub-Committee unanimously proposes that the Commission be elected by the General Assembly, which it considers to be the body best qualified to deal with this matter.

As regards the majority necessary for election, several resolutions
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were put forward:

1. a simple majority of Members present and voting (that is to say, half of the votes plus one);
2. a two-thirds majority of Members present and voting;
3. an absolute majority (that is to say half of the votes plus one of the total number of Members of the United Nations).

The opinion was expressed that the third method would not be in conformity with the Charter, as Article 18, paragraph 2, stipulates that decisions are to be taken either by a simple majority or by a two-thirds majority, but makes no reference to an absolute majority. This interpretation was contested on the ground that the absence of any reference in Article 18 to decisions taken by an absolute majority of votes could not be interpreted to mean that the General Assembly would not have the right to establish a commission whose members would be elected by an absolute majority of votes. In support of this absolute majority, which has been prescribed for the election of members of the International Court of Justice (Article 10 of the Statute), it was argued that quite a small number of votes would provide a simple majority should there be a very large number of abstentions. Other delegations supported the two-thirds majority in order to enhance the prestige of a Commission elected in this way. The proposal that the members of the ILC should be elected by a simple majority was finally adopted by nine votes with four abstentions.

8. The Sub-Committee considered a large number of possible methods of filling casual vacancies, including the following:
 1. Appointment by the Security Council as proposed in the REPORT;
 2. Appointment by the International Court of Justice;
 3. Filling of vacancies by candidates having obtained the largest number of votes at the last election of members of the ILC;
 4. Appointment by the General Assembly at its next session;
 5. Nomination of a limited number of substitute members at the same time as the nomination of full members;
 6. Nomination of fifteen substitute members at the same time as the nomination of the full members;
 7. Appointment by the President of the previous session of the General Assembly;
 8. Appointment by the ILC itself which would thus co-opt new members.

Various arguments were brought forward by one delegation or another against the first seven methods.

The objections raised against proposal No. 1 were similar to those raised against participation of the Security Council in the periodic elections of members.

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The same arguments were raised against proposal No. 2 - appointment by the International Court of Justice - as were raised against appointment by the Court of all members of the ILC.

Proposal No. 3 would not ensure equitable representation of the various legal systems, and the same objection could be raised with regard to the method proposed in No. 5.

The proposal that a seat vacated by reason of death or inability to continue in office should be left vacant until the next General Assembly, which would appoint a new member in accordance with normal procedure, seemed at first sight to have certain advantages. This method also has disadvantages, however. The whole complicated machinery of appointment (requests to Governments, nomination of four candidates by each State, election by the General Assembly) would have to be set in motion for the election of a single member. If the seat became vacant between 1 June - the final date for submission of candidates - and the opening of the General Assembly, the difficulties would be even more serious. To remedy this, it was suggested that the procedure of appointment be simplified, in the case of casual vacancies, by having the General Assembly vote on lists submitted at the previous session. This proposal was not considered satisfactory in view of the fact that after one or two years had passed the lists would no longer be accurate as a result of deaths and withdrawals.

Proposal No. 6, providing for the election of two sets of members, fifteen full members and fifteen substitute members, so that each member could, if necessary, be replaced by a substitute member of the same nationality, or at least by a representative of the same legal system, would have had the advantage of filling vacancies not only in cases of death or permanent inability to continue in office, but also in cases of temporary inability. But it was pointed out that this advantage was more apparent than real, as substitute members could not be expected to hold themselves at the Commission's disposal during the whole term of office; hence, in the event of a vacancy, they would not necessarily be available. On the other hand, the work of the governments and the General Assembly would be seriously increased by the election of two sets of members.

The suggestion (No. 7) that appointment be entrusted to the President of the previous General Assembly was rejected by the Sub-Committee which considered that the President of the General Assembly was not the authority most qualified to perform this task.

In view of the disadvantages inherent in all the above methods, the Sub-Committee finally adopted, by ten votes with three abstentions, the method of election set out in proposal No. 8, namely appointment by the ILC itself. The wording of the text adopted by the Sub-Committee is as follows:

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"In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in Articles 2 and 8 of this Statute."

