

THE COMMITTEE ON THE PROGRESSIVE DEVELOPMENT
OF INTERNATIONAL LAW AND ITS CODIFICATIONMETHODS FOR ENCOURAGING THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL
LAW AND ITS EVENTUAL CODIFICATIONMemorandum Submitted by the
United Kingdom Representative

1. In appointing our Committee the General Assembly adopted a Resolution of its Sixth Committee which contains the following passage:

"It was thought that, in view of the difficulties encountered in past efforts to promote the progressive development of international law and its codification, the proposed Committee would consider the possibility of recommending a fresh approach to the problem."

In this memorandum I try to suggest in outline the lines in which, as it seems to me, this fresh approach may be found.

2. The valuable and comprehensive historical survey of the past efforts to promote the progressive development of international law and its codification which the Secretariat has provided in document A/AC.10/5 makes it unnecessary to refer here in any detail to the difficulties to which the Sixth Committee refers. It is true that these efforts have led to many important achievements in the development of international law by legislation, that is to say, by the extension of the rules of international law into new fields and over matters not hitherto regulated by it. But it is, I think, generally admitted that, in so far as these past efforts have been directed towards promoting the codification of international law, the results, despite the successful work of the Inter-American Conferences, have on the whole been disappointing. This is particularly true of the most ambitious effort at codification hitherto attempted, the Conference

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of 1930 at The Hague. This lack of success makes it, therefore, important that our Committee should examine the difficulties which have been encountered, so that if mistakes have been made in the past their repetition in the future may, if possible, be avoided. A failure such as that of the Conference of 1930 is not merely negative in its effects; it casts doubt on the binding force of rules which have hitherto been generally accepted as rules of law and thus lowers the prestige which should belong to international law as a system to which all states owe allegiance.

3. Our Committee has been charged "to study the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification." Our task, therefore, is twofold, for, as Secretariat document A/AC.10/7 has pointed out, there are many ways in which the General Assembly might encourage "the progressive development of international law" which do not necessarily involve its "eventual codification." In this memorandum, however, I confine my observations to a consideration of the methods by which the General Assembly might encourage the eventual codification of international law, and in that connection my Government has formed the opinion that the difficulties which have been encountered in the past have been largely caused by the attempt to use for codifying the law a method which is inappropriate, namely, the promotion of international conventions.

4. International conventions fulfil for the society of states as a whole the function of legislation within a single state, and they are the only procedure by which the rule of international law can be extended into new fields. But codification is, or should be, a scientific task, and the disadvantage of attempting to codify the law in conventions is that the problem then ceases to be scientific and inevitably becomes predominately political. Conventions are made by States, and their

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provisions become binding for the future in the States that make them; it is, therefore, both proper and inevitable that no State should bind itself by a convention with the contents of which it is dissatisfied or which it thinks may in certain eventualities run counter to its interests. But this is not the question which presents itself in the codification of the law. Codification is primarily a task of ascertaining and declaring the law which already exists, and which is binding on states whether they approve its contents in every detail or not. It is true that it must necessarily involve the correction of minor inconsistencies in the existing rules of the law and the filling of lacunae for which those rules do not provide, and the distinction between legislation and codification can, therefore, not be a strictly scientific one. None the less the distinction is broadly true; the main purpose of codification is not to find rules which are acceptable to the parties, which is inevitably the first consideration in a convention, but to state what the rules already are.

5. An alternative procedure for promoting codification is to aim, at any rate in the first instance, at obtaining a scientific restatement of the law by independent experts, and my Government desires to suggest for the consideration of the Committee a plan on the following lines.

6. The General Assembly might establish a Codification Commission consisting possibly of seven lawyers of international repute, selected purely on their individual capacities and in no sense as representatives of governments. In order to eliminate the risk of political appointments my Government suggests that the members of the International Court of Justice might be invited to nominate the members of this Commission. It would, of course, be for the members of the Court to say whether or not they would accept such an invitation, but it does not seem that by doing so they would be in any way departing from the restrictions imposed upon them by the judicial character of the Court. In many cases international instruments

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provided for requests to be made to the Permanent Court of International Justice to assume functions such as the appointment of umpires or arbitrators or members of conciliation commissions, and the Permanent Court complied with such requests.

7. The first duty of the Codification Commission would be to divide the field of international law into sections and to choose three or four of these sections for immediate codification. For each of these selected sections the Commission would then appoint a rapporteur and a small expert advisory committee to work with him, and the Commission would entrust to each rapporteur the task of preparing a draft restatement of the principles of international law on the particular section of the law committed to him.

8. Each rapporteur would submit his draft restatement to the Codification Commission for consideration, and the Commission would either endorse it, or, probably after discussion with the rapporteur, return it to him for further consideration by him and his advisers. If a draft did not seem sufficiently satisfactory, it might be necessary for the Commission to make other arrangements for the preparation of a new draft.

9. As soon as any draft restatement appeared to the Commission to be satisfactory, it should arrange for its publication, with a suitable preface which would explain, inter alia, that the restatement was not binding either on governments or on the International Court, and that its authority was merely 'persuasive', that is to say, that its influence on governments or courts was dependent upon its scientific merits only. But it may be expected that the persuasive authority of a restatement made under the procedure here outlined, though lacking imperative force, would be considerable.

10. After the stage of publication of a restatement my Government would prefer to leave the further procedure open until it would be seen how successful the restatements produced in this manner were. They suggest, therefore, that an interval of time should in any case be allowed to

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elapse between the publication of a restatement and any further action regarding it. After such an interval it might seem best to leave the restatement to stand with merely persuasive authority. On the other hand, it might seem desirable to submit it to the General Assembly for approval by Resolution, or for inclusion in a convention to be concluded between the member states.
