ARTICLE 13 (1) (a)

With regard to the encouragement of the progressive development of international law and its codification

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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 recommendations for the purpose of:

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

INTRODUCTORY NOTE

1. In the Repertory study of Article 13 (1) (a), 1/ the General Survey dealt with the General Assembly's establishment of the International Law Commission to give effect to this provision of the Charter. Although certain articles of the statute of the Commission were amended by General Assembly resolution 1103 (XI), 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. The present study, therefore, does not include a General Survey.

1/ Throughout this study, references to corresponding Articles in the Repertory and Supplement No. 1 indicate the second part of Article 13 (1) (a), relating to the progressive development and codification of international law.

ANALYTICAL SUMMARY OF PRACTICE

A. The initiation of studies

2. During the period under review no decision was taken by the General Assembly to initiate studies envisaged in Article 13 (1) (a) relating to the encouragement of the progressive development of international law and its codification. Further action taken by the General Assembly with regard to studies which had previously been initiated and entrusted to various organs of the United Nations is described in the following paragraphs.

3. With regard to the question of defining aggression, the General Assembly, in resolution 1181 (XII), established a committee to examine the replies of Governments in order to determine when it would be appropriate for the General Assembly to take up the question again. The committee, which met in April 1959, was of the opinion that the replies did not indicate any change of attitude on the part of Member States and decided 2/ to postpone further consideration of the question until April 1962.

4. Regarding the draft Code of Offences against the Peace and Security of Mankind, 3/ the General Assembly decided 4/ to defer consideration of the question "until such time as the General Assembly takes up again the question of defining aggression" and requested the Secretary-General to transmit the text to Member States for comment.

5. In respect of the question of international criminal jurisdiction, 5/ the General Assembly decided 6/ to defer consideration of the question "until such time as the General Assembly takes up again the question of defining aggression and the question of a draft Code of Offences against the Peace and Security of Mankind".

6. The General Assembly decided 7/ to call an international conference of plenipotentiaries to examine the draft articles on the law of the sea prepared by the International Law Commission. 8/ The recommendations of the General Assembly regarding the conference, are given in section B 2 a of the present study. The Conference on the Law of the Sea, convened in February 1958, adopted the following conventions: (a) Convention on the Territorial Sea and the Contiguous Zone; (b) Convention on the High Seas; (c) Convention on Fishing and Conservation of the Living Resources of the High Seas; and (d) Convention on the Continental Shelf.

7. With regard to the question of statelessness, 9/ the General Assembly, in resolution 896 (IX) of 4 December 1954, expressed its desire that an international conference of plenipotentiaries should be convened to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States had communicated to the Secretary-General their willingness to co-operate in such a

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2/ A/AC.91/2 (mimeographed), p. 5.
3/ See Repertory, vol. I, under Article 13 (1) (a), paras. 11 and 14, and Supplement No. 1, vol. I, under this Article, para. 4 (a).
4/ G A resolution 1186 (XII).
5/ See Repertory, vol. I, under Article 13 (1) (a), para. 15, and Supplement No. 1, vol. I, under this Article, para. 4 (b).
6/ G A resolution 1187 (XII).
7/ G A resolution 1105 (XI).
8/ See Repertory, Supplement No. 1, vol. I, under Article 13 (1) (a), para. 4 (c).
9/ See Repertory, vol. I, under Article 13 (1) (a), para. 27.

conference. The Conference on the Elimination or Reduction of Future Statelessness was convened in Geneva for four weeks, beginning 24 March 1959. It chose as the basis of its work the draft Convention on the Reduction of Future Statelessness, prepared by the International Law Commission. It adopted seventeen articles but was unable to complete its work. 10/

B. The making of recommendations

** *1. Recommendations of a general nature*

2. Recommendations on specific subjects or questions

a. THE LAW OF THE SEA

8. By resolution 1105 (XI), the General Assembly decided "that an international conference of plenipotentiaries should be convoked to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate" and recommended that "the conference should study the question of free access to the sea of land-locked countries, as established by international practice of treaties". Among other documents, the General Assembly referred to the Conference the report of the International Law Commission, which contained draft articles and commentaries on the law of the sea, "as the basis for its consideration of the various problems involved in the development and codification of the law of the sea".