The representative of the Soviet Union favoured the method referred to under No. 7 above and put forward a new proposal to the effect that appointments should be entrusted to the President of the previous General Assembly, who would make his selection from among the candidates appearing on a list drawn up for this purpose by the ILC. The Commission member so appointed would serve only until the next session of the General Assembly which would hold a normal election. The text of the proposal has been annexed to the present report at the request of the representative of the Soviet Union.

9. The Sub-Committee decided to support the proposal of the Committee on the Progressive Development of International Law and its Codification that the ILC should not have more than one national of the same State. It also adopted the following article:

"In the event of more than one national of the same State obtaining a sufficient number of votes for election the one who obtains the greatest number of votes shall be elected and if the votes are equally divided the elder or eldest candidate shall be elected."

In cases of dual nationality it would be for the General Assembly to take a decision.

The Sub-Committee was divided on the question whether persons who were nationals of countries not Members of the United Nations could be elected members of the ILC. It was argued that there was no reason to prevent the General Assembly from electing a national of a non-Member State, if it considered that such appointment would be useful to the Commission. In this connection, attention was drawn to the Statute of the old Permanent Court of International Justice which, by a similar provision, had enabled a United States member to take part in the work of the Court, despite the fact that the United States of America had not acceded to the Statute of the Court. By eight votes to five, the Sub-Committee decided against the participation of nationals of non-Member States, considering that it would complicate matters to admit to a commission whose task would consist primarily in the codification of law among the States Members of the United Nations, nationals of non-Member States who would take part in the work on the same footing as the nationals of Member States. Nationals of non-Member States might uphold ideas contrary to the principles and purposes of the United Nations. This would not, however, preclude the ILC from obtaining the services of nationals of States not Members of the United Nations as experts.

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10. The Sub-Committee agreed that the members of the ILC should be eligible for re-election. The seat of the Commission will be established at the United Nations Headquarters. The Commission will have the right to meet from time to time at another place after consultation with the Secretary-General.
11. The Sub-Committee supported the proposal that the members of the ILC should have the right to be paid their travelling expenses. The Sub-Committee also agreed that the members of the ILC should receive a per diem allowance at the same rate as the allowance paid to members of commissions of experts serving the Economic and Social Council. Opinions at first differed as to the amount of that allowance. Several members of the Sub-Committee considered that eminent jurists, who would have to be absent for considerable periods from their important occupations in order to devote their time to the work of the ILC, should receive a larger per diem allowance than that granted to members or experts of other commissions. Since it appeared difficult to fix a definite amount at the present time, it was proposed that the amount be fixed by the competent authorities, taking into consideration the dignity and importance of the office. This suggestion was not, however, adopted because it would involve too many practical difficulties. The idea that members should receive an allowance proportionate to the services rendered to the United Nations was abandoned, and the per diem allowance was fixed at the amount paid to experts of United Nations bodies.
12. It is clear that the ILC will have to be assisted by a Secretariat which will not only act as an administrative body but will constitute a centre of scientific research. Some representatives considered that the rejection of the idea of a Commission composed of members who would devote themselves entirely to the work of codification implied that the Commission must have at its disposal persons which could be entrusted with preparatory work. Only in this way can the sessions of the Commission achieve fruitful results without being unduly prolonged. It goes without saying that the United Nations Secretariat will be the body primarily indicated for this task.

The Sub-Committee considers that the Secretary-General should be asked to place at the disposal of the ILC such personnel and facilities as the Commission desired for discharging its functions, and the Secretary-General thought practical for helping the ILC in this task. The Sub-Committee would not rule out the possibility that for this purpose the Secretary-General might have to engage temporarily certain experts on matters to be dealt with by the ILC.

13. The Sub-Committee does not wish to exclude the possibility of the Commission's consulting directly, when necessary, individual experts outside the Secretariat. The Sub-Committee felt that such individual experts need

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not necessarily be nationals of a State Member of the United Nations (See page 6 above).

