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CONFERENCE ON THE INTERNATIONAL LAW COMMISSION

GEORGE D. HAIMBAUGH, JR.*

A Conference on "The Future Work Program of the International Law Commission" was co-sponsored by the American Society of International Law and the University of South Carolina School of Law on March 11, 1972. Nineteen seventy-two was the sesqui-jubilee year of the International Law Commission which was created by a 1947 resolution¹ of the United Nations General Assembly as a means of complying with United Nations Charter Article 13's requirement that the General Assembly encourage "the progressive development of international law and its codification." Current interest in the future work of the Commission was stimulated by the 1971 publication, *Survey of International Law: Working Paper prepared by the Secretary General [of the United Nations] in the light of the decision of the [International Law] Commission to review its programme of work*²—a survey which Professor Myres S. McDougal has called "a state of the union message on where we are now" and a survey which "puts international law into focus as no other text book does."³ The 1971 *Survey* is the first since the original *Survey*⁴ of 1948 which was based on the work of Sir Hersch Lauterpacht and which contained a selection of twenty-five topics for possible inclusion on the Commission's agenda. Fourteen of these topics were chosen for study by the Commission which, between the publication of the two surveys, completed final drafts or reports with respect to seven of these topics⁵ and undertook studies of two others.⁶ Which

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1. Resolution 174 (II), November 21, 1947.

2. U.N. Doc. A/CN.4/245, 23 April 1971 [Hereafter referred to as *Survey*]. The *Survey* is to be republished in the *Yearbook of the International Law Commission*. Much of the work was done by Michael Hardy of the United Kingdom.

3. At the American Society of International Law Panel on Codification and Progressive Development of International Law, Washington, D.C., December 13, 1971.

4. *Survey of International Law in Relation to the work of Codification of the International Law Commission*, A/CN.4/1, Sales No. 48.V.1, reissued in 1949 under the symbol A/CN.4/1Rev. 1, Sales No. 48.V.1(1).

5. The regime of the high seas; regime of territorial waters; nationality, including statelessness; law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; and arbitral procedure. *Survey*, *supra* note 2, at 2.

6. Succession of States and Governments and State responsibility. The remaining

of these topics and which new topics the Commission should pursue in the future was the central question dealt with at the March, 1972, Conference at the University of South Carolina. The participants, eminent in the fields of law, scholarship and government, made recommendations for the future work of the Commission to Ambassador Richard D. Kearney, one of the twenty-five International Law Commission members since 1967 and the first American to be elected the Commission's president since Manley O. Hudson served as its first president in 1949.

At the Conference Ambassador Kearney made an introductory statement on recent and current work of the International Law Commission. He was followed by Professor Myres S. McDougal⁷ of the Yale Law School who presented his view of the purpose and proper function of the Commission. He stated that since most international law is made deliberately by multilateral agreement or other expression, or non-deliberately by the mere flow of uniform behavior and procedure by those in effective control, the creation of law is beyond the Commission's basic perspective. Its purpose is rather to clarify and to formulate the emerging expectations of the larger community. This it can do by exploring and exposing relevant facts, clarifying fundamental policies and recommending precise formulations of policy to the members of the United Nations through its General Assembly. This task of describing and rendering more explicit customary international law as it is being made by the effective elites of the world, it was further pointed out, requires the streamlining of the Commission's procedures and the enlargement of its staff. In short, Professor McDougal urges us to see the International Law Commission as an intelligence and recommending agency rather than a prescribing agency.

To the next speaker, Professor L.F.E. Goldie⁸ of the College

five topics from the Commission's list were recognition of States and Governments; jurisdictional immunities of States and their property; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and right of asylum. *Id.* See generally, *The Work of the International Law Commission*, United Nations Publication 67.V.4 (1967) or revised edition, United Nations Publication E.72.I 17 (1972).

7. Former president, American Society of International Law; former president, Association of American Law Schools. Author, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1963) [with William T. Burke]; and *LAW AND PUBLIC ORDER IN SPACE* (1963) [with Harold Laswell and Ivan Vlasic].

