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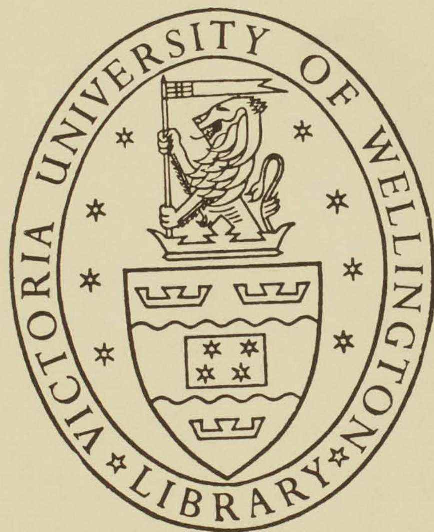
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"AN ANALYSIS OF LAW MAKING BY SELECTED

POLITICAL ORGANS OF THE U.N."

RESEARCH PAPER IN INTERNATIONAL LAW FOR

THE LL.M. DEGREE

VICTORIA UNIVERSITY OF WELLINGTON

NEW ZEALAND

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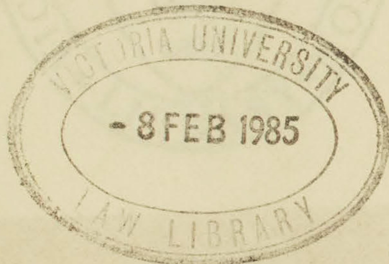

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INTRODUCTION

International Law has always been dominated by the Western States. The lists of subjects of International Law has dramatically increased in the last three decades. As a result of this increase in membership there has been to a much greater extent, unlike the past, of questioning of the relevant International Law principles as to whether they can regulate new problems as "self determination", national sovereignty over natural resources and the protection of human rights in the light of continued totalitarianism. This has resulted in the increase in tension in the area of International Peace. In the light of this dramatic change, international Organisations as the United Nations, have a very important part to play. Its decisions whether in form of Declaration or Resolutions have great impact in the adapting of International Law to meet the necessary changes.

The object of the paper is to attempt to analyse certain selected decisions of the General Assembly with the view of ascertaining what role such politically constituted bodies play in the formation of law-making. The emphasis will be on the institutional and procedural aspects of the law-making process of such selected organs, rather than the substantive aspects which have been adequately dealt with elsewhere. (1) The study shall involve the examination of the adopted procedural rules (such as the voting methods, use of the working group and importance of the precedents) of such organisations involved, which shall be compared and contrasted to those of the International Law Commission in its work of codification and progressive development of law.

To facilitate the process of analysis there are three basic questions which provide the skeleton of the whole paper.

(1) e.g. Obed Y. Asamoah "THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY" (1966); Rosalyn Higgins "THE DEVELOPMENT OF INTER-LAW THROUGH THE POLITICAL ORGANS OF THE U.N. (1963); D.H.N. Johnson "THE LEGAL EFFECTS OF THE GENERAL ASSEMBLY RESOLUTION" 32 B.Y.I.L. p. 97

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(a) WHAT IS THE HISTORY OF THE SUBJECT?

This involves "how" the subject originated, but more importanly, how the subject came before the relevant body concerned with codification and progressive development. In addition what were the factors that necessitated the discussion of the question.

(b) WHAT INSTITUTION WAS SELECTED TO STUDY THE SUBJECT?

On this aspect the examination will involve looking into the background as to "why" the body was selected instead of, say, the International Law Commission. What are the characteristics of the selected body? Why was the selected body "competent" to study the question?

(c) PROCEDURE

In this part the study will be looking at "how" the formulation, documentation and elaboration of the subject. Why, for example, was a two-third majority vote instead of consensus being adopted? In addition, how significant was the role of precedents in the formulation of the question.

These questions shall be analysed in the light of the following topics:

(1) PART A: DECLARATION ON PRINCIPLES OF INTER. LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES.

(2) PART B: DECLARATION ON PERMANENT SOVEREIGNTY OVER NATURAL WEALTH AND RESOURCES.

(3) PART C: UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS.

(4) PART D: LAW OF THE SEA CONFERENCES.

(5) PART E: THE LEGAL SIGNIFICANCE AND STATUS OF THE DECLARATIONS.

The above topics have been chosen because the process of law making involved in each shows the different type of results, which include not only the Declaratory process of International Law, the attempt to create new laws and to create specific programmes in pursuance to the terms of the Charter of the United Nations.

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Secondly, the different subjects highlight how far there should be agreement in a subject before they can be elaborated and codified. The topics also show how far there should be dialogue before the suspicion that exists may be removed.

The process involved in the law making highlights what "type" of institution and the "composition" of such institution is required as to bring success to the whole exercise.

Last but not least, the topics show what different procedures are involved and why they were being selected.

PART A: (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States).

ORIGIN OF THE CONCEPT

The presence of the question before the General Assembly was the result of the convergence of two main political pressure groups, which were coming from the Soviet Bloc and secondly those coming from the "new" non-aligned states. (1)

(A) Soviet Bloc Initiative

At the end of the internal crisis, civil war and foreign intervention, the new Soviet state found itself relatively isolated from the other members of the international community. This posed the problem of how the relationship of the new states can be explained in the light of the other capitalistic states. The explanation of this situation was to be found in the policy of "peaceful co-existence" or as it is known today, "friendly relations".

It was to be the first task of Soviet International Lawyers in finding legal foundation for the theory. In this early stage of the development of the Soviet state, there was a strong conviction that this transformation was merely a temporary one as communism was going to spread to the other parts of the world. (2).

(1) E. McWhinney "THE LAW INTERNATIONAL LAW" (1966) 60 A.J.I.L. at 3

(2) E.A. Synder & H.W. Bracht "CO-EXISTENCE & INTERNATIONAL LAW" (1958) I.C.L.Q. at 55.

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In essence the principle of co-existence involved temporary co-operation between the Communist and capitalistic states. But the co-operation as between the two cannot be a permanent feature of the relationship as it was the ultimate aim of the Soviet state to spread communism universally, thus it involved the destruction of the capitalistic system.(1) Since this expectation did not happen the principle of "peaceful co-existence" (if one may call it that), was the means to bring the capitalistic states within the Communist control. The concept was seen in this light by the Western jurists initially, i.e. it was a means of destruction. Due to the failure of the spread of Communism, as already alluded to, and the non-disappearance of the law, the policy has taken a new turn as the Soviet states become conservative. (2) It is now argued that to be essentially a means of regulating peaceful co-operation and international relations between the two major blocs (3).

Thus the concept now is argued to contain:

(a) mutual respect for the territorial integrity and sovereignty

(b) obligation not to attack other states

(c) non interference in the internal affairs of other states

(d) equality and granting of equal advantages

(e) renunciation of force as a means of settling disputes.

As a result of the Soviet Union's request to include in the 12th session of the General Assembly the item "declaration Concerning Peaceful Co-existence" (4), was included on the 1st October 1957 in the Agenda of the General Assembly. In addition there was a "joint draft proposal" of India, Yugoslavia and Sweden. The wording of the "joint proposal" was adopted by the 6th Committee with the approval of the

(1) E.A. Synder & H.W. Bracht "COEXISTENCE & INTERNATIONAL LAW" (1958) I.C.L.Q. at 57

(2) McWhinney E. "INTERNATIONAL LAW & REVOLUTION" (1967) p. 70
This will undoubtedly be denied by Communist Bloc jurists.

(3) Synder & Bracht (supra). p. 70 McWhinney (supra) p.

(4) Y.U.N. (1957) at 105

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Soviet Union, (whose proposal was severely criticised) and their proposal was not voted. (1) The proposal was to result in General Assembly Resolution 1236 (XII).

(B) INITIATIVE OF 'NEW' STATES (2)

It need not be over emphasised that one of the most dramatic developments in the history of the United Nations has been the increase in the membership since 1945, from its 51 original (3) member states it has increased to 138 in 1975 (4). The unofficial groupings of the General Assembly members clearly shows the voting power of the new states.

These are:

(1)	Permanent Members of the Security Council	5
(2)	African States	43
(3)	Asian States	34
(4)	Eastern European States	10
(5)	Latin America	26
(6)	Western Europe (including Australia, N.Z. & Canada)	20

These figures were approximately the same when these questions were being considered by the appropriate bodies. As a direct result of the above composition of the General Assembly, the emphasis in objects shifted to a more 'active' role of International Law not only in the promotion of justice,but also in the protection of states (especially the "new" ones), from having their independence invaded, literally and economically. They were dissatisfied as International Law was insensitive to their aspirations. In order to get concrete results they neither looked to the West or East Bloc for guidance. It was by direct participation of

(1) Y.U.N. (1957) p. 105

(2) The definition of new shall refer to the newness of states in terms of their history or emergence. This description is very artificial for the term "new" is a relative one. It thus included states which have emerged or attained independence in and after World War 2. This would include most of the states which have joined the United Nations in the last 30 years.

(3) Apart from the states which were signatory to the declaration, it included non-signatory who were invited after the San Fransisco Conference convened.

(4) (1975) United Nations Handbook, Ministry of Foreign Affairs p.9

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these states, that can bring the law as they see it, to meet their changed circumstances. In this respect they picked up from where the Soviet and Western jurists left off in their debate on the question of "friendly relations". In addition they changed the emphasis of International Law to a problem orientated approach and to other legal doctrines often seen as unimportant by the two principal protagonists. (1) Their intervention in the dialogue between the East and the West removed the monopoly held on the elaboration of the concept from the Communist bloc and as seen by McWhinney, was to provide flesh to the bare bones of the discussion (2) which in turn helped to remove the general air of misunderstanding that hung over the discussion of this question. Dissatisfaction was seen as to the state of the law on guarantees of political and legal sovereignty or even a feeling in some quarters that the laws were obsolete. This could be explained in their desire to participate with the process of law making as they have not done before. It was partly for the desire to have that prestige of being seen as lawmakers. There has been a suggestion that the view of the new states towards international law, say, as to "unequal treaties" or the exaggerated emphasis on the concept of national sovereignty and even the rejection of the customary international law, to be due to their economic position. (3) How true this view as that of the "new state" is, is questionable, for it would seem that this is the result of joining forces with the Communist bloc in the attempt to re-write the law.

The initial problem that was faced by the West was this common platform that the East and the "new" states have against the status quo. It was seen that the rather literalistic insistence on the question of the "sources" of the law, and the view that international law can only be improved not by any such broad declaration but on the improvement of the present international law, was to be contrary to the demand for

(1) McWhinney, 60 A.J.I.L. 3

(2) ibid.