Some members of the Sub-Committee were doubtful about consulting specialists, whether these were attached temporarily to the Secretariat, or the Commission applied to them directly. They were afraid that by consulting specialists, who would inevitably be very few in number, and who, if only for reasons of economy, would be recruited chiefly from near the seat of the Secretariat, the Commission might be given too one-sided advice. For this reason it was suggested that it be made a rule that the Commission may apply for advice only to international scientific institutions. The idea that only experts recommended by an international scientific institution may be consulted by the Commission, was rejected by ten votes to four. The majority considered that the Commission should not be denied the right to choose for itself the experts whom it thought the best qualified. Moreover, it would often be very difficult to know to which scientific institutions application should be made. The ILC can be expected to take all necessary precautions to secure the most objective advice possible.

The experts to be employed may have to be remunerated; this must therefore be borne in mind when estimating the expenditure. The suggestion was made to include a proviso that the number of experts should not be more than two and that the cost should not exceed \$6,000 a year. But the Sub-Committee has decided not to fix a number or definite amount. For the financial year 1948, there seemed to be no need to include such an item. In subsequent years the budget will have to allocate a reasonable amount for this purpose.

14. The Sub-Committee considers that the ILC should draw up its own rules of procedure.

15. After considering the various points enumerated above, the Sub-Committee continued its work, taking as a basis of discussion the REPORT from paragraph 7 onward. The Sub-Committee endorsed, subject to the remarks which follow, the decisions of the majority of the Committee on the Progressive Development of International Law and its Codification as set forth in the paragraphs mentioned; it emphasized the point that the rules laid down for the procedure to be followed by the ILC in its work should not be regarded as strict rules, but as principles for the ILC's guidance.

Paragraph 7

Paragraph 7 of the REPORT raises the important question of the method of codification. Two trends of opinion emerged in the Committee on the Progressive Development of International Law and its Codification. In the

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REPORT they are characterized by the terms "progressive development" and "codification". The REPORT reads as follows:

"The Committee recognized that the tasks entrusted by the General Assembly to the ILC might vary in their nature. Some of the tasks might involve the drafting of a convention on a subject which has not yet been regulated by international law or in regard to which the law has not yet been highly developed or formulated in the practice of States. Other tasks might, on the other hand, involve the more precise formulation and systematization of the law in areas where there has been extensive State practice, precedent and doctrine. For convenience of reference, the Committee has referred to the first type of task as 'progressive development' and to the second type of task as 'codification', and it suggests the following procedures which it considers would be appropriate respectively in each of these cases. The Committee recognizes that the terms employed are not mutually exclusive, as, for example, in cases where the formulation and systematization of the existing law may lead to the conclusion that some new rule should be suggested for adoption by States."

There are two trends of opinion in the Sub-Committee: the first according to which the codification of international law can be achieved only by the conclusion of conventions; the second according to which another method should be followed in which greater importance is accorded to the scientific study of law and the persuasive power of the rules formulated.

As regards the respective merits of these two systems, the Sub-Committee feels it is not advisable to reopen the inconclusive discussion already held in the Committee on the Progressive Development of International Law and its Codification on the occasion of the general debate on this matter. Some representatives thought that the system recommended by that Committee should in principle be adopted without further discussion subject to the modifications advocated in the foregoing part of the present report or set forth in the observations which follow. Certain representatives would, however, point out that this attitude is in no way incompatible with a definite preference for incorporating rules of law in international conventions in all cases where the States seem to be agreed on all the essential points of the problem in question.

Paragraph 7 has been adopted by fourteen votes to one.

The representative of France observed that he accepted this paragraph as it did not decide the question of principle.

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The representative of Sweden, who voted against paragraph 7, expressed the opinion that the same method, that of conventions ought to be used for progressive development of international law and for codification.

The representative of the Union of Soviet Socialist Republics considered that the ILC, as an organ of the General Assembly, should carry out codification only in the form of draft conventions.

The representatives of the United Kingdom and the United States declared that the reasons which had led them, as well as various private associations of international lawyers whose resolutions had been laid before the Sixth Committee, to favour the second opinion, were the mediocre results which had been achieved in connection with codification of international law when the first method (international conventions) had been followed.