9. The Conference on the Law of the Sea, convened in 1958, adopted the four conventions mentioned in paragraph 6 above. It also adopted a resolution requesting the General Assembly, at its thirteenth session, to study the advisability of convening a second conference for further consideration of questions left unsettled by the Conference. By resolution 1307 (XIII), the General Assembly recalled "that the Conference made an historic contribution to the codification and progressive development of international law by preparing and opening for signature conventions on nearly all of the subjects covered by the draft articles on the law of the sea drawn up by the International Law Commission", noted that "no proposal concerning the breadth of the territorial sea or fishery limits received the two-thirds majority required for adoption by the Conference", and decided that a second conference should be called for purpose of considering these questions.

b. ARBITRAL PROCEDURE

10. As previously reported, 11/ General Assembly resolution 989 (X) had expressed belief that a set of rules on arbitral procedure would inspire States in drawing up provisions for inclusion in international treaties and special arbitration agreements, and had invited the International Law Commission to report to the General Assembly at its thirteenth session, after considering the comments of Governments and the discussions in the Sixth Committee regarding the draft on arbitral procedure. The General Assembly, in the same resolution, had decided to place the question of arbitral procedure on the provisional agenda of its thirteenth session.

10/ G A (XIV), Suppl. No. 1 (A/4132), p. 94.
11/ Repertory, Supplement No. 1, vol. I, under Article 13 (1) (a), para. 15.

11. In view of the General Assembly resolution, the International Law Commission at its ninth session discussed 12/ the "ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether the object should be a convention or simply a set of rules which might inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements". A decision was taken in favour of the second alternative.

12. The Commission reported 13/ that in arriving at this conclusion a majority of its members were of the opinion that the draft as it stood constituted a homogeneous and consistent whole. The concept of arbitration, however, on which the draft was based, though not going beyond what two States might be prepared to accept in the submission of a particular dispute to arbitration ad hoc or in concluding a bilateral treaty of arbitration governing the settlement of disputes between themselves was clearly beyond what the majority of Governments were ready to accept as a general multilateral treaty of arbitration. In order to be made acceptable to a majority of Governments, the draft would require complete revision and, in all probability, alteration in its fundamental concept. In the circumstances it was considered preferable that the draft should retain its general form and structure but should be presented to the General Assembly as a set of model rules upon which States could draw, rather than as a basis for a general multilateral convention.

13. At its tenth session, the International Law Commission adopted the final text on arbitral procedure in the form of a set of model draft articles. In presenting its model rules on arbitral procedure to the General Assembly, the Commission reported 14/ that though they contained changes of substance and entailed a change of objective, the final text did not represent any fundamental alteration of structure or concept. The draft articles were intended as a guide to States and, if adopted by the General Assembly, would become binding upon a Member State only in the following circumstances: 15/

> "(i) If they were embodied in a convention between two or more States for signature and ratification inter se, intended to govern the settlement of all, or of any specified category of future disputes arising between them;
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> "(ii) If they were similarly embodied in a particular arbitral agreement for the settlement ad hoc of an already existing dispute;
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> "(iii) If - which is a variant of (ii) - parties to a dispute which they propose to refer to arbitration, wished to embody the articles, in whole or in part, in their arbitral agreement or in the compromis d'arbitrage, or to include clauses based upon them, or for which the articles would serve as a model;
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> "(iv) If, in the same circumstances as (iii), the parties did not wish, or found it difficult, to draw up a detailed arbitral agreement or compromis, and preferred simply to declare that the settlement of the dispute and the process of arbitration would be governed by the present articles with or without such exceptions, variations or additions as the parties might indicate."

