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THE ROLE OF THE INTERNATIONAL LAW COMMISSION IN THE DECADE OF INTERNATIONAL LAW

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1. INTRODUCTION

The object of this study is, as suggested by its title: "The Role of the International Law Commission in the Decade of International Law". In this exercise, the title role will be played by the International Law Commission in the context of the 'Decade of International Law' recently proclaimed by the General Assembly of the United Nations.¹ The contribution to be expected of the Commission will be viewed from the perspective of the prospect of enhancing the practice of states in the adoption of available means of their choice for the peaceful settlement of international disputes.

In the ultimate analysis, what is commonly known as compulsory dispute settlement or compulsory jurisdiction of ad hoc or institutional instances or machinery for adjudication, arbitration, conciliation, mediation or good offices, might be more aptly couched in terms of acceptance of the optional clause. The varying phraseology merely reflects persistent international endeavours to persuade states to agree or to give their consent to submit their disputes to some form or method of dispute settlement, truly of their choice and much to their liking, so as to render more practical the implementation of their obligation to refrain from the use of force against the territorial integrity and political independence of other states. The time-honoured principle of non-use of force, which has been said by some to have acquired the status of *jus cogens*, would not have been very meaningful without a workable counterpart to provide a readily available forum with a working procedure for settling interna-

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1. See G.A. Res. 44/23 of Nov. 17, 1989, moved by the Non-Aligned Countries following the initiative taken by their foreign ministers at the Conference in The Hague on June 26-29, 1989.

tional disputes. This quest for peace, as exemplified in peaceful settlement of disputes, has long occupied the attention of statesmen the world over since the First Hague Peace Conference in 1899 and was vigorously renewed at the Second Hague Peace Conference in 1907. The Decade of International Law, just begun in 1990, will serve as the final lap for international peace-making endeavours to prepare the way for the Third Hague Peace Conference, to be convened in 1999. The modern world has come a long way from 1899, and now has a fair chance of reaching another worthy goal, this time more universal and more generally acceptable than ever before, and this to take place within the Decade of International Law.

A world without armed conflict would indisputably be ideal. Peace could reign throughout, under the watchful eye of the benevolent law, in the relations between nations, regardless of their political, ideological and economic structures. World public opinion has now outgrown any naïve belief in utopia or in the alluring attractions of a *pax romana*, or even Japan's co-prosperity sphere. Every nation is independent and sovereign, and every people is free to exercise its right of self-determination. All states are equally free and, given the opportunity, should be encouraged to express their consent to a chosen method of third party dispute settlement to avoid the ripening of a dispute into an outbreak of armed conflict or hostility.

The present study is not concerned specifically with the various methods and procedures for pacific settlement of international disputes which have been in use since the beginning of the century. Rather, attention will be focused on possible improvements of the quality of international justice and on the emergence of fairer and better-balanced contents of the applicable rules of international law, which should neither favour the strong against the weak nor deprive the poor of their viable means of subsistence and hard-earned freedom from hunger to enrich the privileged few beyond the dreams of avarice.

The heightening quality of the rules of international law will naturally induce greater respect for the justiciability of international disputes. States cannot be compelled to seek justice if justice itself is merely an illusion based on antiquated concepts and norms that have grown out of tune with the march of time. The current state of international law must reflect the existing needs and prevailing conditions of the contemporary world which is admittedly pluriform. Colonialism in whatever form or manifestation is out for good and any norm that smacks of the unhappy colonial past is a clear suspect that can have no application in contemporary international adjudication. Any machinery of international justice that is still manned even in part by some recruits from bygone colonial days will not command respect from the bulk of the developing world which mainly composes the core of humanity. Any rule of law that appears just in the eyes of former colonial powers could not stand the current test of universal justice, nor could it withstand the test of time.

A question may be validly asked if there could exist such a thing as a *tabula rasa*

(a clean slate) for newer and younger states which have seen fit to join the international community, or else they could only become members of the family of nations as they find it with all the then existing sets of rules of conduct, whether or not to their liking, and indeed regardless of their options, and, notwithstanding, their volition or the lack thereof. If bad law or unjust rules of law could conceivably be more tolerable than the lack of law or the state of lawlessness, then it is imperative that an alternative of a better set of rules of law, more acceptable to the overwhelming majority of nations, would have to be found which would be preferable to the state of lawlessness, or worse still, to the maintenance of unjust law whose application would assuredly entail gross injustices and odious inequities.

Another alarming prospect for newcomers to join the international community consists not so much in the absence of law or lawlessness but more often in the uncertainty or vagueness of the rules of what may be said to constitute a body of international customs or customary international law. The state of apprehension in which new nations invariably found themselves on the threshold of their entry into the international community was not in the least dispelled by recurring hardship and lingering vagueness in the applicable rules of law in any particular field.

It may be intimated in general that states, old and new, may find inspiration and comfort within the community of nations only with the prospect of improved quality of international justice as reflected in a newer and more equitable set of clear and precise rules of the applicable law on the subject. States would be inspired by more implicit confidence in international adjudication, arbitration or conciliation, if they could be assured of the outcome which should be just and equitable, being decisions, awards or recommendations of a body of internationally trained jurists based on a corpus of just and equitable rules of international law.

Where and how to find such a collegiate of justices or a panel of arbitrators and conciliators will not occupy our immediate thought in the present study, nor indeed would the search for optimal composition of the body of law-makers or experts who prepare draft articles delay our examination of the part to be played by the International Law Commission in this connection. On the assumption that the codification and progressive development of the correct law is positively relevant if not indeed conducive to a wider use of dispute settlement mechanisms currently in operation, the body of experts entrusted with the task of codification and progressive development of international law is unmistakably the International Law Commission.²

Before proceeding to the examination and assessment of the past performance and prospect of future contribution of the Commission to the substantive improvement of the applicable law, one observation appears pertinent. States still possess the option of the application of law or justice in the dispute settlement. Thus, states may

2. The I.L.C. was never endowed with the monopoly of international law-making. For its precise purpose, see Section 2 below.

choose not to apply the law but to consent to the exercise of jurisdiction *ex aequo et bono*. In this particular connection also, the distinction is becoming less acute as equitable principles continue increasingly to receive judicial endorsement by their incorporation as applicable rules of general international law.

Based on the belief that better law will inspire greater confidence among states to settle their disputes by peaceful means of their choice, our primary enquiry must therefore be directed towards the likelihood of further improvements in the substance of international law for the main core of humanity as a whole.

2. THE BIRTH AND GROWTH OF THE INTERNATIONAL LAW COMMISSION

Legal historians may differ as to the division of successive periods of growth and development of the Commission³ but scarcely will anyone disagree on the necessity and timeliness of the birth of the Commission itself.

2. 1. The first decade of the International Law Commission (1949 - 1959)

A. The constitution and organisation of the Commission

The International Law Commission was a creation of the United Nations by virtue of its General Assembly Resolution 174 (II) of November 21, 1948. The Commission was born as a subsidiary organ of the General Assembly connected specially with its Sixth (Legal) Committee. Its creation was inspired in no small measure by Article 13(1) of the Charter which provides inter alia that: "[t]he General Assembly shall initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification".

In accordance with the provisions of its Statute (Articles 3 to 10), the first Commission was elected on November 3, 1948, and commenced the first of its annual sessions on April 12, 1949.

