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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

Seventeen men at Lake Success: In search of the International Law Commission

Keri van Douwen*

Vrije Universiteit Amsterdam, 1081 HV Amsterdam, The Netherlands
Email: k.vandouwen@vu.nl

Abstract

The International Law Commission has allegedly been in crisis from its first day of existence. Its own (former) members have been critical about its working methods, the topics it chooses to discuss, its relationship with other UN bodies, and even its aura. At the same time, the International Law Commission also paints more positive pictures of itself. This article aims to make sense of this dynamic without explaining, accepting or refuting any doubts or critiques. Instead, in an attempt to take these discussions to a new place, the article analyses the debates of the Committee of 17, which recommended the establishment of the International Law Commission in 1947. By combining literary, socio-legal and historical methods, it is argued that the ILC is founded on an embracing of uncertainty. As such, the Commission's ambivalence towards itself is revealed as structural rather than illustrative of the institution being in crisis.

Keywords: codification; indeterminacy; history of international law; International Law Commission; progressive development

1. Introduction

The International Law Commission (ILC or the Commission) – a subsidiary organ of the United Nations General Assembly tasked with the progressive development and codification of international law – has allegedly been in crisis 'from its very first day of existence'.[1] After merely two annual sessions, the General Assembly indicated that 'certain doubts' existed regarding the conditions under which the Commission was operating.[2] In responding to the General Assembly's request to review its own statute, members of the Commission echoed some of these doubts – noting, for example, that 'the results obtained had not been satisfactory'.[3] However, the recommendation of having members devote their full time to the work of the Commission in order to achieve 'rapid and positive results' has never been accepted by the General Assembly.[4] Despite the (other) changes which were made to the Commission's statute in the years that

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[1]C. Tomuschat, 'The International Law Commission-An Outdated Institution', (2006) 49 GYIL 77, at 104.

[2]UN Doc. A/RES/484(V) (1950).

[3]Summary records of the third session, 1951 YILC, Vol. I, at 127, para. 31.

[4]UN Doc. A/RES/484(V) (1950); Report of the International Law Commission to the General Assembly, 1951 YILC, Vol. II, at 137, para. 61.

followed,[5] the question whether the Commission's tasks were not 'destined to continue to remain intractable' kept (and keeps) being asked.[6]

This contribution does not, however, point to the contemporary difficulties the Commission is facing, nor does it echo the view that the institution has been or is in crisis. Instead, in an attempt to take these discussions to a new place, the present article aims to make sense of the persistent doubts about, and (internal) critiques of, the Commission in a different way. By employing a combination of literary, socio-legal and historical methods, and through analysing the debates that led to the establishment of the International Law Commission, it is argued that the Commission was founded on an embracing of uncertainty. As a result of this article's intervention, it becomes possible to see that the Commission's ambivalence towards itself is structural rather than illustrative of the institution being in crisis.

The present intervention is also relevant for other reasons. For one, the (repetitive) emphasis on the Commission's problems obscures and fails to take account of the International Law Commission's continuing influence in international law.[7] Second, the conclusion that the Commission was founded on an embracing of uncertainty is of significance to the wider field of international law in that it challenges established theories of international law(making). More specifically, the history of the creation of the Commission – which is characterized by incoherence, maintaining impossible binaries, and deferring a substantive resolution of the problems this creates elsewhere – can be understood as an illustration of international law's indeterminacy.[8] Still, the present article is less concerned with (current) theoretical debates and more with observations about, as well as portraying, a specific debate that took place in the spring of 1947. More concretely, the article centres on an analysis of three key problems that surfaced in the discussions of the Committee on the Progressive Development of International Law and its Codification. Before turning to these discussions, a compilation of statements made by the Commission and its (former) members is recounted in an attempt to illustrate the ILC's ambivalence towards itself, and disclose the prevailing sense that the institution is in crisis.

A few decades after the General Assembly expressed doubts about the ILC's working methods, Shabtai Rosenne – who had previously been a member of the International Law Commission – argued in the UN's Sixth (Legal) Committee that 'a certain malaise existed about the Commission'.[9] This was in response to the United Nations Institute for Training and Research criticizing the ILC for remaining in its comfort zone and failing to address the changing priorities of the international community.[10] Another ten years later, as the Commission was celebrating its fiftieth anniversary, 'the malaise, not to say the crisis of the International Law Commission itself' was mentioned again, this time by one of the members then still serving the Commission.[11] Another member claimed that 'there is no doubt that the International Law Commission is in a

[5]UN Doc. A/RES /485(V) (1950); UN Doc. A/RES/984(X) (1955); UN Doc. A/RES/985(X) (1955); UN Doc. A/RES/1103(XI) (1956); UN Doc. A/RES/1647(XVI) (1961); UN Doc. A/RES/36/39 (1981).

[6]J. Stone, 'On the Vocation of the International Law Commission', (1957) 57 CLR 16, at 46.

[7]O. Sender and M. Wood, 'The Work of the International Law Commission Between 1997 and 2022: A Positive Assessment', (2022) 25 UNYB 645.

[8]See generally M. Koskenniemi, 'The Politics of International Law', (1990) 1 EJIL 1; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006); M. Koskenniemi, 'The Politics of International Law – 20 Years Later', (2009) 20 EJIL 7; D. W. Kennedy, *International Legal Structures* (1987); B. S. Chimni, 'New Approaches to International Law: The Critical Scholarship of David Kennedy and Martti Koskenniemi', in B. S. Chimni (ed.), *International Law and World Order: A Critique of Contemporary Approaches* (2017), 246; S. Marks, 'False Contingency', (2009) 62 CLP 1. For a more general theory of law's radical indeterminacy see D. Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 89 HLR 1685. See also note 123 and accompanying text, *infra*.

[9]UN Doc. A/C.6/36/SR.36 (30 October 1981), at 9.

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

[11]G. Pambou–Tchivounda, in United Nations (ed.), *The International Law Commission Fifty Years After: An Evaluation* (2000), 24, at 24 (original in French, translated by author).

crisis',[12] and that '[t]here is little doubt that the International Law Commission currently is undergoing a fundamental challenge concerning its very existence'.[13] While others made explicit that they believed there was 'no real crisis',[14] the sentiment still lingered ten years later, as is clear from the title of the event: 'The International Law Commission: Sixty Years … And Now?'[15] Since then, Christian Tomuschat characterized the ILC as 'an outdated institution',[16] Martti Koskenniemi described its practice of codification as 'an archaic relic',[17] Alain Pellet suggested that 'neither the composition nor the achievements of the Commission are commensurate with the aura it still possesses',[18] and Shinya Murase compared the Commission to 'a canary that forgot to sing'.[19] All four men have been members of the Commission for 11, five, 22, and 13 years, respectively.

As this brief overview illustrates, the ILC's own members – present as well as former – criticize and question the Commission, and they do so very publicly.[20] At the same time, the International Law Commission paints a different picture of itself. For example, in 1974, facing a critical Joint Inspection Unit report which assessed the Commission in comparison to other expert working groups, the ILC argued that this was not only inaccurate but

> prejudicial to the work of the Commission in view of the tendency to apply to its unique position general patterns which may be justified in the case of an expert working group but which are completely inadequate and unjustified for a body such as the Commission.[21]

Its unique position ensured that – if a comparison had to be made – it should be with the International Court of Justice: '[t]he work done by the Court, at the judicial level, and that done by the Commission, at the legislative level, are complementary and make those bodies, respectively, the principal judicial and legal organs of the United Nations system'.[22]

More recently, the Commission 'extensively debated' whether its own output was of particular significance in identifying customary international law.[23] Whereas Special Rapporteur Michael Wood had initially suggested that the Commission's work should be mentioned as part of a conclusion on 'teachings of the most highly qualified publicists', many members disagreed.[24] They argued that '[t]he nature and mandate of the Commission required … that it should be the subject of a separate provision';[25] their work was not 'merely a collective academic endeavour';[26] and classifying the Commission's output as writings was 'a debatable over-simplification'.[27] Despite these members' insistence on more explicitly mentioning the ILC's work, it was decided to

[12]G. Hafner, in, ibid., at 21.

[13]Ibid., at 138.

[14]G. Abi-Saab, in, ibid., at 168. 'I do believe that there is no real crisis, although we all have, or have had, a middle-age crisis at around fifty. The Commission has done extremely well, even unexpectedly so.'

[15]Report of the Commission to the General Assembly on the work of its sixtieth session, 2008 YILC, Vol. II (part two), at 145.

[16]See Tomuschat, *supra* note 1.

[17]Summary records of the meetings of the fifty-fourth session, 2002 YILC, Vol. I, at 88, para. 38.

[18]A. Pellet, 'The ILC Adrift? Some Reflexions from Inside', in M. Pogačnik et al. (eds.), *Challenges in Contemporary International Law and International Relations – Liber Amicorum in Honour of Ernest Petrič* (2011), 299, at 299.

[19]S. Murase, 'The Canary that Forgot to Sing', *Environs of International Law*, 13 October 2019.

[20]In an interview, Koskenniemi admitted that during his time as a member of the International Law Commission, he often wondered 'whether any person's life was made any better by what we did there'. See D. Van Den Meerssche, 'Interview: Martti Koskenniemi on International Law and the Rise of the Far-Right', *Opinio Juris,* 10 December 2018.

[21]Documents of the twenty-sixth session, 1974 YILC, Vol. II (part one), at 310, para. 207.

[22]Ibid., para. 208.

[23]Fifth report on identification of customary international law, UN Doc. A/CN.4/717(2018), at 45, para. 105.

[24]According to Wood, he had 'encountered strong opposition on the basis that the Commission's work differed from teachings'. See Summary records of the meetings of the sixty-eight session, 2016 YILC, Vol. I, at 413, para. 95.

