

B. G. Ramcharan

# The International Law Commission

Its approach to the codification  
and progressive  
development of international law



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# THE INTERNATIONAL LAW COMMISSION

## ITS APPROACH TO THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

*by*

B. G. RAMCHARAN



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## FOREWORD

The International Law Commission of the United Nations is generally considered to be one of the success stories of that Organization. Although envisaged in the Charter, it was not actually established until 1947. Since then it has contributed greatly to the "progressive development of international law and its codification," to quote from the words of Article 13(1) of the Charter under which the Commission was established by Resolution 174(II) adopted by the General Assembly on 21 November, 1947. Although Article 15 of the Commission's Statute enacted by that Resolution presupposed a rather sharp division between "progressive development" and "codification," the Commission has in practice abandoned that distinction, although at first it attempted to adhere to it. In so doing the Commission laid itself open to some criticism, but the general opinion is that the Commission was justified in following the course that it did.

The best test of the Commission's record lies in its achievements, and these have been remarkable. The Geneva Conventions on the Law of the Sea 1958, and the Vienna Conventions of 1961, 1963 and 1969, on, respectively, the Law of Diplomatic Relations, the Law of Consular Relations and the Law of Treaties, were all largely based on the careful preparatory studies made by the Commission. It cannot, of course, be said that these Conventions removed all doubts and ambiguities from these substantial branches of international law, but it is undeniable that they contributed to a considerable clarification. As a result of the Commission's work, little is heard any more of the sterile controversy whether attempts to codify international law are justifiable or not.

These are no mean achievements in an era when many factors, such as the great increase in the number of sovereign States and rapid advances in technology, have been throwing much of the old international law into confusion. Article 8 of the Commission's Statute requires that the persons elected to serve on it "should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured." As with other organs of the United Nations, elections to membership of the International Law Commission have sometimes been controversial and on occasions the Commission has been deprived of persons who

might have made a valuable contribution to its work, but on the whole the purposes of the architects of the Commission have been achieved. Many distinguished international lawyers have served on the Commission, often as a preliminary to being elected as members of the International Court of Justice, and they have certainly represented varied legal traditions. In this it helps that persons are elected to serve on the Commission as individuals and they do not sit there simply as delegates of the separate States of which they happen to be nationals. Moreover, election for a term of five years ensures a reasonable blend of continuity in the Commission's approach to its task coupled with periodic infusions of new blood, which is also necessary at a time when many new nations are arriving on the international scene, anxious to make their own special contribution to the formation and modernisation of rules of international law.

It is particularly appropriate that the present work should have been produced after several years of careful academic study by Mr. B. G. Ramcharan, himself a citizen of one of the newer members of the United Nations and now a servant of that Organization. It is essential for the future health of international law that its principles be understood and freely accepted by, and its rules be adapted to the needs of, that large proportion of the membership of the United Nations which has only come into independent existence since 1945. The International Law Commission is making a signal contribution to that end. In this work Mr. Ramcharan subjects that contribution to a thorough and not uncritical examination. This examination covers not only the results of the Commission's work but also, in considerable detail, its methods of working. Mr. Ramcharan feels obliged to make some criticisms of the Commission, but his criticisms are fair and, what is even more important, constructive. The author is, therefore, to be congratulated on writing a book which will in its own way contribute to "the progressive development of international law and its codification."

D.H.N. JOHNSON  
Professor of International Law

The University of Sydney  
10 September, 1976

## PREFACE

This study was prompted by the recent long-term review by the International Law Commission of its future approach and programme, which took place between 1967 and 1973, and which is to continue in the course of future sessions. The main inquiry covers the present approach of the Commission to the codification and development of international law. Our finding in this regard is that the Commission's basic approach is an empirical or pragmatic one. It tries to ascertain rules which are likely to be useful to States in the conduct of their international relations and rules and formulations to which they are likely to agree; and it proceeds to treat each topic accordingly. It has concerned itself principally with the main chapters of international law, adapting and extending them to present conditions and needs.