12/ G A (XII), Suppl. No. 9 (A/3623), para. 19.
13/ G A (XIII), Suppl. No. 9 (A/3859), paras. 13 and 14.
14/ G A (XIII), Suppl. No. 9 (A/3859), para. 15.
15/ Ibid., para. 17.

14. The question of how far this draft might be applicable to other types of arbitration, such as arbitration between international organizations, or between States and international organizations, or between States and foreign private corporations or other judicial entities, was also discussed but the Commission decided not to proceed with these aspects of the matter.

15. In accordance with General Assembly resolution 989 (X), the question of arbitral procedure was placed on the agenda of the General Assembly at its thirteenth session and was referred to the Sixth Committee for consideration. 16/

16. Many representatives in the Sixth Committee found 17/ the draft rules open to the same criticisms as had been considered during the tenth session of the General Assembly. The International Law Commission, it was stated, had not recast the text of the 1953 draft but had merely put it forward as a set of model rules, while preserving its general form and structure. The draft articles therefore possessed the basic characteristics of the earlier draft, to which fundamental objections had been raised. They departed from the principle of international law that an undertaking to arbitrate entered into by sovereign States was based on the autonomy of the will of the parties, and they endeavoured to introduce an element of obligation or compulsion which was foreign to the traditional concept of arbitral procedure and incompatible with the principle of the sovereignty of States. Objection was taken, in large part, to the powers assigned to the International Court of Justice and to the arbitral tribunal; to a great extent, the will of the parties was replaced by decisions of the International Court of Justice or its President or the arbitral tribunal. By providing for the intervention of the Court at various stages, arbitration had been converted into a judicial procedure, and the necessary distinction between the two entirely different procedures of arbitration and judicial settlement had been obscured.

17. It was further stated that the draft tended to depart from the traditional diplomatic nature of arbitration and to destroy its characteristic flexibility; it sought to establish a system half-way between arbitration and judicial settlement which might be called judicial arbitration. Moreover, it was not evident that the draft rules could be regarded as fundamental principles of international law on arbitration. It was also thought that the International Law Commission had placed too much emphasis on the progressive development of international law, and the draft could not be considered as a work of codification.

18. Several representatives, however, were of the opinion that the draft might usefully guide States in drawing up arbitral agreements. They thought that it embodied a set of carefully considered rules which represented a collective doctrinal opinion of great legal value and that it was an important contribution to the cause of the peaceful settlement of international disputes.

19. To others, the draft rules were broadly acceptable; the opinion was expressed that since they were not submitted as a draft convention but only as a guide to States, assertions that the rules made arbitration compulsory and infringed on the independence and sovereignty of States could not be considered well founded. Adoption of the rules would not be prejudicial to classical arbitration; on the contrary, such a set of rules had long been needed in order to ensure that arbitral agreements would not be frustrated. Other representatives emphasized the flexibility of the rules, which were not indivisible, and remarked that States would have the option of using

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16/ G A (XIII), Annexes, a.i. 57, p. 4, A/3983, paras, 15-28.
17/ Repertory, Supplement No. 1, vol. I, under Article 13 (1) (a), para. 13.

provisions which they found suitable to their needs. Moreover, States remained free to subject any of the articles to whatever variations they deemed appropriate.

20. It was also stated that there was nothing in the draft which could be considered as detracting in any way from the sovereignty of States because a State signing an undertaking to arbitrate did so in full exercise of its sovereign powers. Other representatives, in referring to the view that adoption of the draft would involve an infringement of State sovereignty, expressed themselves in favour of such limitation of sovereignty as was necessary to ensure the effectiveness of arbitration.

21. Some representatives otherwise favourable to the draft had reservations as to specific provisions. Many representatives thought that the expression "model rules" was ambiguous and conveyed the impression that the International Law Commission considered them perfect. Others thought the use of the expression was justified in light of the debate at the tenth session of the General Assembly and the terms of General Assembly resolution 989 (X).

