PRELIMINARY DRAFT
(not for quotation)

The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission

Donald McRae (University of Ottawa and Member of the ILC)[*]

I Introduction

During the course of the last (64th Session) of the ILC, which was the first session of a new quinquenniun, there was frequent mention of the Commission's role in codification and progressive development. Some members objected to the inclusion of certain provisions on the ground that they did not represent customary international law and thus were not appropriate for codification. It was suggested that the task of the Commission was to identify the relevant rules of customary international law that could be codified and only after it had done so could it address the question of progressive development. Others took the view that a hard and fast division between codification and progressive development should not, and indeed could not, be made.

The discussion may have been a consequence of the fact that several new members had been elected to the Commission – almost one third of the members were new in 2012. And, inevitably they would be seeking to understand what the Commission does and is capable of doing and giving thought to the scope of its mandate. But, the discussion also reflected a deep-seated uncertainty about the contemporary role of the Commission. And it coincides with often-expressed concerns about the relevance of the ILC as an institution for the progressive development of international law and its codification.[1]

Yet the debate about the relationship between codification and progressive development is not new; it goes back to the beginning of the ILC and earlier. Indeed, it has been the subject of continued discussion both in the literature and in the Commission from its earliest days. And, clearly, within that debate the meaning of what constitutes codification and what constitutes progressive development has shifted. It is appropriate, therefore, in light of this renewed interest within the ILC of the proper relationship between the two, to look afresh at the way in which codification and progressive development have been perceived inside and outside of the Commission and to consider what impact this should have on the Commission's future work.

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[*] I am grateful to Julianne Marley, JD candidate, NYU School of Law, for her research assistance and helpful suggestions.

[1] Christian Tomuschat, "The International Law Commission: An Outdated Institution?" 49 G.Y.I.L 77-105 (2006)

In this presentation, I shall look at the origins of the ideas of codification and progressive development, their incorporation into Article 13 of the UN Charter and the Statute of the ILC, and the early debates over their scope. I shall look also at the way in which the distinction has been applied in the work of the Commission and the implications it has for that work. I shall then look at future models for addressing the codification and progressive development interface and draw some preliminary conclusions. The paper has to be seen as a work in progress, rather than a definitive treatment of the issues that it deals with.

II **The Origin of the Notions of Codification and Progressive Development**

The idea of the codification of international law has a long and venerable history and can be seen as going as far back as the Congress of Vienna.[2] The conferences leading to the conclusion of multilateral treaties that continued throughout the 19th century were all characterized as exercises in codification.[3] By contrast the term "progressive development" of international law has a much more recent pedigree. It first appeared in Article 13 of the United Nations Charter and was incorporated into the Statute of the Commission. However, proposals for what became Article 13 referred initially just to the "development" of international law,[4] although an Ecuadorian proposal suggested that the General Assembly should have the power to "establish or progressively amend the principles and rules of international law".[5]

Much of the discussion in the drafting of what became Article 13 concerned whether the General Assembly was to be granted legislative power to enact binding rules of international law or impose conventions on states by majority vote, approaches that were eventually rejected. Instead, the focus of the General Assembly was to be on "the development and revision" of international law. Herbert Briggs who has analyzed the negotiating process stated that apparently for some states the word "codification" alone suggested too much rigidity and hence the need for the words "development and revision".

But, in the final drafting of Article 13, the word "revision" disappeared, because, Briggs says, "revision" was seen to emphasize change too much. Instead the words "progressive development" and codification were used. In the view of the drafting committees as noted in the Summary Report of Committee II/2 these words would include some element of revision and "establish a nice balance between stability and change".[6] Thus was established the mandate of the General Assembly to initiate studies

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[2] R.Y. Jennings, The Progressive Development of International Law and its Codification" 24 B.Y.B.I.L. 301 (1947)
[3] *Ibid.*
[4] Herbert Briggs, *The International Law Commission* (Cornell University Press: Ithaca, 1965) 4-5.
[5] *Ibid*, 6.
[6] *Ibid*, 12

and make recommendations for the purpose of "encouraging the progressive development of international law and its codification".

