

ARTICLE 13 (1) (a)

Provision relating to the progressive development and codification
of international law

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TEXT OF ARTICLE 13 (1) (a)

Provision relating to the progressive development and codification
of international law

1. The General Assembly shall initiate studies and make recommenda-
tions for the purpose of:

 a. ...encouraging the progressive development of international law
and its codification.

INTRODUCTORY NOTE

1. In the corresponding study of Article 13 (1) (a) in volume I of the Repertory, section I ("General Survey") dealt with the establishment of the International Law Commission by the General Assembly to give effect to the provision of the Charter. Although certain provisions of the Statute of the Commission were amended by the General Assembly (see G A resolutions 984 (X) and 986 (X)) at its tenth session, these amendments do not bear on the interpretation or application of the provisions of Article 13 (1) (a) with regard to the progressive development of international law and its codification. ^{1/} Therefore no further information has been included under the "General Survey" in the present study.

2. During the period under review, the General Assembly took certain decisions relating to the studies which had previously been initiated in pursuance of Article 13 (1) (a); it also made recommendations bearing on that provision of the Charter. At the eighth session of the International Law Commission in connexion with the discussion of the law of the sea, consideration was given to the terms "progressive development" and "codification" of international law. The actions of the General Assembly and the observation of the International Law Commission are examined under section II ("Analytical Summary of Practice") in the present study. The sub-headings under section II,A have been omitted in order to facilitate the presentation of the supplementary material relating to the "initiation of studies."

****I. GENERAL SURVEY****II. ANALYTICAL SUMMARY OF PRACTICE****A. The initiation of studies**

3. In the period covered by the present study, no decision had been taken by the General Assembly to initiate studies envisaged in Article 13 (1) (a) with regard to the encouragement of the progressive development of international law and its codification.

4. As to the studies which had previously been initiated and entrusted to various organs of the United Nations, further actions taken by the General Assembly are as follows:

(a) With regard to the draft Code of Offences against the Peace and Security of Mankind, ^{2/} the General Assembly decided ^{3/} to postpone further consideration until the Special Committee on the question of defining aggression, ^{4/} established by Assembly resolution 895 (IX), had submitted its report.

^{1/} In this study where reference is made to Article 13 (1) (a), in the text or in footnotes, it is understood to be a reference to the second part of sub-paragraph (1) (a) of Article 13 relating to the encouragement of progressive development of international law and its codification.

^{2/} See in the Repertory, Vol. I, under Article 13 (1) (a), paras. 11 and 14.

^{3/} G A resolution 897 (X).

^{4/} See in the Repertory, Vol. I, under Article 13 (1) (a), para. 16.

(b) Consideration of the question of international criminal jurisdiction 5/ was also postponed 6/ until the Assembly had taken up the report of the Special Committee on the question of defining aggression and the draft Code mentioned above.

(c) In respect of the draft articles on the continental shelf submitted 7/ by the International Law Commission, the General Assembly requested 8/ the Commission "to devote the necessary time to the study of the regime of the high seas, the regime of territorial waters and all related problems in order to complete its work on these topics and submit its final report in time for the General Assembly to consider them as a whole." Pursuant to this provision, the International Law Commission submitted 9/ to the General Assembly draft articles concerning "the law of the sea", grouping together systematically all the rules it had adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of living resources of the sea.

B. The making of recommendations

1. Recommendations of a general nature

a. PUBLICATION OF DOCUMENTS OF THE INTERNATIONAL LAW COMMISSION

5. The International Law Commission, at its seventh session, had before it a draft resolution concerning the publication of the Commission's documents. In support of the draft resolution, the Chairman of the Commission pointed out 10/ that under its Statute the International Law Commission could recommend to the General Assembly not only to take note of or adopt the report of the Commission by resolution, but even "to take no action, the report having already been published." If the General Assembly raised no objection to codification in that manner by the International Law Commission, the rules codified virtually became binding upon the international community. The Commission thus had an important role in the development of international law, and its functions were, at times, of a quasi-legislative nature. It was therefore extremely important that not only the General Assembly, but also the learned world — and even the public at large — should know how the International Law Commission had arrived at its formulations.

6. At its 323rd meeting, the Commission unanimously adopted the draft resolution which reads as follows: 11/

"The International Law Commission,

"Recalling that in its resolution 176 (II) of 21 November 1947 on the teaching of international law, the General Assembly stated that 'one of the most effective means of furthering the development of international law consists in promoting public interest in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations',

5/ Ibid., para. 15.

6/ G A resolution 898 (IX).

7/ G A (VIII), Suppl. No. 9, chapter III.

8/ G A resolution 899 (IX), Cf. G A resolution 798 (VIII).

9/ G A (XI), Suppl. No. 9 (A/3159), chapter II.

10/ A/CN.4/SR.322, paras. 39-41. See also in the Repertory, Vol. I, under Article 13 (1) (a), paras. 31-38.

11/ See Report of the International Law Commission covering the work of its seventh session, G A (X), Suppl. No. 9 (A/2934), para. 35.

