

## PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

Note by the Secretary-General

The Secretary-General has the honour to transmit to the Members of the General Assembly a copy of a letter received from the Committee on the Progressive Development of International Law and its Codification, together with that Committee's report, drawn up in accordance with the terms of Resolution 94 (I) adopted by the General Assembly on 11 December 1946.

A. Letter from the Chairman of the Committee to the Secretary-General.\*

I have the honour to inform you that the Committee on the Progressive Development of International Law and its Codification, at its meeting of 16 June 1947, made the following decision:

1. The Committee on the Progressive Development of International Law and its Codification requests the Secretary-General to transmit its report to the Governments of Members of the United Nations at the earliest possible moment.
2. The Secretary-General is further requested to call the special attention of Governments to that part of the report which contains the proposals for the nomination and election of members of an International Law Commission, and to the possibility that the election might take place before the adjournment of the second session of the General Assembly if the General Assembly accepts the recommendation to establish an International Law Commission.

(signed) Dalip Singh  
Chairman

B. Report of the Committee.\*\*

1. The Committee on the Progressive Development of International Law and its Codification, established by the resolution of the General Assembly of 11 December 1946, held its first meeting on 12 May 1947, at Lake Success, New York. It adopted the provisional agenda drawn up by the Secretariat, and

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agreed to commence the general discussion on Item 3 (a) of its agenda relating to the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification.

2. At its fifteenth meeting, 29 May 1947, the Committee concluded its consideration of this item and succeeded in formulating detailed methods<sup>a</sup> for recommendation to the General Assembly at its next session.

3. The Committee agreed that effect could best be given to the provisions of Article 13 (i) (a) of the Charter by the establishment of a Commission, composed of persons of recognized competence in international law. They discussed the question whether it would be desirable to establish separate commissions for public, for private, and for penal international law, but decided unanimously to recommend the General Assembly to establish a single Commission for the purpose of carrying out the progressive development of international law and its eventual codification. This Commission would be called the International Law Commission (ILC).\*

4. Different views were expressed on the question of the number of the members of the International Law Commission, the numbers nine, eleven, thirteen and fifteen being suggested. The Committee by a majority of nine votes to five decided to recommend that it consist of fifteen members.\*\*

Two main methods for the selection of the members of the International Law Commission were suggested, one that the judges of the International Court of Justice should be invited to make the appointments, the other a plan based, with some slight modifications, on the method prescribed for the election of

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\* It appeared to be the feeling of the Committee that the ILC should not do anything which might detract from the valuable work being done in the field of the development and codification of private international law by The Hague Conference on Private International Law. It is therefore recommended that the ILC when dealing with questions in the field of private international law should consider the appropriateness of consultation with the Netherlands Government.

\*\* For minority views see document A/AC.10/SR.23 of 10 June 1947.

the judges of the Court. A large majority of the Committee preferred the second of these methods, and the Committee therefore recommends the following procedure:

(a) The government of each State Member of the United Nations should nominate, as candidates for membership of the ILC, not more than two of its own nationals, and not more than eight persons of other nationalities. In making their nominations, the Governments are recommended to consult their highest courts of justice, their legal faculties and schools of law, their national academies and national sections of international academies devoted to the study of law and, where such exist, the national groups in the Permanent Court of Arbitration.

(b) The Secretary-General of the United Nations should submit this panel of candidates to the Security Council and the General Assembly, which would elect fifteen persons following the principle laid down in Article 3 and the procedure contained in Articles 8-12 of the Statute of the International Court of Justice. The Committee desires to recommend that special emphasis be laid on the provisions of Article 9 of the Statute.

(c) In the event of a casual vacancy occurring in the membership of the Commission, a majority of the Committee thought that the Commission itself might nominate a certain number of persons from among those whose names were on the panel of candidates, and that the Security Council might choose from among the persons so nominated a member of the Commission to hold office until the next regular session of the General Assembly, when the vacancy could be filled by the same procedure as that followed in the election of the original fifteen members.

