ABHANDLUNGEN

The Preparatory Work for the International Law Commission *)

Dr. Yuen-li Liang
Director
Division for the Development and Codification of International Law
United Nations Secretariat

Introductory Note

This address was designed to familiarize the participants in the Conference on the Resumption of the Harvard Research in International Law with the work done by the Secretariat of the United Nations in preparation for the first session of the International Law Commission. In presenting the address to German readers, an effort is made to place it in its proper setting. The text of the address will therefore be preceded by a short review of the origin, constitution and functions of the International Law Commission. And, as the reader may be interested in knowing what action was subsequently taken by the Commission and the General Assembly in regard to the matters dealt with in the address, a postscript is added covering the later developments.

Article 13, paragraph 1, sub-paragraph a, of the Charter of the United Nations provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. With a view to giving effect to this provision, the General Assembly, by resolution 174(II), adopted on 21 November 1947, established as a subsidiary organ the International Law Commission which shall have for its object the promotion of the progressive development and codification of international law, primarily public international law. The constitution and functions of the Commission are regulated by a Statute [1]) annexed to the resolution. The Commission consists of

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[1]) Published separately as document A/CN. 4/4. Lake Success 1949.

fifteen members who shall be persons of recognized competence in international law and shall serve in their individual capacity, not as representatives of Governments. The members of the Commission are elected for a period of three years by the General Assembly from a list of candidates nominated by the Members of the United Nations. The first election took place on 3 November 1948.

The two main tasks entrusted to the Commission are defined, in general terms, in Article 15 of the Statute, as follows. Progressive development of international law means the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Codification of international law means the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine. The authors of the Statute were fully aware that a clear-cut distinction between progressive development and codification could not always be maintained in practice, as the Commission in its work of codification might have to propose new rules in order to fill in gaps in the law or amend the law in the light of new developments.[2]) With respect to the procedures to be followed by the Commission it was, however, considered useful to establish this distinction between projects to extend the rule of international law into new fields and the work of codification consisting, chiefly not exclusively, in the formulation and systematization of existing rules of international law.

The Statute accordingly lays down different procedures for progressive development and for codification. Progressive development is dealt with in Articles 16 and 17 which regulate the procedure in regard to projects referred to the Commission by the General Assembly, respectively by other principal organs of the United Nations, Member States, specialized agencies or certain official bodies.

The codification procedure is outlined in Articles 18–23. Article 18 deals with the selection of topics for codification. As the wording of this article has given rise to different interpretations, it should be quoted literally:

"1. The Commission shall survey the whole field of international law with

[2]) See the report of the rapporteur of the Committee on the Progressive Development of International Law and its Codification A/AC. 10/50, p. 7. Cf. the final report of the Committee, A/AC. 10/51, p. 4. The Committee was established by General Assembly resolution 94 (I) of 11 December 1946 to study the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification. The Statute of the International Law Commission was elaborated on the basis of the Committee's report.

a view to selecting topics for codification, having in mind existing drafts whether governmental or not.

2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly.

3. The Commission shall give priority to requests of the General Assembly to deal with any question."

The successive stages in the Commission's work on a selected topic for codification are set forth in Articles 19–22. The last stage is the preparation of a final codification draft, in the form of articles, and of an explanatory report which the Commission shall submit with its recommendations to the General Assembly. The Commission may, according to Article 23, recommend to the General Assembly: (a) to take no action the report having already been published; (b) to take note of or adopt the report by resolution; (c) to recommend the draft to Members with a view to the conclusion of a convention; (d) to convoke a conference to conclude a convention. Article 23 is of special interest because it opens the way for the codification of international law by other means than international conventions. This new approach to the codification problem was partly inspired by the experience made at the Hague Conference of 1930 of the difficulties inherent in the convention method.

In addition to its two main tasks, the progressive development and the codification of international law, the Commission has also, according to Article 24 of its Statute, the duty to consider ways and means for making the evidence of customary international law more readily available. It shall present a report on the matter to the General Assembly.

