

STATUTE OF THE INTERNATIONAL LAW COMMISSION

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The International Law Commission is a subsidiary organ of the United Nations General Assembly, whose object is the promotion of the progressive development of international law and its codification. The Commission is governed by a Statute annexed to General Assembly resolution 174 (II) of 21 November 1947 (as amended). In addition to setting out the structure and working methods of the Commission, the Statute is of interest for what it tells us about the divided attitudes, in 1947, towards the codification and progressive development of international law. Notwithstanding the divisions of the time – perhaps even because of the somewhat awkward compromises in the text, the Statute of the International Law Commission has proven to be a far-sighted and flexible document, which has stood the test of time.

The movement to codify international law had its origins in *ad hoc* conferences (e.g., Vienna 1814-1815, Paris 1856, The Hague 1899/1907, London Naval Conference 1908-1909) and private ventures (Institut de Droit International and International Law Association, both established in 1873; Harvard Research in International Law, published 1929-1939). To a degree stimulated by the need for clarity in the law if the jurisdiction of the newly established Permanent Court of International Justice were to be accepted, the League of Nations engaged in more systematic intergovernmental efforts, culminating in the work of the Committee of Experts for the Progressive Codification of International Law (1924) and the 1930 Hague Codification Conference and its Preparatory Committee, but these were not a great success. In 1931, the League Assembly adopted a resolution on the procedure of codification, the underlying theme of which was strengthening the role of Governments in the codification process. Many of its ideas were included in the Statute of the Commission.

Article 13, paragraph 1 (a), of the Charter of the United Nations provides that the Assembly “shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.” The General Assembly moved swiftly to implement this provision. It established at its first session in 1946 a Committee on the Progressive Development of International Law and its Codification (known as the “Committee of Seventeen”), which met from May to June 1947 and recommended the establishment of the International Law Commission. The work was taken forward, later in 1947, by Subcommittee 2 of the Sixth Committee. Many important questions concerning the composition of the Commission or arising in the course of its work were considered in depth during the negotiating history of the Statute, as is clear from the reports of the Committee of Seventeen and Subcommittee 2. These included whether the members should be full- or part-time, whether they should represent Governments or serve in their individual capacities (a large majority in both Committees favoured the latter), and the distinction between progressive development and codification (on which views were divided, and which turned out to be impractical - see below).

The Statute, being annexed to a resolution of the General Assembly, does not have the status of a treaty, and may be amended by a subsequent resolution of the General

Assembly. Yet it has remained largely unchanged for over 60 years. It has been amended by six resolutions of the General Assembly (in 1950, 1955, 1956, 1961 and 1981), chiefly as regards the membership of the Commission, the term of office of the members, and where they meet.

At the request of the General Assembly, the Commission briefly reviewed its Statute in 1951, but essentially confined itself to recommending that it be put on a full-time basis. This recommendation was not adopted by the Assembly, and in 1952 the Commission decided that it would not be opportune to proceed further with the review. In 1996, in the course of a general review of its programme, procedures and working methods, the Commission noted that the Statute had never been the subject of a thorough review and revision, but concluded that, on the whole, the Statute had been flexible enough to allow modifications in practice (Report of the International Law Commission on the work of its forty-eighth session, 1996, paras. 241-243). On that occasion, the Commission drew attention to some aspects of the Statute which warranted review and revision (in particular, what it described as the “unworkable” distinction between progressive development and codification, where it suggested that “the procedure for both should be expressly assimilated”). The Commission recommended that it give thought to the possibility of recommending to the General Assembly a review of the Statute, but this was not followed up. Presumably States did not consider the anomalies in the Statute sufficiently serious to warrant opening up the text to general review.

The Commission’s current working methods are not readily apparent from the Statute, which needs to be read in light of the practice of the Commission and General Assembly as it has evolved since 1947. While the Statute does establish the basic framework for the organization of the Commission, its working methods, and indicates the outcomes of its work, it has not acted as a straitjacket. But it nevertheless remains the starting point for an understanding of the Commission.

After a first article setting out the object of the Commission, the Statute is divided into three chapters. Chapter 1 (articles 2 to 14) concerns the organization of the Commission. Chapter 2 (articles 15 to 24) describes its functions. Chapter 3 (articles 25 and 26) deals with cooperation with other bodies.

