

# Codification Revisited After 50 Years

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## I. Toynbee's Pessimism

In a remarkable passage in his *A Study of History* Arnold Toynbee has written:

“As a rule — and this rule is inherent in the very nature of the declines and falls of civilizations — the demand for codification reaches its climax in the penultimate age before a social catastrophe, long after the peak of achievement in jurisprudence has passed, and when the legislators of the day are irretrievably on the run in a losing battle with the ungovernable forces of destruction.”<sup>1</sup>

This chapter will examine that proposition in relation to the codification of international law during the last 70 years, since the League of Nations first adopted a project for the codification of international law in 1924 (leading to the Hague Conference of 1930), and more particularly during the last 50 years, since the establishment of the ILC.

At first glance one might find confirmation of Toynbee's thesis in the codification effort of the League of Nations. As is well known, after inadequate preparation but amidst high hopes, the Conference for the Codification of International Law of 1930 — superficially at any rate — achieved very little. And a social catastrophe did follow it.

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<sup>1</sup> Based on a lecture at the Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 19 January 1998. — A. Toynbee, *A Study of History*, 1954, 279; cited in Sh. Rosenne, “Codification of International Law”, in: R. Bernhardt (ed.), *EPIL* Vol. 1 (1992), 632 et seq., (638).

The Covenant of the League of Nations made no mention of the codification of international law. In fact, it contained very few references to international law which seems to have been taken for granted. In its preamble it referred to the firm establishment of the understandings of international law as the actual rule of conduct among Governments; in article 13 it contained a description of disputes which were generally suitable for submission to arbitration, and that included disputes as to the existence of any fact which if established would constitute a breach of international law — later taken into article 36 of the Statute of the PCIJ and then of the present Court; and in article 15 it referred to a matter which, by international law, is solely within the domestic jurisdiction of a State. That is all.

The League of Nations took the initiative for intergovernmental codification of international law — itself a major innovation as up to that time the work had always been the exclusive province of learned societies and eminent publicists — as part of its more general strategy of establishing a broad legal — some would say legalistic — basis for the maintenance of international peace and security.<sup>2</sup> That legal basis related both to the procedural aspects, through League machinery, through the PCIJ (itself a new venture in international affairs), and through the other established methods for third-party dispute settlement as embodied, for example, in the Hague Convention No. I of 1907. That initiative for the codification of international law thus went hand in hand with others such as the General Act for the Pacific Settlement of Disputes of 1928.<sup>3</sup> What is more, from

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<sup>2</sup> On the codification work of the League of Nations, see my two compilations, Sh. Rosenne, League of Nations, *The Committee of Experts for the Progressive Codification of International Law [1925 – 1928]*, 2 Vols, 1972 and Sh. Rosenne, League of Nations, *Conference on the Codification of International Law (1930)*, 4 Vols, 1975. In fact hints that the codification of international law might be undertaken by Governments were first bruited in a Resolution embodied in the Final Act of the 1907 Peace Conference, calling for the third conference due to be held in 1915 but cancelled owing to World War I. See J.B. Scott (ed.), *The Reports to the Hague Conferences of 1899 and 1907*, 1917, 216. The same idea was taken up again in a Resolution adopted by the Committee of Jurists which prepared the Statute of the PCIJ. Impressed by the argument that recourse to that Court would be impeded by the absence of a clear statement of what the rules of international law are, that Committee adopted a long Resolution on the topic, the central feature of which was the suggestion to resume the work of the Peace Conferences of 1899 and 1907 under the auspices of the League. PCIJ, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 1920, 747.

<sup>3</sup> LNTS Vol. 93 No. 2123.

the papers of the period one can gain an impression that there was a widespread feeling that the task would not be unduly difficult, and could be accomplished rapidly and without a great expenditure of time, money and work-hours. The basic resolution adopted by the League Assembly on 22 September 1924 commenced with the following preamble:

*“Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important Conventions already drawn up with respect to communications and transit, the simplification of customs formalities, the recognition of arbitration clauses in commercial contracts, international labour relations, the suppression of traffic in women and children, the protection of minorities, as well as the recent resolutions concerning legal assistance for the poor[.]”*

The resolution went on to recite that the Assembly was desirous of increasing the contribution of the League to the progressive codification of international law. The Assembly established the Committee of Experts for the Progressive Codification of International Law, a body of 17 members. That led to the 1930 Codification Conference, which could hardly have come at a worse time. Already the relaxation of tension following the Locarno Treaties of 1925 was showing signs of strain; and the grave financial crisis that swept through Europe and through the United States, in fact over the whole world, was not conducive to effective official action for the codification of international law. The PCIJ was still in its infancy. It was only in 1929, as the economic crisis began, that States had started to take some interest in that new institution. Politicians and diplomats had not yet learned to reconcile themselves to the idea that the judicial settlement of international disputes, at all events of certain types of international dispute, was a viable diplomatic possibility.

## II. The United Nations Charter

The Charter of the United Nations introduced fundamental changes. In the first place, it contains a general prohibition on the use of armed force except in conformity with the provisions of the Charter itself. One immediate effect of this is that in the Charter regime, the pacific settlement of an international dispute does not appear as an alternative to a settlement imposed through the use of force, as had previously been the case. From this it is natural to take a much closer look at the state of the law itself, not as an alternative to the use of force in the settlement of disputes but as one

of the primary methods to achieve the broad aims of the United Nations — the maintenance of international peace and security, and today also peace-making. It is therefore not surprising to find Article 13 para. 1 lit. (a), of the Charter imposing on the General Assembly the duty to make studies and recommendations for encouraging the progressive development of international law and its codification. That comes within the framework of the general purposes and objects for which the United Nations exists. To that end, in 1947 the General Assembly adopted the Statute of the ILC, as its principal standing instrument for carrying out this provision of Article 13.<sup>4</sup> It conducted the first election of the members of the Commission — who since 1950 serve for a period of five years (previously three) — in 1948. The Commission held its first session in 1949, and has met annually since. After each session it reports to the General Assembly. Here its work is examined in the Sixth (Legal) Committee which submits appropriate resolutions to the General Assembly for adoption.