(3) Piet - Hein Houben "PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS." (1967) 61 A.J. I.L. at 701

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a more adaptive means of law making that is applicable to the changed circumstances. However, there is the danger that in return for their support, the Communist states able to persuade the majority of new states to depict the status quo as only serving the interest of the West, and the established rules of Customary law be rejected as it's alien and has no application to the new states which were not in existence when the laws were made. (1)

The effects of the intervention of the new states was to bring respectability and acceptability to the concept of "friendly relations" for the real intention of the Soviet Union was doubted in the light of recent events, as the Invasion of Hungary in 1956. The word of the Soviet Union was doubted for it was to be seen in terms of deeds and action. The interest shown by the new states forced the West to re-think their views on the question. This can be shown by the vote and discussion on the proposal of the three states (i.e. Yugoslavia, India, and Sweden) when the question originally arose in the first committee (2)

(C) ATTITUDE OF THE WESTERN JURISTS

As already noted peaceful co-existence was initially a means to bring about universal communism and there was serious doubt as to real motive of the Soviet Union in their attempt to bring about a Declaration of "friendly relations". It was the "deeds" not words that were important. The whole exercise was seen as a mere propaganda to desseminate Communism ideology and to silence the international criticism for what the Soviet Union had just done. The question however was in the agenda of the International Law Association since 1956 despite the ideological differences. In this regard, it should be noted that throughout the discussion of the topic in the International Law Association the title of the topic was not changed to "friendly relations" as was in the General Assembly.

(1) Houben (supra) 735.

(2) 1957, Y.U.N. p. 105

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The concept of "peaceful co-existence" as suggested by the Soviet Union was seen as not one of the established principles of International Law and that the only way to bring results to the concept was not through "peaceful co-existence" but in the promotion and maintenance of friendly relations between states. In any event, the change in the name of the concept came from the proposal of the 3 states (India, Yugoslavia and Sweden) when the question was considered in the first Committee.

The most important result of the discussion of the topic in the Association has been the breakthrough in the general outlook towards the topic.
This breakthrough by the members of the Association, who were dealing on a person to person basis, and outside the arena of the General Assembly was to help in eliminating the initial suspicion that the West had on the whole exercise. It is the change of attitude that has been contributed by the frank exchanges between the jurists of both sides of the bloc. (1) Despite the ideological debate (with emphasis on politics and ideology) that happened early on in the discussion of the topic, the Western jurists were able to insist on pragmatic empirical step by step approach to the practical solutions as between the two sides. (2) This is said to have materialised in the next year when the Moscow Partial Test Ban Treaty of 1963 was completed. Thus the ideological debate often coupled by calling and insults were to be replaced by serious discussions as to how to solve the problems prevailing in the world. (3)

Another important factor that partly helped to eliminate the fear of the West was the improvement in the relationship of United States and the Soviet Union, leading up to the "detente". Despite the double faced policy of "peaceful co-existence", one aimed at the local audience and one at the international world community at large, it was the latter that

(1) E. Mcwhinney "INTERNATIONAL LAW AND REVOLUTION" (1967) at 72.
(2) ibid. at 73
(3) ibid. at 72

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produced more result than the former in that economic and trade relations were encouraged by the Soviet Union. Thus it was the "deeds" rather than "words" that was important in showing that U.S.S.R. was genuinely interested in maintaining international peace. It should be noted however, that there was some breakthrough in the discussion between the East and West ideological rivalry even before the establishment of the sort of atmosphere created by the detente of the early 1960's. This was largely in the scientific field where there was not much pre-occupation with ideological debate. (1) It has been pointed out that it was the result of the West's insistence that more details were being elicited from the Communist bloc as to the content of the "friendly relations". However, a close look at the result of the exercise showed that there was not really much attained in terms of clear concrete principles. It may have succeded in turning the emphasis not on mere generalisations to a more acceptable formulation that would be able to have application to practical problems. It seems therefore from the description of McWhinney's that the discussion was able to provide a "pragmatic, empirical problem orientated step by step approach" (1) to be not really a true description of the result of the Special Committee.

As a result of the two pressures and the improvement in international relations between the major powers that have facilitated and allowed discussion not only in the International Law Association but also in the General Assembly. It became very clear that there was a consensus of opinion that the future is doomed unless international co-operation exists between the members of the General Assembly. The Afghanistan's representative, among others, had this to say:

> ".... if the world wished to be spared of an atomic war, the nations should base their policies on non-intervention,

(1) McWhinney, 60 A.J.I.L. p. 29

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respect of international sovereignty, territorial integrity of states and settlement of disputes by peaceful means......" (1)

(D) WHICH INSTITUTION WAS SELECTED?

Under General Assembly 1505 (XV), operative paragraph 4, the question of friendly relations was included in the provisional agenda of the General Assembly in its 17th session (2). The item was referred to the 6th (legal) Committee for consideration. There was a general agreement among most members of the Committee that there was an urgent need to improve and strengthen international peace and this could be attained by the development of International Law. Two courses of action were available to the Committee.

Firstly, it was proposed by Czechoslovakia, for the 6th (Legal) Committee to prepare a Draft Declaration of 19 specific principles. (3)

In the second place the General Assembly was to restrict itself to studying and defining only a few principles while leaving the others to be considered later. It was sponsored by 14 states. (The first 14 draft Resolution) (4). A compromise solution was suggested whereby the first and second proposals were to be embodied into one. This was submitted by another 14 states (hereinafter called the 2nd & 4th draft resolution). However this was to be opposed, and after a number of informal meetings, an additional draft resolution was proposed, and had the support of 37 states. It included the suggestion that seven principles of International Law would be placed in the current agenda of the 18th session and in terms of priority. This text was submitted for vote by the 6th Committee which was adopted by the vote of 73 to 0 with 1 abstention. It should be noted that the three other proposals were not to be voted and the proposal was to form the General Assembly Resolution 1815 (XXII) (5)

(1)General Assembly 18th session, 6th Committee, 804th meeting, p. 119
(2)(1961) Y.U.N. 525
(3)(1962 Y.U.N. p. 489
(4) ibid
(5) ibid

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In the 17th session the 6th Committee had 29 meetings in dealing with the question. In this session two working papers were submitted by the member states. Czechoslovakia proposed that the 6th Committee should establish 2 working groups, where the first shall deal with the preliminary drafts on the 4 princples that had been selected by the General Assembly. The other Committee was to deal with the other principles that were suggested by the proposal of the first "14 power draft" (i.e. the suggestion of Czechoslovakia).

However, the above proposals were to be amended whereby the 6th Committee was to establish a "Special Committee" to draw up proposals for the progressive development of International Law. This proposal was supported by 19 African states and Yugoslavia (1)

An amendment to this proposal was that the "Special Committee" was to meet at the end of the session of the 6th Committee. This was supported by the 9 Latin American states. However it was resolved that the two proposals were to be jointed into one. This draft was adopted unanimously by the 6th Committee and was to be the General Assembly Resolution 1966 (XVII).

(a) Why was the 6th Committee not selected?

It was clear that at the discussion of the 17th session of the 6th Committee nothing was to be attained by the body of the 6th (Legal) Committee due to the shortage of time, for more could be attained by a Committee which would be able to study the questions. The 6th Committee did not have time to deal with all the speakers interested in the subject for it was seen by the representative of Guatemala that such a committee would be able to study the subject (2) Any such Committee would be able to prepare a report as to the topics to be discussed. Due to the large numbers of the members of the 6th Committee, it was not able to devote enough time for the discussion of the question of friendly relations, since it requires thorough examination of the principles of

(1) ibid. 1962 Y.U.N. p. 489
(2) General Assembly, 18th session, 6th Committee, 815th meeting, p.190

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International Law (1). However, the increase in the membership to 31 from 27 in the special committee (2) seems to defeat this very purpose.

There was a general dissatisfaction with the state of law, and even though the agenda of the 6th Committee has been very light, there was a reluctance to be involved in drafting work involving more than one session. It was felt that the continuity of work would be affected by the change in the membership of the Committee. McWhinney (3) has suggested that there was a feeling of dissatisfaction with the slowness and procedural cumbersomeness adopted by the Committee. This criticism, would hold water, if seen, in the light of the attempt to totally disregard the standard norms in favour of the new ones. As the experience of the law of the sea has shown, that it is very difficult to establish new norms. (4) It is suggested however, that the procedures were not slow, but it was simply that they had too many expectations and the procedures were not geared towards dramatic changes that were being called for. The uncertainty alleged was due not so much to the state of the law but rather to the style of conducting foreign relations (5). The criticism would not be valid when extended to the selection of the Special Committee as the membership consisted of those members of the 6th Committee. In fact, one can say that the Special Committee was a cross section of the 6th Committee.

(b) <u>Why was the International Law Commission Ommitted?</u>

The function imposed by Art. 13 of the charter (i.e. the codification and progressive development of International Law) involved more than the technical functions of drafting the documents, for it presupposes that there is a certain degree of agreement as to procedural rules and substance of the question to be dealt with. Thus it was ludicrous

(1) for example see Gen. Assembly 18th session, 6th Committee, 802nd meeting
(2) U.N. Dox's A/5689, A/5727
(3) McWhinney, 60 A.J.I.L. p. 3
(4) John N. Hazard "<u>NEW PERSONALITIES TO CREATE NEW INTERNATIONAL LAW</u>" (1964) 58 A.J.I.L. 955
(5) (1963) 57, A.J.I.L. pp. 611-2

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to involve the International Law Commission in codification of controversial questions. (1) In the first place, the question of "friendly relations" is a very controversial one. The question covers the entire field of relations between states and any formulation was to have a lot of political impact. The question touches on one of the most sensitive areas of International Law.

Secondly, there was no "political will" or agreement as to the procedure, let alone, on the substance of the question. These two elements made the question of "friendly relations" of a special nature and the I.L.C. was not the appropriate body to deal with its progressive development and codification.

Since the question has important political implications, there was an emphasis on this aspect, and there were doubts if the question has been a "legal" one. From this point of view, it was not a subject that the states were prepared to allocate to a body as the International Law Commission since they wanted to retain the control as to the development of the law in the area, and to see that the developed law was within their commitment. Thus, a body which emphasised "objectivity" in its work was too high powered for the subject as this. Thus, the criticism of McWhinney (2) is that the International Law Commission was not sensitive to the need for the change in the world or as being concerned with obsolete law to be unfounded, as it failed to take into account the "special" nature of the subject and the absence of consensus as to the content of the question and the practical problem of merely creating an academic exercize, which most states were very likely not to go along with.

