Between Codification and Progressive Development of the Law: Some Reflections from the ILC

ALAIN PELLET*

It could well be asked whether there is a need for codifying international law. After all, the very idea of codification is relatively new in modern times. In domestic law, it was only experimented with – and not in all countries – from the French Revolution onward. At the international level, codification remained a purely doctrinal aspiration until 1930 and, in fact, until the creation of the International Law Commission (ILC) over fifty years ago. Yet the World had survived without a formalised codification process.[1]

However, in the 1920s it became apparent that there was a need for uniform and clear rules applicable to the then organizing international "society" – hardly then, and still debatably a "community". After the failure of the League of Nations Conference in 1930, the International Law Commission was created to that effect in 1947 with the double purpose of codifying and progressively developing international law.

It is commonplace to recall that distinguishing between "pure" codification on the one hand and progressive development on the other hand, while intellectually attractive, has proved practically impossible. Indeed, the Statute of the ILC is based on such a distinction, but it has never "worked" in practice: neither regarding the selection of topics, nor in respect of the procedure followed or the outcome of its work, has the Commission made (or been able to make) a difference between both aspects; all topics involve partial codification since no topic is entirely new when it is undertaken by the ILC (except, maybe, purely institutional matters like the draft Statute of the International Criminal Court); in addition, all imply an element of

* Professor, Université de Paris X-Nanterre; Member and Former Chairman, International Law Commission – The present version is a shortened and updated version of a keynote speech introducing the ASIL/Graduate Institute of International Studies Forum held in Geneva on May 16, 1998 on Multilateral Treaty-Making – The Current Status of Challenges to and Reforms Needed in the International Legislative Process, the papers presented at the Forum have been edited by Vera Gowland-Debbas (Nijhoff, The Hague/Boston/London, 2000, VI-144 p.).

[1] It must, however, be acknowledged that, even though there did not exist any formalised process, treaties like The Hague Conventions of 1899 and 1907, or, more generally, *traités-lois* as opposed to *traités-contrats*, were, indeed, codification conventions, at least in the broad sense.

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progressive development since, almost as a matter of definition, customary rules always comprise some elements of uncertainty calling for clarification and this is precisely one of the main purposes of codification; and this is even true in very ancient fields of international relations largely regulated by well established rules, such as diplomatic or consular relations or the law of treaties.

This being said, in practice, this does not raise real difficulties; 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 – except in those very rare cases when the Commission confers a distinct status to provisions which, in its opinion, belong to codification on the one hand, and those belonging to progressive development on the other hand.[2]

This shows once again how artificial the distinction is. "Pure" codification constantly interferes with progressive development; there is certainly no clear threshold. Therefore, even though this conclusion would probably disappoint some learned scholars, particularly those – and they are quite numerous in academic circles ... – who are obsessed with clear and straightforward classifications, the only sensible conclusion is that progressive development is indissociable from codification; it is indeed part of codification.

Now, a more difficult question is: when is legal development "progressive"? When is it more than that? Here again, there is no clear, indisputable threshold; and there is nothing strange in that: law in general, and international law in particular, is not a "hard" science; it is an "art", *ars juris* ... But the absence of threshold certainly does not mean that any new rule of international law qualifies as a "progressive" development.

This is extremely important in respect of the work of the ILC – a group of thirty-four independent experts, without any political mandate or responsibility. It would be absolutely disastrous and extremely arrogant that they assume the role of a legislator; "codification makers" they are; law-makers (even quasi-legislators) they are not, except in the very rare cases where they are expressly given such a role (here, again, the draft Statute of the ICC is probably the only, at least the most striking, example of such an exceptional mandate). The difference is that the ILC

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[2] See the attempt made in the Draft Articles on "Nationality in relations to the succession of States, adopted on first reading in 1997; see e.g.: ILC, Report on the work of its Forty-Ninth Session, 12 May-18 July 1997, UN Doc. GAOR Fifty-Second session, Supp. NE 10 (A/52/10), Article 19, at p. 72.

may complete the existing law with *progressive* developments; it cannot change the whole system of the law of nations. Its duty is to try to understand the logic of existing rules and to develop them in the framework of this logic, not to change the underlying logic.

In fact, as is well known, legal development is, globally, something much too serious to be entrusted to lawyers. And this is not specific to international law: inside the State, law is made by politicians, through (at least in democratic States) Parliaments or through Governments invested with political responsibilities, not by lawyers. As Sir Robert Jennings put it, "No developed nation would allow its legislative policy to be decided upon just by the lawyers. They would be employed to advise and to draft; but the legislative policy would be decided by those who understood the matter the subject of the legislation".[3] Progressive development is the extreme limit of what is tolerable and the ILC would indeed be well inspired not to abuse the confidence placed upon it by its Statute.