The Commission was originally composed of 15 members — two less than the League's Committee of Experts for the Progressive Codification of International Law. With 15 members it was a relatively compact body, which met in the intimacy of *Salle IX* in the old building of the Palais des Nations in Geneva. By stages this was increased, in 1956 to 21 (still intimate), in 1961 to 25 (also intimate), and 20 years later, in 1981, to the

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<sup>4</sup> A/RES/174 (II) of 21 November 1947. See United Nations, *The Work of the International Law Commission*, 5th edition, 1996, Sales No. E.95.V. And see Sh. Rosenne, "The International Law Commission 1949–1959", *BYIL* 36 (1960), 104 et seq.; H. Briggs, *The International Law Commission*, 1965; R.G. Ramcharan, *The International Law Commission: Its Approaches to the Codification and Progressive Development of International Law*, 1977; I. Sinclair, *The International Law Commission*, 1987; C.-A. Fleischhauer, "On Article 13", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1994, 265 et seq., and generally the literature cited at p. 639 of the *EPIL* cited in note 1. On 28 and 29 October 1997 the United Nations Colloquium on Progressive Development and Codification of International Law took place in New York, in commemoration of the 50th anniversary of the establishment of the ILC. The keynote address was given by a former member of the Commission and now the President of the International Court, S. M. Schwebel, on the influence of the ICJ on the work of the International Law Commission, and the influence of the Commission on the work of the Court. The proceedings of this Colloquium are to be published later.

present 34, now a relatively large and unwieldy body.<sup>5</sup> That is leading to what looks like a serious fragmentation of the Commission. For instance, in its 1997 session, apart from the normal Bureau, the Commission established a Planning Committee, two drafting committees, and four working groups. The Planning Committee itself also set up another working group. On top of that, since 1996 the Commission has envisaged standing consultative groups for each Special Rapporteur. Small occasional working groups for a defined purpose have been established in the past, and in 1962 the Commission even set up two Subcommissions which met between the two sessions of the full Commission. But this profusion of groups, and above all two drafting committees, all working *during* the session, must give cause for a pause and a question: will this lead to a fragmentation of the work, all of which originally was intended to be the product of the collectivity as a whole?

### III. The Sixth Committee of the General Assembly

A word is required about the Sixth (Legal) Committee of the General Assembly and its role, since this is frequently misunderstood. The Sixth Committee is not a detached scientific body. It is a purely political organ, with responsibility for the political side of those of the legal activities of the General Assembly as are referred to it, and that is by no means all of them. It is one of the six Main Committees of the General Assembly under Rule 98 of the Rules of Procedure (Doc. A/520/Rev.15). As such, it is identical in nature and exists on a par with the other Main Committees of the General Assembly, dealing in political terms with the items allocated to it. The persons who sit in it are representatives of their countries, as opposed to the Commission whose members — even if responsible officers of their governments — sit in their individual capacity with the formal status of experts, and not as official representatives.<sup>6</sup> While in most cases

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<sup>5</sup> On the increases, see A/RES/1103 (XI) of 18 December 1956, A/RES/1647 (XVI) of 6 November 1961, and A/RES/36/39 of 18 November 1981. The General Assembly adopted each of those increases immediately preceding a quinquennial election of members of the Commission.

<sup>6</sup> Nevertheless, since 1979, in Switzerland, where the Commission normally meets at the United Nations European Headquarters in Geneva, the members of the Commission are accorded, by “analogy ... the privileges and immunities enjoyed by the heads of mission to which the Judges of the ICJ are entitled while in Switzerland. These are the privileges and immunities enjoyed by the heads of mission accredited to the international organizations in Geneva. The members of the International Law

the representatives in the Sixth Committee are trained lawyers (although not necessarily serving in their government's regular legal or diplomatic service), there is no professional qualification required for participation in that Committee's work. The representatives' statements express their government's position, and give to other States, to the Secretariat, and to the ILC, indications of where the rough passages will come in the future. The Sixth Committee, no more than the ILC, is not the general legal adviser of the General Assembly or of any other organ of the United Nations. This does not prevent their advice being sought in appropriate Cases, and both have given advice to the General Assembly.

There have always been in the Sixth Committee delegates who were or had been members of the Commission and the Commission's Chairperson always introduces the annual report and is present for the discussion in the Sixth Committee. When an election of members of the Commission and, to some extent, an election of members of the ICJ (and perhaps other legal bodies) is taking place, the Sixth Committee often becomes a stomping ground for candidates. Many members of the ILC had been representatives in the Sixth Committee both before their election, and during their service on the Commission. However, for a very long time there was a distance between the Committee and the Commission, in the sense that, unless the Commission specially requested otherwise, the Sixth Committee was only concerned with the decisions reached by the Commission at its session and not with any partial account of its ongoing work beyond what was included in the report. However, this has changed very radically, especially in the last decade or so. Some of the more recent reports have contained long summary accounts of the Commission's discussions as something distinct from its formal conclusions which it has to report to the General Assembly, and this in turn has led to excessively lengthy reports. In 1988 the Commission raised the question of enabling its Special Rapporteurs to attend the Sixth Committee's debate on the Commission's report so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of the observations made and to begin preparing their reports at an early stage. It later added that their presence could facilitate useful informal contacts, exchanges of views and consultations between them and representatives of governments. The General Assembly accepted that idea.<sup>7</sup> This has considerably reduced any

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Commission will be entitled to a special red identity card." As far as is known, no other experts members of United Nations subsidiary organs in their individual capacity are granted such extensive privileges and immunities.

