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FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Additional observations by Governments

Note by the Secretary-General: Observations received from the Governments of Afghanistan, Burma, Colombia, Israel, Sweden, the United Kingdom and Yugoslavia have been reproduced in document A/4796. The observations received subsequently from the Governments of Denmark, Ghana and Mexico are reproduced in this addendum.

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8. DENMARK

Transmitted by a note verbale of 11 July 1961 from the Acting Permanent Representative of Denmark to the United Nations

[Original text: English]

I. The Danish Government welcomes the opportunity afforded by resolution 1505 (XV) of the General Assembly to state its views regarding the future work in the field of codification and progressive development of international law.

Towards the end of the last century and in the early part of this century Denmark was one of the small States which took the lead in developing legal procedures for the settlement of international disputes. By tradition, Denmark thus adheres firmly to the rule of law in international relations. Without in any way questioning the continued importance of international judicial institutions and procedures, the Danish Government recognizes that experience has given particular emphasis to another aspect of the rule of law, namely the authoritative formulation of substantive rules governing international relations.

In this respect it should be borne in mind that in national as well as international relations the essential function of law is to provide that measure of stability which is necessary to ensure the orderly conduct of human affairs. This, of course, does not imply that the legal system should be anything like a petrified body; on the contrary, it should be more in the nature of a living organism, developing in harmony with changes in basic social, economic and technical factors.

In the history of international relations the present stage is, to an unprecedented degree, a dynamic one. The attainment of independence by a great number of peoples who were formerly subject to the rule of various European countries; the technical achievements of the present generation and the resulting possibilities of extending the benefits of modern civilization to an ever increasing proportion of mankind; the transformation of national societies as a result of these trends or of deliberate policies of reform - all these factors cannot but exercise the most far-reaching influence on the traditional tenor of international law.

II. In considering the question as to what role should be attributed to the International Law Commission in this context, the Danish Government deems it essential - without in any way detracting from the importance of the task assigned to the Commission - to bear in mind that the Commission is by no means the only law-creating agency within the present structure of international organization.

The long list of international conventions concluded under the auspices of the United Nations bears witness to the important contribution to the development of international law made by the Economic and Social Council with the assistance of its functional and regional commissions, by the General Assembly through the intermediary of its various committees - not least the Third Committee - and by ad hoc conferences convened to consider special subjects. Outstanding examples are the Genocide Convention (1948) and the Convention on the Political Rights of Women (1952). Other subjects are still under consideration. Draft covenants on human rights have been discussed for several years, and such questions as the permanent sovereignty over natural resources and the legal problems relating to outer space are on the agendas of the appropriate bodies.

Less conspicuous, but in no way less important, are the contributions made by the specialized agencies to the development of international law. The impressive volume of international labour conventions adopted within the framework of the ILO have profoundly modified the concept of international obligations of States in the fields of labour standards and social policy, and several UNESCO conventions serve similar purposes in cultural and educational fields. The two conventions on the prevention of discrimination in the fields of employment and education are significant examples of the development of international legal standards achieved through active co-operation between the main organs of the United Nations and the specialized agencies.

The activities of these various international organizations undeniably reflect the increasing concern of international law with the fate and well-being of the individual. This has, incidentally, brought about profound modifications of traditional legal concepts concerning matters which fall within the exclusive jurisdiction of States.

The International Court of Justice has likewise contributed essentially to the development of international law. Although its function is to pronounce upon

specific legal issues, it is well known that in so doing the Court renders outstanding contributions to the establishment of what the law is, generally in a spirit of what might be called progressive realism, endeavouring to harmonize the law with the essential requirements of international society. In its decision on the Anglo-Norwegian fisheries case, the Court laid down important principles concerning the delimitation of the territorial sea; these principles were later embodied in the 1958 Convention on the Territorial Sea. The advisory opinions given on reparation for injuries suffered in the service of the United Nations, and on reservations to the Genocide Convention likewise established legal principles which mark significant steps in the progressive development of international law. These few instances should suffice to illustrate the nature of the contribution which the Court is in a position to render in this respect. But for the modest use which States have made of the Court for the settlement of legal disputes, its contribution might have been even more important.

III. As to the work accomplished so far by the International Law Commission, the Danish Government feels convinced that important results have been achieved.

On the conclusion of its proceedings, the United Nations Conference on the Law of the Sea, held in Geneva in 1958, adopted a resolution in which it paid "a tribute of gratitude, respect and admiration to the International Law Commission for its excellent work in the matter of the codification and development of international law, in the form of various drafts and commentaries of great juridical value". Similarly, the United Nations Conference on Diplomatic Intercourse and Immunities, held in Vienna in 1961, expressed its "deep gratitude to the International Law Commission for its outstanding contribution to the codification and development" of the rules on diplomatic relations. The Danish Government shares the view that these resolutions should be regarded not only as indications of appreciation of the successful accomplishment of specific tasks, but also as an explicit recognition of the important function of the International Law Commission.