"Considering that the Commission is the organ established by the General Assembly for the promotion of the progressive development of international law and its codification, and that it is highly desirable that the records of its proceedings be made easily available both to educational institutions and to the general public,

"Considering that, for various reasons, it has been difficult for interested persons and institutions to acquire the studies, special reports and summary records of the Commission,

"Recalling that the General Assembly, in its resolution 686 (VII) of 5 December 1952, requested the Secretary-General to prepare a report concerning, inter alia, the contents of a Juridical Yearbook as a possible publication of the United Nations,

"1. Requests the Secretary-General, in preparing the above-mentioned report, to take into consideration the possibility of printing the studies, special reports and summary records of the Commission;

"2. Recommends to the General Assembly, in connexion with its consideration of the report of the Commission on the work of its seventh session, to examine the possibilities of printing the studies, special reports and summary records of the Commission, including the possibility of publishing them in the United Nations Juridical Yearbook contemplated in General Assembly resolution 686 (VII)."

7. At the tenth session of the General Assembly, the majority of representatives in the Sixth Committee were agreed that as the question of a juridical yearbook of the United Nations referred to in the resolution of the International Law Commission was not on the agenda, no decision regarding the publication of such a yearbook could be taken at that session. 12/ A draft resolution 13/ which reproduced the preamble of the resolution of the International Law Commission was later withdrawn in favour of another draft resolution 14/ which, upon the recommendation of the Sixth Committee and with slight modifications, was adopted by the General Assembly as resolution 987 (X) reading as follows:

"The General Assembly,

"Recalling the terms of its resolution 176 (II) of 21 November 1947,

"Considering paragraph 35 of the report of the International Law Commission on the work of its seventh session and the study prepared by the Secretary-General in pursuance of General Assembly resolution 686 (VII) of 5 December 1952 concerning ways and means for making the evidence of customary international law more readily available,

"1. Requests the Secretary-General to arrange as soon as possible for the printing of the following documents relating to the first seven sessions of the International Law Commission:

12/ See report of the Sixth Committee, G A (X), annexes, a.i. 50, A/3028, para. 29.

13/ Ibid., A/C.6/L.356.

14/ Ibid., A/C.6/L.359.

"(a) The studies, special reports, principal draft resolutions and amendments presented to the Commission, in their original languages;

"(b) The summary records of the Commission, initially in English;

"2. Requests the Secretary-General also to arrange for the printing each year, in English, French and Spanish, of the documents mentioned in the preceding paragraph relating to future sessions of the Commission;

"3. Invites the International Law Commission to express its views for the guidance of the Secretary-General with respect to the selection and editing of the documents to be printed and, if necessary in its opinion, to resubmit to the General Assembly the question of the printing of the documents of the Commission."

b. THE QUESTION OF STATING DISSENTING OPINIONS IN THE REPORT OF
THE INTERNATIONAL LAW COMMISSION

8. The International Law Commission at its seventh session considered a draft resolution submitted by one of its members which read as follows: 15/

"The International Law Commission,

"Considering that it was created with the object of promoting the progressive development of international law and its codification (article 1 of the Statute of the Commission),

"Considering that it is required under article 20 of its Statute, in preparing its drafts with a view to the codification of international law and in submitting them to the General Assembly, to specify 'the extent of agreement on each point in the practice of States and in doctrine', and the 'divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution',

"Considering that the best method of achieving this is to allow the members of the Commission to express their dissenting opinions in an annex to the final report,

"Decides that any member of the International Law Commission shall have the right to add a short statement of his dissenting opinion to any decision taken by the Commission on draft rules of international law, if the said decision does not in whole or in part express the unanimous opinion of the members of the Commission."

9. The author of the draft resolution stressed 16/ that his proposal was concerned only with the cases where the Commission adopted draft rules of international law which were presented to the General Assembly and to governments. He further stated 17/ that since the Commission was composed of experts representing several different legal systems, it was important that the opinion of the representative of any one of those systems, when it did not find expression in the resolutions adopted by the Commission, should be made known to those bodies which were called upon to deal with the Commission's resolutions and formulations.

15/ See Report of the International Law Commission covering the work of its seventh session, G A (X), Suppl. No. 9 (A/2934), para. 37.

16/ A/CN.4/SR.322, para. 46.

17/ Ibid., para. 48.

10. Some other members of the Commission stressed 18/ the homogeneity of the Commission's report and the adequacy of the existing system.

11. The draft resolution was rejected 19/ by 8 votes to 5. The Commission reaffirmed the existing rule adopted at its third session, that detailed explanation of dissenting opinions should not be inserted in the report, but merely a statement to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report. 20/

2. Recommendations on specific subjects or questions

12. In accordance with General Assembly resolution 797 (VIII), 21/ the item "Arbitral procedure: comments of Governments on the draft on arbitral procedure prepared by the International Law Commission" was included in the agenda of the tenth session of the Assembly and referred to the Sixth Committee for consideration.