[25]Summary records of the meetings of the sixty-seventh session, 2015 YILC, Vol. I, at 54, para. 35.

[26]Ibid., at 61, para. 24.

[27]Ibid., at 45, para. 22.

'hid[e] it away in a commentary',[28] and a footnote.[29] According to Sir Michael Wood, any other decision would 'look very self-serving', even though he agreed that the Commission was more important than writers.[30]

These two anecdotes suggest that the Commission is self-aware rather than self-critical. Facing external critique, the ILC demonstrated confidence; facing an opportunity to spell out its own importance, the ILC demonstrated modesty.[31] In addition to this self-awareness, the previous paragraphs indicate that a kind of uncertainty prevails among members of the Commission, not only about who (or what) the ILC is (doing) but also, more fundamentally, about how it should present itself. This results in an ambivalent attitude that can best be described as ranging from coy to confident. It is against this background that I wonder if – rather than pointing at the contemporary difficulties the International Law Commission is facing and echoing the view that it has been or is in crisis – it is possible to make sense of the International Law Commission in a different way. As mentioned above, this article presents an analysis of three key problems that surfaced in the discussions of the Committee on the Progressive Development of International Law and its Codification, also known as the Committee of 17 (C17 or the Committee).

In terms of material and method, the analysis is based on the summary records of the Committee's 30 meetings, as well as several memoranda and statements which are publicly available in the United Nations Digital Library. Verbatim records of the meetings were never published due to financial constraints, but the summary records are said to be 'fairly complete'.[32] As such, the article presents a study of the Committee's reality as it is reflected in its summary records. In the words of Erich Auerbach, such an endeavour requires one to 'prune and isolate arbitrarily. Life has always long since begun, and it is always still going on. And the people whose story the author is telling experience much more than [s]he can ever hope to tell'.[33] In other words, employing a method of textual interpretation offers the author 'a certain leeway' to accentuate and disregard, guided by a specific purpose.[34] This purpose can be thought to function like the scale of a map, which 'reveals a phenomenon and distorts or hides others'.[35] Regarding such purposeful revealing or hiding, I found my way to the (summary records of the) Committee looking for an

[28]During the annual lecture of the Centre for European and International Legal Affairs, Sir Michael Wood recalls that 'the International Law Commission a couple of years ago had to consider what the status of its product was. That is, in connection with the topic of the identification of customary international law. It was proposed by me that we say that its product was the same as that of any other author or writer. It was worth what it was worth. If it was good, it was worth something. If it was not good, it wasn't worth much. But my colleagues did not like that. They wanted, they said, we are much more important than writers. Anyway, it is. But they said we must have a special conclusion all about the International Law Commission. So I said well, that will look very self-serving, a conclusion about ourselves, so we can't do that. So, in the end, we didn't know where to deal with it. We hid it anyway in a commentary'. M. Wood, 'The Role of the International Law Commission in Shaping International Law', 14 October 2021, at 11.04, available at youtu.be/aUZsjNlVHwo.

[29]Report of the Commission to the General Assembly on the work of its seventieth session, 2018 YILC, Vol. II (part two), at 105. Footnote 715, accompanying the commentary on the draft conclusions on identification of customary international law, reads: 'Once the General Assembly has taken action in relation to a final draft of the Commission, such as by annexing it to a resolution and commending it to States, the output of the Commission may also fall to be considered under draft conclusion 12.'

[30]See Wood, *supra* note 28.

[31]According to a few members, the Commission actually gave too much prominence to its own output by referring to its work in the way it eventually did in the draft conclusions on identification of customary international law (see note 29, *supra*). They are likely to disagree with the idea that the ILC demonstrated modesty here. See Summary records of the meetings of the sixty-eighth session, 2016 YILC, Vol. I, at 413. See also L. Leão Soares Pereira, 'The International Law Commission in the Eyes of the International Law Commission: Mirror or Looking-Glass?', in. S. Droubi and J. d'Aspremont (eds.), *International Organisations, Non-State Actors, and the Formation of Customary International Law* (2020), 227.

[32]UN Doc. A/AC.10/SR.1 (12 May 1947), 6. One member explicitly criticized the summary records for being too concise. See UN Doc. A/AC.10/SR.24 (11 June 1947), 8.

[33]E. Auerbach and E. W. Said, *Mimesis: The Representation of Reality in Western Literature – New and Expanded Edition* (2013), at 549.

[34]Ibid., at 556.

[35]B. de Sousa Santos, 'Law: A Map of Misreading. Towards a Postmodern Conception of Law', (1987) 14 JL&S 279, at 284.

answer to questions relating to what the International Law Commission is 'supposed' to do. These are the questions that have shaped my reading and interpretation of the materials and subsequently have guided me in writing the story about the Committee that unfolds on the pages that follow. Still, even if motivated by specific questions, in employing a method of textual interpretation, I have 'for long stretches of my way . . . been guided only by the texts themselves'.[36] In addition to literary and socio-legal methods, the article adopts a historical approach to situate the debates in their own political context. In so doing, the article seeks to understand the debates as producing 'innovative responses to specific problems',[37] telling us something about our present from the perspective of the past's imagined future.[38]

The remainder of this article is structured as follows. In Section 2, I introduce the Committee and their main task, and briefly sketch the (geopolitical) context in which the Committee operated. In Sections 3, 4 and 5, I analyse the debates of the Committee relating to (Section 3) the role of legal experts; (Section 4) the definitions of, and the distinction between, progressive development and codification; and (Section 5) the method to be used: conventions or scientific restatements. I analyse these three problems rather than others because they were most extensively debated by the Committee and continue being discussed up until the present day.[39] However, the three debates are not neatly separate but are instead entangled and overlap, as conclusions drawn on one topic directly impact the positions taken on others. In order to present a story that is as coherent as possible, I have chosen to discuss the three topics in separate sections. Some cross-referencing and repetition remain unavoidable. In the sixth and final section, I present some concluding remarks.

2. The Committee of 17

On a Monday afternoon in May 1947, 18 men[40] meet at Lake Success, New York. Together, they will spend the spring in brick-walled rooms with high ceilings, closed theatre-like curtains, and

[36]See Auerbach and Said, *supra* note 33, at 556.

[37]A. Orford, 'On International Legal Method', (2013) 1 LRIL 166, at 170.

[38]On the role of archives producing as well as recording events see J. Derrida, *Archive Fever: A Freudian Impression* (1996).

[39]See, e.g., H. Lauterpacht, 'Codification and Development of International Law', (1955) 49 AJIL 16; see Stone, *supra* note 6; R. Y. Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law', (1964) 13 ICLQ 385; B. G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977); D. D. Caron, 'The ILC Articles on State Responsibility: the Paradoxical Relationship Between Form and Authority', (2002) 96 AJIL 857; S. D. Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product', in M. Ragazzi (ed.), *The Responsibility of International Organizations* (2013), 29; J. Crawford, 'The Progressive Development of International Law: History, Theory and Practice', in D. Alland et al. (eds.), *Unity and Diversity of International Law* (2014), 1; S. Sivakumaran, 'The Influence of Teachings of Publicists on the Development of International Law', (2017) 66 ICLQ 1; D. Azaria, 'The International Law Commission's Return to the Law of Sources of International Law', (2019) 13 FIULR 989; C. C. Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?', (2020) 52 *Case Western Reserve Journal of international Law* 331; N. Voulgaris, 'The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development', (2022) 33 EJIL 761. See generally United Nations (ed.), *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission* (1997); United Nations (ed.), *Making Better International Law: the International Law Commission at 50* (1998); United Nations,*supra* note 11; United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (2021).

[40]At the first meeting, the representative for Egypt was absent, while the Assistant Secretary-General and Director of the UN's international law division were present, totalling a number of 18 men. Also present in the room were a number of women. They are visible in pictures taken during the meetings, either standing in the back or seated at a table in the middle of the room or in the second row. In some pictures, they seem to be using a typewriter or are holding a pile of papers. They remain anonymous and no mention is made of them in the summary records. For a reaction to (and the undoing of) the 'curious still-life of international law that remains strikingly male, white and elitist', see I. Tallgren (ed.), *Portraits of Women in International Law: New Names and Forgotten Faces?* (2023). On the importance of asking 'the woman question' when doing history of international law see J. Nijman, 'Marked Absences: Locating Gender and Race in International Legal History', (2022) 31 EJIL 1025. On how the international legal system is gendered see H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

chairs arranged as if an audience can walk in any minute; a play about to start. The men – all wearing suits and ties – are seated at tables in a U shape, their respective countries' names displayed next to carafes of water and ashtrays. This is the Committee on the Progressive Development of International Law and its Codification, also known as the 'Committee of Seventeen' (C17 or the Committee). In December 1946, the General Assembly directed the Committee to study the methods by which the progressive development and codification of international law should be encouraged,[41] following Article 13 of the UN Charter. While the Sixth Committee had initially recommended that the General Assembly establish a committee of 16 members, which should be composed exclusively of governmental representatives,[42] the president of the General Assembly nominated 17 states instead.[43] The men indeed served on C17 as delegates representing their respective countries, but they were also all legal experts.[44] In total, 31 men took a seat at least once on the Committee, which held 30 meetings between 12 May and 17 June 1947.[45]

During those meetings, the Committee was often incomplete, as not all of its 17 members were present. For example, the Egyptian delegate missed the first four meetings; most often absent – eight times in total – was the Panamanian representative. Others also occasionally did not attend because they simultaneously served on other UN committees or had to be at meetings of the General Assembly. Not listed on the attendance sheet, but presumably (almost) always present, were Ivan Kerno (Assistant Secretary-General) and Yuen Li-Liang (Director of the Division of Development and Codification of International Law, acting as Secretary to the Committee). While they could not vote, they did, at times, take part in the discussions.[46]

At one of C17's first meetings, Brierly – who in 1924 had joined two meetings of the League of Nations Committee of Experts for the Progressive Codification of International Law,[47] and was elected as Special Rapporteur of C17 – refers to the 'friendly atmosphere in the Committee'.[48]

[41]UN Doc. A/RES/94(I) (1946). On 2 August 1946, the United States requested the General Assembly to take up the implementation of Article 13(1)(a) of the Charter, which referred the matter to the Sixth Committee, which in turn referred the question to its Sub-Committee 1. In December 1946, the Sixth Committee recommended that the General Assembly establish a new Committee. See Y. L. Liang, 'The General Assembly and the Progressive Development and Codification of International Law', (1948) 42 AJIL 66.