The prime object of the Commission, as indicated in its Statute (Article 1(1)), is "the promotion of the progressive development of international law and its codification". Article 15 draws a distinction 'for convenience' between progressive development as denoting "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" and codification as covering "the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine". Thus, it is the task of this single Commission to undertake both progressive

3. For an informative and instructive study of the I.L.C. up to 1986, see Sinclair, Hersch Lauterpacht Memorial Lectures, 45-112 (1987).

development and codification of international law. The Commission “shall concern itself primarily with public international law, but is not precluded from entering the field of private international law” (Article 1(2)). With very few exceptions, to date the Commission’s work has been almost exclusively in the field of public international law.⁴

The concept of the Commission is not new. It has a forerunner. The Assembly of the League of Nations adopted a resolution on September 22, 1924, envisaging the creation of a Committee of Experts for the Progressive Codification of International Law, which not unlike the International Law Commission, was to be composed so as to represent “the main forms of civilization and the principal legal systems of the world”.⁵ This Committee, consisting of seventeen experts, was to prepare a list of subjects which could be considered ‘sufficiently ripe’ for codification. The Committee came up with three subjects: (1) nationality, (2) territorial water and (3) the responsibility of states for damage done in their territory to the person or property of foreigners.⁶ A Codification Conference was convened in The Hague on March 13 to April 12, 1930, resulting in the production of instruments on the topic of nationality only. No conventions were adopted on the topic of territorial water or state responsibility.

The Commission came into existence with fifteen members whose qualifications are defined by Article 2 of its Statute as “persons of recognized competence in international law”.⁷ No two members of the Commission shall be nationals of the same state.⁸

B. The sessions of the Commission and its work

At its first session, the Commission considered a memorandum entitled “Survey of International Law in Relation to the Work of Codification of the International Law

4. The Commission has only marginally touched the periphery of the field of private international law in such topic as ‘Jurisdictional Immunities of States and their Property’, especially reference has been made on one occasion to the relevant rules of private international law regarding competent jurisdiction and the applicable law (draft Article 11).

5. League of Nations O.J. Spec. Supp. 21, at 10; compare Art. 8 of the Statute of the Commission. In fact, codification through governmental efforts dated back to the Congress of Vienna in 1815. Notable among codification conferences may be mentioned the two Hague Peace Conferences of 1899 and 1907 in regard to certain aspects of the laws of war and pacific settlement of international disputes.

6. League of Nations O.J. Spec. Supp. 53, at 9.

7. Compare the qualifications required of members of the International Court of Justice under Art. 2 of the Statute of the Court.

8. The application of Para. 2 of Art. 1 of the Statute during merger between Egypt and Syria resulted in the lapse of membership of the late Judge Abdullah El-Erian and the maintenance of only one member, El Khouri. El-Erian was reelected for a new mandate beginning in 1962. A similar occurrence may be expected upon the unification of the two German states.

Commission"⁹ and drew up a provisional list of fourteen topics from the twenty-five suggested for possible inclusion. The fourteen topics selected were to form the basis for the long-term programme of work.

Priority was given to the law of treaties, arbitral procedure and the regime of the high seas. Elected as Special Rapporteurs were Brierly (UK) for the law of treaties (1949-1951), Scelle (France), for arbitral procedure, and François (The Netherlands) for the regime of the high seas.

Although the term of office of the Commission was originally three years (Article 10 of the Statute), in practice a longer term would appear more beneficial to the progress of the Commission's work. This was extended to five years by General Assembly Resolution 486 (V) of December 12, 1950.¹⁰ A formal amendment to Article 10 was adopted by the General Assembly in Resolution 985 (X) of December 3, 1955, to take effect from January 1, 1957.¹¹ The size of the Commission was enlarged from fifteen to twenty-one members in 1956, by Resolution 1103 (XI) of December 18, 1956.¹²

During the first decade of the Commission's existence, some progress was made in regard to the three topics on which Special Rapporteurs were elected in 1949.

The law of treaties. A succession of three Special Rapporteurs took place. Brierly was succeeded by Lauterpacht (U.K.) in 1952, who in turn was replaced by Fitzmaurice (U.K.) in 1955, when Lauterpacht was elected to the International Court of Justice. Various reports were submitted by each of the three Special Rapporteurs, but it was not until the second decade that the work on the topic was completed by a fourth Special Rapporteur, Waldock (U.K.) who was elected in 1961, when Fitzmaurice was elected to succeed Lauterpacht on the Court.

The law of the sea. The General Assembly decided in 1953 that several aspects of the law of the sea should be linked in the consideration of the regime of the high seas, including territorial waters, contiguous zones, the continental shelf and the superjacent waters. The Commission followed the lead of the Assembly and submitted in 1956 draft articles on the law of the sea which grouped together systematically all the rules concerning the high seas, the territorial sea, the continental shelf, the contiguous zones and the conservation of the living resources of the sea.¹³ This momentous task, attributable in an appreciable measure to the Dutch School of International Law as exemplified by the Special Rapporteur, François,

9. U.N. Doc. A/CN.4/1 (1948), and Rev. I (1949).

10. This Resolution extended the mandate of the existing Commission (elected in 1948) to five years, ending in 1953 when another election took place.

11. Thus, in this first decade, elections took place in 1948, 1953 and 1956.

12. Further enlargement also took place in 1961 and again in the 1981 from twenty-one to twenty-five and to thirty-four respectively.

13. I.L.C. Report (1956).

constituted one of the high lights of the first decade of the Commission's work.¹⁴

Under the presidency of Prince Wan (Thailand), the First Law of the Sea Conference was convened in Geneva in 1958. Four separate conventions were adopted: one on the high seas, one on the territorial sea and contiguous zone, one on fishing and conservation of the living resources of the high seas and one on the continental shelf. Two innovative notions were introduced, the legal concept of the continental shelf and the common heritage of mankind. The First Law of the Sea Conference did not resolve one controversial issue: the breadth of the territorial sea, while the term 'continental shelf' was to depend on exploitability as well as being the geophysical prolongation of the land mass. The Second Law of the Sea Conference, under the same presidency, did not succeed in securing the two-third majority required for the width of the territorial sea either. Both issues, the maritime belt and the continental shelf had to await two more decades for the practice of states to become more settled.

Diplomatic intercourse and immunities. The Commission decided to initiate work on this subject and appointed Sandström (Sweden) as Special Rapporteur. A report was submitted in 1957, containing draft articles with commentary, which was in turn submitted to the General Assembly. In 1958, the Commission adopted a revised version of the draft articles in the light of observations received from Governments. The draft articles formed the basis for the text which was later to become the Vienna Convention on Diplomatic Relations, 1961,¹⁵ a product of the first decade.

Other activities of the Commission. Apart from the three topics which eventually ripened into codification conventions, the Commission's work on other topics also deserves mentioning.

On the basis of reports submitted by the Special Rapporteur, Scelle, the Commission recommended to member states the conclusion of a convention on arbitral procedure. After further reflection and in view of observations of governments, the draft was submitted as a set of model rules which states might adopt, as it went beyond what the majority of states would be prepared to accept in advance as a general multilateral convention on arbitration. The draft represented in the earlier part of that decade both a codification of existing practice of international arbitration and a formulation of desirable developments in the field. Although the draft failed to produce a convention, it should not be regarded as a failure on the part of the Commission. On the contrary, practitioners in arbitration will appreciate that the Commission's findings, as incorporated in the draft, have provided authoritative sources for subsequent inter-

14. See Section 3 below, regarding more detailed assessment of the Commission's achievements.

15. Done at Vienna, April 18, 1961, entered into force on April 24, 1964. The Work of the I.L.C., Fourth Edition, U.N. 197-213 (1989).

national endeavours to prepare model rules on international arbitration of various characters.¹⁶

The Commission drew up a draft Declaration on the Rights and Duties of States, as instructed by the General Assembly, consisting of fourteen articles defining the basic rights and duties of states. This draft did not attract the attention of a sufficient number of governments to warrant further action or consideration by the Assembly.¹⁷

The Commission undertook a preliminary consideration of the formulation of the Nuremberg Principles at its first session. On the basis of a report prepared by Spiropoulos (Greece), Special Rapporteur for the topic, the Commission submitted a formulation of seven principles.¹⁸