Paragraph 8

The Sub-Committee has been unable to endorse the proposal in the REPORT that the Rapporteur to be designated by the ILC might be chosen outside the Commission. This paragraph should be amended to read that the Commission will appoint one of its own members as Rapporteur. On the subject of appointing a Rapporteur the Sub-Committee sees no reason why the ILC should depart from the practice generally followed by international commissions as well as by other organs of the United Nations. It is unlikely that amongst the eminent jurists composing the Commission, no one can be found capable of acting as Rapporteur.

The words "in conjunction with the Rapporteur" in sub-paragraph (b), which were appropriate only so long as it was proposed to appoint a Rapporteur from outside the Commission, should be deleted.

The wording of the former sub-paragraph (c) has been slightly changed so as to make it clear that governments are asked only for information on subjects included in the plan of work, and not on the plan of work itself. Sub-paragraphs (b) and (c) would read as follows:

"(b) The Commission shall formulate a plan of work.

(c) The Commission shall circulate a questionnaire to the governments and shall invite them to supply within a fixed period of time data and information relevant to items included in the plan of work."

Sub-paragraph (d) has been modified in consequence of a decision by the Sub-Committee, taken by ten votes to three, providing that sub-committees should consist solely of members of the Commission. In this respect too the Sub-Committee feels it should not depart from the usual method of forming sub-committees. The sub-paragraph will read as follows:

"The Commission may appoint some of its members to work with the Rapporteur on the preparation of interim drafts pending receipt of

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replies to this questionnaire."

Sub-paragraph (c) has been modified as follows:

"The Commission may consult with scientific institutions and individual experts. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts."

(See page 8 above)

A proposal that the sub-paragraph (f) should be regarded as superfluous and deleted was rejected, as only one vote was cast in its favour.

Paragraph 9

Certain delegations thought that paragraph 9 should be deleted. In their opinion the Commission should only deal with the tasks entrusted to it by the General Assembly. If governments, specialized agencies, etc. were allowed to send in subjects for study by the Commission, the latter might be swamped with less important work. On the other hand, it was pointed out that under paragraph 9, sub-paragraph (a), Section (iv) the General Assembly would always have power to decide whether the study of the proposed project should be continued. Moreover, the International Law Commission could refuse to take up subjects less important than those which it proposed to handle. The Sub-Committee rejected the proposal to delete paragraph 9 by ten votes to four.

This paragraph, however, met with other objections. In it there is a distinction made between:

1. Projects not yet formulated as draft conventions (a);
2. Draft conventions not yet signed by plenipotentiaries (b);
3. Draft conventions already signed by plenipotentiaries (c).

With regard to Categories (1) and (2), the REPORT contains stipulations which in both cases differ more in form than in substance. The Sub-Committee thinks that Category (3) should be dropped altogether because the task which it was proposed in this paragraph to entrust to the ILC has certain political aspects which make it inadvisable for a legal commission to initiate action. The Sub-Committee therefore thinks that Categories (1) and (2) should be combined and Category (3) deleted. The new text of paragraph 9, adopted unanimously with one delegation abstaining, reads as follows:

"The International Law Commission shall also consider proposals and draft multipartite conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies or official bodies established by inter-governmental agreement to encourage the progressive

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development of international law and its codification, transmitted to it through the Secretary-General. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow a procedure on the following lines:

"(a) The Commission shall formulate a plan of work, and study such proposals or drafts and compare them with any other proposals and drafts on the same subject;

"(b) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

"(c) The Commission shall submit a report with its recommendations to the General Assembly: It may also, if it deems it desirable, before doing so, make an interim report to the organ, agency or body which has submitted the proposal or draft;

"(d) If the General Assembly should invite the Commission to proceed with its work on a proposal, the procedure outlined in paragraph 8 above, shall apply. The questionnaire referred to in paragraph 8 (c) may not, however, be necessary."

The Sub-Committee has inserted the word "multipartite" in the first paragraph and in sub-paragraph (a) to make it clearer that the draft treaties there referred to were those having an importance not confined to two States.

Paragraph 10

Paragraph 10 of the REPORT evoked no comment. It reads as follows:

"For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments. The Committee by a majority vote, however, agreed that for the purposes of the procedures adopted below, the definition given in paragraph 7 would be applicable."