(d) All the members of the Committee were agreed that the members of the International Law Commission should receive a salary proportionate to the dignity and importance of their office, but there was some difference of

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opinion on the question whether they should be required to render full-time service. By a majority of nine votes to five the Committee thought that this would be both desirable and necessary. It was agreed that the Commission should have its headquarters at the seat of the United Nations, though it might decide from time to time to hold its sessions at other places; and that the Secretary-General should be requested to make available to it the services of the Division for the Development and Codification of International Law of the Secretariat. The budget of the Commission should include items for the salaries of members, for the expenses of meetings, travel, etc.

6. The Committee hopes that the ILC may be a permanent body, but it also feels that it might be desirable, in the first instance, to establish the Commission on a provisional basis. It recommends, therefore, that the members of the Commission be elected for a term of three years, but that they be eligible for re-election if the Commission is continued in being after this experimental period.

7. 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

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\* The representative of Sweden dissented from this view in his statement annexed to the summary record of the meeting of 11 June 1947, document A/AC.10/SR.24.

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.

8. If the General Assembly should refer to the Commission a project for the progressive development of the law (as defined in the preceding paragraph) the Committee recommends that the Commission should follow a procedure on the following lines:

(a) The Commission should appoint a Rapporteur. By a majority of eight votes to seven the Committee recommends that in the choice of Rapporteur the Commission should be free to go outside its own membership.

(b) The Commission, in conjunction with the Rapporteur, should formulate a plan of work.

(c) A questionnaire should be circulated to governments, inviting them to supply information and data relevant to the plan of work within such time as the reference from the General Assembly may demand.

(d) The Commission should appoint a small sub-committee to work with the Rapporteur on the preparation of interim drafts pending receipt of replies to this questionnaire. By a majority of eight votes to six the Committee thought that membership of this sub-committee need not be limited to members of the Commission itself.

(e) The Committee decided to recommend that the Commission should be authorized to consult as desired with scientific institutions, and by a majority, that it be authorized to consult, if necessary, with individual experts.

(f) It was agreed that the Commission should periodically consider the drafts; and

(g) That when the Commission considers a draft to be in satisfactory form it should be issued as a Commission document by the Secretariat with such explanations and supporting material as the Commission considers

appropriate, and should be given the widest possible publicity. The publication should include any information supplied to the ILC in reply to the questionnaire referred to in sub-paragraph (c) above. The governments should be requested to submit any comments on this Commission document within a reasonable time.

(h) The Rapporteur and the sub-committee would reconsider the draft, taking into consideration any comments or suggestions which have come to the attention of the Commission through the Secretariat. They would prepare a final draft and explanatory report which the Commission would consider, and, if adopted, would submit, together with its own recommendations, through the Secretary-General to the General Assembly.

9. By a majority the Committee decided to recommend that the ILC should be authorized to consider projects and draft conventions recommended by governments, other United Nations organs,\* specialized agencies, and those official bodies established by inter-governmental agreement to further the progressive development of international law and its codification, transmitted to it through the Secretary-General, and that in such cases the Commission follow a procedure on the following lines:

(a) If the Commission is asked to consider a project not yet formulated as a draft convention, it should:

- (i) formulate a plan of work;
- (ii) circulate a questionnaire to governments and to such of the organs of the United Nations, specialized agencies, and official bodies mentioned above, as are concerned, inviting comments to be transmitted within a reasonable time; and
- (iii) submit a report with recommendations to the General Assembly.

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\* The Committee unanimously recognized that the Economic and Social Council possesses the right of initiative in proposing conventions.

- (iv) if the General Assembly should then invite the Commission to continue working on the project, the Commission should follow in substance the procedure outlined in paragraph 8 above, except that the questionnaire referred to in 8 (c) may not in such a case be necessary.
  - (v) in the case of some projects submitted to the Commission in this way it might be sufficient that the Commission should consult with and tender advice to the government, organ, or body concerned, and in such cases the procedure suggested in this paragraph might not be necessary; but the full record of each such case should be made public by the ILC.
- (b) If the Commission is asked to consider a draft convention already formulated but not signed by plenipotentiaries, it should:
- (i) study the draft and compare it with any other drafts or projects on the same or on a cognate subject;
  - (ii) circulate a questionnaire as in (a) (ii) above; and
  - (iii) report with recommendations to the General Assembly.
- (c) If the Commission is asked to consider a draft convention already signed by plenipotentiaries, it should take into consideration any decisions which the General Assembly may adopt in pursuance of the recommendations made in paragraph 17 below.