<sup>7</sup> A/RES/44/35 of 4 December 1989. And see the Report of the Commission on the work of its fortieth session, para. 582, in: *ILCYB* 1988, Vol. II

distance that might have existed between the Commission and the Sixth Committee, has increased the Commission's direct influence on the Committee rather than the reverse, and in fact may even have transformed the Commission into a kind of sub-committee of the Sixth Committee. This is being pursued without any notable input into the Commission's scientific work, which indeed it may even have impaired. But it has also weakened in some major respects the proper type of informed political control which the Sixth Committee should exercise over the Commission, since the presence in the Sixth Committee's debates of many members, including the Commission's Chairperson and Special Rapporteurs, has had as one of its consequences a tendency of the Sixth Committee to do little more than endorse the Commission's proposals and not to question their political implications and viability. This in turn has led to a consequent waste of time and money and intellectual effort, not only on the part of the Commission and the Sixth Committee, but also on the part of governments called upon to answer the many questionnaires and other requests for information emanating from the Commission.

#### **IV. The Achievements of the International Law Commission**

The Commission's output in terms of completed projects of codification is impressive. For the most part, these projects are in the form of draft treaty articles, which become the basic text for a conference of plenipotentiaries or, more rarely, for the Sixth Committee of the General Assembly, and in that way transformed into a convention (treaty). One of the significant consequences of this is that the Commission does not normally suggest a preamble for the convention which will consummate the codification effort, but leaves that to the diplomatic action. The most it might do is to suggest elements which, in its opinion, the preamble should include. This emphasizes that the final product is not a detached scientific work but a full-fledged diplomatic instrument, to be treated as such. Furthermore, the Commission's preferred method of preparing its draft articles in a form suitable for inclusion in a treaty leads to language patterns that are general, often axiomatic, in form. Also the Commission usually refrains from indicating whether a given proposal is 'codification' or 'progressive development'. Following this, it has become a standard practice for the diplomatic conference to include in the preamble a provision

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Part Two at 112; and its report on the work of its forty-first session, para. 742, *ibid.*, 1989 at 138.

to the effect that the rules of customary international law will continue to govern questions not regulated by the provisions of the convention.<sup>8</sup> These factors have had as one effect a noticeable, and welcome, tendency of averting any petrification of the law or of State practice resulting from the codification — frequently adduced as an argument against the codification of the law.

The United Nations publication cited in note 4 contains the texts of no less than 20 multilateral conventions and other instruments that had been concluded up to the end of 1995 following consideration of the topics by the ILC. These include the 1958 Geneva Conventions relating to the Law of the Sea (five instruments),<sup>9</sup> the 1961 Convention on the Reduction of Statelessness,<sup>10</sup> the 1961 Vienna Convention on Diplomatic Relations (three instruments),<sup>11</sup> the 1963 Vienna Convention on Consular Relations (three instruments),<sup>12</sup> the 1969 New York Convention on Special Missions (two instruments),<sup>13</sup> the Vienna Convention on the Law of Treaties (1969),<sup>14</sup> the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,<sup>15</sup> the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,<sup>16</sup> the 1978 Vienna Convention on Succession of States in respect of Treaties,<sup>17</sup> the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts,<sup>18</sup> and the 1986 Vienna Convention on the Law of Treaties between States and International

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<sup>8</sup> On this, see Sh. Rosenne, *Developments in the Law of Treaties 1945–1986*, 1989, 7.

<sup>9</sup> UNTS Vol. 516 No. 7477; UNTS Vol. 450 No. 6465; UNTS Vol. 559 No. 8164; UNTS Vol. 499 No. 7302; UNTS Vol. 450 No. 6466.

<sup>10</sup> UNTS Vol. 989 No. 14458.

<sup>11</sup> UNTS Vol. 500 Nos. 7310, 7311, 7312.

<sup>12</sup> UNTS Vol. 596 Nos. 8638, 8639, 8640.

<sup>13</sup> UNTS Vol. 1400 No. 23431 and p. 339.

<sup>14</sup> UNTS Vol. 1155 No. 18232.

<sup>15</sup> UNTS Vol. 1035 No. 15410.

<sup>16</sup> Not yet in force. See United Nations Conference on the Representation of States in their Relations with International Organizations of a Universal Character, (Doc. A/CONF.67/16).

<sup>17</sup> Entered into force on 6 November 1996. See United Nations Conference on the Succession of States in respect of Treaties, (Doc. A/CONF.80/31 plus Corr.2).

<sup>18</sup> Not yet in force. See United Nations Conference on Succession of States in respect of State Property, Archives and Debts, (Doc. A/CONF.117/14).



Organizations or between International Organizations.<sup>19</sup> To that list may now be added the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.<sup>20</sup> Topics completed by the Commission and awaiting appropriate diplomatic action through the General Assembly include the jurisdictional immunities of States and their property (1991), the draft statute of an International Criminal Court (1996) due to come before a diplomatic conference in Rome in June 1998,<sup>21</sup> and the draft Code of Crimes against the Peace and Security of Mankind (1996), now under consideration in the Sixth Committee.

In addition the Commission has prepared a draft declaration on the rights and duties of States which has not been adopted by the General Assembly (1949), a formulation of the Nuremberg principles (1950) since absorbed into the Draft Code of Crimes against the Peace and Security of Mankind, Model Rules on Arbitral Procedure adopted by the General Assembly in Resolution 1262 (XIII) of 14 November 1958, draft articles on the most-favoured-nation clause (1978), a topic which arose out of the Commission's examination of the law of treaties but which has led to no conclusive action by the General Assembly, and draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by a diplomatic courier (1989), which also did not lead to any conclusive action by the General Assembly.