Paragraph 11

In regard to paragraph 11, some members of the Sub-Committee again expressed concern lest the ILC should be confronted with too overwhelming a task. In this paragraph the ILC is given the task of surveying "the whole field of customary international law, together with any relevant treaties, with a view to selecting topics for codification".

The delegations in question recalled that in their opinion the activity of

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the ILC should be confined solely to questions referred to it by the General Assembly; they were against giving the ILC any right of initiative. Other delegations, however, were in favour of granting this right to the ILC. They felt that the Commission's work would be unproductive unless it was given fairly wide terms of reference. The Commission should itself have power to take the initiative with regard to the choice of questions to be studied. It would, however, be understood that before starting to frame draft treaties, the Commission would have to get the approval of the General Assembly.

Some delegations expressed the opinion that the activities of the Commission should not be restricted to customary international law, as there are other important aspects of international law which should be considered in all work of codification. The Sub-Committee accepted this opinion and, consequently, the qualification "customary" was deleted.

A proposal for the deletion of paragraph 11 secured seven votes for and seven votes against. After a lengthy discussion, the following text was voted by ten votes to five:

"The International Law Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly. The Commission shall give priority to requests of the General Assembly to deal with any question."

It should be noted that a proposal to give the right of initiative to the ILC had been adopted by ten votes to five.

Paragraph 12

The REPORT had laid down a detailed procedure to be followed by the ILC in the case of such work as that referred to in paragraph 11. It was proposed to leave it to the ILC itself to draw up these rules. Some delegations objected, being of the opinion that the General Assembly should always play the leading part in questions of codification. The Sub-Committee, however, adopted by ten votes to two, with three delegations abstaining, the following text:

"The Commission shall adopt a plan of work appropriate to each case. The Commission shall, through the Secretary-General, address to governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other similar documents relevant to the topic being studied and which the Commission deems necessary."

Paragraph 13

Paragraph 13 of the REPORT has undergone certain modifications and now

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reads as follows:

"The Commission shall draw up its drafts in the form of articles and shall submit them to the General Assembly, together with a commentary containing:

"(a) Adequate presentation of precedents and other relevant data including treaties, judicial decisions and doctrine;

"(b) Conclusions relevant to:

"(1) the extent of agreement on each point in the practice of States and in doctrine;

"(2) divergencies or disagreements which exist, as well as arguments invoked in favour of one or another solution."

Draft conventions presented by a minority of the International Law Commission will also be submitted to the General Assembly.

Sub-paragraph (c) and (d) of paragraph 13 of the REPORT have been deleted as being superfluous.

Sub-paragraph (c) reads as follows:

"When the International Law Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document, including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by governments in accordance with paragraph 12. The Commission shall decide whether the opinions of any scientific institution or individual expert consulted by the Commission shall be included in the publication. The Commission shall request governments to submit any comments on this document within a reasonable time."

Paragraph 14

Paragraph 14 of the REPORT has been amended as follows:

"Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly."

Paragraph 15

Sub-paragraph (b) of paragraph 15 has evoked certain objections.

The question has been put what would be the legal effect of the adoption, by the General Assembly, of the ILC report. There seemed to be no ground for believing that the text "adopted" by the General Assembly would be binding on Members in the same way as if they had ratified it in the form of

/a convention.

a convention. Nor was there any support for the view that it would amount to a declaration in which the General Assembly expressed its opinion on the rule of law. It was felt that this power of the General Assembly to adopt or reject ILC texts would introduce into the work of codification that very political element which it was hoped to remove. Such a provision, in any case, might give rise to doubts or uncertainties which should be avoided. It was, therefore, proposed to delete this sub-paragraph, or else to amend it as follows:

"That the General Assembly should take note of the report by resolution."

By twelve votes to two the Sub-Committee supported the text amended as above.

The question was raised whether, in addition to the new text of sub-paragraph (b), there was any further need to retain sub-paragraph (a). The Sub-Committee replied in the affirmative, on the ground that in certain cases the method provided in sub-paragraph (a) might be preferred to that envisaged in sub-paragraph (b).

