



DISCOURSES ON METHODS IN INTERNATIONAL LAW: AN ANTHOLOGY

THE UN INTERNATIONAL LAW COMMISSION
AND CUSTOMARY INTERNATIONAL LAW

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ABSTRACT: Various aspect of the International Law Commission (ILC)'s relationship with customary international law are considered: first, the distinction between codification and progressive development in the ILC's Statute, as well as the distinction between *lex lata* and *lex ferenda* in the ILC's work. The practice of the ILC as regards codification is then set out, and its recently concluded work on *Identification of customary international law* is described. A final section deals with the ILC's own possible contribution to the development and identification of rules of customary international law.

KEYWORDS: International Law Commission – customary international law – codification of international law – General Assembly – Gaetano Morelli – methodology of international law.

I. INTRODUCTION

It is an honour to take part in this fourth series of the Gaetano Morelli Lectures. Morelli was a jurist in the great Italian tradition, a scholar in both public and private international law. He had a distinguished career as an academic, a practitioner, and a Member of the International Court of Justice (ICJ) from 1961 to 1970.¹

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¹ See E. CANNIZZARO, *Morelli, Gaetano*, in *Dizionario biografico degli italiani*, 2012, www.treccani.it; E. STOPPIONI, *Gaetano Morelli (1900-1990)*, in *Société française pour le droit international, Galerie des internationalistes*, www.sfdi.org; G. GAJA, *Introduction*, in E. CANNIZZARO (ed.), *The Present and Future of Jus Cogens – Gaetano Morelli Lectures Series*, Roma: Sapienza Università Editrice, 2015, www.crde.unitelmasapienza.it, p. 1 *et seq.* Among Morelli's major writings on public international law are *Nozioni di diritto internazionale*,

I would like to think that Gaetano Morelli would have appreciated the subject of this year's lecture series, entitled "Rethinking the doctrine of customary international law". Morelli devoted much of his writings to fundamental questions of international law, including sources. His views on customary international law seem to have been mainstream and straightforward, and he had the opportunity to express and to apply these views as a judge on the ICJ.

Customary international law plays a large role in the work of the UN International Law Commission (hereafter "Commission"), as it does in international law generally.² In 1947, when the Commission's Statute was adopted, international law was largely uncodified, with a few exceptions, including the law relating to the use of force and the laws of war.³ In its essentials, and leaving aside technical fields, international law remained largely unwritten law, that is, uncodified customary international law (or occasionally "general principles of law" within the meaning of Art. 38, para. 1(c), of the Statute of the ICJ). Now the position is quite different, in large part as a result of texts adopted on the basis of the Commission's work. A glance at any general manual on international law will show that many chapters are based largely on the Commission's work, including those on the law of the sea; diplomatic and other immunities; the law of treaties; and international responsibility.

This lecture covers the following matters: the progressive development of international law and its codification as functions of the Commission, and in particular the distinction between these two concepts that was set out in the Commission's Statute of 1947 (Section II), as well as in the practice of the Commission since 1949 (Section III); the Commission's recent work on the topic *Identification of customary international law* (Section IV); and, finally, how to describe the Commission's own role in the customary process (Section V).

First, a preliminary point. It is often suggested, and rightly so, that international law aspires to be a "common language" for the international community.⁴ To this end, it is important to have well-understood terminology to describe its principal concepts, and to use terminology consistently. Over the years, the Commission has made significant

Padova: Cedam, 1967 (French translation R. KOLB, *Notions de droit international public, Gaetano Morelli*, traduction de la 7. édition publiée à Padoue, chez CEDAM, en 1967, Paris: Pedone, 2013) and *Cours générale de droit international public*, in *Collected Courses of the Hague Academy of International Law*, vol. 89, 1956, p. 437 *et seq.* (with bibliography). For a more recent bibliography, see *Comunicazioni e studi*, 1975, p. ix *et seq.*

² O. SENDER, M. WOOD, *Custom's Bright Future: The Continuing Importance of Customary International Law*, in C.A. BRADLEY (ed.), *Custom's Future: International Law in a Changing World*, Cambridge: Cambridge University Press, 2016, p. 360 *et seq.*

³ Primarily in the UN Charter and in the Hague Regulations/Geneva Conventions, respectively.

⁴ See, as one example among many, J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2019, pp. 14-15: "International law provides – in significant part – not merely the vocabulary of interstate relations but its underlying grammar".

contributions in this regard. Terms and concepts used by the Commission have become standard usage in legal argument and in the decisions of courts and tribunals, as well as in writings. This is just one way in which the Commission makes an important contribution to the system of international law, to its coherence, clarity and consistency.

Agreement on terminology is perhaps even more important in relation to the subject-matter of the present lecture, which seeks to address some fundamental issues concerning the identification and development of international law. It may therefore be helpful to mention one or two terminological points at the outset. The following terms, or pairs of terms, need to be distinguished, or at least explained: codification/progressive development; existing rules of international law (*lex lata*)/proposals for new rules (*lex nova*); *lex ferenda*, a term that seems to be used (or abused) in various ways; even *lex desiderata*.⁵ In particular, an important distinction needs to be made between the terms “codification” and “progressive development” on the one hand, and “*lex lata*” and “*lex ferenda*” on the other. At least as used in the Statute of the Commission, the former refers to the outcome of a process of reducing unwritten law to writing; it is inevitably a matter of degree. The latter is a clear-cut distinction: a rule is either existing law or it is not.

For a practitioner, at least, whether judge, legal adviser or advocate, it is important, essential indeed, to distinguish between existing rules of international law (*lex lata*) and proposals for new rules of law (*lex nova*), whether rules that are claimed to be developing (*lex ferenda*) or rules as one would like them to be (*lex desiderata*). To illustrate the practical importance of this distinction in the Commission’s work, one may refer to a current topic, *Immunity of State officials from foreign criminal jurisdiction*, where the question which State officials are (or should be) entitled to immunity *ratione personae* and the question of exceptions to immunity *ratione materiae* raise just this issue.⁶

Such terminological questions are distinct from another important matter: the need for terms that correspond in the various languages. The Commission is always mindful of the importance of ensuring that its texts correspond, so far as possible, in the six official UN languages.⁷ And it is also important that there is well-understood terminology

⁵ In his presentation on the occasion of the commemoration of the Commission’s 50th anniversary, Owada made an interesting distinction between three kinds of international legislation, namely “codification”, “progressive development” and “law making *de novo*”: cf. *Presentation by Hisashi Owada*, in *Making Better International Law: The International Law Commission at 50 – Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, New York: United Nations Publications 1998, www.legal.un.org, pp. 70-72.

⁶ M. Wood, *Lessons from the ILC’s Work on ‘Immunity of State Officials’*, Melland Schill lecture, 21 November 2017, in *Max Planck Yearbook of United Nations Law*, 2018, p. 34 *et seq.*

⁷ Frequent references are made in this connection to the importance of “multilingualism” (see, for example, General Assembly, Resolution 71/328 of 11 September 2017, UN Doc. A/RES/71/328). The Commission certainly benefits from drafting in two or more languages, since this can play a major role in promoting greater precision and understanding.

in non-UN languages, not least because nowadays the national courts of many States are called upon to decide questions of international law.

II. THE DISTINCTION BETWEEN PROGRESSIVE DEVELOPMENT AND CODIFICATION IN THE STATUTE OF THE INTERNATIONAL LAW COMMISSION

The International Law Commission is a subsidiary organ of the UN General Assembly, composed of thirty-four persons “of recognized competence in international law” and mandated, in fulfilment of Art. 13, para. 1(a), of the UN Charter (hereinafter “Charter”), with promoting “the progressive development of international law and its codification”.⁸ It was established by General Assembly resolution 174 (II) of 21 November 1947, to which the Statute of the Commission is annexed. Nowadays, the Commission meets for ten to twelve weeks each year, usually at the UN Office in Geneva.

It is important to recall that, however influential it may sometimes seem, the Commission is not a legislature. This is clear from the cautious wording of Art. 13 of the Charter as well as Art. 1 of the Commission’s Statute. Art. 13, para. 1(a), of the Charter provides that the General Assembly “shall initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification”. Pursuant to this, Art. 1 of the Commission’s Statute provides that “[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification”.⁹

Thus, neither the General Assembly, nor its subsidiary organ, the Commission, has the power to make law. This reflects a deliberate choice by the negotiators of the Charter. As is said in the Simma Commentary, “[a]t the San Francisco Conference [...] all attempts to give the [General Assembly] any power to establish the content of international law with binding force were rejected”.¹⁰

It has been suggested that the expression “progressive development of international law and its codification” limits the mandate of the Commission, and that the Commission (and perhaps even the General Assembly) would be acting *ultra vires* if they

⁸ Cf., Arts 2, para. 1, and 1, para. 1, respectively, of the Statute of the International Law Commission.

⁹ For the drafting history of Art. 13, para. 1(a), of the Charter, see *Documents of the United Nations Conference on International Organization, San Francisco, 1945* (UNCIO): vol. III, documents 1 and 2; vol. VIII, document 1151; vol. IX, documents 203, 416, 507, 536, 571, 792, 795 and 848. Art. 1 of the Statute goes on to say that the Commission “shall concern itself primarily with public international law, but is not precluded from entering the field of private international law” (though the latter hardly happens in practice).

¹⁰ C.-A. FLEISCHHAUER, B. SIMMA, *Article 13*, in B. SIMMA, D.-E. KHAN, G. NOLTE, A. PAULUS (eds), *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press, 2012, p. 301. See also H. BRIGGS, *The International Law Commission* Ithaca, New York: Cornell University Press, 1965, pp. 4-12; United Nations, *The Work of the International Law Commission*, New York: United Nations Publications, 2017, p. 4 (“The Governments participating in the drafting of the Charter of the United Nations were overwhelmingly opposed to conferring on the United Nations legislative power to enact binding rules of international law”).

purported to go beyond codification and the progressive development of existing law to work on proposals for entirely new law, except perhaps where the Commission receives a special assignment, in particular from the General Assembly, or has at least the Assembly's endorsement. This is just one reason to seek to understand the terms used in the Statute, in particular as the Commission has on occasion prepared instruments that do indeed propose new law. A recent example is the topic *Crimes against humanity*, where the Commission has drafted articles that for the most part represent new law and which are in any event plainly intended to be embodied in a treaty to be accepted, or not, by States. More generally, the meaning of the terms employed in the Statute (and thus the proper role of the Commission) has a long and fascinating history and continues to be debated today.¹¹

Chapter II of the Commission's Statute envisages the progressive development of international law and the codification of international law as distinct functions. Art. 15 attributes to "codification of international law" the following meaning: "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".¹²

The expression "progressive development of international law", on the other hand, has the following meaning: "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".¹³ Thus, the definition of "progressive development" in the Statute of the Commission itself includes the preparation of conventions on "subjects which have not yet been regulated by international law".