Just to give an example: in 1994, Professor Arangio-Ruiz, the then Special Rapporteur on State Responsibility, presented an admirable report on the determination of crimes (in the meaning of Article 19 of the Draft Articles adopted in first reading in 1996[4]). Inspired by an eminently respectable moral ideal, he had elaborated an incredible system including recourse to the General Assembly, the Security Council and the International Court of Justice (ICJ).[5] This was admirable but, with respect, it was totally unrealistic and, to say the truth, quite absurd: whether you like it or not, international society is not domestic society and it is of no use at all to try to transplant internal legal reasoning and institutions into the international sphere; the transplantation cannot take effect – except if it is very gradual

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[3] "International Law Reform and Progressive Development", Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday, Kluwer, The Hague, 1998, p. 334.

[4] In the final Draft adopted in 2001 and of which the General Assembly took note in Resolution 56/83 of 12 December 2001, the word "crime" has been substituted by the tortuous expression: "serious breach by a State of an obligation arising under a peremptory norm of general international law"; but the difference is insubstantial (see A. Pellet, "The New Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts: A Requiem for States' Crimes?", *Netherlands Yearbook of International Law*, 2001, pp. 55-79).

[5] See ILC, Yearbook 1994, vol. II, Part II, paras. 261-266, pp.141-42; Sixth Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/461/Add.1, paras. 6-8, p. 4.

and rooted in a political context which makes it acceptable for the community of States.

Moreover and in any case, the ILC is certainly not the appropriate forum to promote such a radical development; nor is it the right place to try to "judicialise" international society, as Part III of these same Draft Articles on State Responsibility tried to do.[6] Legal experts are not negotiators; they are not supposed to bargain or to compromise, but, once again, to codify and to develop *progressively* (that is, gradually) existing law. Would the odd idea that the ILC could be the right forum to discuss the Comprehensive Test Ban Treaty occur to any sensible mind? Certainly not: this kind of treaty implies a huge technical expertise on an immensely complex range of problems outside the legal field, taking into account very diverse factors of a political, military and economic nature which are out of reach of a handful of lawyers, however eminent they may be.

It is good form within international law circles to deplore that the second "codification" of the law of the sea was realised outside the ILC. I would certainly not join the mourners choir! Indeed, the Commission had performed a respectable job in elaborating the 1958 Geneva Conventions; but, at the same time, the failure of the second Conference on the Law of the Sea in 1960 had shown the limits of using a purely legal preparatory process and it can be accepted that the ILC would have been incapable of taking into account all the relevant data, including complex geo-political issues involved by the new developments which had occurred in the rapidly changing political and economic contexts during the 1970s.

This, however, certainly does not mean that multilateral treaty-making should be confined to codification (including progressive development) in the pure sense. It simply means that not all topics are fit for the ILC or comparable forums. If they are highly sensitive politically speaking, they must be tackled in purely political (that is, since we are in the international sphere, diplomatic) forums (with the possibility of having some preparatory work done in the ILC as shown here again, by the precedent of the Criminal Court; but it also shows that it is unavoidable that, in such a case, this work be carried on at the diplomatic level). If the issues at stake are highly technical (besides legal technicalities), the topic must be dealt with in places where this expertise is available. And, if the topic involves a mixture of political, technical and legal issues, then, something like the Third Conference on the Law of the Sea is probably unavoidable.

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[6] See ILC, Report on the Work of its Forty-Eighth Session, 6 May-26 July 1996, UN Doc. GAOR Fifty-First Session, Supp. NE 10 (A/51/10), pp. 147-151.

The inadequacy of the ILC in all these cases is averred even though one of the reasons for its uniqueness is the irreplaceable constant backward and forward motion between the "scientific" and the political parts of the process. For its part, the Commission is (or should be) concerned with collecting and analysing precedents (whether judicial or practical) and doctrinal views, assembling them with a view to ascertaining evidence of practice generally accepted as being the law and to deduce the existence of new trends, and elaborating drafts with a concern for reasonableness, consistency and acceptability. The Sixth Committee in New York, is (or, again, should be) concerned with determining topics which meet the needs of States and deserve attention from the Commission, with making sure that ILC drafts meet these needs, and with giving clear guidance to the ILC in this respect, even though, in practice, this does not work very satisfactorily since States do not show a serious interest in the work of the Commission.

