Basis of International Law

Nature of International Law

Following is a speech on 'The inevitability of change in international law and the need for the adjustment of interests' by the Legal Adviser in the Department of Foreign Affiars, Mr E Lauterpacht QC, to the International Symposium on the Pacific Ocean organised by the Ocean Association of Japan, in Tokyo, on 30 November 1976:[1]

> It is a great honour and a personal privilege for me to have been asked to join you and so many other eminent guests here at the first international symposium sponsored by the Ocean Association of Japan. This is the first time that I have returned to Japan since March 1975 when I was happy to have the opportunity of participating in the negotiation of what has now become the Basic Treaty of Friendship and Co-operation between Japan and Australia. That was my first direct introduction to Japan and its way of life, though I count myself fortunate to have enjoyed the friendship of Japanese abroad for many years. I was very much impressed by what I then saw and experienced. It served actively to add to the respect and admiration which I have come to feel for the talents and achievement of the Japanese people. And I count myself fortunate as having had an opportunity to contribute, in a modest way, to the forging of the Basic Treaty, an instrument which in the very fact of its conclusion, represents so important a stage in the developing relationship between Japan and Australia. It will, I earnestly hope, in the years to come provide the two countries with an efficient bond that will be of major benefit to both.
>
> It is an even greater honour to have been invited to offer a keynote speech on this occasion. Although this is a non-governmental and unofficial gathering, I know that the Australian Government will also feel complimented that one of its officers should have been selected to play this role in your proceedings. I am sure, though, that you will readily understand my emphasis of the fact that I do not appear here in an official capacity, that I am not speaking to you in terms that have been cleared by my Government and that what I say on the Law of the Sea should not be read as a statement of Australian policy. However, I shall, naturally, because of my own role in the Australian delegation at the Law of the Sea Conference, tend to be influenced by that experience.
>
> The Ocean Association of Japan has described the present symposium as a 'concerted consideration of the various problems facing us all in our use of, and reliance on, the Pacific Ocean'. Those present have come from many of the countries that touch on Pacific waters and are directly affected by its economy. But we must realize that,

1. Aust FA Rec, December 1976, 637. The speech was delivered from notes. The speaker prepared the text from the transcript.

though these countries are linked by this common physical fact, as well as by certain political and emotional ties which are connected with it, we do not—and, in the nature of things, cannot—possess a single identical or uniform approach to the Law of the Sea. Our concerns with the sea are diverse and even in some respects conflicting. We reflect here many of the interests which in the current Law of the Sea negotiations we are trying so hard to reconcile: the coastal interests, the island interests, archipelago interests, straits interests, the interests of the geographically disadvantaged states, the interests of the long-distance fishing states, the interests of those who favour a 200-mile economic zone and those who do not, new states, old states, those who are economically advanced and those who are developing. We are, therefore, bound to ask ourselves: What is the function of a discussion of the Law of the Sea in Pacific terms; how can it differ from a discussion taking place among a group drawn from a wider geographical background?

I suggest that we may have in mind the following objectives: First, we can exchange information and pool our experience. Second, we can develop our regional cohesion. In a world already too much divided into blocs we should not wish to add centrifugal elements. We can, however, try to build upon the fact that we are, in a physical and regional sense, closer to each other than we are to non-Pacific countries. And this is so, notwithstanding the mileage differences that separate us. Third, we can try to find out what are common interests. We may explore the possibilities of regional action for regional protection. Fourth, we can, at the very least, take this opportunity—which falls one third of the way between the Fifth and Sixth Sessions of the Law of the Sea Conference—simply to find out what developments have recently taken place, what is in each other's mind and, most important of all, how we may individually and collectively seek to promote progress in this complex negotiation.

In the time available I cannot hope to cover these points in detail. So I must content myself with seeking to develop a keynote theme. I may sum this up in the following phrase—the inevitability of change in international law and the need for the constant constructive adjustment of interests. I will illustrate it by reference to two of the main elements which have been indicated in the outline of this symposium, the problem of seabed resources and the problem of the living resources of the Pacific Ocean.

By way of general introduction, let me observe straight away that the content of international law is not static. We know that international law consists of, on the one hand, treaties and, on the other, custom. Treaties represent the express agreement of states. We know that treaties are not unchangeable and that in many cases they have been revised by subsequent agreement. Part of our problem today is to modify the existing agreements on the Law of the Sea by new agreements. Those now operative do not satisfy all states. The

impetus for the new Law of the Sea Conference came largely from that substantial group of new states which has come into existence subsequent to the Geneva Conference of 1958. Those states did not participate in the elaboration of these conventions. They have, therefore, felt a special urgency about the need to bring the existing structure up to date.

