ARTICLE 13 (1) (a)

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

CONTENTS

Text of Article 13 (1) (a)—Provision relating to the progressive development and codification of international law

	Paragraphs
Introductory Note	1-2
I. General Survey	3-18
II. Analytical Summary of Practice	19
A. The initiation of studies	19
1. International Law Commission	19-23
2. United Nations Commission on International Trade Law (UNCITRAL)	24-40
3. Special Committee on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations	41-56
4. Special Committee on the Question of Defining Aggression	57-59
5. Working Group on the Right of Asylum	60-62
6. Committee on the Peaceful Uses of Outer Space	63
7. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction	64-67
8. Commission on Human Rights	68
B. The making of recommendations	69-81
C. The meaning of "progressive development" and of "codification" of international law	82-99
1. As set forth in the Statute of the International Law Commission	82
2. In the light of the practice of the International Law Commission	83-85
3. In the light of the establishment of the United Nations Commission on International Trade Law (UNCITRAL)	86-88
4. In the light of decisions and discussions in the General Assembly	89-99

ARTICLE 13 (1) (a)

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. The study of Article 13 (1) (a) generally follows the pattern as established in the *Repertory* and continued in *Supplements Nos. 1, 2, and 3,* namely: A. the initiation of studies; B. the making of recommendations for the purpose of encouraging the progressive development of international law and its codification; and C. the meaning of "progressive development" and "codification" of international law.

2. The present study includes those subjects dealt with by the International Law Commission and the United Nations Commission on International Trade Law, as well as those initiated through special methods, namely by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, the Special Committee on the Question of Defining Aggression, the Working Group on the Right of Asylum, the Committee on the Peaceful Uses of Outer Space, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, and the Commission on Human Rights.

I. GENERAL SURVEY

3. In Supplement No. 3[1] it was noted that the International Law Commission had completed the draft articles on the law of treaties at its eighteenth session and had submitted them in its report to the General Assembly with the recommendation that an international conference of plenipotentiaries should be convened to study the draft and conclude a convention on the subject. In 1966 the General Assembly, by resolution 2166 (XXI), decided to convene such a conference, requesting the Secretary-General to convoke the first session of the conference in 1968 and the second in 1969. The Assembly referred to the conference the draft articles on the law of treaties contained in chapter II of the Commission's report as the basic proposal for consideration by the conference. In 1967 the General Assembly, by resolution 2287 (XXII), further decided to convene the first session of the United Nations Conference on the Law of Treaties at Vienna in March 1968. The first session of the Conference was accordingly held at Vienna from 26 March to 24 May 1968. The second session was held from 6 April to 22 May 1969 also at Vienna. The Conference adopted the Vienna Convention on the Law of Treaties together with two declarations and three resolutions. The declarations were on the prohibition of military, political or economic coercion in the conclusion of treaties, and on universal participation in the Vienna Convention on the Law of Treaties; the resolutions related to article 1 of the Vienna Convention on the Law of Treaties, to the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, and to article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto.[2]

4. In one of the resolutions adopted by the Vienna Conference on Diplomatic Intercourse and Immunities of 1961, it was recommended that the General Assembly should refer to the International Law Commission a further study of the subject of special missions in view of the limited time which had prevented the Conference from undertaking a thorough study of the matter.[3] In 1961 the General

[1] *Repertory, Supplement No. 3,* vol I, under Article 13 (1) (a), para 8

[2] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), document A/CONF 39/26

[3] *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities,* vol. II, p. 90.

Assembly requested the International Law Commission to do so by its resolution 1687 (XVI). In 1967, the Commission submitted its final draft articles on special missions to the General Assembly with a recommendation that "appropriate measures be taken for the conclusion of a convention on special missions".[4] The Assembly, by resolution 2273 (XXII), decided to include an item entitled "Draft Convention on Special Missions" in the provisional agenda of its twenty-third session with a view to the adoption of such a convention. Having been unable to complete the text of the convention at its twenty-third session, the Assembly resumed the work at its twenty-fourth session and adopted, by resolution 2530 (XXIV), the Convention on Special Missions and the Optional Protocol concerning the Compulsory Settlement of Disputes relating thereto.

5. Noting the development of a pattern for the codification and progressive development of international law, *Supplement No. 3* made the following comment:

> "The [International Law] Commission prepared a set of articles on a certain subject and submitted them with its recommendations to the General Assembly; the Assembly, after consideration, referred the draft to an international conference and the conference, after deliberations on the basis of the draft, adopted one or more conventions, protocols and resolutions. The effectiveness of the instruments resulting from that process would naturally depend on the acceptance accorded to them by the Member States and other States invited to become parties. Care was therefore taken in the preparation of the drafts to request legal material and written comments from Governments, as prescribed in the Statute of the International Law Commission. Furthermore, as preliminary drafts were usually presented in the yearly reports of the Commission to the General Assembly, representatives of the Member States had the opportunity in the Sixth Committee to express their opinions on the drafts at successive stages of preparation.[5]

The pattern described above was followed during the period under review with respect to the codification and progressive development of the law of treaties. There was, however, a deviation from the pattern in the case of the subject of special missions, where the final draft of the Commission was referred to a subsequent session of the Assembly itself, rather than to an international conference, with a view to the adoption of a convention.[6]

6. As has been reported,[7] the General Assembly, by resolution 2205 (XXI), decided to establish the United Nations Commission on International Trade Law, "which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade".

7. Pursuant to resolution 2205 (XXI), the Commission "shall consist of twenty-nine States, elected by the General Assembly for a term of six years". Resolution 2205 (XXI) stated further that "the representatives of members on the Commission shall be appointed by Member States in so far as possible from among persons of eminence in the field of the law of international trade" and that "the Commission shall normally hold one regular session a year". That resolution specified that the Commission should submit an annual report to the General Assembly and that that report should also be submitted to the United Nations Conference on Trade and Development for comments. On 30 October 1967, at its twenty-second session, the General Assembly elected twenty-nine States as members of the Commission, and the Commission held its first session in 1968.

8. In *Supplement No. 3*,[8] it was noted that, in an important field, a separate procedure for the codification and progressive development of international law had been set in motion by the General Assembly. The codification and progressive development of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations was kept under review by the General Assembly itself and the Sixth Committee, with the assistance of *ad hoc* committees composed, not of experts appointed in their personal capacity, as in the case of the International Law Commission, but of Government representatives.

9. During the period under review the above-mentioned procedure was continued. As indicated in *Supplement No.3*,[9] the General Assembly, at its twentieth session, had requested the newly re-constituted Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations to meet as soon as possible and to report to the General Assembly at its twenty-first session.[10] The Committee met in 1966 and continued to do so every year during the period under review, on the basis of successive General Assembly resolutions renewing its mandate.[11]

10. At its twenty-first session, the General Assembly decided to include an item entitled "Question of methods of fact-finding" in the provisional agenda of its twenty-second session and to renew its earlier invitation to Member States to submit any views or further views they might have on that subject.[12] At its twenty-second session the General Assembly adopted resolution 2329 (XXII) in connexion with the codification and progressive development of the principles on pacific settlement of disputes, whereby it requested the Secretary-General to prepare a register of experts in legal and other fields whose services the States parties to a dispute might use by agreement for purposes of fact-finding in relation to a dispute.

11. During the period under review, the question of defining aggression was given new impetus by the General Assembly. It should be recalled that, although the General Assembly had established a committee in 1957 to determine the appropriate time for further consideration of the question of defining aggression,[13] no recommendation had

[4] *Yearbook of the International Law Commission 1967*, vol. II, pp. 345-368.

[5] *Repertory, Supplement No. 3*, vol. I, under Article 13 (1) (a), para. 9.

[6] For the background of this procedure, see para. 70 below.

[7] See *Repertory, Supplement No. 3*, vol. I, under Article 13 (1) (a), para. 20.

[8] *Repertory, Supplement No 3*, vol. I, under Article 13 (1) (a), para. 17

[9] *Ibid*, para. 45.

[10] G A resolution 2103 (XX).

[11] See G A resolutions 2181 (XXI), 2327 (XXII) and 2463 (XXIII).

[12] G A resolution 2182 (XXI).

[13] G A resolution 1181 (XII).

been made by the committee for nearly ten years. In 1967 the Assembly adopted the following resolution[14] on the "need to expedite the drafting of the definition of aggression in the light of the present international situation":

"*The General Assembly,*

". . .

"*Noting* that there is still no generally recognized definition of aggression,

"1. *Recognizes* that there is a widespread conviction of the need to expedite the definition of aggression;

"2. *Establishes* a Special Committee on the Question of Defining Aggression, composed of thirty-five Member States to be appointed by the President of the General Assembly, taking into consideration the principle of equitable geographical representation and the necessity that the principal legal systems of the world should be represented;

"3. *Instructs* the Special Committee, having regard to the present resolution and the international legal instruments relating to the matter and the relevant precedents, methods, practices, criteria and the debates in the Sixth Committee and in plenary meetings of the Assembly, to consider all aspects of the question so that an adequate definition of aggression may be prepared and to submit to the General Assembly at its twenty-third session a report which will reflect all the views expressed and the proposals made".

12. Thus also with respect to the question of defining aggression the General Assembly followed a procedure similar to the one adopted in the case of the codification and progressive development of the principles of international law concerning friendly relations and co-operation among States: the item was kept under review by the General Assembly with the assistance of an *ad hoc* committee composed not of experts but of Government representatives.

13. The Special Committee met for the first time in 1968. It had before it a number of draft proposals submitted during the session and discussed several issues related to its mandate, including the type of definition to be adopted, the scope of activities to be included in the concept of aggression and the priority principle.[15] At its twenty-third session the General Assembly, by resolution 2420 (XXIII), decided to reconvene the Special Committee in 1969. During the 1969 session, the Special Committee had before it various draft proposals, including those which had been submitted at its previous session. At the 1969 session, the discussion centred mainly on two draft proposals, both of which were supported in principle by a large number of members of the Special Committee. Similar issues to those discussed during the 1968 session were raised. In addition, the question of aggressive intent was discussed and some emphasis was placed in 1969 on the need for preserving the discretionary power vested in the Security Council as the organ with primary responsibility for the maintenance of peace and the need to include clear criteria to distinguish aggression from the legitimate use of force. As in 1968, no agreement was reached.[16] The General Assembly at its twenty-fourth session decided, by resolution 2549 (XXIV), to reconvene the Special Committee in 1970.