[42]Report of the Sixth Committee, UN Doc. A/222 (6 December 1946), 2.

[43]Fifty-fifth plenary meeting of the General Assembly, UN Doc. A/P.V./55 (11 December 1946), 1131. The president nominated Argentina, Australia, China, Colombia, Egypt, France, India, the Netherlands, Panama, Poland, Sweden, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America, Venezuela, and Yugoslavia. Adding that 'this was a very difficult problem' and 'there may be a weakness in my proposals, for, being limited by the number of sixteen, I was unable to include Brazil … Is there any opposition to increasing the number of members to seventeen? As there is no opposition, I shall add Brazil to the list'.

[44]There seems to have been some tension regarding the role of the men. Koretsky, for example, once asked Donnedieu de Vabres whether 'he spoke as a representative for France or as a member of the Committee of Experts?' See UN Doc. A/AC.10/SR.29 (16 June 1947), 11. In another meeting, Kerno wonders 'if this Committee of Government representatives considered itself purely governmental to the extent that its members could not act without instructions from their Governments'. See UN Doc. A/AC.10/SR.30 (17 June 1947), 5.

[45]Dr. Enrique Ferrer Vieyra, Dr. Rodolfo Munoz (Argentina); Dr. W. A. Wynes, Mr. A. H. Body, Mr. G. C. Moore (Australia); Mr. Gilberto Amado, Mr. R. S. Guerreiro (Brazil); Dr. Shu-hsi Hsu (China); Dr. Antonio Rocha, Dr. Jorge Ortiz Rodriguez, Dr. Alberto Gonzalez Fernandez, Dr. Rodolfo Fernandez, Prof. Dr. Jesus M. Yepes (Colombia); Mr. Osman Ebeid (Egypt); Prof. Henri Donnedieu de Vabres, Mr. Michel Leroy-Beaulieu (France); Sir Dalip Singh, Mr. S. M. Sikri (India); Dr. J. G. de Beus (the Netherlands); Mr. Roberto de la Guardia (Panama); Dr. Alexander Rudzinski, Dr. Alexander Bramson (Poland); Mr. Erik Sjoborg, Mr. B. Q. S. Petren (Sweden); Prof. Vladimir Koretsky (USSR); Prof. J. L. Brierly, Mr. Richard Best (UK); Prof. P. C. Jessup (US); Dr. Carlos Eduardo Stolk, Dr. Perrez Perozo (Venezuela); Prof. Milan Bartos (Yugoslavia).

[46]UN Doc. A/AC.10/SR.5 (19 May 1947); UN Doc. A/AC.10/SR.8 (21 May 1947); UN Doc. A/AC.10/SR.9 (22 May 1947); UN Doc. A/AC.10/SR.10 (23 May 1947); UN Doc. A/AC.10/SR.13 (28 May 1947); UN Doc. A/AC.10/SR.17 (3 June 1947); UN Doc. A/AC.10/SR.21 (9 June 1947).

[47]From the Committee's third session, Brierly was replaced by McNair. See United Nations, *70 Years of the International Law Commission* (2020), at 23. Available at legal.un.org/ilc/publications/pdfs/ilc_exhibit_book.pdf.

[48]UN Doc. A/AC.10/SR.6 (20 May 1947), 2.

Reading the summary records, however, it is difficult to imagine that the atmosphere remained friendly throughout all 30 meetings. After only a few days together, the French delegate – Donnedieu de Vabres – accuses the Soviet delegate – Koretsky – of violating the 'basic principle of the United Nations: the democratic principle of solidarity'.[49] Not much later, Brierly tells Koretsky ('his friend from the Soviet Union') that his speech had been 'vigorous', that he is wrong about most things, had misunderstood his position, and had accused him of being inconsistent.[50] In his turn, Koretsky suggested that 'the debate should be conducted in a more realistic manner'.[51]

In 2014, James Crawford characterized the meetings of the Committee as 'one of the earliest Cold War skirmishes within international law'.[52] He argued that 'states opposed to the evolution and elaboration of international law made themselves known'[53] as it was the Soviet (delegate's) aim to bring the International Law Commission under state control or even 'to replicate the paralysis seen at the Hague in 1930'.[54] In Crawford's view, Koretsky was actively trying to resist the realization of 'the true aim of the Committee of 17 (or at least some of its more enlightened members)'.[55] Although it is difficult to establish what 'the true aim' of the Committee of 17 was, the instructions given to them highlight that the men were caught in a development that both emphasized the need for international law and challenged its core foundation as being state-centric.[56] At the time, there was an overwhelming belief that a recurrence of the horrors of the Second World War could be prevented if only more clearly determined, defined, and agreed-upon rules of international law could be formulated.[57] Yet, in light of the failures of the League of Nations Codification Conference held in 1930, many legal experts, including government representatives, were convinced that this project should not remain exclusively in the hands of states.[58] In addition, and as becomes clear from the debates of the Committee of 17, the establishment of the United Nations put pressure on the traditional understanding of sovereignty.

While it is thus impossible to prove or refute Crawford's conclusions about the true aim of the Committee, the summary records leave no room for doubt about mounting tensions. As the 17 men met during the heydays of the Cold War, it makes sense that the statements included in the summary records show suspicion about the intentions of other members. To a large extent, the disagreements that define the Committee of 17 ran along the East/West divide, with those of the Western bloc largely in favour of granting the future commission the power to initiate its own projects and the freedom to codify international law with limited government interference, whereas the representatives of states of the Eastern bloc were more hesitant to have independent experts draft restatement reports.

Because of these mounting tensions, and in many other ways, the summary records read like a play. Rather comical, for example, are the interventions of Donnedieu de Vabres. Not only was he repeatedly very persistent about the need to discuss the possibility of establishing an international criminal court, many points of order were also raised regarding his absolute right to insist on the French text of any document being distributed at the same time as the English text. Lengthy

[49]UN Doc. A/AC.10/SR.10 (23 May 1947), 3.

[50]Statement by the representative of the United Kingdom before the tenth meeting, UN Doc. A/AC.10/35 (28 May 1947), 1–2.

[51]Summary of the speech by the representative of the Union of Soviet Socialist Republics, UN Doc. A/AC.10/SR.4/Add.1 (15 May 1947), 1.

[52]J. Crawford, 'The Progressive Development of International Law: History, Theory and Practice', in D. Alland et al. (eds.), *Unity and Diversity of International Law* (2014), 1, at 3.

[53]Ibid., at 10–14.

[54]Ibid.

[55]Ibid.

[56]Memorandum prepared by the Secretariat, UN Doc. A/122 (17 October 1946), 10; Report of the Sixth Committee, UN Doc. A/222 (6 December 1946), 2; As pointed out in S. Rosenne, 'The International Law Commission, 1949–59', (1960) 36 BYIL 104, at 111, 'the necessity for a fresh approach was also stressed in contemporary academic literature'.

[57]United States Dept. of State (ed.), *The United Nations Conference on International Organization, San Francisco, California, April 25 to June 26, 1945: Selected Documents* (1946).

[58]See note 56, *supra*. See also Stone, *supra* note 6.

discussions were also held about the correct voting rules, with the English and French versions of the same rule stating the exact opposite.[59] Accusations of violating the United Nations Charter and the principle of equality between nations were voiced,[60] as well as complaints about meetings taking place in the morning.[61] It is this increasingly agitated group of '17' men that debated the methods and procedures of the development and formulation of international law.

In the following three sections, I analyse their discussions on (Section 3) the role of legal experts, (Section 4) the definitions of, and the distinction between, progressive development and codification, and (Section 5) the difference between the method of conventions and the method of scientific restatements. In all three debates, the men emphasize the very thing they deny, whether it is the role of science in the development of international law, the possibility to distinguish between progressive development and codification, or the legal effect of non-binding draft conventions adopted by a resolution of the General Assembly. Rather than solving disagreements or attempting to achieve coherence, the Committee of 17 founded the International Law Commission through an embracing of uncertainty.

3. Legal experts, or 'persons of recognized competence'

Before the members of C17 meet and during their first days together, multiple memoranda are submitted, and statements are made regarding the possible ways to codify and progressively develop international law. The idea of recommending the establishment of some kind of subsidiary organ to the General Assembly was featured in many of them. The proposals mention, for example, the need for 'permanently operating codifying commissions',[62] 'a committee of jurists',[63] 'eminent men',[64] 'a committee of scholars',[65] 'a fairly small codification commission consisting of international lawyers of the highest standing',[66] 'a codification commission consisting of lawyers of international repute',[67] 'persons of the highest prominence and attainments',[68] 'the most competent experts',[69] 'a body of great prestige'.[70]

By the Committee's second meeting, the Chairman had already concluded that 'there seemed to be a consensus of opinion that a committee of experts would be necessary'.[71] Many of the men explicitly stated that independent experts rather than government representatives would be suited for the task of progressively developing and codifying international law. Only Koretsky argued that entrusting the task to experts seemed 'an imitation of the old custom of isolating those who had to determine the will of the people'.[72] In advancing their plans, the men do not seem to be occupied with theoretical considerations regarding the role of experts in the lawmaking process. For example, when Hsu argues in favour of establishing a commission of experts, he tells the other men of C17:

> We sit here as government representatives. But don't forget that practically all of us are, by profession or interest, expected to carry forward the torch handed to us by the ... masters.

