INTERNATIONAL LAW

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As international law has become so complex and many-sided, it cannot be expected that this annual survey be both comprehensive in scope and thorough in its treatment of particular topics. Obvious reasons require that the survey confine its scope of inquiry to five chosen areas, namely, 1) Canadian cases, 2) Canadian legislation, 3) treaties, 4) international adjudications, and 5) the legal work of the General Assembly of the United Nations.

I. CANADIAN CASES

A. *Sovereign Immunity*

Under international law foreign sovereigns enjoy certain immunities from the jurisdiction of municipal courts. However, the extent to which the immunities are accorded varies greatly in international practice [1] and it is only recently, in two important cases decided by the Quebec Superior Court, that the question has been properly answered in Canada. [2]

Both cases involved foreign sovereigns' commercial activities at the international exposition, "Expo '67." In each case, after an extensive discussion of the leading authorities, the court unequivocally adopted the "restrictive theory" of sovereign immunity. In *Venne v. Le gouvernement de la république démocratique du Congo* [3] the plaintiff was a local architect. He was asked by the government of the Democratic Republic of Congo through its *chargé d'affaires* in Ottawa to construct a pavilion at Expo. A contract was entered into by the parties but was never completed. The plaintiff carried out part of the work but it was not accepted by the defendant. Before the hearing, the defendant filed a declinatory exception invoking the privilege of a sovereign state to be immune from the jurisdiction of a foreign court. The defendant's claim of exception was rejected. The rationale was

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[1] See 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 553-674 (1968).

[2] The modern distinction between absolute and restrictive theories was acknowledged by Canadian federal courts in two recent decisions, but whether the concept of sovereign immunity should only apply to the operations of a state in its sovereign capacity or should equally apply to operations of a commercial nature was left open. *See* Flota Maritime Browning de Cuba S.A. v. Steamship "Canadian Conqueror," [1962] Sup. Ct. 598, 34 D.L.R.2d 628; Chateau-Gai Wines Ltd. v. Gouvernement de la République Française, 61 D.L.R.2d 709 (Can. Exch. 1967).

[3] [1968] Qué. R. Prat. 6 (C.S. 1967) *aff'd*, Court of Queen's Branch, Montreal No. 10601, October 18, 1968.

that, although the traditional jurisprudence recognized absolute immunity in all the acts of a sovereign state, the new conditions which developed after World War II have led some countries to adopt the distinction between the acts of public authority (*jure imperii*) of a sovereign state and its acts of a private nature (*jure questionis*) and the immunity has tended to disappear in the latter case. [4] The court found that the acts initiated by the accredited representative of the foreign state in question were of a contractual and private nature and tantamount to a free and implicit acceptance by the Congo government of obligations in the local jurisdiction.

Similarly, *Allan Construction, Ltd. v. Le gouvernement du Vénézuela* [5] involved a contract for the construction of a pavilion where restaurants and other concessions were to be established. Regarding the doctrine of sovereign immunity as a derogation from the normal exercise of a court's jurisdiction and hence one that should only be applied in clear circumstances, [6] the court had little difficulty in holding that by entering into the contract the Venezuelan government was engaged in private commercial acts rather than in public or political acts.

In adopting the restrictive theory, the court reasoned that:

> Accepter le principe que tout gouvernement étranger puisse venir au Canada pour y faire affaires et encaisser des centaines de milliers de dollars des Canadiens ou des visiteurs temporaires sous la protection de l'immunité de la souveraineté des Pays étrangers devant les Cours de justice canadienne serait certainement aller au-delà du respect politique et diplomatique qui actuellement devrait faire la seule bas de l'application d'une théorie d'immunité pour les pays étrangers devant nos tribunaux, eu égard aux activités directement commerciales de différents pays dans les activités mondiales; . . . . [7]

The decisions are in accord with the modern trend to abandon the absolute theory of sovereign immunity in favor of a restrictive theory, [8] and are not apparently inconsistent with the view of the subject implicitly taken by the Supreme Court of Canada in its 1962 decision in *Flota Maritima Browning de Cuba S.A. v. Steamship "Canadian Conqueror."* [9]

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[4] [1968] Qué. R. Prat. 6, at 8.

[5] [1968] Qué. R. Prat. 145. (C.S. 1967).

[6] *Id.* at 175.

[7] *Id.* at 177. "To accept the principle that every government may come to Canada to do business and collect hundreds of thousands of dollars from Canadians or from temporary visitors under the protection of the immunity of foreign States before the Canadian courts of justice would certainly go beyond the political and diplomatic deference which actually should form the only basis for the application of a theory of immunity of foreign States before our courts, having regard the distinctly commercial activities of various countries in the world transactions."—translation.

[8] For the development of the theories of sovereign immunity, see Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade*, 7 INT'L & COMP. L.Q. 452 (1958).

[9] [1962] Sup. Ct. 598, 34 D.L.R.2d 628. The case arose out of a suit against seven ships for breach of a lease-purchase agreement. The Cuban government made an appearance under protest to assert sovereign immunity on the ground that the ships were owned by and in the possession of the government of Cuba. The Supreme Court

There remains the question, what are the criteria for differentiating the public acts of a sovereign state from its private acts? Are these acts to be distinguished according to the law of the forum, the law of the defendant state, or standards generally accepted by the international community (if these can be found)? The Quebec Superior Court has offered no answer in either of these cases. [10]

B. *Off-Shore Mineral Rights*

The controversy between the federal and the provincial governments as to the ownership of and jurisdiction over the Canadian off-shore minerals has complicated federal-provincial relations for many years. [11] In a unanimous opinion, in *In re Reference Concerning the Ownership of and Jurisdiction over Offshore Mineral Rights* [12] the Supreme Court of Canada held that, in both a proprietary and a jurisdictional sense, Canada, not British Columbia, had the superior claim to the sea bed and subsoil beneath the territorial sea off the coasts of British Columbia, and that Canada alone had the right to explore and exploit such lands. The Court also found that Canada alone had the right to explore and exploit the mineral and other natural resources of the continental shelf beyond the territorial sea off the British Columbia coasts, and that these resources were within the exclusive jurisdiction of Canada. The legal issues facing the Supreme Court in the *Off-shore Mineral Rights Reference* were essentially constitutional in nature, but a number of the principles of international law were also involved.