2) <u>COMPOSITION OF THE SPECIAL COMMITTEE</u>

There were 27 members (3) who were appointed by the President of the General Assembly, taking into account "geographical representation and the needs of the major legal systems". This was to be increased to 31

(1) Prof. Keith "THE ROLE OF LAW IN THE U.N." (5 VU Law Rev. p. 123)
(2) McWhinney 60, A.J.I.L. 3
(3) Afghanistan, Argentina, Australia, Cameroon, Canada, Czechoslovakia, Dahomey, France, Ghana, Guatemala, India, Italy, Japan, Lebanon, Madagascar, Mexico, Netherlands, Nigeria, Poland, Romania, Sweden, U.S.S.R , United Arab Republic, U.S.A., U.K. Yugoslavia and Venezuela.

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with the inclusion of Algeria, Kenya, Chile and Syria. (1). The justification for the increase was that, part of the failure of the Special Commitee meeting in Mexico in the summer of 1964 was due to the lack of representation of the major legal systems. But, as was noted before, this was contrary to the object of creating a small special body which would have the time to deal with this question, as it was the major reason for allocating it to a special committee of the 6th Committee. The membership did not at all change except for Burma taking the place of Afghanistan which resigned prior to the Mexico sessions.

The appointees to the Special Committe were to be "jurists" which was not defined, and in practice, it was those lawyers in the Foreign Ministries. It was felt that the legal training of the "jurists" were to be helpful in their methodology of work that was to be adopted by the Special Committee in its work and to reduce the likelihood of the excuse being seen as purely political rather than legal. (2) The appointees were lawyers who were the government spokesmen. Unlike the members of the International-Law Commission, who are appointed on their individual basis, and who are free to exercise their legal expertise in the process of codification and progressive development the members of the Special Committee had their hands tied in the back and were merely restating the views of their governments without really exercising the legal expertise that they possess. Thus, this explains a lot of delay in, for example, getting compromises as the representatives have to have their governments' sanction before entering into compromises, and an explanation for the length of time involved in the process of elaboration of the question. Despite the fact that the appointees were "jurists" the exercise emphasised the political aspects and the play on "jurists" was simply to answer the criticism of the body being political.

(1) General Assembly Resolution 2103A (XX) operative para.3

(2) General Assembly, 18th session, 802nd meeting, p.113 (Italian representative)

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(a) Task of the Special Committee

It was set out by the General Assembly Resolution 1815 (XVII) whereby it was to undertake the study of the principles with the view of their progressive development and codification. These principles were:

(a) refraining from the use of threat or force

(b) settlement of international disputes by peaceful means

(c) duty not to intervene in domestic jurisdiction of other states

(d) duty to co-operate with one another in accordance with the charter.

(e) principle of equality and self determination of people

(f) principle of sovereign equality of states

(g) states shall fullfil in good faith their obligations assured under the charter

The Special Committee which met in Mexico dealt with principles (a), (b), (c) and (e). The Special Committee was constituted in 1965, 66, 67, 68, 69 and 70 to complete the task of formulating the principle of "friendly relations".

(b) What procedures were adopted by the Special Committee?

When the question was being discussed by the 6th Committee, emphasis was placed on the importance of procedures that should be followed. The subject required preliminary debates and thorough examination of all its aspects before any worthwhile declaration could be made. (1) Unless the procedure to be adopted was thorough there was no point in going through the exercise as it would be more repetition of the Charter and the only way was to follow the procedure of the International Law Commission in regard to the presentation of precedents, other relevant data, judicial decisions, doctrines and use of commentaries. (2) It was implicit in the discussion that the procedures to be adopted were to -

(1) see General Assembly, 6th Committee, 802nd meeting, p. 113
(2) General Assembly, 6th Committee, 815th meeting at 190 (Guatemala rep.)

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(1) identify the legal principles and the relevant rules

(2) ascertain whether those identified principles and rules were ready for elaboration and codification

1) USE OF COMMENTARY

The drafting committee in its report made great use of the commentaries on each of the principles that were being dealt with by the Special Committee. Under Art. 20 of the statute of the International Law Commission there is a requirement where the International Law Commission when preparing drafts for submission to the General Assembly, with commentary containing -

(a) adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine

(b) conclusions relevant to (1) extent of agreement on each point in practice of state and in doctrine

(c) divergencies and disagreements as well as arguments.

In the light of this provision the Draft Committee in setting out its report to the Special Committee have pointed out not only the point of consensus and principles where no consensus could breached. It also set out the arguments forwarded by the various parties and the explanations of the voting of the participants. The importance of this practice is that it provides the means to ensure that nothing is being overlooked and that the arguments set out the points of bargaining for future conferences. They also raise other possibilities open to the Special Committee, in the area of fact finding, after producing the various proposals submitted, if it went on to consider alternatives.(2)

(2) DRAFTING COMMITTEE

The membership of the Drafting Committee was fourteen (3) given the task of: consideration of proposals, amendments, and the record of the Special Committee, with a view of drawing up draft texts, formulating

(1) See General Assembly, 6th Committee, 802nd meeting, p.113
(2) see U.N. Juridical Yearbook (1964) p.167
(3) Argentina, Australia, Burma, Czechoslovakia, France, Ghana, Italy, Lebanon, Mexico, Nigeria, U.S.S.R, U.S.A., U.K. and Yugoslavia.

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points of consensus plus the arguments advanced in support. The Drafting Committee did more than mere drafting of the formulations for its objects amounted to an authority for seeking common solutions for the Special Committee. It was involved in "bargaining" as to which proposal was more acceptable than others. In its method of work, the Drafting Committee used "consensus" rather than voting. It is similar to the practice of the International Law Commission. Even though this may be time consuming in that there would be a lot of repetition, the result however, would be more acceptable to the governments. It is of great importance to the question of "friendly relations" that there is general agreement as to its formulations and this is better than entrenching the positions of minorities. Thus, the Drafting Committee in its work was trying to get an agreed draft for the Special Committee.

3) <u>SECRETARIAT</u>

The members of the General Assembly under paragraph 4 of General Assembly Resolution (1966 XVII) were requested to furnish information to the Secretariat, as to the documentation of U.N. and states practice, and relevant precedents. The secretariat not only played an administrative function but was the "centre of scientific research".(1) The success of the whole operation depends quite a lot on the expertise and efficiency of such a service.

4) <u>SIGNIFICANCE OF PRECEDENTS</u>

Extensive documentation done by the Secretariat provided as a starting point for the examination of the law and the fact that the representatives on the Special Committee were "jurists" reinforces the importance of precedent as a starting point rather than starting anew without any past reference. (2)

The basis of the 7 principles to be studied came from the United Nations Charter (Art. 2) which incorporated some established principles

(1) Briggs W.H. <u>"THE INDUSTRIAL LAW COMMISSION"</u> (1965) p.170
(2) Hazard 58 A.J.I.L. p. 954

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of International Law - as prohibition on the use of force; sovereign equality and peaceful settlement of disputes. Self determination was the only principle of late origin, for it has been part of the preamble and Art 1. (1) of the Charter.

The expertise of the members was necessary to allow the use of the documentation on U.N. and states practise.

5) VOTING PROCEDURES

In the discussion of the question of "friendly relations" in the 6th Committee, in the 18th session, it was stressed that any result of the exercise must have general acceptance if it was to be of any value at all. In order to attain this, the Special Committee adopted the consensus as its procedure. It didn't follow the General Assembly standard procedure as set out in Art. 18 of the charter, whereby there "shall be a 2/3rd majority vote on "important" questions and ordinary on others". In practice, it may suffice to note that the distinctions do not stand out and doubts have been expressed towards it. (2)

This procedure was adopted because the process undertaken involves more than mere codification and in order for a progressively developed law to be accepted it must have "general" acceptance. It was more likely if adopted through consensus rather than having the majority imposing their will on the "strong" minority. The procedure, however, gives absolute veto to the minority. It was pointed out by the majority, that to allow such a situation to arise was to be time consuming. It would be wrong, so it was argued, for the minority not to recognise the wish of the majority. However, it was clear that any effort to impose such majority will wreck the whole exercise. Any steps to bring back the 2/3rd majority would threaten those principles where agreement had already been reached. Thus, all the work already done would be in jeopardy if the majority wishes to impose its voting majority.

(1) Sahovic M. "PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS & CO-OPERATION" 1972, p.28

(2) Goodrich Hambro & Simmons "CHARTER OF THE U.N." 1969 p.172

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Even though the adopted procedure wasn't common within the General Assembly Organs it is submitted that by the very nature of the question to make the Declaration worth the paper it is written on, it must have consensus, whereby guaranteeing general acceptance. This could be seen in the latest series of the law of the sea conferences where consensus would be best suited to formulating a workable norm to deal with the law of the sea.

The General Assembly adopted the Declaration on "Friendly Relations" on the 24th October 1970 by Res. 2625 and it reaffirmed the importance of international peace and security. It is one of the most important contributions to international peace in recent years and is ranked in the same group as the Universal Declaration of Human Rights; Declaration granting Independence to Colonial People and the Declaration on the Elimination on all forms of Racial Descrimination.

6) CRITICISMS OF THE SPECIAL COMMITTEE

It has 14 people in its Drafting Committee. This is compared to the 9 that forms the Drafting Committee in the International Law Commission and this has been seen as being too big to be able to adequately deal with the question. There were others who were granted the status of being "observers" including the special rapporteaur of the Special Committee (1) But, this was only so in the first Mexico Conference. However, this flexibility allowed the dissenting views to be adequately represented.

McWhinney (2) saw that the Western States tried to belittle the importance of the Conference, by either the sending of junior officials (3) or the silence of some of the representatives, e.g. Canada. This however, was true for the Mexico Conference. Secondly, this only accounts for what is being recorded in the official records and not what goes in the unofficial meetings between the participants. The

(1) Lee. L. "INTERNATIONAL LAW COMMISSION RE-EXAMINED"(1965) 59 A.J.I.L. p. 561

(2) (1966) 60, A.J.I.L. 31

(3) The representatives of the Western States proved this to be not so - Australia - Sir Kenneth Bailey; Canada - A. Robertson, Italy - Gaetano Arangio-Ruiz; U.K. - I.M. Sinclair; Sweden - Hans Blix

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records of the Special Committee showed later on just how important the informal meetings were. It was through these informal meetings that the major breakthroughs were made.

Another criticism was aimed at the calibre of the selected representatives, but because of the nature of the question, the appointees have to be government spokesmen, for the governmental support was very important to the force of the Declaration. Thus the appointees require a blend of legal expertise with political acumen. This is not to say that the members of the International Law Commission lack these skills. Far from it, for one of the criteria for the selection was just that.