The Commission has twice rendered an opinion to the General Assembly, in the form of a report: in 1951 on reservations to multilateral conventions parallel to the Advisory Opinion of the ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>22</sup> and in 1963 on extended participation in general multilateral

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<sup>19</sup> Not yet in force. See United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Doc. A/CONF.129/15). In Resolution 52/153 of 15 December 1997, adopted on the agenda item concerned with the decade of international law, the General Assembly recalled that Convention and its impact on the practice of treaties concluded between States and International Organizations or between International Organizations, and encouraged States and relevant international organizations to consider ratifying or acceding to the Convention at an early date.

<sup>20</sup> A/RES/51/229 of 21 May 1997. Not yet in force.

<sup>21</sup> A/RES/52/160 of 15 December 1997. See in this respect in this Volume the article of A. Zimmermann.

<sup>22</sup> ICJ Reports 1951, 15. The Commission in 1993 decided to include in its agenda, subject to the approval of the General Assembly, the topic of the law and practice of reservations to treaties. It is not clear what real international purpose is served by this revival of a topic which, once an irritant on the conduct of international affairs, is generally considered as

treaties concluded under the auspices of the League of Nations, opening up to accession certain of those treaties which remain of international interest.<sup>23</sup> Both those reports related to aspects of the law of treaties, then on the Commission's agenda. The Commission has also once directly drafted a convention at the specific request of the General Assembly, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents — part of the reaction of the United Nations to international terrorism (cf. A/RES/2780 (XXVI) of 3 December 1971). The Commission adopted an accelerated procedure for dealing with this.

## V. The Impact of the Cold War

All the instruments concluded up to that 1973 Convention have entered into force; the 1958 Conventions on the Law of the Sea have since been largely embodied in the much broader United Nations Convention on the Law of the Sea of 1982.<sup>24</sup> Only some of the conventions concluded after that have entered into force. This is an aspect to be examined.

A striking feature of this work is that much of it was accomplished during the period of high international tension, the Cold War, and that more recently there has been a marked slowing-down of the Commission's output and in its acceptance. All the instruments which were adopted in the Cold War period on the basis of drafts put forward by the ILC have entered into force. Later instruments, established as that level of tension began to subside, are slower in entering into force. Can any explanation be offered for this?

The important instruments adopted in the first 25 years of the United Nations codification effort are the Geneva Conventions on the Law of the

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settled to the reasonable satisfaction of governments in the appropriate provisions of the Vienna Conventions on the Law of Treaties.

<sup>23</sup> For details, see Rosenne, see note 8, 363 note 20; and M. Hardy, "The United Nations and General Multilateral Treaties concluded under the Auspices of the League of Nations", *BYIL* 39 (1963), 425 et seq.

<sup>24</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: United Nations Convention on the Law of the Sea; Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea with Index and excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea, 1997*; Sales No. E.97.V.10. These instruments have entered into force and will appear in the United Nations Treaty Series under numbers 31363 and 31364.

Sea (still in force as between their parties who are not parties to the 1982 Convention), the series of Vienna and New York instruments on Diplomatic and Consular Relations, and the 1969 Vienna Convention on the Law of Treaties. These had all entered into force with significant participation by 1980. In terms of international relations, they all have one thing in common. Each concerns aspects of international relations in which the two super-powers in the very nature of international relations came into direct almost daily physical contact with each other, and not always on amicable terms. Those instruments therefore all supply a basic agreed code for their mutual contacts in periods of high tension and suspicion. True, that code was very minimal and its rules, sometimes couched in language of studied ambiguity, could not always prevail over what one or other of those powers regarded as its higher interests of national security — witness the famous ‘bumping’ of warships in the Black Sea.<sup>25</sup> That codification met a pressing international need. It is an interesting commentary on that aspect of codification that when the Russian Permanent Mission in New York complains to the American authorities about some violation of its rights and privileges, it very frequently bases itself more on the Vienna Conven-

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<sup>25</sup> That in the end led to the Jackson Hole Agreement of 1989 on the meaning of innocent passage in the law of the sea. For the Jackson Hole Agreement, officially entitled *Uniform Interpretation of Rules of International Law Governing Innocent Passage*, see *Department of State Bulletin* 25 (1989), 89 and *Vestnik Ministerstva Inostrannykh Del SSSR* Nos. 21, 25 (15 November 1989). It is difficult to imagine a more land-locked place for the conclusion of an agreement relating to the law of the sea than Jackson Hole, Wyoming. On the ambiguity see, W.J. Aceves, “Ambiguities in Plurilingual Treaties: A Case Study of Article 22 of the 1982 Law of the Sea Convention”, *Ocean Development and International Law* 27 (1996), 187. In fact the ambiguity — which in that article partly results from formal translations made by the Division of Language Services of the US Department of State — may be less than the author suggests. As literal translations, that may be so. As substantive translations, expressing the same thought in appropriate terms, often requiring some rewriting of the original texts, this is less obvious. The real ambiguity derives from the unexplained presence in the Russian text of the little word “*i*” [*and*] in the first line of the Russian text, between the equivalents of the English “when necessary/having regard to”. There is no equivalent in any other of the six authentic texts of that Convention. Although the Conference Drafting Committee was cautious in dealing with sensitive consensus texts which were presented to it (including those on Straits used for international navigation), it drew attention to what it considered to be major discrepancies. It is not clear how this discrepancy over the word “*i*” remained.

tion on Diplomatic Relations than on the Headquarters Agreement, although of course official approaches to the United Nations itself have to be based also on the Headquarters Agreement.