The first question the Court considered was the legal character of the territorial sea lying off the British Columbia coasts. After a careful assessment of historical events and an extensive examination of a number of frequently inconsistent cases and statutes, the Court found that, historically, the

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of Canada was of the opinion that, although at the time of arrest they were being equipped as trading or passenger ships, since there was no evidence that they were so used, they were regarded as "public ships of a sovereign state" and thus immune from the jurisdiction of the Canadian courts.

The Court did not express any opinion as to whether the concept of sovereign immunity should equally apply to property purely used for private commercial purposes. In the judgment, however, Ritchie, J., with three other justices concurring, stated: ". . . [I] do not find it necessary in the present case to adopt that part of Lord Atkin's judgment in The Cristina, *supra*, in which he expressed the opinion that property of a foreign sovereign state 'only used for commercial purposes' is immune from seizure under the process of our Courts, and I would dispose of this appeal entirely on the basis that the defendant ships are to be treated as . . . 'the property of a foreign state devoted to public use in the traditional sense,' . . . ." *Id.* at 608, 34 D.L.R.2d at 638. The language used by Mr. Justice Ritchie was interpreted as a strong indication of the Court's intention to adopt the restrictive theory when private commercial transactions are involved. See the notes in J. CASTEL, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED IN CANADA at 686-87 (1965).

[10] The conceptional difficulties involved in formulating a satisfactory method of differentiating between public and private acts are discussed in Victory Transport, Inc. v. Comisaria General De Abastecimentos Y Transportes, 336 F. 2d 354 (2d Cir. 1964).

[11] For the background of the controversy, see Head, *The Legal Clamour over Canadian Off-shore Minerals*, 5 ALTA. L. REV. 312, 313-14 (1966-67).

[12] [1967] Sup. Ct. 793, 65 D.L.R.2d 353.

realm of England and of any British colony ended at the low-water mark, and the territorial sea beyond the low-water mark was not part of the realm. Under international law the British Parliament by legislation could make the territorial sea of England or of any British colony part of the realm of England or of that colony. However, this was not done with respect to the colony of British Columbia prior to its entry into Confederation in 1871, nor had anything intervened thereafter so as to make the territorial sea a part of British Columbia. [13]

Having denied British Columbia's claim on the first question, the Court went on to add that the power with respect to Canadian territorial sea remained in the British Parliament until Canada became a sovereign state. After Canada acquired full sovereign status, "[i]t is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia." [14] The territorial sea now claimed by Canada is defined in the Territorial Sea and Fishing Zones Act of 1964. [15] "The effect of that Act," the Court continued, "coupled with the Geneva Convention of 1958, [16] is that Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada." [17] As a result, British Columbia has no right in it either in a proprietary sense or in a jurisdictional sense. The lands under the territorial sea outside of British Columbia do not fall within any of the enumerated heads of legislative competence in section 92 since they are not within the province. It is Canada that has the right to explore and exploit these lands, and Canada has exclusive jurisdiction in respect of them either under section 91(1)(a), "The Public Debt and Property," or under the residual power in section 91 of the B.N.A. Act.

Following its finding in favour of Canada, the Court went on to state that:

> Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign States. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign State recognized by international law and thus able to enter into arrangements with other States respecting the rights in the territorial sea.
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> Canada is a signatory to the Convention on the Territorial Sea and Con-

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[13] The Court said: "[I]n our opinion in 1871 the Province of British Columbia did not have ownership or property in the territorial sea and that the Province has not, since entering into Confederation, acquired such ownership or property. We are not disputing the proposition that while British Columbia was a Crown Colony the British Crown might have conferred upon the Governor or Legislature of the Colony rights to which the British Crown was entitled under international law but the historical record of the Colony does not disclose any such action." *Id.* at 808, 65 D.L.R.2d at 367.

[14] *Id.* at 816, 65 D.L.R.2d at 375.

[15] Can. Stat. 1964-65 c. 22.

[16] 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, U.N. A. CONF. 13/L. 52, (1958), signed by Canada April 29, 1958, in force Sept. 1, 1964, not yet ratified by Canada.

[17] [1967] Sup. Ct. 793, at 816, 65 D.L.R.2d 353, at 375.

> tiguous Zone and may become a party to other international treaties and conventions affecting rights in the territorial sea. [18]

With much less difficulty, the Court next proceeded to answer the second question, concerning the claims over resources of the continental shelf, in Canada's favour. The concept of continental shelf is only a recent development in international law, [19] and there is no evidence that British Columbia, which is not an international person, can derive the benefits of the shelf from international law. The Court was able to find that "[t]here is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf." [20]

As with the first question concerning the territorial sea, the Court inexplicably emphasized that: "Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention . . . [on the Continental Shelf]." [21]

Hence, the Court concluded that British Columbia lacked the right to explore and exploit and lacked legislative jurisdiction over the resources of the continental shelf off its coasts.

The declaration that off-shore minerals, so vital to the national security and crucial to the federal government's sovereign prerogative for the conduct of foreign relations, belong to Canada rather than to British Columbia, is wise and desirable. In a technical sense, the *Offshore Mineral Rights Reference* is with respect to British Columbia only, but probably it is also

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[18] *Id.* at 817, 65 D.L.R.2d at 376. For comments on the statement, see *infra* note 21.

[19] For the development of the concept of continental shelf in international law, see E. KATIN, THE LEGAL STATUS OF CONTINENTAL SHELF 12-60, 228-40 (1962). See also N. Campbell, *International Law Developments Concerning National Claims to and in Offshore Areas*, in OIL AND GAS OPERATIONS: LEGAL CONSIDERATIONS IN THE TIDELANDS AND ON THE LAND 46 (R. Slovenko ed. 1963).