Already before the establishment of the Commission had been completed by the election of its members, two special assignments were given to it by the General Assembly. By resolution 177 (II) of 21 November 1947 the General Assembly directed the Commission to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the Nürnberg principles. Furthermore, by resolution 178 (II) of the same date, the General Assembly instructed the Commission to prepare a draft declaration on the rights and duties of States, taking as a basis of discussion a draft declaration presented by Panama, and taking into consideration other documents and drafts on this subject. Later, a third assignment was added. By resolution 260 (III) B of 9 December 1948, the General Assembly invited the Commission to study the desirability and

possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. These three questions were placed on the provisional agenda of the first session, together with a number of items relating to provisions of the Statute, in the first place the planning for the codification of international law in pursuance of Article 18, and the consideration, in accordance with Article 24, of ways and means of making the evidence of customary international law more readily available.

In order to expedite the work of the Commission, the Secretary-General was instructed, by General Assembly resolution 175 (II) of 21 November 1947, to do the necessary preparatory work for the beginning of the activity of the Commission. In pursuance of this instruction the Secretariat prepared the memoranda dealt with in the address, which now follows.

The Text of the Address[3])

As one of the principal organs of the United Nations, the Secretariat renders assistance to the other organs in the way of servicing their meetings, providing documentation, conducting research and offering suggestions in the carrying out of the tasks of these organs. In the field of the development and codification of international law, the primary responsibility is placed by the Charter of the United Nations (Article 13 (1a)) on the General Assembly. The General Assembly has entrusted this task to one of its subsidiary organs, the International Law Commission. In 1946 the Secretariat was requested by the General Assembly to do preparatory work on the methods of the development and codification of international law for the Committee on the Progressive Development and Codification of International Law, a committee of governmental representatives, which met in May–June, 1947. It prepared various memoranda for the use of this Committee, and it is a matter of satisfaction that these memoranda were deemed worthy of being reprinted in the American Journal of International Law in October, 1947. At the 1947 Session of the General Assembly, during which the Statute of the International Law Commission was approved, the Secretary-General was instructed to do the necessary preparatory work for the beginning of the activity of the Commission. It is my intention to outline in this address the various memoranda which will be presented to the International Law Commission, meeting 11 April 1949.

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[3]) See above page 249 note *).

Perhaps it is not out of place to mention that the main responsibility of undertaking the preparatory work in the Secretariat for this purpose rests upon the Division of Development and Codification of International Law, which is one of the Divisions in the Legal Department. Professor Hudson in his address before the American Society of International Law in April of last year very kindly referred to the establishment of this Division as the first step in the serious efforts of the United Nations to carry out Article 13 of the Charter. As it is well-known, this Division was established in 1946 as an integral part of the Legal Department. It may be of particular interest to this audience that as far back as 1945, immediately after the signing of the San Francisco Charter and before the planning of the Secretariat of the United Nations, the Committee on the Codification of International Law of the Section on International and Comparative Law of the American Bar Association recommended that for the purpose of implementing Article 13 (1a) of the Charter, the United Nations should, inter alia, appoint in its Secretariat a special officer or section working continuously on this problem. It is unnecessary, and in my present position it would be perhaps invidious, to trace from documentary sources the influence of this suggestion upon the organization of the Secretariat, but if I were asked for my opinion on this recommendation in 1945, I should certainly have given to it my whole-hearted support.

Among the memoranda prepared by the Secretariat, two have to do with matters specifically referred to the International Law Commission by the General Assembly. It will be recalled that on 21 November 1947 the General Assembly adopted a resolution directing the Commission to formulate the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal. This resolution arose out of a proposal made by the Secretary-General in consequence of a suggestion advanced by President Truman at the second part of the first session of the General Assembly in 1946. The proposal was exhaustively discussed in the Sixth (Legal) Committee of the General Assembly and examined in detail not only by a sub-committee of that body but also by the Committee for the Progressive Development and Codification of International Law. The various stages of the discussion, of which a connected account may now seem to be in order, are set out in the first part of a Secretariat memorandum[4]) This part of the memorandum is confined to a record of the history

[4]) The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (A/CN. 4/5). Lake Success 1949.

of the proposal so far. The examination of the substantive questions involved is a matter for the International Law Commission itself. The Committee on the Progressive Development of International Law had concluded in its report that it was not called upon to discuss substantive provisions and that its task was confined to devising methods and plans for the formulation of the principles of the Nuremberg Charter and Judgment.