A Committee on the "Progressive Development of International Law and its Codification" was established to propose how the mandate of the General Assembly would be fulfilled, and it recommended the creation of an International Law Commission. In the drafting of the Statute of the Commission, there was no change in the wording from Article 13 of the Charter, and the object of the Commission, set out in Article I, as is well known, is "the promotion of the progressive development of international law and its codification."

III The Meaning of "Progressive Development" and "Codification" in the Charter and the Statute of the ILC

The words "progressive development" and "codification" were adopted in Article 13 of the Charter without any agreement as to their precise meaning. Indeed, the Committee of Experts established under the League of Nations to prepare topics that were ultimately dealt with in the 1930 Hague "First Conference for the Codification of International Law" had been called the Committee of Experts for the Progressive Codification of International Law". The term "progressive" here was intended to indicate that the whole of international law was not to be codified at once in a single code; rather it was to be done in stages.[7] In a document prepared by the UN Secretariat in 1947 entitled "Historical Survey of Development of International Law and Its Codification by International Conferences" used the heading "The Progressive Development of International Law" for each of its sections concerning international conferences and the activities of the League of Nations.

Nor was there any clarity over whether the development of international law through conferences and codification were separate or similar processes. In its survey of international conferences that Secretariat noted that

> "the development of written international law through the restatement of principles of existing law or through the formulation of new law (these two methods being frequently undistinguishable), was pursued at over 100 international conferences or congresses held between 1864 and 1914,…"[8]

The Secretariat study also observed that the 1930 Hague Conference "encountered some difficulty in drawing a distinction between codifying existing and drawing up new rules of international law."[9] Indeed, the delegate of Belgium to the Conference stated,

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[7] Report of the UN Secretariat, "The Progressive Development of International Law" 41 A.J.I.L. Supp. Official Documents (1947) 32 at 68

[8] *Ibid*.

[9] *Ibid*, 85.

> "our examination of the questions led us to believe-and the discussions in the Committees convinced us of the truth of this-that, while it is perfectly right in theory to distinguish between pure codification and the adoption of new rules, nevertheless, in practice we could not maintain this distinction in any of our Committees."

In a sense, this uncertainty reflected a broader uncertainty at the time of the appropriate scope of codification. In 1924, a hard and fast distinction was drawn by P.J. Noel-Baker, who said, "the word codification properly used means the writing down of existing law, and that the making of new law, either *in vacuo* or by the amendment or development of existing rules, ought to be termed legislation." It was very much an English common lawyer's view of what codification meant. But even he thought that this should be qualified because he also said, "Codification may involve minor changes in the existing law, and legislation may include the restatement of some parts of the existing law…."[10]

Division over the distinction between progressive development and codification is reflected in the debates of the Committee on the Progressive Development of International Law and its Codification. For some, such as the UK member Professor Brierly, codification was primarily concerned with "ascertaining and declaring the law which already exists and which is binding on states". Progressive development was legislation for which an international convention was suited; conventions were not suitable for codification. The Russian member, Professor Koretsky differed and did not see the need to make such a marked distinction between development and codification.[11]

Yet the Brierly view won out, although by a very divided margin. In its report the Committee defined "progressive development" as "the drafting of a convention on a subject that has not yet been regulated by international law or in regard to which the law has not yet been highly developed or formulated in the practice of states" and "codification" as "the more precise formulation and systemization of the law in areas where there has been extensive state practice, precedent and doctrine."[12] This was embodied in Article 15 of the Commission's statute.

But the Committee was not entirely dogmatic about this distinction. It said that for the codification of international law "no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice." A codifier "inevitably has to fill in gaps and amend the law in the light of new developments.[13] In fact, rather than being concerned about an abstract distinction, what the Committee was concerned with was a debate over the correct method for carrying out the functions of the Commission. Should it be a multilateral convention, a restatement or some other form. The distinction between progressive development and codification was

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[10] Jennings, *supra* note 2.
[11] Briggs, *supra*, note 4, at 132-133.
[12] *Ibid*, 137
[13] *Ibid*, 137-138.

for the purpose of identifying the method to be employed by the Commission to fulfill its role.

In accordance with Article 16 of the Statute matters for progressive development by the Commission were to be based on proposals made by the General Assembly and a particular procedure was then to be followed by the Commission culminating in a draft with explanatory report for the General Assembly. Matters for codification could be proposed from a variety of sources, including the Commission itself, and the result was meant to be in the form of articles with commentaries (Article 20).

