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INTERNATIONAL LAW

Statement in the Sixth Committee
by Professor Maxwell Cohen, Delegation of Canada,
on October 5, 1959

...I should like this morning ... to deal with four matters, some of which have already been touched upon by other speakers. These questions are, firstly, some general problems arising out of the history and operations of the International Law Commission; secondly, the report of the Commission presently before this Committee covering the work of its eleventh session; thirdly, the draft resolution proposed by El Salvador on the question of asylum; and fourthly, some general comments on the work and significance of the Sixth Committee itself.

First, then, a word about the International Law Commission and the record of its activities. I think we are all in agreement that the establishment of the Commission by the General Assembly in 1949 was a happy event. It already has led to a fulfilment of some of the hopes of the draftsmen of the Charter, namely, that members should move together toward programmes of codification and the progressive development of international law. If there are any problems with respect to the work of the Commission, they tend to arise out of the belief by some Member States that the speed with which the Commission is able to accomplish its tasks is not as great as it perhaps should be and that its methods of operation might be improved upon. It is very difficult to judge by any objective criteria whether the work of the Commission has moved less rapidly than could have been expected. Plans for codification among Member States, or programmes involving restatements of the law, have in most cases shown a great resistance to speed. And this is only natural. It took the better part of half a century to develop the first Federal German Civil Code, while so profound a contribution to codification as the Code Napoleon of 1804 was only possible because of the readily available materials in the work of Domat, Pothier, the Customs of Paris and the demoniac energy of a Napoleon driving his draftsmen to distraction and immortality. Hence we should not be too disappointed if the International Law Commission is unable to produce at a greater rate than that which we have had from it.

I am bound to say, however, that the delays in the case of the present study of Consular Intercourse and Immunities, and the discussions we have had on this matter during the past few days, do suggest that some remedies might be available to increase the rate at which the Commission is able to proceed. It would seem to me that there is nothing in the Commission's Statute to prevent the employment of outside rapporteurs not members of the Commission. Indeed, Part B, Articles 18 to 23 of the Statute, dealing with codification, make no reference whatever to the appointment of rapporteurs, or limiting their selection to the membership of the Commission itself. While it is true that Article 16, under Part A of the Statute, dealing with progressive development of international law refers, in clause (a), to the fact that the Commission shall appoint one of its members to be rapporteur, even this language -- which does not appear in Part B -- probably would not prevent the Commission from appointing persons to assist the rapporteur in his research or to provide interim associate rapporteurs whenever other duties make it impossible for the particular Commission member so appointed to carry on with his assignment.

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I therefore suggest respectfully that the Commission examine the question of the employment of rapporteurs and associate rapporteurs, for both codification and the progressive development aspects of the Commission's duties, from persons other than those who are members of the Commission.

A second possible approach to this question of the Committee's efficiency -- although I do not mean to imply that the Committee is in any way inefficient -- may be found in the idea of dividing the Commission into chambers so that perhaps two or more projects can be considered at the same time rather than seriatim as must be the case with the Commission now operating as a committee of the whole. I realize that this matter has been discussed before both in the Commission and in the Sixth Committee itself and I believe that there is some reluctance to divide the membership of the Commission in a way that would prevent any of its members from sharing in the Commission's studies and recommendations. But I think this difficulty can be overcome by having the work of each chamber submitted to the membership of the Commission as a whole. And I would expect that the corporate sense of the Commission, as a whole, would in most cases lead to a general attitude of critical approval to the work of any one of its two chambers.

I now wish to turn to the report of the Commission covering the work of its eleventh session. I would suggest that the very substantial and creative research already done on the Law of Treaties in the reports prepared by the late Professor J.L. Brierly, Sir Hersch Lauterpacht and by the present Chairman of the Commission, Sir Gerald Fitzmaurice, represents an important contribution to international law in this field, altogether apart from whatever final results may emerge in the form of a possible code or multilateral convention. We must be very grateful, therefore, to the many years of intensive scholarship these reports represent. There are one or two questions, however, that concern me about the draft articles on the Law of Treaties presented in the report of the Commission. As many of the delegates already have indicated, and my Delegation shares this view, it would not be desirable to discuss, in any detail, the substantive questions raised by the articles presently to be found in Chapter III of the Commission's report.