The pragmatism of the Commission pervades the various facets of its approach – for example, taking the titles of chapters of this study, its organization and working methods, its general approach, its juristic methodology, its political approach and its approach to theories and principles of international law.

Within the framework of the main investigation we also enquire into the future approach and programme of the Commission. Here we offer two sub-theses: first, that a changed situation faces the Commission in the future from that which faced it in 1949. In the future it will need to be more dynamic, to pay more attention to the formative role of international law besides its regulatory role; to go outside the sphere of traditional international law and to relate international law to major international questions such as the creation of a new international economic order, economic development and the maintenance of peace and security. Second, it must accelerate the pace and volume of its work. To these ends, we submit suggestions for improving the organization and methods of the Commission.

Finally, we offer certain appraisals, conclusions and assessments of the future prospects of the Commission.

Acknowledgement is gratefully offered to the following persons and institutions, for assistance received in the production of this study: Professor D.H.N. Johnson, M.A., L.L.B., former Professor of International and Air Law, London School of Economics and Political Science, my supervisor in the preparation of the thesis on which this study is based, who inspires by

his kindness, simplicity and humility, and who guides with penetrating insight; Professor G. Schwarzenberger, my teacher; Professor A.J.P. Tammes; Dr. T. Van Boven; past and present members of the International Law Commission who have generously granted me interviews; the officers of the Codification Division of the United Nations Office of Legal Affairs; the officers of the Legal Division of the Council of Europe, Strasbourg; the officers of the Codification Division, Office of Legal Affairs, Organization of American States; the Governing Body of the United Nations International Law Seminar held in conjunction with the sessions of the International Law Commission for the opportunity to participate in the seminar, and to the International Law Commission, for enabling me, as a participant in the above seminar, to observe the sessions of the Commission and to speak to members of the Commission. I also received much assistance from Mr. and Mrs. G. Michalopoulos, Miss J. Edrich and Lily and Robin Ramcharan. Responsibility for the work rests, of course, with myself alone.

This work takes into account materials available up to 31 August, 1976.

B.G. RAMCHARAN

Geneva

31 st August, 1976

## LIST OF CASES\*

- Admission of a State to the United Nations (Charter, Article 4), Individual Opinion of Judge Alvarez, *I.C.J. Reports 1948*, p. 57 at p. 69.
- Anglo-Norwegian Fisheries Case, Individual Opinion of Judge Alvarez, *I.C.J. Reports 1951*, p. 116 at p. 145; see especially pp. 146, 148–149.
- Appeal Relating to the Jurisdiction of the I.C.A.O. Council, *I.C.J. Reports 1972*, p. 46 at p. 67, para. 38.
- Attorney-General of Israel-v-Kamir, 44 *International Law Reports* (1972), pp. 197–290, at pp. 261–262; 267–268; 277–279; 285–286.
- Barcelona Traction, Light and Power Company Limited, Judgment, *I.C.J. Reports 1970*, p. 3, Individual Opinion of Judge Fitzmaurice at pp. 85–86; Individual Opinion of Judge Ammoun at p. 287 ff.
- Claim Against the Empire of Iran Case, Federal Republic of Germany, Federal Constitutional Court, 30 April 1963, 45 *International Law Reports* (1973), pp. 57–82 at p. 76.
- Competence of Assembly Regarding Admission to United Nations, Advisory Opinion, *I.C.J. Reports 1950*, p. 4; Dissenting Opinion of Judge Alvarez, at p. 12.
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- Fisheries Jurisdiction (United Kingdom-v-Iceland), Jurisdiction of the Court, Judgment, *I.C.J. Reports 1973*, p. 3, paras. 24, 36, 37.
- Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), *I.C.J. Reports 1971*, p. 16, at p. 47, para. 94.
- Re Martinez and Others, Italy, Court of Cassation, 25 November, 1959, 28 *International Law Reports* (1959), pp. 170–175, at p. 172.