¹¹ See, for example, the 2017 debate in the Commission on the first report of the Special Rapporteur on *Succession of States in respect of State responsibility*, especially the statement of Mr Reinisch on 13 July 2017 (International Law Commission, Provisional summary record of the 3374th meeting, 13 July 2017, UN Doc. A/CN.4/SR.3374, p. 16).

¹² Art. 15 of the Statute of the International Law Commission. For an account of the negotiating history of the relevant provisions of the Statute, see J. CRAWFORD, *The Progressive Development of International Law: History, Theory and Practice*, in D. ALLAND, V. CHETAIL, O. DE FROUVILLE, J.E. VIÑUALES (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden: Martinus Nijhoff Publishers, 2014, p. 1 *et seq.*

¹³ Art. 15 of the Statute of the International Law Commission. McRae has pointed to the ambiguity inherent in the word "progressive" as used in the expression "progressive development", which could refer to a step-by-step process or to something that is "forward-looking": D. McRAE, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, in *Kokusaihō gaikō zasshi*, 2013, pp. 75 and 80. For the view that the reference to "progressive development" in Art. 13 of the Charter "was intended to indicate that international law was not to be codified at once in a single code but was to be done in stages", see R. HIGGINS, P. WEBB, D. AKANDE, S. SIVAKUMARAN, J. SLOAN, *Oppenheim's International Law: United Nations*, Oxford: Oxford University Press, 2017, p. 929.

Both meanings, of codification and of progressive development, are said to be “used for convenience”,¹⁴ a testimony perhaps to the difficulties encountered by the drafters of the Statute to distinguish clearly between the two concepts.

For each of these functions of codification and progressive development the Statute sets out a different working method. A major difference lies in the power of initiative: it was envisaged that projects involving progressive development would be taken up by the Commission following proposals by the General Assembly, while codification would be undertaken when the Commission itself “considers that the codification of a particular topic is necessary and desirable”.¹⁵ Labelling a project as codification or progressive development was also to be relevant for purposes of identifying the procedure to be followed in working on it and, in some measure, the form of the Commission’s output. The Commission’s Statute contemplates the preparation of draft conventions as the output of any effort of progressive development of international law,¹⁶ but prescribes two additional possible results for products of codification: 1) simple publication of the Commission’s final report on the topic; and 2) a resolution of the General Assembly, taking note of or adopting the report.¹⁷

The seemingly clear distinction between codification and progressive development that appears in the Commission’s Statute was drawn by the Committee for the Progressive Development of International Law and its Codification (“Committee of Seventeen”), charged by the General Assembly in 1946 with recommending how to implement the relevant part of Art. 13, para. 1(a), of the Charter. The report of the Committee did, however, recognize that “the terms employed are not mutually exclusive as, for example, in cases where the formulation and systematization of the existing law may lead to a conclusion that some new rules should be suggested for adoption by States”.¹⁸

¹⁴ Art. 15 of the Statute of the International Law Commission.

¹⁵ *Ibid.*, Arts 16 and 18, para. 2, respectively. Under Art. 17 the Commission may also consider proposals submitted by UN Members, other UN organs, specialized agencies and others.

¹⁶ *Ibid.*, Art. 16.

¹⁷ *Ibid.*, Art. 23, para. 1. Some observe (or complain) that nowadays the output of the Commission does not usually lead to the adoption of international conventions. A good example is the debate on the articles on State responsibility. But it is clear from the terms of Art. 23 that it was not the intention that the product should always be a convention, at least not when a topic was seen to be one of codification.

¹⁸ General Assembly, Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, 17 June 1947, UN Doc. A/AC.10/51, para. 7. One member of the Committee of Seventeen, Mr. Bartoš, warned that “it would be impossible to say where codification ends and development begins” (see Summary record of the sixth meeting of the Committee of 20 May 1947, UN Doc. A/AC.10/SR.6, p. 7).

Indeed, as has already been noted, the terms “codification” and “progressive development” are both unclear, in different ways.¹⁹ That may even be a reason why they found their way into the Charter, and then into the Commission’s Statute: “constructive ambiguity” can be useful in negotiations, even if sometimes it just postpones a problem for others to grapple with later.

The idea that the law “should be embodied in a systematic written form”²⁰ has guided the movement for the codification of international law since the early nineteenth century. Unwritten customary international law was considered uncertain and incomplete, and thus in need of clarification and systemization. In the words of one author, “[t]he temple of international justice on near inspection appear[ed] to be rather a storehouse filled with lumber of the ages – a medley of things new and old showing as yet little evidence of order or purpose”.²¹

Attributing a precise meaning to “codification” of international law has not been free from difficulty. Is codification simply a process of reducing *lex non scripta* to written form, or is it the case that, given the desire to eliminate any uncertainties and inconsistencies found in unwritten law, “all codification involves as an incidence in the process an element of what is really legislation”?²²

McNair observed in 1927 that codification of international law

“has at least two distinct meanings, (1) the process of translating into statutes or conventions customary law and the rules arising from the decisions of tribunals with little or no alteration of the law [...] ; and (2) the process of securing, by means of general conventions, of agreement among the States upon certain topics of International Law, these conventions being based upon existing International Law, both customary and conventional, but modified so as to reconcile conflicting views and render agreement possible”.²³

This dual view of the meaning of codification occurs time and time again in later writings and discussions. Differing views as to the meaning to be given to the term “codification” were also among the reasons for the disappointing results of the first international conference specifically called for the purpose of codification, the Hague Codifica-

¹⁹ D. McRAE, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., pp. 92-93: “There has never been a consistent view either within the Commission or outside over the meaning of the terms codification and progressive development”.

²⁰ J.L. BRIERLY, *The Future of Codification*, in *British Yearbook of International Law*, 1931, pp. 1-2 (noting, however, that the ideal could never completely be realized, “because law that is living contains an element of growth and cannot be finally or exhaustively imprisoned in a series of propositions however detailed and numerous”).

²¹ R.S. MORRIS, *Codification of International Law*, in *University of Pennsylvania Law Review*, 1925-1926, p. 452.

²² J.L. BRIERLY, *The Future of Codification*, cit., pp. 2-3.

²³ A.D. McNAIR, *The Present Position of the Codification of International Law*, in *Transactions of the Grotius Society*, 1927, p. 129.

tion Conference of 1930. Hudson wrote of the Conference that “[s]entiment grew quite rapidly against any attempt to state what was the existing law as distinguished from new legislation, and after two weeks it became clear that even the use of the term declaration was stoutly opposed. The discussion in the lobbies of the difference between conventions and declarations was quite interesting”.²⁴

And reflecting on the Conference, Briery (later a member of the Committee of Seventeen) expressed the view that “[t]he legislative element in the attempt to codify any part of international law is not merely incidental and subordinate; it outweighs the codifying element to such an extent that it becomes misleading to describe the process as one of codification at all”.²⁵

The Assembly of the League of Nations, for its part, did not make things any clearer. Having adopted in 1924 a resolution establishing a Committee of Experts for the Progressive Codification of International Law to prepare the Hague Conference, it later reaffirmed, when taking note of the work of the Conference, “the great interest taken by the League of Nations in the development of international law, *inter alia*, by codification”.²⁶

Hurst, observing in 1946 renewed support for the idea that “the prescriptions of international law should be more clearly stated and that there should be general agreement as to what those principles are, in order that all men may understand them and appreciate them”, found that the term codification had come to embody “two possible ideas, two possible methods”.²⁷ One of them, “in the strict and proper sense and as the term has generally been understood by British writers”, had to do with “ascertaining and declaring the existing rules of international law, irrespective of any question as to whether the rule is satisfactory or unsatisfactory, obsolete or still adequate to modern conditions, just or unjust in the eyes of those who formulate it”.²⁸ The second idea, Hurst explained, was “looser and more prevalent on the Continent of Europe. It incorporates the idea of amending the law as well as defining it, so that the provisions in the code shall state the rules of international law as they ought to be, regardless of whether they are so. [...] Codification in this sense is legislative in character”.²⁹

²⁴ M.O. HUDSON, *The First Conference for the Codification of International Law*, in *American Journal of International Law*, 1930, p. 449.

²⁵ J.L. BRIERY, *The Future of Codification*, cit., p. 3.

²⁶ Assembly of the League of Nations, Resolution of 22 September 1924, League of Nations, *Official Journal, Special Supplement*, No. 21, p. 10; Resolution of 25 September 1931, League of Nations, *Official Journal, Special Supplement*, No. 92, p. 9.

²⁷ C. HURST, *A Plea for the Codification of International Law on New Lines*, in *Transactions of the Grotius Society*, 1946, p. 146.

²⁸ *Ibid.*

²⁹ *Ibid.* Watts has similarly observed that “codification has a double meaning: it carries on the one hand the broad meaning of establishing a systematic body of rules, including both existing rules and those which have had to be developed for achieving a coherent and comprehensive treatment of the subject, and on the other hand – and more narrowly – the written formulation of rules which already existed

In keeping with the Charter formulation, in which “progressive development” was apparently intended to refer to a way of modifying or adding to existing rules of international law,³⁰ the members of the Committee of Seventeen, which drafted the Commission’s Statute, must presumably have generally intended to refer to codification in its narrower sense. But they did not insist on a strict, abstract distinction between the two methods; on the contrary, they took the view that “no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice”.³¹

III. CODIFICATION IN THE PRACTICE OF THE INTERNATIONAL LAW COMMISSION

The codification/progressive development debate that was live during the drafting of the Statute continued from the very outset of the Commission’s work. Underlying the legal arguments were no doubt deeper political divisions, this being the Cold War. The Soviet Union and its followers remained deeply suspicious of unwritten law, in which they considered they had had no hand.

As members of the Committee of Seventeen had foreseen, a rigid distinction between codification and progressive development proved impractical. The Commission early on gave up any attempt to uphold the distinction envisaged in its Statute by following the different procedures set out there. Although initially several delegations in the General Assembly complained, it has long been accepted that the Commission does not and cannot follow the distinction made in its Statute, at least so far as working methods are concerned. This early abandonment by the Commission of the theoretically attractive but practically hard distinction between progressive development and codification “set the pattern for the future”.³²

Already at its first session, in 1949, when preparing (at the request of the General Assembly) the Draft Declaration on Rights and Duties of States, the Commission con-

whether in unwritten, i.e. customary, form or in existing treaties, but in either case primarily as a matter of consolidation with little or no alteration of the law”: A. WATTS, *Codification and Progressive Development of International Law*, in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, 2006, www.opil.oupplaw.com, para. 17.