At its third session in 1951, the Commission completed a draft Code of Offences against the Peace and Security of Mankind consisting of five articles. This was submitted to the General Assembly with commentaries. The General Assembly at its 1954 session, considering that the draft code raised problems related to that of the definition of aggression, decided to postpone further consideration of the question as well as that of the definition of aggression until 1957. Both items were brought to the attention of the Assembly in the second decade of the Commission in 1968 and subsequently in 1974.¹⁹

By Resolution 304 (XI) of ECOSOC of July 17, 1950, the Council requested the Commission to prepare a draft Convention on the Nationality of Married Women, embodying the principles recommended by the Commission on the status of women. At its fourth session in 1952, a draft convention was submitted to the Commission by Hudson (USA), Special Rapporteur for the topic of nationality including statelessness.²⁰ Two other draft conventions were adopted by the Commission in 1953, one on the elimination of future statelessness and another on the reduction of future statelessness. The United Nations Conference on the Elimination or Reduction of Future Statelessness, held in Geneva in 1959, used as basis for its discussion one of the two drafts prepared by the Commission and adopted provisions aimed at reducing statelessness at birth.²¹

16. Examples of such endeavours are the UNCITRAL Arbitration Rules and ICSID Arbitration Rules.

17. See Res. 596 (VI) of Dec. 7, 1951, postponing further consideration of the matter "until a sufficient number of States have transmitted their comments and suggestions".

18. By Res. 488 (V) of Dec. 12, 1950, the formulation was sent to member states for comments.

19. It was not until 1978 by Res. 33/97 of Dec. 16, 1978 that member states and relevant international organizations were once again invited to submit comments and observations on the draft code. Now the topic is again under active consideration by the Commission, with Doudou Thiam (Senegal) as Special Rapporteur.

20. The General Assembly approved the substantive articles of the Draft Convention on the Nationality of Married Women prepared by the Commission on the Status of Married Women, and by Res. 1040 (XI) of Jan. 29, 1957, adopted the Convention which came into force on Aug. 11, 1958, 309 U.N.T.S. 65.

21. The Convention entered into force on Dec. 13, 1976; states were parties in 1979.

2. 2. The second decade (1960 - 1969)

A. Further enlargement of the Commission

Following General Assembly Resolution 1514 on the Granting of Independence and a phenomenal increase in membership of the United Nations, principally from Asia and Africa, since 1956 and 1960, the second decade of the International Law Commission (1960-1969) witnessed a further enlargement in the size of the Commission from twenty-one to twenty-five in 1961²². The Commission attained some degree of stability in its methods of work and in combining progressive development of international law with its codification without making too important a distinction between the two.

More Special Rapporteurs were appointed on the topics already initiated in the first decade as well as on new topics which appeared sufficiently ripe for codification. Significant progress continued to be made in the main core of general international law which required progressive development and codification.

B. The sessions of the Commission and its work

Having proceeded with caution and having firmly established the essential ground rules regarding its methods of work, the Commission acquired practical experience in its task of codification and progressive development. Important topics were completed with resounding success in this period, in particular, the law of treaties and the law of diplomatic and consular relations.

The law of treaties. With the appointment of Waldock, the preparation of draft articles on the law of treaties, already begun by three English predecessors, was completed. Between 1962 and 1964, the Commission adopted twenty-nine draft articles and in 1965 and 1966 completed its second reading of a complete set of draft articles on the law of treaties. Within the Commission, the text was much condensed and refined.²³ This led to the adoption in 1969 of the Vienna Convention on the Law of Treaties,²⁴ an instrument which even before entry into force already deserved general recognition as representing a consolidation of the contemporary law of treaties.²⁵ This Convention has done much to reduce the fear of new states joining the international community, by introducing the notion of *jus cogens* as a peremptory

22. By Res. 1647 (XVI) of Nov. 6, 1961.

23. Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* 35, 36 (1970).

24. Done at Vienna, May 23, 1969, U.N. Doc. A/CONF.39/27; 8 I.L.M. 679 (1969).

25. Entered into force Jan. 27, 1980.

norm which allows no derogation and cannot be opted out by the states, relying on the freedom of treaty or on blind application of *pacta sunt servanda*.²⁶

The law of diplomatic and consular relations. One draft prepared by the Commission in the preceding decade already culminated in the adoption of the Vienna Convention on Diplomatic Relations in 1961 at the beginning of this second decade of the Commission. This Convention enjoys the highest record of success in terms of the number of its parties.²⁷

A second draft prepared by the Commission's Special Rapporteur, Zourek (Czechoslovakia), was begun in the first decade. The reports containing sixty-five draft articles were completed in 1960. By 1963, the Conference at Vienna adopted the Convention on Consular Relations, which was open for signature on April 24, 1963. The Convention and its Optional Protocols entered into force on March 19, 1967.²⁸

A third draft was also prepared for the topic 'special missions'. Its second reading was not completed until 1967, as consideration of the reports on the topic continued during the same period when the Commission also considered the law of treaties. This third draft was considered directly in the Sixth Committee during the 1968 and 1969 sessions of the General Assembly. It was adopted and opened for signature on December 8, 1969.²⁹

The law of state responsibility. A topic with a similar name was on the agenda of the Commission and reports were already submitted by the first Special Rapporteur, Garcia-Amador (Cuba), during the first decade. Serious discussion did not take place until 1969, when a sub-committee was appointed. In 1963, a new Special Rapporteur, Ago (Italy), was appointed with a much broader term of reference.³⁰ State responsibility was to have a much wider scope, well beyond general liability for treatment of aliens, including nationalization of property of foreigners. The Commission in its new composition of 1967 resumed consideration of the topic in 1969. The way was cleared for the new Special Rapporteur to undertake the task of preparing draft articles in three different parts.

Succession of states. The Commission also appointed a sub-committee, chaired by Lachs (Poland), to make recommendations on the future heading of the topic of succession of states and governments. Lachs was appointed Special Rapporteur in 1963 and was later elected to the International Court of Justice. It was not until 1967 that two Special Rapporteurs were appointed: Waldock to report on succession of states in respect of treaties and Bedjaoui (Algeria) to report on succession of states

26. See Section 3 below, regarding assessment of the Commission's achievements.

27. By 1985, more than 140 states were bound by the Convention on Diplomatic Relations, 1961.

28. More than 110 states have become parties to the Convention on Consular Relations, 1963.

29. Res. 2530 (XXIV) of Dec. 8, 1969. See Donnarumma, *La Convention sur les Missions Spéciales*, 1972 *Revue Belge du Droit International* 34-79.

30. II Y.B. I.L.C. 224 (1963).

in respect of matters other than treaties. The Commission considered two reports from each of the Special Rapporteurs in 1968 and 1969. Two more reports were submitted by each of them in the third decade in 1970 and 1971.

Relations between states and international organisations. El-Erian (Egypt) was appointed Special Rapporteur in 1962 when the topic was included in the active work programme of the Commission. A first report was submitted in 1963, and a working paper in 1964. By 1968, the Commission adopted twenty-one draft articles on general provisions.³¹ The following year saw another set of twenty-nine draft articles adopted.³² Further consideration of this topic was undertaken in the third decade.

2. 3. The third decade (1970 - 1979)

A. Continuing brain-drain and mounting politicization

The movement of members of the Commission to the World Court had taken place on a systematic and continuing basis. The first two decades had witnessed a steady flow of persons of recognized competence in international law from the Commission to the International Court of Justice.³³ The third decade may be characterized by increasing transfer of brain power from the International Law Commission to the International Court of Justice. What was a gain for the Court was in some way a casualty for the Commission, especially when the jurists elected were active Special Rapporteurs in the middle of a project. It so happened that the transition had not in fact exposed the Commission to too abrupt an interruption.