\*On the development of international law by international courts and tribunals, see: Sir H. Lauterpacht, *The Development of International Law by the International Court* (1958) and the sources cited therein, especially at p. 71, note 20. E. Hambro, *The Case Law of the International Court* (1952). G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. I (1957), Vol. II (1968); G. Schwarzenberger, "Trends in the Practice of the World Court," *Current Legal Problems* (1951), pp. 1–34; Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice . . .," *B.Y.I.L.*, Vol. 27 (1950), pp. 1–42; Vol. 28 (1951), pp. 1–28; Vol. 29 (1952), pp. 1–62; Vol. 30 (1953), pp. 1–70; Vol. 31 (1954), pp. 371–429; Vol. 32 (1955), pp. 20–96; Vol. 33 (1957), pp. 203–293; Vol. 34 (1958), pp. 1–161; Vol. 35 (1959), pp. 183–231; B. Cheng, "The First Twenty Years of the International Court of Justice," *20 Yearbook of World Affairs* (1966), pp. 241–256; S.C.K. Agodzo, "The Development of International Law by International Administrative Tribunals," Thesis No. 431, University of London (1972); P. Pescatore, "Aspects of the Court of Justice of the European Communities of Interest from the Point of View of International Law," 32 *Z.A.O.R.V.* (1972), pp. 239–252.



- North Sea Continental Shelf Cases, Judgment, *I.C.J. Reports* 1969, p. 3.
- Nottebohm Case (Second Phase) Judgment of April 6, 1955, *I.C.J. Reports* 1955, p. 4, See at p. 23; Dissenting Opinion of Judge Read at p. 39.
- Petroleum Development Ltd.-v-Sheikh of Abu Dhabi (Lord Asquith of Bishopstone, Umpire, September, 1951), *International Law Reports* (1951), p. 144, at pp. 156-157.
- Tietz et al-v-People's Republic of Bulgaria, Federal Republic of Germany, Supreme Restitution Court for Berlin, July 10, 1959, 28 *International Law Reports* (1959), pp. 369-413, at pp. 380-381; 407-409.
- Re Weizsaecker and Others (Ministries Trial), United States Military Tribunal at Nuremberg, April 14, 1949, *International Law Reports* (1959), p. 344, at p. 345.

## ABBREVIATIONS

A/...	Numbered documents of the United Nations General Assembly.
A/PV/...	Numbered procès-verbaux or verbatim records of plenary meetings of the United Nations General Assembly.
A/C.6/...	Numbered documents of the General Assembly's Sixth (Legal) Committee.
A/C.6/SR...	Summary Records of the Sixth (Legal) Committee of the General Assembly.
A/AC.10/...	Numbered documents of the Committee on the Progressive Development of International Law and its Codification.
A/AC.10/SR...	Summary Records of the Committee on the Progressive Development of International Law and its Codification.
A/CN.4/...	Numbered documents of the International Law Commission.
A.A.A.	Association of Alumni and Attenders of the Hague Academy of International Law.
A.A.L.C.C.	The Asian-African Legal Consultative Committee.
A.F.D.I.	Annuaire Français de Droit International.
A.J.C.L.	American Journal of Comparative Law.
A.J.I.L.	American Journal of International Law.
A.S.I.L.	American Society of International Law.
A.S.I.L.Proc.	Proceedings of the American Society of International Law.
B.Y.I.L.	British Yearbook of International Law.
C.Y.I.L.	Canadian Yearbook of International Law.
Col.L.R.	Columbia Law Review.
C.L.P.	Current Legal Problems.
E/...	Numbered documents of the Economic and Social Council.
E.C.L.C.	The European Committee on Legal Co-operation.
G.A. Resn.	United Nations General Assembly Resolution.
G.A.O.R.	United Nations General Assembly Official Records.
I.A.J.C.	The Inter-American Juridical Committee.
I.C.A.O.	International Civil Aviation Organization.
I.C.J.	International Court of Justice.
I.C.L.Q.	International and Comparative Law Quarterly.
I.J.I.L.	Indian Journal of International Law.
I.L.A.	International Law Association.
I.L.C.	International Law Commission.
I.L.Q.	International Law Quarterly.
L.N.Doc.	League of Nations Document.
L.N.O.J.	League of Nations Official Journal.
O.A.S.	Organization of American States.
P.C.I.J.	Permanent Court of International Justice.