This formal, rather rigid, distinction between codification and progressive development was both unclear and unworkable and it quickly became somewhat irrelevant. As Manley Hudson noted, there could be no codification without development. He took the view that the procedures for the two should be the same, "to avoid the Commission having to decide in each case whether the subject dealt with was progressive development of codification".[14] And as the Assistant Secretary General Ivan Kerno said, the fundamental difference between the two was that the progressive development was undertaken at the request of the General Assembly, but the initiative for codification could come from different sources. In fact, this difference in procedures between progressive development and codification appears to have been quickly abandonned.

Thus, as Rosenne later pointed out, there is little in the *travaux* that gives a clear picture of what was meant by the terms progressive development and codification.[15] He puts weight on the fact that the term progressive development comes before the term codification, but it is difficult to conclude that this is a point of significance. It will be recalled that the draft used the phrase "the development and revision" of international law". But at the final moment development became "progressive development" and revision became codification. This was the "nice balance" between stability and change.

But even adding the word "codification did not really introduce clarity. There was a debate at the time over the "nature and utility" of codification.[16] There were the "scientific" group who saw codification as simply declaring international law as it is, without regard for whether it was satisfactory or not. This was the view of Sir Cecil Hurst. There were others who saw codification as essentially political; it was not just a restatement of existing rules. According to this view only governments could engage in codification and even then it was likely to be regressive rather than forward looking. In part this was a debate over restatement as opposed to the formulation of multilateral conventions.

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[14] *Ibid*, 138-139.
[15] Shabtai Rosenne, "The International Law Commission" 36 B.Y.B.I.L. 104 at 111 (1960).
[16] Oscar Schachter, *International Law in Theory and Practice*, (Martinus Nijhoff: Dordrecht, 1991) 66.

Is it possible then to get some sense of what was meant in Article 13 of the Charter and the Statute of the ILC by the terms "progressive development" and "codification"? With regard to the term "progressive" it would seem, was probably meant to reflect the development of international law by a step-by-step process, as was meant in the days of the League by the term "progressive codification". Yet there must have been even some uncertainty about that for although the terms used in the French and Spanish texts reflect the concept of a staged process of development, the term used in the Russian text reflects an alternative meaning of "progressive" and that is forward-looking.[17]

Indeed in English, the term "progressive development" is ambiguous, meaning either step-by-step development or forward-looking development. And while it may have originally meant "step-by-step", the continued use of the combined phrase of "progressive development" has led to the forward-looking connotation to be in common parlance.

Moreover, the term codification could not have been given a more precise meaning because of the varieties of views that existed about its meaning and scope. What is clear, however, is that the view that codification could be effected on the basis of existing law without engaging in any modification, change or filling in of gaps, received little support. As the Committee on the Progressive Development of International Law and its Codification said, "no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice."

IV The Distinction Between Codification and Progressive Development in the Practice of the Commission

It emerged very quickly in the practice of the Commission that the different procedures for dealing with topics that were before the Commission for codification and topics that were before the Commission for Progressive Development were not being followed. Special Rapporteurs were being appointed regardless of the classification of the topic and draft articles as a preferred outcome became increasingly common. In its 1951 Report on Reservations to Multilateral Conventions, the Commission noted that it "has been asked to study the question 'both from the point of view of codification and from that of the progressive development of international law'…. The Commission therefore feels that it is at liberty to suggest the practice which it considers the most convenient for States to adopt for the future."[18]

Such an approach was largely what Professor R.Y. Jennings (later the President of the ICJ) had foreseen. In his 1947 analysis of the Statute of the Commission he had expressed concern at the apparent assumption "that a given topic can at the outset be

[17] I am grateful to the Secretary of the International Law Commission, Mr. Vaclav Mikulka for this insight.

[18] Report of the International Law Commission to the General Assembly: Chapter II: Reservations to Multilateral Conventions (1951), p.126, ¶17.

labeled as being either a project for 'progressive development' or a project for 'codification', and so committed to the one or other of the two procedures" and he noted that "[i]t is very much to be hoped…that the two procedures will not be thought of as being either entirely separate or as being mutually exclusive." For Jennings, "codification properly conceived is itself a method for the progressive development of the law."[19]

Having adopted the approach of mixing the two processes, in the early years the Commission said little that would draw attention to the distinction between progressive development and codification. Yet the Commission was well aware that part of what it was doing was developing the law – making choices about what was reasonable and desirable and not just identifying state practice and codifying it. In its 1956 report on its final texts on the law of the sea, the Commission stated:

> "several of the provisions adopted by the Commission, based on a 'recognized principle of international law,' have been framed in such away as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either."