In the case of Judge Waldock, elected to the Court in 1972, the law of treaties had been completed in the second decade, and the draft articles on succession of states in regard to treaties could be entrusted to an English successor.

For Judge Ago, elected in 1978, the Court appeared to have come to terms with the Commission by allowing the Judge to continue submitting his reports to the Commission as Special Rapporteur until completion of the first reading of Part One of the articles on State Responsibility with thirty-five draft articles.

El-Erian, elected Judge in 1978, was another example of the Court drawing from the pool of the Commission's Special Rapporteurs. Not unlike Waldock, El-Erian had completed the first part of his draft articles which were finally adopted in Vienna in 1975.

The Commission and the Court appeared to have learned to live together in perfect peace and harmony without incurring excessive injurious consequences in the process of the brain-drain. Election results could be regarded as a form of

31. II Y.B. I.L.C. 194-213 (1968).

32. II Y.B. I.L.C. 205-222 (1969).

33. Examples of such move include Lauterpacht, Fitzmaurice, Lachs, Alfaro, Cordova, Hudson, Gros, Koretsky, Krylov, Arechaga, Pinto, Spiropoulos.

appreciation for the work performed as members and Special Rapporteurs of the Commission, provided that no grave harm should ensue from the transfer.

Several other members of the Commission were also elected to the Court during the third decade of the International Law Commission.³⁴

A more serious problem confronting the Commission in its third decade is the continuing shortage of 'persons of recognized competence in international law'. A generation gap of such persons has been the result of a combination of several factors. First, the study of international law, in spite of the United Nations efforts to encourage its teaching, study, dissemination and wider appreciation, had become by then increasingly costly, in terms of the time required, the expenses involved and the volume of work to be undertaken. Second, newer nations need to be represented on an equal footing with other states in all legal bodies. There was not sufficient time to prepare and train such persons.

In the meantime, the election process for the Commission had assumed greater political significance and coloration. At one election in 1976, for the twenty-five members elected, Asia suffered one casualty, losing one of the seats it was to hold under the gentlemen's agreement. Africa tied with Latin America for the twenty-fifth seat. Illueca, the Permanent Representative of Panama, who tied with Africa ceded his place to Thiam, the Senegalese candidate, and withdrew his candidacy in favour of the African candidate on the grounds, inter alia, that Latin America had already fulfilled its quota, thereby honouring the gentlemen's agreement. No one from 'Western European and Others' had the courage to withdraw from any of the positions elected.³⁵

With the beginning of a serious brain-drain that divested the Commission of much of its energy and some of its credibility, the third decade signalled the peak and naturally the start of an imminent decline in the quality of the work force of the Commission. Although just as many topics were placed on the agenda of the work programme of the Commission, very few managed to attain maturity and graduation into multilateral conventions, while none of those that were finally adopted met the popularity test by the required number of ratifications and accessions.

B. The sessions of the Commission and its work

Representation of states in their relations with international organizations of universal character. The first part of the topic, relations between states and international organizations, continued to occupy the attention of the Commission in the early

34. Examples are Singh, Elias, Ruda, Sette-Camera.

35. This imbalance was rectified in 1977 after the untimely demise of one Western European member (Hambro). The Commission was compelled by its strong sense of justice to coopt Tabibi (Afghanistan), the Asian candidate who suffered the fate of losing his rightful place on the Commission at the 1976 election by the General Assembly.

years of the third decade. The fifth and final report was discussed at the turn of the decade in 1970. A final draft was presented in 1971. Eighty-two consolidated draft articles adopted by the Commission were discussed at Vienna in 1975. The Conference was well attended by representatives of governments and specialized agencies. The Convention was adopted with ninety-two articles. Its substantive parts cover missions to international organisations, and delegation to organs and conferences. The Conference was open for signature on March 14, 1975.³⁶

Succession of states in respect of treaties. Following Waldock's election to the Court, the Commission appointed Vallat as the new Special Rapporteur who submitted his report summarizing written comments of governments and observations made orally in the Sixth Committee. The final text of the draft articles was adopted and a conference of plenipotentiary was convened in Vienna in 1977. The Conference was reconvened in 1978 to conclude its work. The Convention was adopted and opened for signature on August 23, 1978.³⁷

Questions of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. The Commission set up a working group in 1972, composed of six members with Tsuruoka (Japan) as Chairman. The working group prepared a set of draft articles. The General Assembly, assisted by a Drafting Committee in the Sixth Committee, finally adopted the list of the draft articles entitled "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents", consisting of twenty-five articles. The Convention was opened for signature on December 14, 1973. It entered into force on February 20, 1977.³⁸

The Most-Favoured-Nation clause. Ustor (Hungary) was already appointed Special Rapporteur for this topic during the second decade, in 1964, although initially the Assembly recommended that it be studied in connection with the law of treaties. A series of six reports were submitted by the Special Rapporteur in 1969, 1970, 1972, 1974 and 1975. The Commission completed its final reading of the draft articles in 1976. Ushakov (USSR) was appointed to succeed Ustor as Special Rapporteur for the second reading. The Commission re-examined the draft articles with an analytical report of comments of member states, specialized agencies and non-governmental organizations. A thirty-article draft was adopted and submitted to the General Assembly which, in turn, invited comments of governments. No further action was taken.³⁹

36. U.N. Doc. A/CONF.67/17; see U.N. Conference on the Representation of States in their Relations with International Organizations, Vienna, Feb. 4 - Mar. 14, 1975, Official Records, Vols. I and II.

37. Done at Vienna on Aug. 23, 1978, consisting of 50 articles. The Convention was significant in its systematic treatment of different typology of state successions.

38. Res. 3166 (XXVIII) of Dec. 14, 1973. To this Resolution, the text of the Convention is annexed.

39. See II Y.B. I.L.C. (1978), especially with regard to proposals for additional Arts. 21 bis., A, 21 ter, 23 bis., and 28 (Settlement of Disputes).

Starting a new programme of work in 1978 while continuing with pending topics. In addition to the preceding topics or subtopics on which work was completed during the third decade, the Commission decided to continue with its study of the topics already launched and added to the list further topics to be studied in the new programme of work.

Work on the topic of succession of states in respect of matters other than treaties continued well into and through the third decade. By 1979, eleven reports were submitted by the Special Rapporteur. Consideration of the topic continued at the beginning of the fourth decade, when the question of archives were added for the second reading of the draft articles.⁴⁰

As noted earlier, Judge Ago, as Special Rapporteur, completed the first reading of Part I (thirty-five draft articles) on state responsibility before the third decade was out, having submitted altogether eight reports.⁴¹

The law of the non-navigational uses of international watercourses had followed a somewhat checkered career, with four Special Rapporteurs, two in the third decade, Kearney (USA) in 1970 and Schwebel (USA) in 1977. On the latter's election to the World Court in 1980, consideration of the matter was suspended.⁴²

Yankov (Bulgaria) was appointed Special Rapporteur in 1979 on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

Sucharitkul (Thailand) was appointed Special Rapporteur on jurisdictional immunities of states and their property in 1978 and submitted a preliminary report in 1979.

On the topic of relations between states and international organizations, Diaz-Gonzalez (Venezuela) was appointed Special Rapporteur in 1979 to succeed El-Erian who was elected to the Court in 1978.

Quentin-Baxter (New Zealand) was appointed Special Rapporteur in 1978 to study the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

2. 4. The fourth decade (1980 - 1989)

A. Further enlargement of the Commission and the rising cost of its brain-drain

Thus, the Commission entered its fourth decade with a heavy agenda, having at least seven topics spilled over from the preceding decade.

40. See Section 2. 4. on the fourth decade (1980-1989).

41. See Section 3, concerning Assessment of the Commission's achievements.

42. No new Special Rapporteur was appointed before the new mandate in 1982. Judge Schwebel nonetheless continued to submit another substantial report since joining the Court.