In this temporal context, at the height of the Cold War, some other major international instruments were concluded primarily between the two super-powers and their NATO and Warsaw Pact allies. For the control of nuclear weapons — probably the most dangerous sector of their relations and possible direct contacts, especially after the Cuban missile Crisis of 1962 — we find a series of major treaties, including the Partial Test-Ban Treaty of 1963, banning nuclear weapon tests in the atmosphere, in outer space, and under water,<sup>26</sup> followed in 1968 by the Treaty on the Non-Proliferation of Nuclear Weapons.<sup>27</sup> In the same period the major treaties relating to Outer Space were concluded and entered into force — another area of direct contact, fortunately pacific.<sup>28</sup> There is also a series of what are technically non-binding instruments of a similar character, in the sense that they deal with aspects of international relations where the two major military and ideological groupings come into direct contact. These include the Declaration on Principles of International Law governing Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted in General Assembly Resolution 2625 (XXV) of 24 October 1970 — of Soviet initiative; and the so-called Helsinki Final Act — the Final Act of the Conference on Security and Co-operation in Europe of 1975, also, it is believed, of Soviet initiative.<sup>29</sup>

It is difficult to square all this prodigious and creative legal output with presaging any social catastrophe. More down to earth than anything attempted by the League of Nations, even when dealing with the symbiosis

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<sup>26</sup> UNTS Vol. 480 No. 6964.

<sup>27</sup> UNTS Vol. 729 No. 10485.

<sup>28</sup> These are conveniently collected in the United Nations publication *United Nations Treaties and Principles on Outer Space*, 1994, Doc. A/AC.105/572. These include the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 1966, UNTS Vol. 610 No. 8843; the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space of 1967, UNTS Vol. 672 No. 9574; the Convention on International Liability for Damage Caused by Space Objects of 1971, UNTS Vol. 961 No. 13810; the Convention on the Registration of Objects Launched into Outer Space of 1974, UNTS Vol. 1023 No. 15020; and the Agreement Governing the Activities of States on the Moon and other Celestial Bodies of 1979, UNTS Vol. 1363 No. 23002. Together these are virtually a codification of the law governing activities in outer space.

<sup>29</sup> See *EPIL* note 1, at 693.

of ideologies it aimed precisely at avoiding any social catastrophe, an aim which to all appearances it has achieved. I have noted elsewhere that the tensions of the Cold War do not appear to have had an adverse effect on the working of the International Court (they may have had an effect on the willingness of States to have recourse to the Court, but that is another matter).<sup>30</sup> The same observation would apply to the work of the ILC. So long as the major tensions were between the two super-powers and their allies, the Commission — along with other organs and bodies — performed valuable low-profile services in creating an agreed legal infrastructure for their points of contact. That is legal diplomacy at its best.

## VI. The Problem of Commentaries

There is one major difference requiring notice between the instruments produced after treatment by the ILC and instruments produced in some other way. The Statute of the ILC requires its drafts to be accompanied by a commentary. The Commission has consistently interpreted this as meaning a commentary article by article, an *exposé des motifs*, much the same as is required by national legislatures to accompany draft legislation. This commentary is an invaluable aid, in fact indispensable to understanding the thrust and the purport of any given provision. No such requirement exists for instruments produced through other organs of the United Nations or, indeed, of other international public or scientific organizations. It is frequently said that when the ILC's draft articles become transformed into a convention, the commentaries 'disappear', leaving only the black letter texts. This is misleading. There is an important illustration of this in the *North Sea Continental Shelf Cases*, where the Court examined at length the work of the ILC on the continental shelf during its early work on the law of the sea.<sup>31</sup> The judgment on the merits of the *Military and Paramilitary Activities in and against Nicaragua* Case supplies an even more outstanding instance of reliance by the Court on the ILC's commentary in its final report on the law of treaties.<sup>32</sup> It is clear, for instance from Judge Schwebel's dissenting opinion in the 1995 judgment concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) that in its deliberations where a

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<sup>30</sup> Sh. Rosenne, "The Cold War and the ICJ: A Review Essay of Stephen M. Schwebel's *Justice in International Law*", *Va.J.Int'l L.* 35 (1995), 669 et seq.

<sup>31</sup> ICJ Reports 1969, *passim*.

<sup>32</sup> ICJ Reports 1986, 14 et seq. (p. 100 – para. 190).

text originating in the ILC has been relevant, the Court has not passed over the commentaries.<sup>33</sup> The same can be said of para. 123 of the Court's judgment of 25 September 1997 in the *Gabčíkovo-Nagymaros Project Case*, where the Court relied on the ILC's Commentary to its draft articles on the succession of States in respect of treaties.<sup>34</sup>

A question that has long puzzled me is why the conventions produced through the ILC are always accompanied by an authoritative commentary — not necessarily part of the *travaux préparatoires* — while other conventions, of no less general importance, are not. As for the ILC's commentaries, true, it is customary for the United Nations Secretariat to include them in the *Official Records* of the Conference, and to that extent they are easily available to the researcher who makes use of those *Official Records*. But is that enough? If the negotiators of a convention do not wish for the records of the negotiations to be made public, as was the case, for example, at the time for much of the Third United Nations Conference on the Law of the Sea, all they have to do is not to hold formal meetings. In that particular case, many of the papers and suggestions advanced in informal meetings have been published through private enterprise, and at least one University has undertaken to produce what it terms a *Commentary*, making full use of those informal documents.<sup>35</sup> Actually that *Commentary* is more what is sometimes called a *legislative history*, which becomes indispensable for those who have to interpret the instrument itself. This is a matter which deserves more attention than it has been given. True, there is a doctrinal controversy over the significance of the preparatory works for purposes of interpretation of the instrument. Many people think that this controversy is more theoretical than real, because of the ambivalent

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<sup>33</sup> ICJ Reports 1995, 28.