In its commentary to Draft Article 36 of the 1958 draft articles on "Diplomatic Intercourse and Immunities" the Commission noted:

> "(4) In view of the differences in State practice, the Commission had to choose between two courses: either to work on the principle of a bare minimum, and stipulate that any-additional rights to be accorded should be decided by bilateral agreement; or to try to establish a general and uniform rule based on what would appear to be necessary and reasonable.
> (5) A majority of the Commission favoured the latter course, believing that the rule proposed would represent a progressive step."

By 1964, Professor Jennings in commenting on the work of the Commission over its first 15 years[20] said: "I take it that it is hardly necessary now to argue the point that "codification" strictly so called-if such a thing exists and "progressive development," are indissolubly linked." And he went on to say: "And, as we all know, the Commission itself has long ago had to give up the attempt to maintain the distinction."

This attitude continued. In the 1970s an explicit statement that the Commission was engaged in an integrated process of codification and development appeared in the General Commentary to the draft articles on succession of states in respect of treaties (1974) and the General Commentary to the draft articles on the most-favoured-nation clause (1978). The Commission used identical terms stating that it considered its work on each of these topics,

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[19] Jennings, surpra, note 2 at 302.
[20] R.Y. Jennings, "Recent Developments in the International Law Commission: Its Relation to Sources of International Law, " 13 Int'l Comp. L.Q. 385 at 386 (1964).

> "constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements both of progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls."

While general statements about the link between progressive development and codification characterized the earlier years of the Commission, by the 1980s, a move away from this approach can be detected. Instead, more specific comments were being made about progressive development in relation to particular draft articles. In doing so, the Commission seemed to be implicitly at least drawing a distinction between codification and progressive development.

In its comments on draft article 63 relating to Newly Independent States" in the 1981 draft articles on the succession of states in respect of state property, archives and debts, the Commission said,

> "Neither State practice nor the writings of jurists provide clear and consistent answers to the question of the fate of State debts of the former metropolitan Power. Thus, the Commission is aware that, in drawing up rules governing the subject-matter, it is inevitable that a measure of progressive development of the law should be involved."

At the same time the Commission also made comments that suggested a normative preference for particular provisions, and framed that preference in terms of "progressive development". So, in the 1999 Draft Articles on Nationality of Natural Persons in relation to the Succession of States when dealing with the attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State, and the right of individuals to choose, the commentary to the relevant draft article (Article 20) provides, "the Commission considers that all such persons should be granted this right, even if this were to entail a progressive development of international law".

Progressive development has also been referred to as a reason for including a provision when there was a lack of state practice. In the commentary to draft article 41 of the draft articles on the responsibility of states for internationally wrongful acts, relating to the duty to cooperate to bring an end to a serious breach of international law, it is stated,

> "It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law."

And in draft article 48 relating to the invocation of responsibility by a non-injured state, the Commission sought to provide a justification for engaging in progressive development, stating:

> "This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake."

A significantly greater resort to characterizing particular provisions as exercises in progressive development comes with the draft articles on diplomatic protection. No fewer than four draft articles or parts of them are characterized in this way. The language used varies from the descriptive (Draft article 8, an exercise in progressive development of the law, departs from the traditional rule….)

to the explanatory

"It is, however, incongruous to require that the same nationality be shown both at the date of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim."

But, more than this, some comments juxtaposed progressive development and customary international law:

If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development."

This has led some scholars to contend that the admonition contained in draft article 19, subparagraph (b), is already a rule of customary international law. If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive development.

However a more nuanced statement is made in respect of a further provision when it is said, "It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity."

An even greater reliance on a distinction between progressive development and codification occurred in the draft guidelines on reservations to treaties. Although formulated as guidelines, the provisions in fact reflect existing treaty provisions, customary international and provisions that were formulated for the first time. The commentaries include a variety of references to progressive development, formulated often in quite different ways.

