

INTRODUCTION TO THE INTERNATIONAL LAW COMMISSION

Spring 2025

PURPOSE OF THE COMMISSION



PROGRESSIVE DEVELOPMENT VS. CODIFICATION

- In 1945, the UN Charter drafters considered a proposal to explicitly reference “revision” of existing international rules but instead chose to use the words “progressive development” since “juxtaposed as they were with codification, they implied modification of as well as additions to existing rules”, which “established a nice balance between stability and change, whereas ‘revision’ would lay too much emphasis on change.”
- The Committee of Seventeen recognized that the tasks assigned to the Commission would vary in nature, sometimes involving law that was not heavily developed and other times involving law that involved extensive State practice, precedent, and doctrine.
 - The former was labeled “progressive development” and the latter “codification”.
 - Despite creating a distinction between these two concepts, the Committee of Seventeen recognized they were not mutually exclusive, e.g., when formulation and systematization of the existing law results in the conclusion that some new rule should be suggested for adoption by States.

OBJECT & PURPOSE



- **Statute, Article 1(1):** the “Commission shall have for its object the promotion of the progressive development of international law and its codification”.
- **Statute, Article 15:**
 - **Progressive development** means “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States”.
 - **Codification** means “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”.
 - **In practice**, the Commission’s work involves an aspect of both codification and progressive development, and the balance varies topic-by-topic.

PROGRESSIVE DEVELOPMENT

Statute, Articles 16 and 17



Article 16

When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow in general a procedure on the following lines:

- (a) It shall appoint one of its members to be Rapporteur;
- (b) It shall formulate a plan of work;
- (c) It shall circulate a questionnaire to the Governments, and shall invite them to supply, within a fixed period of time, data and information relevant to items included in the plan of work;
- (d) It may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire;
- (e) It may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts;
- (f) It shall consider the drafts proposed by the Rapporteur;
- (g) When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in subparagraph (c) above;
- (h) The Commission shall invite the Governments to submit their comments on this document within a reasonable time;
- (i) The Rapporteur and the members appointed for that purpose shall reconsider the draft, taking into consideration these comments, and shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission;
- (j) The Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly.

Article 17

1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General.

2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow in general a procedure on the following lines:

- (a) The Commission shall formulate a plan of work, and study such proposals or drafts, and compare them with any other proposals and drafts on the same subjects;
- (b) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;
- (c) The Commission shall submit a report and its recommendations to the General Assembly. Before doing so, it may also, if it deems it desirable, make an interim report to the organ or agency which has submitted the proposal or draft;
- (d) If the General Assembly should invite the Commission to proceed with its work in accordance with a suggested plan, the procedure outlined in article 16 above shall apply. The questionnaire referred to in paragraph (c) of that article may not, however, be necessary.

CODIFICATION

Statute, Articles 18 to 24



Article 18

1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not.

2. When the Commission considers that the codification of a particular topic is necessary and desirable, it shall submit its recommendations to the General Assembly.

3. The Commission shall give priority to requests of the General Assembly to deal with any question.

Article 19

1. The Commission shall adopt a plan of work appropriate to each case.

2. The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.

Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

(b) Conclusions defining:

- (i) The extent of agreement on each point in the practice of States and in doctrine;
- (ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

Article 21

1. When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to the document, including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by Governments in accordance with article 19. The Commission shall decide whether the opinions of any scientific institution or individual experts consulted by the Commission shall be included in the publication.

2. The Commission shall request Governments to submit comments on this document within a reasonable time.

Article 22

Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report, which it shall submit with its recommendations through the Secretary-General to the General Assembly.

Article 23

1. The Commission may recommend to the General Assembly:
 - (a) To take no action, the report having already been published;
 - (b) To take note of or adopt the report by resolution;
 - (c) To recommend the draft to Members with a view to the conclusion of a convention;
 - (d) To convoke a conference to conclude a convention.

2. Whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

Article 24

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

DISCUSSION QUESTIONS

- (1) What does progressive development mean? Versus codification?**
- (2) What is the difference? Does this difference matter?**
 - Progressive development is not binding; it is *lex ferenda*, not *lex lata*, and therefore may lead to regressive development if ultimately State practice pushes against it.
- (3) Is progressive development necessary? Explain.**