This is not wholly to be regretted; it also allows the ILC to be more imaginative and consistent than it would be if it were under too strict a guidance from the States: in the present state of international relations, this would unavoidably lead to cooling down and drying out the ILC proposals on any sensitive issue. In the present state of international relations, the combination of the ill-advised "leadership" of the United States and of the legal conservatism of its main partners (from China to France, and from Russia to India or Mexico), would only result in "killing" all attempts to adapt international rules to the real needs of the modern, "global", society.

Thus, on the occasion of its second reading of the draft on responsibility, the Commission has been well advised not to recant the formidable intuition of Ago which has resulted in the redefinition of the very concept of international responsibility by evacuating damage from its definition[7] and, at the same time, it has accepted – although in a shy manner – that the legal consequences of international wrongful acts must be differentiated, thus perpetuating the former distinction between "crimes" and "delicts".[8] But, at the same time, the ILC has been prudent enough not to recommend the immediate conversion of its Articles into a Convention and this has been accepted by the General Assembly in its Resolution 56/

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[7] On this intellectual "revolution", see Alain Pellet, "Remarques sur une révolution inachevée: le projet d'articles de la C.D.I. sur la responsabilité internationale des États", *A.F.D.I.* 1996, pp. 7-32 and for a brief commentary of the new Articles, "Les articles de la C.D.I. sur la responsabilité de l'État pour fait internationalement illicite: Suite – et fin?, *A.F.D.I.* 2002, pp. 1-23.

[8] See note 3, above.

83: had a diplomatic conference been convened immediately, one could have bet that all the cautious innovations proposed in the Articles would have been mercilessly deleted, while it could be hoped that after some years they would have become normal practice and seen as a *fait accompli*.

One can, of course, object that, since States have turned round and seem to have repudiated the notion of "crime", why would the ILC maintain it against the whole world? First, this is not the whole world but the mighty, and powerful, and conservative States only. In any case, there must be no confusion: acceptability does not mean servility. As legal experts, the role of the ILC members is to explain why a concept is logically and legally necessary and they should not accept that consistency be sacrificed for reason of a supposed non-acceptability. Then, but only then, the States have to take their responsibility and decide.

As explained above, the most precious aspect of the codification process through the ILC is the constant co-operation of the "expert level" with the "political level"; but, in this process, each level must play its own part: the politicians – the States in the case of international law – must fix the aims, but they must leave the experts free to propose. Both levels would be well inspired not to invert the roles.

This might be easier if States, in nominating and electing Members of the Commission, were more faithful to the letter and, certainly, to the spirit, of the ILC Statute. More and more, they nominate and elect candidates who, in reality, are more acquainted with the United Nations and/or the world of diplomacy than with "academic international law"; this, indeed, presents some advantages (it might reinforce support for the Commission and avoids purely metaphysical discussions) but it also has many inconveniences, all the more that, generally speaking, the "professors" come from the West while the "diplomats" are from the Third World. This creates an imbalance inside the Commission in that its composition erases the *raison d'être* of the whole system, that is the complementarity (not the identification) between the ILC on the one hand and the Sixth Committee on the other hand; and the "double cap system", that is the fact that many Members also represent their countries at the Sixth Committee, is far from commendable.

All this might not sound very encouraging and might give the impression that the ILC is, indeed, definitely not the proper forum to respond to new needs through codification and progressive development. Indeed, the ILC is far from perfect. It is certainly not ideally composed; it is, nevertheless, made up of (globally) independent lawyers, and the system of regional "quotas", rigid as it may seem, at least guarantees a diversified regional composition and avoids the weaknesses noticeable, for example, in the composition of the Human Rights Committee. Its co-operation with the Sixth Committee is far from ideal; both levels have, nevertheless, a constant dialogue. The ILC's process might seem desperately slow; its

methods of work have, nevertheless, been improved during the last few years, and they guarantee a serene and in-depth examination of all the facets of a problem; moreover, the Commission has shown that, when necessary (or, simply, when it could benefit from the leadership of a dynamic Rapporteur, as Vaclav Mikulka in the case of nationality in relation to the succession of States or James Crawford for the Criminal Court), it can be quick and efficient.

Now, efficient for what? How can the efficiency of a body like the ILC be measured? Expeditiousness? If this is the test, the average is very bad indeed, not far from zero out of twenty (with, once again, bright but very rare exceptions)! But this is not the only criterion. If we take the quality of the output, things rather improve.

To make the question less subjective: what has happened to the ILC drafts? Statistics in this respect can be made rather short: up to now the Commission has submitted 27 final reports (if one includes both the Code of Crimes and the Statute of the Criminal Court), plus one first reading draft; these 27 reports have resulted in 15 Conventions (plus a number of optional protocols) but this figure includes the Geneva Conventions of 1958 which were four for the sole topic of the law of the sea and are now *de facto* replaced by the "non-ILC" Montego Bay Convention. This is apparently not a wonderful achievement ...