Apart from treaties we have customary international law—law that binds all states, old and new alike. Custom constitutes the basic content of international law. This customary international law is an expression of the practice of states which has been generally accepted as law. This dependence on state practice is both the source and the reflection of the legal relevance of divergence from the normal. It is sometimes hard for those who are not lawyers, and even for many who are, to accept that the law can consist of and reflect deviation from the law. But when we reflect more carefully about our own experience, even as laymen, we recall that the community constantly changes its laws because it finds that its societal activity does not accord with the rules which are strictly prescribed. And in the international community, where we are less accustomed to a system of legislation, of courts and of enforcement, there is even greater scope for change in the law as a result of departures from the normal. The question in any given case is simply one of determining the acceptability of the divergence to the general body of states. You must not misunderstand me. I am far from saying that every divergence from the law is lawful. That would be nonsense. What I am saying is that, when there is a repeated divergence—a divergence which is (as it happens to be in the situations that we shall be considering) subject to the scrutiny of states—and that divergence is either widely accepted or, at any rate, is not widely disapproved of, then that deviation itself tends to become the norm and, therefore, the law.

One is reminded in these circumstances of the way in which the old law relating to territorial waters changed. At one time international lawyers spoke with some confidence of a rule that prescribed a three-mile limit for the width of territorial waters. But even as long ago as the Hague Codification Conference of 1930, it was impossible to secure agreement on the proposition that territorial waters should be limited to three miles. It was even less possible to approach agreement on this question at the 1958 conference. And this was because a substantial number of states had, even as long ago as 1930 and more so by 1958, allowed their own claims to territorial waters to exceed three miles. They had thus departed from the norm and had established a different pattern of conduct. This new pattern of behaviour in due course had an effect on the content of the law, notwithstanding the rigid adherence to the three-mile limit by quite a few maritime states.

One is reminded also of the attitude of some states towards the

emergence of the concept of the continental shelf. Looking back over the records of discussions between states, in the period between, let us say, 1953 and 1958 when the continental shelf doctrine as we know it today was developing, one finds that two states, Sweden and the Federal Republic of Germany, both denied the validity of the emerging concept of the continental shelf. Their positions were dictated by perfectly valid approaches to international law conceived in traditional terms. However, those traditional terms were not appropriate to the developments then taking place. The Federal Republic of Germany and Sweden found themselves outside the mainstream of international legal thinking; and in due course they re-entered it by accepting the new rules which were prescribed in the 1958 Geneva Convention on the Continental Shelf.

Now having, by way of introduction, referred to the inevitability of change, let me relate to the first of our two main themes, the problem of seabed resources lying beyond the limits of national jurisdiction. We are talking about the seabed lying under the high seas—an area which historically has been free for the use of all without restriction and without the need for the prior consent of any state or international authority. Now we find that freedom being limited. We observe a reflection of that reduction of freedom in the General Assembly resolutions which state the principles governing the use of the seabed. These resolutions establish the concept of the common heritage of mankind: the notion that the resources of the seabed should not be used for the benefit of any single state which happens to be able, by virtue of its power, its wealth or its possession of technology, to make use of those resources, but instead that these resources should be used for the benefit of all mankind and, in particular, that the material benefits should be distributed equitably among states with particular reference to the needs of developing countries.

Since 1968, when the Seabed Committee was first established by the United Nations, a virtually continuous attempt has been made to work out an appropriate system for regulating access to the seabed. This system involves the establishment of some institutional machinery of control and of rules to govern the activities of that organisation and of states who wish to operate in the 'area'.

As part of the international organisation contemplated for the control of the 'area', there is general agreement that there should be an international authority. Under the umbrella of that authority there is to be an enterprise—the operating arm of the authority. This enterprise would carry on activity in the 'area': exploration, mining and perhaps, eventually, the subsequent processes of refining and even the sale of the refined commodity. But here a major difference of opinion has emerged. A large number of states, particularly those constituting what we loosely call the Group of Seventy-Seven, consider that, as the enterprise represents all mankind, therefore the

enterprise alone shoud have access to, and be able to operate within, the 'area'.