³⁰ See also Committee II/2 UNCIO, Summary Records of 21st Meeting of 7 June 1945, Document 848-II/2/46, UNCIO IX, p. 177 *et seq.*; M. REISMAN, *Metamorphoses: Judge Shigeru Oda and the International Court of Justice*, in *Canadian Yearbook of International Law*, 1995, pp. 200-203. McRae likewise concludes that “given the definition in Article 15 [of the Commission’s Statute] the term ‘development’ [in Article 13 of the Charter and in the Statute of the Commission] must have meant the articulation of conventions on matters that were not yet law” (D. McRAE, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., p. 80).

³¹ Report of the Committee on the Progressive Development of International Law and its Codification, (UN Doc. A/AC.10/51), cit., para. 10.

³² I. SINCLAIR, *The International Law Commission*, Cambridge: Cambridge University Press, 1987, p. 46.

cluded that the Draft Declaration constituted a special assignment and that it was thus competent to adopt in relation to this task any procedure it deemed conducive to the effectiveness of its work.³³ The General Assembly, for its part, deemed the draft “a notable and substantial contribution towards the progressive development of international law and its codification”.³⁴

Also in 1949, the Commission had before it a memorandum entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission*,³⁵ which was submitted by the UN Secretary-General. In fact, as is now well-known, it was largely the work of Hersch Lauterpacht. The report began:

“The selection of topics for codification must depend to a large extent upon the meaning which the Commission will attach to the term ‘codification’ having regard to its Statute, to the discussions which preceded it, and to the experience of the previous efforts at codification. [...] These definitions [in the Statute] of what constituted ‘progressive development’ and ‘codification’ were adopted for the sake of convenience. In particular it may be assumed that there was no intention that the Commission should limit itself, in the matter of codification, to mere recording, in a systematized form, of the existing law, i.e., of the law as to which there exists an agreed body of rules”.³⁶

The report also noted that there were anyway “only very few branches of international law with regard to which it can be said that they exhibit such a pronounced measure of agreement in the practice of States as to call for no more than what has been called consolidating codification”.³⁷

The Commission itself, in 1949, having considered that “the codification of the whole of international law was the ultimate objective”, concluded that nevertheless “it was desirable for the present to begin work on the codification of a few topics, rather than discuss a general systematic plan which might be left for later elaboration”.³⁸ It also decided that it had the competence to proceed with the work of codification without awaiting approval

³³ Y.-L. LIANG, *The First Session of the International Law Commission: Review of its Work by the General Assembly*, in *American Journal of International Law*, 1950, p. 535.

³⁴ General Assembly, Resolution 375(IV) of 6 December 1949, Draft declaration on rights and duties of States, UN Doc. A/RES/375(IV).

³⁵ General Assembly, *Survey of International Law in Relation to the Work of Codification of the International Law Commission* of 10 February 1949, Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission, Memorandum submitted by the Secretary-General, UN Doc. A/CN.4/1/Rev.1.

³⁶ *Ibid.*, para. 3.

³⁷ *Ibid.*, para. 10.

³⁸ International Law Commission, Report on the work of its first session, in *Yearbook of the International Law Commission*, 1949, p. 280, para. 14.

by the General Assembly of topics selected by it.³⁹ No decision was taken as to more precise definitions of the terms “codification” and “progressive development”.

In 1950, it was the General Assembly that requested the Commission to study the question of reservations to multilateral conventions “both from the point of view of codification and from that of the progressive development of international law”.⁴⁰

By 1951, during the Commission’s third session, Hudson had no hesitation in asserting that “there could be no codification without development”.⁴¹ Two years later, in connection with its draft on arbitral procedure that admittedly had such “a dual aspect”, the Commission said:

“The Statute of the Commission clearly envisages, and regulates separately, these two functions [of codification and progressive development]. This does not mean that these two functions can be invariably – or even normally – kept apart in the drafts prepared by the Commission. In the case of some topics it may be possible to limit the function of the Commission to one or the other of these two fields of its activity. In the case of other topics these two functions must be combined if the Commission is to fulfil its dual task of, in the language of Article 13 of the Charter of the United Nations, “progressive development of international law and its codification”.⁴²

At the same time, the Commission went on to add that it “considers it of utmost importance that the difference between these two aspects of its activity should be constantly borne in mind”.⁴³ One can sympathise with those involved in a discussion that led the Commission to reach such seemingly contradictory positions in one and the same paragraph.

Ultimately, however, after conceding again that “the present final draft of the Commission falls within the category both of the progressive development and the codification of international law”, the Commission said that “[i]t is probable that the same cumulation of functions must apply, in varying proportions, to other aspects of the work of the Commission”.⁴⁴ And it added that

“So far as recommendations proposed by the Commission [as to action to be taken by the General Assembly on the basis of the Commission’s output] are concerned, it seems to

³⁹ Y.-L. LIANG, *The First Session of the International Law Commission*, cit., p. 528. The Sixth Committee was divided as to this decision of the Commission (*ibid.*, pp. 529-532).

⁴⁰ General Assembly, Resolution 478(V) of 16 November 1950, Reservations to multilateral conventions, UN Doc. A/RES/478(V).

⁴¹ General Assembly, Summary record of the Commission’s 96th meeting of 5 June 1951, in *Yearbook of the International Law Commission*, 1951, Vol. I, p. 123, para. 120 (adding that he “would be in favour of minimizing the distinction by adopting the same procedure for both”).

⁴² International Law Commission, Report covering the work of its fifth session (1 June-14 August 1953), in *Yearbook of the International Law Commission*, 1953, Vol. II, pp. 201-202, para. 15.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 208, para. 54.

matter little whether a final draft falls within the category of development or that of codification [...]. There seems to be no reason for any differentiation between the two kinds of recommendation. Neither does it appear that any such differentiation was intended".⁴⁵

Just such a differentiation seems to have been envisaged by the authors of the Statute, though it proved unworkable in practice.

The Commission was even less hesitant in 1956 when it said that

"In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognized principle of international law', have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either".⁴⁶

In fact, the law of the sea was probably one field where such a distinction could be maintained, to some degree at least. In the preamble to the 1958 Geneva Convention on the High Seas, for example, the States Parties state that they desire "to codify the rules of international law relating to the high seas".

Hersch Lauterpacht, who was member of the Commission between 1952 and 1954, explained that "there is very little to codify if by that term is meant no more than giving, in the language of Article 15 of the Statute of the International Law Commission, precision and systematic order to rules of international law in fields 'where there already has been extensive State practice, precedent and doctrine'".⁴⁷

For Lauterpacht, the Statute's dichotomy between "codification" and "development" was anyhow defective since it did not cover the widest and typical cases of codification on the international plane: where there exists practice but no agreement, or where development is called for because existing practice ought to be changed.⁴⁸ He continued:

"It is probable that the result thus achieved is due to an oversight in drafting; it is so drastically out of keeping with experience and with the views persistently expressed on the subject that it cannot be regarded as intentional. It is not surprising that the relevant Article 15 of the Statute of the Commission has been disregarded in practice. It must be

⁴⁵ *Ibid.*

⁴⁶ International Law Commission, Report covering the work of its eighth session (23 April-4 July 1956), in *Yearbook of the International Law Commission*, 1956, Vol. II, pp. 255-256, para. 26.

⁴⁷ H. LAUTERPACHT, *Codification and Development of International Law*, in *American Journal of International Law*, 1955, p. 17.

⁴⁸ *Ibid.*, p. 29.

so left out of account in the future unless the work both of codification and development is to be reduced to nominal dimensions".⁴⁹

While one can understand and agree with this assessment overall, it seems improbable that Brierly, Hudson and the other members of the Committee of Seventeen committed an "oversight in drafting". It is more likely that the Statute was deliberately crafted as it was, taking into account political considerations, and perhaps with no expectation that it would be followed to the letter.⁵⁰

Speaking in 1961, one of the Commission's members, Gilberto Amado, said that he

"had been a member of the Committee which had drafted the Statute of the International Law Commission. It had not been the intention to draw in that Statute a clear-cut distinction between the codification of international law and its progressive development. A codification should fill any gaps which might appear; the rules had to be arranged, clarified and if necessary amplified. The task of codification and that of development of international law could not therefore be separated".⁵¹

The Commission expressly conflated the two working methods in 1958, when referring to both in seeking the views of governments on its provisional set of draft articles on diplomatic intercourse and immunities.⁵² In 1960 the Commission reported that its work on the subject of consular intercourse and immunities "is both codification and progressive development of international law in the sense in which these concepts are defined in Article 15 of the Commission's Statute".⁵³ Such was also the approach explicitly adopted with respect to later topics, such as succession of States in respect of trea-

⁴⁹ *Ibid.*, pp. 29-30.

⁵⁰ See also J. CRAWFORD, *The Progressive Development of International Law*, cit., p. 14.

⁵¹ General Assembly, Summary record of the Commission's 615th meeting (21 June 1961), in *Yearbook of the International Law Commission*, 1961, Vol. I, p. 215, para. 46.

⁵² See International Law Commission, Report covering the work of its tenth session (28 April-4 July 1958), in *Yearbook of the International Law Commission*, 1958, Vol. II, p. 89, para. 48 ("In accordance with articles 16 and 21 of its statute, the Commission decided to transmit this draft, through the Secretary-General, to Governments for their observations").

⁵³ International Law Commission, Report covering the work of its twelfth session (25 April-1 July 1960), in *Yearbook of the International Law Commission*, 1960, Vol. II, p. 145, para. 23. The Commission explained that "[t]he codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law, and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perforce remain incomplete and have little practical value. For this reason the Commission agreed, in accordance with the Special Rapporteur's proposal, to base the articles which it is now drafting not only on customary international law, but also on the material furnished by international conventions, especially consular conventions" (*ibid.*, para. 20).

ties (1974);⁵⁴ the most-favoured-nation clause (1978);⁵⁵ and the law of treaties between States and international organizations or between international organizations (1982).⁵⁶

By 1979 the Commission considered that “the techniques and procedures provided for in the Statute of the Commission, as they have evolved in practice, are well suited to the tasks entrusted to the Commission by the General Assembly [and] are flexible enough to allow the Commission to make, within its general framework, such adjustments as the specific features of a topic or other circumstances may demand”.⁵⁷

In 1996, in reply to a request by the General Assembly that it “examine the procedures of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law”,⁵⁸ the Commission again said that

“As is well known [...] the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in order to give more precise effect to a principle. Moreover, it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons”.⁵⁹

The Commission further said that it had thus “inevitably proceeded on the basis of a composite idea of ‘codification and progressive development’. In other words, its work has involved the elaboration of multilateral texts on general subjects of concern to all or many States, such texts seeking both to reflect accepted principles of regulation, and to provide such detail, particularity and further development of the ideas as may be required”.⁶⁰

Against this background, the Commission called for a revision of its Statute by which the distinctions drawn between the procedures of codification and progressive

⁵⁴ International Law Commission, Report on the work of its twenty-sixth session (6 May-26 July 1974), in *Yearbook of the International Law Commission*, 1974, Vol. II (Part One), p. 174, para. 83 (“The Commission’s work on succession of States in respect of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission’s Statute. The articles it has formulated contain elements of both progressive development as well as of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls”).