Article 1, reflecting Article 13, paragraph 1 (a), of the Charter, provides that the object of the Commission is “the promotion of the progressive development of international law and its codification.” It further provides that “[t]he Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law”. The Commission has not in fact concerned itself with private international law, except incidentally as part of its consideration of questions of public international law (such as in connection with the topic Jurisdictional immunities of States and their property).

Chapter 1 deals with the Commission’s composition, the procedures for the nomination of candidates and their election, the term of office of members (initially envisaged as three, but extended to five years as early as 1950), payments to be made to them (which continues to be a controversial matter), and where the Commission should meet. The Statute originally provided that the Commission should sit in New York, but this was changed to Geneva in 1955, given the view of the Commission that conditions at the European office of the United Nations are more conducive to efficiency in the kind of

work the members of the Commission have to perform. Indeed, after its first session, the Commission has almost always met in Geneva.

Initially the Commission had fifteen members. This increased to twenty-one in 1956, twenty-five in 1961, and thirty-four in 1981. The members of the Commission are to be “persons of recognized competence in international law” (article 2). It is implicit in the text of the Statute, and clear from the negotiating history and subsequent practice, that they serve in their individual capacity, not as representatives of States.

Candidates are nominated by States. Those who obtain the greatest number of votes in the General Assembly and not less than a majority of those present and voting (up to a maximum prescribed for each regional group) are elected. The maximum for each of the five regional groups is prescribed by resolution of the General Assembly (see General Assembly resolution 36/39 of 18 November 1981). The Statute instructs the electors to bear in mind that “in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured”. Casual vacancies are filled by the Commission itself.

The Statute requires the Secretary-General, so far as he is able, to make staff and facilities available to the Commission. The Codification Division of the Office of Legal Affairs has, from the very beginning, made an important substantive contribution to the Commission’s work, not least by preparing or commissioning studies both of a general nature and on individual topics on the Commission’s agenda. The fact that the members of the Commission are not full-time has made the Division’s contribution even more vital. Successive Directors of the Codification Division have acted as Secretary to the Commission.

Chapter 2, entitled “Functions of the International Law Commission”, commences with an article describing, for the purposes of the Statute, “progressive development of international law” and “codification of international law” (article 15). “Progressive development” means “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.” “Codification” means “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”

The chapter then sets out separate procedures for progressive development (Part A) and codification (Part B). Part A further distinguishes between (i) cases where the General Assembly refers to the Commission a proposal for the progressive development of international law (article 16); and (ii) cases where proposals and draft multilateral conventions are submitted by Members of the United Nations, principal organs other than the General Assembly, specialized agencies, or “official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification” (article 17).

Part B sets out a single procedure for codification. This includes an important provision listing a range of possible outcomes to the Commission’s work, a provision that in practice seems equally appropriate for topics involving progressive development of the law. The Commission may recommend to the General Assembly (a) to take no action, the report having been published; (b) to take note of or adopt the report; (c) to recommend the

draft to Members of the United Nations with a view to the conclusion of a convention; or (d) to convoke a conference to conclude a convention (article 23).

It quickly became apparent that the Statute's distinction between progressive development and codification, with three separate procedures, was not workable in practice. According to Briggs (*The International Law Commission*, p. 141), "[i]t was foreseen from the outset that the distinction was basically and practically unsound, but political considerations had dictated its incorporation in the Statute." In practice, the Commission has developed what is essentially a single, albeit flexible procedure, for handling all main topics, drawing on the main features of the procedures in the Statute. These include a deliberate progression through a first and second reading, taking full account of the importance of consulting States throughout the process, individually and within the Sixth Committee.

Part B contains two provisions of wider interest. Article 18 required the Commission to "survey the whole field of international law with a view to selecting topics for codification", with a view to selecting those whose codification is "necessary and desirable". This led to Hersch Lauterpacht's celebrated "survey of international law", which (together with a 1971 survey) was the main inspiration for the Commission's work for almost fifty years. Since 1992, the Working Group on the Long-term Programme of Work of the Commission has been identifying the topics for possible future consideration by the Commission on the basis of outlines or summaries of pre-selected topics prepared by members of the Commission, or its Secretariat. On that basis, the Working Group regularly recommends a list of topics to be included in the long-term programme of work of the Commission. This list now guides the Commission in the selection of topics.