The beginning of the fourth decade witnessed recurring casualties among the Special Rapporteurs. In addition to Judge Ago, who left the Commission before the turn of the decade, Schwebel and Bedjaoui were elected to the International Court of Justice after the untimely departure of Judge Baxter and Judge El-Erian. Judge Bedjaoui completed his work on state succession in respect of matters other than treaties, and attended the Vienna Conference on the topic as expert consultant. Judge Schwebel's work was interrupted until the new Commission, elected in 1981, took office in 1982 when Evensen (Norway) was appointed Special Rapporteur. Two reports were submitted between 1983 and 1984. When Evensen was elected to the Court, leaving the Commission with no option but to delay consideration of the topic the law of the non-navigational uses of international watercourses, until the fourth Special Rapporteur, McCaffrey (USA), appointed in 1985, could begin his study where three of his predecessors had left off.

Meanwhile, the Commission had to be enlarged further to respond more realistically to the rapid increase in membership of the United Nations. To avoid derogation from the gentlemen's agreement, a new formula was introduced,⁴³ whereby thirty-four members were elected in 1981 to assume their functions on January 1, 1982 for a term of five years. Each regional group was to have so many members elected, as the ballots would indicate the maximum number of candidates to be voted for each regional group, and only the maximum number of candidates with the highest votes from each group would be elected. Thus, a more evenly geographical and equitable distribution was assured, while inter-regional manipulation minimized.

The fourth decade also witnessed further politicization in the election campaign and lobbying in and out of the United Nations. A new and unanticipated process of brain-drain occurred as a by-product of over manoeuvring in the election process. The Commission suffered further loss as a direct result of the election of 1986, when the General Assembly failed to re-elect one Special Rapporteur, Riphagen (Netherlands), one member from the Permanent Members of the Security Council, Sinclair (UK), and one significant linguist jurist, Lacleta (Spain). These failures have had further-reaching implication than meets the eye at first glance.

Considerable delay in the Commission's work on state responsibility, which could otherwise have been prevented, was inevitable. Two significant official working languages of the Commission, English and Spanish, required in technical legal drafting, became virtually unmanned. While continuing brain-drain from the Commission to the Court, although admittedly a running sore, has other compensatory considerations, the irreparable loss of top expertise in the much-needed areas of professionalism, through sheer political oversight could find no consolation. In the ultimate analysis, it is a heavy price that the international community had to pay.

43. G.A. Res. 36/39, U.N. Doc. A/36/244 and Add. 1 (1981), amending Arts. 2 and 9 of the Statute.

Furthermore, the Commission also lost one of its active and conscientious Special Rapporteurs, Quentin-Baxter, through natural cause. As mortals, we should mourn such losses, as they adversely affect the work of the Commission.

The brain-drain process has proved very infectious. Once the International Court of Justice was filled more than two thirds with former associates who had practically all served on the Commission, the Court had no hesitation to brain-drain the professional working secretariat of the Commission. To begin with, Torres Bernadez (Spain) was transferred from the post of Deputy-Director of the Codification Division to that of Registrar of the World Court. The Court later appointed Valencia-Ospina (Colombia) from the Codification Division as Deputy-Registrar. Valencia-Ospina is currently the Registrar of the International Court of Justice, thereby completing the entire cycle of brain-drain. All this took place during the first half of the fourth decade, thus, leaving the Commission somewhat stripped and stranded on dry dock.

B. The sessions of the Commission and its work

Although further enlarged and, thus, somewhat undermined, the Commission had to face its fourth decade with even stronger determination, knowing very well that its strength required invigorating rejuvenation. But youth it no longer lacked among the ranks and files of its members. Challenges seemed to multiply from various quarters, including criticisms from a remote cousin.⁴⁴ For all that, the Commission managed to complete some of the topics and to make further tangible progress in the rest of its programme of work, notwithstanding certain delays through no fault of its own.

During this fourth decade, two conventions were concluded on the basis of draft articles prepared by the Commission, while draft articles were completed on two other topics and consideration of the rest of the programme of the Commission's work continued without a halt.

Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. As noted earlier, a Conference was convened in Vienna in 1983, and on August 8, 1983 the text of the Convention on Succession of States in Respect of State Property, Archives and Debts was adopted.⁴⁵ The Convention embodies a set of rules which could prove useful for state succession in the future. For current practical purposes, the Convention could not be expected to be any more popular than a parallel Convention on Succession of States in Respect of Treaties (1975).

Vienna Convention on the Law of Treaties Between States and International

44. See, e.g., T.M. Franck (Director UNITAR Research Department), *The International Law Commission: The Need for a New Direction (Policy and Efficacy Studies, No. 1)* (1981).

45. See Draft Articles in II Y.B. I.L.C. 17 (1981), and the text of the Convention in 22 I.L.M. 298-329 (1983).

Organizations or Between International Organizations, 1986. As a follow-up of Vienna Convention on the Law of Treaties, 1969, the time has come for a second generation to be formally reaffirmed in the form of a multilateral convention. The conclusion of the Convention in 1986⁴⁶ represented an orderly and logical sequence of the law of treaties, as international organizations are now here to stay with universally recognized international personality under international law. The significance of this Convention has been much underrated, even by its own modest Special Rapporteur. Indeed, its global acclaim heralded in a new era, confirming existing customary international law regulating the agreements between international organizations as between states and international organizations. Additional rules had to be formulated and another independent but parallel convention was needed.

It will not be too long before a third generation of the law of treaties involving non-governmental organizations (NGOs) catches the imagination of the international community. The fourth generation would soon also be in sight covering treaty relations or international agreements where international or multinational enterprises are contracting parties. Between now and then, the Commission would have had several other topics to complete.

Apart from the two topics which found their way into multilateral conventions, which may or may not eventually enter into force, work on two other topics has also been completed.

Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Courier. The topic was finally completed on both readings, the first in 1986 and the second in 1989, and has since been submitted to the General Assembly with the Commission's recommendation to convene a conference to conclude a convention on the subject.⁴⁷ Taking into account the fact that the United Nations have already adopted four conventions, referred to together as the 'Conventions on Codification of Diplomatic Law', a decision to convene such a conference will have to be based on purely political considerations. While the usefulness of such a convention is not in dispute, the desirability of upgrading the status of consular and other official quasi-diplomatic bags to that of diplomatic bags can find no valid justification in the light of current abuses and misuses of diplomatic bags in the practice of some states. Nevertheless, the work accomplished by the Commission and its Special Rapporteur on the topic should not go unnoticed.

46. The Convention was adopted by a vote of 67 in favour, 1 against (France), with 23 abstentions including socialist countries. The official text appearing in U.N. Doc. A/CONF.129/15, is also reproduced in 25 I.L.M. 543-592 (1986).

47. See Report of the I.L.C. on the Work of its Forty-First Session, May 2 - July 21, 1989, 44 U.N. GAOR Supp (No. 10), U.N. Doc. A/44/10, paras. 17-72; see the draft articles at 26-117, and two draft optional protocols at 120-124, No. I for Special Missions and No. II for International Organizations of a universal character. See also, S.C. McCaffrey, *The Forty-Second Session of the International Law Commission*, 84 AJIL 930 (1990).