> "[l]ike reservations, interpretative declarations may be formulated jointly by two or more States or international organizations. Guideline 1.1.5, which acknowledges this possibility in respect of reservations, nonetheless appears to be an element of progressive development of international law, since there is no clear precedent in this regard.

> "One can legitimately maintain that the recognition of such limited extensions to competence for the purpose of formulating reservations would constitute a limited but welcome progressive development.
>
> "the Commission decided not to include in the Guide an element of progressive development that would have, for example, allowed depositaries to draw the attention of a reservation's author to the fact that they considered the reservation to be manifestly impermissible."
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> 'Nevertheless, taking into account the provisions of article 20, paragraph 5, of the Vienna Conventions and the current practice of the Secretary-General, the Commission considered that it made more sense to bring its own position — which, in any event, has to do with progressive development and not with codification in the strict sense — into line with those intentions."
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> 'however, the Commission did not adopt this progressive development, since it was anxious to depart as little as possible from the provisions of article 7 of the Vienna Conventions…"

Most recently, the Commission has returned to making reference to progressive development in a general commentary to draft articles. This occurred in the draft articles on the Responsibility of International Organizations. But, instead of taking the position that codification and progressive development are interlinked, as the Commission had done in the 1970s, the 2011 General Commentary made a generic comment about progressive development and codification in the context of specific articles. The General Commentary provides:

> "The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development."

Rather than identifying which articles might be seen as progressive development as was done in the case of the draft articles on diplomatic protection and guidelines on reservations to treaties, what the Commission has done here is leave it to interpreters to discern whether a particular provision of the draft articles on the responsibility of international organizations should be treated as resulting from progressive development, in comparison with similar provisions of the articles on state responsibility.

Such an approach differs from both that taken in the early days of the Commission and that of more recent years. The earlier approach was to acknowledge that codification and progressive development were intermingled throughout all draft articles. The later approach was to identify which draft articles contained an "element"

of progressive development. The Responsibility of International Organizations approach is rather to admit that some provisions may be examples of progressive development without identifying which they are. In a sense it is a form of compromise between the two approaches, although by admitting that some draft articles may constitute progressive development, it is denying the basic tenet of the earlier position that progressive development and codification are so intermingled in the Commission work that it is not possible to identify them separately.

V Factors Influencing the Codification/Progressive Development Debate in the ILC

There are a variety of possible factors influencing the way the Commission looks at the interrelationship of progressive development and codification. Some of these relate to the Commission itself and the way it functions.

(a) Composition of the Commission

The general make up of the Commission, divided between professors, government legal advisers (current or former), diplomats (current or former) and others with international legal experience, has not changed significantly over the years although the number of Commission members has increased. Yet the environment in which the Commission members consider questions relating to codification is quite different today.

The original members of the Commission started their work in the context of a debate about the proper scope and function of codification and its relationship to progressive development. They had before them a lengthy survey of international law prepared by Hersch Lauterpacht which dealt in detail with the function of the Commission in carrying out its mandate of the codification of international law. It had a new statute in which there had been an attempt to distinguish between codification and progressive development. And it had scholarly commentary on that statute which was critical of the distinction made between codification and progressive development.

Today, there is no background of such a debate against which the Commission works. Questions of codification and progressive development arise in the debates of the Commission, but there is no contemporary discussion of the issues in the literature, apart from the occasional article by a current or former member of the Commission. What is perhaps more important is the extent to which the Commission members see themselves as working in hand with or independently of governments. Today, many Commission members have at some stage represented their governments in the debates in the Sixth Commission and that can have an influence on the way they perceive their work. And this can effect the extent to which they consider the Commission's task as related to codification rather than to progressive development.

(b) Selection of Topics

It is often said that the days of codification are over and that any topic now taken on by the Commission will inevitably have to involve a large measure of progressive development. This may be because there is little practice for the Commission to work with as in the case of the topics of responsibility of international organizations and the protection of persons in the event of disasters. Or it may be because there is controversy over the state of the law, as in the case of immunity of state officials from foreign criminal jurisdiction. It may explain as well the frequent reference to progressive development in the draft articles on diplomatic protection.