Under article 24, the Commission was to "consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of decisions of national and international courts on questions of international law". Part II of the Commission's 1950 report to the General Assembly led to a series of important publications, international and domestic, official and non-official, which continue today, including the *United Nations Juridical Yearbook*, the *United Nations Legislative Series*, the *Repertory of Practice of United Nations Organs*, and the *Reports of International Arbitral Awards*.

Chapter 3 makes provision for the Commission to consult widely, with any United Nations organ, and with "any international or national organizations, official or non-official" (articles 25 and 26). (Articles 16 and 21 also refer to consultations with scientific institutions and individual experts.) The trend towards greater consultation seems likely to continue, especially as the Commission takes up new emerging topics. The Commission has recently held consultations with outside experts on such topics as Shared natural resources, Responsibility of international organizations, and Protection of persons in the event of disasters. For an instrument drafted in 1947, the Statute displays a remarkable openness to consultations, both with Governments and with non-governmental bodies and experts.

Related Materials

A. Documents

League of Nations, Assembly resolution of 25 September 1931: *Records of the Twelfth Assembly*, Plenary Meetings, p. 135.

General Assembly resolution 94 (I) of 11 December 1946 (Progressive development of international law and its codification).

United Nations Documents on the Development and Codification of International Law, prepared for the Committee on the Progressive Development of International Law and Its Codification, (including Historical Survey of Development of International Law and Its Codification by International Conferences (A/AC.10/5 of 29 April 1947)), *American Journal of International Law, Suppl.*, vol. 41, No. 4, 1947, p. 29-147.

Report of the Committee on the Progressive Development of International Law and its Codification (A/AC.10/51, reissued as A/331), 17 June 1947.

Report of the Sixth Committee Subcommittee 2 (A/C.6/193), 18 November 1947 (reprinted in *Official Records of the General Assembly, Second Session*, 1947, Sixth Committee, Summary Records, Annexes, p. 188, without text of draft Statute).

General Assembly resolution 174 (II) of 21 November 1947 (Establishment of an International Law Commission).

Report of the International Law Commission on its second session, 5 June to 29 July 1950 (A/1316, reproduced in the Yearbook of the International Law Commission, 1950, Part II, p. 367).

General Assembly resolution 485 (V) of 12 December 1950 (Amendment to article 13 of the Statute of the International Law Commission).

Report of the International Law Commission on its third session, 16 May to 27 July 1951 (A/1858, reproduced in the Yearbook of the International Law Commission, 1951, vol II, chapter V, p. 137-139).

General Assembly resolution 984 (X) of 3 December 1955 (Amendment to article 12 of the Statute of the International Law Commission: Place of meeting of the Commission).

General Assembly resolution 985 (X) of 3 December 1955 (Amendment to article 10 of the Statute of the International Law Commission: Term of office of members of the Commission).

General Assembly resolution 1103 (XI) of 18 December 1956 (Amendments to articles 2 and 9 of the Statute of the International Law Commission).

General Assembly resolution 1647 (XVI) of 6 November 1961 (Enlargement of the International Law Commission: Amendments to articles 2 and 9 of the Statute of the Commission).

General Assembly resolution 36/39 of 18 November 1981 (Enlargement of the International Law Commission).

Report of the International Law Commission on the work of its forty-eighth session, 1996, (A/51/10 (Supp)), paras. 241-243.

B. Doctrine

For a work “largely organized as a legal commentary on the meaning of the provisions of the Commission’s Statute” (taking the story up to the early 1960s), see H. W. Briggs. For more recent developments, see Part II of the latest edition of *The Work of the International Law Commission*.

H. W. Briggs, *The International Law Commission*, Ithaca, New York, Cornell University Press, 1965.

R. Y. Jennings, “The Progressive Development of International Law and its Codification”, *British Yearbook of International Law*, vol. 24, 1947, p. 301.

Y-L. Liang, “The General Assembly and the Progressive Development and Codification of International Law”, *American Journal of International Law*, vol. 42, 1948, p. 66.

Y-L. Liang, “Le Développement et la codification du droit international”, *Recueil des Cours*, vol. 73, 1948-II, p. 411.

S. Rosenne, “The International Law Commission 1940-59”, *British Yearbook of International Law*, vol. 36, 1960, p. 104.

P. S. Rao, “The International Law Commission”, in R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, [www.mpepil.com], visited on 1 December 2008.

United Nations, *The Work of the International Law Commission*, seventh edition, 2007 (United Nations publication, Sales No. E.07.V.9), vol. I, Parts I. 3 and II.