[20] [1967] Sup. Ct. 792, at 821, 65 D.L.R.2d 353, at 380.

[21] *Id.* at 821, 65 D.L.R.2d at 380. 1958 Geneva Convention on the Continental shelf, U.N. Doc. A/CONF. 13/L. 55, A/CONF. 13/L. 58 (April 30, 1958), signed by Canada, April 29, 1958, in force June 10, 1964, not yet ratified by Canada. The words of the Supreme Court seem to indicate that the federal power could assume paramountcy over the provinces by virtue of a treaty obligation. If this is what the Court purported to mean, the words would be "shocking in their impact" and are erroneous as it would be inconsistent with the decision of the Privy Council in the *Attorney-General for Canada v. Attorney-General for Ontario* (Labour Convention Case) which states that "[t]he Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth." These offending sentences could have been omitted without reaching different conclusions in the Court's opinion. See Comment, *The Canadian Offshore Minerals Reference*, 18 U. TORONTO L.J. 131, 147, 151-56 (1968); Notes, *Const'l Law: Intern'l Law: Ownership of the Jurisdiction over Offshore Mineral Rights*, 2 OTTAWA L. REV. 212, 214-15 (1967).

applicable to other coastal provinces.[22] Though the legal position of the off-shore minerals has been clarified, the *Reference* is of no binding force and the conflicting federal-provincial claims are yet to be settled by negotiations to be called for that purpose.[23]

II. CANADIAN LEGISLATION

A. *Visiting Forces Act*

On December 21, 1967, the Visiting Forces Act[24] was enacted to replace the Visiting Forces (North Atlantic Treaty Organization) Act,[25] the Visiting Forces (British Commonwealth) Act,[26] and the Visiting Forces (United States of America) Act.[27] The major purposes of the new act are three. Firstly, as far as the rights, privileges and duties of all foreign forces visiting Canada are concerned, it provides for uniformity of treatment and simplicity in administration. Secondly, the Governor-in-Council may designate any country for inclusion under the act and the servicemen of that country will therefore be brought within the terms of the act which provides for flexibility in its application.[28] Thirdly, the privileges and immunities granted originally to foreign servicemen only, are under the new legislation extended to their dependants to remove possible difficulties which could arise over the treatment of these persons.[29]

The act sets forth the conditions and terms which will control the status of foreign forces of designated states, including those visiting or stationed in Canada.[30] Concerning the question of jurisdiction over criminal offences, it provides that the military authorities of the sending state "may exercise

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[22] Except Alberta and Saskatchewan, all other Canadian provinces have seacoasts.

[23] As a basis for future discussion with the provinces, the federal government has recently proposed that the "mineral resource administration lines" off the sea coasts, in the regions of Hudson Strait, Hudson Bay and James Bay, together with a line defining the boundary between submerged lands adjacent to the provinces and those adjacent to the Northwest Territories and Arctic islands be drawn. The coastal provinces are to administer and manage the offshore mineral resources on the landward side of these lines and enjoy the revenues derived therefrom, while the federal government is to administer those resources on the seaward side of these lines and share equally with the provinces the revenues accruing therefrom. See 3 H.C. DEB. 3342-45 (1968), 113 H.C. DEB. No. 105, at 6171-72 (1969). This proposal has received mixed reaction from the provinces. Globe and Mail (Toronto), Dec. 3, 1968 at 1, col. 6 and at 2, col. 3.

[24] The Visiting Forces Act, Can. Stat. 1967-68 c. 23.

[25] CAN. REV. STAT. c. 284 (1952).

[26] CAN. REV. STAT. c. 283 (1952).

[27] CAN. REV. STAT. c. 285 (1952).

[28] By § 4 of the Visiting Forces Act, Can. Stat. 1967-68 c. 23 the Governor in Council has proclaimed 14 NATO countries (*i.e.* Belgium, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, United Kingdom, and United States and two Commonwealth countries (*i.e.* Australia and New Zealand)) as designated states to be covered under the act SOR/68-258.

[29] *See* Can. Stat. 1967-68 c. 23, §§ 6, 24, 25.

[30] 5 H.C. DEB. 4957 (1967).

within Canada in relation to members of that force and dependants all the criminal and disciplinary jurisdiction" conferred by the sending state's law, [31] and that Canadian civil courts shall have "jurisdiction in respect of any act or omission constituting an offence against any law in force in Canada . . . ." [32] The sending state has the primary right to exercise jurisdiction over a member of its force wherever the offence is solely against its property or security, or solely against the person or property of another member of the visiting force or a dependant, or where the offence arises out of any act or omission done in the performance of official duty. [33] In all other cases Canadian civil courts have the primary right to exercise jurisdiction [34] and either state may waive its primary jurisdiction. [35]

If an offence violates both the laws of the sending state and Canada, safeguards against double jeopardy are provided. Thus, where a member of a visiting force or a dependant has been tried by the military authorities of the sending state and has been convicted or acquitted, he may not be tried again by a Canadian civil court. [36] The contrary is also true if he has been tried by a Canadian civil court, [37] though this does not prevent the military authorities of a sending state from trying a member of its force for a violation of military rules or discipline. [38]

As to the legal status of the visiting forces of non-designated states, which are not covered under the act, there seems to be no rule of international law that such foreign forces are immune from criminal jurisdiction of Canadian courts. [39] In a *Reference as to Whether Members of the Military or Naval Forces of the United States of America are exempt from Criminal Proceedings in Canadian Criminal Courts*, [40] the Supreme Court of Canada was divided on the point—the majority denied absolute immunity, two judges affirmed it and one limited the immunities to events occuring in the camp of the visiting forces.