[59]UN Doc. A/AC.10/SR.27 (13 June 1947).
[60]UN Doc. A/AC.10/SR.28 (13 June 1947), 6.
[61]UN Doc. A/AC.10/SR.7 (21 May 1947).
[62]Memorandum submitted by the representative of Argentina, UN Doc. A/AC.10/10 (13 May 1947), 2.
[63]Statement by the representative of Brazil before the fourth meeting, UN Doc. A/AC.10/28 (15 May 1947), 1.
[64]Ibid., at 2.
[65]Ibid.
[66]Suggestions by the Netherlands representative, UN Doc. A/AC.10/18 (14 May 1947), 3.
[67]Memorandum submitted by the United Kingdom representative, UN Doc. A/AC.10/16 (12 May 1947), 3.
[68]Suggestions by the United States, UN Doc. A/AC.10/14 (12 May 1947), 2.
[69]Ibid.
[70]Ibid., at 1.
[71]UN Doc. A/AC.10/SR.2 (13 May 1947), 6.
[72]UN Doc. A/AC.10/SR.4 (15 May 1947), 6.

> Let us match our efforts with courage and, within the realm of practical politics, boldly forge ahead.[73]

It is thus a group of *government representatives* that specifically sees a role for *legal experts* in developing international law: it is their 'profession or interest' rather than their current role as government representatives that expects them to move forward. Yet, it also seems to be their current role that *enables* them to move forward. As such, it follows from Hsu's statement that what these government representatives can or cannot do is different from what is expected of legal experts, even though this is never explicitly mentioned.

Of course, a role for experts – as opposed to states or government representatives – in developing international law was not unheard of. By 1947, the *Institut de Droit* and the International Law Association – of which some of the men of C17 were also members – had been firmly established. In fact, the men who founded the *Institut* in 1873 had considered themselves to play a role in line with Savigny's thinking that 'learned jurists ... have the sole control on the development of law'.[74] However, unlike the men of 1873 who advanced the idea that 'it was the task of legal science to capture and describe [international law] in its dynamism',[75] the men of C17 do not spend much time justifying or explaining the role of, or need for, experts. According to Donnedieu de Vabres, experts are 'more detached in the view they take of their work' than government representatives.[76] Others instead emphasize the potential results of experts' work without explaining how those results would be achieved. For example, codes prepared by a committee of scholars would have 'undoubted moral force',[77] and a statement drafted by experts would create 'better chances of agreement and give it "persuasive" authority'.[78]

Only Special Rapporteur Brierly explicitly connects the importance of tasking experts to the task at hand. That is, according to him, 'codification is, or should be, a scientific task'.[79] It is to ensure that codification does not become political that independent experts 'selected purely on their individual capacities and in no sense as representative of governments' should be offered the task.[80] The Soviet representative mocks this idea by referring to Brierly's plan as ensuring 'the "independence" of experts from their governments'.[81] While Koretsky was the sole objector to recommending that the General Assembly set up a new committee – he argued that if not the General Assembly, C17 itself, composed of government representatives, could continue the work[82]– others also doubted the desirability of having 'scientific lawyers' carry out the task of progressively developing and codifying international law in isolation from governments.[83]

The proposal submitted by Brierly foresees the work of the experts merely to be published ('with a suitable preface which would explain, *inter alia*, that the restatement was not binding')[84] and 'to leave the further procedure open until it would be seen how successful the restatements produced in this manner were'.[85] However, a majority of the Committee preferred to set up a system of two stages, in which the work of the experts would subsequently be discussed by government representatives. The Brazilian representative observed that 'even these jurists shut up

[73]Statement by the representative of China before the third meeting, UN Doc. A/AC.10/31 (14 May 1947), 3.
[74]M. Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870–1960* (2001), at 42–5.
[75]Ibid., at 43.
[76]UN Doc. A/AC.10/SR.4 (15 May 1947), 8.
[77]Statement by the representative of Brazil before the fourth meeting, UN Doc. A/AC.10/28 (15 May 1947), 2.
[78]Suggestions by the Netherlands representative, UN Doc. A/AC.10/18 (14 May 1947), 4.
[79]Memorandum submitted by the United Kingdom representative, UN Doc. A/AC.10/16 (12 May 1947), 2.
[80]Ibid., at 3.
[81]Summary of the speech by the representative of the Union of Soviet Socialist Republics, UN Doc. A/AC.10/SR.4/Add.1 (15 May 1947), 4.
[82]UN Doc. A/AC.10/SR.4 (15 May 1947).
[83]Ibid.
[84]Memorandum submitted by the United Kingdom representative, UN Doc. A/AC.10/16 (12 May 1947), 4.
[85]Ibid.

in an ivory tower … will be inclined to propose solutions resulting, to a great extent, from personal reflections'.[86] Similarly, the Dutch representative doubted whether exclusively tasking experts 'would yield the best possible results', considering that 'the political considerations of states, which the adherents of codification by experts intend to cut out', could potentially find its way in 'by devious means'.[87] The Colombian representative argued that 'many aspects of law are of a political order so that the final stage should be the task of government representatives'.[88] Thus, while the British government may have wished to see the work of experts stand with merely persuasive authority, most of the men of C17 agreed with the Brazilian representative that the task could not 'be achieved merely by the submission of learned opinions'.[89] As he explained, having the experts routinely collaborate with political authorities should not be understood to mean that the jurists would be tasked to solve political problems, but rather that they are obliged to take them into account 'in order that their work may be effective'.[90]

During this discussion, the men disagreed on whether it is possible to distinguish between the political and the scientific in international law and whether or not it is possible to have a commission of experts acting independently of their respective states. As such, it is worth repeating that all of the above statements were uttered by legal experts who, at the time, were themselves acting as government representatives. They did not, however, consider themselves to be unsuited to take a seat on the commission they would recommend to the General Assembly. Donnedieu de Vabres argued that 'for example, professor Brierly, as an expert elected [to the commission], could very well succeed professor Brierly, the representative appointed by the United Kingdom Government [to the Committee of 17]'.[91] One may wonder how Brierly would distinguish between these two personas. We cannot expect one to have more expertise than the other, so the difference would have to be found in Brierly's behaviour. Logically, Brierly, as a government representative, would be inclined to take his own government's interests into account, whereas an independent expert Brierly would not. Thus, if one were to ask government representative Brierly to state the existing law, he would formulate the law as it is *according to the United Kingdom*. Independent expert Brierly, on the other hand, is expected to state what the law is, regardless of any government's interests. In other words, we may think of Brierly as acting *politically* as a government representative and *scientifically* as an independent expert. In light of this, and since codification is said to be a scientific task, it seems highly relevant to distinguish between the roles of independent experts and government representatives. Yet, according to some members of C17, one person can fulfil both roles, even at the same time.

By the end of their seventh meeting, the men unanimously agreed that 'the GA should establish a single commission for the purpose of carrying out the progressive development of international law and its eventual codification'.[92] After this decision had been made, the question arose whether the commission should be operating on a part- or full-time basis. On this matter, the Committee was split.[93] Some argued that a full-time basis was necessary if the work 'were to be effective and terminated speedily'[94] or 'to acquire the most qualified persons'.[95] Others had argued instead that 'legal experts of outstanding reputation' might hesitate to accept an appointment which would

[86]Statement by the representative of Brazil before the fourth meeting, UN Doc. A/AC.10/28 (15 May 1947), 2.
[87]Suggestions by the Netherlands representative, UN Doc. A/AC.10/18 (14 May 1947), 2.
[88]UN Doc. A/AC.10/SR.6 (20 May 1947), 5.
[89]Ibid.
[90]Statement by the representative of Brazil before the fourth meeting, UN Doc. A/AC.10/28 (15 May 1947), 2.
[91]UN Doc. A/AC.10/SR.4 (15 May 1947), 8.
[92]UN Doc. A/AC.10/SR.7 (21 May 1947), 2.
[93]Committee members also had different ideas about what a 'fulltime service' would mean in practice. See UN Doc. A/AC.10/SR.24 (11 June 1947).
[94]UN Doc. A/AC.10/SR.23 (10 June 1947), 17.
[95]Ibid.

prevent them from doing other work,[96] and that 'some countries would not be in a position to do without the services of their best specialists'.[97] Brierly, who had strongly emphasized the need of independence to ensure that codification would be scientific rather than political,[98] now argued that the members should not render a full-time service because this 'would deter the most eligible candidates from serving on the commission, as they could not be spared in their own country'.[99] This, of course, problematizes the strict distinction Brierly had drawn between 'political' and 'scientific'; 'independent expert' and 'government representative'.

Despite their disagreements, the men ultimately came to the understanding that the future commission would have to enjoy the highest prestige. According to Hsu, the provisional name of the commission, 'Commission of Experts in International Law', was inadequate because 'the word "experts" denoted persons of rather low rank', and so should be avoided.[100] After other proposals had been rejected, Brierly's suggestion to name the future commission the 'International Law Commission' was accepted with nine votes in favour and none against.[101] Nearly two weeks later, the summary records note that Koretsky expressed doubts about the use of the word 'experts' to refer to those serving on the ILC. He proposed to use the words employed for the Judges of the International Court of Justice instead.[102] There are two reasons listed for this: the Committee would be recommending an election procedure for the members of the ILC similar to that of the judges of the Court, and the word 'experts' was already used for persons that would be consulted from outside of the ILC. After a brief discussion, the Committee agreed to replace the term 'experts' by 'the words used in Article 2 of the statute of the International Court of Justice: "persons of recognized competence in international law"'.[103]

As a result, the men of C17 placed the 'independent experts' of the International Law Commission on the same footing as the judges of the International Court of Justice, effectively creating a similar kind of authority and prestige for (individuals elected to) the ILC. However, as pointed out by the Swedish representative, it is only for the judges of the International Court of Justice to state which is the content of existing international law, not for the members of the ILC.[104] So the International Law Commission would be a commission of experts – very special ones, as competent as judges – yet should not be a scientific academy, and should not merely (re)state existing international law. At the same time, the independent experts cannot make new law: they are not states nor government representatives, yet they are allowed to work for their government whilst they act independently on the ILC.