14. It was noted in *Supplement No. 3*[17] that in 1959 the General Assembly had requested the International Law Commission to codify the principles and rules of international law relating to the right of asylum. During the period under review, the General Assembly took a further step on one aspect of the question by adopting a Declaration on Territorial Asylum, although this step was entirely distinct from the work of codification to be undertaken by the Commission. The General Assembly first took up the question of adopting a declaration in 1960 when the Economic and Social Council transmitted to it the text of a draft Declaration on the Right of Asylum prepared by the Commission on Human Rights. In 1962 the Third Committee began the consideration of the draft declaration and approved texts for the preamble and article 1. Because of pressure of other work at subsequent sessions, the Third Committee was unable to complete the text of the draft declaration, and the General Assembly transferred the item to the Sixth Committee in 1965 in order to finalize the draft declaration at the earliest opportunity. The Sixth Committee spent three sessions for the elaboration of the declaration, setting up a working group for the drafting of a preliminary draft. In 1967, upon the recommendation of the Sixth Committee, the Assembly adopted the Declaration on Territorial Asylum by its resolution 2312 (XXII).

15. In addition to the major actions described above, the General Assembly took a number of steps during the period under review in connexion with its efforts to encourage the progressive development and codification of international law on outer space, the law of the sea and the human rights law.

16. The practice, noted in the *Repertory* and its *Supplement No. 3*,[18] of entrusting the Secretary-General with studies to supplement the work of the International Law Commission continued.

17. The General Assembly continued to refer to the International Law Commission the study of topics of succession of States and Governments, State responsibility and relations between States and intergovernmental organizations.[19] Furthermore, it recommended to the International Law Commission that it should study two new topics, namely, most-favoured-nation clauses in the law of treaties[20] and the question of treaties concluded between States and international organizations or between two or more organizations.[21]

18. Lastly, the General Assembly continued the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, established by resolution 2099 (XX), during the period under review through its resolutions 2204 (XXI), 2313 (XXII), 2464 (XXIII) and 2550 (XXIV).

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[14] G A resolution 2330 (XXII).

[15] G A (XXIII), a i. 86, A/7185/Rev.1.

[16] G A (XXIV), *Supplement No. 20* (A/7620).

[17] *Repertory, Supplement No. 3*, vol. I, under Article 13 (1) (a), para. 23.

[18] *Repertory*, vol. I, under Article 13 (1) (a), paras. 17 and 18; *Repertory, Supplement No. 3*, vol. I, under Article 13 (1) (a), para. 10.

[19] G A resolutions 2166 (XXI), 2272 (XXII), 2400 (XXIII) and 2501 (XXIV).

[20] G A resolution 2272 (XXII).

[21] G A resolution 2501 (XXIV).

II. ANALYTICAL SUMMARY OF PRACTICE

A. The initiation of studies

1. International Law Commission

19. During the period under review the General Assembly initiated two studies to be undertaken by the International Law Commission for the purpose of encouraging the progressive development of international law and its codification. One was the study of the topic of most-favoured-nation clauses in the law of treaties, which was recommended by paragraph 4 (b) of resolution 2272 (XXII). The recommendation of the Assembly was pursuant to the following decision taken earlier by the International Law Commission and contained in its report on the work of its nineteenth session:

> "48. It was recalled that, in dealing with the law of treaties, the Commission had laid aside one aspect of that topic — the "most-favoured-nation" clause — which it had not considered indispensable to deal with in its codification of the general law of treaties, although, as was said in its report on the work of its eighteenth session, "it felt that such clauses might at some future time appropriately form the subject of a special study". The Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that the Commission should deal with this aspect. In view of the more manageable scope of the topic, of the interest expressed in it, and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL), which will begin its work in 1968, the Commission unanimously decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties. It also unanimously decided to appoint Mr. Endre Ustor as Special Rapporteur on that topic."[22]

20. In paragraph 5 of resolution 2501 (XXIV), the General Assembly also recommended "that the International Law Commission should study, in consultation with principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question". The recommendation was based on a resolution adopted by the Vienna Conference on the Law of Treaties, which had recommended to the General Assembly to refer such a study to the International Law Commission[23] to be carried out in consultation with the principal international organizations.

21. It should be recalled that the General Assembly, by article 17 of the Statute of the International Law Commission, also gave the power of initiative to the other principal organs of the United Nations, to Members of the United Nations, to the specialized agencies or to official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification. Such power, however, was not exercised during the period under review.

22. In connexion with a review of its programme of work, the International Law Commission decided at its 1968 session to request the Secretary-General to prepare a new survey of the whole field of international law on the lines of the memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission"[24] submitted at the Commission's first session in 1949. The Commission considered it possible to draw up, on the basis of such a survey, a new list of topics that were ripe for codification, taking into account General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment.[25]

23. During the discussion of the report of the Commission at the General Assembly's Sixth Committee in 1968, opinions were divided on whether that request of the Commission was in order. A number of representatives welcomed the Commission's decision. Some representatives, however, believed that the question of how and by whom the new survey would be carried out should not be prejudged, since that was a matter which should be decided at an appropriate time by the Commission in accordance with article 18 of its Statute. Surveying the whole field of international law with a view to selecting topics for codification was, in their opinion, a statutory responsibility of the Commission and not of the Secretary-General. Other representatives observed that the Commission was free to request the Secretary-General to do the preparatory work required for the new survey.[26] The General Assembly thereupon noted with approval, in paragraph 3 of resolution 2400 (XXIII), "the preparation, in accordance with article 18 of its Statute, of the new survey of the whole field of international law referred to in paragraph 99 of the Commission's report."

2. United Nations Commission on International Trade Law (UNCITRAL)

24. The United Nations Commission on International Trade Law, at its first session in 1968, drew up the following list of topics that, without being exhaustive, should form the basis of its future work programme:[27]

> "(1) International sale of goods:
>
> "(*a*) In general;
>
> "(*b*) Promotion of wider acceptance of existing formulations for unification and harmonization of international trade law in this field including the promotion of uniform trade terms, general conditions of sale and standard contracts;

[22] *Yearbook of the International Law Commission 1967*, vol II, p. 369, para. 48.

[23] Resolution relating to article 1 of the Vienna Convention on the Law of Treaties, annexed to the Final Act of the Conference. *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, 1968 and 1969, Documents of the Conference*, p. 285.

[24] A/CN.4/1/Rev.1 (mimeographed).

[25] See *Yearbook of the International Law Commission 1968*, vol. II, p. 223, para. 99

[26] G A (XXIII), Annexes, a.i. 84, A/7370, para. 65.

[27] G A (XXIII), Suppl. No. 16, para. 40.

"(*c*) Different legal aspects of contracts of sale like:

(i) Limitations;

(ii) Representation and full powers;

(iii) Consequences of frustration;

(iv) *Force majeure* clauses in contracts.

"(2) Commercial arbitration:

"(*a*) In general;

"(*b*) Promotion of wider acceptance of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

"(3) Transportation.

"(4) Insurance.

"(5) International payments:

"(*a*) Negotiable instruments and banker's commercial credit;

"(*b*) Guarantees and securities.

"(6) Intellectual property.

"(7) Elimination of discrimination in laws affecting international trade.

"(8) Agency.

"(9) Legalization of documents."

25. At its first session in 1968, the Commission also decided that priority should be given to the following three topics:

(i) International sale of goods;

(ii) International payments; and

(iii) International commercial arbitration.[28]

The Commission was agreed "that it was not essential at this stage of its work for the Commission to formulate a definition of international trade law".[29]

26. Within the priority topic of international sale of goods, the Commission decided to deal separately with the following items:[30]

(i) Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods;

(ii) Hague Convention of 1955 on the Law Applicable to International Sale of Goods;

(iii) Time-limits and limitations (prescription) in the field of international sale of goods;

(iv) General conditions of sale, standard contracts, Incoterms 1953 and other trade terms.

Within the priority topic of international payments the Commission decided to deal separately with:

(i) Negotiable instruments;

(ii) Bankers' commercial credits; and

(iii) Guarantees and securities.[31]

27. Concerning the priority topic of international commercial arbitration, the Commission requested the Secretary-General to prepare a preliminary study of possible steps aimed at promoting the harmonization and unification of law in this field.[32]

[28] *Ibid.*

[29] *Ibid.*, para. 24.

[30] *Ibid.*, para. 48.

[31] *Ibid.*

[32] *Ibid.*

28. At its first session in 1968, the Commission decided to publish a register of organizations engaged in work towards the progressive harmonization and unification of the law of international trade, and a register of texts relating to the priority topics on the Commission's work programme.[33]

29. In 1968, the Trade and Development Board of the United Nations Conference on Trade and Development commended the Commission on the work programme established at its first session and stressed that the needs of developing countries should receive adequate attention.[34] Furthermore, many members of the Trade and Development Board expressed the wish that the Commission should add the subject of international shipping legislation to its list of priority topics.[35]

30. During the consideration of the Commission's first annual report by the Sixth Committee in 1968:

"A number of representatives expressed approval that the Commission had not felt it necessary, at this stage of its work, to formulate a definition of international trade law and were of the opinion that it had acted wisely in taking practical considerations into account when drawing up its programme. It was observed by others, however, that it was unfortunate that the Commission had been unable to agree on a definition of international trade law; the Commission should not limit its work to the consideration only of questions of private law, since a significant number of the questions of international trade law which were of cardinal importance to all countries would then lie outside its field of activity."[36]

31. At its twenty-third session in 1968, the General Assembly, by resolution 2421 (XXIII), noted with approval the programme of work adopted by the Commission at its first session and authorized the Secretary-General to establish, in accordance with directives laid down by the Commission, a register of organizations and a register of international instruments in certain fields of international trade law.

32. By resolution 2421 (XXIII) the General Assembly also recommended that the Commission:

"(*a*) Continue its work on the topics to which it decided to give priority, that is, the international sale of goods, international payments and international commercial arbitration;

"(*b*) Consider the inclusion of international shipping legislation among the priority topics in its work programme;

"(*c*) Consider opportunities for training and assistance in the field of international trade law, in the light of relevant reports of the Secretary-General;

"(*d*) Keep its programme of work under constant review, bearing in mind the interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade;

"(*e*) Consider at its second session ways and means of promoting co-ordination of the work of organizations

[33] *Ibid.*, para. 60.

[34] G A (XXIII), Suppl. No. 14, para. 165.

[35] *Ibid.*, para. 74.

[36] G A (XXIII), Annexes, a.i. 88, A/7408, para. 12.

active in the progressive harmonization and unification of international trade law and of encouraging co-operation among them;

"(*f*) Consider, when appropriate, the possibility of issuing a yearbook which would make its work more readily available."