I do wish to suggest, however, that the discussions during the past few days on the question of the advantages of a multilateral convention incorporating the provisions of the Commission's proposals as against a code may be premature, not only because one should see the document as a whole but possibly for a more important reason. For there is a question which we have not examined. Some of the articles proposed by the Commission deal with narrow questions of form, others deal with mixed questions of form and substance, particularly the problems of validity, and, finally, we have yet to see the draft articles dealing with the meaning or interpretation of treaties -- surely a most important part of the Commission's studies and any final report. I would like to suggest that we keep our minds open on this whole question of code versus treaty, because we may discover that, far from having to decide upon either method, there is a third alternative -- namely, placing those purely formal articles on the negotiation, authentication, signing and similar formal questions in the form of a multilateral convention, while preferring to place the articles dealing with the meaning and interpretation of treaties, and possibly questions of validity, in a declaratory code. My reasons for suggesting this possibility to the Commission, and to members of the Committee, are that it very well may be that the purely technical aspects of treaty-forming do lend themselves to reasonably strict definition. Indeed, there may be many advantages in achieving uniformity of practice by such a multilateral agreement. On the other hand, the broader questions of interpretation, of validity, of the nature of a treaty obligation including reservations, conceivably might be more happily placed in a code that is declaratory of general principles rather than fixed in a multilateral treaty. Some such division may make much more sense, having in mind the functional differences between

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these classes of articles, than a position that insists rigidly either upon a code declaratory of principles on the one hand or a detailed multilateral convention on the other.

I turn now to the second subject with which the Commission has been dealing, namely, its report on Consular Intercourse and Immunities. It is, of course, regrettable that there have been delays in the final preparation of this report but the reasons expressed by the Chairman and in the report itself, seem to be quite acceptable ones. Indeed, it should be a matter of pride to the Assembly that members of the Commission are called upon for the very senior duties that were in fact undertaken by the rapporteur, in this case as an ad hoc judge of the International Court of Justice.

I am, however, of the opinion, and I am instructed to say, that here again no purpose would be served by examining any of the articles of the partial text now before us. Any such examination by this Committee, if it takes place here at all, should await the completion of the full draft. However, I wish to go even farther and suggest that there is much to be said for considering this draft, when it is completed, together with the completed draft now before us on Diplomatic Intercourse and Immunities and, indeed also to have these two drafts considered only when the proposed study on ad hoc diplomacy is ready; and finally to include in that full examination whatever studies may result from the draft resolution proposed by the distinguished Delegate of El Salvador on the question of asylum. Speaking very generally, it would seem to me that there are many advantages both intellectually and technically, and in terms of saving time and manpower, if all of these documents which overlap in many areas were seen as a whole by whatever body -- either the Sixth Committee or a special conference called for that purpose -- may be asked to study them.

I am aware that a number of distinguished delegates have argued that the General Assembly at its last session required that the draft articles on Diplomatic Intercourse and Immunities be given early attention for purposes of a possible multilateral agreement. I am not one of those, however, who is so wedded to the notion of the value of a multilateral agreement attempting to restate, codify or advance existing customary international law in this ancient field as to believe that this is a question of such great urgency, particularly if, there are other considerations that would make it desirable to see the draft text on diplomatic intercourse more clearly in relation to other texts having a bearing on the same generic field of interstate relations and international law doctrines. Indeed, it is no longer possible to divide so sharply the field of diplomatic intercourse from consular intercourse, as has been suggested. For the habit of many states is well established of treating members of their consular corps as if they were members of the diplomatic corps and demanding from host states that consular officials shall receive diplomatic benefits even though they are performing traditionally consular functions. The use of diplomatic personnel for consular duties is now widely accepted and many of the old reasons for the separation of the two functions, particularly the employment of local nationals as consuls -- a declining practice -- no longer apply with the same force. Similarly, one can predict that the privileges sought for those engaged upon missions coming within the framework of ad hoc diplomacy will have much in common with many of the privileges traditionally accorded to the status of diplomat and his entourage. Finally, in this connection it is obvious that many aspects of the problem of asylum touch directly on the question of the lawful use of the premises of a legation or an embassy and related matters. I am inclined to think, therefore, that the inconvenience that may result from not proceeding at once with the text on the draft articles