In view of the Committee's recommendation, adopted by the General Assembly, that the International Law Commission should prepare a draft convention incorporating the principles recognized by the Charter and sanctioned by the Judgment of the Nuremberg Tribunal, the memorandum referred to goes on in its second part to attempt, in order to assist the Commission, to analyze both the Charter and the Judgment. This part examines both the question of the legal nature of the Charter and the general question of the criminal responsibility of individuals under international law in the light of the contentions of both prosecution and defence, and of the findings of the Tribunal. It also surveys the categories of international crimes, with special reference to the categories of "crimes against the peace", "war crimes" and "crimes against humanity" established by the Charter. And it concludes with some comment on the manner in which the Tribunal dealt with the classes of offenders – or degrees of complicity of individuals – referred to in the Charter, and upon the criminal character, or responsibility, of organizations. The whole discussion constitutes what is believed to be the first attempt at a systematic presentation of the rules of law applied at Nuremberg. It is, as has been pointed out, for the International Law Commission itself to express these rules in the form of articles of a draft convention. But it is thought that the provision by the Secretariat in this memorandum of a commentary upon the sources of these rules may be of some assistance to this end.

Another matter specifically referred to the International Law Commission by the General Assembly was that of a draft declaration of the rights and duties of States. This is a matter which has been before the General Assembly since its first session and which was therefore referred to the Commission as one of some urgency. It is also one of very wide implications indeed, which is not capable of being disposed of in any hurried fashion. This is especially the case in view of the fact that the substantive provisions of any such draft declaration must cover the whole field of international law, or at least involve a consideration of almost every part of that field. At the same time, the General Assembly has had the benefit of the research into this question on the part of the Governments comprehended within the Organization of American States, extending

over a period of more than two decades. The task of preparing the draft declaration is that of the International Law Commission itself. But the preparatory work on the draft is the responsibility of the Secretariat.

In conformity with the Resolution referred to, the Secretariat has prepared a memorandum[5]) of a documentary nature on the question of a declaration on the rights and duties of States. No attempt has been made in it to study the rights and duties of States as such. It takes rather, as its basis, the draft declaration presented to the General Assembly by Panama. That draft, it will be recalled, was recommended to the International Law Commission as a basis of discussion by the General Assembly. In the Secretariat memorandum this and other suggestions for a declaration which have been made in the United Nations are described, and the history of the whole proposal from the time of the San Francisco Conference is surveyed. It is thought that this general account of the now numerous documents on the question may be of assistance to the Commission.

Another memorandum – entitled Ways and Means for Making more easily available the Evidence of Customary International Law[6]) – contains suggestions as to how effect might be given to Article 24 of the Commission's Statute. That article assigns to the Commission the function of considering how the evidence of customary international law can be rendered more accessible and in particular how far the collection of documents illustrative of State practice and of international and national decisions would assist to this end.

This memorandum presents a brief examination of Article 24 of the Statute and of its history. It also contains a fairly comprehensive survey of the existing collections and compilations of the evidence of customary international law. It reviews the main series of State papers published and the various digests of them, the different collections of relevant arbitral or judicial decisions in existence, the digests of such awards and decisions, and the collections of national legislation touching questions of international law. It further lists other material of interest, including, of course, the publications of the Harvard Research in International Law. Each publication or work mentioned is described in some detail, and the principal appraisals or criticisms of it which have been made are reproduced. The survey ends with some general comments upon the existing state of documentation which it reveals and with a review of some suggestions which have in the past been advanced with a view to its improvement.