⁵⁵ International Law Commission, Report on the work of its thirtieth session (8 May-28 July 1978), in *Yearbook of the International Law Commission*, 1978, Vol. II (Part Two), p. 16, para. 72.

⁵⁶ International Law Commission, Report on the work of its thirty-fourth session (3 May-23 July 1982), in *Yearbook of the International Law Commission*, 1982, Vol. II (Part Two), p. 15, para. 55.

⁵⁷ International Law Commission, Report on the work of its thirty-first session (14 May-3 August 1979), in *Yearbook of the International Law Commission*, 1979, Vol. II (Part Two), p. 188, para. 95.

⁵⁸ General Assembly, Resolution 50/45 of 26 January 1996, UN Doc. A/RES/50/45.

⁵⁹ International Law Commission, Report on the work of its forty-eighth session (6 May-26 July 1996), in *Yearbook of the International Law Commission*, 1996, Vol. II (Part Two), p. 86, para. 156.

⁶⁰ *Ibid.*, para. 157.

development would be eliminated.⁶¹ But this has not happened, and no real difficulties seem to have arisen in practice.

Neither the Statute nor the Commission's views have since changed. In its 2011 Guide to Practice on Reservations to Treaties, for example, the Commission stated that "[t]he very concept of a 'codification convention' is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and its progressive development".⁶²

A similar approach may be found in the Commission's Articles on the responsibility of international organizations of 2011, the commentary to which refers to "the border between codification and progressive development".⁶³ The 2014 Draft articles on the expulsion of aliens are similarly said to be "both a work of codification of international law and an exercise in its progressive development".⁶⁴ As already noted, such an approach may also be evident on the part of some members of the Commission in the context of the current work on the topic Immunity of State officials from foreign criminal jurisdiction.⁶⁵

Thus, from the very beginning of the Commission's work, the "formal, rather rigid, distinction between codification and progressive development was both unclear and unworkable and it quickly became rather irrelevant".⁶⁶ The result, in Rosenne's words, has been that "in practice a single consolidated procedure has been made applicable to both

⁶¹ *Ibid.*, p. 84, para. 147(a), and p. 97, para. 242.

⁶² International Law Commission, Report on the work of its sixty-third session (26 April-3 June and 4 July-12 August 2011), in *Yearbook of the International Law Commission*, 2011, Vol. II (Part Three), p. 223, para. 11 of the commentary to guideline 3.1.5.3. The Introduction to the *Guide to Practice on Reservations to Treaties* indicates that "the various provisions in the guidelines cover a wide range of obligatoriness and have very different legal values" (*ibid.*, p. 36, para. 3). Moreover, the Commission stated that "[t]his range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion – made, *inter alia*, during discussions in the Sixth Committee of the General Assembly – that a distinction should be made between guidelines reflecting *lex lata* and those formulated *de lege ferenda*" (*ibid.*, fn. 5).

⁶³ International Law Commission, Report on the sixty-third session (26 April-3 June and 4 July-12 August 2011), in *Yearbook of the International Law Commission*, 2011, Vol. II (Part Two), pp. 46-47, general commentary, para. 5.

⁶⁴ International Law Commission, Draft articles on the expulsion of aliens, 2014, p. 3, para. 2, www.legal.un.org.

⁶⁵ M. WOOD, *Lessons from the ILC's Work on 'Immunity of State Officials'*, cit.

⁶⁶ D. McRAE, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., p. 79. McRae suggests that the Commission has been through three broad phases (the "fused model" of avoiding making a distinction between codification and progressive development; the "clear separation model" beginning in the 1980s; and the more recent "responsibility of international organizations model", by which the Commission provides only a general "consumer warning" that some – unspecified – draft articles may be progressive development while others are a codification). While that is an interesting perspective, it tends to rationalize what has been somewhat messier in reality (indeed McRae himself observes, at p. 91, that "there is overlap and no clear distinction").

types of work, and the formal differentiation established in the Statute has been blurred. This result seems to be, on the whole, uncontroversial, and is probably inevitable”.⁶⁷

By treating the concepts of codification and progressive development as closely interlinked or even inseparable (or, to put it another way, by adopting a “looser” definition of codification), the Commission has afforded itself greater freedom in elaborating and proposing international legal texts. And as a result, it may be difficult to disregard a rule proposed by it solely as an exercise of “progressive development” unless the Commission itself has acknowledged this to be the case.

Yet at the same time, in the words of the Commission, it is “of utmost importance that the difference between these two aspects of its activity should be constantly borne in mind”.⁶⁸ For States, for courts, for international lawyers generally, it may be crucially important to know how far a particular text emanating from the Commission is intended to reflect existing law or amount to a proposal for new law, even if at the end of the day one may have to make an independent assessment of the matter, taking into account whatever can be gleaned from the Commission’s work.

In fact, within the Commission, the notions of “codification” and “progressive development” remain very much present, and it has not always sought to blur or ignore them. The question whether (and if so how) to distinguish between the two concepts remains a live one within the Commission, both in general and with regard to particular topics or draft provisions. But such a discussion is often in reality about the distinction between *lex lata* and *lex ferenda*, which are indeed “a variation on the question of what constitutes customary international law”.⁶⁹

To begin with, the Commission has not infrequently labelled particular draft provisions expressly as codification or as progressive development. For the Commission to state that in its view a draft provision, especially one that the Commission considers to be central to a topic it has worked on, represents codification of an already existing rule, can carry great weight and help to clarify and consolidate the law. This is usually done in commentaries that accompany the draft provisions, which often indicate the sources underlying the adopted provisions.

Clarifying that a certain draft article represents (or in any event may represent) an effort at progressively developing the law, on the other hand, has been done on occasions where the Commission sought to suggest a change to an established rule; or where State practice and/or *opinio juris* was lacking or insufficient to distil a rule, if only in the eyes of certain members of the Commission.

⁶⁷ S. ROSENNE, *The International Law Commission, 1949-59*, in *British Yearbook of International Law*, 1960, p. 142.

⁶⁸ International Law Commission, Report covering the work of its fifth session, cit., p. 202, para. 15.

⁶⁹ D. McRAE, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., p. 90.

The label “progressive development” is indeed a way to secure the agreement of such members to the inclusion of the provision in the Commission’s eventual output, as it may offer them comfort that it is indeed recognized as a policy preference rather than existing law.⁷⁰ An example is Art. 41 of the *Articles on State responsibility*, which proclaims a duty to cooperate to bring to an end a serious breach of *jus cogens*. The Commission’s commentary states: “It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law”.⁷¹

It may also be that the Commission, or the General Assembly, wishes a certain topic or certain issues within a topic to be approached as an exercise in codification *stricto sensu* or, on the other hand, as progressive development. This depends of course on the subject-matter, including how well-established and indeed satisfactory the existing law is thought to be. For example, the law of treaties and State responsibility, being well-established in the case-law and literature, were for the most part exercises in codification.

Somewhat paradoxically, then, differentiating between codification and progressive development has been seen to be both difficult (if not undesirable) and useful for the Commission. Again, all depends on context. It is important for some topics, particularly those that are likely to come before the domestic courts, such as all aspects of international immunities. It is less important where the topic concerns largely practical issues between States, especially in relatively new fields, such as the protection of persons in the event of disasters.

Whatever the approach ultimately adopted in a particular topic or provision, it must also be borne in mind that the Commission should always approach a topic by first surveying State practice in order to ascertain whether and which relevant rules of customary international law already exist. At the preliminary stage of considering whether or not to add a topic to its work programme, the Commission looks into, inter alia, the question whether the topic is sufficiently advanced in terms of State practice to permit progressive development and codification. In other words, the Commission does seek to identify the *lex lata* in the strict sense for purposes of assessing the legal situation as part of its work on any particular topic.

⁷⁰ McRae has similarly suggested that “[t]he distinction becomes important when Commission members wish to oppose the inclusion of a particular provision. Characterizing it as progressive development is a way to diminish its weight and authority and the claim for its inclusion”: D. McRAE, *The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, cit., pp. 93-94. He adds that “[a] reference to progressive development may well have been reached in the drafting committee in order to gain support for a particular provision, rather than a considered collective judgment that the Commission was engaging in codification in some cases and progressive development in others” (*ibid.*, p. 92).

⁷¹ International Law Commission, Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), in *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 114, para. 3.

In so doing, the Commission has consistently adhered to the definition of customary international law enshrined in the Statute of the International Court of Justice: “a general practice accepted as law”.⁷² Its methodology in seeking to identify rules of customary international law has recently been described in a memorandum by the Commission’s Secretariat, on the basis of a systematic review of the final versions of the various drafts adopted by the Commission over the years: “[t]o identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists”.⁷³

The care and thorough manner of identifying rules of customary international law when the Commission engages in such a task may endow its eventual analysis (output) with much authority. As Watts observed, the Commission’s formulations “constitute a reasonable *prima facie* indication of the ‘world view’ on a particular legal question. They are a convenient articulation of the position in international law, which is what one is always seeking in an essentially customary law regime. By virtue of its global and collegiate basis, the Commission’s articulation is not just convenient but authoritative”.⁷⁴

IV. THE COMMISSION’S WORK ON THE TOPIC *IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW*

At a time when questions of customary international law increasingly fall to be dealt with also by “those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than ministries for foreign affairs, and those working for NGOs”⁷⁵, and given the considerable differences of approach amongst writers, the Commission considered in 2012 that there was a need for some reasonably authoritative guidance on the process of identifying customary international law. It was thought that the Commission itself, given its role and experience, its privileged relationship with States, and its composition and working methods, might be well placed to offer such guidance. While aware of the difficulties inherent in an attempt to “codify the relatively flexible process by which rules of

⁷² Art. 38, para. 1(b), of the Statute of the International Court of Justice.

⁷³ International Law Commission, Formation and evidence of customary international law – Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, A/CN.4/659, p. 7.

⁷⁴ A. WATTS, *The International Law Commission 1949-1998*, Vol. I, Oxford: Clarendon Press, 1999, p. 15. For important qualifications, however, see p. 33 *et seq.* below.

⁷⁵ International Law Commission, Report on the work of its sixty-third session (26 April-3 June and 4 July-12 August 2011), Annex I, para. 3, in *Yearbook of the International Law Commission*, 2011, Vol. II (Part Two), p. 183.

customary international law are formed”,⁷⁶ the Commission added the topic Formation and evidence of customary international law to its current programme of work. (In 2013, the title of the topic was changed to Identification of customary international law.) Members of the Commission agreed that the outcome of the project should be of an essentially practical nature; it was not the aim to seek to resolve largely theoretical controversies. Nor, of course, was the topic concerned with the substantive rules of customary international law: it dealt only with the methodology for identifying such rules. The conclusions – together with commentaries – seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, they aim to offer clear and concise guidance without being overly prescriptive.