This consistent incoherence is not just the result of a disagreement among the different members. It follows from the fact that what is persistently emphasized (the scientific aspect of international law) is simultaneously and explicitly denied by the same members (the role of science in developing international law). As a result, it is the political element of international law, as opposed to its scientific element, that is continuously on display.

[96]UN Doc. A/AC.10/SR.11 (26 May 1947), 7.

[97]Ibid.

[98]The memorandum submitted by Brierly mentions that a codification commission should consist of 'lawyers of international repute, purely on their individual capacities and *in no sense as representative of governments*. In order to eliminate the risk of political appointments my Government suggests that the members of the International Court of Justice might be invited to nominate the members of this Commission'. See Memorandum submitted by the United Kingdom representative, UN Doc. A/AC.10/16 (12 May 1947), 3 (emphasis added).

[99]UN Doc. A/AC.10/SR.23 (10 June 1947), 17.

[100]UN Doc. A/AC.10/SR.15 (29 May 1947), 14.

[101]Ibid., at 15.

[102]UN Doc. A/AC.10/SR.23 (10 June 1947), 5.

[103]Ibid.

[104]UN Doc. A/AC.10/SR.24 (11 June 1947), 14–15.

4. Progressive development and codification

In the same breath that Brierly professed a commission of independent experts would have to be established, he 'emphasized the necessity of keeping distinct the task of the progressive development of international law and its codification'.[105] For Brierly, as mentioned above,

> codification is, or should be, a scientific task … Codification is primarily a task of ascertaining and declaring the law which already exists, and which is binding on states whether they approve of its contents in every detail or not … [T]he main purpose of codification is not to find rules which are acceptable to the parties … but to state what the rules already are.[106]

It is important to emphasize that Brierly is in favour of establishing only one commission, meaning that the 'distinct task of progressive development' – which Brierly does not argue to be scientific – would also be undertaken by independent experts rather than government representatives. Many of the men, however, disagree with Brierly's distinction. They argue that progressive development and codification form a 'dual task'[107] that is best 'undertaken in unity'.[108] Distinguishing between the two tasks is said to be hardly possible in practice[109] because the two are closely connected;[110] influence one another;[111] overlap;[112] are complementary;[113] are really one.[114] Even if it were possible, doing so would be undesirable because existing international law should be accompanied by new legislation;[115] codification should not be a mere restatement but also lay down new rules;[116] efforts should be made to fill the gaps by legislation;[117] codifiers should be free to say that they find that essential parts are lacking and must be free to propose necessary solutions.[118] Even Brierly himself admits that codification necessarily involves correcting inconsistencies in existing rules and filling of lacunae,[119] and that, therefore, 'the distinction between [progressive development] and codification cannot be a strictly scientific one'.[120]

Still, Brierly concludes that 'the distinction is broadly true'.[121] According to him, progressive development of international law refers to the task of laying down new rules, a necessarily political matter (that he, nonetheless, argues should be undertaken by the independent experts of the future ILC). Because codification *primarily* dealt with existing law, it could be said to be more scientific than political. This claim was also not undisputed: the representative for Yugoslavia found codification to be political precisely because it focuses on the practice of states, which is 'a political

[105]UN Doc. A/AC.10/SR.2 (13 May 1947), 5.
[106]Memorandum submitted by the United Kingdom representative, UN Doc. A/AC.10/16 (12 May 1947), 2–3.
[107]UN Doc. A/AC.10/SR.3 (14 May 1947), 3; UN Doc. A/AC.10/SR.4 (15 May 1947), 3, 8, 10.
[108]UN Doc. A/AC.10/SR.6 (20 May 1947), 5.
[109]Suggestions by the Netherlands representative, UN Doc. A/AC.10/18 (14 May 1947), 3; UN Doc. A/AC.10/SR.5 (19 May 1947), 7.
[110]UN Doc. A/AC.10/SR.3 (14 May 1947), 5; UN Doc. A/AC.10/SR.4 (15 May 1947), 3; UN Doc. A/AC.10/SR.5 (19 May 1947), 8.
[111]UN Doc. A/AC.10/SR.3 (14 May 1947), 5.
[112]UN Doc. A/AC.10/SR.5 (19 May 1947), 6.
[113]UN Doc. A/AC.10/SR.4 (15 May 1947), 3.
[114]UN Doc. A/AC.10/SR.5 (19 May 1947), 6.
[115]UN Doc. A/AC.10/SR.4 (15 May 1947), 3, 8.
[116]UN Doc. A/AC.10/SR.5 (19 May 1947), 7.
[117]UN Doc. A/AC.10/SR.4 (15 May 1947), 3.
[118]Statement by the representative of Brazil before the fourth meeting, UN Doc. A/AC.10/28 (19 May 1947), 2.
[119]See Jennings, *supra* note 39, at 386, Brierly is quoted as writing in 1931 that: 'The legislative element in the attempt to codify any part of international law is not merely incidental and subordinate; it outweighs the codifying element to such an extent that it becomes misleading to describe the process as one of codification at all.'
[120]Memorandum submitted by the United Kingdom representative, UN Doc. A/AC.10/16 (12 May 1947), 3.
[121]Ibid.

matter'.[122] Similarly, the representative for Poland observed that the work 'was not photographic, it would not just copy existing international law, but creative' and as such, could not be considered purely scientific.[123] This shows that the men had fundamentally different ideas about what it means to formulate the rules of international law. Moreover, these different ideas largely correlated with the different political ideologies of the represented states.[124]

After a few repetitive meetings during which nothing much gets done, the Chairman suggests formulating precise questions to bring order into the discussions. One of these questions was whether 'a distinction [should] be made between the development of international law and codification'.[125] The Dutch representative proposes to discuss at the same time 'whether or not the two problems should be separated'.[126] In response, the Secretary of the Committee made clear that 'it would be unnecessary to decide upon an academic distinction between development and codification. If a distinction is to be decided upon, the distinction should be in terms of methods'.[127] The next day, the Chairman reopened the discussion by reading out the following question: 'Should a distinction be drawn and a separation be made between *the methods* for the development of international law and its codification?'[128] As a first response, the Polish representative observed that this question could not be answered 'by a single yes or no' because it was really composed of two questions to which different answers could be given:

> [t]he problem as to whether a distinction can be made is rather theoretical and cannot be decided upon by voting. The problem as to whether a separation should be made, however, can be decided by voting and the Committee should now proceed to give its opinion on this point.[129]

The men, however, do neither. They do not proceed to a vote and also do not discuss the possibility of distinguishing between developing and codifying law. Instead, Brierly states that there is 'some misunderstanding in the Committee as to the meaning of the terms "development of international law" and "codification"'.[130] Rapporteur Brierly is offered the stage again to explain to the other men the 'correct' meaning of the two terms. He tells them that there are many ways of progressively developing international law. In the memorandum prepared for the Committee by the Secretariat, progressive development is divided into methods for (i) encouraging international legislation, (ii) encouraging the development of customary international law, and (iii) encouraging the development of international law through the judicial process.[131] In this perspective, laying

[122]UN Doc. A/AC.10/SR.27 (13 June 1947), 7, 9.

[123]UN Doc. A/AC.10/SR.15 (29 May 1947), 5.

[124]Rather than further exploring what is 'scientific' or 'political' in international law, I follow the example set by C17 in staying away from such interminable theoretical debates. There is an (ever-increasing) abundance of literature dedicated to international legal theory and lawmaking approaches. For a brief overview of different theoretical approaches to international law see A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 10–20; for an overview of contemporary theories and methods of international law see 'Symposium: Method in International Law', (1999) 93 AJIL 291–423; for an overview of contemporary theories and practices of international lawmaking see C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (2016); for a critical examination of international law as a science see A. Orford, 'Scientific Reason and the Discipline of International Law', (2014) 25 EJIL 369. See also, e.g., Stone, *supra* note 6; Chimni, *supra* note 8; Kennedy, *supra* note 8; Koskenniemi, *supra* note 8; Koskenniemi, *supra* note 74; Charlesworth and Chinkin, *supra* note 40; see note 195, *infra*.

[125]UN Doc. A/AC.10/SR.5 (19 May 1947), 3.

[126]Ibid., at 7.

[127]Ibid., at 7–9.

[128]UN Doc. A/AC.10/SR.6 (20 May 1947), 2 (emphasis added).

[129]Ibid., at 3.

[130]Ibid.

[131]UN Doc. A/AC.10/7 (6 May 1947) in UN Documents concerning Development and Codification of International Law, supplement to 1947 (October) 41 AJIL 110, at 111–15.

down new rules is just one way of progressively developing the law, and therefore, codification and progressive development cannot be the same. The other men, however, had been arguing that 'international legislation' (which they understood progressive development to mean, and this is also how they will define it in their final report to the General Assembly, to which I will return later) cannot be distinguished or separated from codification. From Brierly's explanation it seems that there is no misunderstanding at all. Brierly repeats in his own words what had already been said by others: 'codification, if competently effected, would entail the laying down of new rules, which is a legislating activity'.[132] Compare this, for example, to what Koretsky had asserted a few days earlier: 'codification was not only registering what exists but more, the noting of what had been done, the cleansing of existing law of its errors and the proceeding to the laying down of new rules'.[133]

Thus, the men of C17 seem to agree that 'progressive development', i.e., 'international legislation', cannot be strictly separated from codification. However, Brierly maintains that there are other methods to progressively develop international law, and that the Committee should thus make a distinction. Still, as pointed out before, Brierly argues for a *single* commission (of independent experts) to be tasked with both codification and progressive development. Thus, when it is mentioned that codification is a task for experts, which is different from the task of development, which 'might be entrusted to political instead of legal experts',[134] this is not further discussed. A majority of the Committee prefers one rather than two commissions – whether of independent experts or political representatives – so they recommend the General Assembly to establish a single commission.