33. At its second session in 1969, the United Nations Commission on International Trade Law established a Working Group on the International Sale of Goods, which was asked to:

"(i) Ascertain which modifications of the Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and a Uniform Law on the Formation of Contracts for the International Sale of Goods, and of the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods;

"(ii) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference."[37]

34. At its second session the Commission also established a Working Group on time limits and limitations (prescription) in the field of the international sale of goods, with a view to preparing a draft convention dealing with "the formulation of a general period of extinctive prescription by virtue of which the rights of a buyer or seller would be extinguished or become barred".[38]

35. In the area of international payments, the Commission at its second session decided to undertake a study of the possible creation of a new negotiable instrument to be used only in international transactions.[39] At the same session, the Commission appointed a Special Rapporteur on international commercial arbitration and requested him to study the major problems concerning the application and interpretation of the existing conventions in this area and other related problems.[40]

36. Also at its second session in 1969, the Commission decided to include international legislation on shipping among the priority items in its work programme and established a Working Group to deal with the subject.[41] The Commission also requested the Secretary-General to prepare a study on alternative forms of an UNCITRAL Yearbook, taking into account the financial implications and relevant precedents.[42]

37. In 1969, commenting on the report of the Commission on the work of its second session, the Trade and Development Board of UNCTAD noted with appreciation the report and the Commission's decision to include international legislation on shipping among the priority items in its programme of work.[43]

38. After considering the report of the Commission on the work of its second session, the General Assembly at its twenty-fourth session in 1969, by resolution 2502(XXIV) endorsed the inclusion of international legislation on shipping among the priority topics on the work programme of the Commission.

39. At the same session, the General Assembly, by resolution 2502(XXIV), also approved in principle the establishment of an UNCITRAL Yearbook and noted with appreciation the progress made by the Commission in the implementation of its work programme, including the establishment of working groups on uniform rules governing the international sale of goods, on time-limits and limitations (prescription) in the field of the international sale of goods and on international legislation on shipping. The General Assembly recommended that the Commission:

"(*a*) Continue its work on the topics to which it decided to give priority, that is, the international sale of goods, international payments, international commercial arbitration and international legislation on shipping;

"(*b*) Continue to give attention to the ways and means which would effectively promote training and assistance in the field of international trade law;

"(*c*) Keep its programme of work under constant review, bearing in mind the important contribution which the progressive harmonization and unification of international trade law can make to economic co-operation among all peoples, and, thereby, to their well-being;

"(*d*) Give special consideration, in promoting the harmonization and unification of international trade law, to the interests of developing and land-locked countries."

40. At its second session in 1969, the Commission decided "to inform the International Chamber of Commerce that, in the view of the Commission, it would be desirable to give the widest possible dissemination to Incoterms 1953 in order to encourage their world-wide use in international trade".[44] It noted with approval "the valuable contribution to the development of international trade made by the 'Uniform Customs and Practice for Documentary Credits' of the International Chamber of Commerce" and commended to Governments its use in transactions involving the establishment of a documentary credit.[45] Further, it expressed the view "that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 should be adhered to by the largest possible number of States".[46]

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[37] G A (XXIV), Suppl. No. 18, para. 38.

[38] *Ibid.*, para. 46.

[39] *Ibid.*, para. 87.

[40] *Ibid.*, para. 112.

[41] *Ibid.*, para. 133

[42] *Ibid.*, para. 167.

[43] G A (XXIV), Suppl. No. 16, part 3, chap. III, para. 188.

[44] G A (XXIV), Suppl. No 18, para. 60.

[45] *Ibid.*, para. 95.

[46] *Ibid.*, para 112.

SPECIAL COMMITTEE ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

41. As indicated in the General Survey[47], the General Assembly, at its twentieth session, by resolution 2103 (XX), requested the newly constituted Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States to meet as soon as possible and to report to the General Assembly at its twenty-first session. By the same resolution, the General Assembly referred to the Special Committee seven principles which the Assembly had set out in 1962. With regard to the four principles which had been studied by the previous Special Committee, namely those relating respectively to the prohibition of the threat or use of force, the peaceful settlement of disputes, the duty of non-intervention in matters within the domestic jurisdiction of any State, and the sovereign equality of States, the 1966 Special Committee was requested to complete their consideration and elaboration, having full regard to matters on which the previous Special Committee had been unable to reach agreement, and also to the measure of progress achieved. With regard to the other three principles not previously before the Committee, namely those relating respectively to the duty of States to co-operate with one another in accordance with the Charter of the United Nations, equal rights and self-determination of peoples and the fulfilment of obligations in good faith, the Special Committee was instructed to pay full regard to the practice of the United Nations and of States, as well as to the comments submitted by Governments and to the views and suggestions advanced in the General Assembly.

42. The Special Committee met each year during the period under review. In the introduction to its report to the General Assembly in 1966, the Special Committee indicated that it had decided to adopt a *seriatim* approach to each of the seven principles before it. Upon completion of discussion of each principle, it would be referred, together with the proposals made regarding it, to a drafting committee of sixteen members which would be a negotiating and drafting body and not a decision-making body. The drafting committee would, in turn, make its recommendations to the Special Committee immediately after it had finished its consideration of each principle referred to it and the Special Committee would take such action as it deemed fit on those recommendations.[48] This procedure continued to be applied during the remaining years of the period under review.

43. In 1966, the seven principles referred to the Special Committee were considered by it but no consensus was reached except in certain areas connected with the principle relating to the peaceful settlement of international disputes and the principle of sovereign equality of States. The text of the former was based on the one submitted by the drafting committee and that of the latter was based partly on a proposal of the drafting committee and partly on a text approved by the 1964 Special Committee.[49] Again in 1967 all seven principles were considered and proposals were made but new areas of agreement were reached only with respect to certain aspects of the prohibition of the threat or use of force, the principle of the fulfilment of obligations in good faith and the duty of States to co-operate, on the basis of consensus reached in the drafting committee, of which the Special Committee took note.[50] The 1968 session of the Special Committee was devoted to the principle of the prohibition of the threat or use of force and the principle of equal rights and self-determination of peoples. Only with respect to the former was a measure of progress achieved. The area of agreement obtained in 1967 concerning the prohibition of the threat or use of force was widened, the existing areas of disagreement reduced and new bases of discussion established for future negotiations[51]. The same two principles were the only ones that were considered during the 1969 session of the Special Committee. The area of agreement on some of the components of the principle of the prohibition of the threat or use of force was broadened still more. In addition, and for the first time, the drafting committee of the Special Committee agreed on a statement of the principle of equal rights and self-determination. The statement pointed out the basic elements of the principle, specifying the areas on which agreement had been reached and those where no consensus had been achieved.[52]

44. In *Supplement No. 3*[53] it was pointed out that the question of the methods of the Special Committee on Friendly Relations had occupied the attention of the Sixth Committee. This continued to be so during a part of the period under review. For instance, at the twenty-first session, there was extensive discussion of the role to be played by consensus or unanimity in the work of the Special Committee, this problem being often linked with a discussion on the value and effects of a declaration by the General Assembly.[54] Thus it was pointed out that what was being aimed at was an authentic interpretation of the Charter by the parties to it, which, if agreed to by all of them, would have the same legal force as the Charter itself. For those representatives unanimity was indispensable, as without it there would be no possibility of authentic interpretation. A method of deciding by general agreement should be an incentive to negotiation and compromise and not a dogma whose only purpose was obstruction. Other representatives, however, considered that the goal was a recommendation by the General Assembly. Although the Assembly could not of itself create general international law, its recommendations could nevertheless, if virtually unanimous, constitute such cogent evidence of the practice of States that it could provide substantial evidence of the rules of customary law. For those representatives a consensus procedure would mean proceeding without a vote where there was no recorded dissent, rather than by strict unanimity, and voting was not in all events excluded. One

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[47] See para. 9 above.

[48] See G A (XXI), Annexes, a.i 87, A/6230, para. 21.

[49] See G A (XXI), Annexes, a.i. 87, A/6230, paras. 157 and following and 356 and following.

[50] See G A (XXII), Annexes, a.i. 87, A/6799, paras. 107, 161 and 285-300.

[51] See G A (XXIII), Annexes, a.i. 87, A/7429, paras. 19-41 and 42-54.

[52] See G A (XXIV), Annexes, a.i. 89, A/7809, paras. 14-20 and 21-32.

[53] *Repertory, Supplement No 3*, vol. I, under Article 13 (1) (a), paras. 41-43.

[54] See paras. 51-54 below.

representative, while maintaining the value of unanimity, considered that the Special Committee's main duty was to clarify the situation, and that, when every possibility of unanimity had been exhausted, a vote should be taken (preferably by roll-call), not in order to decide on adoption of the text but rather to inform the General Assembly of the degree of support for the various views. Another group considered that every effort should be made to reach general agreement, but that as a last resort texts should be voted on so that one delegation or a few delegations could not paralyse the efforts of the great majority. Still other representatives believed that the practice followed by the 1964 and 1966 Special Committees should be abandoned and that no demand should be made for unanimous adoption, which was not even required for amendments to the Charter itself. In their view, the value of a declaration would depend not upon the method of its adoption but upon its content, its lucid formulation and its application by States; if matters of major importance were left aside because of the impossibility of consensus, the codification would in any event be a failure. The need was alsc stressed for proceeding with a maximum of objectivity, with a constant view to the broadest interests of the international community and without pursuit of short-term political gains. One representative said that it should be decided whether the aim was a declaration, which traditionally was an infrequent and solemn instrument of major and lasting importance with which maximum compliance was expected, or the aim was a less solemn document which would mirror existing trends, possibly of an ephemeral character.[55]

45. The methods of drafting were also discussed in this connexion. It was suggested that the relationship between the principles should constantly be borne in mind, and that it was essential to maintain close liaison between the various working groups. It was also said that working groups should be appointed not only from members of the drafting committee but from other members of the Special Committee as well, and that some record should be kept of the work of working groups, in the form of reports by their chairmen either to the drafting committee or to the Special Committee. It was also suggested that perhaps some equivalent to the system of Special Rapporteurs used by the International Law Commission could be worked out, and that greater use should be made of written documents setting out and explaining in detail the proposals made and their implications. In any case, if the suggestions made with respect to working groups were adopted, such groups should be established at the very outset of the session of the Special Committee, in order to avoid last minute proposals and hasty negotiations, hardly compatible with a proper method of drafting legal documents of high importance.[56]

46. The question of the methods of work of the Special Committee, including the discussion concerning consensus and majority, came up again at the twenty-second session of the General Assembly. One trend of opinion at the Sixth Committee considered that the method of consensus or general agreement should be an incentive for negotiation and compromise, but not an absolute rule or immutable dogma. They emphasized that unanimity or consensus was a desirable, from a legal point of view, and important goal to be aimed at, but they were opposed to its abuse as a kind of right of veto to prevent or hinder the progressive development of international law. It was unacceptable that a small number of States should oppose that development by refusing to recognize rules of international law that were almost universally accepted. Furthermore, the main concern should be with the substance of the rules and not with trying at all costs to reach a consensus in which their content was sacrificed. A clear formulation accepted by a great majority of States would be preferable to an inadequate or defective rule adopted unanimously. It was also added that most of the present rules of international law had originated in the practice of some States only and that even for the adoption of the Charter of the United Nations the procedure of a qualified majority vote had been used. According to this trend, the Special Committee should do everything possible to reach a consensus but, if that proved impossible because of unjustified opposition by some States, the Special Committee should give up the rigid procedure of consensus and adopt majority decisions. Some representatives said that in that event they would prefer the procedure of a qualified majority. It was further observed that the consensus of a body with limited membership like the Special Committee did not necessarily represent the consensus of the international community.[57]