22. On the question of the action to be taken with respect to the draft rules, various opinions were expressed. Representatives who had offered serious criticism of the rules were of the view that the General Assembly should not recommend them to Governments, but should merely take note of them and avoid any suggestion of approval. Other representatives considered that the draft rules should be brought to the notice of Member States to guide them in drawing up arbitral agreements. Still others thought that Governments should be invited to send any comments they might wish to make on the draft to the Secretary-General. Many representatives were in favour of a review of the question by the United Nations at an appropriate time, in the light of the comments and practice of Governments.

23. Following the discussion, the Sixth Committee approved a draft resolution which was adopted by the General Assembly as resolution 1262 (XIII). It reads as follows:

"The General Assembly,

"Recalling its resolutions 797 (VIII) of 7 December 1953 and 989 (X) of 14 December 1955,

"Considering that arbitration is one of the means for the pacific settlement of disputes referred to in the Charter of the United Nations,

"Having considered chapter II, on arbitral procedure, of the report of the International Law Commission covering the work of its tenth session,

"Taking note of the comments in that report to the effect, in particular, that the draft articles on arbitral procedure contained therein would have no binding effect on States unless accepted by them and save to the extent that each one is accepted by them in treaties of arbitration or in a compromis.

"Taking into consideration the observations of Governments and the statements made in the Sixth Committee at the thirteenth session of the General Assembly,

"1. Takes note of chapter II of the report of the International Law Commission covering the work of its tenth session;

"2. Expresses its appreciation to the International Law Commission and the Secretariat for their work on arbitral procedure;

"3. Brings the draft articles on arbitral procedure contained in the report of the International Law Commission to the attention of Member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration or compromis;

"4. Invites Governments to send to the Secretary-General any comments they may wish to make on the draft, and in particular on their experience in the drawing up of arbitral agreements and the conduct of arbitral procedure, with a view to facilitating a review of the matter by the United Nations at an appropriate time."

c. DIPLOMATIC INTERCOURSE AND IMMUNITIES

24. By resolution 685 (VII) the General Assembly had requested the International Law Commission to undertake the codification of the topic "Diplomatic intercourse and immunities". At its tenth session, the Commission adopted a final draft 18/ of forty-five articles which it submitted to the General Assembly, proposing that it should be recommended to Member States with a view to the conclusion of a convention. The draft dealt only with permanent diplomatic missions; a report on the question of ad hoc diplomacy was, however, planned for the future. The draft did not deal with the questions of relations between States and international organizations, or the privileges and immunities of such organizations.

25. The item was included in the agenda of the thirteenth session of the General Assembly and referred to the Sixth Committee for consideration. Commenting on the draft prepared by the Commission, a number of representatives were of the opinion 19/ that the subject was ripe for codification and that the draft, though lacking a preamble and final clauses, provided a suitable basis for a convention.

26. Some representatives, however, expressed doubts 20/ about the desirability of attempting to regulate the subject by convention. They were of the opinion that it was adequately governed by custom and usage, and regulation by an international instrument would merely introduce an unnecessary element of rigidity. Some States might not be willing to obligate themselves by treaty to grant all the privileges accorded in practice. These representatives thought that adoption of a convention was not the best course to follow, at least at that time. They suggested that a mere restatement of the law on the subject would be preferable to regulation by convention.

27. Representatives in favour of codifying the topic by convention were divided into two groups. Some thought 21/ that the question should be discussed by the General Assembly at a later session, while others favoured convening a conference of plenipotentiaries for the purpose. It was finally agreed to leave the question open until the fourteenth session of the General Assembly. A draft resolution 22/ was submitted to that effect.

