



CONCEPT NOTE

By

Prof. Charles C. Jalloh
Florida International University
College of Law

Member, International Law Commission and Chair of Drafting Committee, 70th Session

Seventieth Anniversary Celebration Symposium

The Role and Contributions of the International Law Commission to the Development of International Law in the Past/Next 70 Years: Codification, Progressive Development, or Both?

Venue: FIU College of Law, Rafael Diaz Balart Hall, 11200 SW 8th Street, Miami, FL 33199

Dates: Friday and Saturday, 26 and 27 October 2018

With the view to promoting international cooperation among states in the political field, the United Nations General Assembly, under Article 13, paragraph 1 of the *Charter of the United Nations*, was tasked with initiating studies and making recommendations to encourage “the progressive development of international law and its codification”. In seeking to discharge that important responsibility, during the second part of its first session, the General Assembly adopted Resolution 94(I) on 11 December 1946 by which it established the Committee on the Progressive Development of International Law and its Codification (the so-called “Committee of Seventeen”). The Committee, comprised of seventeen members, was asked to conduct a thorough study and make recommendations on the most effective method by which the General Assembly could discharge its Charter obligation to promote the progressive development and formulation of public and private international law.

Following a careful study, the committee of experts recommended the establishment of a full-time international law commission comprised of persons with recognized competence in the field, sitting possibly in their personal capacity, and reflecting the principal legal systems of the world. The General Assembly endorsed the recommendation through the adoption of Resolution 174 (II) on 21 November 1947, to which was annexed the Statute of the International Law Commission, though it opted for the establishment of a part-time rather than a full-time body. The Commission was initially comprised of 15 members. However, thrice over the course of several decades, its membership expanded to reflect the growth of the United Nations (to 21 in 1956, 25 in 1961), until it settled in 1981 on the present number of 34 independent members drawn from the different geographic regions of the world. The increase in size could better ensure the representation of the main forms of civilization and of the principal legal systems of the world.

The Commission’s mandate was set out in Article 1 of its statute. The new body had as its “object” the promotion of the “progressive development” of international law and its “codification”. Article 15 of the Statute then



developed these two ideas further. The former expression was defined to mean “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”. Whereas, the phrase “codification of international law” was understood to be a specific reference to “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”. Emphasizing the apparent distinctive character of “progressive development” and “codification”, additional statutory provisions (Articles 16 and 17, and Articles 18-23, respectively) fleshed out the general procedures that the Commission shall follow in carrying out each of its statutory responsibilities.

In its practice, the Commission initially sought to adhere to the distinction between the progressive development of international law, on the one hand, and the codification of international law on the other. But as it began to delve deeper into its work program, the question arose whether there can be as clear-cut a distinction between “progressive development” and “codification” as a textual reading of the statute implied. The Commission soon drifted towards the nuanced understanding that despite the distinction advanced by its founding statute, the two concepts of codification and progressive development overlapped to such an extent that it was hard to draw a neat line separating them. Practice suggested that the formulation and systematization of an existing rule could easily lead to the conclusion that another new and complementary rule should be suggested for consideration by states. Thus, far from the two forms being mutually exclusive, as was apparently envisaged by the statute, they were intertwined, inter-related and indivisible.

In the result, by the end of its first decade, the Commission had begun to develop and ultimately settled on a so-called “composite idea” of its mandate. It thus freely drew on aspects of both progressive development and codification to elaborate international legal principles, guided only by the specific needs of the project under consideration. By 1996 when it celebrated its 50th anniversary, and upon the special invitation of the General Assembly, the Commission’s review of its mandate and working methods ultimately concluded that the apparent division in its statute was difficult if not impossible to maintain in practice. It thus suggested that the formal distinction between codification and progressive development could, in its view, be eliminated in any future review of its constitutive instrument. This recommendation has not been taken forward since the statute has not been reopened for amendments.

In any case, despite the seeming uncertainty surrounding interpretation of its mandate, over the course of the past 70 years, the Commission has made significant contributions to the development of modern international law. In this regard, it has produced seminal international law instruments which have in some cases set the benchmark for inter-state regulation of core areas of the field including the law of the sea, the law of treaties, diplomatic and consular immunities, international criminal law and the law of state responsibility.

On the occasion of the Commission’s 70th anniversary, Florida International University College of Law and the Center for International Law and Policy in Africa will convene an international symposium to assess the past, examine the present and peek into the future from the perspective of progressive development and codification of international law. Leading scholars and practitioners of international law from the United States and around the world will meet in



beautiful Miami to interrogate how the foundational pillars of “progressive development” and “codification” of international law took concrete expression in the *mandate* and in the *practice* of the Commission. We will review the key accomplishments of the past seventy years, identify their distinctive features, as well as celebrate the resulting contributions to establishment of a rule based international legal order.

Turning to the present, we will debate the Commission’s role in the contemporary law-making process, its topic selection process, and potential improvements of its working methods. Key questions include whether the ILC should strike a better balance between “traditional” and “newer” topics, between “progressive development” and “codification”, between maintaining stability and innovating change, and if so, how far it can realistically be expected to go as a subsidiary body of the General Assembly towards progressively developing international law. We will assess whether, and if so how, the part-time as opposed to full-time nature of the Commission impacts its work, its relationship with the Sixth Committee of the General Assembly and other UN organs, international organizations and regional bodies as well as global civil society including experts, academics and non-governmental organizations. We will also discuss the key work products of the ILC, including those in relation to which states have not taken up the Commission’s recommendations and ask the “why” question with the view to identifying the political, legal and other factors that may have impacted these and possible improvements that could be made in that regard.

Looking forward, and building on the successes of the past while considering the projects and challenges of the present, the symposium will invite participants to imagine how international law should develop in the next seventy years and the role that the Commission could play in that regard. Can the Commission enhance its relevance by being flexible and creative in the interpretation of its statute? Since proposals for amendments of its statute have met with only limited success to date, could it adjust its practices to better meet the current needs of states and the international community? What types of pressing international legal issues are confronting the world today that the Commission could examine and thereby strengthen its contributions to the international community and to the advancement of international law? Could the ILC enhance its role by perhaps paying greater attention to the needs of the majority of states especially people and countries of the Global South? What, if any, strategic or structural changes might be required in that regard?

Ultimately, in terms of concrete outcomes of this symposium, it is hoped that a small selection of the invited papers will be published with the *FIU Law Review*. Subject to later confirmation, it is possible that a smaller collection of the papers and others that are commissioned for that purpose will be published with Oxford University Press or Cambridge University Press, under Professor Jalloh’s editorship.