13. Commenting on the draft 22/ on arbitral procedure prepared by the International Law Commission, some representatives 23/ in the Sixth Committee considered that besides codifying certain established rules, the draft introduced many innovations into the procedure of international arbitration. These representatives maintained that in proposing such novel provisions the International Law Commission had borne in mind that its task was not only to codify but also to promote the progressive development of international law. Other delegates, while recognizing the dual role of the Commission, were nevertheless concerned about what they considered to be a discrepancy between existing principles of arbitral procedure and some of the rules newly developed by the Commission. 24/

14. The discussion in the Sixth Committee concerning the action to be taken by the General Assembly centred in the main on three courses of action. According to one proposal, 25/ the General Assembly should commend the draft to Member States as a guide for their use in the drawing up of provisions for inclusion in arbitration treaties and agreements. Another proposal, in the form of an amendment, 26/ was to refer the draft back to the International Law Commission for renewed consideration in the light of the comments of Governments and the discussions in the Sixth Committee. A third proposal, also in the form of an amendment, 27/ would request the Secretary-General to convene an international conference to consider the conclusion of a convention on arbitral procedure as soon as a certain number of States had signified their willingness to participate.

15. As a result of discussion, the second course of action referred to in the preceding paragraph was approved by the Sixth Committee and, upon the recommendation of the Sixth Committee, adopted by the General Assembly as resolution 989 (X) which read as follows:

18/ A/CN.4/SR.322 and 323.

19/ A/CN.4/SR.323, para. 53.

20/ G A (X), Suppl. No. 9 (A/2934), para. 38.

21/ See also in the Repertory under Article 13 (1) (a), Vol. I, para. 45.

22/ G A (VIII), Suppl. No. 9, p. 9.

23/ G A (X), annexes, a.i. 52, A/3083, para. 10.

24/ G A (X), 6th Com., 383rd mtg., para. 47; 387th mtg., para. 33; 463rd mtg., para. 10.

25/ Ibid., A/C.6/L.369 and A/C.6/L.369/Rev.1.

26/ Ibid., A/C.6/L.370 and A/C.6/L.370/Rev.1.

27/ Ibid., A/C.6/L.371.

"The General Assembly,

"Having considered the draft on arbitral procedure prepared by the International Law Commission at its fifth session and the comments thereon submitted by Governments,

"Recalling General Assembly resolution 797 (VIII) of 7 December 1953, in which it was stated that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure,

"Noting that a number of suggestions for improvements on the draft have been put forward in the comments submitted by Governments and in the observations made in the Sixth Committee at the eighth and current sessions of the General Assembly,

"Believing that a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements,

"1. Expresses its appreciation to the International Law Commission and the Secretary-General for their work in the field of arbitral procedure;

"2. Invites the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session;

"3. Decides to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure."

C. The meaning of "progressive development" and "codification" of international law

1. *As set forth in the Statute of the International Law Commission*

16. Article 15 of the Statute of the International Law Commission which explained the meaning of the terms "progressive development" and "codification" of international law remains unmodified. However, the case described in paragraphs 17 and 19 below further illustrated the difficulty of drawing a clear-cut distinction between those two terms. 28/

2. *In the light of the practice of the International Law Commission*

17. The introduction to the law of the sea, contained in the draft report of the International Law Commission covering the work of its eighth session, referred to the two aspects of the Commission's work, namely, "the progressive development of international law," and "the codification of international law." It proceeded with the following observation: 29/

28/ See in the Repertory, Vol. I, under Article 13 (1) (a), para. 48.

29/ A/CN.4/L.681/Add.1, paras. 19 and 20.

"During the eight years of its existence the Commission has become more and more convinced that the very clear distinction established in the Statute between these two activities cannot be maintained in practice. Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in the practice of States', but also several of the provisions adopted by the Commission, and based on a recognized principle of international law, have been framed in such a way as to be suitable for inclusion in the category of the 'progressive development of international law.' At first the Commission tried to draw a distinction between articles in the one category and those in the other but has had to abandon the attempt; few of the rules adopted belong purely to codification and many belong partly to one and partly to the other category."

18. During the discussion of the above-quoted paragraph by the International Law Commission, the following views were expressed: 30/ (1) The wording of the paragraph was too general; while in the case of the law of the sea it was probably difficult to maintain a clear distinction between the codification and the progressive development of international law, that difficulty was much less true of other items on the Commission's programme of work. (2) While the Commission should not attempt to indicate whether each article approved by it was lex lata or lex ferenda, it was going too far to say that all attempts to distinguish between the codification and the progressive development of international law must be abandoned. There was a distinction between the two, although it might not always be possible to say exactly where it lay.

19. The Rapporteur subsequently redrafted the paragraph in question, taking into account the opinions expressed in the Commission. The final text of this paragraph and its preceding paragraph were included in the report of the Commission to the eleventh session of the General Assembly as follows: 31/

"When the International Law Commission was set up, it was thought that the Commission's work might have two different aspects: on the one hand the 'codification of international law' or, in the words of article 15 of the Commission's statute, 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'; and on the other hand, the 'progressive development of international law' or '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.'

"In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognized principle of international law', have been framed in such a way as to place them in the 'progressive development category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either."

30/ I.L.C., Yearbook, 1956, Vol. I, Summary records of the eighth session, 374th mtg., paras. 41, 42, 44, 45, 47 and 49.

31/ G A (XI), Suppl. No. 9 (A/3159), paras. 25 and 26.