THE FORMATION OF INTERNATIONAL LAW IN THE 21ST CENTURY

*John de Saram**

Thank you, Mr. Chairman, I take a somewhat different view of the International Law Commission and its work.

I

The methods and procedures of the Commission, as in the case of all human endeavors, need, of course, to be kept under regular review and to be improved wherever advisable. The methods and procedures of the Commission were referred to in the Sixth (the Legal) Committee of the UN General Assembly over the two weeks just passed, in the course of Sixth Committee consideration of the Report of the Commission.

The Resolution on the Commission to be adopted by the General Assembly, on the recommendation of the Sixth Committee, though still in negotiation, will, I believe, request the Commission to review next year, 1996, the final year of its present quinquennium (1992 to 1996), its methods and procedures of work in light of its experience over the quinquennium.

The Commission will report next year to the Sixth Committee, and I expect that in the fall of next year the Sixth Committee will consider Commission methods and procedures as well as the methods and procedures followed by the Sixth Committee itself when the Sixth Committee debates the Reports of the Commission.

A number of the specific points made by Professor Mcaffrey as to the methods and procedures of the Commission, as well as such other points as may be raised in the Commission itself, will this and will be considered next year both by the Commission and the Sixth Committee.

II

Yet it would be incorrect if the impression were to be left that the Commission was without useful purpose and just drifting aimlessly along. Whether or not a convention prepared by the Commission has been

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* Member of International Law Commission, Representative of Sri Lanka to United Nations General Assembly (50th session) Sixth Committee; and formerly Director, Office of the Legal Counsel, United Nations Office of Legal Affairs.

brought into force by governments within a short period of time is certainly not appropriate criterion of the usefulness or worthiness of the Commission. One need only refer to the many examples of conventions that have taken several years to enter into force (the 1969 Convention on the Law of Treaties and the 1982 Convention on the Law of the Sea come immediately to mind), yet which have not in the meanwhile been without considerable influence on governments and governmental practice.

Though the membership of the Commission are nominated by governments and elected by the General Assembly, members of the Commission serve in their individual capacities. This is as it and was intended to be and should be. The Commission is not, in other words, just another committee of governmental representatives. It is required to have, and does have, careful regard to both governmental and non-governmental opinion: to the views of the practitioner of international law but to those of the academic as well, to the former for guidance as to trends in state practice and to the latter for opinion as to what, in light of principle, is the proper "doctrinal" course.

The proposals of the Commission are in the nature of recommendations to the General Assembly on what, in the view of the Commission, the law presently is, codification, and on what, in the view of the Commission, the law ought to be, progressive development. One cannot, of course, assume that the views of the Commission, the General Assembly, and governments will always be comfortable. Yet neither should one assume that the recommendations of the Commission, even though not brought by governments speedily into force, are without persuasiveness.

III

A glance at the record of the past four years of the present quinquennium of the Commission, moreover, is surely not unimpressive.

In 1993 and 1994, the Commission, as requested by the General Assembly, did an extraordinary amount of work in the preparation of a statute for the establishment of an international criminal court. It is true that there still remain a number of difficulties to be resolved in the statute, such as the provisions of the statute relating to the Security Council. Yet, whatever the ultimate disposition of the Commission's statute for an international criminal court, the fact should remain that the Commission took the concept of an international criminal court much, much, further than it had ever been taken, since the subject of an international criminal court was first placed on the international legal agenda in the early 1950s. Whatever each of us may feel as to the usefulness or likelihood of an

international criminal court, we must recognize that there was, and is, a very substantial body of world opinion in favor of very serious consideration now being given to the question of the establishment of an international criminal court.

Nor should the work of the Commission on the "Draft Code of Crimes Against the Peace and Security of Mankind" be lightly dismissed. It is true that, in the interests of arriving at a consensus within the Commission, initial proposals made by its Special Reporter as to the subject-matter scope of the Code have been very substantially reduced.