On the other hand there is a group of states consisting of the technologically advanced and financially powerful states comprising, among others, the United States, the Soviet Union, Japan and the Federal Republic of Germany, which has spent considerable sums on exploration, in developing mining techniques and equipment and on research into methods of refining the minerals thus extracted. These states do not wish access to the 'area' to be limited to the enterprise. There are two main reasons for this. One is strategic. The interest of these prospective operators in this respect is that there should be no body capable of limiting their ability to find, take and use seabed minerals. Another reason is essentially commercial: that they do not consider it practical to have the operations of their companies under the control of an international authority. They believe that if they are to proceed effectively they need to be able to operate freely without constant and detailed international supervision and administration. So the idea has been developed of a system of parallel access which would permit operations by both sides. There should be no exclusion of the enterprise and likewise no exclusion of state or private activity.

There would, of course, be regulation of both. The question which now has to be answered is how much regulation of both. The regulation of the activities of the enterprise is not particularly contentious because the enterprise is an arm of the authority. But the question of the degree and manner of regulation of state and private activities is crucial. Here the position adopted by this group of developed countries is that they wish to have an assured right of access to the deep sea. They are prepared to accept a licensing arrangement but they do not wish that the possibility of any particular company operating in any particular area should be exposed to an exercise of discretion by an international body which might be hostile to the state of which that particular company is a national.

At the end of the Fourth Session in New York in May 1976 a Revised Single Negotiating Text was established which recognised a reasonable degree of freedom of access to the 'area' for the developed states and their companies. But when this Text was seen by the Seventy-Seven, they reacted adversely to it. They felt in part that it had been negotiated in a manner unacceptable to them. Their resentment was demonstrated at the Fifth Session of the Conference which took place in August and September 1976—a session which many of the participants found particularly frustrating because of the failure of the two sides to approach each other in real negotiation. Nonetheless that session served a valuable purpose by bringing into the open this fundamental difference of approach to the question of the degree of control the authority might exercise over those who wished to operate in the 'area'.

Here is a situation where constructive statesmanship is required and where both sides must make moves towards each other. It is essential, however, to bear in mind that any suggestion that both sides should make such moves cannot overlook the history of the steps which have already been taken by one side or the other. It must be recalled that the developed countries have over recent years considerably softened their position towards the less developed countries, while the latter have made fewer shifts. Consequently, in measuring the scope for future bargaining we are not starting at this moment from a position of equality in which each side must make the same degree of sacrifice. The area for equality of activity is in the realm of flexibility and of willingness to negotiate.

In April 1976, the United States Secretary of State, Dr H Kissinger, made certain suggestions of which the most important was an indication by the United States for the first time of its willingness to accept some degree of production limitation on minerals recovered from the 'area'. At that time this was considered as a particularly delicate question and the ideas indicated by the United States somewhat alleviated the tensions prevailing at that time, though it did not completely dispose of them.

During the session of August-September 1976, the United States came forward with certain other proposals which, had they been made earlier, and had they been developed in more detail, might have served again to reduce or eliminate the tensions which so seriously affected that session. The United States indicated that it would be willing to assist the enterprise in commencing activities at a very early stage in the existence of the authority; that it would be prepared to see capital provided for the activities of the enterprise; and that it foresaw that there should be some transfer of technology to the enterprise to enable it to operate genuinely in parallel with private activities. The United States also indicated its willingness to see some revision of the system after a period of twenty-five years. However, this United States proposal came too late and in too little detail to change the course of the last session.

Consequently, on this central question of access to the 'area' and of the terms of operation within the 'area', the whole negotiation is quite open; if we can make progress on this central point then there are prospects of success. The other contentious aspects of the negotiation in the First Committee, though still difficult, may be easier to resolve. We must, therefore, ask ourselves what is now needed. First, we need an elaboration of the United States position, including its proposals regarding the financing of the enterprise. It is possible that this is a context in which thought may be given to the relevance of the activity of the proposed International Resources Bank. As you may remember, this was a suggestion which was aired at the United Nations Conference on Trade and Development (UNCTAD) in Nairobi. The proposal at that time was in no way

linked to the activities of the enterprise and it is a curious reflection of how compartmented international thought can be, that just as the economists appear not to have thought of the relevance of the International Resources Bank to the problems of the deep sea, so equally we, who have been concerned with the deep sea, have not really considered the relevance to our own needs of the International Resources Bank. I would suggest therefore that this is an area which deserves examination. The United States must also come forward with more detailed ideas regarding the transfer of technology and its views on production limitation, which must be updated and made more realistic.