In August 2016 the Commission adopted, on first reading, a set of 16 draft conclusions.⁷⁷ A second and final reading took place in 2018, bringing the topic to completion after taking into account input from States and others on the first reading text.⁷⁸ On 20 December 2018, the UN General Assembly took note of the conclusions, the text of which was annexed to the resolution, with the commentaries thereto; brought them to the attention of States and all who may be called upon to identify rules of customary international law; and encouraged their widest distribution.⁷⁹

The Commission has long dealt with items concerning the sources of international law, and it was not for the first time that, in 2012, it took up a topic concerning customary international law. An earlier foray into this field (*Ways and means of making the evidence of customary international law more readily available*) was mandated by Art. 24 of its Statute, leading the Commission in 1950 to call on States to make evidence of their practice more accessible.⁸⁰ In his working paper on the topic, Hudson thought that “sub-heading (b) of article 38 of the Statute of the International Court of Justice was not

⁷⁶ Report of the Study Group on the Future Work of the International Law Commission, in M.R. ANDERSON, A.E. BOYLE, A.W. LOWE, C. WICKREMASINGHE, (eds.), *The International Law Commission and the Future of International Law*, London: British Institute of International and Comparative Law, 1998, p. 42.

⁷⁷ The draft conclusions together with their accompanying commentaries, adopted by the Commission on 5 and 8 August 2016, may be found in International Law Commission, Report on the work of its sixty-eighth session (2016), UN Doc. A/71/10, pp. 79 *et seq.*

⁷⁸ In May 2018 the Commission adopted the set of draft conclusions on identification of customary international law on second reading, and in August that year adopted the commentaries thereto; the final text may be found in International Law Commission, Report on the work of its seventieth session, 2018, UN Doc. A/73/10, p. 119 *et seq.* The written comments and observations received from Governments on the first reading draft conclusions and commentaries are reproduced in UN Doc. A/CN.4/716. The Special Rapporteur's fifth report, taking into account these comments and observations, is in UN Doc. A/CN.4/717.

⁷⁹ General Assembly, Resolution 73/203 of 20 December 2018, Identification of customary international law, UN Doc. A/RES/73/203.

⁸⁰ International Law Commission, Report covering its second session (5 June – 29 July 1950), in *Yearbook of the International Law Commission*, 1950, Vol. II, pp. 367–74, especially paras 90–94.

very happily worded”,⁸¹ and sought to offer “a few guiding principles” as to the “elements which must be present before a principle or rule of customary international law can be found to have become established”.⁸² Almost 70 years later, much of that (rather brief) discussion remains highly instructive.

Dealing as they do with the identification of rules of customary international law, the Commission’s more recent conclusions do not address, at least not directly, the processes by which customary international law develops over time. But, as the commentary indicates, in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the process by which it has developed. The conclusions thus inevitably refer in places to the formation of rules; they do not, however, deal systematically with how rules emerge, or how they change or terminate.

In approaching this topic, the first place for the Commission to look for guidance in determining how to identify customary international law was Art. 38, para. 1(b) of the Statute of the ICJ, which in a sense tells one all one needs to know with its now almost century-old formula: “international custom, as evidence of a general practice accepted as law”. Then there is what States do and say about the methodology, although that is often hard to come by – at least it was until the Commission commenced work on the topic. Fortunately, there is considerable guidance in decisions of the International Court of Justice and – to a lesser extent – in those of other international courts and tribunals as well as regional courts. We have of course looked at national courts as well, studying carefully the decisions of the courts of as many States as possible.

The conclusions are to be read together with the commentaries.⁸³ Although not part of the conclusions *per se*, the commentaries are not separable from them and should be read in combination with them: they provide more detailed explanation on each conclusion as well as the context, wording and interrelation between the conclusions. In addition, they often provide concrete examples supporting the points made. One question within the Commission and among States was whether the balance between conclusions and commentary was right. Some wished to see more detail in the conclusions them-

⁸¹ Summary record of the Commission’s 40th meeting of 6 June 1950, in *Yearbook of the International Law Commission*, 1950, Vol. I, p. 4, para. 5.

⁸² *Ibid.* See also International Law Commission, *Article 24 of the Statute of the International Law Commission*, Working Paper by Manley O. Hudson, Special Rapporteur, UN Doc. A/CN.4/16, in *Yearbook of the International Law Commission*, 1950, Vol. II, p. 26, para. 10.

⁸³ A concern to emphasise this for users who may not be conversant with the work of the Commission led to the inclusion in the 2016 commentaries of an initial footnote (245 in the *ILC Report*, 2016) reading “As is always the case with the Commission’s output, the draft conclusions are to be read together with the commentaries”. In the text adopted in 2018, this sentence has been relocated to the first paragraph of the general commentary (*ILC Report*, 2018, p. 122). For a discussion on the role of the Commission’s commentaries, see G. GAJA, *Interpreting Articles Adopted by the International Law Commission*, in *British Yearbook of International Law*, 2015, p. 10 *et seq.*

selves, but that was not always easy. It will be noted that the commentaries themselves do not refer to any of the vast literature on the subject, but an extensive bibliography has been prepared to accompany the conclusions and commentaries.⁸⁴

Conclusion 2 reads: "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)".⁸⁵

This basic approach would have likely won the approval of Morelli, who, in his 1956 Hague lectures, said that

"The custom arises from two elements: (a) an objective or material element, consisting in the use, that is to say, in a conduct constantly held by the States with regard to certain conflicts of interest; and (b) a subjective or psychological element consisting in the conviction, gradually acquired by the same States, that that conduct is in conformity with a rule of law, that it is, in other words, the obligation or the exercise of a legal right (*opinio juris sive necessitatis*).⁸⁶

Conclusion 2 confirms the two-element approach to the identification of rules of customary international law, which has been widely endorsed not only by the members of the Commission but also by States in the Sixth Committee of the General Assembly and in abundant international practice and international jurisprudence. That is already a significant conclusion to be drawn from the Commission's work – significant, if not particularly surprising. It is important because in recent years there have been calls to abandon the two-element approach – essentially, to abandon custom as we know it. Several writers have called for a reduced role for "acceptance as law", arguing that in most cases widespread and consistent State practice alone is sufficient for constructing customary international law. Others, particularly those working in the field of human rights, as also international humanitarian law and international criminal law, have claimed the opposite – reducing the significance of the practice requirement and concentrating instead on the *opinio juris* element. Yet the two-element approach has withstood both political pressures and the test of time: customary international law continues to require "a general practice accepted as law". The identification of a rule of customary international law, in all fields of international law, requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).

The reference in conclusion 2 to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both

⁸⁴ See International Law Commission, Addendum to Fifth report on Identification of customary international law: revised bibliography by Michael Wood, Special Rapporteur, 6 June 2018, UN Doc. A/CN.4/717/Add.1.

⁸⁵ International Law Commission, Report on the work of its seventieth session, cit., p. 124.

⁸⁶ G. MORELLI, *Cours général de droit international public*, cit., p. 453 (my translation).

the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise contours are disputed. This may be the case, for example, where there is disagreement as to whether a particular formulation (usually found in written texts such as treaties or resolutions) does in fact equate to an existing rule of customary international law; consider, for example, the issue of freedom from arbitrary detention, where the International Covenant on Civil and Political Rights and the European Convention on Human Rights formulations are quite different. Instances where the precise content may be disputed also include cases where the question arises whether there are exceptions to a recognized rule of customary international law.

There may, however, be a difference in the application of the two-element approach by a careful assessment that considers, in each case, the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found. This is reflected in the latter part of conclusion 3, para. 1, which, as the commentary indicates, is “an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual”.⁸⁷ It implies, among other things, that the type of evidence consulted (and consideration of its availability or otherwise) may be adjusted to the situation, with certain forms of practice and evidence of acceptance as law being of particular significance. This was the case, for example, in the *Jurisdictional Immunities of the State* case, where the ICJ said that for purposes of identifying the scope and extent of the customary rule on State immunity,

“[i]n the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States”.⁸⁸

Regard must be had to the particular circumstances in which any evidence is to be found because relevant conduct may often be fraught with ambiguities. As the commentary to conclusion 3 explains,

“[w]hen considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will

⁸⁷ International Law Commission, Report on the work of its seventieth session, cit., p. 127.

⁸⁸ International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), judgment of 3 February 2012, para. 55.

count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State's failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. Practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law".⁸⁹

Taking account of the particular circumstances and context in which an alleged rule has arisen and operates affords flexibility, while respecting the essential nature of customary international law as a general practice accepted as law. In other words, the underlying approach is the same: both elements are required. Any other approach would risk artificially dividing international law into separate fields, and would run counter to the systemic nature of international law.

Conclusion 3, para. 2, specifies that "Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element".⁹⁰ As the commentary explains, "while practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, two distinct inquiries are to be carried out. The constituent elements may be intertwined in fact (in the sense that practice may be accompanied by a certain motivation), but each is conceptually distinct for purposes of identifying a rule of customary international law".⁹¹

Part Three of the conclusions deals with the constituent element of "a general practice", which "both defines and limits" customary international law,⁹² and seeks to provide guidance as to what this requirement is about and how it may be evidenced. Also known as the "material" or "objective" element, this element refers (in the aggregate) to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. Judge Morelli similarly said in his Dissenting Opinion in the *North Sea Continental Shelf* cases that State practice may at times be

⁸⁹ International Law Commission, Report on the work of its seventieth session, cit., p. 128.

⁹⁰ *Ibid.*, p. 127.

⁹¹ *Ibid.*, pp. 128-129.

⁹² See International Court of Justice, *Right of Passage over Indian Territory* (Portugal v. India), judgment of 12 April 1960, dissenting opinion of Judge Spender: "The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined".

“relevant not as a constitutive element of a custom which creates a rule, but rather as a confirmation of such rule”.⁹³

Part Three begins with conclusion 4, which seeks to answer the question: whose practice counts? It will be recalled that the basic text, Art. 38, para. 1(b) of the Court’s Statute, does not answer this question. It refers simply to “a general practice”, without saying whose practice. Conclusion 4 consists of three paragraphs: the first deals with States; the second with international (intergovernmental) organizations; and the third with “other actors”, that is, actors other than States and international organizations.