Draft Articles on Jurisdictional Immunities of States and their Property. Consideration of this topic was completed on first reading of the draft articles in 1986.⁴⁸ Sucharitkul, Special Rapporteur on the topic, did not stand for re-election. Not unlike his compatriot, Khoman, who in contrast to other members of the Commission, resigned from the Commission as he could not attend its sessions after taking up the portfolio of the Ministry of Foreign Affairs of Thailand in 1958, Sucharitkul, for personal and political reasons, decided not to contest the election in favour of his ASEAN colleague. No ASEAN candidate was elected in 1986. The Commission appointed Ogiso (Japan) to succeed Sucharitkul. The second reading is expected to be completed at the beginning of the current fifth decade, the Decade of International Law.⁴⁹ It is feared, however, that the momentum gained in 1986 for this topic has somewhat diminished and much confusion has been generated as the combined result of several mishaps and misconstructions of the issues involved. With patience and good will, it is hoped that the study on the topic could be salvaged and the text of the draft articles completed at first reading, appropriately revised to correspond to the developments and events since 1986. Finalization of the draft articles on second reading will be contained within the first year of the fifth decade, barring no unforeseen complications.

Consideration of other topics. Several topics received serious and substantial consideration by the Commission during its working sessions between 1980 and 1989. Work on some topics has advanced more rapidly than on others, owing to a number of factors, including guidance from the General Assembly, availability of material on state practice, precedent and doctrine and disposition of the special rapporteurs. Substantive topics, pending on the agenda of the Commission since the beginning of the Decade of International Law, deserve a brief mention here.

The non-navigational uses of international watercourses received a new impetus since the appointment of the current Special Rapporteur, McCaffrey. The choice was difficult and political, as the study of the topic required a special rapporteur from a country which had no unresolved conflicts with its neighbours. The Commission has made great stride in its consideration of this topic. Twenty-one draft articles were adopted by the end of the fourth decade. The crucial point was the launching of a new notion of 'resource-sharing' traceable to the Bandung Declaration 1955, upholding the principles of good-neighbourliness, friendly relations and cooperation among states.⁵⁰ The draft could serve as a general framework treaty containing general principles of equitable and reasonable utilization and participation in the uses of the watercourses. These general principles would be applicable to all watercourses,

48. See II Y.B. I.L.C. 7-22, paras. 10-22 (1986), including text of the draft article.

49. For the latest information available, see Report of the I.L.C., *supra* note 47, Chapter VI, Paras. 398-613, at 258-333.

50. See the Communiqué of the First Asian African Conference in Bandung, April 24, 1955.

although each watercourse system may be regulated further by a particular system or regional agreement. Such particular arrangements as regulating the Rhyne and the Lower Mekhong Basin, are envisaged in the general convention, just as the Law of the Sea Convention also envisages further regional arrangements for the conservation of the living resources of the sea, according to species and the degree of their migratory habits. A multilateral convention is not expected to be fully comprehensive in every detail which will have to be tailored or adjusted to answer the needs of each international watercourse system.⁵¹

Consideration on state responsibility picked up after the appointment of the latest Special Rapporteur, Arangio-Ruiz. The First Part was well received during the fourth decade. The Second and Third Parts, on which work had progressed thanks to the Dutch Special Rapporteur, Riphagen, would not be expected to move forward. The five draft articles, provisionally adopted, were reconfirmed, while the structure for Part II and Part III was discussed further. Draft Articles 6 and 7 in Part II received some comments. Two reports were submitted by the Special Rapporteur. Due to lack of time, the Commission did not consider the second substantial report. This will be done at the outset of the new decade.⁵²

International liability for injurious consequences arising out of acts not prohibited by international law received further consideration from the turn of the decade. Quentin-Baxter, the Special Rapporteur, had submitted five reports by 1984. A conceptual basis was developed for a schematic outline of the topic.⁵³ The topic took a new turn after the appointment of Barbosa (Argentina) as the new Special Rapporteur after Quentin-Baxter's death. By the end of the fourth decade, the Commission considered five successive reports of the current Special Rapporteurs. In his latest report, a revised text for the final ten draft articles of Chapters I and II, already referred to the drafting committee, was submitted and eight new draft articles for Chapter III, dealing with procedures to prevent transboundary harm, was also submitted. The matter will thus continue to receive attentive consideration of the Commission during the Decade of International Law.⁵⁴

It was in this fourth decade, in 1983, that the Commission appointed, for the first time, a Special Rapporteur from Africa (South of the Sahara), Thiam (Senegal), for a topic that remains highly charged and sensitive, namely the draft Code of Offences against the Peace and Security of Mankind. The Commission was modest in its approach by limiting the contents *ratione personae* of the draft code to the criminal

51. See Report of the I.L.C., *supra* note 47, paras. 514-685, at 334-360, especially Art. 4 [Watercourse] [System] Agreements.

52. *Id.*, paras. 218-302, at 118-219.

53. II Y.B. I.L.C. 129 (1984), U.N. Doc. A/CN.4/378.

54. See Report of the I.L.C., *supra* note 47, Paras. 303-397, at 220-257. A complete set of some 30 draft articles was submitted to the Commission by the Special Rapporteur in 1990 to project an overall picture of the topic.

responsibility of individuals, while the content *ratione materiae* should include all the offences covered by the 1954 draft code, with appropriate modification of form and substance, and added to that list newer notions of such offences, as colonialism, apartheid, and possibly serious damages to the human environment and economic aggression. Up to 1989, the Commission considered seven reports submitted by the Special Rapporteur, and draft Articles 1 to 15 were provisionally approved by the Commission.⁵⁵

At the turn of the fourth decade, Diaz-Gonzalez (Venezuela) was appointed Special Rapporteur for the relations between states and international organizations (second part of the topic), to continue the work left by El-Erian who was elected to the Court. A preliminary report was submitted in 1980. Owing to priority accorded to other topics, consideration for the topic was not resumed until 1983. Up to 1989, the Commission received four reports submitted and introduced by the Special Rapporteur. Due to lack of time, the Commission did not discuss the latest report, which would receive the Commission's attention in the fifth decade. Eleven draft articles were submitted by the Special Rapporteur. The topic promised to be of vital interest to international organizations, although by definition the draft articles will only be confined to organizations of a universal character.⁵⁶

3. PAST PERFORMANCE: ACHIEVEMENTS AND SHORTCOMINGS OF THE COMMISSION

The preceding section provides a rough and ready indication of the performance of the Commission during the past four decades of its existence. An assessment in terms of success or failure or relative success and failure of the Commission would seem too facile and misleading. A more accurate description of the Commission's work based on past record could be given in more expressive terms of achievements, having regard to its short-comings.

3. 1. Achievements of the Commission

The prevailing view appears to be that the Commission is foremost among the existing international agencies or organs of an international organization, entrusted with the task of progressive development and codification of international law. Thus, in a critical analysis prepared by the Working Group on the Review of the Multilateral Treaty-Making Process, the Group explicitly singled out the Commission as example of "a group or body of experts", to which the preparation of "a draft multilateral treaty within the framework of the United Nations" may be entrusted to serve as a basic

55. *Id.*, Paras. 73-217, at 127-187.

56. *Id.*, Paras. 686-726, at 361-379.

document for negotiating the text of the proposed treaty.⁵⁷ While the preparation of draft articles or text of a convention on a specialized topic is undertaken by a number of bodies or committees within the Specialized Agencies concerned, such as ILO, FAO, WHO, UNESCO, etcetera, codification and progressive development of the main core of general international law has been entrusted primarily and principally to the International Law Commission.⁵⁸

Achievements of the Commission stand out without much underscoring through the overwhelming acceptance and implementation by the international community. A number of topics belonging to the main core of substantive international law have been thus progressively developed and codified with initial preparation undertaken by the Commission. As has been seen in the preceding survey of the four decades, the finished and nearly finished products of the Commission include the following:

Codification of diplomatic and consular laws

- Vienna Convention on Diplomatic Relations, 1961;
- Vienna Convention on Consular Relations, 1969;
- Convention on Special Missions, 1969;
- Convention on the Protection and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 1973;
- Vienna Convention on Representation of States in their Relations with International Organisations of Universal Character, 1975;
- Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not accompanied by Courier, 1989.