47. Others expressed concern at the fact that doubt had been cast on the advisability of following the consensus method in dealing with the development of principles of international law and opposed any attempt to substitute majority vote for consensus. According to this trend, the method of consensus, based on a spirit of mutual cooperation, was not only the most appropriate method, but in fact the only possible one. Noting the great importance attached to consensus in the Sixth Committee and the International Law Commission, some representatives stated that, if that method were abandoned, there would be less effort to overcome differences and to compromise and that there would be appreciably less possibility of universal recognition and application of formulations which were adopted by majority vote and lacked the support of a substantial number of States. A text adopted by consensus, however imperfect, would be more likely to be faithfully respected and observed by all States in their relations with each other. Consequently, it was felt that the codification and development of principles by means of a simple majority vote would be harmful to the unity and indivisibility of the international legal order. One representative said that codification achieved through such a procedure would merely reveal the existence of open disagreement among States, which might mean that the development of the principles of international law under consideration would move backwards rather than forwards. It was added that only if the declaration on those principles ultimately adopted by the General Assembly met with the quasi-unanimous approval of the Members of the United Nations could it be said to express a universal legal conviction and thus be considered a source of law under Article 38, paragraph 1(c) of the Statute of the International Court of Justice. Lastly, it was also asserted that undue haste would only place the texts already adopted by consensus in jeop-

[55] G A (XXI), Annexes, a.i. 87, A/6547, paras. 31-33.

[56] *Ibid.*, para. 34.

[57] G A (XXII), Annexes, a.i. 87, A/6955, para. 108.

ardy and undermine the authority of the United Nations by drawing attention to its limitations.[58]

48. An intermediate view held that the Special Committee should continue to employ the method of unanimity, unless it might be desirable in the future to resort to a majority vote in order not to have to abandon the formulation of principles on which unanimity could not be achieved.[59]

49. Concerning other aspects of the methods of work, certain representatives maintained that the Special Committee should base its work on a serious legal study of the theoretical positions and practices of all States, old and new, taking into account also the instruments and declarations concerning the principles under study. In point of fact, they said, the Special Committee's work had been based on proposals which mainly reflected the State's own points of view on those aspects of the principles in which they were particularly interested.

50. With regard to the appointment of Special Rapporteurs by the Special Committee, since the Special Rapporteur would at the same time be a representative of one of its Member States, one representative thought it might be preferable to entrust the preparatory work to a body of experts such as the International Law Commission.[60]

51. The resolutions of the General Assembly which successively renewed the mandate of the Special Committee during the period under review contain some indications regarding the methodology to be followed during the work of the Special Committee on Friendly Relations. Those indications reflect to a certain extent a balance between the different views, expressed in the debate summarized above, concerning consensus and majority. Thus the resolutions often speak of the desirability of "widening the areas of agreement"[61] or about "the significance of continuing the effort to achieve general agreement in the process of the elaboration of the seven principles of International Law" set forth by the General Assembly.[62] The usefulness of a consensus in the process of work of the Special Committee was therefore clearly pointed out. But, at the same time, those resolutions sought to prevent a lack of consensus from endangering the codification and progressive development of those principles, by adding "but without prejudice to the applicability of the rules of procedure of the Assembly",[63] thus paving the way for a majority decision in case a consensus cannot be reached. One aspect linked with the foregoing questions and particularly emphasized by the resolutions in question was the usefulness of consultations in order to ensure the success of the Special Committee's sessions, calling upon its members to "undertake, in the period preceding the session, such consultations and other preparatory measures as they may deem necessary".[64]

[58] *Ibid.*, para. 109.

[59] *Ibid.*, para. 110.

[60] *Ibid.*, paras. 114 and 115.

[61] G A resolutions 2181 (XXI), para. 7; 2327 (XXII), para. 5.

[62] G A resolutions 2181 (XXI), 6th preamb. para.; 2327 (XXII), 6th preamb. para.; 2463 (XXIII), para 6; and 2533 (XXIV), para. 6 (the latter resolution uses the expression "general agreement on the statements of the seven principles").

[63] *Ibid.*

[64] G A resolutions 2327 (XXII), para. 6; 2463 (XXIII), para. 5; and 2533 (XXIV), para. 5.

52. As pointed out in the General Survey,[65] since its twentieth session the General Assembly had considered the "Question on methods of fact-finding", which was introduced as an item of the agenda of the General Assembly in connection with the codification and progressive development of the principle of friendly relations concerning pacific settlement of disputes. In the Sixth Committee, during the twenty-second session, of the Assembly, the importance of fact-finding for the pacific settlement of disputes was emphasized. Different views were expressed concerning the adequacy of the existing machinery for fact-finding and the reasons why that machinery was rarely used.[66] The question of fact-finding procedures gave rise to a variety of suggestions, one of which was the establishment of a permanent body for fact-finding purposes. In support of this suggestion it was argued that such a body would have a number of advantages over the existing machinery, in particular, that of separating inquiry from conciliation. It would also have the advantage of being always available whereas the machinery provided for in the instruments in force was only brought into being after a dispute had arisen. Furthermore, it might facilitate and thus encourage recourse to methods of impartial inquiry and would also make it possible to derive the greatest benefit from past experience and to acquire appropriate experience for the future. The proposed body would not only be engaged in establishing facts concerning disputes; it might also lend its services to States parties to treaties which provided for inquiry as a means of ensuring their execution, and to international organizations which had to take decisions on the basis of established facts.[67]

53. Three main arguments were advanced against the establishment of a permanent international fact-finding body. In the first place, some delegations said that the establishment in the United Nations system of a permanent body which would have powers assigned to the Security Council would be contrary to the provisions of the Charter. Second, it was pointed out that, in addition to regional fact-finding machinery, there were already institutions of a general character in that field, and that in all cases it was the prerogative of States, as sovereign entities, to decide what fact-finding body was most appropriate in a given instance. It was also pointed out that the current stage of development of international law did not permit the centralization of existing fact-finding procedures. Third, it was claimed that there were no grounds for assuming that a permanent body would be more effective than the existing procedures. Experience had proved, on the contrary, that what had made these procedures successful was their flexibility and diversity, and that therefore nothing would be gained by trying to centralize or codify them.[68]

54. The Sixth Committee established a working group consisting of sixteen members selected on the basis of the principle of geographical distribution, to make recommendations on the possibilities of reconciliation of the different views in order to expedite the consideration of the item by the Sixth Committee. At the request of the working group, the Secretariat prepared a document listing specific suggestions made by Governments concerning either existing or

[65] See para. 10 above.

[66] G A (XXII), Annexes, a.i. 88, A/6995, para. 7.

[67] *Ibid.*, para. 8.

[68] *Ibid* , para. 9.

possible improved methods of fact-finding. It reported on the following proposals: establishment of a special subsidiary organ of the Security Council; maintenance of a panel by the General Assembly; establishment of a special international body for fact-finding or, alternatively, the conferring of appropriate powers on existing organizations; compilation of a list of experts; stationing of United Nations representatives in various geographical regions of the world; establishment of a permanent organ; creation of a special department in the United Nations Secretariat; formation of *ad hoc* fact-finding committees by the Secretary-General; establishment of a special international body for fact-finding; use of the Permanent Court of Arbitration; and constitution of a Panel for Inquiry and Conciliation established under General Assembly resolution 268 D (III) or greater use of rapporteurs and conciliators in cases before the General Assembly and the Security Council. The document also contained a proposal by the Secretary-General to appeal to Member States to accede to the Revised General Act for the Pacific Settlement of International Disputes and to participate in the Panel for Inquiry and Conciliation.[69]

55. The Sixth Committee endorsed the recommendations of its working group, approving a draft which became General Assembly resolution 2329 (XXII). Several delegations expressed regret that, although the draft resolution affirmed in general terms the importance of fact-finding, it had not gone further and included some of the other constructive ideas which had been put forward, such as the proposal that the Secretary-General should continue to consider favourably giving appropriate assistance with regard to fact-finding in response to requests made by States. A number of speakers also mentioned the formulation which had been examined by the working group whereby more explicit reference would have been made in the draft resolution to the main facilities for fact-finding which then existed[70]. As adopted by the General Assembly, resolution 2329 (XXII) stated, *inter alia*:

"*The General Assembly*,

"...

"*Recognizing* the usefulness of impartial fact-finding as a means towards the settlement of disputes,

"*Believing* that an important contribution to the peaceful settlement of disputes and to the prevention of disputes could be made by providing for impartial fact-finding within the framework of international organizations and in bilateral and multilateral conventions or through other appropriate arrangements,

"*Affirming* that the possibility of recourse to impartial methods of fact-finding is without prejudice to the right of States to seek other peaceful means of settlement of their own choice,

"*Reaffirming* the importance of impartial fact-finding, in appropriate cases, for the settlement and the prevention of disputes,

"*Recalling* the possibility of the continued use of existing facilities for fact-finding,

"1. *Urges* Member States to make more effective use of the existing methods of fact-finding;

"2. *Invites* Member States to take into consideration, in choosing means for the peaceful settlement of disputes, the possibility of entrusting the ascertainment of facts, whenever it appears appropriate, to competent international organizations and bodies established by agreement between the parties concerned, in conformity with the principles of international law and the Charter of the United Nations or other relevant agreements;

"3. *Draws special attention* to the possibility of recourse by States in particular cases, where appropriate, to procedures for the ascertainment of facts, in accordance with Article 33 of the Charter;

"4. *Requests* the Secretary-General to prepare a register of experts in legal and other fields, whose services the States parties to a dispute may use by agreement for fact-finding in relation to the dispute, and requests Member States to nominate up to five of their nationals to be included in such a register.