According to the view of three of the members of the Committee, the initiative for undertaking studies and making recommendations for the progressive development of international law, lies solely\* with the General Assembly under the terms of the Charter. It was therefore their view that the ILC was constitutionally precluded from making recommendations to the

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\* In the view of one of these members, the Economic and Social Council, under the authority of the General Assembly, also has the right of initiative in matters within its competence.

General Assembly on projects other than those referred to it by the General Assembly itself.

10. 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 in 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 above would be applicable.

11. The Committee by a majority decided to recommend to the General Assembly that it adopt a resolution instructing ILC to survey the whole field of customary international law, together with any relevant treaties, with a view to selecting topics for codification, having in mind previous governmental and non-governmental projects; that if the ILC finds that codification of a particular topic is desirable or necessary, it should present its recommendations to the General Assembly in the form of draft

articles of multipartite conventions; and that, if the General Assembly should request the ILC to prepare a draft convention on any subject, or to explore the necessity or desirability of preparing such a draft convention, ILC should give precedence to complying with such request.

12. The Committee then decided that a procedure on the following lines would be appropriate for giving effect to the above resolution of the General Assembly:

(a) Unless the topic has been selected by the General Assembly the Commission should make the survey indicated in the resolution of the General Assembly and select a topic or topics to be considered for treatment, having in mind previous governmental and non-governmental projects.

(b) The Commission should appoint a Rapporteur for each topic to be treated.



(c) The ILC in conjunction with the Rapporteur should formulate a plan of work and circulate a request to governments for the texts of pertinent laws, decrees, judicial decisions, treaties, diplomatic correspondence, and other comparable data, to be submitted within a reasonable time.

(d) The Commission should appoint a small sub-committee to work with the Rapporteur on the preparation of interim drafts pending receipt of the information requested in the preceding sub-paragraph.

13. The work should proceed according to the following plan:

(a) The results of the study of any particular topic should take the form of one or more sets of draft articles of multipartite conventions.

(b) The text of each draft article should be followed by comment containing:

(i) Complete presentation of all precedents and other relevant data including treaties, views of leading publicists, etc.

(ii) Conclusions relevant to:

(1) The measure of agreement in the practice of States and in doctrine on each point involved;

(2) The areas of divergence or disagreement in practice and doctrine.

(iii) The arguments which have been advanced in favour of one or another solution, in cases where divergence or disagreement exist.

(c) There should be consultation as desired with scientific institutions, and, if necessary, with individual experts. The consultation with individual experts was recommended by a majority of the Committee.

(d) The Commission should periodically consider the drafts, and

(e) When the Commission considers a draft to be in satisfactory form it

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should be issued as a Commission document by the Secretariat with such explanations and supporting material as the Commission considers appropriate, and should be given the widest possible publicity. The publication should include any information supplied to the Commission in reply to the request referred to in sub-paragraph 12 (c) above. The governments should be requested to submit any comments on this Commission document within a reasonable time.

14. The Rapporteur and the sub-committee would then reconsider the draft, taking into consideration any comments or suggestions which have come to the attention of the ILC. They would prepare a final draft and explanatory report which the ILC would consider, and, if adopted, would submit, together with its own recommendations, through the Secretary-General, to the General Assembly.

15. These recommendations might be either:

- (a) That no further action be taken in view of the fact that the report has already been published, or
- (b) That the General Assembly should adopt all or part of the report by resolution,\* or
- (c) That the General Assembly should recommend the draft to States for the conclusion of a convention, or
- (d) That the General Assembly should convoke a special conference to consider the conclusion of a convention.

The Committee appreciates the fact that the General Assembly might in any of these cases think fit to refer the drafts back to ILC for reconsideration and redrafting.