<i>R.C.A.D.I.</i>	Recueil des Cours de l'Académie de Droit International de la Haye.
<i>R.I.I.A.</i>	Reports of International Arbitral Awards.
<i>Trans.Gr.Soc.</i>	Transactions of the Grotius Society.
U.N.	United Nations.
<i>U.N.Doc.</i>	United Nations Document.
<i>UNCIO</i>	United Nations Conference on International Organisation.
UNCITRAL	United Nations Commission on International Trade Law.
UNIDROIT	United Nations Institute for the Unification of Law.
<i>Y.B.I.L.C.</i>	Yearbook of the International Law Commission.
<i>Y.B.W.A.</i>	Yearbook of World Affairs.
<i>Z.A.O.R.V.</i>	Zeitschrift für Ausländisches Recht und Völkerrecht.

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## INTRODUCTION

The International Law Commission has been assigned the task of assisting the United Nations to codify and progressively develop international law. Its duties include suggesting modifications and changes in the law to bring it into line with the needs of present-day international society and suggesting new law where none existed before, or where the law has been unclear hitherto.

Being the vehicle for systematizing, consolidating, up-dating, adapting and expanding the law, and for giving an opportunity to the States of the 'second and third worlds', particularly the newer members of the enlarged international society, to participate in this process, and also because it has ultimate charge of the whole of international law, it is reasonable to conclude that in the long term<sup>1</sup> the nature of international law and the role which it discharges in international society, will be significantly shaped by the work of the Commission, the consensus that builds around it, and the developments which it inspires or triggers off, such as, for example, the growth of international customary law around its work.

At the end of the first quarter century of the Commission<sup>2</sup> it is appropriate to ask: (i) what is the nature of the process in which the Commission is engaged and what is the approach which it is following? (ii) what are the lines along which the law is developing? (iii) what are the factors that are influencing these lines of development and the approach of the Commission generally? (iv) how is the Commission functioning as a body and what improvements can be made in its organization, methods and approach? The present inquiry is addressed to some of these questions.

At its nineteenth session in 1967, the Commission, recognizing that 1968 would be its twentieth anniversary year, discussed a review of its future programme of work and decided to place the matter on its provisional agenda for 1968. "The Commission . . . considered that [its twentieth] session would be an appropriate time for a general review of the

<sup>1</sup> R. Ago, *Y.B.I.L.C. 1966*, Vol. I, Part I, p. 1, para. 8: It is in "the long term that its work is of importance to peace."

<sup>2</sup> The Commission attained its 25th year in 1973. The event was marked by the General Assembly at its 2151st meeting on 12 October, 1973. See A/PV.2151. The event was marked by the Commission at a commemorative meeting held on 27 May 1974. See A/CN.4/SR.1265, *Y.B.I.L.C. 1974*, Vol. I, pp. 66-75.

topics which had been suggested for codification and progressive development, of the relation between its work and that of other United Nations organs engaged in development of the law, and of its procedures and methods of work under its Statute.”<sup>3</sup>

This review became part of the Commission’s contribution to the twenty-fifth anniversary celebrations of the United Nations and featured in the agenda and discussions of the Commission between 1968 and 1973 when the first round of discussions was completed. Further discussions are to take place on the matter in the course of future sessions. Accompanying discussions have also been held within the Sixth Committee of the General Assembly. These discussions have been backed up by papers<sup>4</sup> produced by the Codification Division of the United Nations Office of Legal Affairs.