Last but not least, the Special Committee had spent a lot of time in its work. However, the time factor should be seen in the light of the preparedness to exchange views frankly, and such exchange though time consuming established the base for future agreement. These exchanges also persuaded the doubters that after all, the exercise was not that bad, or at least dangerous, as had been made out to be.

PART B (Permanent Sovereignty over Natural Wealth and Resources)

A) HISTORY OF THE CONCEPT

As a direct result of the change in membership in the United Nations since it started (1) the emphasis that was to be initiated by the "new" members was on the questioning of the international law principle affecting the sovereignty of natural wealth and resources available in those states. This was the result of the re-direction of the pressures which had led those states in demanding and attaining political independence. (2) Political nationalism turned to economic

(1) see p.5.
(2) Muhamad A. Mughraby "PERMANENT SOVEREIGNTY OVER OIL RESOURCES" 1966 p.4

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nationalism because it became clear that more political independence did not mean economic independence. Political independence didn't alter the backward economic state that was being faced by these "new" states, which was characterised by severe imbalance in emphasis, and was more attractive to outside investors than to the internal need. (1) Unless economic independence can be attained, political independence did not mean much.

A result of this view was to threaten the established investments from the capital exporting states. It was threatened because political independence had allowed the "new" states to adopt economic polities more geared to the local needs without any fear of automatic diplomatic intervention on behalf of a foreign enterprise unlike the past. (2) This is not to say that other forms of sanctions (as withdrawl of expertise and so on) could not be used. The question was aimed at the need to reaffirm the right of the "new" states to exploit their natural wealth and resources.

It first arose when the 2nd Committee dealt with a draft resolution proposed by Uruguay (3) where "member states should recognise the right of each country to nationalise and freely exploit its natural wealth as an essential factor of economic independnece" (4) The reasons were that the present forms of aid as in loan or private investment were not adequate to solve the problem of the "new" states (5) What was required was the right of those states to dispose freely of their own resources (6). It was then seen by those opposed to draft resolution that the matter was an established principle of international law and any reaffirmation would only raise doubts as to the validity of this principle. It was defective in that it didn't take into account the established principle, that of compensation when properties are attached. Thirdly, the question was

(1) Muhamad A. Mughraby "PERMANENT SOVEREIGNTY OVER OIL RESOURCES"1966 p.4
(2) Mughraby (supra) at p.13
(3) (1952) Y.U.N. at p. 389
(4) See p. footnote
(5)

beyond the competence of the U.N. as it was within the domestic jurisdiction of the states (1). The capital exporting states were opposed to the omission of the right to adequate opposition and the U.S.A. tried to amend the draft Resolution to this end. However, an amendment from India where a compromise was reached whereby the rights of the "new" states were recognised but equally so, was the acknowledgement of the need of the underdeveloped states as to the need for investment (private and public) (2). This didn't satisfy the industrialised states who wanted an express statement as to the obligation of adequate compensation. Such draft resolution was adopted by the General Assembly in Resolution 676 (VII) by 36 votes to 4 with 19 abstentions (4). The fear expressed towards this "nationalisation (5) resolution" was to materialise in the nationalisation of the United Fruit Co. by Guatemala and as a recognition of international law principle in the Anglo Iranian oil case. (6)

However, the concept, which started off as aimed at private investors (7) was to extend its applicability as it became more and more identified with the drawing up of the Human Rights Covenants. From this point on, the concept of permanent sovereignty was to become part of the concept of self determination which was to be drafted into Human Rights Covenant.

In the 9th session of the General Assembly the question arose when the draft Human Rights Covenant was considered. The concept of permanent sovereignty was included in para 3 of Art. 1 of the Draft Covenant. Doctrines were, that it was an authorisation for nationalisation without compensation and that control over natural resources had no

(1) ibid
(2) Mughraby (supra) p.p. 20 - 21
(3) Hyde N.J. "PERMANENT SOVEREIGNTY OVER NATURAL WEALTH & RESOURCES" 50 A.J.I.L. p. 854 (1956)
(4) Those against - N.Z., South Africa, U.K., U.S.A.
Abstain - Australia, Belgium, Canada, Cuba, China, Denmark, France, Greece, Haiti, Iceland, Israel, Luxembourg, Sweden, Turkey, Venezuela, Philipinnes, Netherlands, Nicaragua, Norway and Peru.
(5) cited in Mughraby (supra) at p. 20
(6) cited in Hyde (supra) p. 854
(7) Hyde (supra) p. 855

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relationship to the concept of "sovereignty." It was argued on the contrary, that political independence was to be guaranteed only through economic independence (1)

The question was in the agenda of the Committee on Human Rights Commission in the 10th session, when dealing with the drafts covenents. It had 2 draft resolutions of which only one was relevant for our purpose. It was proposed (2) that a commission be set up to survey the status of the rights of people and nations to permanent sovereignty over their natural wealth and resources, and, to make recommendations where necessary, to strengthen that right. (3) Such commission was required to study the question thoroughly. On the contrary, it was argued that due to the shortage of time, this couldn't be done and instead prepare recommendations whereby the U.N. bodies and specialised agencies should give particular attention in their regular work to the rights of people and nations to self determination. (4) After the adoption of the recommendation it was submitted to the Economic and Social Council where not only was the constitutionality of the "proposed commission" doubted but also that the Commission was seen as an appropriate body to deal with such political questions.(5) The council did report the recommendations of the Commission and referred the question back to be reconsidered by the Commission (6) This action was criticised in the 3rd Committee, where it was seen as a delaying tactic to a question of immediate concern. On the other hand the Western States defended the action on the basis that the question of self determination was a political one which neither the Commission on Human Rights, nor the Economic and Social Council, nor the General Assembly was the appropriate organ to deal with in preparation of the recommendations (7). This resulted in the adoption of General

(1) Banerice K.S. "THE CONCEPT OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES - AN ANALYSIS" (1968) Indian Journal of Int. Law p. 528
(2) Proposals were submitted by Chile, China, Egypt, Pakistan & Philippines
(3) (1954) Y.U.N. at p. 209
(4) (1954) Y.U.N. at p. 209
(5) ibid.
(6) Res. 545 G (XVII)
(7) (1954) Y.U.N. p. 211

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Assembly Resolution 837 (IX) where the Commission on Human Rights was requested to complete its work on the question of self determination; including recommendations concerning permanent sovereignty over natural wealth and resources, having due regard to the rights and duties in international Law and to the importance of encouraging economic development in the underdeveloped states, and further, requested the Council to submit the recommendations to the General Assembly in its 11th session (1).

The question again featured in the debates of the 3rd Committee in 1955, where paragraph (3) deals with permanent sovereignty. The inclusion of the item was objected to by the West for various reasons, since there was no such thing as "permanent sovereignty" where voluntary successions have been made by states (2) and that it was vague and ambiguous. There were attempts to delay the discussion of Art. 1 of the draft covenant - as the question still needs further study (3). However, the majority agreed that Art. 1 para 2 read with a few modifications as it exists today under the Covenants on Economic, Civil, Cultural, Political and Social Rights, as adopted by General Assembly Resolution 2200 (XXI) in 1966 (4). This wasn't the end of the matter, as it was again in question in the Economic and Social Council in 1955. The Economic and Social Council had before it the recommendation of the Commission, calling for an establishment of a Commission to survey the question of permanent sovereignty. There was a proposal to set up an Ad Hoc Commission of 5 members to study all the aspects of self determination. (5) The U.S. proposal was opposed by Afro Asian States and the Communist bloc. They emphasised that the question was an urgent one and such a proposal was a mere delaying tactic to forestall criticism. (6)

(1) operative paragraphs (i) and (ii)
(2) Gen. Assembly Official Records, 10th session, 3rd Committee, 647th meeting (per U.K. Representative) p. 90
(3) Baneree (supra) at p. 522
(4) see Eichelberger M.C. "THE U.N. AND HUMAN RIGHTS" (1968) pp. 198-208
(5) Baneree (supra) at 524
(6) ibid

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This proposal was rejected even though the Council transmitted the U.S. draft resolution for the General Assembly to make its own decision. A three year moratorium ended in 1958 and again the debate continued in the 13th session of the General Assembly. The same objections as to the vagueness or ambiguity of the concept as "nations" and "people" was raised again. Notwithstanding the strong opposition from the capital exporting states, the Committee adopted the recommendation to set up a Commission by a vote of 52 to 15 with 4 absentions. (1)

The concept of permanent sovereignty which was a basic constituent of the right of self determination, was to be adopted in the 1966 Resolution 2200 as Art. 1 (2) of the Covenant on Economic, Cultural, Civil, Political and social rights:

> "all people may, for their own end, freely dispose of their natural wealth and resources without prejudice to any objections arising out of the international economic co-operation based upon the principle of mutual benefit, and international law. In no case may people be deprived of their means of subsistence"

B) <u>WHICH INSTITUTION WAS SELECTED TO STUDY THE SUBJECT?</u>

There were two proposals to deal with the question of permanent sovereignty. Firstly, it was for the General Assembly to set up a commission to conduct a survey of the rights of peoples and nations to permanent sovereignty over their natural wealth and resources. The other proposal was for the establishment of an Ad Hoc Commission. This originated out of the Economic and Social Council. (3)

Those arguing for the Ad Hoc Commission felt that before proceeding any further, this proposed study was necessary as it would clarify the misunderstanding as to the nature and content of the principle of self determination. (4) This proposal, it was argued, ignored what has been done in the preparation of Art. 1 of Draft Covenant on Human Rights, where the principle of self determination was clearly defined. Such

(1) Mughraby (supra) p. 22
(2) ibid
(3) (1958) Y.U.B. 212
(4) ibid

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a proposal was a mere delaying tactic to put off the exercise of the right of peoples and states to self determination. (1) As to the proposal of a commission, it was argued that it was illogical to use the term sovereignty to people who have not attained sovereign status. Proposal for the establishment of a Commission was adopted by 52 to 15 with 8 abstentions. The membership was to be left to the General Assembly. (2) This resulted in General Assembly Resolution 1314 (XIII) where a commission of 9 states was to establish a Commission with the object of:

> conducting a full survey on the status of the question of permanent sovereignty, with recommendations, where necessary to strengthen this right. (3)

C) MEMBERSHIP OF THE COMMISSION

The question of membership was left for the General Assembly to decide and in its preliminary meeting on12th December 1958, the President appointed 9 members (4) on the basis of geographical distribution. (5)

D) REASONS FOR THE SELECTION OF THE COMMITTEE

There was a feeling among some members of the General Committee in the 16th session that because of the nature of the question, it was unlikely to be given its economic significance, if given to a body like the 6th (Legal) Committee or the International Law Commission. It should therefore be left with the 2nd Committee. The representative of Ghana had this to say at this point:

> "his delegation, having studied the report felt that as the principle of economic self determination it should be allocated to the 2nd Committee. If it were allocated to the 6th Committee it would have to be given a restrictive legalistic interpretation in which its all important economic aspects would be lost sight of" (6)

(1) (1958) Y.U.N. 212
(2) ibid
(3) operative para. 1 of Res. 1314 (XIII)
(4) Afghanistan, Chile, Guatemala, Netherlands, Philippines, Sweden, U.S.S.R., United Arab Republic and U.S.A.
(5) (1958) Y.U.N. p. 213
(6) Gen. Assembly Official Record, Gen. Committee, 138th meeting, p. 24

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The emphasis on the economic aspects of the question was put forward as the reason for giving it to such a non legal body. In addition, the question was largely a political one. The Soviet representative observed that:

> "The subject was primarily a political one since it related to the liquidation of and the termination of the process whereby the imperialist countries have plundered the colonies and the under developed countries of their natural resources, thus hampering their economic development" (1)

Further, the Soviet representative said that:

> "Whatever legal aspects it (i.e. the question of permanent sovereignty) had were, however clearly subordinate to its political aspects" (2)

The delegate from Cyprus saw that even though the question was "more legal and an economic one" he favoured not leaving it to the 6th Committee, as the matter had not yet reached the stage where legal action could be taken. (3)

There was a general agreement among the capital exporting states that the question was a legal one, even though it has strong economic and political overtures. The representative of Porto Rico observed that:

> "the item had had its origin .... which had consistently approached the matter from the legal standpoint. The logical forum in which to discuss it was therefore the 6th Committee" (4).

Another reason for allocating it to the 6th Committee was the practical reason, that the 6th Committee had in recent years been given very few items to discuss although it was fundamentally a very important committee. (5)

(1) Gen. Assembly Official Record, General Committee, 138th meeting, p. 24
(2) ibid
(3) ibid
(4) General Assembly, Official Records, 16th Session, Gen.Committee, 138th meeting,p. 24
(5) ibid.

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In the General Committe, the proposal to allocate the question to the 6th Committee was adopted by 11 votes to 4 plus 5 abstentions.

However, in the preliminary session, proposal was put forward by Ghana that the question be left to the 2nd Committee as it was largely dealing with economic self determination. This proposal was adopted (with U.S.A. agreeing, that reference be made to the 6th Committee where necessary) by 61 votes to 1 with 21 abstentions. (1) Doubts as to the competence of the 2nd Committee (which controlled the Commission of Permanent Sovereignty over Natural Wealth and Resources) were raised because the question involved important international law principles - as state responsibility contractual freedoms and jurisdiction - which were beyond the competence of an economic Committee (2).

However, it seems that due to the shortage of time it was necessary to deal with the question very quickly and that there was a likelihood of a draft text being adopted by the 2nd Committee (3).

WHAT PROCEDURES WERE ADOPTED IN THE FORMULATION OF THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL WEALTH AND RESOURCES?

1) Secretariat - Persuant to operative paragraph of Resolution 586D (XX) the Secretary General was requested to provide facilities and so as to facilitate the fullfilment of the task of the Committee. In this respect it was playing its administrative role. But, more important, it was also the "centre of scientific research" (4) A preliminary study (5) of the Permanent Sovereignty was submitted by the Secretariat for the Commission in its 2nd session (held from 16/2 - 13/7/1960). It was a documentation based on the

(1) Gess N.K. "PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES" (1964) 13 I.C.L.Q. at 418
(2) ibid at 419
(3) ibid
(4) Briggs W.H. "THE INTERNATIONAL LAW COMMISSION" (1965) p. 121
(5) A.I.A.C. 97/5

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response of states (1) to call for information requested under the study of Permanent Sovereignty. After the consideration of the preliminary study, the Secretariat was requested to prepare a revised study, taking into account the views expressed by the members of the Commission and the verified information that was submitted for preliminary study (2). There was a limited number of responses to the call to "verify" the information already submitted (3). The revised study (4) which was so detailed concerning natural measures attempting the ownership and use of natural resources by foreign nations;(II) agreements attepting foreign exploitation of natural resources;(III) adjudication and studies under governmental bodies as to the responsibility of states in regard to property and contract of aliens; (4)the status of permanent sovereignty over natural wealth and resources in newly independent states and in non self-governing territories (5) economic data pertaining to the status of permanent sovereignty over natural wealth and resources in various countries.

This extensive study was, unlike that of the friendly relations or law of the sea conferences, the basis of the success. It should also be noted that in the nature of the question that was being dealt with the study was a rare achievement.

(1) those states who responded to the call for preliminary information were - Australia, Belgium, Bulgaria, Cambodia, Canada, Ceylon, Cuba, Denmark, Malaysia, Finland, France, Iran, Japan, Laos, Mexico, Netherlands, Norway,Pakistan, Philippines, Peru, Sudan,Sweden, Thailand, Ukranian U.S.S.R., U.S.S.R., South Africa, United Arab Republic,U.K., U.S.A. & Yugoslavia

(2) Res. 97/10

(3) States which replied were: Afghanistan, Australia, Canada,Chile, China, Cyprus, Czechoslovakia, Hungary, India,Iran, Laos, Netherlands, Norway,Pakistan,Peru, Sudan, Sweden, Thailand, Ukranian U.S.S.R., U.S.S.R., South Africa, United Arab Republic, U.K. U.S.A. and Yugoslavia

(4) A/A/C/ 97/10 rev. 1

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2) Some Criticisms

It was seen by the Soviet representative as lacking factual information and was misrepresenting the facts as to the extent of monopolies exploiting the wealth in non-self governing states. It didn't consider the profits of foreign capitals

state sovereignty. (1) It was seen as defective by Afghanistan in that it didn't contain information as to the investment in landlocked states.

Turning to the criticisms of the Soviet Union and Afghanistan, these criticisms beg the question as to, the obligation that the states have to supply the information required. There is no general obligation for the states to respond to the call for such information. There is no power on the part of the Secretariat to compel compliance with such a request. This is a defect of the present system.

It is rather ironical to see the Soviet Union representative contending that the study lacked factual information, for it didn't take part in verifying the information for the revised study. It is not surprising that there was a lot of misrepresentation because the information that was supplied was not verified at all. (2)
In the Afghanistans' case, a brief perusal of the list of states who responded to the preliminary call and to the 2nd call showed just how invalid the criticism is, as it could be said it was only the critic that was able to respond and was the only representative of such state. As no obligation to compel the supply of the information, it was a misdirection to blame the Secretariat for any defect in the study as they are dependent on the extent of the responses of the states. Such criticisms should be levelled off against the members who haven't responded due to apathy or other reasons.

The sad aspect of the criticism is that the most likely states to scream are the ones who haven't done their part. Notwithstanding the

(1) A/AC 2/5R 834th meeting at p. 229

(2) see footnote 3, page 29

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criticisms levelled against the study of the Secretariat, it was so thorough in its coverage of the state of the law pertaining to the question that it has to be commended. It was essential in providing the background and important to the drafting or re-stating of principles required for strengthening the rights of the "new" states as well as taking into account of the interests of the investors.

3) Working Group

The adoption of Working Group was not strictly involved in drafting the text for the Commission on Permanent Sovereignty over Natural Wealth and Resources. What it involved was beyond that of preparing drafts as it was the area of bargaining as between the capital exporting and importing states. It wasn't extensively used as was in "friendly relations" for it was used when a compromise was sought as to the question of compensation to the investors if their property was to be nationalised. Thus, it was dealing with matters of substance where no agreement has been reached or where protracted discussion led to no result.

4) Significance of Precedents

The Secretariat in its study, shows how important precedents were in the determination of acceptable formulae. It could also be seen that the importance of precedents were, by the fact that most of the members of the Commission were lawyers who were representatives of their own governments. Thus, the legal background allowed these people to exploit the usage of precedents to meet their own situation. An example was that the representative of Philippines tried to justify the ommission of the legal organs was on the basis that there had been precedents whereby Declarations were not being dealt with by legally inclined bodies, as was the Declaration of the Rights of the Child. (1) But, it was pointed out that there was a basic difference between that declaration and the one in question since the declaration in question didn't effect any international relations between states in the same way as that of permanent sovereignty.

(1) General Assembly, Res. 1386 (XIV)

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5) Voting Procedures

The Draft Resolution prepared by the Commission as Permanent Sovereignty over NaturalResources was voted by the ordinary rule of para.3 of Art. 18 of the Charter. The vote was taken and the toll was 87 votes to 2 plus 12 abstentions. Those who voted against were - Bulgaria, Burma, Byelorussian S.S.R., Cuba, Czechoslovakia, Ghana, Hungary, Mongolia, Poland, Romania, Ukranian U.S.S.R. and U.S.S.R. The voting pattern showed the need to attain a compromise - a workable solution of the developing states in need of foreign capital, required for their resources on one hand and the provision for adequate guarantees for political investors. Thus, it was a reflection of the satisfactory middle ground for the conflicting claims of develloping and developed states.

6) General Comments

Under para.3 of the General Assembly 1803 (XVII) there was a request for the continuation of the study of the various aspects of permanent sovereignty over natural resources, taking into account the need of protection of the sovereign rights while encouraging interntaional co-operation in the field of economic development on the other and to submit its report to the 18th session if possible to the Economic and Social Council. The report of the Secretary General (1) was considered by Economic and Social Council in 1964 and without adopting a formal resolution, submitted it to the General Assembly with comments (2) It was considered in the 20th session of the General Assembly and recorded in the 21st session and this led to / right of all states to exercise permanent sovereignty over natural resources and it was declared that the U.N. should channel its activities so as to enable all states to exercise that rights. (3)

The question was included in the discussion on "friendly relations" in 1964 but was not expressly included in the Declaration on Friendly

(1) U.N.Doc. E/3840
(2) (1964) Y.U.N. p.479
(3) Gen. Assem Res. 2158 (XXI)*which was adopted by 99-0 with 8 abstentions (Aust, N.Z., Argentina, Belgium, Japan, Malta, U.K. & U.S.A.)
*See Y.U.N. (1967) p. 329; for the latest development see Lillich B.R. "REQUIEM FOR HICKENLOOPER" (1975) 69, A.J.I.L. p. 97

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Relations and Co-operation Among States in accordance with Charter of U.N. (1)

The voting pattern showed just how extreme a view was taken by the Communist bloc and a few non-aligned states (2) that as a result of the rejection of amendment that would authorise naturalisation without compensation, it abstained.