B. *Anti-Dumping Act*

The Anti-Dumping Act [41] which was passed on December 19, 1968, became law on January 1, 1969. This act is to provide for the implementa-

[31] Can. Stat. 1967-68 c. 23, § 6(1).
[32] Can. Stat. 1967-68 c. 23, § 5(1).
[33] Can. Stat. 1967-68 c. 23, § 6(2).
[34] [1962] Sup. Ct. 598, 34 D.L.R.2d 628.
[35] Can. Stat. 1967-68 c. 23, § 7(1).
[36] Can. Stat. 1967-68 c. 23, § 5(2).
[37] Can. Stat. 1967-68 c. 23, § 6(3).
[38] *Id.*
[39] In the relatively few cases where the claim of immunity was sustained in the absence of agreement, the offences charged were almost uniformly committed in the line of duty. Therefore, the only immunity for which there is any substantial support in international law is for an offence committed in the line of duty, although even this is questionable. See 6. M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 379-92 (1968).
[40] [1943] Sup. Ct. 483, [1943] 4 D.L.R. 11. See Comment, *Jurisdiction over Foreign Armed Forces which enter Canada with the Consent, Express or Implied of the Government of Canada*, 21 CAN. B. REV. 593 (1943).
[41] Can. Stat. 1968 c. 10.

tion of the international Anti-Dumping Code which was signed by Canada and forty-five other countries on June 30, 1967, at the concluding meeting of the Kennedy Round trade negotiations in Geneva, Switzerland. [42] The principal features of the new legislation are to authorize the imposition of anti-dumping duties on imports sold in Canada at prices likely to cause material injury to Canadian producers [43] and the establishment of a tribunal to apply the Anti-Dumping Act.

Under the act, goods are considered to be dumped if the normal value exceeds the export price of the goods, and the dumping duty applicable (*i.e.* the margin of dumping) is the difference between these two amounts. [44] Also if the dumped goods cause material injury, threat of injury or retardation to production in Canada, dumping duties will be levied. [45]

The Department of National Revenue retains its responsibility for making an investigation to determine whether goods are dumped in Canada. If, as a result of the investigation, the deputy minister is satisfied that the goods have been or are being dumped, he shall make preliminary determinations of dumping and the consequent levying of provisional duties. [46] These duties would apply to all imports of such goods until the order or finding is made by the tribunal. Upon the receipt of an order or finding of the tribunal, the deputy minister shall make a final determination of dumping and definitive duties are applied to all subsequent importation of like goods that are dumped. [47] The deputy minister's decision is subject to appeal to the Tariff Board and, on a question of law, to the Exchequer Court, [48] as set out in the Customs Act. [49]

The most significant change in the new legislation is the requirement that there must be a formal inquiry into the impact of dumping on production in Canada. This requirement is consistent with Canada's obligations under the Anti-Dumping Code which provides that injury, threat of injury or material retardation to production in the importing country must be determined before dumping duties are assessed. [50] An anti-dumping tribunal consisting of not more than five members is to be established [51] to make a

[42] The text of the Code, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT), 55 U.N.T.S. 187, *reprinted*, 6 INT'L LEGAL MATERIALS 920-31 (1967).

[43] There is no requirement of injury under the old legislation. See the Customs Tariff Act, CAN. REV. STAT. c. 60, 6(1) (1952). For a critical analysis of the old legislation, see MacKenzie, *Anti-Dumping Duties in Canada*, 4 CAN. Y.B. INT'L L. 131 (1966).

[44] Can. Stat. 1968 c. 10, § 8.

[45] Can. Stat. 1968 c. 10, § 10.

[46] Can. Stat. 1968 c. 10, §§ 14, 15.

[47] Can. Stat. 1968 c. 10, § 17.

[48] Can. Stat. 1968 c. 10, §§ 19, 20.

[49] CAN. REV. STAT. c. 58, § 44(1) (1952); An Act to Amend the Customs Act, Can. Stat. 1958 c. 26, § 45.

[50] The Anti-Dumping Code, *supra* note 42, art. 2, *reprinted*, 6 INT'L LEGAL MATERIALS at 920 (1967).

[51] The tribunal has been established consisting of three members. See Edmonton Journal, Jan. 9, 1969, at 26, col. 1.

decision, within three months from the date of the deputy minister's preliminary determination, on the question of "injury, threat of injury or material retardation to production in Canada." [52]

III. Treaties

A. *Disarmament*

The recently concluded Treaty on the Non-Proliferation of Nuclear Weapons (NPT) [53] which represents a major milestone towards nuclear disarmament is, like the test ban [54] and outer space [55] treaties, one of the most important international instruments since World War II. [56] The treaty will come into force with ratification by the three depository governments (*i.e.* the United Kingdom, the Soviet Union and the United States) and forty other States. [57]

Articles I and II are the main articles of the treaty. Article I deals with the obligations of nuclear powers. Firstly, they cannot "transfer" nuclear weapons, or control over them, "to any recipient whatsoever." Secondly, they cannot assist non-nuclear states to "manufacture or otherwise acquire" nuclear weapons. Thirdly, these prohibitions are applicable not only to nuclear weapons but also to other "nuclear explosive devices." Article II deals with the obligations of non-nuclear weapon parties and is the obverse of article I. Firstly, such states cannot receive the "transfer" of nuclear weapons, or control over them, from any "transferor whatsoever." Secondly, they cannot "manufacture or otherwise acquire nuclear weapons or" seek to receive assistance for such manufacture. Thirdly, these prohibitions are again applicable not only to nuclear weapons but also to other nuclear explosive devices. [58]

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[52] Can. Stat. 1968 c. 10, §§ 21, 16(3).

[53] The treaty was approved by the General Assembly in a resolution (Ann., A/RES/2373 (XXII)) by a vote of 95-to-4 (Albania, Cuba, Tanzania and Zambia), with 21 abstentions (including France and India) on June 12, 1968. N.Y. Times, June 13, 1968, § 1, at 1, col. 8. The treaty was opened for signature on July 1, 1968, in London, Moscow and Washington, and was signed by Canada in Washington and London July 23, and in Moscow on July 29 of the same year. For the text of the treaty, *see* Ann., A/RES/2373 (XXII) (1968), 7 Int'l Legal Materials 811-17 (1968), 20 External Affairs 426-31 (1968).