The law of the sea

- Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958;
- Geneva Convention on the High Seas, 1958;
- Geneva Convention on fishing and Conservation of the Living Resources of the High Seas, 1958;
- Geneva Convention on the Continental Shelf, 1958.

The United Nations Convention on the Law of the Sea, 1982 embraced most of the provisions of the four Geneva Conventions, 1958, with necessary adjustments and supplementing the rules regarding the width of the territorial sea, the definition of the

57. See Review of the Multilateral Treaty-Making Process, Report of the Working Group, U.N. Doc. A/C.6/39/L.12 (1984), especially the annexed "Final Document on the Review of the Multilateral Treaty-Making Process", II: Preparation and Formulation of the Draft Treaty, para. 4.

58. For instance, Non-Governmental Organizations, such as the International Committee of the Red Cross (ICRC), have been active in the preparation of codification convention, such as the text of the 1977 Protocols of the General Convention of 1949 on the subject of humanitarian law in the regulation of an armed conflict.

continental shelf, and incorporating new regimes of the Exclusive Economic Zones and Archipelagic Seas. Questions of marine environment and scientific research, as well as the arrangements for the exploitation of the area, are tainted with extra-legal characteristics and could be directly negotiated within a political body, such as the Third Law of the Sea Conference. Whatever the outcome of further negotiations, the Convention is not in any sense comprehensive, as it envisages the conclusion of further regional arrangements, while several other issues need to be reviewed and amended, such as the definition of 'piracy'. For all that, the work of the International Law Commission which continues to provide the basic rules regulating the law of the sea, in its legal context, should not be forgotten, nor the monumental contribution by the Dutch member, François, pass unnoticed. The notion of the 'common heritage of mankind' also deserves the highest commendation.

The law of the treaties and its sequence

- Vienna Convention on the Law of Treaties, 1969;
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986;
- Vienna Convention on Succession of States in Respect of Treaties, 1978;
- The Most-Favoured-Nations Clause, 1978;
- Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983.

The law of state responsibility and related questions

- Draft Articles on State Responsibility, Part I: General Principles, 1979, first reading, and Part II and III in progress;
- Draft Code of Offences against the Peace and Security of Mankind, currently under renewed active consideration.

International arbitration

- Draft Model Rules on Arbitral Procedure.

Relations between states and international organizations

- Part I : Vienna Convention adopted in 1975;
- Part II (under active consideration).

State immunities

- Draft Articles on Jurisdictional Immunities of States and their Property (first reading, 1986, second reading 1991 (expected)).

Several other important topics have been considered and more are still under active consideration. The law of non-navigational uses of international watercourses will

rank among the most meaningful set of draft articles prepared by the Commission with far-reaching implications and significance.

The achievements of the Commission are to be assessed on a longer term and not on the basis of accelerated ratification and entry into force. Indeed, even as draft articles on first reading, the work of the Commission has often been cited and discussed by the international judicial instance. This is not unnatural since many of the members of the International Court of Justice have come from the Commission.

Notwithstanding non-ratification, or even absence of further action taken by the General Assembly, draft articles or studies made by the Commission, such as 'model rules on arbitral procedure' and the 'most-favoured-nation clause', prove invaluable to practitioners in the negotiation, interpretation and application of legal principles on the subject.

Moreover, the rules of law, as contained in the Conventions concluded and in the draft articles adopted, serve to clarify whatever doubts still exist. In several instances they clearly serve to enhance respect for the law by heightening its quality and reaffirming the triumph of the rule of law and the quest for justice over the rule of force and the primitive rule of gun-boat diplomacy. Today, *pacta sunt servanda* has been reduced to its proper size and may be invoked by every state alike, but no former colonial power or any of its successor could be heard to claim the undue advantage as the fruit of the use of force or threat of force, resulting in the conclusion of an 'unequal treaty'. Jus cogens is a peremptory norm that admits of no derogation, even by a 'pact' to which both parties have expressed their consent. The law cannot be subservient to the interests of the rich and the powerful at the expense of the not so rich and not so powerful. The Commission has unmistakably contributed to this marked improvement in contemporary international law, conventional and customary.

3. 2. Shortcomings of the Commission

It would be presumptuous of any outside commentator to brand any particular product of the Commission as a failure, total, partial or otherwise. Each product is an achievement, when finished and at times even when still unfinished. It has an inherent value in itself and none can be said to have failed. Each will have its own use, in its own proper time. The Commission merely follows instructions and recommendations of the General Assembly on matters of policy and priority or choice of topics.

This does not in any way imply that the Commission is beyond reproach, or that it is perfect in every respect. Like most other things associated with human imperfections, the work of the Commission is not infallible, nor beyond improvement. On the contrary, the law itself is not static. It is changing with a dynamic force. And so must be the Commission, which each year is reviewing its own methods of work.

The Commission can choose and has in fact adopted several methods of work, although the most usual one is the appointment of a special rapporteur for the topic

for which a set of draft articles with commentaries is expected at the conclusion of the study. Other methods have also been used, such as consideration by working groups or sub-committees. Of course, the Commission also has its Planning Committee and Drafting Committee functioning in the normal course of events during every session.

The Planning Committee, chaired by the First Vice-Chairman of the Commission, is responsible for the planning, organization and allocation of the number of meetings and timing for each of the items to be considered at each session. It normally meets at the beginning and also throughout the session to keep track of the progress made. It also revises and streamlines the Commission's programme of work and decides on possible measures to be taken to improve existing methods of work. The Drafting Committee, on the other hand, is concerned not only with questions of wording and construction of the draft articles as a whole and harmonisation of the different languages as well as the toilette of the text, but more significantly, it is this Drafting Committee which conducts most of the serious negotiations on the substance of the entire draft. In view of the back log of draft articles awaiting consideration by the Drafting Committee, it is desirable that the Committee should meet as early and as long as possible, for, principally, through the work of the Drafting Committee the achievements of the entire Commission may be assessed.

Suggestions have been made regarding possible restructuring of the Commission, for instance, by appointing full-time members similar to the judges of the International Court of Justice. But such a suggestion is doomed from the start in the absence of a supporting budget and in the face of the existing shortage of available manpower to fill the posts. Besides, there is no guarantee that a restructured Commission would be more professional, if divorced from politics, or more independent if subservient to national policies.

The Commission suffers several shortcomings like any other organ of an international organization or any specialized agency. First of all, the problem of brain-drain permeates the Commission whose members have been drawn to other positions, such as judge in the World Court, minister of foreign affairs, prime minister or president of a republic. Members of the secretariat staff of the Commission have likewise been attracted to other positions with higher prestige and rank, for instance, as Registrar of the Court or legal adviser to a specialized agency.⁵⁹ Such promotion is generally tolerated. But when the General Assembly failed to re-elect key members of the Commission, such as Riphagen, Sinclair and Lacleta, it is self-inflicted, unforgivable and practically suicidal.

The Commission can ill afford to overlook the need for linguistic skills in the drafting of articles under preparation. While experts are diminishing on a world-

59. Thus, Adede (Kenya), a Senior Legal Officer, was seconded to the position of Legal Adviser of the IAEA.

wide scale, the Commission has to spread far and wide. Further official languages are introduced at considerable expense, but that is far from covering all languages. In particular, some persons of recognized competence in international law may not be fully equipped to tackle any one of the three working languages or any one of the six official languages. Besides, a special rapporteur cannot choose his own native language, but has to be content with one or two of the three working languages. If the special rapporteur was born with one, there might be less handicap. For those whose mother tongues are different, the chance of finding a person of recognized competence who could use one of the three languages professionally is exceedingly rare. Tsuruoka (Japan) was a unique exception. Men like Khoman (Thailand) are exceedingly scarce. The system of special rapporteur, on which the work of the Commission depends, appears therefore to be precariously at risk. The Commission is not without candidates for special rapporteurs, but it is becoming more and more difficult to fill the shoes left by Waldock, Ago, Reuter or Quentin-Baxter. This is a fact of international life, an inevitable shortcoming for the Commission to contain.