Conclusion 4, para. 1, explains that the requirement of a general practice refers primarily to the practice of States as contributing to the formation, or expression, of rules of customary international law.⁹⁴

The practice of States, the primary subjects of international law, is self-evidently of paramount importance to the identification of customary international law. But conclusion 4, para. 2, indicates that “[i]n certain cases” the practice of international organizations also contributes to the identification of rules of customary international law.⁹⁵ This statement deals with practice attributed to international organizations themselves, not that of their member States acting within or in reaction to them (which is to be attributed to the States in question). This has not been free from controversy, within the Commission and outside. And it is indeed a difficult area, not least given the great number of international organizations, the many and significant differences between them, and their limited powers and functions (the principle of speciality).

The formula “a general practice accepted as law”, enshrined in Art. 38, para. 1(b) of the ICJ Statute, is flexible enough to include the practice of international organizations: the suggested Root-Phillimore formulation of “International custom, as evidence of a common practice in use between nations and accepted by them as law”, like Baron Descamps’s original reference to international custom as “being practice between nations accepted by them as law”, ended up on the cutting room floor. Authors have thus argued that custom “[is] not required to be followed or acknowledged ‘by states’ only, as it is actually required [in the Statute] [...] when referring to conventions. So that, in principle, practices may emanate from state and non-state actors”.⁹⁶

Para. 2 reflects, first, the fact that although most international organizations lack a genuinely autonomous law-making power, their contribution to the creation and expression of customary international law seems undeniable where the member States

⁹³ See International Court of Justice, *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), judgment of 20 February 1969, dissenting opinion of Judge Morelli, para. 6.

⁹⁴ International Law Commission, Report on the work of its seventieth session, cit., p. 130.

⁹⁵ *Ibid.*

⁹⁶ For example, J.P. BOHOSLAVSKY, Y. LI, M. SUDREAU, *Emerging Customary International Law in Sovereign Debt Governance?*, in *Capital Markets Law Journal*, 2014, p. 63.

have transferred exclusive competences to them, such that the States themselves do not engage in practice with respect to the issue at hand. In such cases, international organizations exercise some of the public powers of their member States, and their practice may (some would say must) thus be equated with the practice of those States. This is sometimes the case with the European Union, and possibly also with some other international organizations, including regional international economic organizations.

Relevant practice may also arise, in certain cases, where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are functionally equivalent to the powers exercised by States. Examples include the practice of secretariats of international organizations when serving as treaty depositaries, the deployment of military forces (such as for peacekeeping), or the taking of positions on the scope of privileges and immunities for the organization and its officials.

The practice of international organizations is likely to be of particular relevance with respect to rules of customary international law that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties.

The Commission explained, however, that caution is required in assessing the relevance and weight of such practice by international organizations. As the commentary stipulates, international organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. The reaction of member States to such practice is of importance. Among other factors that may need to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; whether the conduct is *ultra vires* the organization or the organ; and whether the conduct is consonant with that of the member States of the organization.⁹⁷

At the same time, conclusion 4, para. 3, provides that the conduct of actors other than States and international organizations – for example, NGOs, non-State armed groups, transnational corporations and private individuals – is neither creative nor expressive of customary international law.⁹⁸ As such, their conduct does not serve as direct (primary) evidence of the existence and content of rules of customary international law. Para. 3 recognizes, however, that such conduct may have an important indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law by States (and international organizations). For example, the official statements of the International Committee of the Red Cross (ICRC), such as ap-

⁹⁷ International Law Commission, Report on the work of its seventieth session, cit., p. 131.

⁹⁸ *Ibid.*, p. 130.

peals and memoranda on respect for international humanitarian law, play an important role in shaping the practice of States when reacting to such statements; and publications of the ICRC may serve as helpful records of relevant practice. Such activities may contribute to the development and determination of customary international law; but they are not practice as such. Similarly, although the conduct of non-State armed groups is not practice that may be constitutive or expressive of customary international law, the reaction of States to it may well be. All of this is consistent with the Commission's approach in the context of its work on the topic *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*. There it was decided that "Other conduct, including by non-State actors, does not constitute subsequent practice [...] Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty".⁹⁹

Conclusion 5 provides that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions".¹⁰⁰ This is fairly straightforward, though in the past it was sometimes argued that relevant practice may emanate only from those authorized to represent the State in its international relations. The conclusion and its commentary do raise a few interesting points, however, including those relating to attribution of conduct and to confidential practice.

Conclusion 6, which lists prominent forms of practice (and states that "[t]here is no predetermined hierarchy among the various forms of practice"),¹⁰¹ provides further illustration that the Commission's work on the topic has shown that several longstanding theoretical controversies related to customary international law have by now been put to rest. It seems to be no longer seriously contested, for example, that verbal acts, and not just physical conduct, may count as "practice". Writers have also been divided on whether practice may only be relevant for the purposes of customary international law when it relates to a situation at the international level and to some actual incident of claim-making (as opposed to assertions *in abstracto*),¹⁰² a position that seems now to have been abandoned.

Conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of conclusion 8). As the two paragraphs of conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.¹⁰³

⁹⁹ *Ibid.*, p. 14 (Draft conclusion 5(2)).

¹⁰⁰ *Ibid.*, p. 132.

¹⁰¹ *Ibid.*, p. 133.

¹⁰² See, for example, J.L. KUNZ, *The Nature of Customary International Law*, in *American Journal of International Law*, 1953, p. 666.

¹⁰³ International Law Commission, Report on the work of its seventieth session, cit., p. 134.

As the commentary explains, the requirement to assess the available practice “as a whole” is illustrated by the *Jurisdictional Immunities of the State* case, where it was described that the Hellenic Supreme Court had decided in one case that, by virtue of the “territorial tort principle”, State immunity under customary international law did not extend to the acts of armed forces during an armed conflict. Yet a different position was adopted by the Greek Special Supreme Court; by the Greek Government when refusing to enforce the Hellenic Supreme Court’s judgment and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision. Assessing such practice “as a whole” led the International Court of Justice to conclude “that Greek State practice taken as a whole actually contradicts, rather than supports, Italy’s argument”.

Conclusion 8 seeks to capture the essence of the requirement that the relevant practice be “general” as well as the inquiry that is needed in order to verify whether this requirement has been met in a particular case. It defines “general” as “sufficiently widespread and representative, as well as consistent”, the commentary explaining that this “does not lend itself to exact formulations, as circumstances may vary greatly from one case to another”. Citing the Court’s case-law, the commentary further explains that complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform; some inconsistencies and contradictions are thus not necessarily fatal to a finding of “a general practice”.¹⁰⁴ No particular duration is required for the emergence of a rule of customary international law (if the practice is general and accepted as law), as is made clear in conclusion 8, para. 2.

Conclusions 9 and 10 deal with the second constituent element, that of “acceptance as law”, sometimes referred to as the “subjective” or “psychological” element.¹⁰⁵ This element is commonly referred to as *opinio juris*, but the Commission has followed the Statute of the Court in referring to acceptance as law (a term that seems to capture more accurately what is involved); at the same time, the Latin term *opinio juris* appears in brackets, mainly out of deference to its frequent use in practice.

Acceptance as law is yet another issue that has provided scholars with much to ponder. The Commission has been able to avoid much of the theoretical debate connected with *opinio juris* (to a large extent given its focus on identification, as opposed to the formation, of customary international law), seeking to clarify its nature and function as well as how it may be proved. The non-exhaustive list of forms of evidence of acceptance as law offered by the Commission includes public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; and inaction (under cer-

¹⁰⁴ *Ibid.*, pp. 135-138.

¹⁰⁵ *Ibid.*, pp. 138-142.

tain circumstances). Guidance has also been provided on how to distinguish between acceptance as law and other motives that may accompany a certain practice.

The relevance of treaties to the formation or identification of customary international law is familiar ground. It is dealt with in conclusion 11, which indicates that (a) a treaty rule may codify a rule existing at the time of the conclusion of the treaty; (b) a treaty rule may have led to the crystallization of a rule that had started to emerge prior to the conclusion of the treaty; and (c) a treaty rule may give rise to a general practice that is accepted as law, thus generating a new rule of customary international law.¹⁰⁶ As the conclusion indicates, caution is needed when establishing whether this is so. Treaty texts alone cannot serve as conclusive evidence as to the existence or content of rules of customary international law: in order to establish the existence in customary international law of a rule found in a written text, the rule must find support in external instances of practice coupled with acceptance as law. In the words of the *Libya/Malta* judgment, “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”.¹⁰⁷

One may also recall in this context Judge Morelli’s thoughtful methodological approach in his Dissenting Opinion in the *North Sea Continental Shelf* cases, where he said that he thought that

“in order to find the principles and rules of general international law concerning the delimitation of the continental shelf it might be useful, whenever the circumstances so require, to take account of the Convention [on the Continental Shelf] as a very important evidential factor with regard to general international law, because the purpose of the Convention is specifically, at any rate in principle, to codify general international law and because this purpose has been, within certain limits, effectively realized”.¹⁰⁸

The role of resolutions adopted by international organizations or at international conferences used to be very controversial. Conclusion 12 deals with this matter and begins with a negative statement, perhaps a word of warning: “[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law”.¹⁰⁹

In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to

¹⁰⁶ *Ibid.*, p. 143.

¹⁰⁷ International Court of Justice, *Continental Shelf* (Libyan Arab Jamahiriya v. Malta), judgment of 21 March 1984, para. 27.

¹⁰⁸ *North Sea Continental Shelf*, dissenting opinion of Judge Morelli, cit., para. 1.

¹⁰⁹ International Law Commission, Report on the work of its seventieth session, cit., p. 147.

a general practice that is accepted as law. There is no “instant custom” arising out of such resolutions on their own account.

Conclusion 12, para. 2, strikes a more positive note. As the International Court of Justice observed in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, resolutions “even if they are not binding [...] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*”.¹¹⁰ This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, “[t]he effect of consent to the text of such resolutions [...] may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution”.¹¹¹ Conversely, negative votes, abstentions, or disassociations from a consensus may be evidence that there is no acceptance as law, and thus that there is no rule.

Conclusion 12, para. 3, as a logical consequence of paras 1 and 2, clarifies that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law.¹¹² Thus, a provision in a resolution may reflect a rule of customary international law only if it is established that the provision corresponds to a general practice that is accepted as law.

The next point addressed in the conclusions is the role of judicial decisions in relation to customary international law. This is dealt with in conclusion 13.¹¹³ As is well-known, Art. 38, para. 1(d) of the ICJ Statute refers to “judicial decisions” and to “teachings of the most highly qualified publicists of the various nations” as “subsidiary means for the determination of rules of international law”. What does “subsidiary” imply here? It indicates that judicial decisions and teachings are not primary sources of law in the same way as international conventions, international custom, and general principles of law. Rather they are secondary means for assisting in determining the law: for interpreting treaties, for identifying the existence of rules of customary international law and their content, and for the determination of general principles of law. Judicial decisions, and the writings of learned authors, may be looked to for guidance as to the law, but are not themselves law. On the other hand, the word “subsidiary” should not be taken

¹¹⁰ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, para. 70 (referring to UN General Assembly resolutions).

