The European Journal of International Law Vol. 33 no. 3

The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development

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Abstract

The idea that jurists have a vocational duty to progressively develop the law finds its way in international law chiefly via the mission statement of the United Nations' International Law Commission (ILC). Mandated by states to codify and progressively develop international law, the ILC's modern practice has merged these two distinct exercises. The Commission utilizes a common working procedure for the elaboration of both and appears to perceive progressive development as an appurtenance of codification. What is more, progressive development has often been equated by the ILC with lex ferenda *propositions and policy considerations. It is little wonder then that the ILC has never attempted to meaningfully analyse this aspect of its mandate. This article examines progressive development from a methodological standpoint and maintains that it is an exercise with self-standing importance. It argues that there are two ways to understand the ILC's mandate to progressively develop the law: either as 'progressive development* stricto sensu*' or as 'legislation'. The difference between the two is methodological; 'progressive development* stricto sensu*' is elaborated via an inductive methodology and principally justified by legal considerations. On the other side, in the case of 'legislation', provisions are principally justified by policy considerations and, hence, imbued with uncertainty regarding their methodological foundations. The article suggests that 'progressive development* stricto sensu*' falls squarely within the ILC's legal mandate, while this will be the case with respect to 'legislation' only when the ILC is conscious of the question it sets out to answer and the requisite methodology that it employs to do so. To this end, the article lays down some basic methodological principles that the ILC should adhere to when*

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I am grateful to Sotirios-Ioannis Lekkas and the participants at the Annual Junior Faculty Forum for International Law for their comments and feedback on previous drafts. The usual disclaimer applies.

engaging with topics of work where political considerations play a significant role in the development of the law. Finally, it calls for a revival of the forgotten discussion regarding the ILC's capacity to develop international law.

> To speak about progress presupposes the existence of commonly shared values; it evokes a sense of a unidirectional development of culture and human society.
> – Peter Hilpold, 'Book Review of R. Miller and R. Bratspies (eds), *Progress in International Law*'[1]

1 Progress via Progressive Development

The mandate of the International Law Commission (ILC) is twofold: to progressively develop and to codify international law. Chapter II of the ILC's Statute entitled 'Functions of the International Law Commission' provides for two distinct procedures, one for each aspect of its mandate.[2] Articles 16–17 give to the United Nations General Assembly the initiative to propose topics of work that focus on progressive development. Articles 18–24 describe the respective procedure for codification where the ILC is in charge. Yet the Commission's modern practice has adopted a common working method for both aspects of its mandate.[3] As a result, progressive development is conceived as an appurtenance of codification, and no methodological principles have been developed for the inference of rules that reflect the progressive development of the law.[4] This article challenges this dominant perception and maintains that progressive development – despite the political considerations on which it occasionally rests – should be understood as an exercise with self-standing importance.

In most topics of the work it undertakes lately, the ILC avows in the introductory General Commentary that it engages to a certain – unspecified – extent in a drafting exercise that exceeds the realm of codification. This is projected either as progressive development[5] or more seldom as 'the drafting of provisions that would be both

1 Hilpold, 'Book Review of R. Miller and R. Bratspies (eds), *Progress in International Law* (Martinus Nijhoff, 2008)', 20 *European Journal of International Law* (*EJIL*) (2009) 1270, at 1270.

2 Statute of the International Law Commission (ILC Statute), GA Res. 174 (II), 21 November 1947.

3 ILC, Report on the Work of Its Forty-eighth Session, UN Doc. A/51/10, 6 May – 26 July 1996, at 86–7, para. 159. Secretariat of the International Law Commission (ILC), 'Introduction', in United Nations (UN) (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (2021) 1, at 21.

4 Crawford, 'Progressive Development of International Law: History, Theory and Practice', in D. Alland *et al.* (eds), *Unity and Diversity of International Law: Essays in Honour of Pierre-Marie Dupuy* (2014) 1, at 3; Pellet, 'Between Codification and Progressive Development of the Law: Some Reflections from the ILC', 6 *International Law Forum du droit international* (2004) 15, at 16 ('it only allows Members of the International Law Commission to make erudite speeches distinguishing between both aspects but nothing can be inferred from this and it is usually of no consequence at all').

5 See, e.g., 'Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries', 2(2) *ILC Yearbook* (2016) 24, para. 2, General Commentary ('[i]t also serves, at the outset, to highlight the fact that the draft articles contain elements of both progressive development and codification of international law'). For an analysis of how the ILC is referring to progressive development in the commentaries, see McRae, 'The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission', 111 *Journal of International Law and Diplomacy* (2013) 75.

effective and likely acceptable to States'.[6] The Commission must be fully cognizant of the framework in which it engages in such discourse in order to disambiguate which political decisions it can and cannot make. The article suggests that policy considerations can play a varied role in the justification of a decision adopted in the process of progressive development. They either constitute the principal justification of a proposed provision in whichever case the ILC engages in – what I shall term 'legislation' – or they are invoked only as supporting justifications of a provision justified principally by legal considerations – what I shall term 'progressive development *stricto sensu*'. And there are good reasons to keep these instances of progressive development separate, for only the former is imbued with uncertainty regarding its methodological foundations. As the analysis will demonstrate, the Commission's recent work can be understood, for the most part, as an exercise in 'legislation'. Nevertheless, the ILC has not devised any methodological principles in order to systematize its engagement with topics where political considerations play a significant role in the determination of the law.

In order to examine progressive development from a methodological standpoint, the article assumes that international law possesses a scientific quality; otherwise, any justification of methodology becomes nearly impossible.[7] This inevitably puts to the side important philosophical questions, but, unless this axiom is accepted, a complete relativization of the distinction between law and politics ensues. And the ILC works under the same assumption – that is, that the science of international law is somehow able to develop international legal rules.[8] This only makes sense if the Commission treats international law as a system whose logic and rationality can be further explored and developed by trained jurists who agree on what counts as 'progressive development'.[9] Thus, the article analyses the recent practice of the ILC while keeping this assumption in mind. A caveat is in order at this point; the argument presented here does not aim to draw a hard and fast distinction between law and politics. Rather, it asks whether some outer limits could be drawn – a red line that the ILC cannot cross when progressively developing the law.

6 See, e.g., 'Protection and Punishment of Crimes against Humanity', 2(2) *ILC Yearbook* (2019) 22, para. 2, General Commentary.

7 I owe this realization to Martti Koskeniemmi's comments during the 2020 Annual Junior Faculty Forum for International Law. For a critical examination on international law as a science, see Orford, 'Scientific Reason and the Discipline of International Law', 25 *EJIL* (2014) 369.

8 Chen, 'Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law- Maker', in UN, *supra* note 3, 233, at 238.

9 Werner, 'Buribunks and Foundational Paradoxes of International Law', 28 *Griffith Law Review* (2019) 259, at 267. It should be mentioned at this point that the notions 'progress' and 'progressive development' are not equivalent in international law. And it is not the intention of this article to assign such an equivalent meaning to them. Somewhat paradoxically, in the term 'progressive development' – as it is incorporated in the UN Charter and the ILC Statute – progressive means gradual rather than associated with progress. R. Higgins *et al.*, *Oppenheim's International Law: United Nations* (2017), at 929; Pellet, 'Responding to New Needs through Codification and Progressive Development', in V. Gowlland-Debbas (ed.), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in International Legislative Process* (2000) 13, at 17.

The argument presented here develops as follows. Section 2 demonstrates the confusion surrounding the normative content of both notions on which the ILC's mandate is based ('codification' and 'progressive development'). Conceived as an aspect of codification *lato sensu* in the pre-UN era, progressive development has not been analysed extensively from a conceptual standpoint so that neither states nor Commission members share a common understanding as to what it entails. Rather, it is conceived by ILC members and commentators as an exercise in *lex ferenda* – that is, a political decision irreducible to meaningful legal analysis.[10] Section 3 puts forward a twofold understanding of progressive development through an analysis of the ILC's recent practice. It suggests that progressive development can be understood in the following ways: first, as a technical decision on how the law develops ('progressive development *stricto sensu*'), which comes down to an induction of new trends, not their invention. To the extent that these trends can be inferred through a method that can be characterized as legally scientific, such as collecting and analysing practice and *opinio juris*, it is indisputable that this is a lawyer's job. Second, it can be understood as a normative decision concerning how the law ought to develop ('legislation'). Such is a matter of legislative policy that involves the balancing of interests and *prima facie* exceeds the remit of legal science.[11] As it will be argued, the prevalence of policy considerations does not render 'legislation' a non-scientific endeavour or an exercise that lies *ab initio* beyond the ILC's legal mandate but, rather, one that the ILC can engage in if it adheres to certain methodological principles.

The aforementioned exercises can be distinguished on a double basis. They have a different *telos*: 'progressive development *stricto sensu*' answers the question 'towards which direction is the law headed?', while 'legislation' respectively answers the question 'what would we like the law to be / what would be the best law?'. And they are elaborated via different methodologies: 'progressive development *stricto sensu*' is principally based upon legal considerations and ensues from the employment of an inductive methodology. 'Legislation', on the other hand, rests principally on extra-legal considerations as relevant factors for the determination of the proposed rule via either deduction or assertion.

The ILC has not incorporated in its practice the separation between the two aspects of progressive development explained above. Rather, it seems to understand this part of its mandate as not being conducive to any principled methodological treatment. In fact, progressive development is often utilized by the Commission as a smokescreen; by

[10] Secretariat of the ILC, *supra* note 3, at 27. Relatedly, Sarah Nouwen suggests that, by labelling its work on the Articles on Prevention and Punishment of Crimes against Humanity as progressive development, the ILC felt liberated 'to avoid the laborious process of ascertaining the status of customary law' and thus to deal with a topic with serious political implications in a speedy fashion. Nouwen, 'Is there Something Missing in the Proposed Convention on Crimes against Humanity? A Political Question for States and a Doctrinal One for the International Law Commission', 16 *Journal of International Criminal Justice* (2018) 2, at 2.