In explanation for their vote, the French expressed the belief that the 2nd Committee wasn't competent to study the subject matter and it was necessary to obtain the views of the 6th Committee and the International Law Commission. They refrained from taking a stand on the substance of the matter. (3)

PART C (United Nations High Commissioner for Human Rights)

ORIGIN OF THE CONCEPT

The proposal for such institution was seen as a means of implementation of the Human Rights Covenants. It was enunciated by Prof. Cassin in the days of the drafting of the Declaration of Human Rights and not in the specific terms as known today. (4) It contemplated a universal Attorney General where the proposed two tier systems would allow the complainant to have access to the lower level to a Commission on Human Rights. A right of appeal would be available to a Court of Human Rights and it is in here that the Attorney General would play a part. (5) This proposal was to provide the means of implementation of the Universal was rejected.

It was revived when the Consultative Council of Jewish Organisation took the issue and the concept was renamed "U.N. Attorney/General or "High Commissioner for Human Rights". The revival was marked by submission in 1950 of the proposal, to the Commission on Human Rights. The first governmental support came when Uruguay, when it was to be

(1) (1970) Y.U.N. p. 789
(2) see footnote p. 35
(3) Muhammad A 313 Shu Kri "THE CONCEPT OF SELF DETERMINATION IN THE UN" (1965) p.
(4) Roger Stenson Clark "A U.N. HIGH COMMISSION FOR HUMAN RIGHTS" (1972) p. 39
(5) Ibid p. 40

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amended by the General Assembly to take up the proposal to create a permanent agency of U.N. known as the "Attorney General" or the "U.N. High Commissioner for Human Rights" (1). The proposal came before the 5th session of the General Assembly could set up an agency to initiate proceedings before a standing committee upon receipt of complaints concerning non-observance from government parties to the covenant from individuals or groups. Such an agency would be responsible for supervision of the observance of the Covenant by the parties. To be able to do its job, it should have the power to investigate complaints ex-officio and would attempt to reach settlement before referring the complaint to the implementating body. (2) The proposal wasn't dealt with as 3rd Committee referred the question to be dealt with by the Human Rights Commission (3) This attempt failed and it was argued against the proposal that it was too ambitious and vague, it would allow floodgates of complaints, the difficulty of finding any suitable appointee and it was too premature (4). These arguments had been seen to have been levelled against Commission proposal. (5) Apart from these objections more substantial ones such as the constitutionality of such institution was questioned as it proposed to take over from the role of the existing institutions as Commission on Human Rights and Human Rights Committee. The working of the proposed office would be contrary to Art. 2 (7) of the Charter but an example proved this to be not the case (6).

The next important point that the question was to be given more life, as observed by Clark (7) was at the keen interest shown by some members of United States, State Department. In particular, was the then Deputy Assistant Secretary of State for International Organisation

(1) (1950) Y.U.N. p. 528
(2) ibid
(3) ibid, at 529
(4) Clark (supra) p.44
(5) ibid
(6) Clark (supra) Chap. 5
(7) supra. p.45

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(Richard Gardner) whose influence was to materialise at the foreign policies adopted by late President John Kennedy, such as the U.S. opposition to apartheid, and the forwarding of supplementary Slavery Convention 1956. With the interest renewed, the non-governmental organisations as the American Jewish Committee were to be the main force behind the survival of the concept. The climax of the informal meetings of the non-government organisations was the seminar held in Paris on the 14th December that was convened by the International Commission of Jurists and resulted in a joint statement favourable to the institution of High Commissioner for HumanRights (1). In this period as well, there was extreme lobbying to governments. This resulted in Corta Rica taking up the call which submitted an agenda in the General Assembly in 1965.

The item was to encounter such a lot of delaying tactics. Objections to the inclusion of the item was because the General Assembly had already included in its agenda the consideration of the question of establishment of bodies to supervise the implementation of the Conventions (2) But, it was not dealt with. When the question was tried before the Economic and Social Council, it was decided to put the question to the General Assembly (3). It was felt by some members that even though there was a need to supplement the existing means of enforcement, it wasn't possible to adequately deal with this question on the correct session. It was seen, also, as unacceptable as it would the complex question of the application of Human Rights (4). No formal decision was taken.

Later in 1965, the question was discussed in the 3rd Committee with the draft resolution submitted by Costa Rica. The outcome of the discussion was the request to be made to Economic and Social Council

(1) Clark (supra) at 47
(2) Clark (supra) at 48
(3) (1965) Y.U.N. 0.494
(4) ibid

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to transmit to the Commission on Human Rights the proposal for study at its 21st session (1). In the 21st session the Commission on Human Rights it was decided by 16 votes to 5 on a proposal by Argentina, Austria, Costa Rica, the Dahomey, Philippines, Senegal and Sweden to establish a working group to consist of 9 members with the object of studying all the aspects of the proposed institution, taking into account the debate of the commission and all the questions raised therein. In addition, it was decided that the report of the Working Group was to be given priority in its 1967 session (2)

1. WHY WAS THE INSTITUTION SELECTED?

In the first place, the question which raised a lot of difficulties couldn't be adequately dealt with in the Economic and Social Council (3) also by the 3td Committee (4).

But, it was for this very reason that led the Commission on Human Rights to put off the discussion of the question when it was included in its agenda in 1965 to its 1966 session (5).

Such smaller and specialised bodies as the Commission would be able to deal with the question. (6) In addition to special expertise of the Commission in dealing with the question was such as to make it ideal for studying the question (7). It was also agreed that by putting off the discussion it would reduce the expenses that would be incurred.

2. WHAT PROCEDURES WERE FOLLOWED?

(a) Working Group - The membership of the Commission on Human Rights was too big to allow adequate study of the subject, and it was decided to set up a working group, consisting of 9 members (8). The appointees were appointed by the Chairman of the Commission. They were - Austria, Costa Rica, Dahomey, France, Jamaica, Philippines, Senegal, U.K. and U.S.A.

(1) General Assembly Res. 2062 (XX) of 16/12/1965
(2) General Assembly Res. 1163 (XLI) of 5th August, 1966
(3) (1965) Y.U.N. at p. 494
(4) ibid. p.495. See also (1967) Y.U.N. p.534, (1968) Y.U.N. p.600
(1969) Y.U.N. p.545
(5) ibid, at p. 495
(6) A/C 3/SR 137th meeting, p.490 (Nigerian representative)
(7) A/C 3/SR 137th meeting at p.490 (8) Gen. Assem.1163 (XLI)operative para.1

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The composition of the Working Group reflected the state of disagreement in the Commission of Human Rights and the General Assembly as a whole on this question. The hint as to the boycott which met the request (1) to serve in the Working Group came, when it was expressly stated by representatives of the Soviet bloc that they would not participate in the creation of such institution (2).

The Working Group was the forum of bargaining and was responsible for drafting of draft resolutions that was to be recommended to the General Assembly.

(b) Secretariat - The Secretariat was asked to prepare a detailed study on the question, apart from its administrative functions necessary to facilitate the working of the organisation. The thorough and detailed study (3) that was prepared by the Secretariat was the basis of the work of the Working Group which documented views of delegations and other possible interpretations of the draft resolution. (4)

(c) Precedents - The study (5) that was prepared by the Secretariat emphasised this point - as not only the constitutionality of the institution was being questioned but also the other possible interpretations of the draft Resolution that was to be prepared by the Working Group. In addition, importance was placed on the experience of other institutional machinery in dealing with international problems such as the High Commission for Refugees.

(d) Voting Procedure - The question was not allowed to be voted in its content. Since it was first introduced, it had faced the procedural encounter that has excluded its vote on the substance. The question

(1) Clark (supra) p.51
(2) Commission on Human Rights Report, 23rd session, suppl. 8 at p.74
(3) U.N. Doc. E/CN 4/AC 21/2 1 (1966)
(4) Clark (supra) p.52
(5) see footnote 2

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received only 3 meetings on the 24th, 5 on the 25th and 6 on the 26th sessions of the General Assembly (1). The procedural debates that dominated the discussion of the question showed the unwillingness to give concession and one could say perhaps the highlight of this disagreement was the "scuffle" in the 25th session (1805th meeting of the 3rd Committee).

(e) General Comments

The Composition of the Working Group - This element has been criticised as not being representative of the Commission on Human Rights or even the General Assembly (2). This was naturally denied by the Chairman of the Working Group, the Philippine representative (3). It is the failure of the Soviet bloc to participate in the Working Group's bargaining that is submitted to have caused the failure of the acceptance of the Draft Resolution. Even though the minority view was included in the Working Group (as represented by Dahomey) it was not representative of the strong dissenting view shown by the Soviet Bloc and other non-aligned states. Had these (Soviet bloc) states been represented in the Working Group there probably was a chance of reaching an acceptable compromise on the question.

(1) MacDonald R. St.J. "A. U.N. HIGH COMMISSION FOR HUMAN RIGHTS: THE DECLINE AND FALL OF AN INITIATIVE" (1972) C.Y.I.L. p.63

(2) cited in MacDonald R. St.J. "THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS" (1967) p.84

(3) ibid.

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PART D (The Law of the Sea Conference)

HISTORY OF THE CODIFICATION PROCESS OF THE LAW OF THE SEA

There were some attempts prior to the 1930 first conference for the codification of International Law to codify principles of international law of the sea (1). The use of the "conference" in 1930 was an innovation into the adoption of a new means of codification of international law (2). Agreement was reached in Committee stages on the question of nationality and state responsibility. No agreement was attained in regard to the question of the breadth of territorial waters. There was no final text produced due to the failure to reach agreement on the question of breadth of territorial sea. What the conference did bring home was the need for thorough preparation by the Preparatory Committee as well as government participants, if satisfactory results were to be obtained (3). In addition, there must be consultation between the preparatory body and the governments who were going to participate. Hudson (4) also pointed out that the codification Conference needed the expertise of scholars and jurists who were able to conduct scientific investigations (5). It was the experience that was gained in the Codification Conference that had been conveyed to subsequent conferences.

(1) These were in the Declaration of Paris 1856: Geneva Convention and Declaration of St Petersburg 1864, and Hague Conference 1907. These are adequately dealt with in Colombos C.J. "INTERNATIONAL LAW OF THE SEA" (1967) at pp. 19-21

(2) Hudson O.M. "THE FIRST CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW" (1930) A.J.I.L. p.447

(3) ibid p. 456

(4) ibid

(5) Those defects have now become part of the International Law Commission which prepared the 1958 Conference on the Law of the Sea and the "Sea bed Committee" which is now the preparatory body for the latest series of law of the sea conferences.