Second, there is a real need on the part of the Seventy-Seven to accustom themselves to a parallel system of access. And in so doing the Group must consider more carefully, and become better acquainted with, the system of joint ventures so that possibly some scheme may be worked out for co-operation between the enterprise and the private companies.

Those are the two main needs: an adjustment of attitudes on both sides and a willingness to compromise. There are of course other matters that will require detailed attention in due course, but not everything can be covered at once. It will be necessary to think more about the structure and powers of the Council and the Assembly, the voting within each body and their relationship to each other. It will also be necessary to work out more carefully an approach to the so-called 'anti-monopoly provisions', a problem that is dividing the developed countries. At the moment it is the United States which appears to have almost a monopoly on the technology and the capacity to operate in this field. Somehow or other the developed countries must work out a basis of equitable division between themselves of their share of the benefits of the 'area'.

It is also necessary for both groups to work out an effective negotiating process. In particular there is a need for the Seventy-Seven to develop some mechanism of representative negotiation. During the last session we had some interesting experiments in negotiating techniques. We tried something called 'the workshop system' which involved the activities of two co-chairmen—both of them able, worthy, experienced gentlemen. But it is very difficult in a negotiation that requires a constant and rapid injection of leadership from the chair to have two co-chairmen, coming as they did from two different sectors, the Seventy-Seven and the developed countries. It is difficult to have two such co-chairmen work together with the same identity of approach, an identity that is required if there is to be a positive presidential initiative. We also tried something called 'the arena system', in which a smaller, more interested and active group of states participated in the discussion in the presence of any other states who wished to attend. We are at the moment about to move into the phase of 'intersessional negotiations'. There is a need for

some speed here. We are faced unfortunately by some uncertainty in the position of the United States resulting from the forthcoming change in its administration. Some months must pass before the United States can either confirm or amend its negotiating position.

So what can we do? We must recognise the nature of the concern on both sides. We must escape from theoretical formulae. We must endorse the need for flexibility. We must recognise the need to grapple with details. We must identify the matters where negotiation is relevant. In other words, we are here in the face of an area of constructive initiative and of continuing necessity for imaginative development. This is not an area in which old international law applies or can be applied. It is an area where new interests must be harmoniously reconciled.

Let me turn now to the second main illustration of my keynote theme: access to the living resources of the sea. Here the central problem is that of the 200-mile economic zone. We have to accept that a 200-mile economic zone is now an inescapable fact of life. There is no longer any real point in arguing about the present content of international law. Change is inevitable. This change is the consequence of the erosion of the old law. Some may not like it, but it cannot be stopped. We are confronted now by an accumulation of divergence from the old pattern which cannot be ignored: an accumulation of activity that is partly unilateral, partly bilateral and partly multilateral.

As to unilateral moves in relation to fisheries, we have to note action by Iceland and the prospect of action by New Zealand, the United States, Canada, Papua New Guinea. In the last few days the states of the European Economic Community have collectively declared that they too are moving towards a 200-mile fishery limit at the beginning of 1977. The states I have just mentioned have limited their action to fishery matters. In addition there are those states who have made clear their intention to proceed to a 200-mile economic zone in its full extent—that is to say, covering all economic resources, living and non-living—Mexico, France, Norway, India, Britain and Sri Lanka. That is a body of action which cannot be ignored. In addition, there are those states which in the past have claimed a 200-mile belt of territorial waters and who must *a fortiori* be regarded as supporting this approach.

Now, if we were confronted only by unilateral action it might be possible to continue arguing for some time yet that these individual actions did not represent law modifying international practice. But we have to add to the unilateral actions a series of bilateral actions. It is to be noted, for example, that Canada, which I mention as but one example, has already concluded with such countries as the Soviet Union, Poland and Norway, treaties which are intended to regulate fisheries in the 200-mile zone off Canada.