It is true that the work of the International Law Commission has also been criticized. The "Model Rules on Arbitral Procedure" submitted to the General Assembly in 1958 is a case in point. Objection has been raised against this draft on the grounds that it did not respect the sovereignty of States. Quite apart from the fact that the rules were only intended to be binding on States having otherwise

agreed to submit a dispute to arbitration, the objection does not appear to be well founded. It is in the nature of things that the rule of law in international relations imposes limitations on the liberty of States to act at their own discretion. In that particular sense the sovereignty of States is limited by any new development of procedures for the binding settlement of international disputes, and, indeed, by any new substantive rule of international law. In conformity with its traditional policy, maintained since the beginning of this century, the Danish Government cannot but welcome any proposal tending to enlarge the scope of arbitral and judicial procedures in international relations. Far from being met with criticism, the International Law Commission ought to be encouraged to pursue its efforts in this direction.

As to the work of the International Law Commission in other matters, it is well known that the Commission has already completed its consideration of several of the subjects which it selected for codification when it adopted its initial programme of work. Among the subjects still pending are State responsibility and the law of treaties, on which a great amount of preparatory work has already been done, and which should be completed. In the case of the law of treaties the Commission may find it useful to proceed by selecting specific subject matters, leaving a complete code to be drawn up at a later stage. Among subjects on which little or no preparatory work has been undertaken by the Commission are such questions as: Recognition of States and Governments; Succession of States and Governments; and Jurisdictional immunities of States and their property.

It is also well known that from time to time the General Assembly has asked the International Law Commission to give special consideration to subject matters selected by the Assembly. By resolution 1289 (XIII) the International Law Commission was invited to consider the question of relations between States and inter-governmental, international organizations, and in resolution 1453 (XIV) the International Law Commission was requested to undertake a study of the question of the juridical regime of historic waters.

IV. This long list of topics which have been or remain to be considered by the International Law Commission includes subject matters of varying importance. Whatever the practical significance of these subject matters considered separately, they can only be properly appreciated as parts of a coherent pattern. The codification and development of international law is a process which is bound to go

As to the drafting and adoption of international conventions on subject matters which arise out of new technical or social developments and which, for this very reason, have not given rise to any substantial international practice or custom, the situation may be somewhat different. This is essentially what is called "progressive development of international law" in the terms of article 15 of the Statute of the International Law Commission. While it is true that the Statute provides that the General Assembly may refer proposals in this field to the Commission, experience seems to indicate that most problems of this kind are better solved by ad hoc procedures which allow political and legal factors to play their proper part. It has been suggested, for instance, that the International Law Commission should be associated with the consideration of certain aspects of the disarmament problem. Any substantial progress made towards disarmament will admittedly place the legal problems of international security in a new setting, but it would be a mistake, if not an absurdity, to isolate such legal problems from the political elements of a disarmament arrangement. Likewise, the legal problems of outer space cannot be adequately treated if they are considered merely from a legal point of view. The policy aspect is overriding. It is quite conceivable that the International Law Commission could render excellent service as an advisory body in such matters, but the Commission cannot bear the main responsibility for determining the policy of international co-operation in matters of such an essentially political nature. The General Assembly, its subsidiary bodies established ad hoc, or special conferences convened for specific purposes, appear in general to be more adequate instruments for such purposes.

VI. In the introductory observations, reference was made to the interrelationship existing between the codification of international law and the judicial settlement of international legal disputes. In the view of the Danish Government, codification of extensive areas of international law will only attain its full significance and render its full contribution to the rule of law in international relations if States accept the compulsory jurisdiction of the International Court of Justice with respect to disputes arising out of the interpretation and application of codified rules. One objection, which is often raised against the compulsory jurisdiction of the Court, especially by new States, is that no State can submit to judicial settlement of disputes on the basis of substantive rules of

international law which it has not expressly recognized or in the elaboration of which it has not taken part. Without expressing an opinion on the general merits of this argument, the Danish Government wishes to point out that the argument cannot reasonably be applied to rules of law elaborated within the framework of the United Nations, particularly as part of the general work of codification.

It is therefore with considerable concern that the Danish Government has seen two successive United Nations conferences - that of 1958 on the Law of the Sea, and that of 1961 on Diplomatic Intercourse and Immunities - reject proposals for the compulsory judicial settlement of disputes arising out of the interpretation and application of the conventions adopted by these conferences, and relegate the clauses on compulsory jurisdiction to optional protocols which have been signed by a limited number of States only and which, by their optional character, are the very negation of a general compulsory system of judicial settlement. The Danish Government hopes, therefore, that the precedents established in this respect by the two conferences mentioned will not be taken as guidance for the future course of codification of international law.