8. Director of International Legal Studies, Syracuse University College of Law. See Goldie, *International Principles of Responsibility for Pollution*, 9 COLUM. J. TRANSNAT'L

of Law of Syracuse University, the role of the International Law Commission is a symbolic rather than a prescribing one. However, since the Commission has an input into the formulation of these prescriptions, the languages that are used in the intercourse of the prescribers may develop their expectations and claims upon each other in the reciprocal process of the crystalization of the law. Therefore, as Professor Goldie feels, the International Law Commission has something more to offer than an intelligence function; he agrees with Professor McDougal's thesis that the Commission requires a far greater intelligence activity than it is presently able to perform due to the limitation of its budget.

Warming to the theme of his speech, "Liability for Space, Polar and Marine Disaster," Professor Goldie expressed his plea to Ambassador Kearney that the Commission take up the liability issue and produce a restatement of the law of international liability. He felt that its failure to act in this field in the past was due to the Commission's own crisis of identity and to the "firehouse mentality" of those at the United Nations who have assigned work on liability problems to special committees and specialized agencies such as the Space Committee and the Intergovernmental Maritime Consultative Organization (IMCO). As an example of "firehouse mentality," he cited the oil pollution conventions,⁹ the drafting of which was assigned to IMCO almost immediately after the *Torrey Canyon* disaster and which were in fact drafted on the basis of positions taken by British Prime Minister Harold Wilson. The Goldie approach to the problem of disasters at sea, in space and in the polar regions is suggested by the following passage from his speech:

As science and technology dance on the frontiers of what our environment can support, we require that the enterprisers and undertakers of these activities, whether they are scientific, military or simply economic, should not rely on the environment or the public to carry the costs of their risks, for to do so is a form of expropriation without any kind of compensation to the expropriatee whatsoever.

L. 283 (1970); Goldie, *The International Law Commission and the Progressive Development of International Law*, 28 FED. B.J. 25 (1968); and Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189 (1965).

9. *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 9 INT'L LEG. MAT. 25 (1970); *International Convention on Civil Liability for Oil Pollution Damage*, 9 INT'L LEG. MAT. 45 (1970).

Professor Goldie then proposed that an "absolute" liability be imposed on such operators and defined such liability as being based on the rule of *Rylands v. Fletcher*,¹⁰ with no exculpations save those arising from natural catastrophies or from political events such as revolutions and upheavals over which the operator can have no control and the burden of which should be borne, as predetermined, by the community as a whole.

Professor Goldie explained the Commission's crisis of identity as its tendency to see itself involved with law, as such, and with analytical problems—drawing the hem of its garment away from the political as if there were no such thing as legal politics. A similar note would have been struck by Professor Dean Rusk of the Law School of the University of Georgia had he been able to attend the Conference. The former Secretary of State had hoped to elaborate on his view formed at the State Department that the International Law Commission should cease gearing its work to its capabilities as now organized thus avoiding the "hot" international issue of the day. Rather, he believes, it could rely more heavily upon staff support of appropriate specialized agencies of the United Nations and so fortified, be able to deal with such issues while the need is still urgent.

In the afternoon, Professor Gerhard O.W. Mueller,¹¹ Director of the Criminal Law, Education and Research Center of New York University School of Law, spoke on "Proposals Regarding an International Criminal Court." Professor Mueller urged the Commission to take a broader interest in the development of international criminal law and proposed the establishment of judicial machinery headquartered on the border between East and West in the old Reichstag Building in Berlin.

Commentary followed by Professor McDougal, Professor Hardy Wickwar¹² of the University of South Carolina, and Professor David B. Michaels¹³ of Northern Virginia Community College and Trinity College. Professor Michaels asked that the International Law Commission prepare a draft convention on privileges and immunities for international organization personnel to supplement those conventions on diplomatic and consular immuni-

10. L.R. 3 H.L. 330 (1868).

11. Author, *INTERNATIONAL CRIMINAL LAW*, (1965) [with E. Wise].

12. Consultant to Social Defense Section, United Nations Secretariat.

13. Author, *INTERNATIONAL PRIVILEGES AND IMMUNITIES, A CASE FOR A UNIVERSAL STATUTE* (1971).

ties adopted in Vienna in 1960 on the basis of the Commission's recommendations. The new convention would provide uniform protection for the work of such personnel within the jurisdiction of both international organization member and non-member states including the individual international civil servant's home state.

The Conference ended with Ambassador Kearney replying to the various suggestions made during the day regarding the future work, organization, and priorities of the International Law Commission. His response to these proposals as well as to many other points raised in the United Nations Secretary General's *Survey of International Law* are to be found in the following comprehensive article by Ambassador Kearney.