<sup>34</sup> Judgment not yet published in the Court's *Reports*.

<sup>35</sup> For the collection of formal and informal documents, see R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, 18 Vols (1982 – 1988). And see University of Virginia, Center for Oceans Law and Policy, *The United Nations Convention on the Law of the Sea: A Commentary*, 5 Vols to date (1985 – 1995). In the meantime the Department of Oceans Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations Secretariat has produced a series of brochures assembling the legislative history of selected parts of the Convention, based for the most part only on what appears in the *Official Records* of the Conference. The same occurred at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which held six sessions between 1993 and 1995. See J.-P. Lévy and G.G. Schramm, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents*, 1996.

attitude towards this material of international tribunals, and especially the International Court itself. Be that as it may, adequate knowledge of this material performs other functions and meets other needs than resolving problems of interpretation. It is virtually indispensable for governments when they have to take a position on the text, for instance in the internal ratification process. The Secretariat has shown that it is capable of producing excellent dispassionate commentaries when requested to do so.<sup>36</sup> I venture to suggest that it should become part of routine conference procedure, at all events when the conference has taken place in formal sessions, to request the Conference Secretariat to produce this kind of commentary, really as a matter of form. Where for political reasons the negotiating States do not wish for an officially produced commentary to be made, universities and other research institutes should be encouraged to take the matter in hand.

## VII. Some Hesitations

I would like now to return to the question, why the later conventions produced on the basis of the work of the ILC have not entered into force and, indeed, why for some of them the political decision was taken not to proceed further with them. Two explanations can be advanced for this, one a matter of legal technique, and one more clearly political.

Some of the instruments that have been produced have been found to be unnecessary, at all events in the form in which the topic emerged from the codification process through a diplomatic conference. The outstanding example of this is the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations. Much of this is unchanged repetition of provisions already included in the major Vienna Convention on the Law of Treaties of 1969. The ILC correctly set about examining each one of those provisions to determine its applicability, changed or unchanged, to international treaties to which an international intergovernmental organization is at least one party. Indeed, the special procedure adopted for that Conference, by which

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<sup>36</sup> Examples of this are the Secretariat's Commentary on the Draft Convention on Arbitral Procedure adopted by the ILC at its Fifth Session, Doc. A/CN.4/92, Sales No. 1955.V.1 (1955); its Convention on the Nationality of Married Women: Historical Background and Commentary, Doc. E/CN.6/389, Sales No. 62.IV.3 (1962) and its Commentary on the Single Convention on Narcotic Drugs 1961 prepared by the Secretary-General in accordance with para. 1 of E/RES/914 D (XXXIV) of 3 August 1962, Sales No. E.73.XI.1 (1973).

the discussion was limited to those provisions which differed from the 1969 Convention, confirms this.<sup>37</sup> The project could easily have been consummated in a short protocol, or even a non-binding instrument, setting out necessary changes. It did not require a full-blown diplomatic conference leading to a treaty requiring ratification. In most countries ratification means a decision by the government followed by some parliamentary action. A topic like the law of treaties, lawyers' law if ever there was one, is an unlikely matter for a legislature to examine and decide — and this is no doubt one explanation of why it took so long for the 1969 Convention itself to enter into force. Likewise, the matter of the diplomatic courier and the unaccompanied diplomatic bag certainly needs an agreed arrangement to keep pace with the major changes in civil aviation and the introduction of unaccompanied diplomatic mail in sealed lockers under the control of the captain on long-flying national airlines with the possibility of their unanticipated landing in a third country. But did this require a draft convention running to 32 articles together with two protocols, adopted by the Commission in 1989, only to be buried by the General Assembly as recently as 1995?<sup>38</sup> Was it really necessary to consume so much time and energy on this topic in the Commission and later in the Sixth Committee, leaving out of consideration the expense involved? Is it really necessary, from the point of view of States, for the Commission, for the third if not fourth time in the 50 years of its existence, to take up again, and in isolation, the topic of reservations to treaties, merely because of dissatisfaction, at least in some academic and non-governmental circles, at reservations made by one State to a given convention? In the late 1950s an attempt was made to refer to a single conference the two closely related topics of diplomatic and consular relations. That attempt failed after the Special Rapporteur on consular relations, Professor Žourek, was appointed judge *ad hoc* for a case in the International Court heard in 1959.

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<sup>37</sup> See on this Rosenne, see note 8, 384.

<sup>38</sup> In Decision 50/416 of 11 December 1995, the General Assembly "wishing to pay tribute to the valuable work done by the International Law Commission on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and of the draft protocols thereto, decided to bring the draft articles prepared by the Commission to the attention of Member States, together with the observations made by Member States in written form or orally during the debates in the Sixth Committee, including the report of the Vice-Chairman of the Sixth Committee at the forty-seventh session of the General Assembly, and to remind Member States of the possibility that this field of international law and any further developments within it may be subject to codification at an appropriate time in the future."



It was accepted at the time that it was not really necessary to have two conferences on those topics, one in 1961 and the second so shortly after, in 1963.<sup>39</sup> There has been no repeat of this reticence to avoid unnecessary duplication of effort.