It is also true that there is a substantial body of opinion to the effect that, given the incorporation into the proposed Statute for an international criminal court of definitions of international crimes in treaties presently in force for the purpose of demarcating the subject-matter jurisdiction of the Court, no useful purpose would be served by the elaboration of a Code of Crimes against the peace and security of mankind. Yet there is also a substantial body of opinion that holds that there are a number of international crimes that would not be provided for in the Statute for an international criminal court, and that the inclusion of such international crimes in a code, be it only for deterrent effect, would begin a process of consolidation into a single code of the substantive law of international crimes. And it is difficult to conclude that the world does not seem ready for such a code of international crimes.

The work of the Commission in the last four years on "State responsibility" has also, I would think, been extraordinarily useful. There was in the Commission, in 1994 and 1995, one of the most interesting discussions ever, in any forum, of the controversial concept of state crimes and of the controversial concept of counter-measures. In 1995, there were also a number of provisions completed by the Commission for Part Three, the concluding section, of its Articles on State Responsibility which would provide for the settlement of disputes; and that would provide particularly for settlement of disputes in situations where one state has taken a counter-measure against another state.

The work of the Commission in the field of counter-measures has been very much in the area of progressive development, given the sparseness of authoritative international judicial or arbitral decision with respect to this issue. Though still incomplete, the work of the Commission, certainly in my view, is a most impressive example of consensus procedure working as it should in legal deliberative bodies: a reaching out for the highest level of agreement possible on sensitive and controversial matters.

IV

Of course, if the subjects placed on its agenda are too broad, or contain too great a component of political sensitivity, or should a subject contain at its core a fundamental but unresolved question of great legal principle, great difficulties arise in the Commission.

This is particularly so as the Commission must have regard not only to the nature of state practice but also to non-governmental opinion and also because the Commission always proceeds in its work by way of consensus, except in very ultimate recourse.

If the subject of "state responsibility" is a subject of great breadth of scope and if the "Code of Crimes Against the Peace and Security of Mankind" is one of high political sensitivity, then the subject of "Liability for injurious consequence of activities not prohibited by international law" is one which contains at its core a fundamental but unresolved question of great legal principle and great practical implication. The question is whether the criterion of "due diligence" is the legally necessary, or the practically sensible, standard for determinations as to the basis of the obligation to compensate in cases of physical transboundary harm.

The fact that injurious consequences in one state of an activity in another state, which are not prohibited by international law, may be extremely substantial or even catastrophic exacerbates complexities. The question of the basis of the obligation to compensate in physical transboundary harm cases has not as yet been clarified in the Commission. Whether or not the Commission reaches consensus conclusions, its debates and working documents on the issue will undoubtedly be followed very carefully outside the Commission and will be of substantial interest to those concerned with the development of international law in such transboundary cases.

Authoritative precedent in the form of international judicial or arbitral decisions is sparse, and found by some to offer no guidance. Further, treaty practice or custom are indeterminative largely because, it would seem, governmental representatives are, quite understandably, sensitive to the very great implications of the question of the obligation to compensate for physical transboundary harm and have, therefore, hesitated in treaty or in practice to resolve the basic legal question that needs to be considered. The one exception to this observation is the 1972 Convention on International Liability for Damage Caused by Objects Launched into Outer Space. Thus, recourse would seem to be necessary, in terms of Article 38(1)(c) of the Statute of the International Court of Justice, to "general principles of law recognized by civilized nations." And there, of course, one finds a substantial body of national precedent for a moving

away on occasions, such as in cases of extra-hazardous activities, from the "due diligence" criterion. Yet it is not at all an easy question to resolve and understandably has occupied much time within the Commission.

V

Thus, I would think that the record of the Commission's present quinquennium would show that the Commission, which proceeds, as it should, in the light of governmental and non-governmental opinion and through consensus-procedure, is useful and worthy. But, of course, it is important that the subjects placed on the agenda of the Commission and its methods and procedures, as in the case of all legal deliberative bodies, be kept under continuous and careful review.