[54] The Nuclear Test Ban Treaty, Ann., A/5488/XVIII (1963).

[55] For the text of the Outer Space Treaty *see* Ann., A/RES/2222(XXI) (1967), *also* 55 Dep't State Bull. 953-55 (1966).

[56] For the background development of the treaty, see Bunn, *The Nuclear Non-proliferation Treaty*, 1968 Wis. L. Rev. 766-71 (1968). See also *Non-Proliferation Treaty*, 20 External Affairs 416-23 (1968).

[57] NPT, art. IX(3).

[58] Both arts. I and II include peaceful nuclear explosive devices in the prohibitions of the treaty because these devices could be used as nuclear weapons and the technology for making them is essentially indistinguishable from that of nuclear weapons. See the statement of William C. Foster, U.S. Representative to the Conference of the Eighteen-Nation Disarmament Committee at Geneva, August 24, 1967, in its plenary session, 62 Am. J. Int'l L. 151, at 153 (1968).

While non-nuclear parties are barred from exploding any nuclear devices for any purposes whatsoever under article II, their rights concerning peaceful use of nuclear energy are reaffirmed in article IV, and the principle that the benefits of "peaceful applications of nuclear explosions" should be made available to them is also acknowledged in article V. [59]

Article III calls for the application of international safeguards to the peaceful nuclear activities of non-nuclear parties and seeks to ensure that nuclear materials intended for peaceful purposes will not be diverted clandestinely to military purposes.

To meet the requests of non-nuclear states, article VI contains a significant pledge that each of the parties "undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament. . . ."

In response to non-nuclear states' concern (particularly that of India and the Federal Republic of Germany) [60] over probable "nuclear blackmail," the United States, United Kingdom and Soviet Union have made parallel declarations of intention concerning action which would be taken by the Security Council. [61] And to give further substance to these declarations, the three nuclear powers co-sponsored a Security Council resolution which "recognizes" that nuclear threats or aggression "would create a situation in which the Security Council, and above all, its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter." [62]

B. *Outer Space*

In a further effort to expand the scope of the Outer Space Treaty, [63]

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[59] For a more detailed discussion of the problem, see Bartels, *The Non-proliferation Treaty and Peaceful Applications of Nuclear Explosions*, 20 STAN. L. REV. 1030 (1968).

[60] For the proposals of India and the Federal Republic of Germany concerning "nuclear blackmail," see U.S. ARMS CONTOL AND DISARMAMENT AGENCY, 1965 DOCUMENTS ON DISARMAMENT 142; 1967 DOCUMENTS ON DISARMAMENT 179.

[61] The U.S. declaration reads in part as follows:

> [The United States] "affirms its intention as a permanent member of the United Nations Security Council to seek immediate Security Council action to provide assistance in accordance with the Charter to any non-nuclear weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used."

20 EXTERNAL AFFAIRS at 432 (1968).
See the texts of the three nuclear Powers' parallel declarations in 20 EXTERNAL AFFAIRS 431-32 (1968).

[62] For the text of the Security Council resolution, see S/RES/255 (June 19, 1968), *reprinted in*, 7 INT'L LEGAL MATERIALS 895-96 (1968); *also in* 20 EXTERNAL AFFAIRS 433 (1968). Despite the achievement of the NPT and all the security assurances, the failure of China and France to sign the treaty seems to have reduced its potential effectiveness.

[63] See Ann., A/RES/2222 (XXI) (1967), also 55 DEP'T STATE BULL. 953-55 (1966).

the General Assembly of the United Nations unanimously adopted, on December 19, 1967, an Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.[64] The agreement was executed at London, Moscow and Washington on April 22, and was signed by Canada three days thereafter.[65] It will come into force upon ratification by five contracting states, including the three depositaries (United Kingdom, United States and Union of Soviet Socialist Republics).[66]

The agreement places on every contracting party the duty to notify immediately the launching state and the Secretary General of any emergency or unintended landing in the party's territory or on the high sea or in any other place not under the jurisdiction of any state.[67] It requires that a contracting state shall take immediate and all possible steps to rescue and to return promptly both the space object and astronauts to the launching state.[68] Expenses incurred by a party in fulfilling the obligations to rescue and return a space object and its component parts are to be borne by the launching state.[69]

IV. International Adjudications

A. *International Court of Justice*

No case has been handed down by the International Court of Justice since it delivered its so-called "Dred Scott decision"[70] in the "second phase" of the South African cases in 1966.[71] Nevertheless, there are three contentious cases before the International Court at the present time, one concerning the Barcelona Traction, Light and Power Company, Ltd., and the others involving the North Sea continental shelf. The protracted *Barcelona* case concerns an action by the Belgian government against Spain seeking reparation for damages claimed to have been caused to a number of Belgian nationals, shareholders in the Barcelona Traction Company incorporated in Canada (Ontario), by the conduct of various administrative and judicial organs of the Spanish state alleged to have amounted to a denial of justice. Four preliminary objections, in respect of the competence of the Court or the admissibility of the claim, were raised by Spain. In a judgment in 1964, the Court rejected the first two objections and joined the others to the merits

[64] A/RES/2345 (XXII) (1968), *reprinted in*, 20 External Affairs 312-15 (1968).

[65] 20 External Affairs 310, at 312 (1968).

[66] Art. 7(3) A/Res/2345 (XXII) (1968), *reprinted in*, 20 External Affairs 312-15 (1968).

[67] Art. 1 A/Res/2345 (XXII) (1968), *reprinted in*, 20 External Affairs 312-15 (1968).

[68] Arts. 2 & 4 A/Res/2345 (XXII) (1968) *reprinted in*, 20 External Affairs 312-15 (1968).