[5]) Preparatory Study concerning a Draft Declaration on the Rights and Duties of States (A/CN. 4/2). Lake Success 1948.

[6]) A/CN. 4/6. Lake Success 1949.

Part III of this memorandum sets out various tentative schemes, one or more of which the Commission might recommend in order to produce some improvement in the existing state of documentation. In particular, it suggests the ways and means as to how the Commission, the Secretariat, individual Governments and national scientific organizations and individual scholars might co-operate, in different ways, to produce a new and more complete record of the evidence of customary international law.

Another memorandum[7]) prepared by the Secretariat for the International Law Commission is a study undertaken pursuant to General Assembly resolution 260 (III) b, adopted in December 1948 in connection with the Convention for the Prevention and Punishment of Genocide. Several representatives had raised the question of the possibility of having persons charged with genocide tried by a competent international tribunal. Many favoured the idea of establishing an international criminal jurisdiction, but were unable at the time to include in the Convention reference to an international tribunal which did not exist. The Legal Committee finally adopted a draft resolution which invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ, which would be competent to try all persons charged with genocide, or other international crimes coming within its jurisdiction. The draft resolution also proposed that the International Law Commission should be requested to study at the same time the possibility of establishing a criminal chamber within the International Court of Justice. This draft resolution was approved by the General Assembly.

The memorandum prepared by the Secretariat attempts to review the background material in this field. The memorandum describes what have been considered "crimes against the law of nations". Brief reference is made to the long established practice concerning the jurisdiction over piracy and other crimes that have been proscribed by international conventions, i. e. slavery, traffic in women, etc.. The memorandum contains also a historical background of official attempts and proposals made in the inter-war-period towards establishing an international criminal jurisdiction, including those advanced by non-governmental institutions interested in the subject. Finally, a summary is included of the discussion in the various organs of the United Nations in connection with this subject.

Apart from the preparatory work outlined above, the Secretariat attaches considerable importance to the organization, on a long-range basis, of the work of the International Law Commission as a whole. As it will be

[7]) Historical Survey of the Question of International Criminal Jurisdiction (A/CN.4/7/Rev. 1). Lake Success 1949.

clear from a close examination of the Statute of the Commission, the Commission has less liberty to stimulate and undertake projects for the development of international law in the sense of the creation of new law, as such projects, being largely in the field of economic and social matters of international concern as yet unregulated by international law, have to be preceded by political decisions which can only be made by organs of the United Nations, such as the Economic and Social Council, and finally by the General Assembly. In the field of codification, however, the Commission has at hand the entire body of existing international law to work on and the key article of the Statute is the one which lays a duty on the Commission to survey the whole field of international law with a view to selecting topics for codification (Article 18). It is on the basis of this conception that the Secretariat thinks that, immediately upon the assumption of its functions, the International Law Commission might embark upon an examination of a long-range plan of its work, in order to lend scope and steadiness to its programme.

For this purpose, the Secretariat has prepared and issued a document entitled A Survey of International Law and Relation to the Work of Codification[8]). This survey is not, of course, intended to be a substitute of the survey which the Commission itself is to undertake. Its object, as stated in the introduction, is to present considerations and to put before the Commission the data which may facilitate the accomplishment of its preliminary tasks as envisaged in the article of the Statute which I quoted. Incidentally, it is also conceived as embodying certain suggestions as to how the Commission might envisage its task in relation to codification from the point of view of the continuity of its programme, the scope of its activity, and the creative function of its labours.