Finally, on the multilateral side of things, it is impossible to ignore

the general sentiment of approval for the creation of an economic zone which has manifested itself in the sessions of the Law of the Sea Conference. Given that we cannot stop this change, the question we must ask ourselves is: What are the progressive things to do? First we must watch out. We must scrutinize individual and bilateral actions to ensure that they fall properly within the limits of the concept of the economic zone as it is emerging from multilateral discussions in which we are all participating. For example, I noticed recently that one country is proposing regulations in relation to its 200-mile fishery limit which require fishing vessels contemplating transit through the 200-mile zone to give notice of their location, route and destination prior to, or upon entry, into the fishery zone. I was struck by that because it suggested to me that this particular state was pitching rather high its conception of the degree of control which it is entitled to exercise in its economic zone. One thing is clear, there is a considerable division between states regarding the status of the economic zone: some have claimed that the economic zone remains high seas except in so far as specific economic rights are attributed to the coastal states; others have argued that the economic zone is to be assimilated to the territorial sea. Neither side accepts the position of the other and neither position can be accepted as absolutely correct. There is also a middle position—a tendency to accept that the economic zone is something special, something *sui generis*. But the proposition that a foreign fishing vessel, which is not going to make use of an economic zone, must give prior notice of intention to transit the economic zone appears to go beyond even the assimilation of the economic zone to territorial waters since it seeks to limit the right of innocent passage which exists in territorial waters. Such a requirement interprets in a manner very generous to the coastal state the scope of its entitlement to ensure that there is no violation of its exclusive right to the economic benefit of the coastal zone.

So the first thing we must do is to scrutinize carefully the manner in which states assert their rights in the economic zone. Second, it is essential that at present states should act with restraint. It would be undesirable to prejudice the outcome of the Conference by premature action. Third, we must try to harmonize our policies. It is important that when one state conducts research in what may become, but is not yet, the economic zone of another state, there should be a sharing of knowledge thus acquired. We must go on to create organs to promote conservation and the rational utilization of the fish stocks in all regions, whether they be high sea or areas that are potentially the economic zones of particular states. And we must consider carefully the development of a system of joint ventures so as to ensure that the economic benefits of the economic zones are enjoyed not only by the fishermen of foreign states but also by the nationals of the coastal states.

It is worth noting that there have already been some important Pacific actions in this connection. We may recall the Declaration of the South Pacific Forum made at Suva on 14 October. There were present at that meeting, and I list them not in alphabetical order but in the order of the status or seniority of the representatives present, Nauru, New Zealand, Tonga, Western Samoa, Fiji, the Cook Islands, Nieue, the Gilbert Islands, the Solomon Islands, Tuvalu, Australia and Papua New Guinea. These representatives participated in a declaration of which the most important points were these: they took notice of the broad consensus which was developing at the Law of the Sea Conference in support of the 200-mile economic zone, they declared their intention each to establish a 200-mile economic zone at an appropriate time and after consultations with one another; and they decided to harmonize their fisheries policies and, in principle, to establish a South Pacific Fisheries Agency.

Now, I have described at some length two aspects of the decline of the old law and the emergence of the new. It is quite clear that we must have constructive discussion; that we must be open minded; that we must recognize realities—realities important both for the coastal states and for those who are dependent upon the resources of the sea, not only close to their own shores but in the high seas and even in the areas which may fall within the economic zone of others. Yet in talking about these matters, it is also important to bear in mind the need for maintaining an overall balance between the different interests which any one state may have in different aspects of the Law of the Sea. When we talk, for example, about access to the resources of the seabed, we cannot view that as a matter standing in isolation. The resolution of that problem is intimately connected with a whole package of problems falling under the heading of Law of the Sea, a package which includes our approach to the living resources, to the protection of the marine environment; to transfer of technology and last, but by no means least, to the problem of freedom of navigation. We must not be too greedy in one respect lest we be obliged to pay too great a price in another.

Codification and Progressive Development

International Law Commission.

Following are extracts from statements by the Legal Adviser, Mr E. Lauterpacht QC, in the Sixth Committee of the United Nations General Assembly on the role of the International Law Commission.[2]

At the 31st Session he said:

My Delegation approaches the debate on the Report of the International Law Commission with some hesitation. We find ourselves in a dilemma when faced by this massive tome of 400 mimeographed pages. On the one hand, we are full of admiration for the scholarship

2. Texts supplied by the Department of Foreign Affairs, Canberra.

and diligence which it reflects. Twenty-five eminent international lawyers have given 10 weeks of their time to the United Nations. 'Given' is the appropriate word because the material reward for their effort and devotion is negligible. Four amongst them—Professor Ustor, Professor Ago, Ambassador Bedjaoui and Ambassador Kearney—have made the major additional contribution of preparing Special Reports—each of which can properly rank as a significant contribution to our knowledge of the subjects covered. A fifth, Professor Tsuruoka, has been responsible for guiding through the Commission the text which we now find in our hands. And a sixth, the distinguished Chairman of the Commission, Ambassador El-Erian, has done us the courtesy of coming specially to attend our deliberations on the Report. Needless to say, we are grateful to him, both for his attendance and for his opening exposition. Its lucidity and economy have placed us all in his debt.