The review thus far has thrown up several issues which require examination anew or re-examination in the light of the Commission’s past experience and its future role. Of these the following may be mentioned: (1) The problems of lack of time, lack of resources, slow rate of work and need for greater flexibility, which face the Commission; (2) The general approach of the Commission and the perspective for the next twenty-five years; (3) The selection of a new long-term programme of work for the next twenty-five years; (4) Determining the needs of the international community with regard to the codification and progressive development of international law; (5) Finding suitable criteria for the selection of topics; (6) Review of the work methods of the Commission; (7) The problem of the sparse ratification of codification conventions; (8) The form of work – whether it should take the form of draft conventions only or whether it should also include the preparation of restatements and model rules as well; (9) The need to strengthen the secretariat services, especially increasing the staff of the Codification Division; (10) The question of a possible extension in the term of office of members of the Commission from five to seven years; (11) The revision and updating of codification conventions; (12) Consideration of problems relevant to economic development, the maintenance of peace and security and the pacific settlement of disputes.

The object of this study is to examine some of the above issues and at the same time to undertake a broader analysis of the efforts of the Commission to codify and develop international law. In the latter respect our purpose is to see how the Commission emerges from a review from a number of

<sup>3</sup> *Y.B.I.L.C.* 1967, Vol. II, p. 369. On the significance attached to this review, see K. Waldheim, Secretary-General of the United Nations, *Y.B.I.L.C.* 1972, Vol. I, p. 255, para. 12; C. Stavropoulos, United Nations Legal Counsel, “Current Legal Problems of the United Nations,” 7 *International Lawyer* (1973), pp. 70–77, at pp. 74, 75.

<sup>4</sup> See p. 216 below.



standpoints: its organizational, general, methodological, political and theoretical approaches. At a time when the Commission is re-grouping and re-planning for the next twenty-five years, it is appropriate to step back from the Commission, look at it, and assess what is found.<sup>5</sup>

The organization and methods, and the general approach of the Commission determine the effectiveness and efficiency with which it can discharge its functions. The political approach is important because upon it depend the success and usefulness of the Commission's work. The philosophy of the Commission is of importance on account of its implications for the direction of the Commission's work. It is therefore essential that it be identified and assessed.<sup>6</sup> The theoretical approach determines the unity and direction of development of the system of international law.

The main inquiry of this study covers the approach of the International Law Commission to the codification and development of international law which is being pursued at the present time. Our finding in this regard is that the Commission's basic approach is an empirical or pragmatic one. It seeks to ascertain rules which are likely to be useful to States in the conduct of their relations, bears in mind what rules and formulations States are likely to agree to and, on the basis of its appreciations on these two questions, it proceeds to examine and deal with each topic. The Commission has seen its task as being primarily to assist Governments in the conduct of their international relations. Apart from the topics assigned to it by the General Assembly, it has concerned itself principally with the main chapters of international law, adapting and extending them to present conditions and needs.

The pragmatism of the Commission pervades the various facets of its approach: the general, methodological, political, philosophical and theoretical approaches. There are occasions when the Commission acts on a philosophy, such as, for example, the philosophy of equity and justice, or on a theoretical basis, such as the principle of *jus cogens*, but it will only do this if it is practicable; it will not act on either of these bases if to do so would be to go against the prevailing views and attitudes of Governments.

<sup>5</sup>See D.P. O'Connell, "The Role of International Law," *Daedalus* (1966), pp. 627-643 at p. 630: "From time to time it is necessary for practitioners of a discipline to stand back from its enmeshing complexities and look at it as a discipline."

<sup>6</sup>See D.P. O'Connell, *ibid.*, at pp. 630-634: "... the very integrity of the subject is at issue for want of any consensus of views on its theoretical basis ... the subject is more deprived of the guidance of theory than ever before ... it is theoretically adrift. The problem is not so much that its philosophical foundations have been questioned; it is rather that the question is not even being posed ... [There is] a lack of theory to render congruous what is, in so many respects, factually incongruous." A proposal has recently been made in the I.L.A. for a profound study on the foundations, nature, functions and methodology of contemporary international law - See *Bulletin of the 56th Conference of the I.L.A.*, pp. 22, 23.