It is thought that the International Law Commission might at the very commencement of its work consider the question whether it should take up isolated questions for codification in the first instance without having previously laid down a systematic programme of work. In other words, should the Commission follow the League of Nations precedent in establishing first a list of subjects, then choose some subjects from the list, and carry on its work in a piece-meal fashion? This process, under the League of Nations, was described as the progressive codification of international law in the sense that the process of codification was to proceed gradually and progressively, and for the reason that it was obviously impossible to codify every branch of international law simultaneously. The basic idea of

[8] A/CN. 4/1/Rev. 1. Lake Success 1949.

this process is beyond question in view of the complexity of modern international law as contrasted with what existed in the days of Bluntschli, David Dudley Field, and Fiore – a time when a jurist by his sole efforts could write a complete code of international law. But the Committee of Experts under the League of Nations never drew up a comprehensive plan for the work to extend over the whole domain of international law, though it was no doubt contemplated that if the first efforts were successful, the work could be pursued to the end that in time the whole field of international law would be codified. The so-called failure of the Hague Conference of 1930 cast a spell of gloom over the entire activity, and although the League Assembly in 1930 and 1931 discussed the possibility of the continuation of codification, the activity was brought to an abrupt end.

There seem to be two principal reasons why the Committee of Experts, and later the Preparatory Committee, of the League of Nations did not consider it necessary to lay down a comprehensive plan, and it is understandable that they did not see fit to do so. The Committee of Experts had very narrow terms of reference. It was instructed to draw up a list of subjects, the regulation of which by international agreement appeared desirable and realizable, to communicate the list to the governments, to examine the replies from the governments and to study the procedure of conferences called for the solution of questions appearing sufficiently ripe. It was essentially a committee for the preparation of a conference of codification. The Preparatory Committee, created two and a half years before the Hague Conference of 1930, was, as its name indicates, intended to perform the immediate preparatory work for the Conference.

In contrast to these two committees of the League of Nations the International Law Commission was established for the much broader purpose of promoting the progressive development and codification of international law, as the phrase is understood in the Charter of the United Nations. It is no a d h o c organ as were the Committee of Experts and the Preparatory Committee. It is not necessarily a preparatory machinery for the convocation of a conference of codification. Though it was suggested at an early stage in the deliberations previous to its establishment that the Commission might have an experimental period of three years, this suggestion was, very wisely, not pursued when the Statute of the Commission was elaborated by the General Assembly in 1947. It is true that the members of the Commission are elected for three years and eligible for re-election (Article 10), this has to do with the tenure of office of the members and has no bearing on the life of the Commission itself. There is nothing to preclude the Commission from envisaging its task as a long-range one. On the contrary, it would seem

that the Commission would find it most becoming to inaugurate its programme with the elaboration of a comprehensive plan, in keeping with the place which its functions occupy in the Charter of the United Nations. Such a plan would be a blue-print, in symmetrical arrangement, of the various mansions of the house of international law. It would serve as a basis of work not only for the present members of the Commission themselves, but for future members as well. If this view is taken, the task of the selection of subjects and of the execution of individual projects will be welded into that of the eventual codification of international law as a whole. Also, it is probably within the framework of some such comprehensive undertaking that the otherwise perplexing and intractable problem of selection of subjects may be brought nearer solution.

The second reason why the Committee of Experts and the Preparatory Committee did not make a long-range plan was that they were limited by their mandate that they should draw up a list of subjects, the regulation of which by international agreement was most desirable and r e a l i z a b l e. The word "realizable" was used in the context as meaning "realizable" in terms of the possibility of securing agreement in international conferences, and such agreement was to take the form of multilateral treaties. Though the three subjects which were actually chosen for codification through the Hague Conference proved to be not "realizable", the condition of "realizability" was frequently referred to in the deliberations of the Committee of Experts. In a considerable number of cases, the Committee, while admitting that the codification of a proposed topic was desirable, discarded it for the reason that owing to the divergencies of national laws and jurisprudence, the codification was not realizable. This took place with regard to subjects such as extradition, judicial assistance in penal matters and the jurisdiction of states with regard to crimes committed outside its territory. It is therefore not surprising that the Committee of Experts could not venture to establish a comprehensive plan to cover the whole field of international law. As has been stated, the Committee was not only limited by the a d h o c nature of its own existence but by the mandate that it should recommend only "safe" subjects or subjects which, on a pragmatic view, would yield immediate results.