The new topics taken up by the Commission at its last meeting – the formation and evidence of customary international law and the provisional application of treaties, while on their face topics that look like the traditional stock in trade of the Commission, may well turn out also to have conflicting practice with which to work and a lack of clear bases for agreement on contentious issues.

Having said this, however, one might argue that work of the early Commission on the 1958 conventions on the law of the sea was equally confronted with lack of practice and contradictory views of states. Yet the Commission did not engage in an article-by-article commentary on whether something was codification or progressive development. As I have pointed out, the Commission simply said frankly that the results of its work were a mix of both – some were codification, some progressive development and some not possible to classify. This suggests that perhaps the early Commission had a different perception of its role from that of the Commission of recent years.

(c) Working Methods

It is not clear how the working methods of the Commission can influence the way in which codification and progressive development are perceived. The fusion of the methods that were envisaged in the statute as separate militates against any clear distinction between the two. Both the plenary discussion of the reports of the Special Rapporteur and the work in the Drafting Committee provide an opportunity for views to be expressed on whether a particular provision should be viewed as the result of codification or of progressive development. Indeed, agreement to a particular provision in the drafting committee can sometimes be predicated on the willingness of the Special Rapporteur to refer to the provision in the commentary as an exercise in progressive development. In other words, the distinction can be used as a bargaining chip in negotiations over draft articles.

However, in the Working Group on the Long-Term Programme of Work, where topics are identified as appropriate for the Commission and recommended to the Commission for inclusion on the long term programme work, the discussion is less of whether they would be exercises in codification or progressive development, but more in terms of the criteria that have been adopted by the Commission for the selection of topics:

(i) the topic should reflect the needs of States in respect of the progressive development and codification of international law;
(ii) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification;
(iii) the topic should be concrete and feasible for progressive development and codification; and
(iv) the Commission should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole

There is a tension in these requirements – the need for a topic to be sufficiently advanced in state practice, and the move to non-traditional topics reflecting new developments. By definition, such latter topics are unlikely to be based on significant state practice.

A concern not infrequently addressed is whether a particular topic is too "political", that is whether it might be an intrusion into ongoing negotiations at the political level. Such a comment although not expressed in terms of codification or progressive development might well be a surrogate for that debate. "Too political" might mean that the matter is one that would be seen as wholly progressive development. If codification is simply writing down accepted law, the political element would have been removed.

(d) Expectations of the Sixth Committee

The Commission's reports are discussed in the Sixth Committee. Thus, it is to the comments made there that the Commission has to respond. However, guidance from the Sixth Committee is frequently divided. States support certain topics or certain draft articles, but do not necessarily base their comments on whether the topic is one for codification or progressive development or whether a particular provision reflects existing law or not. As will be pointed out later, however, the reluctance of governments to convene conferences leading to the conclusion of a multilateral convention has an impact on the Commission's work and again might be seen as a warning to the Commission to steer clear of exercises where new forms of legal regulation are to be adopted through treaties. Particularly today when a number of members of the Commission have had experience in the Sixth Committee, Commission members may be indirectly responding to this.

VI Factors External to the ILC Process

(a) The contemporary crisis in customary international law

The present Commission is operating in an environment in which customary international law is increasingly called into question. Notwithstanding some impressive

affirmations of the role and binding force of customary international law,[21] scholars question its normative character or binding force[22] and query whether states can opt out of it.[23] Such questions make any exercise in codification and progressive development even more suspect.

It has always been clear that states and scholars can differ over whether a particular principle has binding force and the notion of soft law has gained increasing usage in order to describe usage without resolving the difficult question of *opinio juris*. But what has been occurring more recently is a tendency to view treaty law as the law that has legitimacy and customary international law as more questionable. This can result in a narrowing of what can be regarded as customary international law and hence a questioning whether certain claims to regulation should be cast in terms of progressive development rather than codification. It can result in an increasingly conservative view of what can be included in the category of customary international law, and this can feed back into the debates in the Commission. Thus, what is available for codification in the traditional sense becomes much narrower and this leads to a heightened concern about turning the work of the Commission into a continual exercise in progressive development.

The decision of the Commission to address the problem of the "formation and evidence of customary international law" means that indirectly the relationship between codification and progressive development will take on an even greater importance. How customary international law is found and identified will have implications for the way the Commission is to go about its work in the future. It is a considerable challenge.