[69] Art. 5(5) A/Res/2345 (XXII) (1968), *reprinted in*, 20 External Affairs 312-15 (1968).

[70] For this characterization, see Highet, *The South West Africa Cases*, 52 Current Hist. 154 (1967).

[71] South West Africa Cases, [1966] I.C.J. 6 (Second phase).

of the case. [72]

A question of jurisprudential and practical importance concerning international claims was raised in the third Spanish objection. In that objection, the Spanish government denies the *jus standi* of the Belgian government in the present proceedings, and its legal capacity to protect the Belgian interests. The basis of the objection is that "the acts complained of . . . took place not in relation to any Belgian natural or juristic person but to the Barcelona Traction company, which is a juristic entity registered in Canada, the Belgian interests concerned being in the nature of shareholding interests in that company." [73] Hence, "it is contended that . . . 'international law does not recognize, in respect of injury caused by a State to a foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company.' " [74] The interesting question whether in an international claim the "corporate veil" should be pierced is awaiting the Court's determination. [75]

The two *North Sea Continental Shelf* cases (Denmark—Federal Republic of Germany; Federal Republic of Germany—Netherlands) are concerned with the delimitation of the continental shelf of the North Sea between the parties involved. The North Sea covers an area of about 222,000 square miles between the British Isles and the northwest coast of the European continent. With the exception of the so-called Norwegian Trough, the waters at the greatest depth do not exceed two hundred metres. Recent exploration and development seems to confirm the possible presence of very large petroleum and natural gas reserves in the submarine area of the North Sea. [76]

There are five littoral states having potentially large interests in the submarine resources of the area, *i.e.*, the United Kingdom, Norway, Denmark, the Federal Republic of Germany and the Netherlands. [77] Among these

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[72] Barcelona Traction, Light and Power Co., [1964] I.C.J. 6. See Comments, *Preliminary objections—jurisdiction of I.C.J.*, 59 AM. J. INT'L. L. 131 (1965); *International Law—Jurisdiction of I.C.J.*, [1965] CAMB. L.J. 166; Case concerning the *Barcelona Traction, Light and Power Company Ltd. Preliminary Objections*, 3 CAN. Y.B. INT'L. L. 306 (1965).

[73] [1964] I.C.J. at 44.

[74] *Id.*

[75] Judge Wellington Koo in his separate opinion dissented on the Court's conclusion of joining the third preliminary objection to the merits and was of opinion that "the original simple rule of protection of a company by its national State has been found inadequate and State practice, treaty regulation and international arbitral decisions have come to recognize the right of a State to intervene on behalf of its nationals, shareholders of a company which has been injured by the State of its own nationality, that is to say, a State where it has been incorporated . . . ." [1966] I.C.J. 6, at 58.

[76] Young, *Offshore Claims and Problems in the North Sea*, 59 AM. J. INT'L L. 505, at 508 (1965).

[77] Though Belgium and France are also littoral states of the North Sea, their combined coast lines are less than one hundred miles and the offshore minerals pertaining to the area are much less favourable than to the other littoral states. Therefore the two countries have shown little interest in the problems of the North Sea Continental Shelf.

states, only the United Kingdom and Denmark are, at the end of 1968, parties to the 1958 *Geneva Convention on the Continental Shelf*. Nevertheless, the delimitation of the North Sea continental shelf has now been determined as between the United Kingdom, Norway, Denmark and the Netherlands [78] by using the median line set out in the Geneva Convention. [79]

The Federal Republic of Germany has concluded treaties with Denmark and the Netherlands, but only with regard to the coastal section of the boundary lines. [80] For the areas beyond the partial boundaries settled by the existing treaties, the German government signed with Denmark and the Netherlands respectively at Bonn on February 2, 1967, two special agreements, which were filed with the ICJ on February 20 of the same year for adjudication. The Court is requested to decide what principles and rules of international law are applicable to the delimitation as between the respective parties of the areas of the continental shelf in the North Sea. The special agreements recite that the governments concerned shall delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision of the Court. [81] Upon finding that Denmark and the Netherlands were in the same interest the Court made an order on April 26, 1968, consolidating the proceedings in the two cases. [82] Public hearings in the cases began on October 23 in the same year. [83]

B. *Rann of Kutch Arbitration*

While the ICJ was busying itself in delimiting the continental shelf in the North Sea, another boundary question between India and Pakistan was resolved by ad hoc arbitration without much fanfare. The boundary between India and Pakistan in the Gujarat-West Pakistan border region—the Great Rann of Kutch [84]—with a length of some 250 miles, has been in dispute since the early years of this century. [85] Pakistan's claim was to 3,500 square miles of the Great Rann on the ground that it was a "marine feature" forming a broad belt of boundary between the two countries and had to be divided along its median line. India's case was that the boundary lay roughly

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[78] *Current Legal Developments: North Sea*, 15 INT'L & COMP. L.Q. 904 (1966).

[79] Art. 6(1) of the 1958 Geneva Convention on Continental Shelf, A/CONF. 13/L. 55 (April 26, 1958) provides that: "In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary [of the continental shelf adjacent to the territories of two or more States whose coasts are opposite each other] is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured." U.N. Doc. A/CONF. 13/L. 58, Apr. 30, 1958, in force June 10, 1964.

[80] *Supra* note 78.

[81] [1967-68] I.C.J.Y.B. 85-86.

[82] *Id.* at 86.

[83] 5 U.N. MONTHLY CHRONICLE No. 10, at 187 (Nov. 1968).

[84] The Great Rann of Kutch is a salt marsh lying between the former province of Sind (formerly part of British India), now part of Pakistan to the north and west, and certain former Indian states (which merged with India) to the south and east.