16. The Committee also considered a number of suggested means of encouraging the progressive development of international law by improvements in the

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\* This sub-paragraph was adopted by a majority of the Committee.

technique of multipartite instruments. It was pointed out, for instance, that absence of uniformity in the drafting of the formal clauses of multipartite conventions sometimes leads to unnecessary delays in concluding them as well as creating certain difficulties of interpretation afterwards. A majority of the Committee therefore desired to recommend that the ILC should consider this matter and the ways and means of bringing about improvements in the technique of multipartite instruments in relation to such matters as uniform treaty clauses with a view to ultimate recommendation to the General Assembly. It was understood, of course, that the adoption of any clauses as the ILC might draw up would be entirely optional for the parties to any multipartite convention, and that the recommendations of the ILC would only concern the formal clauses of multipartite conventions.

17. Another matter considered by the Committee was the utility and importance of encouraging the ratification of and accession to multipartite conventions already concluded. A majority of the Committee desired that the ILC should consider this matter with a view to ultimate recommendation to the General Assembly.

18. In connection with the development of customary international law, as well as with the development of the law through the judicial process, the Committee desired to recommend that the ILC consider ways and means for making the evidences of customary international law more readily available by the compilation of digests of State practice, and by the collection and publication of the decisions of national and international courts on international law questions.

19. The Committee was also asked by the General Assembly to study methods of securing the co-operation of the several organs of the United Nations in the task of the progressive development of international law and its eventual codification. On this point the Committee recommends:

- (a) That the ILC should be authorized, if need be, to consult with any of the organs of the United Nations on any draft or project the subject  
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matter of which is relevant to the functions of the particular organ.

(b) That in projects referred to it by a competent organ of the United Nations the ILC should be authorized, if it thinks it desirable, to make interim reports to the organ concerned prior to submitting its final report to the General Assembly. This resolution was carried by a majority in the Committee. A minority of the members dissented from it on the ground that, in their view, it would not be in accordance with the provisions of the Charter for any organ of the United Nations, other than the General Assembly,\* to refer a project to the ILC.

(c) That all ILC documents which are circulated to governments should also be circulated to the organs of the United Nations for their information, and that such organs should be free to supply any data or make any suggestions to the Commission.

20. The Committee was also asked to study methods of enlisting the assistance of such national or international bodies as might aid it in the attainment of its objective of encouraging the progressive development of international law and its eventual codification. On this point the Committee recommends:

(a) That the ILC should be authorized to consult any national or international organization, official or non-official, on any matter entrusted to it, if and when it believes that such a procedure might aid it in the attainment of its objectives. A minority of the members of the Committee were of the opinion that such consultation should be limited to organizations included in the list referred to in the sub-paragraph following.

(b) That for the purpose of the distribution of ILC documents the Secretary-General, after consultation with the ILC, should draw up a

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\* Two members of this minority desire to add to this sub-paragraph the following words: "or the Economic and Social Council under the authority of the General Assembly".

list of national and international organizations dealing with questions of international law. In drawing up this list the Secretary-General would take into account the necessity of having the national organizations of all the members of the United Nations represented on the list.

(c) That, in the consultations referred to in sub-paragraph (b) of this paragraph, the Commission and the Secretary-General should take into account the resolutions of the General Assembly and of the Economic and Social Council concerning relations with Franco Spain, and that organizations which collaborated with the nazis and fascists should be excluded both from consultation and from the list.

(d) By a majority, the Committee decided to refer specially to the necessity and importance of frequent consultation between the ILC and the organs of the Pan-American Union whose task is the codification of international law in the Inter-American System, without, however, disregarding the claims of other systems of law. Three members of the minority dissenting from this resolution desire it to be recorded that in their opinion this resolution, by singling out the Pan-American Union for special mention, creates for that Union a privileged position, and thereby violates the principle of equality between nations and between systems of law. They are of the opinion, that the resolution might be taken to imply that the work of States, other than those represented in the Pan-American Union, is of less importance for the ILC, and that the ILC need not maintain equally close contact with such other States.

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