(b) The *lex lata/lex ferenda* debate

The distinction between *lex lata* and *lex ferenda* has been a staple of the discipline of international law. Used to distinguish the law as it is from the law as it should be, it is sometimes seen as encapsulating the distinction between codification and progressive development. James Brierly saw it that way in the discussions in the Committee on the Progressive Development of International Law and the description in Article 15 of the Statute of the Court reinforces this. Indeed, in the commentaries to the Guide to Practice on reservations to treaties, the terms *lex lata* and *lex ferenda* are used as surrogates for codification and progressive development:

> "[l]ike reservations, interpretative declarations may be formulated jointly by two or more States or international organizations. Guideline 1.1.5, which acknowledges this possibility in respect of reservations, nonetheless appears to be an element of progressive development of international law, since there is no clear

[21] Harold Kongju Koh "Why do nations obey international law?" 106 Yale L.J. 2599-2659 (1997).
[22] J. Patrick Kelly, The Twilight of Customary International Law, 40 Va. J. Int'l L. 449, 452 (2000)
[23] Curtis A. Bradley and Mitu Gulati, "Withdrawing From International Custom" 120 Yale L.J 220-275 (2010).

precedent in this regard. The same is not true with regard to interpretative declarations, the joint formulation of which comes under the heading of lex lata."[24]

The use of the terminology of *lex lata* and *lex ferenda* does little to clarify the relationship between progressive development and codification. Rather, it simply restates the issue. There is no agreement on the dividing line between the two; it is simply a variation on the question of what constitutes customary international law. Nonetheless, in the debates of the Commission the terms are frequently used to indicate what is acceptable for codification and what is not.

(c) Attitudes of Governments towards multilateral treaty making

In recent years the outcome of the Commission's work has not led to the convening of a conference and the drafting of a multilateral convention. Indeed, when the Commission adopted the draft articles on the responsibility of states for an internationally wrongful act, the Commission, with some controversy, broke with its past practice and did not invite the General Assembly to convene an international conference to turn those articles into a convention. Rather it asked the Assembly to take note of the draft articles and recommend them to states, postponing the issue of a possible multilateral conference to the future.

While the approach in that instance may have been partly motivated by a desire to have the draft articles run the gamut of acceptance through state practice, rather than immediate revision and downgrading in a multilateral conference, in fact the Commission has continued this practice. And partly as a result, the General Assembly has avoided having to confront immediately the question of convening such law making conferences.

This, too, may have implications for the codification and progressive development divide. If the General Assembly is reluctant to take the Commission's work and turn it into a multilateral convention, this may have the consequence that members of the Commission will be cautious in proposing anything that is not seen as solidly grounded in state practice. Only in that way, it might be seen, will the Commission's work receive acceptance.

VII Models for the Future

The practice of the Commission in respect of the distinction between codification and progressive development has undergone three distinct phases, each of these providing a potential model for the future work of the Commission.

[24] Comment (1) to Guideline 1.2.1 "Interpretative declarations formulated jointly"

(a) The fused model

In the earlier days of the Commission, the approach was to avoid making a distinction between codification and progressive development. Notwithstanding the process difference as set out in the statute of the Commission, the view was that the two were intermixed and it was not possible realistically to determine whether the Commission was engaging in one or the other. This did not mean that the Commission was ignoring the distinction completely. Clearly it was trying to identify what the law was, but in the process of drafting articles to deal with a particular topic, it did not see it as its function to separate in each case whether a particular provision was wholly or partially accepted in international law.

Such an approach distinguishes the role of the Commission in formulating draft articles or draft conventions from that of governments in deciding in the Sixth Committee or in a multilateral conference whether they find the draft articles individually or as a whole acceptable. And, thus governments would decide whether they wished to see such provisions included in a binding multilateral convention on the basis of the acceptability of the proposed provisions rather than on the basis of a prior classification of codification or progressive development..

(b) The clear separation model

From the 1980s on, the approach of the Commission appeared to be one of making a clearer distinction between codification and progressive development. Identifying certain draft articles as more in the nature of progressive development, the Commission was implying that it had distinguished between codification and progressive development in its preparation and adoption of draft articles. The implication of specific reference to progressive development in respect of particular draft articles left the implication that where no such reference was made, then the draft article had to be regarded as codification. In other words, unless mentioned otherwise draft articles had to be regarded as reflecting *lex lata* rather than *lex ferenda*.