[11] Jennings, 'International Law Reform and Progressive Development', in G. Hafner (ed.), *Liber Amicorum Professor I. Seidl-Hohenveldern in Honour of His 80th Birthday* (1998) 325, at 334 (the legislative policy would be decided by those who understood the matter the subject of the legislation).

putting 'legislation' in the same basket with 'progressive development *stricto sensu*', the Commission labels its work 'progressive development' and legislates surreptitiously. In this way, the ILC projects its work as being anchored in its statutory mandate, while, in reality, it is questionable whether it is acting within its statutory confines.[12] Since this may leave the Commission open to criticism, it is in its best interests to keep the two exercises separate.

Finally, the article suggests that the ILC is well advised to be cognizant of its mandate's scope and its drafting methodology when inferring the progressive development of the law if it wishes to remain relevant. With this in mind, section 4 aspires to lay down some basic methodological principles on the inference of progressive development to which the Commission should adhere. By drawing insights from Ernst Freund's 'Prolegomena to a Science of Legislation', two qualifications to the progressive development of rules are discerned; first, that such development should occur against the background of existing law and, second, that the scientific expertise of the ILC limits its competence to make proposals of rules in scientific fields that lie outside this remit.[13]

2 Codification versus Progressive Development: A History of Concepts

The notion of progressive development is not self-explanatory.[14] As a means of bringing about a change in the current state of established legal rules, it has for some time been part of the so-called 'codification movement' in international law.[15] In this context, progressive development 'existed' within the notion of *lato sensu* 'codification', so this

[12] Focus and starting point of the analysis attempted here is the conceptual indeterminacy of 'progressive development' as an aspect of the ILC's mandate. An analogous attempt to discuss at an analytical level the inherent limitations in the Commission's work emanating from its engagement with policy decisions was made more than 20 years ago in Owada, 'International Law Commission and the Process of Law-formation', in UN (ed.), *Making Better International Law: The International Law Commission at 50 – Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law* (1998) 167. Hisashi Owada introduces 'legislation *de novo*' as a separate category from codification and progressive development to conclude that 'new, untrodden fields of human activity, which require regulation through international law-making *de novo*, had better be left, in the first instance at least, to policy decision at the political level' (at 178). This contribution differs from Owada's in two respects: first, all ILC decisions justified by policy considerations are presumed to fit within the general category of progressive development. In this way, the argument runs, progressive development is used by the ILC as a vehicle in order to justify engagement in law-making. Second, it is suggested here that the Commission, a legal body, may engage in policy-making but under strict confines. And this claim sets the stage for the analysis in section 4 – that is, the elaboration of a scientific methodology for progressive development.

[13] Freund, 'Prolegomena to a Science of Legislation' in A. Kocourek (ed.), *Celebration Legal Essays to Mark the Twenty-fifth Year of Service of John H. Wigmore as Professor of Law in Northwestern University* (1919) 122.

[14] *Contra* A.Watts, 'Codification and Progressive Development of International Law', *Max Planck Encyclopedia of Public International Law* (2006), para. 17.

[15] The idea that jurists have a vocational duty to guard and progressively develop the law found its way into international law via Johann Bluntschli, one of the founding fathers of the Institut de Droit International. M. Koskenniemi, *The Gentle Civilizer of Nations* (2004), at 45–48.

section attempts to understand how both these notions developed and came to acquire nowadays a separate conceptual existence.[16]

In 1932, Manley Hudson – later to become the first chairman of the ILC – published his book *Progress in International Organization*, where he attempted to dutifully chronicle the state of development of international legal rules. The progress narrative that he embraced came with a prediction – the codification of international law will have 'a greater influence on the growth of international law than any other movement' – and a caveat – 'the precise line between codification and legislation would be difficult to draw', which should not be a reason to worry because 'all codification possesses a legislative character'.[17] Of course, the codification that Hudson had in mind exceeded the mere systematization of existing law, but his prophetic remarks foreshadowed the role and the difficulties faced by the codification movement in the UN era. Nevertheless, during the interwar, the nexus between codification and progress had emerged, but progressive development had not yet entered the lexicon of international lawyers.

It was the UN Charter that introduced this notion in international law discourse by juxtaposing it to a newly understood concept of codification. Article 13(1)(a) of the Charter empowers the UN General Assembly, *inter alia*, to 'initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification'.[18] This dichotomy originates in the strong influence of the interwar debate on the revision of international law, and, thus, 'the drafters had an inherently quasi-revisionary exercise in mind when coming to the notion of "progressive development"'.[19] In the words of the drafters of the Charter, '[i]n support of the use of the words "progressive development," … it was said that, juxtaposed as they

[16] Although the term was not used consistently across the literature, general consensus was formed around the idea that 'codification' comprised *de minimis* the creation of written texts containing binding international rules. T. Skouteris, *The Notion of Progress in International Law* (2010), at 112. It was a matter of considerable debate whether aspirational rules formed part of the codificatory process. Influenced by the use of the terms in the English legal system, P. J. Baker distinguished 'codification' by reference to 'legislation' in the following terms: '[C]odification properly used means the writing down of existing law, [while] the making of new law, either *in vacuo* or by the amendment or development of existing rules, ought to be termed legislation. … Codification may involve minor changes to the existing law and legislation may include the re-enactment of some parts of the existing law; but broadly the distinction is clear.' Baker, 'The Codification of International Law', 5 *British Yearbook of International Law* (*BYIL*) (1924) 38, at 41. The limited success of the two major codification projects of the 1920s (one commissioned by the Pan-American Union and the other by the League of Nations) corroborated the misgivings of certain writers; codification could bring rigidity to the law when not accompanied by revision mechanisms (at 46ff). De Visscher, 'La Codification du Droit International', 6 *Recueil des Cours de l' Académie de Droit International* (1925) 325, at 386ff. This need for adaptation of existing rules to contemporary conditions was also stressed by the Assembly of the League of Nations in laying down the principles that were to govern the Hague Codification Conference of 1930. *League of Nations Official Journal*, Special Supplement no. 55 (1927).

[17] M. Hudson, *Progress in International Organization* (1932), at 84.

[18] It must be stressed that states never gave the UN General Assembly the right to legislate so the creation of legal rights and obligations fell outside the mandate of the UN's plenary organ. UN Conference on International Organization, Summary Report of Tenth Meeting II/A, UN Doc. 506 II/2/202, 23 May 1945, at 69–70.

[19] Pronto, 'Codification and Progressive Development of International Law: A Legislative History of Article 13(1)(a) of the Charter of the United Nations', 13 *Florida International University Law Review* (*FIULR*) (2019) 1101, at 1104.

were with codification, they implied modifications of as well as additions to existing rules'.[20] According to this, a hard and fast distinction is drawn between the two processes; 'codification' pertains exclusively to the restatement of *lex lata*, while 'progressive development' is concerned with the law's development through change, be this change in *lex lata* (additions to existing rules) or the proposition of new formulations of rules (modifications of existing rules).

The broad mandate given to the General Assembly by the drafters of the UN Charter was not passed on to the ILC, as its Statute demonstrates.[21] Article 1 confines the Commission's mandate exclusively to the codification and progressive development of international law, and Article 15 provides definitions of both terms 'for convenience'. According to the latter provision, 'progressive development' means 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. While 'codification' is 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'. Arguably, these formulations were intended to serve as working definitions for the Commission and not as general conceptual understandings of those terms; they provide an enumeration of instances when the ILC should adopt a concomitant drafting method.[22] Article 15, then, restricts the ILC's authority to develop the law to these two very particular instances. It leaves out of the Commission's mandate the promotion of change when the law is fixed but such change is called for by considerations of progress, human rights or other interests.

Since then, the conceptual understanding of progressive development has remained in flux because the ILC has used it circumstantially while furthering its agenda. Both the individual opinions of ILC members on what constitutes 'progressive development' and the ILC's final products showcase this situation. Individual ILC members understand progressive development differently so that the Commission's conceptual and methodological indeterminacy around progressive development appears to be dependent on time and composition. And this difference in understanding sprang out of a broader academic debate around the ILC's mandate during the early days of the Commission.[23] Today, such a discussion recurs in a stalemated fashion only during the ILC's annual sessions.[24]

[20] UN Conference on International Organization, Summary Report of Twenty-First Meeting of Committee II/2, UN Doc. 848 II/2/46 (1945), at 178.

[21] ILC Statute, *supra* note 2. The Statute has been amended four times since by Resolutions 485(V), 984(X), 985(X) and 36/39.

[22] Pellet, *supra* note 3, at 16–18.

[23] For example, Robert Jennings understood progressive development as a broader exercise within which codification must be incorporated (Jennings, 'The Progressive Development of International Law and Its Codification', 24 *BYIL* (1947) 301, at 302), while, for Hersch Lauterpacht, this relationship was reversed (Lauterpacht, 'Codification and Development of International Law', 49 *American Journal of International Law* (*AJIL)* (1955) 16, at 23).

[24] The discussion that unfolded before the adoption of the Draft Articles on the Protection of Persons in the Event of Disasters demonstrates the different perceptions of ILC members on what constitutes progressive development. ILC, Provisional Summary Record of the 3293rd Meeting, UN Doc. A/CN.4/SR.3293, 17 June 2016; ILC, Provisional Summary Record of the 3294th Meeting, UN Doc. A/CN.4/SR.3294, 3 March 2017.

During the 1950s the narrow formulation of Article 15 did not deter the ILC from proposing modifications of established rules when this was deemed necessary in such scenarios. For example, the Draft Convention of Arbitral Procedure, which was adopted in 1955, introduced novelties in existing law 'for ensuring that the obligation to carry out the agreement to arbitrate shall not be frustrated at any point'.[25] Likewise, in its Draft Articles on the Law of the Sea, prepared in 1956, the Commission introduced limitations to navigation and fishing rights in the continental shelf since, otherwise, exploration and exploitation of that zone by the coastal state would risk becoming nominal.[26] The ILC did not doubt its role as a reformer of existing law, and the literature of the time took this as granted.