on Diplomatic Intercourse, by this Committee or some other forum, is outweighed by the advantages of viewing these four areas as a doctrinal whole whatever very substantial differences may divide some aspects of the four from each other.

I cannot leave this subject without commenting on the curious insistence by some Member States, in the last few days of the debate, on the general advantages of multilateral conventions over informal codes, declarations and restatements that do not have the force and effect of a treaty, as well as over customary international law itself. Indeed, I was surprised to hear from the learned Delegate of Hungary, if I understood him correctly, that the most desirable form of international law was that based upon the positive consent of states expressed in the form of a binding treaty. I should have thought that the distinguished Delegate's experience with his own domestic legal order would have led to a quite different position, since I understand that a very large part of the private law of Hungary, until recently at least, was based upon a combination of mediaeval Roman law, customary Hungarian law, and individual statutes. Indeed, I believe it to be true that Hungary attempted early in this century to codity its private law, but that the proposed code was not adopted -- although it had great influence as a kind of restatement of the law. If this difficulty on codification can hold true for a municipal legal order with all the advantages of direct immediate law-creating agencies, surely customary law is a desirable source to be retained in the much more fluid and loosely-organized international legal order. Indeed, can anyone deny not merely the fundamental role that customary law has played in the development of public international law but the role that it continues to play? And that role is not likely ever to be supplanted entirely by conventional arrangements or codification. No one who has lived with both the common law and the civil law -- for Canada is fortunate to have both systems -- can fail to accept the proposition that there is a flexibility and a dynamism in "common" or "customary" law which can create a living, mature body of rules, and a successful legal order. Finally, it would surely not be the intention of any delegate to suggest that the mass of customary international law that has regulated international legal relations for at least 400 years, often even amid great crises, should be regarded as any less binding or effective than conventional international law.

My comments a moment ago on asylum, of course, require me now to address myself briefly to the proposal of the distinguished Delegate of El Salvador. I have no instructions at this time from my Government as to this proposal. But, speaking personally, I wish to bring to the attention of the Commission that, should it be instructed to undertake this task by the General Assembly, there would be valuable reasons for bearing in mind not only the relationship of asylum to diplomatic intercourse, consular intercourse and ad hoc diplomacy, but also to the very important questions of extradiction to which other delegates have referred.

Moreover, the fact that the Human Rights Commission has now a report in preparation on this subject must be a matter of interest to the Commission. It should seek to gain whatever benefits may flow from the results of the Human Rights Commission's efforts and from the discussions, if any, in the Third Committee as well.

This brings me to the final point with which I wish to deal this morning. I have been discussing the fact that another agency of the Assembly, namely, the Human Rights Commission, is dealing with a problem that has a central legal element in it. I am now bound to say that this is by no means the first time that there have been matters before other committees or organs of the General Assembly intrinsically legal in their nature but which have not come before

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this Committee. It is no secret that many Member States have been concerned about the varying role of law and legal method within the United Nations system. Apart altogether from the relatively infrequent use of the International Court of Justice by the Member States, and the difficulties arising out of various forms of reservations in submission to the Court under Article 36 of the Statute of the Court, there is the further fact that the agenda of this Committee, but for certain striking expections, shows a relatively modest place assigned to law and to legal methods in the work of the Assembly. I have the highest regard for the work of this Committee over the past years but I would be less than frank if I did not indicate my concern for the modesty of its agenda in many of those years and for the fact that a number of other committees of the Assembly are undertaking questions that would seem to be related directly to the jurisdiction of this Committee.