56. In pursuance of the above resolution, the Secretary-General, in a circular letter dated 15 January 1968, requested Member States to submit to him the names of up to five of their nationals for inclusion in the above-mentioned register. On 24 September 1968 and again on 7 November 1969, the Secretary-General transmitted to the Members of the General Assembly, for their information, the register of experts nominated by the States which responded to the request.[71]

4. Special Committee on the Question of Defining Aggression

57. As stated in the General Survey,[72] the General Assembly during the period under review created the Special Committee on the Question of Defining Aggression. At the twenty-second, twenty-third and twenty-fourth sessions of the Assembly there were considerable discussions in the Sixth Committee as to whether it was possible and desirable to define the notion of aggression. One trend of thought, which gathered the majority of views, held that it was an important task of the United Nations, and in particular of the General Assembly, to promote the progressive development and codification of international law, especially of the rules which would promote the cause of peace.[73] It was stressed that a definition of aggression would facilitate the implementation of the system of collective security provided for in the Charter while at the same time promoting the development of international law. The point was also made that it was absurd to contend that a definition of aggression would be of no value because it would not prevent all cases of aggression. Those who advanced that argument, it was asserted, had a mistaken view of the role and function of legal definitions, which were not designed to prevent or encourage a given type of behaviour but rather to demarcate the area within which States could carry on their activities. In point of fact, the existence or absence of aggression would depend on the effectiveness of the enforcement machinery which provided the foundation for whatever definition was adopted.[74] A definition of aggression, it was stressed,

[69] G A (XXII), Annexes, a.i. 88, A/6995, annex II.

[70] G A (XXII), Annexes, a.i. 88, A/6995, para. 20.

[71] A/7240 and A/7751 (mimeographed).

[72] See Para. 11 above.

[73] G A (XXII), Annexes, a.i. 95, A/6988, para. 10.

[74] G A (XXIII), Annexes, a.i. 86, A/7402, para. 9.

would constitute an important step forward in the codification and progressive development of international law. It was pointed out that, until a definition of aggression was formulated, several international instruments, such as the draft Code of Offences Against the Peace and Security of Mankind and the question of international criminal jurisdiction, would remain in abeyance. Furthermore, a definition adopted by the General Assembly would facilitate international efforts to safeguard the sovereignty, independence and territorial integrity of States in the cases of threat or use of force which now occurred, particularly against small countries. Such a definition would not, of course, completely discourage a potential aggressor, but it would at least help the United Nations to expose the aggressor and establish his international responsibility. It was also observed that a definition of aggression approved by a large majority of countries would strengthen the part played by law within the United Nations and would eliminate the element of indecision and subjectivity which characterized any political judgement for which the law failed to establish guidelines.[75]

58. Another trend of thought, on the other hand, expressed doubts as to whether it was possible or useful to define the concept of aggression. It was argued that the concept was essentially vague and that it would not be easy to arrive at a practical definition of it in legal terms that were acceptable. In any case, however aggression was defined, the definition would be superfluous. In this connexion, it was pointed out that in the Charter of the United Nations, unlike in the Covenant of the League of Nations, the definition of the notion of aggression was not indispensable to the security system. There were, it was said, certain general principles of international law which made it possible to identify aggression fairly easily in any particular case. Those principles were stated in the Charter, which every Member State had undertaken to respect. Since its foundation the United Nations, acting through the General Assembly and the Security Council, had frequently applied those fundamental principles, sometimes calling upon Member States to respect them and sometimes taking measures to reduce the risk of violation, or even to halt aggression which had been started. On some occasions, the General Assembly or the Security Council had tried to interpret the principles in question or had cited them in connexion with particular resolutions. The view was also expressed that to think that a definition of aggression would have been enough to prevent certain disputes and violations of international law would be to delude oneself about political reality in the modern world. Reference was made to existing bilateral and multilateral conventions including a definition which, however, was not followed. It was not the lack of a definition as such which prevented the Security Council from acting effectively. The problem was not the lack of legal criteria on which the Security Council could base a decision on a case of aggression, but the fact that the Council had not been able at the political level to agree whether or not a particular act had constituted aggression or whether it was desirable to label it as such. In point of fact, the Security Council was not obliged to determine the existence of an act of aggression before it could exercise the powers conferred on it in Chapter VII of the Charter. When situations had been brought before it, the Council had always sought to play the part of a mediator or conciliator in order to re-establish international peace, rather than to identify the guilty party and inflict the punishment that the idea of aggression called for. The point was also made that it was doubtful whether a definition of aggression could really help to improve the security machinery established by the Charter. While the development of legal rules should be continued, even if the possibility of their violation still remained, it was open to question whether a definition, which would be used principally by the Security Council, would represent, at the present stage in international relations, a means of making the Council's work more effective. It would not give the Council any more authority; only when the Council, and the United Nations, had more authority would it be possible to identify and punish cases of aggression more effectively.[76]

59. As to the methods of work of the Special Committee, the relevant General Assembly resolutions gave no specific instructions. During the discussions in the Sixth Committee, the question concerning the decision-making process of the Special Committee was raised by some delegations. Thus, at the twenty-fourth session of the General Assembly, several representatives expressed the view that in order to be satisfactory any definition of aggression should not only conform to and be based on the Charter but it should also be supported by a large majority of the States Members of the United Nations, including all the permanent members of the Security Council. The latter condition was, however, contested by some representatives, who considered it incompatible with the Charter and in particular with the basic principle of the sovereign equality of States. The view was expressed that, in the adoption of a definition of aggression, there should be no hesitation about resorting, if necessary, to the procedures used in the General Assembly, namely, the rule of the majority.[77]

5. Working Group on the Right of Asylum

60. As stated in the General Survey,[78] the General Assembly adopted the Declaration on Territorial Asylum in 1967. During the consideration by the Sixth Committee of the proposed Declaration in 1966 and 1967, questions were raised about the relationship between the Sixth Committee's task and the future work of the International Law Commission on the right of asylum as the latter body had been requested by the General Assembly in 1959 to undertake, as soon as it considered advisable, "the codification of the principles and rules of international law relating to the right of asylum."[79] It should be recalled in this connexion that, in 1965, when the topic was first referred to the Sixth Committee, the Committee had a note by the Secretariat containing the following statement:

"2. It has been the intention of the Commission on Human Rights and of the Third Committee [which has been preparing the draft Declaration before it was referred to the Sixth Committee] that the Declaration on the Right of Asylum, which is confined to territorial

[75] G A (XXIV), Annexes, a.i. 88, A/7853, para. 7.

[76] G A (XXIII), Annexes, a.i. 86, A/7402, para. 11.

[77] G A (XXIV), Annexes, a.i. 88, A/7853, para. 10.

[78] See Para. 14 above.

[79] G A resolution 1400 (XIV).

asylum, should serve, when finally adopted, as a means for promoting respect for the right of territorial asylum as a humanitarian measure, without modifying existing rules of international law. The draft Declaration, therefore, differs in purpose and scope from the more general question of the codification of the principles and rules of international law relating to the right of asylum, which has previously been the subject of some discussion in the Sixth Committee and in the International Law Commission."[80]

At the twentieth session the General Assembly established a working group to facilitate and accelerate the work of the Committee on the subject.

61. On the question whether the Sixth Committee should proceed with the draft Declaration independently of the work of codification to be undertaken by the International Law Commission, the Working Group reported:

"9. It was the opinion of the Working Group that the Sixth Committee should prepare a text of the draft Declaration, independently of the work of codification to be undertaken by the International Law Commission. When the Sixth Committee had completed its draft, and a Declaration had been adopted by the General Assembly, that Declaration would be one of the elements available to the International Law Commission in its task of progressively developing and codifying the rules of international law relating to the right of asylum."[81]

The same point was repeated in the Sixth Committee during the twenty-first session in 1966. The report of the Sixth Committee on the item contained the following summary of the debate:

"15. It was stressed by a number of representatives that the task of the Sixth Committee at the present stage was not to prepare a legal statement of the right of asylum but to elaborate a series of broad humanitarian principles on territorial asylum independently of the work of codification to be undertaken in due course by the International Law Commission pursuant to General Assembly resolution 1400 (XIV)".[82]

Again in 1967, at the twenty-second session, the Sixth Committee's report stated:

"16. It was also said that the practical effect given to the declaration by States would help to indicate whether or not the time was ripe for the final step of elaborating and codifying precise legal rules relating to asylum. In this respect, many representatives expressed the conviction that the declaration, when adopted, should be regarded as a transitional step, which should lead in the future to the adoption of binding rules of law in an international convention. They drew attention to the fact that asylum was on the programme of work of the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959. The declaration now to be adopted would be one of the elements to be considered by the Commission in its work. Certain of these representatives expressed the hope that, when it took up the codification of the institution of asylum, the Commission would correct some of the ambiguities in the terms of the Declaration and would also extend the subject to cover other forms of asylum, such as diplomatic asylum, on which there was extensive treaty law in Latin America and elsewhere. It was also said that the existence of the Declaration should not in any way diminish the scope or depth of the work to be undertaken when the International Law Commission took up the subject of asylum."[83]

62. On the recommendation of the Sixth Committee, the General Assembly, by resolution 2312 (XXII), adopted the Declaration on Territorial Asylum.

6. Committee on the Peaceful Uses of Outer Space

63. With respect to the development and codification of the law of outer space,[84] the General Assembly, in its resolution 2222 (XXI), reaffirmed the importance of developing the rule of law in this new area of human endeavour and commended the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The Depository Governments were requested to open the Treaty for signature and ratification at the earliest possible date. At the same session, the General Assembly further requested the Committee on the Peaceful Uses of Outer Space to begin the study of questions relating to the definition of outer space and the utilization of outer space and celestial bodies. At its twenty-second session the General Assembly, by its resolution 2345 (XXII), commended another international agreement, namely, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, and requested the Depository Governments to open it for signature and ratification at the earliest possible date. Moreover, the Assembly repeated its call upon the Outer Space Committee to complete urgently the preparation of the draft agreement on liability for damage caused by the launching of objects into outer space. At its twenty-third session, the General Assembly, by resolution 2453 B (XXIII), approved the establishment by the Committee of a working group to study and report on the technical feasibility of communication by direct broadcast from satellites and the current and foreseeable developments in this field, including implications of such developments in the legal area. At its twenty-fourth session, the General Assembly, by resolution 2601 A (XXIV), invited countries which had not yet become parties to the Outer Space Treaty and the Agreement on the Rescue of Astronauts to give consideration to ratifying or acceding to those agreements so that they might have the broadest possible effect. It also drew the attention of the Committee to the agenda of the Working Group on Direct Broadcast Satellites.

7. Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction

64. With respect to the development and codification of the law of the sea, after consideration of the item entitled

[80] G A (XX), Annexes, a.i. 63, A/C.6/L.564, para. 2.

[81] *Ibid.*, A/C.6/L.581, para. 9.

[82] G A (XXI), Annexes, a.i. 85, A/6570, para. 15.

[83] G A (XXII), Annexes, a.i. 89, A/6912, para. 16.

[84] See *Repertory, Supplement No. 3*, Vol. I, under Article 13(1)(a), para. 18.

"Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind", the General Assembly, in its resolution 2340 (XXII) of 18 December 1967, decided to establish an *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, composed of thirty-five States. The *Ad Hoc* Committee was requested, *inter alia*, to prepare, in co-operation with the Secretary-General, a study which would include a survey of existing international agreements concerning the sea-bed and the ocean floor.