The problem with this separation model is that it may well have been giving a somewhat misleading picture. It is unlikely that the Commission was in fact making such a deliberate separation in each case. A reference to progressive development may well have resulted from a compromise in the drafting committee in order to gain support for a particular provision, rather than a considered collective judgment, that the Commission was engaging in codification in some cases and progressive development in others. And the Commission may well have resisted the implication mentioned in the previous paragraph.

(c) The Responsibility of International Organizations model

The most recent approach in the work of the Commission is that taken in the draft articles on the responsibility of international organizations. Here, the Commission in its General Commentary warned that some draft articles might have a lesser basis in practice and thus more in the nature of progressive development than codification. Instead of an article-by-article assessment, this note represented more of a consumer warning – "some of these draft articles may be progressive development and not codification"!

It is too early to tell whether such a notation will be seen as attractive for other draft articles prepared by the Commission. The problem with it is that in fact it does not tell the reader very much. Every final report of the Commission that included draft articles since the inception of the Commission could well have carried exactly the same notation.

VIII Conclusions

There has never been a consistent view either within the Commission or outside over the meaning of the terms codification and progressive development. Indeed, the term "progressive development" has undergone a change of meaning or at least emphasis over time. At the beginning it carried the meaning of step-by-step development. Today, however, the context in which it is used generally indicates that it is intended to mean "forward-looking' development. Perhaps the difference in meaning is not particularly significant, but when "progressive development" means forward-looking development, it is easier to equate the notion with *lex ferenda*.

It is also clear that throughout its history the Commission has had differing approaches to the relationship between progressive development and codification. At times the Commission has treated the two as closely interlinked with the consequence that it is difficult to separate in either its process or its outcome what is one and what is the other. At other times it has signified that a particular provision is an example of progressive development with the implication that if no such reference is made then it is codification. The approach taken in the General Commentary to the Draft Article on the Responsibility of International Organizations appears to hover between the two.

The question arises whether the Commission should fix on a particular approach to the distinction between codification and progressive development and follow it consistently. While this may appear to have some attraction, flexibility has been more the hallmark of the work of the Commission and different generations of independent Commissioners should be free to approach the relationship between codification and progressive development as they wish.

But, what is clear from the practice of the Commission is that although the idea that codification involved simply identifying accepted rules of customary international law and that the development of the law was something different had an attraction in early discussions on the establishment of the Commission, such a view never took hold. Even those, such as James Brierly, who saw codification in more limited terms,

considered that it was impossible to distinguish clearly between the two and that any exercise in codification involved development of the law – filling in gaps and making changes in the light of new developments.

Moreover, regardless of what has been said in the commentaries, in practice for the most part the Commission codifies and progressively develops as it goes along.[25] The distinction becomes important when Commission members wish to oppose the inclusion of a particular provision. Characterizing it as progressive development is a way to diminish its weight and authority and the claim for its inclusion. This suggests that implicitly at least the Commission has always being followed what has been referred to above as the fused model.

What is also clear that the *lex lata*/*lex ferenda* distinction, although often employed as a surrogate for codification and progressive development is not a helpful way to explain the distinction between the two. If codification inevitably involves some element of development, then *lex lata* and *lex ferenda* start to merge. In short, the real utility of these terms lies is something other than describing the difference between codification and progressive development. They are useful for indicating at a particular point in time what one observer – judge, scholar or practitioner – believes the law to be as opposed to what it should be. But that is different from the process in which the Commission is engaged.

Finally, any consideration of the origins and development of ideas about codification and progressive development comes back to the question of the outcome of the Commission's work. The early debates about the meaning and scope of codification and progressive development were about the product of the Commission's work – draft conventions, restatements, reports, model clauses and articles. Over time the Commission fell into the practice of producing draft articles, but that was not the only possible outcome, nor is it the necessary outcome for a body charged with the progressive development of international law and its codification.

[25] An illustration of this is found with the Commission's draft articles on transboundary aquifers prepared under the guidance of the Special Rapporteur Ambassador Yamada. Clearly a combined exercise in codification and progressive development, there is no general commentary similar to that of the draft articles on state responsibility, nor are individual draft articles identified as either codification or progressive development.