I have examined the agendas of this Committee for the past ten sessions and find that the number of items on them has been declining steadily during that time, or at least has remained on a kind of plateau of development. At the very same time, at each of these sessions of the Assembly, there were matters assigned to other committees that clearly contained a juridical element of some considerable importance and where the Sixth Committee could be said to have had a legitimate concurrent, if not exclusive, interest. Let me illustrate. In 1950 at the fifth session there were ten items on our agenda, of which the most important, apart from the report of the International Law Commission, were such matters as reservations to multilateral conventions, reparations for injuries incurred in the service of the UN and the Secretary-General's report on the Registration and Publication of Treaties. But the following items were assigned to other committees: the definition of refugees and stateless persons; criteria for the admission of new members; legal claims of the Palestine refugees; the Draft Covenant on Human Rights; the interpretation of peace treaties with Hungary, Bulgaria and Romania; the Draft Convention on the Freedom of Information; the staff regulations dealing with the rights of Secretariat personnel; and certain Southwest African questions arising out of the Mandatory obligations of South Africa. At the Sixth Session in 1951 there were nine items on the agenda of the Sixth Committee, some of them quite important, such as the Secretary-General's report on the Draft Declaration on Rights and Duties of States; Reservations to Multilateral Conventions; the question of defining aggression. At the same time other committees were dealing with the problem of implementing the International Court's opinion with respect to Southwest Africa; the interpretation of the Libya-Egypt frontier arrangements; the legal status and definition of refugees and stateless persons; the Draft Covenant on Human Rights.

At the seventh session the number of items on the Sixth Committee's agenda again was nine which, apart from the report of the ILC, contained such questions as the report on international criminal jurisdiction; the report of the Secretary-General on the question of defining aggression; the status of claims for injuries incurred in the service of the UN. Yet elsewhere in the Assembly other committees were dealing with criteria for the admission of new members under the Charter; the Draft Protocol on Stateless Persons; the legal status and definition of refugees and stateless persons; the Draft Covenant on Human Rights; the Draft Convention on the Political Rights of Women; the advisory opinion of the International Court on Southwest Africa. At the eighth session only two items appear on the Committee's agenda. Yet, at the same time, other committees were considering the question of admission of states to the Statute of the Court where such states were not members of the United Nations; Korean prisoners-of-war problems; factors to determine eligibility of states for self-government; and staff regulations

covering the rights and duties of personnel of the Secretariat. At the ninth session there were five items on our agenda, in this case four very important ones dealing with international criminal jurisdiction; aggression, the draft articles on the continental shelf and problems of fishery conservation and regulation. Other committees of the Assembly at that session, however, were dealing with such legal matters as awards of compensation by the Administrative Tribunal of the UN; personnel policy questions involving the rights and duties of staff members; the Draft Covenant on Human Rights; the Draft Convention on the Status of Women in Private Law.

At the tenth session we had four items; the report of the ILC; arbitral procedure; the UN tribunal in Libya; and the correction of votes in the Assembly and its committees. At the same time other committees of the Assembly were involved in human rights matters; a further advisory opinion of the Court on Southwest Africa; the problem of publication and registration of treaties; the Draft Convention on the Nationality of Married Women; and the problem of considering a review of the United Nations Charter.