In doing so, the men also decide not to make a *separation* between progressive development and codification. That is, not in terms of the number of commissions or in the individuals responsible for the task. Whether or not a *distinction* can be made is more complicated. As the Polish representative pointed out, they cannot decide a theoretical question by voting. So, rather than further discussing the meaning of the terms 'codification' and 'progressive development', the men move on to methods. However, after discussing the methods (to which I turn in the next section), the Committee is summarizing its discussions and recommendations in a report to be sent to the General Assembly. As they try to come up with definitions, the men stumble upon their disagreement regarding the meaning of the two terms again. They had never formally decided that there was a clear distinction between codification and progressive development, let alone agreed to one.

In a joint proposal, the delegates of China and the US suggested defining codification as 'the more precise formulation of law in areas where there has been extensive state practice, precedent and doctrine'; and progressive development as 'the extension of law to new areas not yet regulated by law or in which the law has not yet been highly developed or formulated in the practice of states'.[135] Koretsky is unhappy with the definition of codification ('absolutely inadequate')[136] and suggests that the Committee's final report instead mentions 'systematization of the standards of international law in specified areas thereof'.[137] Note that Koretsky's definition makes no reference to existing rules or practice. In response,

> Jessup pointed out that a question of principle and not simply a matter of words was involved. The delegate of the Union of Soviet Socialist Republics did not want to admit the difference between the development of international law and its codification; but the Committee had already established this distinction based on the idea that development dealt

[132]Ibid., at 4.

[133]UN Doc. A/AC.10/SR.4 (15 May 1947), 5.

[134]UN Doc. A/AC.10/SR.6 (20 May 1947), 8.

[135]Joint proposal by the delegations of the United States and China regarding the organization and procedure of the Commission of Experts on International Law (CEIL), UN Doc. A/AC.10/33 (23 May 1947), 3, 5.

[136]UN Doc. A/AC.10/SR.14 (29 May 1947), 7.

[137]Ibid.

> with that part of international law for which there were, as yet, no rules, or very few rules, whereas codification could only be undertaken in areas where there was extensive state practice.[138]

Reading the summary records, however, it is difficult to pinpoint when the Committee had established this distinction. While Koretsky questioned the definitions when they were first introduced, the Committee never discussed them.[139] It was only insisted that 'there was a great difference between the development and the codification of international law'.[140] Yet, as pointed out at the beginning of this section, a majority of C17 was of the opinion that there would always be a connection between developing and codifying international law: 'distinguishing between the two tasks is said to be hardly possible in practice[141] because the two are closely connected;[142] influence one another;[143] overlap;[144] are complementary;[145] are really one'.[146] Besides, when the Committee discussed the draft Declaration on the Rights and Duties of States, the men themselves experienced the difficulty of making a distinction between codification and progressive development, as the question whether the draft referred to existing law only or also contained new law remained unanswered.[147]

In spite of this, the representative of the United States continues his statement above by claiming 'that codification could only deal with positive law and not with law as it should be'.[148] This is far from how the men defined codification when they first discussed the possibility of making a separation or distinction. Jessup himself even voices conflicting statements about what it means to codify in a matter of minutes. He first implies that codification is to be practised in *areas* of international law where state practice exists (which presumably would include laying down new rules), whereas his second statement limits codification to restating positive law only. Here – at the request of another Committee member and in the context of Koretsky's objection – he suddenly makes a strict distinction between codification (as dealing only with *lex lata*) and progressive development.

After Jessup's latter assertion, the Committee moved on, with Koretsky mentioning that he would raise the matter again when the Committee would discuss its final report. Nine days later, the Chairman opens the discussion on the paragraph in Brierly's draft report that attempts to define the two terms, which reads:

> Some of the tasks [entrusted to the ILC] might involve the drafting of a convention on a subject which 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. Other tasks might, on the other hand, involve the more precise formulation of the law in areas where there has been extensive state practice, precedent and doctrine. For convenience of reference, the Committee has referred to the first type of task as "progressive development" and to the second type of task as "codification".[149]

[138]Ibid., at 7–8.
[139]UN Doc. A/AC.10/SR.12 (27 May 1947), 8.
[140]UN Doc. A/AC.10/SR.14 (29 May 1947), 6.
[141]Suggestions by the Netherlands representative, UN Doc. A/AC.10/18 (14 May 1947) 3; UN Doc. A/AC.10/SR.5 (19 May 1947), 7.
[142]UN Doc. A/AC.10/SR.3 (14 May 1947), 5; UN Doc. A/AC.10/SR.4 (15 May 1947) 3; UN Doc. A/AC.10/SR.5 (19 May 1947), 8.
[143]UN Doc. A/AC.10/SR.3 (14 May 1947), 5.
[144]UN Doc. A/AC.10/SR.5 (19 May 1947), 6.
[145]UN Doc. A/AC.10/SR.4 (15 May 1947), 3.
[146]UN Doc. A/AC.10/SR.5 (19 May 1947), 6.
[147]UN Doc. A/AC.10/SR.22 (10 June 1947); UN Doc. A/AC.10/SR.26 (12 June 1947), 6.
[148]UN Doc. A/AC.10/SR.14 (29 May 1947), 8.
[149]UN Doc. A/AC.10/SR.24 (11 June 1947), 6.

It is Bartos, the representative for Yugoslavia, who mentions that the words 'and systematization' should be inserted after 'formulation'; it is Sjoborg, from Sweden, who wishes that the report notes that he distances himself from the definitions altogether; Koretsy remains silent.[150] Perhaps fearing a repetition of the disagreement, the Chairman not only opened the discussion on the paragraph above, but also called attention to a later paragraph meant to clarify the first, which reads:

> For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments. The Committee, by a majority vote, however, agreed that for the purposes of the procedures adopted below, the definition given in [the] paragraph ... above would be applicable.[151]

The two paragraphs are accepted without further discussion.[152] Thus, in its final report, the Committee both defines codification and progressive development as distinct from one another and simultaneously recognizes that the two terms are not mutually exclusive at all. The offered definitions are 'for convenience of reference' only. They are convenient indeed: they make it possible for the Committee to propose distinct procedures for codification and progressive development, even though the report admits – in advance and explicitly – that maintaining the distinction would be impossible in practice. Here, again, what is emphasized is simultaneously denied.

5. Conventions or restatements

As mentioned in the preceding paragraphs, the Secretariat's memorandum made a distinction between 'progressive development' and 'codification' in terms of methods. The Secretariat argued that for progressive development, 'one of the most fruitful methods ... is to extend the area of "law-governed matters" through the conclusion of international conventions'.[153] The memorandum mentioned two 'methods' for encouraging the eventual codification of international law: (i) international conventions; (ii) restatements of international law.[154] While it is stated in the memorandum that the convention method 'has many drawbacks when it is considered as a method for securing international agreement on general rules and principles of international law', the memo does not 'suggest that the preparation of scientific restatements should serve as an alternative to international conventions as a method of codification'.[155] The 'method' of scientific restatements is instead presented as a 'useful preliminary step'.[156]

From the moment C17 broached the topic of methods, Koretsky made clear that all United Nations' organs should use only one: international conventions. From his perspective, the same method should be used for the progressive development of international law and codification. 'The United Nations [is] not a scientific organization, and it must lay down definite rules in multilateral conventions.'[157] According to Koretsky, 'legality demands precise legal forms',[158] and

[150]Ibid., at 6–7.

[151]Report of the Committee, UN Doc. A/331 (18 July 1947), 9.

[152]UN Doc. A/AC.10/SR.24 (11 June 1947), 8; UN Doc. A/AC.10/SR.26 (12 June 1947), 7.

[153]UN Doc. A/AC.10/7 (6 May 1947) in UN Documents concerning Development and Codification of International Law, supplement to 1947 (October) 41 AJIL 110, at 111.

[154]Ibid., at 115.

[155]Ibid.

[156]Ibid.

[157]UN Doc. A/AC.10/SR.9 (22 May 1947), 13.

[158]Statement by the representative of the Union of Soviet Socialist Republics before the ninth meeting, UN Doc. A/AC.10/32 (22 May 1947), 6.