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The question of the law of the sea was one of the terms that was to be studied by the International Law Commission from 1949 (1) the regime of the High Seas was given priority and was to be joined by the regime of the territorial sea. The rapporteur for both terms was Prof. Francois, who participated in the 1930 Codification Conference (2). The topics were extensively shortened by the rapporteur and full commission. The drafts were prepared and communicated to the states but the responses were very small. (3) Despite the poor responses of the governments to comment on the prepared drafts, the drafts were not out of touch with the majority of opinions of the General Assembly (4) This was the case in the 1930 codification conference. Thus, this reflected the high standing of the members of the International Law Commission and the degree of good sense and care. The report of the International Law Commission was submitted to the General Assembly in the 8th session where it was dealt with by the 6th Committee. In the discussion of the report containing 73 draft articles, it was pointed out that the 6th Committee was not qualified to improve the work already done. (5) The 6th Committee was essentially a body of jurists, for what was needed was a conference with all kinds of experts. In addition it was premature for the Committee to deal with substance of report due to limited time. The preparation of the 1958 law of the sea Conference was done by the Secretariat, who in pursuance to the mandate provided by the General Assembly Resolution 1105 (XI) invited experts whose tasks (6) include the preparation of documents (legal, scientific, technical and economic) and the determination of procedures to be followed.

(1) (1950) Y.U.N. p.846
(2) Johnson D.H.N. "THE PREPARATION OF THE GENEVA CONFERENCE ON THE LAW OF THE SEA" (1959) I.C.L.Q. p.126
(3) ibid
(4) ibid
(5) Johnson (supra) p.133
(6) Sir K.H. Bailey, Jorge Castaneda, B.N. Chopra, W.V.J. Evans, Prof. J.P.A. Francois, F.V. Garcia Amada, H.A.F. Gohar, Luis Melo Lecaros, Karel Petrzelka, William Sanders.

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The conference was able to approve 4 conventions (regimes on the Territorial Sea, High Seas, Continental Shelf and Fishing Rights and Conservation of Living Resources) and an optional protocol (i.e. on the Recognition of the Compulsory Jurisdiction of the International Court of Justice in respect of any disputes arising out of the Conventions). No agreement was reached on the question of the breadth of the territorial sea. The Conference also decided to request the General Assembly to reconsider the aspect of convening a second Law of the Sea Conference to deal with the unsettled problem of 1958 (1).

Under General Assembly Resolution 1307 (XIII) the Secretary General was requested to convene a second conference in March or April 1960 to consider the questions of breadth of territorial sea and fishing limits unsettled in the 1958 Conference. There was no prepared draft text like the 1958 Conference. Instead, it had proposals and amendments submitted by the participating governments. Out of the proposals the "Committee on the Whole" adopted two proposals and they both failed to receive the necessary 2/3rd majority vote in the preliminary. It is important to note that the failure of the failure of the Conference was due to disagreement on substance.

(1) (1958) Y.U.N. p.381

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The next important date in this historical discussion, on the question of the law of the sea was when Malta's representative proposed in 1967 for a Treaty and Declaration to sanction the concept of "heritage of mankind" (1) to govern the legal regulation of the seabed beyond national jurisdiction. The proposal also envisaged a declaration whereby sea beyond national jurisdiction was not to be subject to national approvation and the exploitation of the seabed was to be consistent with the UN Charter and for peaceful means.(2) In addition, the Declaration would also establish an agency - linked to the U.N. system and to assume jurisdiction and to act as trustee over the seabed beyond national jurisdiction. The proposal also envisaged the establishment of a U.N. Committee to negotiate a comprehensive Treaty.

The proposal caught the technologically developed states by "surprise", while not objecting to the proposal, for a U.N. Committee, it was felt by the U.S. representative that time was needed to study all the facts and implications before it could commit itself to the proposal (3). On its part, the Soviet Union, saw that the question needed to be referred back to the governments before taking any action. (4)

The less technologically developed states however wanted to see some positive action, for study was construed as a delaying tactic to temporarily silence critics. A compromise was found whereby an Informal Group was approached to draft proposals that might receive the support of the General Assembly. This resulted in the adoption of Resolution 234D (XXII) where, an Ad Hoc Committee was established to -

1. UN Doc. A/6695
2. Ibid, para. 3
3. Arvid Pardo "Development of Ocean Space - An International Dilemma" (1970), 31
4. Ibid.

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(a) make a survey of existing inter-agreements and and present activities of the U.N. system with regard to the seabed.

(b) provide an account of the scientific, technical, economic, legal, and other aspects of the problem together with an indication of practical means to provide international co-operation in the exploration and conservation, and use of the seabed, and its resources, taking into account the views of the member states. (1)

The term of reference of the Ad Hoc Committee was limited in 1967 but was to be extended in 1968 and it was then no longer dealing with national jurisdiction.

(a) What are the factors necessitating such a Conference?

It is most important that due to the great advancement in science and technology, the environment that man lives in is being threatened by pollution. The advancement that had been attained has imposed a lot of strain on international law. International law function (in the law of the sea) has broadened to meet the expansion in the membership of international community and the internationalization of a lot of problems that were formerly dealt with on a regional basis. Thus the pressure is on international law to deal with the common needs and interests of world community. (2) As a result of such pressures, there is a widespread dissatisfaction with the state of the law. (3) On the one hand, international law is breaking down - on the other, it is adequate to deal with the sort of problems presently faced.

Those arguing that world International law has broken down have pointed towards the achievement of the United States submarine, Sea Dragon, which circumnavigated the world without surfacing (4)

1. Pardo (supra) at. p. 61
2. ibid, at p. 59
3. John R. Stevenson & Bernard H. Oxman, "the preparation for the Law of the Sea Conference (1974) AJIL p. 2
4. Arthur H. Dean, "The 2nd Geneva Conference on the law of the Sea. A fight for the freedom of the Seas (1860) 54 A.J.I.L. p.1

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What experience shows is that territorial sovereingty can be violated without the realization of the states. International law has also failed to take account of the need of coastal state, in regard to the exploitation of fishing potential. It had only benefited a few privileged ones - but having adverse effects on the coastal fishing industry. (1) In order to protect their own industry, the coastal states have extended their territorial sea to 200 mile limit. This would enable the coastal states to have control in the conservation and exploration of resources in their area. It would allow them to deal with oil spillage and other noxious substances that are now transported across the world in huge tankers (2).

These unilateral actions have threatened the strategic manouverability of the super powers - who would no longer enjoy the free use of the "High Seas" (3) These actions also affect the right to overflight of planes (who can't fly over territorial seas and the manouverability of the sea to merchant ships (4) The World International Law does not deal effectively with the exploitation of the sea bed resources, which have great oil, mangense, copper, nickel, cobalt and other resources that would be able to be exploited by the privileged few (i.e. the technologically developed states).

In order to avoid the scramble for the ocean floor and the open conflict between coastal and other states using the high seas, what is needed and, urgently at that, is an agreement as to the new international norms to govern the law of the sea.

(B) WHICH INSTITUTION WAS SELECTED?

The Ad Hoc Committee already alluded to was the forerunner of the Preparatory Committee which now consisted of 91 members. The former

1) Beeby C.D. "The U.N. Conference on the Law of the Sea"(1975) at p.4
2) ibid. p. 3
3) Dean (supra) at p. 756
4) ibid. at p. 756.4

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Ad Hoc Committee was made a permanent one in 1968 (1) This jurisdiction was extended from that of surveying part and present activities on account of scientific, technical, economic, legal and other aspects of the subject and an indication regarding practical means of providing international co-operation to a study of:

(i) observation of the legal principles and norms to provide the international co-operation in use of seabed.

(ii) ways and means of promoting the exploration and use of the sea bed.

(iii) review study carried out in the field of operation.

(iv) the proposed measure of co-operation to be adopted by the international community to prevent marine pollution.

The "Seabed Committee" has been the preparatory body of the 1973 Conference and other subsequent ones.

(C) <u>WHICH PROCEDURES WERE ADOPTED?</u>

1. <u>Working Committee</u> -

There are 3 committees on the "Sea Bed Committee" and generally the first committee deals with the establishment of a seabed regime and a treaty. The second Committee deals with the general aspects of the law of the Sea. Third Committee is dealing with marine environment, research and the technology aspects. The function of each Committee is to prepare draft texts for the Conference <u>but</u> this had not not been attained. In 1973 there was no single draft text from which the Conference could work.

The function that this Committee has is that of bargaining as to what are the acceptable formulation, <u>but</u> this has not been so successful. In 1973 the only agreement was reached in the first committee as to the lists of subjects and items to be discussed.

(1) General Assembly Resolution 2467 (XXIII) A.
(2) Res. 2467 (XXIII) A, para 2.

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2. Voting Procedure -

Consensus is the basis of procedure of the seabed Committee. It was the result of the informal consultation and the initiative of the President of the Conference, (Mr Amerasinghe of Sri Lanka) and was embodied in Resolution 2749 (XXV). It was part of the "gentlemen's agreement" that all avenues be made use of before there can be a vote. This allows for the "cooling off period" between the request for a vote and the actual voting. The effect is to eliminate the problem of premature voting, whereby the majority can partly force its views on the minority, the price for this process is that it is time consuming and gives absolute veto to the minority. The procedure is adopted because the major powers have openly stated that where the majority has to use its vote, they would disregard such decision being reached. It is also because in the process of making new rules of international law - it is a must that it should have general acceptance, and where the very "strong" minority and especially when they are technologically strong, any victory for the majority of the less technologically developed would be an empty one.

3. Significance of precedents

The present documentation emphasises the importance of precedents where a large part of the areas of the law presently being dealt with are those of the 1958 law of the Sea Conference. However, it is only in the new area of the sea bed, where there are not many states and the United Unations practice, that we can say, precedents do not have the same dominant force.

4. General Comments

The analysis as to the success or failure of the Conference should not be seen in terms of length or time spent but as the willingness to solve the problem. This could be seen in the increasing importance of informal consultation not recorded by official Records, for one need not

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to lookfar, as it took some 8 years for the International Law Commission to prepare the 1958 Law of the Sea Conference.

5. PART E. (The Significance and Status of the Declaration)

It is not intended in this part to contribute anything new to the debate as to whether political organs do make law. It is however important to know the principal arguments, as they are essential to the understanding of the Declarations dealt with in the paper.

There is no doubt that certain decisions (1) of the General Assembly are binding on its members . The area of uncertanty surrounds the legal significance of the General Assembly to "pass recommendations. It is argued that the clear words of the Charter do show that, since recommendations are not legally binding and only have moral value (2) This does not mean that it has political effect, for any recommendations of the General Assembly represent such public opinion that compels states to obey their principle. The importance of the non-legal significance of these recommendations, is in the absence of legislative competence on the part of the General Assembly to make law. However, this is not the onlyfunction of the General Assembly for its decision in forms of Resolution or Declaration can be an assertion of customary international law (3). The absence of the legislative competence doesn't mean that the political organs can't contribute to the developement of customary international law, for it could be said that a declaration as the Universal Declaration of Human Rights which has been repeated with sufficient frequency and bearing an element of "opinio juris" can be said to have established international customary law.