65. By resolution 2467 A (XXIII) of 21 December 1968, the General Assembly established a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, composed of forty-two States, and instructed the Committee, among others, to study the elaboration of the legal principles and norms which would promote international co-operation in the exploration and use of the areas in question and ensure the exploitation of their resources for the benefit of mankind. For the implementation of this provision, the Committee established a Legal Sub-Committee which undertook to study the elaboration of legal principles relating to such matters as the legal status of the areas in question, the applicability of international law, including the United Nations Charter, the reservation of the sea-bed and the ocean floor for exclusively peaceful purposes, the use of its resources for the benefit of mankind as a whole and freedom of scientific research and exploration.

66. In resolution 2574 B (XXIV) of 16 December 1969, the General Assembly noted with interest the synthesis at the end of the report of the Legal Sub-Committee and requested the Committee to expedite its work of preparing a comprehensive and balanced statement of these principles and to submit a draft declaration to the General Assembly at its twenty-fifth session.

67. In resolution 2574 A (XXIV) the General Assembly requested the Secretary-General to ascertain the views of Member States on the desirability of convening at an early date a conference on the law of the sea to review the régimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the area of the sea-bed and ocean floor which lies beyond the limits of national jurisdiction, in the light of the international régime to be established for that area.

8. Commission on Human Rights

68. As has been reported,[85] the General Assembly entrusted the Commission on Human Rights with the task of elaborating the principles contained in the Universal Declaration of Human Rights into legally binding international covenants on human rights. By resolution 2200 (XXI), the General Assembly, "having considered since its ninth session the draft International Covenants on Human Rights prepared by the Commission on Human Rights and transmitted to it by Economic and Social Council Resolution 545 B (XVIII) of 29 July 1954, and having completed the elaboration of the Covenants at its twenty-first session," adopted and opened for signature the following three international instruments on human rights: (*a*) The International Covenant on Economic, Social and Cultural Rights; (*b*) The International Covenant on Civil and Political Rights; and (*c*) The Optional Protocol to the International Covenant on Civil and Political Rights.

B. The making of recommendations

69. As indicated in *Supplement No. 3*,[86] while the initiation of studies and the making of recommendations are not necessarily activities which are mutually exclusive, the stage of initiation is clearly passed when the preparatory work on a topic results in a final draft submitted by the International Law Commission to the General Assembly, and the action taken thereafter by the Assembly on a draft comes exclusively with the "making of recommendations". During the period under review, the General Assembly took action on the International Law Commission's final drafts on two topics. The action on one of the topics, namely resolution 2166 (XXI) on the final draft on the law of treaties, followed the established pattern noted in *Supplement No. 3*:[87] the Assembly decided that an international conference of plenipotentiaries be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it might deem appropriate, requested the Secretary-General to convoke the conference and make arrangements for the conference, invited the participants, and referred the draft articles to the conference for consideration. The action taken on the other topic, namely resolution 2273 (XXII) on special missions, deviated from the above-mentioned pattern: the General Assembly decided to include an item entitled "Draft Convention on Special Missions" in the provisional agenda of the twenty-third session, with a view to the adoption of such a convention by the General Assembly; requested the Secretary-General to make necessary arrangements for its consideration; and invited Member States to include as far as possible in their delegations to that session experts competent in the field to be considered. The preambles of both resolutions contained an identical paragraph which read as follows:

> "*The General Assembly*,
>
> "...
>
> "*Mindful* of Article 13, paragraph 1(*a*) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification".

70. The General Assembly's resolution on special missions was adopted pursuant to the following recommendation made by the International Law Commission in its report to the Assembly on the work of its nineteenth session:

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[85] See *Repertory*, vol. III, under Article 62 (3), paras. 7, 14-15 and 22-27; *Supplement* No. 3, vol. II, under Article 62 (3), para. 7; and this *Supplement*, vol. II, under Article 62 (3), para. 8.

[86] *Repertory, Supplement No. 3*, vol. I, under Article 13 (1)(a), paras. 48-49.

[87] *Ibid.*, para. 49.

"At the 941st meeting on 14 July 1967, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that appropriate measures be taken for the conclusion of a convention on special missions".[88]

In introducing the report to the Sixth Committee, the Chairman of the International Law Commission noted that that recommendation was worded differently from the one submitted in 1966 with respect to the draft articles on the law of treaties. The Commission in 1966 had specifically recommended the convening of an international conference for the purpose of concluding a convention on the law of treaties. He explained that the Commission wished to make it clear to the Sixth Committee that the different form of recommendation in no way implied that the Commission did not favour the convening of an international conference. The Commission had framed its recommendation in that more general form only because it was aware of the crowded conference programme of the United Nations. It had had in mind that, if there was a risk of a long delay in completing the codification of the law of special missions, the General Assembly might wish to consider the possibility of using some other procedure for concluding a convention, such as having it drawn up by the Sixth Committee itself.[89] During the debate in the Sixth Committee a number of representatives favoured the preparation of a convention by the Sixth Committee and the adoption of the convention by the General Assembly at a plenary meeting. It was argued in support of that solution that it would avoid the considerable expense of convening an international conference. It would also accelerate the conclusion of the convention, since no conference could be convened before 1970 because of the crowded calendar of the Organization. Finally, the preparation of an international convention would enhance the role and the prestige of the Sixth Committee. The Committee's task would be facilitated by the fact that the draft articles on special missions covered familiar ground since they were based on the Convention on Diplomatic Relations. It was also pointed out that in the past the Sixth Committee—and other Main Committees of the General Assembly—had successfully prepared conventions which had been adopted by the Assembly. Some representatives, however, held that the Sixth Committee was not the appropriate forum for the preparation of a convention on special missions. In their view, the delegations to the General Assembly lacked the necessary experts for the study of such a very technical subject. Because of its other duties, the Committee would be able to devote only a limited number of meetings at each regular session to the preparation of the convention. Moreover, in a plenipotentiary conference the discussion would be in two stages, namely, the committee stage and the plenary stage, and the latter might take up a substantial part of the whole period of the conference. By contrast, if the matter were taken up by the Sixth Committee, it would be impossible for the General Assembly in plenary meeting to devote to the drafting of such an important convention the time and attention it deserved.[90]

[88] *Yearbook of the International Law Commission 1967*, vol. II, p. 347.

[89] G A (XXII), 6th Com., 957th mtg , para. 17

[90] G A (XXII), Annexes, a i. 85, A/6898, paras. 70 and 71.

71. It may be noted that, at the request of Switzerland (a non-Member State), the Sixth Committee decided[91] to invite that country to participate, without the right to vote, in the Committee's deliberations, on the understanding that no precedent was being created. On the basis of that decision, at the twenty-third and twenty-fourth sessions of the General Assembly, Switzerland participated in the relevant proceedings of the Sixth Committee.

72. In a further action which could have a certain bearing on the codification of international law, the General Assembly, by resolution 2312 (XXII), "*considering* the work of codification to be undertaken by the International Law Commission in accordance with General Assembly resolution 1400 (XIV) of 21 November 1959", adopted the Declaration on Territorial Asylum. During the discussions in the Sixth Committee in 1966 on that draft declaration, comments were made regarding its basic objectives. The Chairman of the working group on the draft declaration reported to the Committee that the working group had approached its task with the understanding that it was not preparing legal norms but was merely laying down humanitarian principles that States might rely upon in seeking to unify their practices relating to asylum.[92] It was noted by some representatives in the Sixth Committee that the task of the General Assembly was to formulate the political and humanitarian principles underlying the practice of territorial asylum.[93] The draft declaration was thought to constitute a step towards codification of the relevant rules and help to establish uniform State practice with regard to asylum.[94] It was stressed, however, that the task of the Sixth Committee was not that of the progressive development and codification of the principles and rules of international law on the subject.[95] Once the declaration was adopted by the General Assembly, it would be part of the material or a guide that would be available to the International Law Commission, when it took up the tasks of developing and codifying the rules of international law concerning the right of asylum.[96]

73. During the debate at the twenty-second session a great number of delegations in the Sixth Committee stressed that the draft declaration was not intended to propound legal norms, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum. The declaration, when adopted, like any other recommendation of the General Assembly addressed to Governments in the field of human rights, would not of itself be a legally enforceable instrument or give rise to legal obligations, and for that reason would not affect existing international undertakings or national legislation relevant to the subject of asylum and related matters. To the extent that the declaration might, in some respects, go beyond the present state of international law, existing law would continue in effect until such time as the relevant provisions of the declaration

[91] G A (XXIII), 6th Com., 1039th mtg., para. 42, and G A (XXIV), 6th Com., 1121st mtg., para. 13.

[92] G A (XXI), 6th Com., 963rd mtg., para. 3.

[93] *Ibid.*, 922nd mtg., paras. 26 and 46; 923rd mtg., paras. 31, 62 and 65.

[94] *Ibid*, 923rd mtg., para. 9.

[95] *Ibid.*, 921st mtg., para. 43; 922nd mtg., paras. 6, 26 and 46; 923rd mtg., paras. 5, 9 and 31.

[96] *Ibid.*, 922nd mtg., paras. 6, 20 and 26; 923rd mtg., paras. 5 and 65.

were incorporated into positive international law.[97] Other representatives, while agreeing that the declaration would not be binding on States, pointed out that, if it achieved its purpose of serving as a guide for State practice, it might eventually, through the unification of such practice, lead to the establishment of new customary rules of international law, creating new obligations for States.[98]

74. It was generally agreed, in principle, in the Sixth Committee that the work under way should lead to the adoption of a declaration.[99] This was reflected in General Assembly resolution 2181 (XXI) which used the following terminology both in its preambular and operative parts:

"*The General Assembly*,

"*Being convinced* of the significance of continuing the effort to achieve general agreement in the process of the elaboration of the seven principles of international law set forth in General Assembly resolution 1815 (XVII), but without prejudice to the applicability of the rules of procedure of the Assembly, with a view to the adoption of a declaration which would constitute a landmark in the progressive development and codification of those principles,

"...