'there could hardly be a more perfect legal form in international law than an international treaty'.[159] Whereas Brierly, as we have seen in the previous section, argues that there is a distinction to be made between progressive development and codification, both tasks, according to Koretsky, have to end in a convention: there is no difference that would justify the use of different methods.[160] For Brierly, however,

> the fundamental reason why the method of convention is not the best method to use for codification is that a proposal for a convention inevitably leads states to ask themselves – do I like the rule that this convention contains? And inevitably leads to the result that if they do not like them, they will refuse to accept the convention. And there is always something in the law which exists which states do not like – with the result that states refuse to accept a convention which they do not like and thus throw doubt on the law which is already in force.[161]

Needing an alternative to the convention method which has proven to be unsatisfactory, Brierly suggests to recommend the restatement method for the codification of international law instead, which would have considerable persuasive authority though lack imperative force:[162] 'its influence on governments or courts was dependent upon its scientific merits only'.[163] In other words, Brierly suggests a codification method that does not require states' explicit acceptance or signature. He argues for introducing 'an interval of time' to see how successful a restatement would be, after which it could be decided to 'leave the restatement to stand with merely persuasive authority', submit it to the General Assembly for approval by resolution or have it be concluded as a convention between member states.[164] Similarly, the Dutch representative argued that 'either the General Assembly or an international conference accepted the restatement as it stood, or else the Assembly rejected it, in which case the restatement would not become binding'.[165] According to him, even a rejected restatement would have the advantage of contributing to custom. However, no government would find itself bound by a majority vote. Or, in the words of Jessup,

> no state [is] bound by changes introduced into international law without its consent, but that [does] not mean that the convention method [is] the only possible one. The existence of a great body of customary international law expressly recognized in Article 38 . . . could not be denied.[166]

The representative of Australia also agreed that conventions were not the only source of international law.[167] Still, the Polish representative argued that, following the UN Charter, scientific restatements could not be given binding force or even semi-official validity.[168] In response, the representative of China stated that 'the United Nations Charter accepted the majority principle for the General Assembly. Advantage should be taken of this, even if it meant a certain risk'.[169] The representative of Yugoslavia cautions the men of C17:

[159]Summary of the speech by the representative of the Union of Soviet Socialist Republics to the Committee at its fourth meeting, UN Doc. A/AC.10/SR.4 (15 May 1947), 3.

[160]UN Doc. A/AC.10/SR.9 (22 May 1947), 13.

[161]Statement by the representative of the United Kingdom before the tenth meeting, UN Doc. A/AC.10/35 (28 May 1947), 3 (emphasis in original).

[162]Ibid.

[163]Memorandum submitted by the United Kingdom Representative, UN Doc. A/AC.10/16 (12 May 1947), 4.

[164]Ibid.

[165]UN Doc. A/AC.10/SR.10 (23 May 1947), 2.

[166]Ibid., at 3.

[167]Ibid., at 4.

[168]Ibid.

[169]Ibid.

> against any attempt to violate or encourage the revision of the Charter … He did not deny the value of scientific restatements but emphasized that Article 38 of the Statute of the International Court of Justice regarded teachings as no more than a subsidiary means for the determination of the rules of international law. The adoption of the method of scientific restatements would be a violation of the Charter.[170]

At last, the men refer to the system within which the International Law Commission and its output would someday have to fit. And yet, the legal experts disagree on what that system exactly requires or (dis)allows. Since a majority of the men had expressed the opinion that the future commission's output would have to be signed and ratified by states to become legally binding on the signatories, Koretsky concludes that 'all the delegates appeared to admit that the method of conventions and multipartite treaties was best'.[171] He suggests appointing a subcommittee of members who had expressed different tendencies so that it could 'endeavour to find a compromise solution'.[172] A few days later, the subcommittee presents the following text:

> [T]he Commission in carrying out its activities concerning the codification of international law shall present its recommendations to the General Assembly if it finds that codification on the subject is desirable or necessary, in the form of drafts of multipartite conventions.[173]

Although the Committee unanimously adopts the text, the men immediately disagree about its meaning. According to Koretsky, the General Assembly would decide the matters with which the ILC could deal; Brierly and the others had been of the view that the ILC would itself decide what topics were fit for codification. Similarly, the subcommittee is divided over whether or not their recommendation meant that the same procedure should be followed for the codification of international law and its progressive development. According to the summary records, 'the delegates of the USSR and of Sweden maintained that the text referred both to codification and to development, while the delegates of Brazil, and the UK, and the Secretary of the Committee held the opposite view'.[174] They remain divided, with different translations of the text apparently leading to different conclusions. However, knowing that Koretsky will only accept the convention method, Brierly asks him, 'would he not have to have a draft before his convention could be concluded, and would this draft be anything very different from what I am calling a restatement of the law?'[175] After the difference between the two positions is presented as a matter of words only, C17 unanimously agrees that the future commission would 'present its recommendations to the General Assembly … in the form of drafts of multipartite conventions'.[176] It is important to highlight that this decision (as well as much of the discussion so far) is about *form* rather than *method*. Even if all of the men of C17 are willing to go along with Koretsky's emphasis on the *form* of the output of the ILC needing to be draft (articles of) multipartite conventions, they disagree on (i) the *method* to arrive at such a draft convention, and (ii) the *method* to finalize the output of the ILC, i.e., that which comes after the preliminary stage.

Thus, while Koretsky may have gotten what he wanted – the work of the ILC would finish in a draft convention – Brierly did too – different procedures (or methods) were set out for codification and progressive development, with governments being included far less in the former than in the latter process. The amount of times governments should be consulted in the codification process was an important point of contention. Koretsky wanted the future commission to consult

[170]Ibid., at 4–5.
[171]Ibid., at 6.
[172]Ibid.
[173]UN Doc. A/AC.10/SR.12 (27 May 1947), 1.
[174]Ibid., at 7.
[175]Statement by the representative of the United Kingdom before the tenth meeting, UN Doc. A/AC.10/35 (28 May 1947), 4.
[176]UN Doc. A/AC.10/SR.12 (27 May 1947), 1.

governments as often and extensively on codification drafts as all others.[177] According to him, observations from governments would always be necessary because 'scientists were never perfect' so that the work of the commission could not be expected to be perfect either, and consulting governments might even accelerate the procedure.[178] Others argued that no consultation during the codification process was necessary because the General Assembly had no legislative powers, and 'would only perform the final task in the preparation of international conventions which would be signed at international conferences composed of government delegates'.[179]

As pointed out in Section 3 above, a majority of the Committee saw value in setting up a system of two stages. According to Brazilian representative Amado, for example, there was a 'necessity of consulting the governments right at the beginning of the codification procedure and regularly during its various stages'.[180] Doing so, Amado thought, might positively impact the number of ratifications that the conventions would receive. Thus, it was decided, with seven votes in favour, six against, and three abstentions, that codification drafts would be presented to governments before they were submitted to the General Assembly.[181] However, during one of their final meetings, Donnedieu de Vabres comes back to this decision and suggests to mention in the report that governments should be requested to give their opinion at the beginning stage of a codification project, so that they could not impede the work by expressing their objections only at the end.[182] Jessup prefers to simply delete the request for governments' comments altogether because the work of codification is 'primarily legal and scientific, not political'.[183] If the men of C17 were to accept these suggestions, there would be no involvement of governments in the process of codification; it would be left entirely to the ILC. The men repeat their previous disagreement: those who do not consider codification to be purely scientific argue that governments have the right to give their 'undoubtedly necessary' opinions on the drafts,[184] and even if the work was scientific, 'the governments would want to consult also the scientists outside the ILC'.[185] Bartos concludes that deleting the request for comments

> would result in codification becoming a monopoly of the fifteen scientists of the ILC and as it was a basic principle of the Charter of the United Nations that this organization was not a super-State: all the Governments should at any time be entitled to give their opinion on any law which would govern the relationship between them.[186]

Donnedieu de Vabres accuses Bartos of reopening the whole problem, noting that his 'arguments would be to the point only if there was really a question of international legislation being envisaged, however, such was not the case. The work of the ILC would always finish in a draft convention'.[187]

But would it? A majority of the Committee is in favour of including in its report multiple recommendations the future commission could make to the General Assembly regarding a final codification draft. In relation to progressive development, no recommendations are spelled out. Regarding codification, however, the final report of the Committee foresees four possibilities:

[177]UN Doc. A/AC.10/SR.15 (29 May 1947), 6.
[178]Ibid.
[179]Ibid., at 5.
[180]Ibid., at 7.
[181]Ibid.
[182]UN Doc. A/AC.10/SR.27 (13 June 1947).
[183]Ibid., at 2.
[184]Ibid.
[185]Ibid., at 3.
[186]Ibid., at 7.
[187]Ibid., at 8.

a) That no further action be taken in view of the fact that the report has already been published, or
b) That the General Assembly should adopt all or part of the report by resolution, or
c) That the General Assembly should recommend the draft to States for the conclusion of a convention, or
d) That the General Assembly should convoke a special conference to consider the conclusion of a convention.[188]

Again, Koretsky protests: according to him, this proposal was contrary to the decision that all recommendations would be in the form of a multipartite convention.[189] Importantly, however, the *form* of the output of the future commission would remain the same no matter what the General Assembly would subsequently do with it. Hence, Hsu argues that the General Assembly 'could do whatever it wished: even a mere recommendation … would give enormous prestige to a restatement on any subject of international law'.[190] When Koretsky asks what its prestige could be if it were not laid down in a convention binding on states, Hsu replies that he, too, would be happier if the drafts would be turned into international conventions. 'However, if it should prove that only a majority of the member states would want a convention on any subject and that no unanimity could be achieved, a majority resolution would still be very useful.'[191] In response to a point of order raised by Koretsky that the question had already been decided and that all recommendations to the General Assembly should be worked out in the form of a multipartite convention, the Assistant-Secretary General shares his opinion: if a report would always contain the draft of a multipartite convention, there was a gradation in points a to d with point b meaning 'action of a lesser degree': the ultimate aim would always remain the conclusion of a convention.[192] Put differently, the *form* of the output of the future commission would always be a draft multipartite convention, both in projects of progressive development and of codification. Yet, the *method* to reach that output, as well as the *method* to subsequently deal with that output, differs, leading to different procedures for codification and progressive development.