1. These are in: Art. 4 (relating to admission of members); Art 21 (adoption of rules of procedure); Arts 36,61 and 68 (election of some members of the Economic and Social Comd); Arts 5 & 6 (suspension and expulsion of members); Art 97 (appointment of the Secretary-General); Art 93 'conditions for non-members to be made patty to the ICT); Art 22 (establishment of subsidiary organs); and Art 17 (approval of budget and expenses).
2. Tunkin G. "The Legal Nature of UN" (1966) 3 Recueil Descours at p.35
3. A Samoah (supra) at 6.

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In any event, the passing of "binding decisions" is not the only way in which law development occurs as non-binding decisions do lead to legal consequences (1).

The second objection is that, political instead of legal considerations dominate the decisions of the political organs (2). This is based on the assumption that we can separate law and politics, but in fact, the two are not entirely inseparable. It is not denied that political factors do play a very important part in the deliberation of the political organs. It would be unrealistic to isolate the examination of the law from the political development and environment, as the development of the law by whatever process is politically motivated (3). This is more so in the development of customary international law. There is no reason to reject politically motivated states practice within the framework of the international organisation as evidence of custom (4).

In their daily work the political organs are engaged in lawmaking in various forms, by interpreting the charter and developing practice. Such practice can be either evidence or source of international law.

They can be evidence where the law is being restated in the form of either a resolution or Declaration, such as the Declaration on Sovereignty over Natural Wealth and Resources. In that respect, the binding force of the law originates <u>not</u> out of the Declaration, but by the existing customary law. The Declaration is only a medium of clarifying or applying the law.

The practice can be a source of international law where the practice plays the quasi -legislative role, and this is so in creating new rules. Can they satisfy the requirement of customary international law?

(1) Rosalyn Higgins "THE U.N. AND LAW MAKING: THE POLITICAL ORGANS" (1970) A.S.I.L.P. at p.42
(2) A Samoah (supra) at p.10
(3) ibid
(4) Rosalyn Higgins "THE DEVELOPMENT OF INTERNATIONAL LAW BY THE POLITICAL ORGANS OF THE U.N." (1965) A.S.I.L.P. at p.117

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There is a difficulty in ascertaining the element of intention, for states actions may be done for various reasons un-connected to the real intention to see the decision binding. Noting that political motive within the framework of the international organisation is accepted, there is no difference between a vote and a collateral statement made by the states (1). The whole circumstances have to be taken into account in attempting to ascertain the "interaction" of the states. The International Court of Justice in the Nuclear Test Case (2) saw that in unilateral actions by states do create legal obligations if the intention of the parties to make such declaration binding and even whenmade in the context of international negotiation. International law doesn't impose any form of requirement as to the format of how the intention can be made. It can be done orally or in writting. (3)

As to the extent of how extensive should the practice be before it is binding, it may be noted that Judge Tanaka said in his South West African cases: that the highly developed technique of communications has allowed the function of customs to be developed not so much than a lot of repetition. As was the case in the Outer Space Treaty, where instant customary law argument could be used to show that the practice need not be extensive before it is binding.

Where the states have voted for oragainst any declaration or resolution, it could be argued that they are stopped from denying its validity or otherwise subsequently. In the Anglo Norwegian Fishery Cases (4) the International Court of Justice, regarded the contention that Britain was not bound by the Norwegian system of de limitation as...

> "... the United Kingdom could not have been ignorant of the Decree of 1896 which had at once provided a request for explanations by the French Government. Not

(1) Higgins (1971), A.S.I.L.P. at p.40
(2) I.C.J. Report. p.4
(3) ibid at pp.19-20
(4) (1969) I.C.J. Report 3
(5) (1951) I.C.J. Report 130

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knowing of it, could it have been under any
misapprehension as to the significance of its
terms..." (1)

1) FACTORS AFFECTING THE VALUE OF DECLARATIONS

In the first place, what role does law play in the deliberation of the political organ in question. (This has been covered (2) already.)

The consensus procedure that is adopted in the development of the principle enhances the probative value of a declaration restating the customary international law and providing the basis of validity for a Declaration creating new laws. Consensus doesn't mean that the support of the major powers must be always won. There are circumstances however where the support of such states are important. It is in the area involving the creation of new rules and where the major powers have monopoly to the states practice, as in the Outer Space Treaty. It is also relevant in the present of law of the sea Conferences, for without their support, the exercise is futile.

The 3rd factor is that of realism, or that the Declaration has to take account of the precedents, states practice, and all the conflicting views of states. Mere manipulation of the majority is no legal value and such victory could be an empty one.

2) STATUS OF THE DECLARATIONS

There can be no generalization as to the value of the declarations of the General Assembly without any thorough examination of the nature of the instrument and the procedure that followed.

(a) Declaration on Friendly Relations and Co-operation Among States

The institution selected to deal with the question on representation or cross section of the 6th (Legal) Committee and was the most adequate body to deal with such a controversial question, where no agreement exists as to the content of the principle. Because of the interest

(1) International law (LLV) Hardant 1975 at p.10
(2) see p.66

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shown by the states towards the question of "friendly relations" it was not realistic to allocate the question to any other body, as the International Law Commission. Since the Question touched on one of the most sensitive areas in relations beween states, its allocation to a body more responsive to political control was therefore essential.

The procedure of adopting working Groups where bargaining was carried out, the importance of the use of precedents that were prepared by the detail study of the secretarial, the use of a rapporteur showed that it was following the standard practise of the International Law Commission. The use of commentary enabled all the views to be taken up at the subsequent Conferences. To reinforce these is the reason that consensus was adopted which, even though time consuming, enabled the Special Committee to reach agreement. This was to lead directly to the result of the adoption without vote of the Declaration by the General Assembly in 1970.

The exercise shows the need for dialogue between states, i.e. not just between the Western States <u>but</u> those of the Soviet bloc as well. This was done by the International Law ~~Commission~~ Association. In contrast to the preparation of the High Commissioner for Human Rights where the only dialogue was between the Western non-governmental organisations. This was not enough to eliminate the fear and suspicion towards the concept. This is submitted as an explanation for the failure of the Commission on Human Rights in its preparation of the Draft Declaration. It is only through such dialogue that preparedness can lead to frank exchange of their views on the subject.

It is submitted that on close examination of the procedures adopted, the study was very technical, in that it didnt really matter that the political emphasis as certain states made out of the exercise, and that it is an important contribution to the codification of international law. Notwithstanding the fact that recommendations are not binding per se, it is an important contribution to the source of international customary law.

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(b) PERMANENT SOVEREIGNTY OVER NATURAL WEALTH AND RESOURCES

Even though the preparatory body was dominated by the capital exporting states (1) the extreme views were represented and this allowed a draft resolution that was acceptable to most members of the Commission on Permanent Sovereignty over Natural Wealth and Resources. The importance of precedents as prepared by the detailed work of the Secretariat facilitated the process of work of the Commission. The adoptionof consensus procedure in the preparation of the draft with the view of general acceptance was another important factor that needs to betaken into account.

When the question was voted in the General Assembly (2) and those who abstained could be said to have not greatly affected the status of of the Declaration, as they do not contribute much to states' practice or private investment in international law.

An important lesson was the willingness to solve the problem of investment, as contrasted to that of the High Commissioner for Human Rights. The importance of procedure, as was in the law of the sea, was because it was to be accepted by those people who dominate the practice. The Declaration has played an important part in settling the disputes between the capital exporting and importing states. Its preparation was thorough and was in line with the realistic situation of the world.

(c) GENERAL COMMENTS

As for the Law of the Sea Conferences, there is an urgent need to reach agreement before any more unilateral actions are presented. The agreement can only be on the basis of a "package deal" since everyone has a future at stake as to what will happen in the law of the sea.

(1) see p. 34, footnote 2
(2) voted by 82 to 2 with 12 abstentions - see p. 43.

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There is no prospect in the foreseeable future of reaching any agreement on the High Commissioner of Human Rights Concept. Unless there is a dialogue between the non-governmental organisations who are in best positions to bring about change through personal consultation far removed from political pressures. It is essential that this contact must be established to remove the fear and suspicion held on the question. It is also important to allocate the question to a smaller body representative of the General Assembly and study it.

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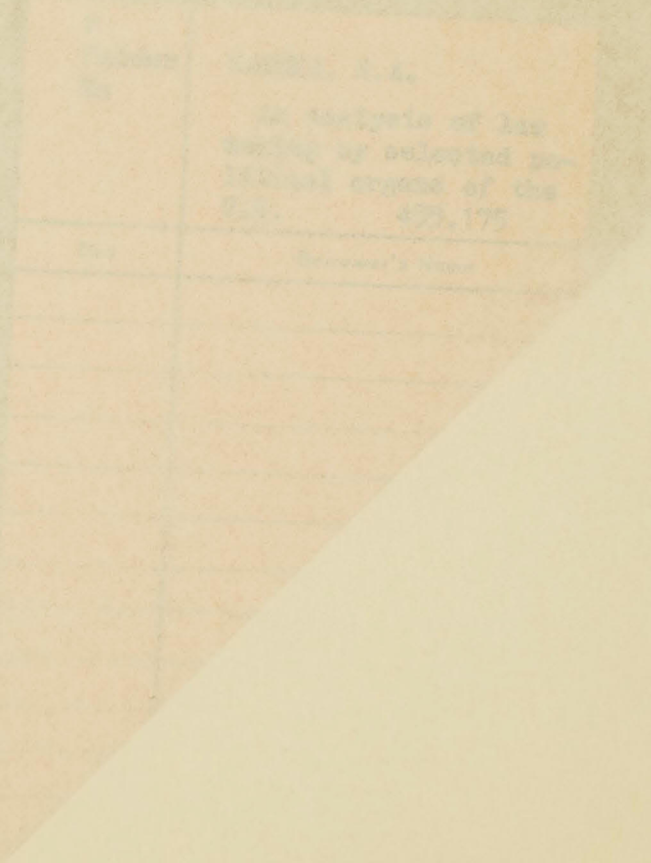
CONCLUSION

The result of the work of the Special Committee and the Commission on Permanent Sovereignty overNatural Wealth and Resources showed that politically constituted organs as these, following the strict procedures of the International Law Commission can contribute to the development of international law. Thus, they do fill in the gaps in the law-making, in the field of international law.



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