Such is not the mandate of the International Law Commission. The Statute of the Commission says that when the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly. There is no reference to the necessity of any topic selected being "realizable" as a subject for codification. The reason for this difference is not far to seek. The Com-

mission is not limited to the selection of such subjects as can be codified successfully in the form of an international convention by an international conference of governmental representatives. A subject the codification of which may not be realizable by way of a convention adopted by an international conference may still be a necessary or desirable subject of codification in any other of the various forms envisaged in Articles 20–23 of the Statute.

The importance of having a long-range plan is not only that the Commission can thereby give direction and system to its work, thus preventing its assuming a haphazard and fragmentary character, but also that such an undertaking alone would be commensurate with the duty laid upon the General Assembly by the Charter and with the responsibility of the Commission itself as one of principal agencies now existing for the advancement of international law.

What I have submitted above has to do with the scope of the activity of the Commission as well as with the continuity of its programme. I wish, however, to stress the question of the scope of activity from another point of view. Assuming that there is a comprehensive plan of work, there is no doubt that the Commission must nevertheless proceed to some selection of subjects for the reasons both that it is instructed to do so by the Statute and that it cannot possibly codify all subjects at once. Selection, therefore, there must be, and criteria in terms of priority may have to be sought. Such criteria may be ascertained by reference to such factors as the amount and accessibility of material on any given subject, the availability of the appropriate experts, and the continuity with work already performed under the League of Nations and by the Harvard Research. These are relatively easy questions to decide, so long as there exists a comprehensive plan evolved after mature and prolonged deliberation.

It may be asked, however, whether for the purpose of establishing a priority, attention should not be directed first to those subjects which touch the very foundation of international law but which were embodied in the Charter of the United Nations only in the form of general principles. Professor Philip C. J e s s u p sounded in 1945 the warning lest the General Assembly should content itself with a mere continuation of the efforts of the League of Nations at a juncture when the world is crying for more law, more modern law, more effective law (39 American Journal of International Law, page 755). Professor Quincy W r i g h t a few days ago wrote me urging also that the work of the Commission should not stop with the re-examination of the traditional subjects. I personally fully subscribe to this approach. I myself have expressed elsewhere my belief that the

traditional doctrine de maximis non curat praetor is a stumbling-block to the progress of international law (22 Tulane Law Review, page 381). The same sentiments were voiced by Mr. George W. Wickersham before the third session of the Committee of Experts of the League of Nations in 1927. Mr. Wickersham said: "The Committee would be making a mistake if it were to choose a subject of secondary importance at a moment when the world was calling for the establishment of the Rule of Law in the place of the Rule of Force. The Committee would expose itself to the criticism of having been superficial and having wasted its time when the chief object should have been to solve certain major problems of international law". (Minutes of Third Session, Committee of Experts 1927, page 18).

In the Survey of International Law, the subject "Fundamental Rights and Duties of States", occupies a prominent place (page 25). As I said earlier, this subject is one of the special assignments given to the International Law Commission by the General Assembly, and the Commission is under a duty to give priority to it. The formulation of the Nuremberg principles belongs equally to the category of fundamental questions; the International Commission is also under a specific mandate to deal with it as a matter of primary importance. This particular question is related to the question of the "Subjects of International Law" and is commented upon in the Survey from this point of view. Moreover, a large body of international law is of course connected with the pacific settlement of disputes, – a subject which is undoubtedly of vital importance in the present-day world. It may be said that the United Nations Charter in Chapter VI has already embodied, in broad outline, the law of pacific settlement in a codified form. But thorough studies have been and are being pursued in the Interim Committee of the General Assembly on the further development of the Law of pacific settlement, and it is to be hoped that the results of such studies will be correlated to and co-ordinated with the work of the International Law Commission.