¹¹¹ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, judgment of 27 June 1986, para. 188. See also *Ad hoc* Arbitral Tribunal, *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, final award of 24 March 1982, in *International Legal Materials*, 1982, p. 1032, para. 143.

¹¹² International Law Commission, Report on the work of its seventieth session, cit., p. 147.

¹¹³ *Ibid.*, p. 149.

as suggesting that they are of no great importance, which is clearly not true, especially for judicial decisions.

What is the position of national courts? It is clear that decisions of national courts may count as State practice and as evidence of the *opinio juris* of States, and thus contribute directly to the formation (and evidence) of customary international law under Art. 38, para. 1(b).¹¹⁴ But may they also be used as a subsidiary means for the determination of rules of customary international law under Art. 38, para. 1(d) in the same way as decisions of international courts and tribunals? There is no reason in principle not to include decisions of national courts within Art. 38, para. 1(d) as it relates to customary international law. Such landmark cases as *Paquete Habana* and *McLeod* have contributed greatly to international law. But the decisions of domestic courts have to be approached with great care, and in context, since they may reflect national legal systems and approaches, not necessarily the position under international law. This is perhaps particularly so with respect to domestic judgments dealing with human rights, which are situated within a particular legal (and political) framework.¹¹⁵

Next comes another subsidiary means for the determination of rules of international law, “teachings of the most highly qualified publicists” as the ICJ Statute puts it.¹¹⁶ As with decisions of courts and tribunals, referred to in conclusion 13, writings are not themselves a source of customary international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that they may have in systematically compiling State practice and synthesizing it; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law. This is what conclusion 14 seeks to capture.¹¹⁷

There is a need for caution when drawing upon writings. Their value for determining the existence of a rule of customary international law varies markedly; this is reflected in the words “may serve as”. First, and this is often the case, for example, with writings on international human rights law, writers may aim not merely to record the state of the law as it is, but also to advocate its development. In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual positions of their authors. Third, writings differ greatly in quality. Assessing the authority of a given work is thus essential: in the well-

¹¹⁴ See draft conclusions 6(2), and 10(2), *ibid.*, pp. 133 and 140.

¹¹⁵ See International Law Commission, Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, Memorandum by the Secretariat, 9 February 2016, UN Doc. A/CN.4/691.

¹¹⁶ The word “publicists” in the ICJ Statute is a curious one in English. It seems that the French word *publicistes* refers to lawyers qualified in public law, as opposed to those who teach or practice private law.

¹¹⁷ International Law Commission, Report on the work of its seventieth session, *cit.*, p. 150.

known words of the United States Supreme Court in *Paquete Habana*, “the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat [...] are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is”.¹¹⁸

Conclusion 15 concerns the persistent objector rule, and provides, inter alia, that “[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection”.¹¹⁹

This is another issue that has proven somewhat less contentious than in the past, perhaps given the amount of State practice now available in support of the rule’s existence.¹²⁰ But the conclusion emphasises that in each case, stringent conditions must be met: “The objection must be clearly expressed, made known to other States, and maintained persistently”.

Conclusion 16 concerns “particular customary international law”, that is, rules of customary international law, whether regional, local or other, that apply only among a limited number of States.¹²¹ In his Hague Academy lectures, Morelli, too, chose to refer to “particular” custom rather than “special custom”, “regional custom”, “local custom” etc.¹²² The conclusion and its commentary explain that the two-element approach applies in the identification of such rules, too, but taking into account their special nature by virtue of their limited reach. The practice must be general in the sense that it is a consistent practice “among the States concerned”, that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves.

The fourth report on *Identification of customary international law*,¹²³ presented to the Commission in May 2016, envisaged three parts to the final output of the Commission on this topic. First, the conclusions and commentaries; second, a bibliography; and, fi-

¹¹⁸ US Supreme Court, judgment of 8 January 1900, *The Paquete Habana and The Lola*. In the same case, Chief Justice Fuller, dissenting, said of writers that “[t]heir lucubrations may be persuasive, but not authoritative”. Compare the much-quoted remarks of the English Court of Admiralty in the *Renard Case*, judgment of 9 December 1778: “A pedantic man in his closet dictates the law of nations; and who shall decide, when doctors disagree? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius”.

¹¹⁹ International Law Commission, Report on the work of its seventieth session, cit., p. 152.

¹²⁰ See, for example, the practice collected in International Law Commission, Third report on Identification of customary international law by Michael Wood, Special Rapporteur, 27 March 2015, UN Doc. A/CN.4/682, pp. 60-61, para. 87; and in J.A. GREEN, *The Persistent Objector Rule in International Law*, Oxford: Oxford University Press, 2016.

¹²¹ International Law Commission, Report on the work of its seventieth session, cit., p. 154.

¹²² G. MORELLI, *Cours général de droit international public*, cit., p. 458.

¹²³ International Law Commission, Fourth report on Identification of customary international law by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/695 and Add.1.

nally, a new study of ways and means for making the evidence of customary international law more readily available. So far as the study is concerned, the Commission requested its Secretariat to prepare a memorandum, which surveys the present state of the evidence of customary international law and make suggestions for its improvement. The Commission looked into this matter some sixty-five years ago. Revisiting it was considered appropriate given what even 20 years ago was referred to as the “enormous proliferation of the available material on the many aspects of international law and relations [...] the rising costs associated with its accumulation, storage, and distribution [...] [and the] revolutionary developments in global information technology”.¹²⁴

V. THE INTERNATIONAL LAW COMMISSION’S ROLE IN THE CUSTOMARY PROCESS

An interesting question is the weight to be given to pronouncements emanating from the ILC itself when one is seeking to determine whether a rule of international law exists or not, the precise contours of such rule, or even when a rule came into existence. Such questions arise most often in connection with the identification of customary international law, but could also arise in relation to the interpretation of a treaty.

The importance of the Commission’s role is clear. This is particularly the case where the Commission’s output is endorsed by States within the General Assembly and elsewhere. But even where States do not endorse the work, expressly or otherwise, the Commission’s output may be influential and even contribute to the formation of new law. This is not a recent phenomenon, as some suppose. What was almost the Commission’s very first output, the Nürnberg Principles, was not endorsed by the General Assembly yet became highly influential.¹²⁵ Even “failed” topics, those that the Commission has begun to work on but at some point chose not to proceed with, may have an impact.¹²⁶ The Commission’s output often constitutes a reference point that serves as a catalyst for practice and expressions of legal opinion;¹²⁷ and it has also been a significant influence on courts and on writers, shaping international law through their distinct roles as well.

¹²⁴ To borrow the words of A. WATTS, *The International Law Commission 1949-1998*, cit., Vol. III, p. 2106. The updated study was published by the Commission’s Secretariat and considered by the Commission in 2018 (see International Law Commission, Ways and means for making the evidence of customary international law more readily available, Memorandum by the Secretariat, 12 January 2018, UN Doc. A/CN.4/710).

¹²⁵ See General Assembly, Resolution 488 (V) of 12 December 1950, Formulation of the Nuremberg principles, UN Doc. A/RES/488 (V).

¹²⁶ Such as the topic “Question of defining aggression” (1950-1951), where the Commission decided not to prepare a conclusive definition of aggression but to continue considering the matter in the context of the Draft Code of Offences against the Peace and Security of Mankind: in *Yearbook of the International Law Commission*, 1951, Vol. II, pp. 131-133, paras 35-53.

¹²⁷ This reality is referred to in several of the conclusions on *Identification of customary international law*, in particular those dealing with forms of practice, forms of evidence of acceptance as law (*opinio ju-*

Still, the Commission has not found it easy to describe its own role in relation to the identification of rules of customary international law. Its output undoubtedly merits special consideration because, as may easily be observed in many decisions of the ICJ and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may be given particular weight (as may a conclusion by it that no such rule exists). Judge Tomka has said that “the codifications produced by the International Law Commission have proven most valuable [to the Court in ascertaining whether a rule of customary international law exists], primarily due to the thoroughness of the procedures utilized by the ILC”.¹²⁸ Judicial decisions of national courts and tribunals referring to the work of the Commission are also abundant.

It may be asked whether the Commission’s output falls within Art. 38, para. 1(d) of the ICJ Statute as “teachings of the most highly qualified publicists of the various nations” that may serve as subsidiary means for the determination of customary rules. If not, how is it to be classified?

The 1949 *Survey of International Law in Relation to the Work of Codification of the International Law Commission* suggested that texts produced by the Commission but not turned into conventions “would be at least in the category of writings of the most qualified publicists, referred to in Article 38 of the Statute of the International Court of Justice as a subsidiary source of law to be applied by the Court”.¹²⁹

It went on to say that

“Most probably their authority would be considerably higher. For they will be the product not only of scholarly research, individual and collective, aided by the active co-

ris), and the potential relevance of treaties. Of course, the Commission’s work may also feed into resolutions of the General Assembly, which may serve as impetus to legal development as well.

¹²⁸ P. TOMKA, *Custom and the International Court of Justice*, in *The Law & Practice of International Courts and Tribunals*, 2013, p. 202, reproduced as *Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification/Le droit international coutumier dans la jurisprudence de la Cour mondiale: l’importance croissante de la codification*, in L. LIJNZAAD, Council of Europe (eds.), *The Judge and International Custom*, Leiden-Boston: Brill-Nijhoff, 2016, p. 10. It has been said that “the ICJ and other tribunals [...] rely on ILC conventions without overtly enquiring whether particular articles represent existing law, revision of existing law or a new development of the law”: A. BOYLE, C. CHINKIN, *The Making of International Law*, Oxford: Oxford University Press, 2007, p. 200. Villalpando has noted that, where the Court has applied the Commission’s draft articles: “the Court’s finding that these provisions reflect customary international law is as brief and categorical as its own autonomous determinations of rules of law, which apparently indicates an increasing trust placed by the Court in the Commission”: S. VILLALPANDO, *On the International Court of Justice and the Determination of Rules of Law*, in *Leiden Journal of International Law*, 2013, p. 247. For an account of the Court’s reliance on the work of the Commission up to 1987, see I. Sinclair, *The International Law Commission*, cit., pp. 127-138.