[85] For the history of the dispute, see Chacko, *The Rann Of Kutch and International Law*, 5 INDIAN J. INT'L. L. 147 (1965).

along the northern edge of the Great Rann. Occasional outbursts of violence did erupt, but these were brought to an end by the agreement of June 30, 1965, which provided for a cease-fire as well as for arbitration of the dispute. [86]

After an unusual procedure, [87] the tribunal in the Indo-Pakistan Western Boundary case constituted pursuant to the agreement of June 30, 1965 delivered its award on February 19, 1968, [88] in which, by a majority of two-to-one, the tribunal held that ninety percent of the disputed territory belonged to India and the rest to Pakistan. Numerous historical events and voluminous maps and administrative statements were examined, but all of these failed to convince the tribunal that at any relevant time did there exist a historically recognized and well-established boundary in the disputed region. Nor did the evidence prove that either side came close to a token display of sovereignty, let alone any continuous and effective exercise of jurisdiction and authority over the disputed territory. Thus the whole question appears to have been decided on the basis of a presumption arising out of conterminous boundary existing in the area.

During the proceedings, an interesting question arose as to whether the tribunal was invested with the power to adjudicate *ex aequo et bono*. [89] The tribunal was able to answer in the negative because, "[a]n international Tribunal will have the wider power to adjudicate a case ex aequo et bono, . . . only if such power has been conferred on it by mutual agreement between the Parties." [90] However, in finding that the two deep inlets on either side of Nagar Parkar belong to Pakistan, the rationale of the majority opinion seems to be contradictory to its earlier pronouncement where it reads:

> For the reasons now given, and with due regard to what is fair and reasonable as to details, I conclude . . . . [the two deep inlets on either side of Nagar Parkar will constitute the territory of Pakistan]
> . . . . In my opinion it would be *inequitable* to recognize these inlets as foreign territory. *It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such.*[91]

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[86] For the text of the agreement, see *id.* at 264; *see also* Rao, *Indo-Pakistan Agreement on the Rann of Kutch: Form and Content*, 5 INDIAN J. INT'L L. 176.

[87] The unique feature of the procedure is that, instead of making an outright decision, the tribunal distributed to the parties on Oct. 20, 1967, a draft award for comment. And the final text of the award was determined only after taking into consideration the comments and counter-comments submitted by the parties. See Murti, *The Kutch Award: A Preliminary Study*, 8 INDIAN J. INT'L L. 51, at 53-54 (1968).

[88] For the text of the award, see *The Rann of Kutch Arbitration (India and Pakistan)*, 7 INT'L LEGAL MATERIALS 633 (1968), *reprinted in*, 8 INDIAN J. INT'L L. 75 (1968).

[89] During the proceedings, India moved that the agreement did not authorize the tribunal to decide the case *ex aequo et bono*, while Pakistan submitted that the agreement gave the tribunal such power. See 7 INT'L LEGAL MATERIALS at 642 (1968).

[90] *Id.* at 643.

[91] *Id.* at 690, 692 (emphasis added).

V. General Assembly Of The United Nations

A. *Law of Treaties*

The United Nations Conference on the Law of Treaties convened by the General Assembly upon the recommendation of the Sixth Committee [92] concluded on May 24, 1968, in Vienna, a nine-week review of the draft Convention on the Law of Treaties prepared by the International Law Commission. [93] Sitting as a committee of the whole, the conference at its first session discussed all the seventy-five draft articles, together with a number of new articles proposed at the session. The committee approved sixty-six draft articles, deleted one, and reserved decision on eight until its second session next year. [94]

At its second session, scheduled to be held from April 9 to May 31, 1969, in Vienna, the committee of the whole will complete its work, and the conference in plenary session will then consider and decide its report and recommendations. [95] One recommendation already adopted by the committee is that the final act of the convention shall include a declaration solemnly condemning "the threat or use of pressure in any form, military political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent." [96]

In the light of the complexity of treaty relations between states, and the importance of the subject, the draft Convention on the Law of Treaties, if adopted and widely ratified, will be the most important codification of international law in United Nations history.

B. *International Law Commission*

The International Law Commission (I.L.C.) held its twentieth session in Geneva from May 27 to August 22, 1968. [97] State succession and relations between states and intergovernmental organizations ranked as important topics for discussion. The special rapporteurs appointed in 1967 by the I.L.C. to report on two aspects of state succession; *i.e.*, succession in

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[92] For resolutions on the conference, see A/RES/2166(XXI) (1966); A/RES/2287/(XXII) (1967).

[93] For text of the ILC's draft articles and commentaries, see U.N. GAOR, 21st Sess., 1966, Supp. 9 (A/6309/Rev.1) at 10-100.

[94] Draft article 38, on modification of treaties by subsequent practice was deleted. Decision on arts. 2, 8, 12, 17, 26, 36, 37, 55, 66 and three proposed new articles was deferred. See *Issues Before 23rd Gen. Assembly: Legal Questions*, 569 Int'l Conciliation 177, at 178, fn. 2. (Sept. 1968).

[95] See U.N. Doc. A/CONF. 39/C.1/L.370 (May 22 1968) and addenda. For the committee's summary records, see U.N. Doc. A/CONF. 39/C.1/SR 1 to 83; see also Stanford, *United Nations Law of Treaties Conference: First Session*, 19 U. Toronto L.J. 59 (1969).

[96] U.N. Doc. A/CONF. 39/C.1/L.370/Add. 7, at 11 (May 22, 1968).

[97] See Report of the ILC on the work of its 20th session, U.N. GAOR, A/7209/REV. 1 23rd Sess., Supp. 9.

respect of treaties and succession in respect of rights and duties resulting from sources other than treaties, have submitted their first reports for consideration. [98] The commission also discussed the second and third reports of its special rapporteur on the relations between states and intergovernmental organizations. The reports include a draft convention on the legal status of representatives to international organizations. [99]

The most-favoured-nation clause in treaties and state responsibility were also on the agenda at this session. [100] If approved by the United Nations Conference on the Laws of Treaties in its second session, the commission will receive a new assignment from the General Assembly on the question of treaties concluded between states and international organizations as well as between organizations. [101]

C. *International Trade Law*

In recognition of the growing importance of international trade law, the General Assembly in 1966 by unanimous vote established the twenty-nine member United Nations Commission on International Trade Law (UNCITRAL). [102] The UNCITRAL is the second permanent commission on legal matters created in United Nations history. [103] Its main purpose is to promote the development of international commercial law by the harmonization and the unification of existing conventions, law and trade practices.