In short, we find ourselves now in the presence of a work—the Report of the Commission—which has a real and permanent scientific value. It is a work to which every serious devotee of international law, professional and academic alike, will need to turn for reference; and, indeed, to which he will turn with appreciation.

But there is another side to the Report—and it is the existence of this other aspect of the matter which occasions the dilemma to which I referred in my opening sentences. We are bound to ask ourselves what is the function of the Report. No doubt if we could separate ourselves in space and time from our present surroundings, we could think of the Report exclusively as an element on the work of the International Law Commission; as the crown of its efforts for the year; and as the distillation of its developing views on the subjects under consideration. We could think of it exclusively in terms of what it contains.

However, that is not our position. We are sitting within these walls and at this time as the Sixth Committee of the General Assembly; and the Report of the International Law Commission is presented not to the world at large but to the General Assembly. The Report is the link between the Commission and the Assembly. As such, it falls to be scrutinised by us for a purpose. That purpose is utilitarian, not formal. It is to examine the work of the Commission from the point of view of governments; to convey to the Commission some sense of the likely reaction of governments to proposals; and by so doing to supplement in a direct way the political wisdom of the Commission. If this task of the Sixth Committee is not a worth-while one, or if it cannot be made to be worth-while, we ought not to be attempting to carry it out. My Delegation believes that it is a valuable task—but only in certain circumstances. These circumstances exist when the Sixth Committee can grapple in a serious and detailed way with points of substance. Indeed, the Committee should bear in mind that mere general expressions of approval can in certain circumstances

give rise to misunderstanding. As the Report in hand shows, the International Law Commission has on a number of occasions identified in the debates of this Committee a measure of support or approval for proposals of the Commission—and in so doing may perhaps have read more into these debates than they were intended to convey.

These opening remarks lead me to two preliminary conclusions. The first is that, once again, the Report is too long. Despite such qualities as may be inherent in elaboration and length, the fact remains that, in spite of the pleas made in this Committee last year that there should be some reduction in the dimensions of the Report, the body of this year's Report has grown by some nine percent over last year's. This may compare well with the rate of inflation in the economic sphere, but it does nothing to facilitate the task of this Committee in debating the Report. Indeed, it is possible to foresee the day when, unless checked by the Commission itself or by some specific directive of the General Assembly, the Report may grow to such dimensions that it ceases to be a possible subject for debate. This clearly would be an undesirable and unacceptable development. It would destroy the link between the Commission and the Assembly. It is necessary, therefore, once again to urge on the Commission the importance of limiting the length of its Report. For the moment, this limitation cannot be achieved by reducing the number of topics which the Commission examines. But there is undoubtedly scope for restricting the length of some of the commentaries, especially by avoiding repetition of doctrinal or jurisprudential elaboration which has already appeared in Special Reports. If the Commission approves and adopts almost verbatim substantial portions of the commentaries in the Special Reports—as often it clearly does—there is no reason why such adoption should not take the form of cross-reference rather than that of actual incorporation. After all, the Special Reports appear in full in the Year Book of the Commission. Quite apart from anything else, the financial saving would also be considerable.

I should perhaps interject here a comment on the distinction which Ambassador El-Erian drew between the commentaries attached by the Commission to its preliminary drafts and those attached to final drafts. Ambassador El-Erian suggested that it was more important that there should be extended commentary on the earlier than on the later drafts. He argued that, as *travaux préparatoires* are an important element in the interpretation of treaty texts, it is desirable that a full indication should be available of the considerations which the Commission had in mind in proposing the earlier drafts. With the greatest of respect, I would like to suggest a somewhat different view. Experience has shown that in fact it is the commentary on the final draft which is the most useful. The outstanding example of the value of such a commentary is provided by the one attached to the

Commission's final draft articles on the Law of the Sea prepared in 1956. This draft served as the basis of discussion at the Geneva Conference in 1958 and was almost wholly absorbed into the 1958 Conventions on the Law of the Sea. Thus, the Commission's commentary in this final draft is of special value in interpreting the 1958 Conventions and is much more frequently used than the comments on the earlier, superseded, drafts. If a choice must be made between the expansion of the commentaries on the earlier and on the later drafts—and, since some economy is demanded, such a choice ought probably to be made—then preference should be given to in full exposition of the final draft.