28. Some representatives were of the opinion 23/ that the absence of recommendations by the International Law Commission on ad hoc diplomacy, and the fact that consideration of consular intercourse and immunities had not yet been completed, made it impossible to prepare a comprehensive and systematic study of the topic of diplomatic intercourse and immunities. They thought that study of all these questions

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18/ G A (XIII), Suppl. No. 9, chapter III, para. 53.
19/ G A (XIII), Annexes, a.i. 56, p. 5, A/4007, para. 27.
20/ Ibid., paras. 28 and 29.
21/ G A (XIII), Annexes, a.i. 56, p. 5, A/4007, paras. 30 and 31.
22/ Ibid., para. 11 (A/C.6/L.429 and Add.1); ibid., p. 4, A/C.6/L.429/Rev.1.
23/ G A (XIII), Annexes, a.i. 56, p. 5, A/4007, para. 33.

should be co-ordinated, and that final consideration of the draft should await the completion of drafts on the other closely related subjects.

29. For reasons of economy, it was suggested 24/ that if a conference should be convened, it should prepare not only a convention on the topic of diplomatic intercourse and immunities, but also conventions on consular intercourse and immunities, on ad hoc diplomacy and on the relations between States and international organizations.

30. One representative stated 25/ that the development of permanent international organizations presented a number of legal questions and that it would be useful not only to codify the rules contained in special conventions, but also to work out general principles which would serve as a basis for the progressive development of international law on the subject. He therefore submitted a draft resolution 26/ which requested the International Law Commission to consider further the question of relations between States and international organizations. It met with favourable response from several representatives. It was pointed out, in this connexion, that the Commission was given very wide discretion in dealing with the study.

31. Following the discussion, the Sixth Committee approved two resolutions, which the General Assembly adopted. Resolution 1288 (XIII) reads as follows:

"The General Assembly,

"Having considered chapter III of the report of the International Law Commission covering the work of its tenth session which contains draft articles and commentaries on diplomatic intercourse and immunities,

"Recalling that the General Assembly, in its resolution 685 (VII) of 5 December 1952, requested the International Law Commission to undertake the codification of the topic "Diplomatic intercourse and immunities", and to treat it as a priority topic,

"Taking into account paragraph 25 of the report of the International Law Commission covering the work of its ninth session wherein it is stated that the Commission decided to present a final report on the subject of diplomatic intercourse and immunities to the General Assembly at its thirteenth session, after reviewing the subject in the light of the comments of Governments,

"Taking into account also paragraph 50 of the report of the International Law Commission covering the work of its tenth session wherein it is stated that the Commission decided to recommend to the General Assembly that the draft articles on diplomatic intercourse and immunities should be recommended to Member States with a view to the conclusion of a convention,

"1. Expresses its appreciation to the International Law Commission for its work on diplomatic intercourse and immunities;

"2. Invites Member States to submit their comments on the draft articles concerning diplomatic intercourse and immunities not later than 1 June 1959;

24/ Ibid., para. 34.
25/ Ibid., para. 35.
26/ G A (XIII), Annexes, a.i. 56, A/C.6/L.427; ibid., p. 2, A/C.6/L.427/Rev.1.

"3. Requests the Secretary-General to circulate such comments so as to facilitate the discussion of the subject at the fourteenth session of the General Assembly;

"4. Decides to include the item entitled "Diplomatic intercourse and immunities" in the provisional agenda of its fourteenth session with a view to the early conclusion of a convention on diplomatic intercourse and immunities;

"5. Decides to consider at its fourteenth session the question to what body the formulation of the convention should be entrusted."

32. Resolution 1289 (XIII) reads as follows:

"The General Assembly,

"Taking note of paragraph 51 of the report of the International Law Commission covering the work of its tenth session, which refers to ad hoc diplomacy and, in particular, to diplomatic conferences, and of paragraph 52 of the same report, which refers to relations between States and international organizations,

"Considering the importance and development of international organizations,

"Considering the observations made by Governments at the twelfth and thirteenth sessions of the General Assembly, particularly on the question referred to in paragraph 52 of the report,

"Invites the International Law Commission to give further consideration to the question of relations between States and inter-governmental international organizations at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and ad hoc diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly."

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