The first session of the commission was held in New York from January 29 to February 26, 1968. After considerable discussion, the commission decided that priority of its work programme should be given to three topics, *i.e.*, international sale of goods, international payments, and commercial arbitration. [104] In approving the commission's programme of work, the General Assembly decided on December 18 to recommend that the commission consider the inclusion of international shipping legislation among its priority topics. [105]

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[98] For the reports, see U.N. Doc. A/CN.4/202, (Mar. 15, 1968, and A/CN.4/204, (Apr. 5, 1968).

[99] U.N. Doc. A/CN. 4/195 & Add. 1, (April. 7 & May 25, 1967); & A/CN. 4/203, (Mar. 20, 1968).

[100] The work of the ILC was adopted by the Sixth Committee and the General Assembly itself. The Assembly recommended that the commission continue its work on succession of states and government and relations between states and international organizations; continue its study on the most-favoured-nation clause; and make every effort to begin substantive work on state responsibility, as from its next session. See GAOR A/C.6/L. 651/Rev. 1. (Oct. 15, 1968); and A/RES/2400 (XXIII) (Dec. 13, 1968).

[101] The committee of the whole of the conference so recommended in its first session held in 1968.

[102] A/RES/2205(XXI) (Dec. 17, 1966). Canada is not a member of the commission.

[103] The first is the ILC established in 1947.

[104] See Report of the UNCITRAL, GAOR, 23d Sess., Supp. No. 16 (A/7216), at 13 (1968).

[105] A/2421(XXIII) (1968).

D. *International Law and Friendly Relations*

In 1962 the General Assembly enumerated seven principles of international law concerning friendly relations and co-operation among states which the Charter suggests are basic. [106] The following year, a special committee was established to study these principles for the purposes of drafting for the Assembly's adoption, a declaration of universally agreed legal principles to serve as a standard for the conduct of states. [107] Since 1964 the committee has held several meetings. [108] However, owing to the complexity of the subject and diversity of interests among states, the thirty-one member special committee [109] has proceeded in its assigned task at a slow pace. [110]

During its 1968 session, held in New York from September 9 to 30, the committee had on its agenda the three principles most important for the maintenance of international peace and security, *i.e*, the prohibition of threat or use of force, the equal rights and self-determination of peoples and the duty to refrain from intervention. After careful discussions, the committee adopted a number of agreed statements on the principle of the non-use of force in international relations, including an agreement for general and complete disarmament under effective international control.[111] Nevertheless, there were several disagreements related to the military occupation and non-recognition of situations brought about by the illegal use of force, the use of force against colonial people, and the application of the principle to economic and political coercion. Owing to the lack of time, the committee was unable to consider the two other principles. [112] The General Assembly, on Decem-

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[106] By resolution 1815 (XVII) Dec 18, 1962, at 67, the General Assembly listed the following seven principles:

> (a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (c) The duty not to intervene in matters within the domestic jurisdiction of any State; (d) The duty of States to co-operate with one another in accordance with the Charter; (e) The principle of equal rights and self-determination of peoples; (f) The principle of sovereign equality of States; (g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

[107] A/RES/1966/(XVIII) (Dec. 16, 1963).

[108] The committee has met in Mexico City (1964), New York (1966 & 1968) and Geneva (1967). For the achievements and difficulties involved in these meetings, see Houben, *Principles of International Law Concerning Friendly Relations and Co-operation among States*, 61 AM. J. INT'L L. 703 (1967), and McWhinney, *The 'New' Countries and the 'New' International Law: The United Nations' Special Conference on Friendly Relations and Co-operation Among States*, 60 AM. J. INT'L L. 1 (1966).

[109] Canada is a member of the committee.

[110] See *supra* note 108.

[111] See REPORT OF THE SPECIAL COMM. ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES, U.N. Doc. A/7326, at 10-51 (1968).

[112] *Id.* at 52-69.

ber 20, decided to ask the special committee to continue and complete its work in 1969. [113]

E. *Special Missions*

The Sixth Committee, from October 15 to November 15, 1968, considered the fifty-article draft Convention on Special Missions prepared by the I.L.C. [114] It adopted, approved, or referred to the Drafting Committee, articles 2 through 29 inclusive and article 31. [115] The draft convention relates to the activities, functions, membership, facilities, and privileges and immunities of special missions.

F. *Defining Aggression*

After nearly a decade of inaction, [116] the General Assembly established a thirty-five member Special Committee on the Question of Defining Aggression. [117] The committee met in Geneva from June 4 to July 6, 1968, but was again unable to reach agreement on a definition. [118] The General Assembly, upon the recommendation of the Sixth Committee, decided on December 18 that the Special Committee should resume its work early in 1969. [119]

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[113] A/RES/2463/(XXIII) (Dec. 20, 1968).

[114] For the background as well as the text of the draft convention and its commentaries, see GAOR, 22d Sess., 1967, Supp. 9 (A/6709/Rev. 1). The draft convention is modeled on the 1961 Vienna Convention on Diplomatic Relations with certain special provisions.

[115] See 5 UN MONTHLY CHRONICLE, No. 10, at 50-52 (Nov. 1968); and *id.* No. 11, at 111-113 (Dec. 1968).

[116] For the historical attempts in defining aggression, see Hazard, *Why Try again to Define Aggression?*, 62 AM. J. INT'L L. 701, 702, *esp.* nn. 6-11 (1968).

[117] A/RES/2330(XXII) (Dec. 18, 1967). Canada is a member of the special committee.

[118] For the report of the special committee, see U.N. Doc. A/AC/134/2, (July 12, 1968).

[119] A/RES/2420/(XXIII) (Dec. 18, 1968).