But the ILC's practice changed during the 1960s, and, with it, the understanding of both progressive development and codification changed. A restrictive understanding of 'progressive development' has heavily affected the way in which the ILC has done its work ever since.[27] The 1960s mark the 'golden era' of codification where almost all final ILC products become codification conventions. Progressive development paid the price for this success; it was relegated to an accessory exercise, and theoretical and practical interest in its elaboration was hence lost.[28] This promoted a different perception of the Commission's role. Codification became equated with the authority to declare a rule to be customary international law,[29] while progressive development became equated with the promotion of change through *lex ferenda* proposals. Since a commonly accepted definition of the latter term is lacking in international law, this article uses Hugh Thirlway's *lex ferenda* definition: 'a subjective assertion that some rule should be part of positive law'.[30] The ILC is timid to propose what it considers to be the progressive development of the law as a change in *lex lata*. The reformist role undertaken during the 1950s is now considered to fall outside the ILC's mandate.

[25] ILC, Commentary on the Draft Convention on Arbitral Procedure, UN Doc. A/CN.4/92, April 1955, at 8.

[26] See Draft Article 71 and its commentary. ILC, Report of the International Law Commission to the General Assembly, UN Doc. A/CN.4/SER.A/1956/Add.1, November 1956, at 299.

[27] Lauterpacht has insightfully warned about the effects of the narrow formulation of progressive development in Article 15 since 1955 ('Article 15 of the Statute of the Commission, especially when taken in conjunction with the definition of "development of international law" as contained there, would seem, unless explained to the point of being disregarded, to exclude from the purview of the activity of the Commission practically the entire field of codification in its larger sense'). Of course, Lauterpacht understands 'codification in its larger sense' as encapsulating progressive development. He then concludes that the ILC has done well to disregard the definition of progressive development in Article 15 in practice and 'the distinction thus conceived between codification and development of international law'. Lauterpacht, *supra* note 23, at 23.

[28] Crawford, *supra* note 4, at 4 ('the instinct of the Commission from the beginning has been to read down, to minimize, even to sublimate it'). Donald McRae urges for 'an explicit recognition by members of the Commission of their active responsibility for the progressive development of international law'. McRae, 'The International Law Commission: Codification and Progressive Development after Forty Years', 25 *Canadian Yearbook of International Law* (1988) 355, at 366.

[29] Dordeska, 'The Process of International Law-Making: The Relationship between the International Court of Justice and the International Law Commission', 15 *International and Comparative Law Review* (2015) 7, at 12, n. 18.

[30] Thirlway, 'Reflections on Lex Ferenda', 32 *Netherlands Yearbook of International Law* (2001) 3, at 4.

Examples that corroborate this view are numerous, and only two recent examples need be referenced here. The general commentary on the Succession of States in Respect of State Responsibility acknowledges the limited state practice in this area; hence, '[i]t was proposed that the Commission expressly indicate that it was engaging in progressive development of international law when proposing draft articles, taking best practices into account, including considering that *lex ferenda* should be based on solid grounds and not on policy preferences'.[31] And the Conclusions on Identification of Customary International Law not only equate progressive development with *lex ferenda* but also proceed further to define the latter in the way explained above.[32] Hence, in a recent commentary, the ILC's secretariat acknowledged that 'the debate about codification and progressive development by the Commission becomes one about the balance between *lex lata* and *lex ferenda*, and therefore about stability and change in international relations'.[33]

This equation between *lex ferenda* and progressive development is problematic. Not because of its substance but, rather, because of the way it came about. The ILC never tried to understand progressive development conceptually but only as a specific normative output. Due to the lack of an analytical argument on the substance of what constitutes progressive development and how it should be determined, the latter was reduced to rules proposed in cases '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'.[34] Rules proposed in these instances do not amount to customary rules and, thus, to *lex lata*, so it was inferred that the ILC is entitled to develop international law only via *lex ferenda* propositions. The practical straitjacket in which the ILC encapsulated progressive development became unconsciously a conceptual one.

In this way, a dipole has emerged: on the one end, codification was attached to *lex lata*; on the other end, progressive development was attached to *lex ferenda*. A caveat is in order here; this article does not claim that the ILC separates codification from progressive development in its work. To the contrary, it rather suggests that the Commission henceforth understands the two concepts in the way in which they are defined and kept apart in its Statute without, at the same time, really elaborating on the methodology upon which each exercise should be based. Academia has its share of responsibility for this *mélange* since a relevant discussion never occurred after the era of great codifications. Some commentators dismiss the issue altogether; for James Crawford, the identification of progressive development is 'a matter of knowing it when one sees it'.[35] Along the same lines, for Arthur Watts, 'progressive development

[31] ILC, Report on the Work of Its Seventy-first Session, UN Doc. A/74/10, 29 April – 7 June and 8 July – 9 August 2019, at 301, para. 91.

[32] ILC, Report of the International Law Commission Seventieth Session, UN Doc. A/73/10, 30 April – 1 June and 2 July – 10 August 2018, at 151, para. 3.

[33] Secretariat of the ILC, *supra* note 3, at 27.

[34] See, e.g., Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?', 32 *Leiden Journal of International Law* (2019) 169, at 172.

[35] Crawford, *supra* note 4, at 22.

is in large part self-explanatory'.[36] And others add another level of perplexity; David Caron equates progressive development with what he calls legislation, without at the same time explaining what this term means.[37] And for Robert Jennings, it is a process of 'merely adding a layer of new law on top of the still existing old law'.[38] Overall, no meaningful clarification came about from commentators; hence, the ILC has conveniently hidden behind the conflation of the two exercises in practice so as to not deal further with their conceptual disentanglement.

This lack of a common understanding on the meaning and elaboration of progressive development is also reflected in the individual opinions of ILC members. The two latest annual sessions of the ILC are a case in point. Commenting on the sixth report of the special rapporteur on the provisional application of treaties, Yacouba Cissé suggested that '[t]he absence or insufficiency of State practice in that regard should not be considered a major obstacle to the formulation of the draft model clauses, which gave the Commission a good opportunity to progressively develop the international law of treaties'.[39] His view is shared by Hussein Hassouna[40] and Pavel Šturma,[41] but, for other members, the Commission's task is to establish 'what had developed as practice, which should be the subject of an exercise in progressive development'.[42] The position one adopts on the relationship between practice and progressive development foreshadows the position on progressive development's relationship with policy considerations. Those who understand progressive development as an exercise necessarily based on developed practice hold that 'the Commission [is] not competent to make policy choices, since such a task [is] even beyond the bounds of progressive development'.[43] *A contrario*, for those who claim that no supporting practice is deemed necessary for its inference, progressive development can rest solely on policy considerations.[44] Finally, some members call for a cautious approach when inferring

[36] Watts, *supra* note 14, para. 17.

[37] Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96 *AJIL* (2002) 857, at 859. Since it is not a term of art in international law, 'legislation' is borrowed from domestic law and can thus have different meanings (see note 16 above).

[38] Jennings, *supra* note 11, at 325.

[39] ILC, Provisional Summary Record of the 3519th Meeting, UN Doc. A/CN.4/SR.3519, 15 June 2021, at 4.

[40] ILC, Provisional Summary Record of the 3532nd Meeting, UN Doc. A/CN.4/SR.3532, 10 August 2021, at 11.

[41] ILC, Provisional Summary Record of the 3536th Meeting, UN Doc. A/CN.4/SR.3536, 10 August 2021, at 7.

[42] ILC, Provisional Summary Record of the 3524th Meeting, UN Doc. A/CN.4/SR.3524, 23 June 2021, at 5 (Ernest Petric). Similar positions by Huikang Huang ILC, Provisional Summary Record of the 3461st Meeting, UN Doc. A/CN.4/SR.3461, 11 June 2019, at 11 and Aniruddha Rajput ILC, Provisional Summary Record of the 3467th Meeting, UN Doc. A/CN.4/SR.3467, 1 July 2019, at 17.

[43] ILC, Provisional Summary Record of the 3521st Meeting, UN Doc. A/CN.4/SR.3521, 15 June 2021, at 10 (Rajput).

[44] See, e.g., Mahmoud Hmoud argues for an expansion of the principle of corporate due diligence on the basis of environmental protection ILC, Provisional Summary Record of the 3464th Meeting, UN Doc. A/CN.4/SR.3464, 24 June 2019, at 17; Claudio Grossman Guiloff appeals to the interrelationship between the environment and human rights as a factor precipitating the progressive development of international law on the protection of the environment in relation to armed conflicts ILC, Provisional Summary Record of the 3469th Meeting, UN Doc. A/CN.4/SR.3469, 8 July 2019, at 8.

the progressive development of the law, without specifying what this entails from a methodological standpoint. Michael Wood excludes 'personal policy preferences' as pertinent but, at the same time, is hesitant to admit that state policy preferences could be factored in,[45] while Georg Nolte understands progressive development as a 'policy oriented' exercise without any further clarification.[46]

It is pertinent at this point to analyse how this lack of agreement about the conceptual understanding of progressive development affects the ILC's work at the present juncture. The era of codifications is long gone, and, in this 'codification crisis', progressive development has gained considerable traction. Thus, the next section examines the Commission's recent practice and attempts to flesh out the methodological patterns to which it adheres when engaging in progressive development.