The question might well be asked how it comes about that the General Assembly endorses projects such as these emanating from the Commission. To some extent an answer can be found in an element of administrative inertia. It may also be due to the fact that for many years now the Commission's report becomes available only after the annual session of the General Assembly has begun, so that delegations do not, and cannot, receive adequate and properly considered instructions from their home authorities. The Commission is a well qualified body and if it considers that a given topic requires its attention, why should delegations think otherwise? Yet it is possibly here that the Sixth Committee should step in and look more critically at what the Commission is proposing, how its work on a given topic is taking shape, and how it should proceed. The examination in the Sixth Committee of the first draft of the ILC's draft articles on a given topic should provide the proper point for this type of critical examination and control. At the same time, one can observe that neither the Commission's Special Rapporteurs, nor the Commission itself, always pay sufficient attention to the debates which lead up to the decisions of the General Assembly. For example, the reports on the thorny topic of international liability for injurious consequences arising out of acts not prohibited by international law, which the General Assembly at its 28th session in 1973 thought it desirable that the Commission should study at an appropriate time, and on which the Commission commenced work in 1978, do not mention the close vote in the Sixth Committee on that issue, or even attempt to draw any conclusions from that.<sup>40</sup>

The second reason for the *rallentando* in the acceptance of the Commission's proposals — the political reason — is to be sought in the changing

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<sup>39</sup> Cf. the Report of the Commission covering the work of its eleventh session, 20 April – 26 June 1959, paras. 27, 39, *ILCYB* 1959, Vol. II at 109, 111.

<sup>40</sup> The Sixth Committee, at its 1415th Mtg. on 15 October 1973, on a roll-call vote of 42:40:21 adopted that proposal. Since the Commission commenced work on the topic, R. Quentin-Baxter was the first Special Rapporteur. He submitted five reports between 1980 and 1984. He was succeeded by J. Barboza who submitted 12 reports between 1985 and 1996. In 1997 the Commission appointed P.S. Rao as Special Rapporteur. In a period of 20 years and after receiving 17 reports the Commission has adopted some scattered articles on part of the topic, but no comprehensive first draft.

pattern of international relations. While the Commission's early work attacked topics the regulation of which was a matter of interest to the protagonists in the Cold War, later work reflects the more latent and less dangerous polarities of North/South tensions, where the "South" holds the numerical majority in the General Assembly and in a diplomatic conference, all now generally operating by consensus as the process for adopting decisions. The texts produced by the Commission and the Conferences on the whole did not meet the requirements of many States of the northern hemisphere. The Convention on the Relations of States with International Organizations of a Universal Character, for example, goes beyond what has been accepted by several important States and the United Nations and other international intergovernmental organizations which have concluded host agreements with each other, in particular the specialized agencies of the United Nations family.

### **VIII. Codification and the Teaching of International Law**

The existence of these codifications has had one unanticipated effect, which some regard in a negative light: the teaching of international law is undergoing a very radical change. For example, it is no longer necessary, in many universities, for students to spend much time on such a core topic as the law of treaties. It is enough if they know that the Vienna Conventions exist, and to some extent exceptional if they know how to read them, with their commentaries. The same goes for other major branches of the law, including diplomatic and consular relations (perhaps the main topic which the general practising attorney is likely to encounter in his general work), and even the law of the sea. And what will happen to the law of international responsibility, on which so much of the specialized branches of the law rests? The details of these codified topics are being left to specialists. This leaves the average student — and many professors — free to put their minds and talents to the newer topics that are coming to the fore: human rights, the environment, the very idea of the rule of law in national and in international affairs, the modern business law for worldwide market economy — to mention but a few.

From one point of view this is not good. A legal adviser of a major European Ministry for Foreign Affairs once told me that he had encountered difficulties in finding for his office new recruits who were familiar with the ins and outs of the law of treaties, the very heart of the work of a legal department of a Foreign Ministry, and the rock bottom foundation for every other branch of general and specialist international law. The Institute of International Law, which at Strasbourg last August adopted a major resolution on the teaching of international law, had great difficulty

in having the law of treaties included in what it called 'the foundation course on public international law', and nothing like it in the parallel course for private international law.<sup>41</sup> Recently a prominent professor of international law in the United States, specializing in human rights law, told me that he did not require any knowledge of the law of treaties from his students, yet at the same time they could handle the problem of reservations to human rights conventions. I wonder how!

There are signs that this lack of basic theoretical knowledge of the law of treaties may even have reached into the ILC. In its draft resolution on reservations to multilateral treaties which it adopted in 1997, and on which the General Assembly is seeking the views of Governments, it refers to 'normative multilateral treaties'. This is an almost unintelligible expression for the practitioner, and in fact, even if it was in vogue at the beginning of the century in the distinction made by Triepel between the *Vertrag* (*traité-loi*) and the *Vereinbarung* (*traité-contrat*), has long ceased to have practical value for the codification of the law of treaties, and in particular was rejected by the ILC as a possible element in the codification of the law of treaties. Another example: the 1982 Convention on the Law of the Sea is sometimes described as a 'normative treaty'.<sup>42</sup> Is it? Part of it is certainly codification. Part of it is certainly progressive development, for instance the introduction of the concept of the archipelagic State or the exclusive economic zone, or the new definition of the continental shelf for juridical purposes. It is the constituent instrument of at least two major international organizations, the International Sea-Bed Authority and the International Tribunal for the Law of the Sea. It imposes charges on its States Parties, partly directly and partly indirectly, through the United Nations budget and those of the ISBA and the Tribunal. It sets up new administrative bodies, notably the Meeting of States Parties. It is an umbrella instrument for a whole series of what can only be regarded as administrative measures, for instance in relation to certain major aspects of navigation, of charting and mapping, for the enforcement of measures for the protection of the marine environment, and regarding jurisdiction over ships at sea. In some respects even the codification of the law of the sea as embodied in

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<sup>41</sup> This will be published in Vol. 68, Tome II (Strasbourg Session) of the *Annuaire de l'Institut de Droit international*.