The second consequence of my opening comments is this: if I am correct in believing that our debate here should be specific and substantive—and, as the speeches of other delegates have shown, this is clearly a widely held view—then, in order not to take too much of the Committee's time, it becomes necessary to be highly selective in one's commentary. When faced by such a wealth of material which lends itself to discussion, the factors which suggest themselves for the regulation of one's choice appear to be these:

(1) that the items should be selected which are the most controversial;

(2) that the items selected should be ones on which the Commission and its special Rapporteur are likely to be more helped by the early expression of States' opinions in the Sixth Committee than by their much later expression in written comments.

At the 32nd Session Mr Lauterpacht said:

Every speech in this Committee on the Report of the International Law Commission is necessarily a compromise. It is a compromise between, on the one hand, a bare statement of approval or disapproval of the Commission's work and, on the other, a detailed consideration of the substantive matters which the Commission has itself already debated. If the views expressed in this Committee are too summary, the danger is that the Commission can receive an impression of the approval or disapproval of the Governments represented in this Committee which may not be entirely in accord with their intentions. If, on the other hand, the examination in this Committee of the Commission's Report is too detailed, we shall be straying across the boundary between two important sets of divisions.

Of these divisions, one is between the Sixth Committee and the Commission itself. The Commission is the delegate of the Assembly to pursue the tasks prescribed by Article 13 (1) of the Charter and there is no point in this Committee becoming overinvolved in the substance of the Commission's discussions. The role of this Committee is to prescribe or approve the main courses, procedural and substantive, which the Commission is pursuing—not once again to

plough the furrows of its debates. The second division which we should be careful not to cross is the line between what is appropriate for oral comment and what is appropriate for written comment. Governments are given an opportunity to comment in writing on draft articles prepared by the Commission—and it would not be to the advantage of the Commission or its work if written comments were replaced by oral ones. It may be a question for consideration whether the opportunity given to Governments to comment in writing when a draft set of articles is completed is sufficient. That is a matter to which I shall revert towards the end of this speech.

But, for the moment, our purpose in offering these introductory remarks on the role of the present debate is to emphasize the need for caution in seeking (as those outside this Committee occasionally do seek) to extract from the summary records of our debates a more exact reflection of our approval or disapproval of the Commission's approaches or plans than the debate can properly furnish. Our collective will is reflected in the draft resolution which we offer to the Plenary of the Assembly. Our speeches represent the views of our delegations individually. And with our present varied approaches to the discharge of our responsibilities in this debate, these words of caution may be justified.

If my delegation has begun its contribution to this debate with these remarks, rather than with an expression of our thanks to the Commission, that does not reflect any lack of gratitude to this dedicated, dutiful and diligent body. The very opposite is true. We have much to acknowledge this year: the further consideration of, and a measure of advance in, three major subjects; a careful examination of the Commission's plan of future work; and a valuable report. There is no need to dwell on the length of the report. The words of the Chairman, Sir Francis Vallat, in his opening statement to this Committee will be noted—that the Commission has made a serious attempt both to simplify and shorten the Commentaries. We can ask for no more than that as evidence of the concern of the Commission to meet the needs of the situation as identified in this Committee. So, once again I take much pleasure in telling the Members of the Commission, each and every one of them, how much this delegation appreciates the enormous contribution which they make to the advancement of international law.

As to the possible additional topics for study after the implementation of the current programme of work, my delegation believes that the one which most merits consideration is the question of 'Jurisdictional immunities of States and their property'. The Commission will no doubt wish to bear in mind that at the Commonwealth Law Ministers Conference recently held in Canada it was decided to request the Commonwealth Secretariat 'to examine whether there are any general principles of law that could be adhered to by all Commonwealth countries in this field, taking into account the recent

developments in international organizations, including the Council of Europe and the United Nations'.

The Commission observes in paragraph 111 of Chapter V of its Report that 'support has been expressed by some delegates at the Sixth Committee for considering again' the topic of the 'Draft Code of Offences against the Peace and Security of Mankind'. We should take this opportunity to make it clear that we cannot be numbered amongst such delegations. In comparison with the productive use to which the Commission's time could be put on other topics, we feel that for the foreseeable future time devoted to this item is unlikely to be well spent.