The second clause of paragraph 15 was worded as follows:

"Whenever it deems it desirable the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

Paragraph 16

Objections were raised with regard to paragraph 16. The opinion was expressed that the ILC would not be the most suitable body for introducing uniformity into the wording of the formal clauses of multipartite conventions. Some members, while admitting the weight of this objection, drew attention to the need for this task being carried out in one way or another. On the other hand, it was urged that there should be no attempt to overdo uniformity in this matter. The Sub-Committee has decided to omit paragraph 16, as it did not consider the ILC as the appropriate body to deal with it.

Paragraph 17

Paragraph 17 has been omitted. Encouragement of accession to and ratification of treaties often bears, as has been shown in connection with paragraph 9, a political rather than a juridical aspect. It was therefore not thought desirable to entrust the ILC with this task, which could more suitably be assumed by other organs.

Paragraph 18

Paragraph 18 has been slightly amended so as to make it clearer. The paragraph was worded as follows:

"The Commission shall consider ways and means for making the evidence of customary international law more readily available,

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such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law and shall make a report to the General Assembly on this matter."

Paragraph 19

Paragraph 19 has been adopted, with a reservation by one delegation which held that the ILC could accept only projects which emanate from the General Assembly (see paragraph 9).

Paragraph 20

As regards paragraph 20, a proposal was made for the deletion of sub-paragraph (b). Fear was expressed that the distribution of documents on such a large scale would involve heavy expenses for the United Nations. Moreover, such distribution seemed superfluous since institutions which were really interested in these documents could always obtain them. It would be very difficult to draw up such lists without offending the susceptibilities of organizations which had been omitted. On the other hand, it was argued that these arrangements, concluded on the basis of reciprocity, would further the exchange of communications and suggestions. The Sub-Committee voted against omitting the paragraph by ten votes to four.

Sub-paragraph (d) was criticized by some representatives. This sub-paragraph stresses the necessity and importance of frequent consultations between the ILC and the organs of the Pan-American Union which are engaged in codifying international law in the Inter-American System. It was pointed out that, while recognizing the merits of the Pan-American Union for the codification of law as between American States, there was no desire to force the ILC to frequent consultation with these organs, since this might mean influencing the ILC in a unilateral manner. As stated in sub-paragraph (a), the ILC should obtain its information from all parts of the world, and not particularly from America. Frequent consultation with American organs, as suggested, would inevitably mean giving preponderance to one particular system to the detriment of the work of codification, which should bear a universal character. As against this, it was pointed out that the Pan-American Union is a permanent inter-governmental organization which has for a long time past been engaged in the codification of international law. It would be perfectly natural for the ILC to take advantage of the experience gained by the Union organs in this matter. The fact of the Union being the only body of its kind is no reason for leaving it unmentioned. If other similar organizations existed or were later created, the ILC should maintain similar relations with them. If the Pan-American Union, which is referred to in this connection in the REPORT were no longer

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mentioned in the final text, it might be considered as showing a lack of appreciation by the General Assembly of the Union's work. To meet this point as far as possible, it was agreed that the text of sub-paragraph (d) might be modified as follows:

"The advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan-American Union, is recognized."

After a proposal to delete the entire paragraph was rejected by twelve votes to three, the above text was adopted by thirteen votes to two.

16. In conclusion, the Sub-Committee examined the question what limits should be fixed for the ILC's task. The Committee on the Progressive Development of International Law and its Codification had taken the view that the ILC's task also embraced the sphere of private international law. That Committee had added that the ILC should undertake nothing which might possibly encroach upon the valuable work being done in the sphere of private international law by the Hague Conferences on private international law. It was, therefore, recommended that the ILC, when dealing with problems bearing on private international law, should consider the advisability of consulting the Netherlands Government.

Several members of the Sub-Committee feel that the ILC should not concern itself with private international law. Some of them contend that Article 13 of the Charter envisaged the progressive development and codification of public international law only. Above all, practical considerations were cited in support of the view that the Commission's task should be limited. Most of the jurists who had specialized in private international law are little interested, it was held, in public international law. The system already adopted for having representatives on the Commission of the principal legal systems of the world will be seriously compromised if some systems of law are represented by experts in public international law and others by jurists who have specialized in private international law. It will, in that case, be necessary to double the number of members of the Commission, which seems out of the question. Some representatives considered that most countries will prefer that the ILC should consist of experts in public law. It would seem inadmissible that a Committee which does not include the leading experts in private international law should have the necessary authority to direct work in that domain. Other members of the Committee have challenged this view, and have pointed out that there is no express stipulation limiting the task of the Assembly, as laid down in Article 13 of the Charter, to public international law. The borderline between public international law, on the one hand, and private international law, on the other, is, moreover,
/extremely

extremely vague. The number of experts engaged in both these fields is not so small as it is claimed to be. The Commission will always be able to call on experts if there are insufficient specialists in private international law among the members of the ILC.