3 Progressive Development of International Law as an Exercise in Politics

A *Establishing the Connection between Progressive Development and Politics*

As the analysis in this section will demonstrate, the ILC's recent work tends to merge imperceptibly into what Jennings has called 'law reform'[47] or Michael Reisman calls 'exercise in legislation'.[48] And this is becoming increasingly important in the present circumstance where, in most topics of its work, the Commission engages to a lesser or greater extent in progressive development. It must be recalled that the last big-scale codification project of the ILC – the Articles on State Responsibility – was finalized in 2001.[49] Hence, John Dugard's point, made over 20 years ago, that, because it does not possess legislative powers, the Commission rarely, if ever, takes on topics with an overt character of progressive development as defined in its Statute no longer reflects reality.[50] Testament to this is a closer look at the topics on the ILC's programme of work in its latest session.[51] Dugard's comment is important though for it highlights the connection between progressive development and politics.

A seminal moment that turned the ILC in this direction has been the success of the Rome Statute of the International Criminal Court – initiated by the General Assembly

[45] ILC, Provisional Summary Record of the 3535th Meeting, UN Doc. A/CN.4/SR.3535 10 August 2021, at 5 (Michael Wood).

[46] ILC, Provisional Summary Record of the 3467th Meeting, UN Doc. A/CN.4/SR.3467, 1 July 2019, at 11.

[47] Jennings, *supra* note 11, at 334.

[48] Reisman, 'Judge Shigeru Oda: Reflections on the Formation of a Judge', in N. Ando, E. McWhinney and R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (2002) 57, at 66–67.

[49] ILC, Report on the Work of Its Fifty-third Session, UN Doc. A/56/10, 23 April – 1 June and 2 July – 10 August 2001, at 20.

[50] Dugard, 'How Effective Is the International Law Commission in the Development of International Law? A Critique of the ILC on the Occasion of Its Fiftieth Anniversary', 23 *South African Yearbook of International Law* (1998) 34, at 41.

[51] The list of topics examined in the 72nd session is available at https://legal.un.org/ilc/.

in 1992,[52] prepared by the ILC in 1994[53] and transformed to a treaty in 1998.[54] Within a very limited time span, a difficult and controversial topic 'where the element of codification was almost entirely absent, and the element of progressive development overwhelming' had been completed.[55] But, for this to become possible, a set of unlikely circumstances had to occur. The atrocities in Yugoslavia and Rwanda in the early 1990s and the establishment of the two ad hoc tribunals highlighted the need for a permanent international criminal court. And the Cold War was recently over so the political climate was favourable – to say the least. The strong political commitment of states in the project was the key to its success. This realization is crucial in order to understand the importance of political input in the fruition of any exercise in progressive development.

As a body composed of independent legal experts, the ILC is not mandated or equipped to substitute in any way the states as legislators in the international legal order.[56] The rationale behind this is that the ILC lacks the democratic legitimacy to determine the rights and duties of the subjects of the international legal order or, for that matter, to undertake a process of negotiation that would effect compromises for and on behalf of them.[57] This is evident from the drafting of the UN Charter[58] and the provisions of the ILC Statute. The latter establishes two distinct processes for the elaboration of codification and progressive development. The Commission is capable of generating work *proprio motu* only in cases of codification.[59] *A contrario*, progressive development may only take place '[w]hen the General Assembly refers to the Commission a proposal for the progressive development of international law'.[60] Read in conjunction with Article 15, which refers to progressive development solely in terms of the preparation of draft conventions, the results cannot be presented in the form of a restatement but, rather, must be presented to the General Assembly through the Secretary-General with recommendations. In practice, this distinction is not upheld,[61] but the idea behind it was that states were meant to be in charge of progressive development and for good reason.

[52] GA Res. 47/33, 25 November 1992, para. 6.

[53] ILC, Report on the Work of Its Forty-sixth Session, UN Doc. A/49/10, 2 May – 22 July 1994, at 26.

[54] Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

[55] Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *AJIL* (1995) 404, at 405.

[56] It is not argued here that states are the sole entities that perform this role in international law. International organizations can also legislate by concluding treaties and by contributing to customary law practice. See Voulgaris, 'International Organisations as Autonomous Actors', in J. d'Aspremont and S. Droubi (eds), *Non-State Actors and the Formation of Customary International Law* (2020) 21.

[57] Danae Azaria suggests that the recent work of the ILC on sources (for example, general principles, *jus cogens*, identification of custom) 'reiterates the centrality of States in the formation, change and termination of secondary rules on sources [which] may be symptomatic of the need to "soothe the anxiety" of States as to who holds the master key to the building of international law'. Azaria, 'The International Law Commission's Return to the Law of Sources of International Law', 13 *FIULR* (2019) 989, at 1001.

[58] See notes 18–20 above and accompanying text.

[59] ILC Statute, *supra* note 2, Art. 18.

[60] *Ibid.*, Art. 16.

[61] See note 3 above. Only two 1954 topics on statelessness were concluded in this way. ILC, Report on the Work of Its Sixth Session, UN Doc. A/2693, 3 June – 28 July 1954, at 140ff.

The process of progressive development was understood as a politically sensitive issue that could not be entrusted solely to lawyers. This is why the political guidance of the UN General Assembly was deemed necessary in its elaboration. This limitation notwithstanding, a political element is often present in the ILC's work; resort to extra-legal considerations is inevitable in situations where the substance of the law is not clear.[62] One of the numerous relevant examples of a 'remarkable compromise' of a political nature from the ILC's practice concerns the legal effects of invalid reservations to human rights treaties and the competence of human rights bodies to assess such invalidity.[63] In its Guide to Practice on Reservations, the Commission indeed accommodates most of the human rights-inspired critique of the Vienna Convention on the Law of Treaties (VCLT) without giving any ground to the idea that special rules developed in a human rights context would be superposed on the general treaty framework.[64] In view of this, it is important to understand which political decisions are tolerable to be taken by the lawyers when progressively developing the law and which ones fall within the realm of the politician or the lawmaker. Given the uncertainty as to the exact meaning of progressive development described above, drawing this line has been impossible for commentators and the ILC.

Before any criticism can be levelled against the ILC for the adoption of political decisions, some further nuance regarding the role of politics in progressive development is necessary. As the ILC's practice shows, progressive development of the law could be based either on politics/policy considerations or on law/legal considerations (see section 3.B). It is methodology that dictates which of the two is in play: development that rests on politics involves the regulation or harmonization of differing and often conflicting interests in society. Otherwise put, it involves principally the exercise of political judgment rather than the consideration of legal principles. On the other hand, development based on the law involves the application of the legal rules regarding the sources of the law. And the source that is mostly of interest for the Commission is customary international law. Thus, the difference lies in the justification of the proposed rule. In the case of development based on politics, the proposed rule is principally justified on the basis of considerations such as progress, human rights, equity, environmental protection and so on (what I shall call extra-legal discourse). Development based on the law, on the other hand, is principally justified on the basis of legal considerations – that is, practice and *opinio juris* (what I shall call legal-technical argumentation).

Based on the above, two inferences can be made. First, the ILC may appeal to both legal and policy considerations in order to justify a proposed rule. It is a matter of ad hoc judgment whether the justification of every provision rests principally on policy or legal grounds for it cannot rest principally on both. Second, a rule that is developed

[62] B.E. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977), at 108; Arajärvi, 'Between *Lex Lata* and *Lex Ferenda*? Customary International (Criminal) Law and the Principle of Legality', 15 *Tilburg Law Review* (2011) 163, at 174.

[63] Milanovic and Sicilianos, 'Reservations to Treaties: An Introduction', 24 *EJIL* (2013) 1055, at 1058.

[64] ILC, Report on the Work of Its Sixty-third Session, UN Doc. A/66/10, 26 April – 3 June and 4 July – 12 August 2011; Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

in a methodologically legal-technical way does not necessarily mean it has been developed in an apolitical way. As demonstrated in the next section, this will very seldom be the case. In fact, policy considerations have taken centre stage in the day-to-day work of the ILC; the discussions within the Commission revolve all the more around the normative status of its outputs, and special rapporteurs are having a hard time justifying normatively the inclusion of politically sensitive topics in the agenda. All in all, politics is an integral part of progressive development irrespective of the form this may take, and engaging in extra-legal discourse in the context of progressive development is very often inevitable.

B *Progressive Development* Stricto Sensu *versus Legislation*

The ILC must be fully cognizant of the framework in which it utilizes such discourse in order to disambiguate which political decisions it can and cannot make. Commentators have described the work of the ILC as searching inductively and with some empiricism for the general points of agreement between states.[65] In this sense, the Commission employs a combination of inductive methodology and policy-oriented approach.[66] Nevertheless, the inductive method is of limited use when existing practice is scant and inconclusive, case law is inexistent and commentators are divided. The question then persists: how to infer the progressive development of the law when resort to induction does not point to a specific direction? The way in which the ILC addresses this question dictates whether it opts for 'progressive development *stricto sensu*' or 'legislation'. The inductive, deductive or assertive nature of the methodology employed by the ILC provides a strong indication as to the type of progressive development in play.

'Progressive development *stricto sensu*' is a legal-technical decision on how the law develops, justified principally on indications of practice and *opinio juris* via an inductive method. Perhaps the textbook example of a rule adopted by the ILC in an exercise of 'progressive development *stricto sensu*' is Article 54 of the Articles on State Responsibility on '[m]easures taken by States other than an injured State'. The Commission is hesitant to invent new trends in a subject where practice is 'limited and rather embryonic'.[67] Instead, in order not to prejudice any position on the matter, it has opted for an open wording that could embrace the future development of the law. Likewise, when defining the notion of damage in Principle 2 of the 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm, the ILC included claims concerning the environment.[68] The commentaries underlined that this broadened definition represented recent – at the time – trends from several liability regimes that

[65] S. Sur, *L'interprétation en droit international public* (1974), at 71; Ramcharan, *supra* note 62, ch. 4. Ramcharan understands empiricism 'as a method [that] involves acting or basing drafts on observation and assessment of the needs, claims and attitudes of States rather than on prior theory, and rather than being rigidly covered by existing law' (at 88). For an explanation of inductive and deductive reasoning in international law-making, see Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', 26 *EJIL* (2015) 417.

[66] Ramcharan, *supra* note 62, at 103.