But the picture is less dark than it looks: first, several of these treaties, beginning with the Vienna Convention on the Law of Treaties, are among the most important ever concluded; second, and above all, it is far from certain that the influence of the work of the ILC can be properly measured through these treaty statistics. Suffice it to recall that ILC drafts may exert a considerable influence even before they are completed; just think, in this respect, of the remarkable impact of the Articles on State responsibility even before or when they were adopted on first reading.[9]

It can, nevertheless, be sustained that the ILC is both:

- a misused forum; and
- one forum among others and not *the* forum, appropriate in all circumstances and for all and every possible topics.

It is a misused forum in the sense that this costly mechanism is not properly provided with topics. This might sound as an odd declaration: the Commission now

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[9] ICJ, Judgment of 25 September 1997, Gabcikovo/Nagymaros Project, ICJ Rep. 1997, p. 7. See also "Introduction – The Achievement of the International Law Commission", in *ILC, International Law on the Eve of the Twenty-First Century*, United Nations, New York, Sales NE E/F 97.V.4, pp. 1-18.

has seven topics on its agenda, more than it has ever had. But, it must be noted, only one, inherited from a remote past, has been assigned to the Commission by the General Assembly.[10] The six others are pure "inventions" of the Commission! Indeed, all these topics have, finally, been endorsed by the Sixth Committee, but they were certainly not chosen by it.

This being said, with the important exception of "Liability", all these topics are appropriate and fit for the Commission, as the Commission fits them: they bear on "lawyers' law"; they do not involve too strong short-term political debates; they do not primarily imply expertise in non-legal fields; they do not overlap with similar topics dealt with elsewhere. And they respond, in their own manner, to real needs of the international society.

One could even go so far as to say that they are part of the "constitutional law" of the international society; not in the formal acceptance of the word "constitution" (this would correspond more to the UN Charter or the very rare existing peremptory norms of general international law), but in the substantive sense: they are part of the legal basis in which international society is rooted. This has been the case, until recently, of the law of State responsibility now prolonged with diplomatic protection, and of the law of the sources of law as in the case of treaties (through the topic of reservations) or unilateral acts of States. In all these cases, the ILC consolidates (through progressive development and codification) the legal roots of international society as and when required by its slow process of consolidation.

And, as in all societies, this slowly consolidating international society needs uniform legal rules which transversally cut through all fields covered by international law. Of course, it has to be accepted that rules must adapt to their object, and that special fields, in some cases, might need special rules. But the new mania in the Commission of advocating "diversity" in all and everything, and in particular, human rights and environment, can only be regretted. This way of thinking certainly attracts much sympathy and approval. But there are limits to this decentralised or "exploded" approach to international law: what would one think of a constitution which systematically adopts special rules concerning the adoption or the application of parliamentary acts depending on whether they bear on military or economic or human rights issues? The same holds true concerning treaties: whether human rights activists like it or not, the same general basic rules apply and

[10] "International Liability for injurious consequences of acts not prohibited by international law" – a topic studied since 1977, which was, in fact, removed from the topic on the "Responsibility of States".

must apply to all of them.[11] This does not rule out exceptions when exceptions are indispensable, but these exceptions must be included in the *general* codification; and when they are not, they must be provided for in the treaties themselves, not decreed by specialists without regard to the need for clear, general, uniform, well established and well respected rules. And this is not all that constraining: after all, codified rules are only applicable when the special treaties themselves do not provide otherwise! There is nothing "democratic" or "humanist" in the opposite approach: it only tries to justify the dictatorship of the "specialists" or of the "activists"; it is no more acceptable at the international level than that of the dictatorship of bureaucrats inside the States or in the European Union.

In this respect, it can be said that if the ILC did not exist, we should invent it or some kind of similar mechanism. Indeed, one of its main functions is to facilitate and encourage a uniform international law, responding to the needs of international society as a whole, its constant and everlasting needs for uniform transversal rules. This certainly is less exciting, less fashionable, than forging new rules for new needs; but this is a necessary and respectable task which could, certainly, be performed in a better and more efficient way. But, for the time being, let the ILC live ... *faute de mieux*! and for the "new needs", let other forums, better equipped for that, and unavoidably more political, deal with them. This is a perfectly acceptable sharing of the tasks.

[11] One of the recently adopted topics on the Agenda of the ILC is "Fragmentation of International Law: Difficulties Arising from the Diversification and expansion of International Law".