<sup>42</sup> A. de Marffy-Mantuano, "The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea", *AJIL* 89 (1995), 814. The International Court has recognized that the "character" of a treaty can raise specific problems of interpretation. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* Advisory Opinion, ICJ Reports 1996, p. 45, para. 19. But that is another matter altogether.

the 1958 Conventions and thence transcribed into the 1982 Convention can be seen as a commodity agreement, regulating the supply of fresh fish, or the resources of the continental shelf or now the mineral nodules of the deep ocean floor. No less an authority than Charles de Visscher saw a likeness between the Geneva Conventions on the Law of the Sea of 1958 and commodity agreements.<sup>43</sup> In short, the Law of the Sea Convention defies all theoretical classification of treaties.

## IX. Towards Multi-Disciplinary International Law

In one sense it can now be said that the ILC, except for its unfinished work on the topic of State responsibility, has practically covered the whole ground of accepted general international law, and has done its work well. It appears to be moving out of the realm of codification, concentrating essentially on the *lex lata*, into that of progressive development, working *de lege ferenda*. Here it comes up against two obstacles. One is serious competition from *ad hoc* bodies which the General Assembly usually establishes when it wants to work *de lege ferenda*. The second is that much of the work on new law today must be interdisciplinary, involving different branches of law, and even 'multi-interdisciplinary', involving other branches of science and human activity. In that context the question even arises whether the Commission is the proper body to concentrate on the progressive development of the law, apart from elements of progressive development as arise naturally in the course of a codification process, where there is a real desire and need to introduce corrections into the received law.

The Commission is not alone in facing this dilemma. The two non-governmental organizations specifically created to deal with the codification and development of the law — the Institute of International Law and the International Law Association — also face it and are looking for new ways of approaching these topics. The Institute, for example, at its session in Strasbourg last summer has asked its *Commission des Travaux*, its Programme Committee, to conduct feasibility studies on two new branches of law which are interdisciplinary *par excellence*, genetic engineering<sup>44</sup> and telecommunication.

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<sup>43</sup> Ch. de Visscher, *Théories et réalités en droit international public*, 3rd edition, 1960, 182.

<sup>44</sup> Cf. the Universal Declaration on the Human Genome and Human Rights, adopted by the 29th Session of the General Conference of UNESCO on 11 November 1997.

## X. Toynbee Refuted

Let us now return to the doctrine advanced by Toynbee which heads this chapter. Taking a look at the major codifications of national law, at first sight support for his pessimism can be found both in international and in national experiences.

The first great national codification is the *Code Napoléon*, completed in 1807. Seven years later Napoleon's France finally collapsed in the Battle of Waterloo (1814) and Europe was reorganized in the Congress of Vienna (1815). Yet can it seriously be said that in producing that work France was in the penultimate age before a social catastrophe, long *after* the peak of achievement in jurisprudence had passed? If anything, France reached its peak in the century between the Congress of Vienna and the catastrophe of 1914. And what about this side of the Rhine? The *Bürgerliches Gesetzbuch* was completed in 1900 — between the so-called Peace Conferences of 1899 and 1907. In a sense one could say that this did presage a social catastrophe, not only for Germany but for Europe and for the world as a whole, in the cataclysm of 1914 and the ruinous collapse of the aristocratic European civilization of legitimate monarchies as it had developed in the age of European imperialism. But it can hardly be said that its replacement half a century later by the modern technological revolution accompanied by increasing independence and democratization all over the world (although to different degrees and at different paces) puts that great codification "on the run in a losing battle with the ungovernable forces of destruction", in Toynbee's words.

We can say the same about the attempts at codification of the Anglo-American common law — codification which, not on the whole being in statutory form easily to be reproduced in pocket books, is not so well known as the European civil law codifications. In the United States this is achieved largely in a more informal way through the *Restatements* of the American Law Institute and the uniform laws adopted by the different states of the Union. In the British Empire this was largely achieved through the India Office with the great codes of India, and through the Colonial Office with the great codes produced for the colonial and other overseas territories, but not accompanied by anything similar in the United Kingdom itself. As in the civil law countries, the greatest jurists of the day have worked on producing these instruments, which in many instances have survived the break-up of the British Empire and Commonwealth, and form the core of the law of many of the new States that have arisen since 1945.

The codification of international law, whether through the ILC or through other mechanisms, is showing similar results. It has withstood the buffeting of history. Some of the Hague Conventions of 1907, progressive

development in their day, are now regarded as rules of customary international law, and that after two world wars. The 1930 Conference did not produce much in the way of treaties, but what it did produce, in the sphere of nationality, still retains some general interest, while its work on the law of territorial waters was in fact for the most part incorporated in the later work of the ILC and the Geneva Conventions of 1958. Even in the sphere of state responsibility, where the 1930 Conference was at its weakest, the negative results, at first continued by the United Nations, paved the way for the more correct orientation adopted by the ILC in 1963, leading to the draft articles adopted on first reading in 1996. Is that really a sign of decadence?

I do not know what led Toynbee to make his pessimistic remark. I do not see that it has any relevance for the codification of international law. In fact there is another way of looking at codification. In the *Oxford Companion to Law* we can read:

“Two major factors have operated in favour of codification, the desire to rationalize a more or less chaotic volume of pre-existing law and to provide a legal system with a fresh basis for development, and the desire to provide a unifying element for a newly created or developing state by creating a unified legal system.”<sup>45</sup>

That is the correct way of looking at the codification of international law as it has evolved during the last 50 years. Codification, rationalizing a chaotic volume of pre-existing law, is creating a unified legal infrastructure for the new international community of nations slowly taking shape.

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<sup>45</sup> D. Walker (ed.), *The Oxford Companion to Law*, 1980, s.v. Codification.