[67] ILC, Report on the Work of Its Fifty-third Session, *supra* note 49, at 137, para. 3.

[68] ILC, Report on the Work of Its Fifty-eighth Session, UN Doc. A/61/10, 1 May – 9 June and 3 July – 11 August 2006, at 66–67, para. 11.

opened up possibilities for further developments of the law for the protection of the environment *per se*. In both occasions, the Commission performed an inductive exercise but did not go any further. It inferred that the direction the law was headed through an application of legal considerations and resorted to policy in order to either induce states to accept a specific formulation of the provision (Article 54) or to provide additional support for the proposed rule (Principle 2).

Nevertheless, the ILC does not always show such self-restraint. In two types of scenarios, the Commission has been accused of 'changing hats' and assuming the job of the lawmaker. First, it does so in 'impossible choice' scenarios where the Commission adopts either of two equally plausible positions. A characteristic example in this respect has been the inclusion of Draft Article 7 in the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction that pertains to exceptions to immunity *ratione materiae*.[69] The polarization of ILC members on this topic and the politicized climate surrounding the debate was evinced by the adoption of the provision after two rounds of voting. In essence, the discussion turned to a political debate of competing considerations: on the one hand, the need to combat impunity for the most serious international crimes and, on the other, the respect for state sovereignty and stability in international relations.[70] The commentary to this provision reflects this debate and gives two reasons that justify the provision's inclusion. First, the Commission relies on questionable practice (national case law and legislation)[71] to induce that 'there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae*' in case of grave international crimes.[72] The ILC omits any reference as to the normative status of the rule and presents it ambiguously as a 'discernible trend'. Further, it ascertains the existence of the proposed rule from a balancing of policy interests.[73]

Arguably, the principal justification of the provision lies in the weight attributed to the policy consideration of combatting impunity. The unconvincing reference to relevant practice was made in order to legitimize a decision based on extra-legal discourse. One wonders what the added value of such an argument is if not to support what the ILC considers to be a legislative proposal. This is why draft Article 7 should be regarded as an exercise in 'legislation'. In view of this, some ILC members argued that the provision should be considered as 'new law' that bears no relation to either the codification or the progressive development of international law.[74] The division of opinion on the

[69] ILC, Report on the Work of Its Sixty-ninth Session, UN Doc. A/72/10, 1 May – 2 June and 3 July – 4 August 2017, at 164–165, paras 74–75. It must be noted that adopting provisions via voting is very rare at the ILC.

[70] See Provisional Summary Records of ILC Meetings 3360–3364, available at https://legal.un.org/ilc/sessions/69/docs.shtml.

[71] Shenn, 'Methodological Flaws in the ILC's Study on Exceptions to Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction', 112 *AJIL Unbound* (2018) 9.

[72] ILC, Report on Sixty-ninth Session, *supra* note 69, at 178–180, para. 5.

[73] *Ibid.*, at 181, para. 5.

[74] ILC, Provisional Summary Record of the 3362nd Meeting, UN Doc. A/CN.4/SR.3362, 19 June 2017, at 4 (Sean Murphy); ILC, Provisional Summary Record of the 3360th Meeting, UN Doc. A/CN.4/SR.3360, 19 June 2017, at 11 (Wood). Same criticism by Austria, Russia and the United Kingdom with respect to the topic of the succession of states in respect of state responsibility, see Šturma, Fourth Report on Succession of States in Respect of State Responsibility, UN Doc. A/CN.4/743, 27 March 2020, at 4, para. 9.

substance of the rule as well as the arguments and the methodology adopted in order to support the proposed draft suggest that the ILC has attempted to project its work as 'progressive development *stricto sensu*' but, in reality, is engaging in 'legislation'.

Similarly, Article 19(c) of the Draft Articles on Diplomatic Protection is primarily grounded on policy considerations due to the lack of clarity of relevant practice. The provision suggests that states should transfer any compensation received from the responsible state to the injured individual, despite the admission that states enjoy complete freedom of disposal regarding compensation awards. Since 'it is by no means clear that State practice accords with the above view',[75] the ILC resorts to public policy, equity and respect for human rights as justifications for the curtailment of the state's discretion in the disbursement of compensation.[76] Based on such policy considerations and not on pre-existing practice or *opinio juris*, the commentary acknowledges this provision to be written in non-prescriptive language.

Analogous criticism has been levelled in scenarios of *ex nihilo* 'legislation'. This refers to situations when the ILC infers the progressive development of international law without any (or very scarce) relevant practice to guide its work. The wording of Article 15 of the ILC Statute would *prima facie* allow this ('subjects which have not yet been regulated by international law'), and the Commission has included in its agenda topics that are admittedly supported by scant practice.[77] Article 12(2) of the Draft Articles on the Protection of Persons in the Event of Disasters provides a double duty for a potential assisting actor when presented with a request for assistance: to 'expeditiously give due consideration to the request and inform the affected State of its reply'.[78] The commentaries cite no relevant practice, the provision's wording is inspired from Article 3(e) of the Framework Convention on Civil Defence Assistance and the main justification for its inclusion is the introduction of 'greater balance within the text of the draft articles as a whole'.[79] Being a last-minute addition, this provision was not debated by ILC members, and the Commission is relying on an existing treaty rule as a source of inspiration – and not as an element of state practice or *opinio juris*[80] – in order to extract legal duties that exceed the *ratione materiae* scope of the treaty rule. Thus, Article 12(2) is principally justified by policy considerations, and both states[81] and Commission

[75] ILC, Report on Fifty-eighth Session, *supra* note 68, at 98, para. 6.

[76] *Ibid.*, at 100, para. 8. According to ILC member Mathias Forteau, 'the Commission overrode pronounced divergences by taking a decision on the better policy regarding what international law should be'. Forteau, 'Comparative International Law within, Not against, International Law: Lessons from the International Law Commission', 109 *AJIL* (2015) 498, at 508.

[77] See, e.g., the general commentary to the 2014 Articles on Expulsion of Aliens, the ILC recognized that '[o]n certain aspects, practice is still limited'. ILC, Report on the Work of Its Sixty-sixth Session, UN Doc. A/69/10, 5 May – 6 June and 7 July – 8 August 2014, at 24, para. 1.

[78] 'Draft Articles on the Protection of Persons', *supra* note 5.

[79] *Ibid.*, at 34, para. 7; Framework Convention on Civil Defence Assistance, 2000, 2172 UNTS 213.

[80] The Framework Convention on Civil Defence Assistance, *supra* note 79, has been ratified by four states.

[81] Australia held that the Draft Articles 'proposed creation of new duties for States'. Protection of Persons in the Event of Disasters: Comments and Observations Received from Governments and International Organisations, UN Doc. A/ CN.4/696, 14 March 2016, at 5. The USA held that they 'articulated new legal rights and duties'. Protection of Persons in the Event of Disasters: Additional Comments and Observations Received from Governments, UN Doc. A/CN.4/969/Add.1, 28 April 2016, at 21.

members[82] have categorized such provisions – inspired from treaties and not supported by practice – as legislative proposals or new law.

The same issue is identified with respect to several Articles on the Responsibility of International Organizations (ARIO).[83] In view of the scant – or, with respect to some provisions, non-existent – relevant practice, the ILC used as a source of inspiration the concomitant ILC's Articles on State Responsibility.[84] As admitted by the special rapporteur, two pressing political needs underpinned this methodological choice; first, the promotion of 'coherency in the Commission's work'[85] and, second, the setting up of a system of responsibility rules for international organizations.[86] Based on a presumption of similarity between the two sets of responsibility articles, the ILC never offered convincing legal reasons for extending state responsibility rules to international organizations.[87] Since the paucity of practice was widespread in the ARIO, and the Commission had to justify the drafting of these provisions upon policy considerations, commentators and ILC members have questioned whether the topic should have been undertaken by the Commission in the first place.[88] The logic behind this criticism is that, absent a minimum amount of practice, the ILC would be forced to speculate as to the direction the law is headed and thus engage in an exercise that exceeds its mandate.

There are two ways to remedy the limited availability of scientific data in international rule making; resort to either deduction or assertion.[89] And the ILC has made use of both when engaging in 'legislation'. New rules are deduced from existing rules

[82] Fervent opposition from Dire Tladi who considers Draft Articles 10–12 'law out of thin air'. Tladi, 'The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?', 16 *Chinese Journal of International Law* (2017) 425, at 426. Alain Pellet believes that the topic 'lend[s] itself much more to diplomatic negotiation than to codification' and that the ILC 'might as well take a bold and stimulating plunge into progressive development, shunning excessive caution and procrastination'. ILC, Provisional Summary Record of the 3102nd Meeting, UN Doc. A/CN.4/SR.3102, at 178, para. 39. See similar criticicsm by Roman Kolodkin. ILC, Provisional Summary Record of the 3294th Meeting, UN Doc. A/CN.4/SR.3294, 3 March 2017, at 9.

[83] ILC, Articles on the Responsibility of International Organizations, with Commentaries (ARIO), Doc. A/66/10 (2011).

[84] ILC, Report on the Work of Its Fifty-fourth Session, UN Doc. A/57/10, 29 April – 7 June and 22 July – 16 August 2002, at 94, para. 475.

[85] G. Gaja, Second Report on Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 April 2004, at 4, para. 5.

[86] ILC, Provisional Summary Record of the 3080th Meeting, UN Doc. A/CN.4/3080, 26 April 2011, at 3, para. 12 (Giorgio Gaja).

[87] F.L. Bordin, *The Analogy between States and Inernational Organizations* (2018), at 41–42.

[88] Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (2011) 695, at 700–704; Proulx, 'An Uneasy Transition? Linkages between the Law of State Responsibility and the Law Governing the Responsibility of International Organizations', in M. Ragazzi (ed.), *The Responsibility of International Organizations* (2013) 109, at 114; ILC, Provisional Summary Record of the 2878th Meeting, in 1 *Yearbook of the ILC* 2006, 72 at 75–76, para. 22 (Constantine Economides).