In the last, but not the least, place, a word as to the character of the codification work of the Commission might be said. In the Statute, the expression "codification" is used for convenience as meaning the more precise formulation and systematization of the rules of international law in fields where there already has been extensive state practice, precedent and doctrine. The words "for convenience" are used advisedly, for it is conceived that codification in its broad sense cannot be separated from the development of the law as generally understood. It seems, therefore, that while the primary task of the Commission in the field of codification would be to ascertain

what the law is and to present it in a form which is precise, systematic, and as detailed as the over-riding principle of the necessary generality of the law allows, its task cannot, in the nature of things, be limited to a passive registration of agreement or disagreement. The experience of the Harvard Research is particularly instructive in this connection. The subjects of diplomatic and consular immunities are generally regarded as those in respect of which an almost universal agreement exists and which, by their non-controversial nature, are considered relatively easy of restatement. Yet the authors of the Harvard Research Draft Convention on the Legal Position and Functions of Consuls point out: "A perusal of the material indicates that comparatively few of the functions and privileges of consuls are established by universal international law. Thus a code on the subject will be to a large extent legislation." Also, the authors of the Draft Convention on the Competence of Courts in regard to Foreign States assert that the draft convention does not purpose to be merely a declaration of existing international law.

It is submitted that in the process of formulating the rules of international law, the Commission cannot avoid the filling of lacunae by reconciling divergencies and suggesting improvements in cases where the situation calls for a combination of the consolidating and legislative aspects of codification. So long as it distinguishes clearly between what it finds de lege lata and what it proposes as the proper rule of law de lege ferenda, there can be no objection to its acting in that capacity and to giving expression to a constructive and what is currently referred to as the sociological approach to international law. Though there may be a legislative element in the process, this function does not impinge upon the domain of what is referred to in the Statute of the Commission as the development of international law, for the reason that these are subjects which have been regulated by international law but the regulation of which is unsatisfactory and fragmentary.

Nor is it thought that the Commission is precluded from offering suggestions in the way of proposed solutions in cases where there is such a clear discrepancy of practice that it may be claimed that there is no law at all on a particular point because there is no agreed law. The criticism made by Professor Edwin Dickinson in his lecture, "What is Wrong with International Law", of the decision of the World Court on the Lotus Case is directly to the point. He properly emphasizes that the reasoning in that case is a "sanctification of juridical irresponsibility" and that "there is no contribution to the progress of law in the bare reminder that there is 'want of law' relating to the issue presented" (page 17). In this respect,

one should also recall the classic story related by Mr. Justice Holmes in his lecture "The Path of Law", of a Vermont justice of peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider and then said that he had looked through the statutes and could find nothing about churns and gave judgment for the defendant. The lesson to be drawn is that, as Mr. Justice Holmes puts it, every effort to reduce a case to a rule is an effort of jurisprudence.

The position of the International Law Commission in this respect is not unlike that of an international judge, insofar as the finding of the law is concerned. Having regard to the Statute of the Commission and the corresponding responsibilities inherent in its functions, it is not too much to expect that the Commission will exercise a creative function by improving the content and filling the lacunae in the existing system of international law with due reference to the community interest of the international society, the requirements of peaceful intercourse, the demands of international progress, and above all the supreme authority of international law. The Commission will thus have ample opportunities to renovate and revitalize international law, and the results of its labours will incidentally represent a most valuable and potent scientific achievement covering, in the fullness of time, the entire corpus juris gentium. Such an achievement will fulfill in some measure the demand voiced by Professor Hudson in his inspiring address given twenty-four years ago that "a sound philosophical basis for the international law of the twentieth century could only result from a functional critique of international law in terms of social ends" (10 Cornell Law Quarterly, page 435). I know for certain that at least one member of the International Law Commission will devote his unstinted energies to this end.

In conclusion, it might be said that envisaging the efforts of the United Nations through various stages in the field of the development and codification of international law, a new vista opens up for creative activities in international law both in and outside the Organization. The plans for the revival of the Harvard Research are no doubt inspired by the official effort which crystallized in the establishment of the International Law Commission. The whole process and its eventual outcome may perhaps be described in the words which I venture to borrow from the author of the introduction to a book published in 1923 entitled "The Rational Basis of Legal Institutions". I quote, "To make a code that should do more than embody the unreasoned habits of the community it would be desirable in the beginning to determine our ideal – the remote but dominant end that we aim to reach – and then to consider whether one measure rather than

another would help toward it. I confess that I do not think that as yet we are very well prepared for wholesale reconstruction. But even if it never led to reconstruction it would gratify the noble instinct of scientific curiosity to understand why we maintain what now is." The combined optimism and realism of this statement make it particularly apposite as applied to the circumstances leading to the creation of the International Law Commission and the hopes which may be entertained of its achievements. I make no apology for quoting Mr. Justice Holmes again in this address, for I know for that in no place in the world is his memory more revered for his contributions to jurisprudence than in the Harvard Law School.