4. CURRENT TRENDS

Several current trends appear to have emerged. The Commission is now better prepared at the beginning of each quinquennium to project its own future work and to plan its programme accordingly. Flexibility has been introduced, so that not all items need to be considered at each and every session, while according priority to the consideration of some topics on which there has been specific request from the General Assembly or expression of greater public demand. On the other hand, the Commission should not lack the multiplicity of reports submitted, so as to enable it to be better prepared for more thorough consideration of the topics.

The manpower within the Commission is quantitatively greater without being unduly cumbersome or entailing a useless waste. Not all members would or could attend the session throughout. The result is clearly acceptable as the amount of statements or comments in the general debates on each topic would not include every member. There is advantage in the time saved. But even this is not to be taken for granted. There is nothing to prevent one member, for personal reason or otherwise, spending more than one hour in a general debate on a topic, whereas his statement could be more effectively reduced to ten minutes at the most. Younger members from the developing world are sometimes too timid and other times too bold. Another drawback is the backtracking of absentees, who, unaware of the on-going progress made in their absence, could raise the very critical issue that had already been put to rest with sacrifices on all sides.

The current trends are therefore apparent in several directions. Clearly, the Commission must continue with the rest of its work programme. Some of the topics are open to injections of new materials and new concepts. For instance, the draft Code

of Offences against the Peace and Security of Mankind will, apart from filling the gap with a provision on 'threat of aggression'⁶⁰, also undertake to tackle the offence against mankind in the form of intentional attacks on the human environment,⁶¹ a futuristic approach indeed in the light of current retarded development in state practice in the field. Obviously, international cooperation is wanting and it is for the Commission to educate and help form international opinion in this direction.

The valid question has been asked as to what new topics the Commission can undertake in view of the fact that the main core of international law has been more or less exhaustively treated by the Commission in the past four decades? This question must be answered in the light of the need of the community as expressed through the General Assembly.

The Commission still has to learn new strategies: how to deal with its shortcomings, how to make do with the expanded but diluted Commission. It is handicapped by shortage of expertise and scarcity of topics which appeal to the international community and which are sufficiently ripe for progressive development and codification. The Commission cannot afford undue hesitations and indecisions by going back and forth on drafting points, while overlooking the substance on which consensus has been reached. Nor can the Commission afford to cast aside the results of its careful study at the behest or suggestion of one delegation in the Sixth Committee or the expression of one view in the Commission, thus ignoring the view of the overwhelming silent majority and abandoning the carefully balanced formulation it has itself previously established and maintained.

All in all, the Commission can fare better once it has mastered the art of balancing the various political interests and the trends that follow the gravitational pull of short-term political or material interests of some members to the exclusion of the general interests of the international community. Time is of essence. A new Commission has to undergo the same process of walking before racing to reach its targets. It could learn from its past experience and mistakes.

The growth and health of the Commission may well depend on its ability to weather the storm of the fifth decade, the Decade of International Law. "Will the Commission live up to its expectations" and "what can be expected of the Commissions" are questions that await examination in the next section.

5. PROSPECT FOR A DECADE OF INTERNATIONAL LEGAL DEVELOPMENTS

Subject to the caveat thus lodged and the safeguard thus outlined, it is not unexpected that the Commission can continue to make further stride in the progressive development

60. See Report of the I.L.C., *supra* note 47, Paras. 73-217, at 127-187, Art. 13: Threat of Aggression.

61. *Id.*, at 168-169, *e.g.*, massive pollution of the atmosphere or of the seas, harm to human environment.

and codification of international law. There is no strong reason, no insuperable difficulty whatever for the work of the Commission to be unduly impeded. If any thing, the political obstruction is probably obviated. The four decades just past could be characterized by obstinate persistence on the part of one member of the Commission, whose voice appeared to have exercised the most negative influence on the progress of the Commission's work. If there was such a nightmare as 'veto' operating in practice within the Commission, it appears to have receded if not altogether forsaken. More orderly cooperation appears to have reigned in the place of the obstructionist attitude of one member. Care should be taken, nonetheless, lest a young generation member would aspire to emulate the bygone superstar in his obstructionist fashion which is dangerously unpatented.

The prospect on the whole is reasonable. The Commission has a fair chance of completing its mandates during the current fifth decade, 1990-1999, which is critical. It will be a cross-road for the Commission, a transition from a rejuvenated body of experts to a body of experienced jurists, learning how to work constructively and to cooperate in their formulation of rules of international law.

Two elements must coexist to ensure the success of the Commission: legal expertise which is indispensable and the political will to cooperate which should not be found lacking. A balance must be struck between the opposing trends, between diversity and uniformity, between law and justice, and once struck it should be maintained throughout the norm-formulating process of the Commission.

The Commission should be encouraged to carry on with its existing programme of work and to add to it other topics that appear viable. Its work should be undeterred by outside interference. There is already a built-in process of consultation with member governments through the General Assembly and the Sixth Committee.

6. SERVICEABILITY OF THE COMMISSION TO THE GLOBAL COMMUNITY

Clearly the Commission needs no prompting to prove its serviceability to the global community, taking into account its resounding achievements in the various fields it has ventured. The Commission has answered many a call of the General Assembly and other principal organs as well as specialized agencies of the United Nations.

The quality of the law under which modern nations live today is admittedly superior to that of, say, twenty years ago, when by a split decision an international court of yesteryear could still apply a principle of dubious validity to settle a territorial dispute charged with colonial flavour in favour of colonial expansion by way of territorial encroachment to the extent of legitimizing violation of treaty obligations.⁶²

62. See the Temple of Preah Vihear Case, 1962 I.C.J. Rep..

Such a decision cannot today be repeated, as the Court is better composed and the law to be applied is far more just than the primitive rule of nineteenth century custom. The services of the Commission in this connection cannot be disregarded. The dedication of Waldock in development of the notion of *jus cogens* is historic. François' introduction of the new law of the sea with 'Continental Shelf' and indeed wider jurisdiction over fishing zones was farsighted. Riphagen's proposal for the three parametres in the law of state responsibility and his three-pronged measures *ex nunc*, *extunc*, *ex ante* will go down in history as a major contribution to legal developments in the general interest and for the common benefit of mankind.

The Commission has done much to clarify the rules of international law on so many important topics. Without the Commission, it would have taken much longer for modern international law to reach the current stage of legal developments.

Codification of international law and its progressive development appear to involve an endless process. As long as the international community continues to prosper, as long as mankind persists in its survival, the services of the Commission will continue to be useful and helpful to the international community and to mankind as a whole.

7. CONCLUSION

It is with the expression of good will and good wishes that we should close our brief study of "The Role of the International Law Commission in the Decade of International Law". We are convinced that with further improvements in the quality of the law to which substantial contribution from the Commission has been warmly appreciated, there will be greater confidence on the part of states to accept a third-party resolution of an international conflict. There should be no room for doubt as to the justice, fairness and correctness of the law to be applied. Without improvements in the law, no amount of improvement in the composition of the Court or its procedure could provide adequate guarantee of a just and equitable settlement. It might be better to have the dispute unresolved than to have it settled in an unjust and unequitable way by applying unjust and unequitable rule of outmoded customary law.

Ultimately we share the hope expressed by the President of the International Court of Justice on the occasion of a recent visit to his chamber by the President of an Asian Island Republic that "the end of the twentieth century might witness the acceptance by all nations of the jurisdiction of the Court".⁶³ By that time, the prospect of a Third Hague Peace Conference should commend itself.

63. See I.C.J. Communiqué No. 90/9, dated June 14, 1990, Visit of the President of the Republic of Cyprus to the International Court of Justice.