[89] Stefan Talmon argues convincingly that when ascertaining customary rules the ICJ resorts to the same methods in order to avoid a *non-liquet*. Talmon, *supra* note 65, at 423ff.

usually in *ex nihilo* scenarios. For example, draft Articles 12–15 of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction on the applicable procedural safeguards between the forum state and the state of the official were deduced from general legal principles and 'members … appreciated the deductive methodology employed by the Special Rapporteur to provide *de lege ferenda* proposals in the progressive development of international law'.[90] And, in 'impossible choice' situations, legislative proposals are asserted in order to end stalemated debates. Acting as special rapporteur, Wood, mindful of the few authoritative sources that he had in hand to support Conclusion 4(2) of the 2018 Conclusions on Identification of Customary International Law regarding the role of international organizations in the formation of custom, conceded that the proposed rule was but an assertion that reflects reality and may not even qualify as *lex ferenda*.[91] In short, as far as methodology is concerned, with respect to 'legislation', anything goes.

It does not follow automatically from the above that the ILC is acting *hors mandat* in such 'legislation' occasions. Hersch Lauterpacht held that the ILC should legislate more aggressively, and, thus, its work 'must consist essentially in inducing governments (or some governments) to accept new law'.[92] In view of the topics in the Commission's agenda nowadays, it is questionable whether this is a role the Commission can realistically undertake.[93] Alain Pellet, who served at the ILC for more than 20 years, suggests that progressive development entails some measure of 'legislation'. As he argues, 'the politicians – the States if you prefer – must fix the aims, but they must let us be free to propose; political orientations are their responsibility; conceptual elaboration is our business'.[94] In other words, the Commission may engage in policy-making but under strict confines. Because of the allocation of roles in the international legal order, it cannot be presumed that the ILC can seize legislative initiative in its own right. The political latitude left to the ILC to make proposals of new rules depends on the volition of states. This echoes Jeffrey Morton's conclusion that the ILC is greatly limited when developing the law 'to those laws which States are prepared to consent to'.[95] Hence, the mandate given to the ILC in a process of progressive development demarcates the limits of political feasibility and, thus, the scope of political decisions to be taken by the lawyers.[96]

[90] ILC, Report on Seventy-first Session, *supra* note 31, at 318, para. 149.

[91] ILC, Provisional Summary Record of the 3303rd Meeting, UN Doc. A/CN.4/SR.3303, 28 June 2016, at 8.

[92] Lauterpacht, *supra* note 23, at 29.

[93] The ILC arguably tried to do this with its topic of work on crimes against humanity, as Wood observes. Wood, 'The UN International Law Commission and Customary International Law', in E. Cannizzaro *et al.* (eds), *Discourses on Methods in International Law: An Anthology* (2020) 65, at 69. However, it is highly unlikely that the Commission's articles will be converted to a convention.

[94] Pellet, *supra* note 3, at 20; Graefrath, 'The International Law Commission Tomorrow: Improving Its Organization and Methods of Work', 85 *AJIL* (1991) 595, at 600.

[95] J. Morton, *The International Law Commission of the United Nations* (2000), at 112.

[96] M.E. Baradei, T. Franck and R. Trachtenberg, *The International Law Commission: The Need for a New Direction* (1981), at 26.

As mentioned above, Articles 16–17 of the ILC Statute were drafted on the premise that states would be in charge of progressive development.[97] However, their political input in the ILC's work is provided more covertly than initially thought in the Statute. States abstain in practice from giving this political guidance, and the insertion of topics in the ILC's agenda is only exceptionally initiated by them.[98] Thus, the Commission sometimes takes preventive action before taking on politically sensitive topics. The protection of the atmosphere topic, for example, was inserted in the agenda on the understanding that 'work on this topic will proceed in a manner so as not to interfere with relevant political negotiations' or 'seek to "fill" gaps in the treaty regimes'.[99] In this way, the Commission is second-guessing state criticism in order to forestall reactions that may debase the authority of its work. Political guidance has to be found implicitly from the *ex posto facto* reactions of states to the Commission's work either through their comments and observations on the ILC's work or through the discussions at the Sixth Committee.[100] Since the ILC is not *prima facie* a legislative organ, state authorization to engage in 'legislation' must be given in unequivocal terms and cannot be presumed when not clearly endorsed. In the example of the immunity of state officials provided earlier, such an authorization was lacking since states were equally divided as to the Commission's authority to pronounce on the matter in the first place.[101] Arguably then, the Commission was treading dangerous waters with the inclusion of Draft Article 7 not only because it exceeded its mandate to progressively develop the law but also because this 'mission creep' risked provoking a backlash from states.[102]

But the contribution of legal science in shaping this framework does not end there. The following section will turn to legal methodology. What role does it play in the determination of progressive development? Has the ILC adhered to a consistent pattern in this respect so as to remedy the defective analytical understanding of progressive development analysed above?

[97] See notes 59–61 above and accompanying text.

[98] Since states have been passive in proposing new topics, the ILC de facto seized this power. ILC, Report on the Work of Its Fiftieth Session, UN Doc. A/61/10, 20 April – 12 June 1998 and 27 July – 14 August 1998, at 110, para. 553.

[99] ILC, Report on the Work of Its Sixty-fifth Session, UN Doc. A/68/10, 6 May – 7 June and 8 July – 9 August 2013, at 115, para. 168.

[100] It is impossible to fully appreciate the level of state influence over the ILC's work solely via academic literature and official UN documentation. A former ILC member has noted that the legislative process of the Commission, the choice of topics and the ordering of priorities are heavily dependent upon and ultimately determined by states. Graefrath, *supra* note 94, at 600–604.

[101] This position was endorsed notably by four permanent Security Council members during the Sixth Committee discussion. C. Escobar Hernández, Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/722, 12 June 2018, at 7–10, paras 15, 18.

[102] The normative ramifications of this 'mission creep' exceed the remit of this article. It suffices to say that they can be significant given the tendency of courts to uncritically rely on the ILC's work. See, e.g., the application by the European Court of Human Rights of what was then Draft Article 5 of the ARIO before its adoption on first reading. *Behrami and Behrami v. France*; *Saramati v. France, Germany and Norway*, Appl. nos. 71412/01 and 78166/01, Judgment of 2 May 2007.

4 Prolegomena to a Scientific Methodology for Progressive Development

Section 2 of this article argued that neither ILC practice nor commentators have meaningfully analysed the elaboration of methodology undertaken in the process of progressive development. This argument derives partly from the underlying assumption that the development of legal rules is understood as an art and, thus, that it is not prone to legal analysis.[103] It becomes handy for a lawyer to label an issue as *ab initio* 'political' – and, hence, outside the remit of her science – when it involves policy decisions. This section does not endorse this thesis. It draws insights from Ernst Freund's 'Prolegomena to a Science of Legislation' in an attempt to construct a scientific methodology that the ILC may use when inferring rules that are based on extra-legal discourse.[104]

An American scholar of the late 19th and early 20th centuries, Freund is mostly unknown to modern international lawyers. A prolific writer at the time, he acquired fame as a reformer of legal education in the USA – he placed emphasis on the interdisciplinary approach to legal education – and a pioneer in the development of administrative law in that jurisdiction. His observations on the science of legislation are pertinent for two basic reasons: first, he was equipped with a strong background in both political sciences and law, which allowed him to tackle issues that cross-cut these two fields of science such as the limitations imposed on legislative power,[105] and, second, as a social reformer, he also played a major role as advisor to legislative agencies around the country and hence acquired practical experience in drafting and amending legislative texts.

Freund understood the science of legislation as an independent branch of legal science. And he delineated the contours of this science – albeit in a common law context – as follows: 'The special province of the science of legislation must be to carry the development of the law beyond what the processes of the unwritten law can possibly do for it.'[106] His objective was to debunk the myth that legislation is a non-scientific endeavour, a matter of wise discretion in adapting means to ends. While he concedes that 'there is an element that is irreducible to rule', there exist, he believes, certain methodological principles that determine the scope of legislative discretion.[107] Starting from this same premise, this section will argue that the ILC is not unrestrained when progressively developing international law. In fact, the vocation of the Commission is to apply systemic reasoning in scenarios of '*ex nihilo* legislation' (for example, Chapter IV of the ARIO) and in 'impossible choice' scenarios (for example, Conclusion 4(2) of the 2018 Conclusions on Identification of Customary International Law).

However, the practice of the ILC tells a different story. The Commission does not seem to understand progressive development in all its forms as an exercise conducive

[103] Pellet, *supra* note 3, at 16.
[104] Freund, *supra* note 13, at 122.
[105] See E. Freund, *The Police Power: Public Policy and Constitutional Rights* (1904).
[106] Freund, *supra* note 13, at 127.
[107] *Ibid.*, at 123.

to principled treatment. As noted above, the ILC has always proceeded on the basis of a composite idea of codification and progressive development. The separation between the two exercises 'has proved impractical'[108] or 'unworkable',[109] and the Commission's modern practice has de facto pushed the distinction to the side. Hence, a concrete methodology for the inference of rules that reflect international law's progressive development is missing from the ILC's work. Further, to the extent that progressive development of the law is equated with *lex ferenda*, the latter's establishment – as opposed to *lex lata* – is perceived as a subjective assertion that some rule ought to be part of positive law.[110] The ILC, then, is pulling rabbits out of its hat without providing any epistemological support. Given also the lack of guidance from its Statute in this respect, the Commission does not follow systematically a juristic methodology in order to infer the progressive development of the law. This has been convenient for every actor involved in the process – for the ILC, it has been convenient since it saves precious time[111] and, for states, since it leaves them free to deal with normative issues at will and gives them the assurance that they are the only lawmakers in the international legal order.