¹²⁹ General Assembly, Survey of International Law in Relation to the Work of Codification of the International Law Commission of 10 February 1949, Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission, Memorandum submitted by the Secretary-General, UN Doc. A/CN.4/1/Rev.1, p. 16.

operation of Governments, of national and international scientific bodies, and the resources of the United Nations. They will be the result of the deliberations and of the approval of the International Law Commission. Outside the sphere of international judicial settlement, they will be of considerable potency in shaping scientific opinion and the practice of Governments".¹³⁰

A number of judges of the Court have agreed with this assessment.¹³¹ Judge Shi, addressing the Commission in 1997 on behalf of the Court, said that "ICJ had always held the Commission's work in very high esteem. It viewed the draft articles produced by the Commission and the reports prepared for it as sources at least as authoritative as the writings of the most eminent publicists".¹³²

Several authors have taken a similar view.¹³³ According to David Caron, for example, "[i]f the Commission's work was only a subsidiary means of determining interna-

¹³⁰ *Ibid.*

¹³¹ See also, for example, International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, declaration of Judge Guillaume, para. 9 ("The question of the effect of the passage of time on treaty interpretation has been the subject of spirited debate in the literature between proponents of "contemporaneous" (also called "fixed reference") interpretation and advocates of "evolutionary" (also called "mobile reference") interpretation. Thus, within the International Law Commission "there was support for the principle of contemporaneity as well as the evolutive approach", but a consensus seems to have emerged to the effect that the problem should be resolved through the application of ordinary methods of treaty interpretation" (citations omitted)); International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Provisional Measures, order of 8 December 2000, declaration of Judge *ad hoc* Van den Wyngaert, para. 7, fn. 14 (treating the Commission's products as "legal doctrine").

¹³² Summary record of the Commission's 2503rd meeting (2 July 1997), in *Yearbook of the International Law Commission*, 1997, Vol. I, p. 214, para. 64. Addressing the Commission in 2003 as President of the Court, Judge Shi similarly said that "If the Commission's work was only a subsidiary means of determining international law, according to Article 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means": summary record of the Commission's 2775th meeting, 15 July 2003, in *Yearbook of the International Law Commission*, 2003, Vol. I, p. 163, para. 4.

¹³³ See, for example, M.E. VILLIGER, *Customary International Law and Treaties, A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties*, Dordrecht: Martinus Nijhoff Publishers, 1985, p. 79; A. WATTS, *The International Law Commission 1949-1998*, Vol. I, cit., pp. 14-15 (suggesting, however, that "there is something inappropriate" about such classification); S. ROSENNE, *The Perplexities of Modern International Law*, Leiden: Martinus Nijhoff Publishers, 2004, p. 52; F.L. BORDIN, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, in *International and Comparative Law Quarterly*, 2014, p. 559 ("[c]odification conventions and ILC draft articles are not, of course, to be assimilated with custom, and their characterization as subsidiary sources remains technically correct. And yet, the tendency to associate these texts with customary international law makes it somewhat simplistic to treat them as mere evidence of State practice or as the work of publicists"); H. THIRLWAY, *The Sources of International Law*, Oxford: Oxford University Press, 2019, p. 23; M. PEIL, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, in *Cambridge Journal of International and Comparative Law*, 2012, p. 136 *et seq.*; F. BERMAN, *Authority in International Law*, KFG Working Paper Series, No. 22, Berlin

tional law, according to Art. 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means".¹³⁴

Others, such as Ian Brownlie, considered the draft articles prepared by the Commission to be "[s]ources *analogous* to the writings of publicists, and at least as authoritative" (emphasis added).¹³⁵

Still others, however, have seen the Commission's output as wholly distinct from writings of the most highly qualified publicists of the various nations. Judge Álvarez, for example, in commenting on sources of international law, stated that, in addition to treaties and customary international law, "[r]eference must also be made to the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, *the works of the Codification Commission set up by the United Nations*, and finally, the opinions of qualified jurists" (emphasis added).¹³⁶

In my third report as the Commission's Special Rapporteur for the topic *Identification of customary international law* (2015), I adopted what I thought was the orthodox view and treated the work of the Commission as falling within the subsidiary means for the determination of rules of law listed in Art. 38, para. 1(d) of the ICJ Statute.¹³⁷ I did not include any express reference to the Commission's work in the proposed draft conclusions proposed in that report. I did, however, point to the particular importance of the Commission: "Special importance may attach to collective works, in particular the texts and commentaries emerging from the work of the International Law Commission, but also those of private bodies such as the Institute of International Law and the International Law Association".¹³⁸

But, on reflection this was perhaps not the best description, especially in apparently equating the Commission, the *Institut de droit international* and the International Law

Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin, November 2018, available at www.kfg-intlaw.de.

¹³⁴ D. CARON, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, in *American Journal of International Law*, 2002, p. 873.

¹³⁵ I. BROWNIE, *Principles of Public International Law*, seventh edition, Oxford: Oxford University Press, 2003, p. 25. This language is retained in Crawford's eighth edition (Oxford: Oxford University Press, 2014), p. 43, as well as his ninth edition (Oxford: Oxford University Press, 2014), p. 41.

¹³⁶ International Court of Justice, *Fisheries case* (United Kingdom v. Norway), judgment of 18 December 1951, at p. 149. See also, for example, International Court of Justice, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, judgment of 30 November 2010, dissenting opinion of Judge *ad hoc* Mahiou, at p. 828 ("This viewpoint, widely accepted within the doctrine, is also taken up in the draft Articles adopted by the International Law Commission in 2006").

¹³⁷ International Law Commission, Third report on Identification of customary international law, cit., para. 65.

¹³⁸ *Ibid.* See also M. WOOD, *Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)*, in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, last updated 2017, opil.ouplaw.com.

Association, and in the debate on the third report, in 2015, and in the Sixth Committee that year, the matter received much attention. Some members of the Commission and States felt that to omit any explicit reference to the work of the Commission in a guide designated to assist practitioners in the task of identifying rules of customary international law would not do justice to the role played by the Commission in international legal argument. They also protested that placing the Commission's output under "teachings" did not reflect its real standing or role, as it did not equate to scholarly work given the Commission's status and relationship with States as a subsidiary organ of the General Assembly. And, after all, the members of the Commission, even those who were academics, were not fulfilling an academic role, but were acting as independent experts in fulfilment of the mandate of the Commission.

Others, however, insisted that the Commission's output was "teachings" within the meaning of the term in the Court's Statute, albeit teachings of the highest authority. At the same time, they also suggested that not all of the Commission's products were deserving of the same status: the weight to be given to any determination by the Commission, they explained, ought to depend on various factors, including the sources relied upon by the Commission, the stage reached in its work, and, above all, upon States' reception of it. They also considered it inappropriate for the Commission to blow its own trumpet, so to speak, by including a draft conclusion dedicated only to this matter.

In the end, a compromise was struck. In the first reading draft, the Commission's output and its significance were highlighted in a paragraph dedicated to this matter in the commentary to the draft conclusions. This paragraph was not found under the draft conclusion dealing with "teachings", but was instead highlighted in the introductory commentary to Part Five of the set of conclusions, the part which deals with the significance of certain materials for the identification of customary international law (including teachings). This approach was maintained in the final text adopted on second reading, where the paragraph reads:

"The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification; the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various

factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output".¹³⁹

Of course, the Statute of the Court and the notion of "subsidiary means" predate the establishment of the Commission and the very idea of a permanent organ dedicated to promoting the codification (and progressive development) of international law in the service of governments. At the end of the day, it may not matter on what ground the Commission's output is invoked. The Court itself has not concerned itself with this formal question, at least not publicly, when invoking the work of the Commission.

It is surely correct that the Commission's output should be treated as a "subsidiary means". After all, the Commission, like its parent body, the General Assembly, does not have a mandate to legislate. Nonetheless, it is rightly seen as a particularly influential and important subsidiary means, if only because of its unique mandate from States, which necessarily involves a process of elucidation of customary international law. And what makes the Commission different from other bodies doing more or less the same thing (such as the *Institut de droit international* and the International Law Association) is that it works closely with the General Assembly and with States as part of the process envisaged in Art. 13, para. 1(a) of the UN Charter. Indeed, there are obvious features that distinguish the Commission's output from other writings. Most significant are the composition, working methods, mandate, and above all the privileged relationship of the Commission with States: at all stages, the work of the Commission is looked at and commented on in the Sixth Committee, and States also have the opportunity to provide examples of their practice and to make written comments on the provisionally adopted texts. So, the Commission has the benefit of an interaction with States and the General Assembly on the substance of its work. This and the other factors tend to give the Commission's output a particular authority.

At the same time, it is not possible to generalize about the value of the Commission's work in attempts to identify rules of customary international law. Each case should be examined on its own merits, and it thus seems necessary to emphasise the caution with which the product of the Commission needs to be approached. In most cases it is only the final output that carries particular weight, generally not first-reading drafts or reports of the Special Rapporteurs, still less the views of individual Commission members.

In addition, and this brings us back to where we began, it may sometimes be essential to seek to distinguish between work that is intended to reflect *lex lata* and that which is intended as *lex ferenda* or new law. That, as we have seen, is not always easy in practice. Perhaps most important, then, is the response of States to the Commission's work. Only where the output of the Commission receives the general endorsement of

¹³⁹ International Law Commission, Report on the work of its seventieth session, cit., pp. 142-143 (commentary para. (2)).

States should it be considered as authoritative. At the very least, where significant disagreement by States is recorded it should carry less weight.

VI. CONCLUSIONS

A few concluding remarks may be in order. First, although it may have been thought that codification would drive out customary international law or push it into the background, in fact, notwithstanding its many achievements, the Commission's work has maintained the place of customary international law and its role as a central source of international law. This may be particularly so at a time when States seem generally reluctant to embark on further "codification" conventions. And it is well established that the conclusion of conventions does not mean that the corresponding rules of customary international law cease; conventional and customary rules continue in parallel. Customary international law continues to be important and indeed has a "bright future".¹⁴⁰

Second, and closely related: while customary international law feeds regularly into and guides the work of the Commission, the same may be said in reverse. As has been explained, the Commission's work not only surveys and evaluates State practice and judicial pronouncements; it may also influence them. Thus the output of the Commission, whatever title or form it takes, contributes to the development of the law. In this sense, too, codification and progressive development go hand-in-hand.

Third, despite the persistent difficulty in differentiating between codification of international law and its progressive development, it remains both important and useful to bear the distinction in mind, whether generally or in assessing any particular legal pronouncement. And the distinction between *lex lata* and *lex ferenda* (or new law) remains fundamental in the practice of international law: the identification of law is distinct from the progressive development of law.

The Commission's recent work on *Identification of customary international law* may be seen as an effort to maintain the legitimacy, integrity and effectiveness of custom as a source of international law. Such an impact is highly desirable:

"if custom were truly in crisis, the stability of the international legal system as a whole would be endangered. Even if, admittedly, "it may not be the ultimate source of law, [custom] is still the most basic source of rules to govern the activities of States" and "the principal construction material for general international law" (in the sense of its capability to generally bind all States). Being a central means of bringing under one legal regime all members of a large and heterogeneous international community, and underpinning as it does the other sources of international law, not least treaties, customary international law is now more necessary and important than ever".¹⁴¹

¹⁴⁰ O. SENDER, M. WOOD, *Custom's Bright Future*, cit.

¹⁴¹ *Ibid.*, p. 369.