A common measure of agreement between these two divergent views was found by the unanimous adoption, with one abstention, of the following stipulation:

"The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law."

The Sub-Committee proposes that the Sixth Committee recommend to the General Assembly the adoption of the following resolution:

ESTABLISHMENT OF THE INTERNATIONAL LAW COMMISSION

THE GENERAL ASSEMBLY

RECOGNIZING the need for giving effect to Article 13, paragraph 1, sub-paragraph (a), of the Charter, stipulating that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

HAVING STUDIED the report of the Committee directed by Resolution 94 (I) of the General Assembly of 11 December 1946 to study:

- (a) The methods by which the General Assembly should encourage the progressive development of international law and its eventual codification;
- (b) Methods of securing the co-operation of the several organs of the United Nations to this end;
- (c) Methods of enlisting the assistance of such national or international bodies as might aid in the attainment of this objective;

RECOGNIZING the desirability of establishing a commission composed of persons of recognized competence in international law, as recommended by the above-mentioned report;

RESOLVES to establish an "International Law Commission", the members of which shall be elected at the third regular session of the General Assembly, and which shall be constituted and shall exercise its functions in accordance with the provisions of the annexed statute;

STATUTE OF THE INTERNATIONAL LAW COMMISSION

Article 1

1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.
2. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.

CHAPTER I. ORGANIZATION OF THE INTERNATIONAL LAW COMMISSION

Article 2

1. The Commission shall consist of fifteen members who shall be persons of recognized competence in international law.
2. No two members of the Commission shall be nationals of the same State.
3. In case of dual nationality a candidate shall ~~of this Statute~~, be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 3

1. The members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the governments of Members of the United Nations.
2. Only nationals of Members of the United Nations shall be eligible for election.

Article 4

Each Member may nominate for election not more than four candidates, of whom two may be nationals of the nominating State and two nationals of other Members.

Article 5

The names of the candidates shall be submitted in writing by the governments to the Secretary-General by the first of June of the year in which an election is held, provided that a government may in exceptional circumstances substitute for a candidate whom it has nominated before the first of June another candidate whom it shall name not later than thirty days before the opening of the General Assembly.

Article 6

The Secretary-General shall as soon as possible communicate to the governments of Members the names submitted as well as any statements of qualifications of candidates that may have been submitted by the nominating governments.

/Article 7

Article 7

The Secretary-General shall prepare the list referred to in Article 3 above, comprising in alphabetical order the names of all the candidates duly nominated, and shall submit this list to the General Assembly for the purposes of the election.

Article 8

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 9

1. The fifteen candidates who obtained the greatest number of votes and not less than a majority of the votes of the Members present and voting shall be elected.

2. In the event of more than one national of the same State obtaining a sufficient number of votes for election the one who obtains the greatest number of votes shall be elected and if the votes are equally divided the elder or eldest candidate shall be elected.

Article 10

The members of the Commission shall be elected for three years. They shall be eligible for re-election.

Article 11

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in Articles 2 and 8 of this Statute.

Article 12

The Commission shall sit at the headquarters of the United Nations. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General.

Article 13

Members of the Commission shall be paid travel expenses and shall also receive a per diem allowance at the same rate as the allowance paid to members of commissions of experts of the Economic and Social Council.

Article 14

The Secretary-General shall, so far as he is able, make available staff and facilities required by the Commission to fulfil its task.