Since the ILC never resolved the issue of methodology, it is now facing mutually defeating criticisms as to how it should infer international law's progressive development. To the extent that this derives from the ILC's practice not to distinguish between codification and progressive development, the distinction that the Commission has swept under the rug for many decades has 'rise[n] up to shame thee in thine old age'.[112] For example, when discussing the special rapporteur's *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)*, a number of states have suggested that the work has thus far been based on theory and doctrine and not on practice. Yet another completely contradictory criticism within the ILC has been that the work of the Commission has not paid sufficient attention to theory.[113] Inevitably, this varied reaction affects the overall normative authority of the ILC's work.

The question that arises at this point is whether the ILC remains completely unrestrained to propose any provision it sees fit as the progressive development of the law or if the latter is qualified in some way. To put this differently, can the content of a proposed rule affect its standing as the progressive development of the law? Two qualifications are discernible from Freund's analysis, and this article will examine them in turn.

[108] Lauterpacht, *supra* note 23, at 30.

[109] Watts, *supra* note 14, para. 20.

[110] Thirlway, *supra* note 30, at 4.

[111] When submitting to the General Assembly the set of draft articles for the Convention on the Law of the Sea in 1956, the ILC acknowledged that it tried at first to identify which draft articles had involved codification and which progressive development, but it found that it had to abandon the attempt. ILC, Report on the Work of Its Eighth Session, UN Doc. A/CN.4/SER.A/1956/Add.l, 23 April – 4 July 1956, at 255–256, paras 25–26.

[112] *The Ten Commandments of Trevor-Roper* (c. 1971), Commandment no. 10.

[113] D. Tladi, Fourth Report on Peremptory Norms of General International Law (Jus Cogens), UN Doc. A/CN.4/727, 31 January 2019, at 8–10, paras 16–17.

A *A Systemic Development of Rules*

The absence of a methodological pattern dictates the absence of any substantive restriction as to what counts as progressive development. Since assertion is understood by the ILC as an acceptable method of identifying the progressive development of the law, then, *prima facie*, no qualification on the content of the law can be sustained. The adjective 'progressive' is devoid of any meaning, any new proposal qualifies as progressive development of the law and legislation is not understood as a 'hard' science but, rather, as an art, *ars juris*. Mindful of this unprincipled ascertainment of rules, the ILC has attempted to qualify its approach to drafting new provisions and the commentary in the Guide to Practice on Reservations to Treaties is instructive in this respect: '[T]he Commission did not intend to legislate and to establish *ex nihilo* rules. … It is a question not of creating but of systematizing the applicable principles and rules in a reasonable manner, while introducing elements of progressive development, and of preserving the general spirit of the Vienna system.'[114] While it offers no clarification as to the methodology on the elaboration of progressive development nor on its connection with systematization, this generic *dictum* highlights the importance of existing law – in this case, the VCLT – when developing international law.

Freund understands this connection with existing law to be the cornerstone of a science of legislation. In order to achieve the high ideal of 'a statute harmonious with other statutes of independent operation', he contends that 'the first requirement for correct and intelligent legislation is a knowledge of the existing law'.[115] Such systemic understanding of legislation is the key to a principled development of new rules by the ILC. In a similar vein, Guideline 9(2) of the ILC's recent report on the Protection of the Atmosphere, which was adopted on first reading, reads: 'States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.'[116] While this provision is addressed to states in their capacity as international legislators and not to the ILC, it confirms the applicability of the principle of systemic integration when developing the law.[117] According to this principle, legal reasoning 'builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose'.[118] The so-called presumption against normative conflict that emanates from this principle dictates that rules do not conflict and, 'when creating new obligations, States are assumed not to derogate from their obligations'.[119] Since no single legislative will can be discerned in international

[114] ILC, Report on Sixty-third Session, *supra* note 64, at 298, para. 18.

[115] Freund, *supra* note 13, at 123.

[116] ILC, Protection of the Atmosphere: Texts and Titles of the Draft Guidelines and Preamble Adopted by the Drafting Committee on First Reading, UN Doc. A/CN.4/L.909, 6 June 2018, at 3.

[117] ILC, Report on Sixty-ninth Session, *supra* note 69, at 161, para. 14.

[118] ILC, Report of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, at 24–26, paras 35–38.

[119] *Ibid.*, at 26, para. 38.

law, this principle promotes harmonization, coherence and uniformity in the application, interpretation and development of international law.

That the ILC has not paid sufficient attention to this is evident with respect to Chapter IV of the ARIO. Due to the absence of relevant practice, these provisions were deduced *per analogiam* from the concomitant state responsibility provisions. By setting the legal foundations for the ARIO's edifice in the form of *lex lata* Articles 3–5, the Commission has self-imposed certain limitations on what it can put forward as legislative proposals in the rest of the ARIO. According to Article 4, breach and attribution are considered necessary prerequisites for the establishment of an internationally wrongful act and, thus, of international responsibility as a matter of existing law. But Article 14 on 'aid or assistance' has eradicated the prerequisite of breach, while both provisions on 'direction and control' (Article 15) and 'coercion' (Article 16) suggest that an internationally wrongful act can arise without attribution of conduct. Arguably, in this case, the ILC has used its mandate of progressive development to draft *ex nihilo* provisions that run counter to foundational legal rules underpinning the topic of the ARIO as a whole.[120] In this way, the Commission demonstrates a lack of systemic understanding of international law when engaging in 'legislation'. To claim that the law can gradually develop in defiance of *lex lata* when no legal indication points to this direction is self-contradictory. It defies any systemic conceptualization of international law if the latter were allowed to undermine itself in such a way.

Similarly, the drafting of the 2014 Articles on the Expulsion of Aliens presented methodological challenges for the Commission.[121] Perhaps the topic's main difficulty rests on the divergent, long-standing and dynamic domestic regulations that render the inference of common rules particularly challenging.[122] This has forced the ILC to stress from the outset in the commentary that 'the entire subject area does not have a foundation in customary international law … although it does point to trends permitting some prudent development of the rules of international law in this domain'.[123] Thus, the ILC has asserted the progressive development of international law by reference to existing treaties as a source of inspiration, without assessing whether the proposed articles reflect or are supported by practice and *opinio juris.*[124]

At the heart of the topic in question lies a tension between the sovereign prerogative of states to deny entry to any individual and the restrictions thereto deriving mainly from international human rights treaties. The inherent right of states found its way in Article 3 and underpins the articles in their entirety; hence, the tendency of many states during the Sixth Committee debates to refer to their domestic legal framework as

[120] N. Voulgaris, *Allocating International Responsibility Between Member States and International Organisations* (2019), at 11–16.

[121] ILC, Report on Sixty-sixth Session, *supra* note 77.

[122] Murphy, 'The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission', 109 *AJIL* (2015) 130.

[123] ILC, Report on Sixty-sixth Session, *supra* note 77, at 24, para. 1.

[124] Forteau 'A New "Baxter Paradox"? Does the Work of the ILC on Matters Already Governed by Multilateral Treaties Necessarily Constitute a Dead End? Some Observations on the ILC Draft Articles on the Expulsion of Aliens', 30 *Harvard Human Rights Journal* (2017) 9.

a means of regulating this issue.[125] However, Article 26 extends the procedural guarantees of those subject to expulsion to aliens who are unlawfully present in state territory, despite the absence of relevant practice or relevant treaty provisions. The latter limit their scope of application *rationae personae* to lawfully present aliens. Article 26 then constitutes a legislative proposal that restricts a sovereign right with the sole justification that this is how things 'should' stand.[126] But when identifying progressive development, even the most noble considerations – humanitarian in this case – do not justify setting aside *lex lata* when this is not the direction the law is headed. Despite the policy considerations on which it may rest, progressive development does not amount to the adoption of legislative political decisions when they run counter to existing law.

The same defect is discernible in the 'impossible choice' situation that the ILC was facing when drafting its conclusion on the role of international organizations in the formation of custom in its 2018 Conclusions on Identification of Customary International Law. Conclusion 4(2) provides that the practice of international organizations is relevant only 'in certain cases', but this assertion is not the product of a systemic legal syllogism. The Commission identified some relevant practice, but it pointed to opposite directions. So, the ILC failed to induce a clear trend. And the discussion between members unfolded as a repetition of entrenched positions that lacked a minimum consensual starting point.[127] Some members held a purely state-centric view of international law-making, and others contended that, in principle, practice and *opinio juris* of international organizations could play a role in the formation of custom.[128] This is why the ILC members and the special rapporteur himself remained unconvinced that Conclusion 4(2) represented the progressive development of the law.[129]

The problematic aspect of this provision is not its substance but, rather, the way in which it came about. The ILC's methodology failed to account for the international legal personality of international organizations as a basis of the ensuing debate. Instead, the ILC put forward a proposal that sets to the side the legal status of international organizations as international legal persons,[130] a feature that has been recognized as

[125] See UNGA Sixth Committee, Summary Record of the 20th Meeting, UN Doc. A/C.6/69/SR.20, 10 November 2014, at 7; UNGA Sixth Committee, Summary Record of the 17th Meeting UN Doc. A/C.6/72/SR.14, 13 November 2017.

[126] ILC, Report on Sixty-sixth Session, *supra* note 77, at 45, para. 11 ('[t]his being so, as an exercise in the progressive development of international law the Commission considered that even foreigners unlawfully present in the territory of the expelling State for a specified minimum period of time should have the procedural rights listed in paragraph 1').

[127] In the words of the special rapporteur, the discussion degenerated into 'almost an ideological debate'. ILC, Provisional Summary Record of the 3303rd Meeting, UN Doc. A/CN.4/SR.3303, 28 June 2016, at 8.

[128] ILC, Report on Sixty-sixth Session, *supra* note 77, para. 159.

[129] The special rapporteur himself does not think that the conclusion 'could reasonably be described as *lex ferenda*'. Summary Record 3303, *supra* note 91.