Generally, in connection with the planning of the Commission's work in the future, we should like to suggest that the Commission give thought to the possibility of dealing with some smaller and more specific questions. It would be our hope that these could be approached in a practical, concrete and detailed way, and that because of their restricted ambit they could be fully dealt with within two or three sessions of their first being taken up. Two illustrations may be given of topics of this kind. First, in so far as the subject of nationality of claims does not fall within the scope of the present studies on State Responsibility, we believe that that subject is ripe for study, particularly in the light of the effect upon the protection of corporations and shareholders of the decision of the International Court of Justice in the *Barcelona Traction* case. The second illustration requires reference to the Geneva Convention on the High Seas, 1958, where in Article 7 it is provided that the articles on the obligation of ships to fly the flag of a State 'do not prejudice' the question of ships flying the flags of international organizations. That article reflected in part the inability of the International Law Commission in the time available to it to probe the subject with adequate thoroughness. Now, virtually twenty years later, a comparable formula appears in the Informal Composite Negotiating Text of the Law of the Sea Conference. To this delegation at any rate, the resolution of the problems associated with the use of ships by international organizations is at least as urgent and practical as consideration of the problems of treaties concluded by international organizations. My delegation would like to suggest that the Commission should attempt to deal succinctly and rapidly with topics such as these, and that they should be given priority over larger and possibly more theoretical questions.

I turn briefly to the discussion by the Commission of its methods of work. In paragraph 119, mention is made of comments by Governments on first-reading drafts. In paragraph 120, the Commission reports that it has decided unanimously to reaffirm the conclusion reached in 1974 that its present methods of work are correct and appropriate; and it concludes that there is no reason for amendment of the Statute. Nonetheless, my delegation suggests that the Com-

mission, in the process of keeping its methods under review—as it says it will—should consider whether there is scope for or advantage in modifying the present pattern of governmental involvement in the evolution of the Commission's texts. At present, the Statute contemplates that Governments will be given an opportunity to comment in writing only on a draft set of articles. Thus, when a set of articles appears in instalments over an extended period, the only opportunity which Governments have to comment in writing is at the conclusion of the whole draft. The result is that Governments tend to resort to the debates in the Sixth Committee as a vehicle for the communication of the substance of their ideas to the Commission. The disadvantages of such a procedure are evident: there is little time for the careful weighing of the Report; the process unduly extends our consideration of the Report; it deflects our attention from current procedural aspects of the Commission's work, on which it is arguable that our views are more necessary; and the fact that this Committee has only summary records means that officially only a summarized version of the comments reaches the Commission. We believe, therefore, that the Commission should give this aspect of its relations with Governments further thought.

Sovereignty, Independence, Self-determination

Independence

Non-self-governing territories. Cocos (Keeling) Islands. Australian authority over.

Following is text of a statement by the Australian Representative to the Sub-Committee on Small Territories of the UN Committee on Decolonisation on 23 July 1976:[3]

> It has been stated several times previously at meetings similar to this that the Australian Government welcomes the interest of the United Nations in the process of ensuring the well being, and guiding the advancement, of the people of the Cocos (Keeling) Islands. This meeting today can be assured that the present Australian Government, which was elected to office on 13 December 1975, continues that tradition.
>
> Australia is proud of its achievements as an administering power. For example, the emergence of the independent nation of Nauru in 1968 and the admission of Papua New Guinea last year as the 142nd member state of the United Nations, are testimony to our sincerity and achievements in the area of decolonisation. We aim to maintain our record in relation to our administration of Cocos. Nevertheless, we must stress that the problems Australia faces with Cocos are, for example, very different from those we faced in guiding the emergence of the relatively large country of Papua New Guinea and the wealthy island of Nauru. They require quite different approaches and, possibly, rather different solutions.
>
> In a statement to the Fourth Committee of the General Assembly on 13 November last, Australia's representative outlined a number of changes which had been introduced on Cocos. He also indicated that major divisions were occurring in the tiny community. The community appeared to be divided into three groups of about equal size. The first was dissatisfied with the existing situation and looked to the Australian Government to effect early changes. The second was joined with Mr Clunies Ross in opposing any Government intervention. The third was waiting to see how matters developed.
>
> This Committee now has before it the latest report on Cocos which, consistent with practices since 1957, Australia has submitted in conformity with Article 73.e of the Charter. The report covers the year ending 31 December 1975 and, I am sure distinguished representatives will agree, confirms that 1975 was indeed a year of considerable change in the circumstances of Cocos. It also demonstrates that 1975 proved to be a year of considerable uncertainty within the community on Cocos. By the end of the year a situation of

3. Text supplied by the Department of Foreign Affairs, Canberra.