Postscript

The first session of the International Law Commission was held at Lake Success from 12 April to 9 June 1949. The Commission considered all the questions referred to in the address above, but most of its time was devoted to the planning for the codification of international law and to the preparation of a draft declaration on rights and duties of States. In undertaking, under Article 18 of its Statute, a survey of the whole field of international law with a view to selecting topics for codification, the Commission felt that it had first to determine its precise powers in regard to the selection of codification topics. The question arose as to whether the Commission was competent to proceed with the work of codification under Articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under Article 18, paragraph 2. By a majority vote of ten to three the Commission decided that it had such competence. The Commission thereafter proceeded to review a number of topics of international law using the memorandum prepared by the Secretariat as a basis of discussion. After due deliberation the Commission provisionally selected fourteen topics for codification and decided to give priority to three of them, namely, the law of treaties, arbitral procedure and the regime of the high seas. Each of the three topics given priority was entrusted to a rapporteur who was requested to prepare a working paper for submission to the Commission at its next session. Mr. J. L. Brierly was elected rapporteur for the law of treaties, Mr. G. Scelle for arbitral procedure and Mr. J. P. A. François for the regime for the high seas. After three readings the Commission finally adopted a Draft Declaration on Rights and Duties of States. There was some difference of opinion within the Commission as to whether the draft should be submitted immediately to the General Assembly or first be referred to Member Governments for consideration. By twelve votes to one the Commission

decided to submit the draft to the General Assembly immediately and to place on record its conclusion that it was for the General Assembly to decide what further course of action should be taken and, in particular whether the draft should be transmitted to Member Governments for comments. A provisional draft of the Nürnberg principles prepared by a Sub-Committee was dicussed and revised by the Commission. The Commission was, however, of the opinion that the task of formulating these principles was so closely connected with that of preparing a draft code of offences against the peace and security of mankind that it would be premature to give a final formulation to the principles before the work on the draft code was further advanced. It was therefore decided to refer the provisional draft to a rapporteur, Mr. J. Spiropoulos, who was asked to submit his report at the next session. Mr. Spiropoulos was also entrusted with the task of preparing for the next session a working paper on the draft code of offences against the peace and security of mankind. The question of an international judicial organ for the trial of genocide and certain other crimes was referred to two rapporteurs, Mr. R. J. Alfaro and Mr. A. E. F. Sandström, who were requested to submit at the next session one or more working papers on this subject. Finally, the Chairman of the Commission, Mr. M. O. Hudson, was invited to present at the next session a working paper on the problem of making the evidence of customary international law more readily available.

At the fourth session of the General Assembly, the International Law Commission submitted a report[9]) on the work accomplished during its first session. The first part of the report, dealing with all the items on the agenda of the Commission with the exception of the draft declaration on rights and duties of States, was approved by the General Assembly on 6 December 1949. The General Assembly thereby accepted the interpretation given by the Commission to Article 18, paragraph 2, of its Statute regarding its competence in the matter of the selection of topics for codification (see the introductory note, above). By a separate resolution, also adopted on 6 December 1949, the General Assembly recommended to the Commission to include the regime of territorial waters among the topics given priority for codification. The Draft Declaration on Rights and Duties of States, forming the second part of the Commission's report, was by a General Assembly resolution of the same date, commended to the continuing attention of Member States and of jurists of all nations, and referred to Member States for consideration and comments.

[9]) General Assembly, Official Records: Fourth Session, Supplement No. 10 (A/925). Lake Success 1949.