At the eleventh session, there were three items on the Sixth Committee's agenda, with two involving such important questions as the final report of the ILC on the regime of the high seas, territorial seas and related questions; the elimination or reduction of future statelessness. But again such matters as a Draft Convention on the Nationality of Married Women and the Human Rights Covenants; the admissibility or hearing of petitions concerning Southwest Africa; and the registration and publication of treaties and international aggreemant, all were being considered by other committees. At the twelfth session, only three items were to be found on our agenda: the report of the ILC; aggression; and a Draft Code of Offences Against the Peace and Security of Mankind. At the same time other committees were examining the Draft Covenants on Human Rights; the Draft Covention on Freedom of Information; the legal action necessary to fulfil the obligations to Southwest Africa; amendments to the Charter dealing with membership in the Security Council, the Court and Economic and Social Council; the staff regulations and appointments to the Administrative Tribunal. At the thirteenth session, there were four items on our agenda: arbitral procedure; the initiation of the study of the regime of historic bays and waters and the problem of convening a second UN conference on the Law of the Sea. But the Sixth Committee did not have anything to do with the Draft Covenants on Human Rights or the Draft Convention of the Freedom of Information or appointments to the United Nations Administrative Tribunal; the staff regulations, or the discussion about the creation and terms of reference of the ad hoc Committee on the Peaceful Uses of Outer Space.

Finally, at the present session we have five items on our agenda, admittedly some of them very important, but other committees of the Assembly will be dealing with such significant legal matters as outer-space jurisdictional questions; Human Rights; a Draft Convention on the Freedom of Information; legal action to fulfil obligations with respect to Southwest Africa; and a Draft Declaration on the Rights of the Child.

Now, of course, reviewing this record, it may be said that on a number of occasions some dramatically significant items have been assigned to the Sixth Committee, most conspicuously in the ninth, eleventh and thirteenth sessions, in the case of the problems of the Law of the Sea. Indeed, in retrospect, I am somewhat surprised that this question was not pre-empted or assigned to some other committee, since its equally important political aspects were raising very contentious problems for many Member States. At the present session of the Assembly we find on the agenda a report on outer spece (A/41[illegible]),

a large part of which, perhaps the most important part, deals with questions of the highest legal significance to Member States. While it may be premature to discuss any questions of jurisdiction in space in this Committee, until more work is done on them, surely it would be equally premature to have them discussed very largely on a political plane, in the First Committee, as apparently may be the case at the present session. Similarly, over the past many years the various problems of human rights in the Third Commmittee have involved legal matters requiring a high degree of sophistication in understanding and elucidation. None of these questions has been put to the Sixth Committee, where surely there was a contribution to be made by us both as a technical and as a general matter. Moreover, there is already a sound tradition for references by other committees to the Sixth Committee, and there is even a precedent for a joint session between two committees, a procedure adopted in 1951 when the Second and Third Committees united to discuss relations with the World Meteorological Organization.

I should like to think that the more mature becomes the United Nations as an organization, the greater will be its resort to the legal procedures, a sign in some respects of an advancing body politic. I should like to think also that before that distant day arrives, we might employ the method of joint committee studies wherever the subject matter before other committees involves also a legal element of importance. I believe that the success of the Sixth Committee in dealing with Law of the Sea questions indicates that it was capable of effective action and that there need be no fear of undue delay because of the refinements of legal debate.

Addressing myself to lawyers, I need hardly insist that there is much to be said for viewing the law as a pacifying instrument, as a means of lessening the tensions to which too sharp political discussion over contentious matters may often lead. I would suggest that Member States try wherever possible to encourage the conversion of political issues into juridical ones for the dampening effect such a transformation may have on the dispute and, too, for the clarification such a focus often may have on the problem inself. It is almost twenty-five years since Judge Lauterpacht -- or Professor Lauterpacht as he then was -- wrote his now classical statement about "The Function of Law in the International Community". We would do well to re-examine his thesis and to apply to many of the situations before us the idea that the juridical approach and mood is often a happier method of atmosphere than an openly political posture for the settlement of many international problems.

...I have spoken perhaps at too great length on too many matters. I should like to conclude upon a note of cautious optimism that, while the day may yet be far when the rule of law automatically governs the behaviour of states in all matters of high policy, we are likely to move more rapidly toward that ideal if Member States now are willing to risk more law in their affairs, rather than less.

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