"8. *Requests* the Special Committee, having regard to the work already accomplished by the 1966 Special Committee, as specified in paragraph 3 above, to submit to the General Assembly at its twenty-second session a comprehensive report on the principles entrusted to it for study and a draft declaration on the seven principles set forth in Assembly resolution 1815 (XVII) which will constitute a landmark in the progressive development and codification of those principles;"

The same terminology was repeated during the period under review by subsequent General Assembly resolutions renewing the mandate of the Special Committee.[100]

75. A discussion did arise, however, regarding the legal value of a declaration by the General Assembly on the principles under study. According to one trend, the question to what extent an interpretation by a political organ could be considered as legally binding, if the organ in question lacked the competence to adopt binding decisions, was related to the question of interpretation of treaties. In any discussion of that question, it was stressed, the starting point had to be the principle of international law —recognized in the draft articles on the law of treaties— that the authentic interpretation of a treaty by the parties had the same binding legal force as the treaty itself. Although the constitutional character of the Charter was not in question, that principle of interpretation was entirely applicable to the Charter and, indeed, followed from its constitutional nature. Inasmuch as in international law an authentic interpretation needed no special procedure, an interpretation of the Charter adopted in the General Assembly by Member States had the same significance and legal effects as the Charter itself. That was the meaning which should be attributed to the often cited passage concerning the interpretation of the Charter in the report of the Rapporteur of Commission IV, Committee 2, of the San Francisco Conference.[101]

76. According to another trend, however, it was necessary to link the legal effects of a declaration by the General Assembly to the degree of agreement reached by Member States when adopting the declaration and, more specifically, with the question of consensus and majority.[102] Thus it was suggested that the Special Committee should clarify precisely what it considered to be the nature of the declaration it was labouring to produce, bearing in mind an important and fundamental statement on the interpretation of the Charter, adopted by Commission IV, Committee 2 of the San Francisco Conference, to the effect that: if an interpretation of the Charter made by any organ of the Organization or by a committee of jurists was not generally acceptable, it would be without binding force; and in such circumstances, or in cases where it was desired to establish an authoritative interpretation as a precedent for the future, it might be necessary to embody the interpretation in an amendment to the Charter, and that amendment might always be accomplished by recourse to the procedure provided for that purpose. That statement seemed to draw a valid distinction between individualized interpretation of the Charter, through its day-to-day application in actual circumstances by the different organs acting within the sphere of their own competences, and generalized abstract interpretation, which required general acceptance to be legally binding. The task upon which the Sixth Committee and the Special Committee were engaged came within the scope of that latter form of interpretation, and consequently the agreement reached at San Francisco on that cardinal aspect should not be lost from sight.[103]

77. It was also stressed that, although it was true that in some cases the degree of agreement reached had since diminished, the cumulative effect of the negotiations conducted by the two Special Committees had been to lay the foundation for a general agreement. In order to understand the significance of that cumulative process, it was necessary to consider the fact that for some years the General Assembly had been engaged in formulating legal texts that would be authoritative interpretations of broad principles of international law expressed in the Charter and that the juridical value of such texts was directly dependent on the extent to which they commanded general support. A text which merely set forth various controversial majority views was totally ineffectual as a declaration of international law.[104]

78. In this respect, certain passages of a memorandum of the Office of Legal Affairs on the use of the terms "declaration" and "recommendation" were recalled. In that memorandum it had been said that a "declaration" or a "recommendation" was adopted by resolution of a United Nations organ and, as such, could not be made binding upon Member States, in the sense that a treaty or convention was binding upon the parties to it, purely by the de-

[97] For example, G A (XXII), 6th Com., 984th mtg., para. 7; 985th mtg., paras. 12 and 16; 986th mtg., paras. 6, 7, 9, 15, 26 and 36; 987th mtg., paras 6, 9, 10, 11, 15, 16, 34, 35 and 51; 988th mtg., paras. 13, 23 and 28.

[98] *Ibid.*, 985th mtg., para. 9; 986th mtg., para. 26.

[99] See G A (XXI), Annexes, a.i. 87, A/6547, para. 24.

[100] See G A resolutions 2327 (XXII), 6th preamb. para; 2463 (XXIII), 6th preamb. para.; and 2533 (XXIV), 6th preamb para. and para. 4.

[101] G A (XXI), 6th Com., 928th mtg., para. 22.

[102] See paras. 46-51 above.

[103] G A (XXI), 6th Com., 935th mtg., para. 38.

[104] G A (XXI), 6th Com., 926th mtg., para. 3.

vice of terming it a "declaration" rather than a "recommendation"; but that in view of the greater solemnity and significance of a "declaration", it might be considered to impart, on behalf of the organ adopting it, a strong expectation that members of the international community would abide by it and consequently, in so far as the expectation was gradually justified by State practice, it might by custom become recognized as laying down rules binding upon States. According to that memorandum, a "declaration", in United Nations practice, was a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance was expected.[105]

79. The General Assembly resolutions adopted during the period under review, establishing and renewing the mandate of the Special Committee on the question of defining aggression, were silent as to what juridical form the projected definition should take, whether a convention, a declaration by the General Assembly or other legal form. This question was raised at the twenty-third session of the General Assembly. In the Sixth Committee, the opinion was expressed by some representatives that the definition should take the form of a declaration included in a General Assembly resolution in order to show the special importance the Assembly attached to the question and to give the definition a greater influence on the progressive development of international law. While it was true, they said, that such a resolution would not be strictly binding either on States or on the Security Council, it could not be categorically stated that it would be without any legal force. Considering that the idea of the illegality of aggression was established by many international treaties, it was not possible to rule out *a priori* the possibility that with the passage of time a definition of aggression solemnly approved by an overwhelming majority of the General Assembly would take on a binding character and become a permanent part of international law.[106]

80. It was noted in *Supplement No. 3*[107] that, as one of the recommendations of a general nature, the General Assembly decided during the twentieth session to establish a programme of assistance and exchange in the field of international law. In 1966, by resolution 2204 (XXI), the General Assembly changed the name of the programme to "The United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law". The advisory committee which had been created for the programme came to be called accordingly "The Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law". The same resolution authorized the Secretary-General to carry out in 1967 the activities proposed by him and consisting of, *inter alia*, (*a*) the holding of a regional training and refresher course, in co-operaion with UNITAR and UNESCO; (*b*) the award of ten fellowships at the request of Governments of developing countries; (*c*) the provision of a set of United Nations legal publications to up to fifteen institutions in developing countries; and (*d*) the provision of advisory services of experts within the framework of existing technical assistance programmes. Similar decisions were made by the Assembly in subsequent years, except that regional training and refresher courses were to be organized by UNITAR, that the number of fellowship grants was increased to fifteen, and that the system of providing legal publications was modified so that more institutions in developing countries receive current publications starting with 1969.[108]

81. One of the goals set out in resolution 2099 (XX), which established the programme of assistance, was the dissemination through United Nations information media of information about international law and activities in that field. In connexion with that goal, the Secretariat prepared and published in 1967 a booklet entitled "The Work of the International Law Commission"[109] containing a general introduction to the work of the Commission as well as the texts of the Commission's Statute, selected final drafts prepared by the Commission and multilateral conventions which were adopted by diplomatic conferences, convened under the auspices of the United Nations, following the consideration of certain topics by the Commission.

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

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

82. The provisions of the State of the International Law Commission explaining the meaning of the expressions "progressive development of international law" and "codification of international law" and providing a procedure for each of these two functions remained unchanged.

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

83. In *Supplement No. 3*[110] it was noted that in practice the International Law Commission continued to indicate that drafts submitted by it to the General Assembly had come both within the category of progressive development and that of codification, making it difficult to keep apart the two tasks as defined in the Statute.

84. During the period under review, that practice was followed by the Commission with respect to two final sets of draft articles, one on the law of treaties and the other on special missions. The Commission's statement on the draft articles on the law of treaties was contained in *Supplement No. 3*.[111]

85. Regarding the draft on special missions, the Commission stated in its report to the Assembly on the work of its nineteenth session:

> "23. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formu-

[105] *Ibid.*, 935th mtg., paras 38 and 39.

[106] G A (XXIII), Annexes, a.i. 86, A/7402, para. 21.

[107] *Repertory, Supplement No. 3*, vol. I, under Article 13(1)(a), paras. 68 and 71.

[108] See G A resolutions 2313 (XXII), 2464 (XXIII), and 2550 (XXIV).

[109] United Nations publication, Sales No.: 67.V.4. The booklet has since been revised and up-dated.

[110] *Repertory, Supplement No. 3*, vol. I, under Article 13(1)(a), paras. 73 and 74.

[111] *Ibid.*, para. 76.

lated by the Commission contain elements of progressive development as well as of codification of the law."[112]

3. IN THE LIGHT OF THE ESTABLISHMENT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

86. At its twenty-first session the General Assembly considered an item entitled "Progressive development of the law of international trade" on the basis of a report of the Secretary-General.[113] It was noted in that report that the International Law Commission "does not believe that it would be appropriate for it to become responsible for work in the field of the progressive development of the law of international trade".[114] The report concluded by stating that the General Assembly might wish to consider the establishment of a new Commission with the function "to further the progressive harmonization and unification of the law of international trade".[115]

87. By resolution 2205 (XXI) of 17 December 1966, the General Assembly noted that the establishment of a United Nations Commission on International Trade Law "would be properly within the scope and competence of the Organization under the terms of Article 1, paragraph 3, and Article 13, and of Chapters IX and X of the Charter of the United Nations", and decided "to establish a United Nations Commission on International Trade Law which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade".

88. During the consideration of the report of the United Nations Commission on International Trade Law on the work of its first session, which took place at the twenty-third session of the General Assembly, in the Sixth Committee "several representatives characterized the Commission as the principal organ responsible for the progressive development of international trade law".[116]

4. IN THE LIGHT OF DECISIONS AND DISCUSSIONS IN THE GENERAL ASSEMBLY

89. In *Supplement No. 3*[117] it was noted that, in the practice of the General Assembly, the concepts of progressive development and codification of international law had not been clearly distinguished. This continued to be so during the period under review. However, the interpretation of those two concepts as applied to the work of the Special Committee on the Principles of International Law concerning Friendly Relations and Co-operation among States still gave rise to controversy.

90. With reference to the work of the International Law Commission, the General Assembly, in resolution 2166 (XXI), having decided to convene a conference of plenipotentiaries on the law of treaties, recalled a series of previous resolutions by which it had recommended to the Commission to "continue the work of codification and progressive development of the law of treaties", and expressed the belief that "the successful codification and progressive development of the rules of international law governing the law of treaties" would contribute to the development of friendly relations and co-operation among States and would assist in promoting and implementing the purposes and principles set forth in Articles 1 and 2 of the Charter. Again, by resolution 2273 (XXII), the General Assembly, having decided to take up the Draft Convention on Special Missions with a view to the adoption of such a convention by itself, recalled in a preambular paragraph a previous resolution recommending that the Commission should "continue the work of codification and progressive development of the topic of special missions". Resolutions 2167 (XXI), 2272 (XXII) and 2400 (XXIII), on the report of the International Law Commission, included a common preambular paragraph recalling previous resolutions by which the General Assembly had recommended to the International Law Commission that it should "continue its work of codification and progressive development of the law" relating to various topics being considered by the Commission. These resolutions as well as resolution 2501 (XXIV) contained another common preambular paragraph worded as follows:

> "Emphasizing the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,"

In paragraph 4 of resolution 2167 (XXI), the General Assembly recommended that the International Law Commission should " . . . continue the work of codification and progressive development of the international law relating to special missions". In paragraph 2 of resolution 2400 (XXIII), the Assembly expressed its profound appreciation to the International Law Commission of the valuable work it had accomplished during the previous twenty years in the "progressive development and codification of international law". And last, in paragraph 2 of resolution 2532 (XXIV), the Assembly expressed its deep gratitude to the International Law Commission for its outstanding contribution to the "codification and progressive development of the rules of internationaı ıaw on special missıons .