VII. In conclusion, the Danish Government wishes to summarize the preceding observations as follows:

1. The process of adapting international law to the ever changing conditions of international relations should be pursued by the various means and procedures currently used within the competent international organs and organizations, bearing in mind the desirability of combining progressive evolution with the preservation of indispensable elements of stability in international relations.

2. The International Law Commission, whose composition adequately reflects the various groups of social and legal systems and the expanded membership of the United Nations, should be allowed to continue its work according to its own programme, with such additions and supplements as the General Assembly may decide from time to time.

3. Codification and development of international law should be contemplated as only one aspect of the rule of law in international relations, and should - in addition to the purposes immediately served - contribute towards the creation of conditions in which the compulsory jurisdiction of the International Court of Justice may gain extended recognition.

9. GHANA

Transmitted by a note verbale of 30 June 1961 from the Minister of Foreign Affairs of Ghana

[Original text: English]

The Minister of Foreign Affairs ..... suggests that the following topics should be included in the list of the International Law Commission:

(1) The law of space.
(2) Compulsory jurisdiction of International Court of Justice.
(3) State jurisdiction.
(4) International responsibility.
(5) The determination of international responsibility.
(6) Enforcement of international law.
(7) The acquisition of statehood.
(8) Ad hoc diplomacy or special missions.
(9) Consular intercourse and immunities.
(10) Recognition of States and Governments.
(11) Succession of States and Governments.
(12) Jurisdictional immunities of States and their property.
(13) Nationality.
(14) Right of asylum.
(15) Treatment of aliens.
(16) Extradition.

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10. MEXICO

Transmitted by a letter of 30 June 1961 from the Permanent Representative of Mexico to the United Nations

/Original text: Spanish/

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In the opinion of the Government of Mexico, it would be desirable for the General Assembly to undertake a general survey of the present state of international law, with a view to strengthening and adapting to present circumstances the encouragement which, under Article 13 of the Charter, the General Assembly must give to the progressive development of international law and its codification.

Since the end of the last war, and during the past fifteen years, there have, in both the political and economic fields, been many events and phenomena, and there have emerged various aspirations and concepts, which should undoubtedly affect the shaping of contemporary international law. For example, the preliminary debate in the Sixth Committee in 1960 revealed an awareness on the part of most States of the necessity and timeliness of undertaking a general review of the whole field of international law.

A full debate in the General Assembly on the possible legal implications of the new trends apparent in the world today would be extremely important and valuable in itself. In addition, however, we feel that the conclusions arrived at in this debate should be reflected in the selection of new topics suitable for codification or conducive to the progressive development of international law, with a view to their being considered by the International Law Commission. This is particularly necessary as studies of most of the more important topics selected by the Commission in 1949 have been either fully or partially completed.

On the question of the organ which should be responsible for selecting those topics, the Government of Mexico considers that it should be the General Assembly. To select topics for international codification means to pronounce judgement on the political and economic questions which, at any given time, affect the world of international relations. The strongly political aspects of this task are apparent

even where the purpose is to formulate legal principles. For this reason, it appears essential that it should be performed by representatives of States, rather than by a body like the International Law Commission, the members of which act in the capacity of individual experts.

In the view of the Government of Mexico, the following topics, inter alia, might be subjects for profitable study by the International Law Commission, it being understood that they are not listed in order of importance:

1. Succession of States and Governments. Since many new nations have recently become independent, this problem takes on particular importance. A study of the topic would naturally involve important questions of all kinds: the validity of treaties, the problem of nationalities, inheritance, debts, acquired rights, indemnification, compensation and, in addition, certain problems which might arise concerning membership in international organizations. Problems which in future might emerge in the converse case of the amalgamation or federation of a number of States might also be included in a study of this topic.

2. The problem of outer space. Apart from the military and political aspects of this problem, which are being studied by other United Nations organs, it would appear that an attempt might be made at the same time to formulate certain minimum basic rules - without of course attempting, at this stage, to produce a complete code - which might even help in future studies of the military and political aspects of the problem.

3. Sources of international law. There is need for a re-examination of this question in the light of the many and varied decisions and resolutions of all kinds, some of doubtful legal validity, which have been adopted by the various international organizations. The actions of these organizations undoubtedly have a strong impact on international affairs and contribute in one form or another to the creation of international law. As the creation of international law in this manner is becoming daily more important, this might be a profitable topic of study for the International Law Commission.

4. There are also certain corollaries of the principle of non-intervention which should be internationally codified. At the inter-American level, a Convention signed at Havana in 1928 sets out the obligations and rights of States

in cases of civil war. Such practices as foreign subversion and external assistance to rival factions in civil wars, which that Convention is expressly designed to control and to limit, appear to take place more and more frequently in other continents. In the view of the Government of Mexico, consideration should be given to the desirability of extending the provisions of that Convention to all countries or perhaps of formulating new provisions that would be in keeping with present conditions and be universally applicable.

These are the observations which the Government of Mexico submits for the consideration of the General Assembly and the list of topics which it believes should be studied.