CHAPTER II. FUNCTIONS OF THE INTERNATIONAL LAW COMMISSION

Article 15

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

A. Progressive Development of International LawArticle 16

When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow a procedure on the following lines:

- (a) The Commission shall appoint one of its members to be Rapporteur;
- (b) The Commission shall formulate a plan of work;
- (c) The Commission shall circulate a questionnaire to the governments, and shall invite them to supply within a fixed period of time data and information relevant to items included in the plan of work;
- (d) The Commission may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire;
- (e) The Commission may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts;
- (f) The Commission shall consider the drafts proposed by the Rapporteur;
- (g) When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in sub-paragraph (c) above;
- (h) The Commission shall invite the governments to submit their comments on this document within a reasonable time;
- (i) The Rapporteur and the members appointed for that purpose shall reconsider the draft taking into consideration these comments and shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission;
- /(j) The Commission

(j) The Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly.

Article 17

1. The Commission shall, also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of international law and its codification, and transmitted to it by the Secretary-General.
2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow a procedure on the following lines:
 - (a) The Commission shall formulate a plan of work, and study such proposals or drafts and compare them with any other proposals and drafts on the same subject;
 - (b) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;
 - (c) The Commission shall submit a report with its recommendations to the General Assembly. It may also, if it deems it desirable, before doing so make an interim report to the organ, agency or body which has submitted the proposal or draft;
 - (d) If the General Assembly should invite the Commission to proceed with its work on a proposal, the procedure outlined in Article 16 above shall apply. The questionnaire referred to in paragraph (c) of that Article may not, however, be necessary.

B. Codification of International Law

Article 18

1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not.
2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly.
3. The Commission shall give priority to requests of the General Assembly to deal with any question.

/Article 19

Article 19

1. The Commission shall adopt a plan of work appropriate to each case.
2. The Commission shall through the Secretary-General address to governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.

Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

- (a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;
- (b) Conclusions relevant to:

1. The extent of agreement on each point in the practice of States and in doctrine;
2. Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

Article 21

1. When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to the document including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by governments in accordance with Article 19. The Commission shall decide whether the opinions of any scientific institution or individual expert consulted by the Commission shall be included in the publication.
2. The Commission shall request governments to submit comments on this document within a reasonable time.

Article 22

Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly.

Article 23

1. The Commission may recommend to the General Assembly:
 - (a) To take no action, the report having already been published;
 - (b) To take note of the report by resolution;
 - (c) To recommend the draft to Members with a view to the conclusion of a convention;
 - (d) To convoke a conference to conclude a convention.
2. Whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

/Article 24

Article 24

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

CHAPTER III. CO-OPERATION WITH OTHER BODIES

Article 25

1. The Commission may consult, if it considers necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ.

2. All documents of the Commission which are circulated to governments by the Secretary-General shall also be circulated to such organs of the United Nations as are concerned. Such organs may furnish any information or make any suggestions to the Commission.

Article 26

1. The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions.

2. For the purpose of distribution of documents of the Commission, the Secretary-General, after consultation with the Commission, shall draw up a list of national and international organizations concerned with questions of international law. The Secretary-General shall endeavour to include on this list at least one national organization of each Member of the United Nations.

3. In the application of the provisions of this Article, the Commission and the Secretary-General shall comply with the resolutions of the General Assembly and the other principal organs of the United Nations concerning relations with Franco Spain and shall exclude both from consultations and from the list, organizations which have collaborated with the nazis and fascists.

4. The advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized.

ANNEX

PROPOSAL OF THE REPRESENTATIVE OF THE
UNION OF SOVIET SOCIALIST REPUBLICS ON THE PROCEDURE TO BE FOLLOWED
TO FILL VACANCIES AMONG MEMBERS OF THE INTERNATIONAL LAW COMMISSION

In case a vacancy occurs in the ILC, the Commission itself will select names from a list of candidates and submit the list of candidates thus selected by the Commission to the President of the preceding Session of the General Assembly, who will then designate, from among those candidates, the new member of the ILC to replace the outgoing member. In making this selection, the President of the General Assembly will take into account the necessity, at the time he appoints the new member, of maintaining the system of representation of the principal forms of civilization and of the principal juridical systems of the world, which will have been established in determining the composition of the ILC.

The member of the Commission thus appointed will exercise his functions as member of the ILC until the following Session of the General Assembly. At that time, the General Assembly will elect the member of the Commission to replace the outgoing member.