91. During the debate in the General Assembly on the draft articles on the law of treaties and on special missions, comments were made on their nature, including whether those drafts represented progressive development or codification of the law. The report of the Sixth Committee at the twenty-first session gave a summary of the debate on the draft articles on the law of treaties as follows:

> "25. Many representatives stressed the fundamental importance of the codification of the law of treaties for ensuring legality and the stability of the international legal order. . . . All those representatives regarded the results achieved in the codification of the law of treaties as a very significant landmark in the movement towards the codification and progressive development of international law, and considered therefore that the next steps

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[112] *Yearbook of the International Law Commission 1967*, vol. II, p. 346, para. 23.

[113] G A (XXI), Annexes, a.i 88, A/6396

[114] *Ibid.*, para. 5.

[115] *Ibid.*, para. 227.

[116] G A (XXIII), Annexes, a.ı. 88, A/7408, para. 8.

[117] *Repertory*, *Supplement No. 3*, vol. I, under Article 13(1)(a), para. 79.

should be taken very carefully so as not to impair those results.

"26. It was emphasized in the debate that now that the Commission had submitted final draft articles on the law of treaties, the principal task of the Sixth Committee was to see that that codification was promptly and effectively translated into international legislation, by recommending that the General Assembly should bring the work of codification and progressive development of the law of treaties to its logical conclusion by the most appropriate procedure for the adoption of a multilateral convention on the law of treaties which would give binding force to the principles and rules proposed by the Commission in its draft."[118]

92. With regard to the draft articles on special missions, the opinion was expressed that they represented an attempt at the progressive development of international law rather than codification of existing rules and practices.[119] An opposite view was also expressed.[120] The majority of the representatives who spoke on the point, however, characterized the draft articles as a contribution to the progressive development and codification of international law on the subject.[121]

93. With reference to the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, all the resolutions of the General Assembly adopted during the period under review concerning the renewal of its mandate[122] coincided in typifying the task of the Special Committee as one of "progressive development and codification" of international law, thus reaffirming the approach of earlier resolutions on the subject.[123] However, as indicated above, the interpretation of those two concepts still gave rise to controversy during the debate in the Sixth Committee at the twenty-first session of the General Assembly. It was agreed that the work was not a process of covert and informal amendment of the Charter. That document, which was not only a constitution but, as one representative observed, the greatest law-making treaty of modern times, had to be interpreted effectively in the light of its object and purpose and, as was said by another, of more than twenty years of development of customary international law. The substance of the principles could not be discarded but should be amplified, enriched and adapted to the problems of the present day. One representative added that the task related not only to rules of conduct but also to organizational rules and principles, since all of the provisions of the Charter were relevant to the purpose, and organizational rules were relevant not only for the interpretation of the rules of conduct, but also in themselves, as an integral part of the principles to be codified.[124]

94. On other aspects, however, there was a divergence of views. One trend upheld that the Special Committee should distinguish between proposals incorporating *lex lata* and proposals *de lege ferenda*. It was argued that the Committee was not, of course, bound to limit itself to the consideration of the former to the exclusion of the latter, but, unfortunately, whereas the 1964 and 1966 Special Committees had been able to make a certain amount of progress in producing formulations expressive of *lex lata*, they had consistently encountered serious difficulties when considering proposals *de lege ferenda*. That was because certain delegations had presistently advanced, under cover of alleged progressive development of the principles of the Charter, propositions that were political rather than juridical in content and had been designed to stretch the principles of the Charter to fit the dimensions of a particular ideological system. To attempt in that way to set up unclear political principles as legal norms in order to obtain short-term advantages for certain countries was a distortion of the concept of progressive development.[125]

95. It was further maintained that the idea of progressive development should be different. Although international law was a dynamic and not a static discipline, it nevertheless sought to establish a balance between the antinomies of stability and change. Of course, profound political developments had occurred in the world over the previous twenty years and the contributions that had been made to the development of international law within the framework of the Charter by the new States that had been created as a result of decolonization should be welcome; but it was precisely the Charter principles currently under discussion that guaranteed the independence and territorial integrity of those States. The formulae to be worked out must stand the test of time. The Committee's task was to draw basic rules of conduct for the community of States; to adopt what was asserted to be a legal principle because it served the immediate interests of a particular State would in the long run lead to disaster. Moreover, it would be just as dangerous to cherish the illusion that jurists could solve all contemporary international problems merely by drawing up a declaration on the principles of international law concerning friendly relations and co-operation among States. The more modest the Committee's objectives, the more enduring would be its work. If it succeeded, by common agreement, in elaborating the legal elements of the basic Charter principles it was studying, taking into account the practice of States and of the United Nations over the previous twenty years, it would have made a significant contribution to the development of international law.[126]

96. It was argued, on the other hand, that, in truth, codification and progressive development were inseparable. In establishing the rules of international law, existing gaps were bound to be filled by the formulation of new rules. To describe that process as legislative merely in order to deny it any legitimate place in the work of progressive development was a mere play on words. In actual fact it was essential for a body like the Special Committee, if it was to succeed in the task of codification and progressive development of international law entrusted to it by the General Assembly, to interpret that task in the broadest possible sense and to feel free to formulate such rules as best served the accomplishment of its purposes—rules that reflected both the realities and the necessities of international

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[118] G A (XXI), Annexes, a.i. 84, paras. 25-26.

[119] See, for example, G A (XXII), 6th Com., 961st mtg., para. 21; *ibid.*, 962nd mtg., para. 11

[120] See, for example, *ibid.*, 963rd mtg., para 12.

[121] See, for example, *ibid.*, paras 28, 36, 41 and 51.

[122] G A resolutions 2181 (XXI), 2327 (XXII), 2463 (XXIII) and 2533 (XXIV).

[123] G A resolutions 1815 (XVII), 1966 (XVIII) and 2103 (XX)

[124] G A (XXI), Annexes, a.i. 87, A/6547, paras. 24-27.

[125] G A (XXI), 6th Com., 930th mtg., para. 13.

[126] *Ibid.*, para. 14.

life. For example, a declaration reaffirming the prohibition of the use of force would not be complete if it failed to mention the problem of disarmament, or a prohibition of ideological preparation for war, namely, war propaganda. It was true that such principles did in a sense belong to the realm *de lege ferenda*, inasmuch as they had never been explicitly spelled out as binding law. However, it was difficult not to regard them as a logical consequence of the law that commanded States to refrain from the use of force; it was equally difficult to assert that the codification and progressive development of international law must consist merely in recording the customs of a society which, after thousands of years of development, seemingly hesitated to divest itself of its barbarous heritage.[127]

97. The Committee was considering basic principles, it was stated, the observance or non-observance of which would determine whether the world survived or was destroyed. The fact that the existence of a Charter based on those principles had not prevented the arms race and the deterioration of international relations made it essential for the Special Committee to deal with international law and the provisions of the Charter in the light of contemporary international realities with a view to making whatever adjustments were necessary. If a particular type of conduct by a State was harmful to friendly relations and co-operation among States, international law and the principles of the Charter should be modified so as to prohibit such conduct. That was the way in which the term "progressive development and codification of international law" should be understood. It was stressed that the objective was not to use abstract legal maxims for the purpose of disregarding realities but to express those realities in legal terms.[128]

98. It was further maintained that it was contrary to the very spirit of progressive development that, in formulating the principles, certain members of the Special Committee should have systematically refused to have the texts fully reflect developments over the previous twenty years or to take account of the principal international instruments that had been adopted during that period, such as the Charter of the Nuremberg International Military Tribunal, the Charter of the International Military Tribunal for the Far East, resolutions of the General Assembly, the Declarations of Bandung, Belgrade and Cairo, the Charter of the Organization of American States and the Charter of the Organization of African Unity. All those instruments had been adopted after prolonged and thorough discussion. To describe them as purely political, solely to repudiate their contents, was to refuse to admit that, in so far as those international instruments were evidence of State practice, they were traditional constituents of international law. International law was not created *ex nihilo*; world evolution, which was progressive, had to be taken into account.[129]

99. Still another trend of thought held that it was difficult to maintain the sharp distinction between legal principles and political propositions that had been made by some speakers. To attempt to divorce international law from the broader political context within which it necessarily had to evolve would, even if it were feasible, prove the surest way to stultify the growth of international law and to deprive it of any real possibility of affecting the course of international affairs. The International Court of Justice, when urged to refuse to give an advisory opinion because the question put to the Court was intertwined with political questions, had rejected that argument, asserting that most interpretations of the Charter of the United Nations would in the nature of things have political significance, great or small. A line between political and economic or social affairs could no longer be drawn in the conduct of foreign relations and that fact was reflected in the modern development of international law as well. The declaration should be neither a revision of the Charter nor a mere recital of its legal principles. It must be based on an effective interpretation of the Charter, inspired by its general philosophy and directed towards the fulfilment of its fundamental purposes, and on an investigation of the impact of the Charter on the traditional rules of international law. The interpretation of the Charter should be inspired by its general philosophy and should be in keeping with its fundamentals. The Charter was not merely a constitution of an international organization; it was the greatest law-making treaty of modern times. The difference of opinion on the question of *lex lata* and *lex ferenda* was more apparent than real. The declaration under preparation would not be the final step in the process of progressive development and codification of the principles; consequently, the question of whether its provisions were *lex lata* or *lex ferenda* did not arise. It was necessary to ascertain the positive rules that could be codified and to indicate the direction in which the rules should be developed. The declaration would lay down guide-lines and would establish a standard of conduct and achievement for States; hence the sole criterion by which its principles should be judged was their conformity with the purposes and principles of the Charter. The determination of whether a rule was *lex lata* or *lex ferenda* was not so clear-cut. It involved a thorough investigation of the impact of the Charter on traditional international law. The unhappy experience of the Conference on the Law of the Sea concerning the three-mile limit should not be repeated. The failure of that Conference to agree on a rule was due mainly to the position taken by those who insisted that the three-mile limit was the *lex lata* that should be maintained.[130]

[127] G A (XXI), 6th Com., 925th mtg., paras. 4-6.

[128] G A (XXI), 6th Com., 934th mtg., para. 40.

[129] *Ibid.*, para. 42.

[130] G A (XXI), 6th Com., 937th mtg., paras. 15, 17, 19 and 20.