As we know, Koretsky and Brierly feel differently about the desirability of this procedure. However, if we take a closer look at the speeches made by Koretsky and Brierly, what they consider to be (im)possible is not all that different. Koretsky claims that the rules resulting from the work of codification may become generally obligatory, but only through the method of concluding multilateral conventions.[193] He makes clear that 'there must be no enforcement of the adoption of standards laying down rules for the conduct of states in the future, against the will of any states. … [N]o laws must be established for them without their volition'.[194] He reminds the men that the United Nations is not a 'super-state legislative body', which he proves by the defeat of a San Francisco proposal to grant the General Assembly authority to legislate.[195] Similarly, Brierly argues that

[188]Report of the Committee, UN Doc. A/331 (18 July 1947), 10. The Sixth Committee later changed 'adopt' to 'take note of' because 'it was felt that this power of the General Assembly to adopt or reject ILC texts would introduce into the work of codification that very political element which it was hoped to remove. Such a provision, in any case, might give rise to doubts or uncertainties which should be avoided'. See Report and Draft Resolution adopted by Sub-Committee 2, UN Doc. A/C.6/193 (18 November 1947), 15.

[189]UN Doc. A/AC.10/SR.15 (29 May 1947), 10.

[190]Ibid.

[191]Ibid., at 11.

[192]Ibid., at 13.

[193]Statement by the representative of the Union of Soviet Socialist Republics before the ninth meeting, UN Doc. A/AC.10/32 (23 May 1947), 2.

[194]Ibid.

[195]Ibid. For a similar argument see also Wood, *supra* note 28, at 8.43. After stating that the ILC cannot and does not make law, Wood argues that it is clear from the UN Charter that 'the General Assembly under article 13 has power to promote the development of international law, the progressive development, codification of international law, but not to make law. And attempts at San Francisco to give the General Assembly legislative power were firmly rejected. So, the International Law

> there is no super-state, no authority which can legislate for sovereign states, which can say to them "this or that shall in the future be the rule which you must obey." New international laws can only be made by states which agree to them, and for states which agree to them. Such laws do not bind states which dissect from them ... [E]ven if there were a thousand methods open to us–which there is not–conventions would be the right method.[196]

In addition, Brierly agrees with Koretsky that conventions are ideal and would be better and more satisfactory than a restatement. That is because Brierly considers such restatements to have 'considerable persuasive authority' but no 'actual authority'.[197] What is interesting is that Koretsky actually makes a similar argument. In his speech, Koretsky makes a distinction between scientific restatements prepared by learned institutions and those prepared by an organ of the United Nations, such as the proposed International Law Commission. According to the Soviet delegate, restatements prepared by learned institutions promote the work of codification because they facilitate the preparation of draft conventions. However, if the UN acts similarly, something else happens:

> that will render the possibility of real codification remote, because it will weaken efforts directed towards real codification and will mislead public opinion by inspiring an unjustified confidence that codification in the form of informal compilations is adequate, and that there therefore remains nothing more to be done.[198]

In other words, 'informal compilations', 'non-legal forms' or 'imprecise legal forms' prepared by an organ of the UN could have a similar effect (misleading or not) as 'real codification'. While Koretsky clearly considers this to be undesirable, he does not seem to consider it impossible, no matter how often he reminds the other men that the UN is not a super-state, that only states can make law or that 'restatements would lead to no results'.[199] Indeed, Koretsky later argues that 'special authority [to publish the drafts] from the General Assembly would be superfluous and might even be undesirable as it could be interpreted as giving additional weight to the drafts'.[200] Whereas the first part of this sentence seems to suggest that a General Assembly resolution does not 'do' anything (it would be superfluous), the latter part reveals that there is always a possibility that it could: it may be interpreted as giving additional weight. Thus, even though Koretsky is convinced that the General Assembly does not have the power to legislate, he realizes that a resolution adopted by the General Assembly could possibly have legal effect. Similarly, Bartos asserts that conventions prepared by the ILC 'even if they were not signed by all the governments, would always have a great authority'.[201] Sjoborg argues for an increase in the commission's membership so that the reports adopted by the General Assembly 'might have the greatest

Commission cannot make law'. For an exploration of the General Assembly's (potential) legal influence see, e.g., Jennings, *supra* note 39; O. Asamoah, 'The Legal Effect of Resolutions of the General Assembly', (1964) 3 CJTL 210; R. R. Baxter, 'International Law in "Her Infinite Variety"', (1980) 29 ICLQ 549; C. C. Joyner, 'U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation', (1981) 11 *California Western International Law Journal* 445; C. C. Joyner (ed.), *The United Nations and International Law* (1997); see Boyle and Chinkin, *supra* note 124, at 116–9. See also more generally note 124, *supra*.

[196]Statement by the representative of the United Kingdom before the tenth meeting, UN Doc. A/AC.10/35 (28 May 1947), 2–3 (emphasis in original).

[197]Ibid., at 4.

[198]Statement by the representative of the Union of Soviet Socialist Republics before the ninth meeting, UN Doc. A/AC.10/32 (23 May 1947), 5–6.

[199]UN Doc. A/AC.10/SR.9 (22 May 1947), 14.

[200]UN Doc. A/AC.10/SR.15 (29 May 1947), 9.

[201]UN Doc. A/AC.10/SR.27 (13 June 1947), 6.

authority possible',[202] even though he considers the convention method to be the only possible one.

What this shows is that the men realize that while scientific restatements are not legally binding – they are 'no more than a subsidiary means' per the statute of the ICJ – the proposed procedure will nevertheless have some legal effect. Here, too, the men emphasize and deny the same thing at the very same time: the legal authority of a non-binding draft convention. Whereas the opponents of the new approach consider this authority to be undesirable, Brierly and some others find it very appealing. Importantly, however, no one argues that restatements drafted by experts are, or should become, legally binding. Rather, to paraphrase Brierly, a slice of cake is preferable to having no cake at all.[203] Put differently, the Committee created an ambiguous procedure. In doing so, and in combination with maintaining the impossible distinctions between progressive development and codification, and between government representatives and independent experts, the men found the International Law Commission on an embracing of uncertainty.

6. Concluding remarks

On a Tuesday afternoon in June 1947, 19 men[204] meet at Lake Success, New York. For a little over a month, they searched for the International Law Commission. The summary records of their meetings are reminiscent of the play 'Six Characters in Search of an Author', which centres around six 'characters' – meaning that they are conceived by the imagination of a writer – whose drama in which their *raison d'être* resides remains unwritten. Luigi Pirandello, the author of the play, confessed that he deliberately denied the characters their reason for existence:

> it was they who were most eager to live, who were most fully conscious of being characters, that is to say, absolutely dependent on a play, on their own play, since that is the only one they are capable of imagining. Yet that is the play that is turned down! An impossible situation in short, a situation they must get out of at any cost.[205]

Instead of writing his characters their much-needed play, Pirandello imagines the characters into existence only to have them search for a different author, for a different play. As he explains, the characters have been given 'another *raison d'être* than their own, another function … which consists of being turned down and in search of an author'.[206] In playing with the real (the actors) and the apparent (the characters), Pirandello shows that the distinction between the two (real/apparent and actor/character) is an illusion. As such, the play invariably creates doubt and confusion, both in the minds of the characters, the actors and the audience.

Similarly, the men of C17 – caught in a development that both emphasized the need for international law and challenged its core foundation as being state-centric – were forced to search for another Commission in which they – government representatives – could find another play, could play another role.[207] As demonstrated throughout this article, the men prove that distinctions – between independent experts and government representatives, between codification and progressive development, between conventions and scientific restatements – are illusory. Rather than attempting to solve the problems that maintaining these distinctions creates, the men

[202]UN Doc. A/AC.10/SR.23 (10 June 1947), 11.

[203]Statement by the representative of the United Kingdom before the tenth meeting, UN Doc. A/AC.10/35 (28 May 1947), 4.

[204]At the last meeting, all 17 members were present, as well as the Assistant Secretary-General and Director of the UN's international law division, totalling a number of 19 men.

[205]L. Pirandello, 'PIRANDELLO CONFESSES … Why and How He Wrote "Six Characters in Search of an Author"', (1925) 1 VQR 36, at 44.

[206]Ibid.

[207]Five of the members of C17 (Amado, Brierly, Hsu, Koretsky, and Yepes) were among the first 15 men elected to the ILC. Bartos was elected in 1957. Quite ironically perhaps, Brierly was appointed as the first Special Rapporteur of the law of treaties.

embrace – utilize even – the uncertainty that comes with them in order to find/found the Commission. As a result, the International Law Commission persistently struggles with its function ('nothing less than the "impossible" situation'[208]).

This article aimed at making sense of the International Law Commission, its struggle with itself, and the discourse surrounding the institution in a new way. Doing so would require looking differently and elsewhere. In light of this, the intervention presented in this article employs a combination of literary, socio-legal, and historical methods, and traces the observation that the ILC is self-aware and its members often publicly critical back to the debates that established the Commission. The focus on these debates follows from the understanding that they can offer a new perspective, that of the past's imagined future. From this perspective, we are able to see our present differently, thereby bringing new understandings to the fore. As the analysis ultimately reveals, the process of founding the Commission is characterized by incoherence, maintaining impossible binaries and deferring a substantive resolution of the problems this creates elsewhere. The conclusion that the International Law Commission was founded on an embracing of uncertainty not only makes it possible to make sense of the International Law Commission in a new way – implying that the institution is not in a (forever) crisis but that its uncertainty and ambivalence towards itself are structural – it can also be understood as an illustration of international law's indeterminacy, thereby challenging traditional understandings of international law(making). As such, the intervention adds to discussions on international law's theory and practice without seeking to reconcile contradictions or trying to achieve coherence.

In other words, or in conclusion, members of the International Law Commission as well as those observing from the sidelines will likely continue discussing and trying to solve whatever problem comes up in its work. The men of C17 show that one can always opt to embrace uncertainty if faced with impossibilities. In addition, we learn from Pirandello that even a function that is impossible can be a 'real reason for being, and a sufficient cause for existence'.[209]

[208]See Pirandello, *supra* note 205.
[209]Ibid.

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