[130] Rossana Deplano holds that '[t]he combined interpretation of Draft Conclusions 4(2) and 12(2) suggests that international organisations do not possess a distinctive normative identity as subjects of international law'. Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues', 14 *International Organizations Law Review* (2017) 227, at 229. There is a similar criticism in Odermatt, 'The Development of Customary International Law by International Organizations', 66 *International and Comparative Law Quarterly* (2017) 491, at 495.

lex lata by the Commission.[131] If the identifiable characteristic of international organizations – and the only one that puts them on a par with states – is their possession of international legal personality, the special rapporteur should have elaborated on the ramifications of this personality and, in particular, whether it is somehow attached to what the ILC has termed 'autonomous law-making power'. Rather, Conclusion 4(2) is presented as an out-of-context assertion, and existing practice is not analysed in the legal context in which it is placed in order to draft a legislative proposal.

It follows from the three examples mentioned above that neither deduction (Articles 14, 15 and 16 of the ARIO) nor assertion (Article 4(2) of the Conclusions on Identification of Customary International Law and Article 26 of the Articles on the Expulsion of Aliens) are outright rejected as legislative methods incompatible with the ILC's mandate. This is the case only when the Commission uses them to unduly circumvent existing law.

B *The Commission's Scientific Expertise*

Having seemingly exhausted most of the traditional topics of international law, the ILC has lately shifted to those related to special regimes of international law, such as environmental law and economic law. In this context, political, economic and cognate factors are becoming all the more relevant in the legislative process. It is important then to understand what legislative proposals the Commission is not competent to make due to a lack of scientific expertise. For example, when discussing the inclusion of the protection of the atmosphere topic in the ILC's agenda, France argued that the Commission lacked the expertise to deal with the topic's 'scientific and technical aspects'.[132] Can the ILC engage in non-legal scientific research in order to gain the information on which its reports can be based? Contemporary international law scholarship looks beyond traditional sources and assumptions and is becoming more interdisciplinary. Should the Commission be moving in that direction too?

The answer to this question requires a demarcation of legal science from other sciences that operate with and through the legislative process (economics, political sciences, sociology and so on). As Christian Tomuschat has remarked that, since the ILC is made up of lawyers, 'it is lawyers' law on which it can pronounce authoritatively'.[133] But how is this 'lawyer's law' delineated? Freund's insights are pertinent once more:

> The only satisfactory division line will be that which assigns to jurisprudence [legal science] the collection, systematization, and fructification of those data affecting the choice between various possible legislative provisions which have a specific relation to law as a social phenomenon, and for the handling and understanding of which training and tradition render the lawyer specially competent.[134]

[131] ILC, Report on the Work of Its Sixty-eighth Session, UN Doc. A/71/10, 2 May – 10 June and 4 July – 12 August 2016, at 106, paras 3–4.

[132] UNGA Sixth Committee, Summary Record of the 19th Meeting, UN Doc A/C.6/67/SR.19, 4 December 2012, at 15, para. 91.

[133] Tomuschat, 'The International Law Commission: An Outdated Institution?', 49 *German Yearbook of International Law* (2006) 78, at 80.

[134] Freund, *supra* note 13, at 129.

Thus, the ILC – an expert body in international law – is definitely not competent to generate non-legal data by engaging in research from other fields of social sciences since its members possess no such training.[135] In this sense, the Commission is not equipped to research the economic benefits from the application of most-favoured nation (MFN) treatment in the field of trade in services.[136] But Freund's most important inference is probably the realization that 'any demarcation of this kind must be more or less conventional, a working arrangement rather than a logical differentiation'.[137] Having in mind that a hard and fast distinction is impossible to draw, it is still important to understand what working arrangement should underpin the Commission's engagement with 'legislation'.

Hearing the views of experts may help the ILC understand the technical aspects of a particular topic, and this is anticipated in Article 16(e) of the ILC Statute. What is considered a 'technical aspect' nevertheless is open to discussion and the question inevitably arises: when should the Commission solicit the views of experts? The ILC has only exceptionally made use of expert opinion, and it has always concerned data provided by natural sciences. For example, the Articles on the Law of Transboundary Aquifers were completed with the assistance of hydro-geologists and water law experts.[138] Similarly, in the context of the topic on the protection of the atmosphere, it was evident that the assistance of experts was necessary for the ILC 'to have a certain level of understanding of the scientific and technical aspects of this complex problem such as the sources and effects of' atmospheric damage.[139] Contrariwise, when a decision has to be taken on the basis of data from social sciences, the Commission considers itself capable of understanding the data in play and is thus competent to render an informed decision without further consultations. In its MFN topic, for example, the Commission alluded to the economic concept of comparative advantage in order to explain why MFN treatment has been seen as the cornerstone of the General Agreement on Tariffs and Trade and the World Trade Organization.[140]

It would not be fair to unduly limit the ILC's competence in this respect and suggest that every decision that is based on non-legal data falls beyond its expertise. From both a practical and a theoretical point of view, this is unsustainable. Very few, if any, legislative decisions would then be taken without 'external' assistance, so that the time and

[135] As observed by McRae, the possession of such knowledge by ILC members would be serendipitous, McRae, 'The Work of the International Law Commission, 2007–2011: Progress and Prospects', 106 *AJIL* (2012) 322, at 334.

[136] ILC, Report on the Work of Its Sixty-seventh Session, UN Doc. A/70/10, 4 May – 5 June and 6 July – 7 August 2015, at 157–158, paras 37–40 (Annex).

[137] Freund, *supra* note 13, at 128.

[138] ILC, Report on the Work of Its Sixtieth Session, UN Doc. A/63/10, 5 May – 6 June and 7 July – 8 August 2008, at 23, para. 5.

[139] Murase, 'Scientific Knowledge and the Progressive Development of International Law: With Reference to the ILC Topic on the Protection of the Atmosphere', in S. Mahmoudi (ed.), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (2017) 41, at 44.

[140] ILC, Report on Sixty-seventh Session, *supra* note 136, at 97, para. 38 (Annex); General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194.

resources needed would hamper the ILC's effectiveness. Further, legal science does not operate in a vacuum, and lawyers are trained to comprehend the rationale of laws. Since the motives underlying legislative regulation are anthropological, sociological, political, economic and so on, they are exposed to social science argumentation. Thus, the only safe criterion as to whether the ILC can legitimately engage in 'legislation' is a subjective one: should Commission members believe they are capable to comprehend the relevant data so that they can make use of them (for example, collect and systematize), then the ILC may make adequate proposals. Also, throughout its 75-year history, a respective criticism has not been levelled against the Commission, so its judgment as to whether it indeed possesses such capacity must be trusted. If, on the other hand, the ILC finds that it lacks the respective expertise, it should strive to acquire the necessary knowledge for an informed decision.[141]

5 Conclusion: May the Debate Revive

The debate on the necessity of codification *lato sensu* as a means to develop the law and thus achieve progress in human societies has been going in circles since the early 19th century. After Napoleon's defeat, Anton Thibaut and Friedrich Savigny debated the unification of German law through a uniform code. Similar arguments were exchanged between David Field and James Carter in the struggle for codification of the New York Civil Code towards the end of the century.[142] Such a dramatic exchange of views never occurred in international legal scholarship, and the discussion in the 1950s between Lauterpacht, Charles de Visscher and Julius Stone regarding the appropriate body to codify international legal rules remains an isolated incident.[143] It sprang out of the pertinence of the then newborn ILC to authoritatively codify and progressively develop international law. The Commission's relative success to finalize certain key areas put this debate to bed. This article highlights the renewed importance of such a discussion today if the ILC wishes to regain its prominence.

This neglected facet of the debate on the ILC is proving particularly topical. The international system produces 'documents in the legislatistic genre with promiscuous abandon',[144] new ways of regulatory governance through specialized bodies tend

[141] Such is an obligation of conduct or '*une obligation de s'efforcer*'. Combacau, 'Obligations de résultat et obligations de comportement. Quelques questions et pas de réponses', in P. Reuter (ed.), *Le droit international, unité et diversité: mélanges offerts à Paul Reuter* (1981) 181, at 196.

[142] Reimann, 'The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code', 37 *American Journal of Comparative Law* (1989) 95.

[143] Stone, 'On the Vocation of the International Law Commission', 57 *Columbia Law Review* (1957) 16. Like Julius Stone, Charles de Visscher held a pessimist view on the fruition of the UN codification project, to the point that he considered it as 'a threat to the development of international law'. C. de Visscher, *Théories et Réalités en Droit International Public* (1953), at 177. Lauterpacht, on the other hand, considered the ILC to be the adequate body to perform this important function and any difficulties faced by the Commission of a 'transient character'. Lauterpacht, *supra* note 23, at 43.

[144] Reisman, 'International Law-making: A Process of Communication', 75 *Proceedings of the ASIL Annual Meeting* (1981) 101, at 102.

to replace formal law and political commitment to 'old school' general law-making bodies is declining. In this panorama of constant changes, Martti Koskenniemi has predicted the Commission's demise about a decade ago.[145] While tracing evidence of this demise, this article argues that the ILC's reaction to this new reality has been spasmodic at best. The Commission attempts to remain relevant by including 'futuristic' topics in its agenda without adapting its working methodology. This only provokes a legitimacy crisis; instead of promoting progress, the ILC puts its legacy and authority on the line.

The central premise of the argument presented here is that the science of international law should be able to develop international law. 'Progressive development', which has taken centre stage in the ILC's work, forms part of this science. Its un-scientific understanding by the Commission has provoked some warranted criticism as to the authority of its work. In this juncture, a rethinking of the Commission's role and mandate is a priority. To make sense of how this development should occur, this article has discussed a twofold analytical understanding of progressive development. The distinction between 'progressive development *stricto sensu*' and 'legislation' put forward here puts into context the role that politics has to play when developing the law and works as a starting point for the elaboration of a methodology on progressive development.

[145] M. Koskenniemi, *The Politics of International Law* (2011), at 237.