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SYMPOSIUM ON 150 YEARS OF THE INSTITUT DE DROIT INTERNATIONAL AND THE INTERNATIONAL LAW ASSOCIATION

THE INTERNATIONAL LAW COMMISSION, THE INSTITUT, AND STATES

*Dire Tladi**

Unlike the International Law Association (ILA) and the Institut de Droit International (the Institut), the International Law Commission (the Commission, or ILC) is not 150 years old. Established in 1948, the Commission is exactly half the age of the two codification bodies to which this Symposium is dedicated and is celebrating its seventy-fifth anniversary in 2023.[1] Like its older cousins, the Commission is charged with the codification and progressive development of international law. Among the many differences between the Commission and its older cousins, one that stands out and that provides the lens for this essay, is its close relationship to states. Although a comparison of both the ILA and the Institut with the younger, but apparently more "authoritative" body, the Commission, is worthwhile,[2] due to space limitations, I focus my comments on the Institut and the Commission. This essay will home in on the impact of the relationship of these two bodies with states and argues that this relationship affects, *to some extent*, the work of the relevant bodies, both in terms of what topics they may address and how they address them. This broad conclusion, which is necessarily limited by space considerations, is substantiated on the basis of the membership and outputs of the two bodies.

Membership

The composition of the Institut and the Commission raises a number of issues such as the size of the body, the qualifications of members, the election process, and the representativeness of the members. With respect to the size, the Commission is composed of thirty-four members. The Institut technically does not have an absolute limit on the size of its membership. However, the Institut may not have more than 132 members, not counting those over the age of eighty. As a result, because membership is potentially lifelong,[3] there is in practice no limitation on

* *NRF SARChI Chair of International Constitutional Law, Future Africa Chair in Global Equity, University of Pretoria, South Africa. Former Member and Chair of the International Law Commission, Member of the Executive Council of the International Law Association, Member of the Institut de Droit International.*

[1] In commemoration of its seventieth anniversary, the Commission produced SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION (2021).

[2] For suggestion that the Commission has pre-eminence in the milieu of codification, see Zuzana Trávničková, *The International Law Commission and the International Codification Market*, *in* SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION, *supra* note 1, at 357 ("The International Law Commission's position in the market became firm, undisputable, and also unique."). See for an even stronger description of the Commission's place in the pecking order, Dire Tladi, *The Authority and the Membership of the Commission in the Future – Art, Science, Economics: A Comment on Trávničková, and Pinto*, *in* SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION, *supra* note 1, at 375.

[3] *See* Nico Schrijver, *Keynote Address*, *in* SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION, *supra* note 1, at 422.

the size of the total membership of the Institut. Given that the Institut is funded from fees collected from members, a financial incentive exists to have a large membership. Conversely, the fact that the Commission is funded from the coffers of the United Nations makes a limited membership logical.

As for the qualifications of members, both the Institut and the Commission require expertise in international law. The Commission's Statute describes the qualifications of its members as "persons of recognized competence in international law,"[4] while the Statute of the Institut, describes its members as persons "who have given service to international law either in the field of theory or in that of practice."[5] Because of the overlap in qualifications, it is unsurprising that many members of the Institut are or have been also members of the Commission.

Ultimately, whatever the description in the respective statutes, membership is determined by election processes. The voting systems in both entities are tied to the nature of the bodies, with the Commission being a subsidiary body of the UN General Assembly and the Institut being completely independent or, to use the words in its Statute "an exclusively learned society, without any official nature."[6] Thus, members of the Commission are elected by the General Assembly, while new Institut members are elected by its existing members. This difference makes the election process of the Commission much more political, with the result that from time to time, stronger candidates may lose to less qualified candidates.[7] Nonetheless, in my view, the elections generally result in a balanced and appropriately qualified composition of the Commission. The election system of the Institut is designed to be apolitical and to yield results based solely on merit. Yet, even in that system, there are issues that can, potentially, affect elections. For example, members may take into account personal rivalries, doctrinal disagreements, or even political alignment. More seriously, while the Statute refers to "service to international law either in the field of theory or in that of practice," it is not inconceivable that members may privilege academic accomplishments over other professional accomplishments. This might explain why, in a recent election, the Legal Adviser of the United Nations was not elected to the Institut. However, as with the system of the Commission, the election system of the Institut generally works and for the most part, produces a diverse cohort of members.

There is, however, another aspect of the voting systems that does create particular dynamics which *may* impact the work of the two bodies. Because members of the Institut, once elected, are in principle members for life, they are not beholden to a constituency. Members can thus express their views freely and without fear of repercussion for their membership in the Institut. This is not the case for members of the Commission who are elected for a renewable term of five years and whose re-nomination and re-election ambitions may be scuppered by unfavorable views of member states. This may have the adverse effect of turning Commission members into state pleasers. While there is certainly much truth to this observation, the criticism should also not be overstated. Many members of the Commission are able to exercise independence, even against the views of their own states, while some Institut members may feel constrained in expressing their independent opinions by ambitions for future positions on the Commission or even the International Court of Justice.

One of the perennial features concerning composition that arises at least with respect to the Commission, is the extent to which diplomats are represented (or, some might say, overrepresented) on the body. For example, in the 2021 election, out of the thirty-four members, sixteen were employed primarily within governments and in the 2016 elections, twelve out of the thirty-four elected were employed mainly within governments. For some, this

[4] Statute of the International Law Commission, Art. 2(1); adopted in GA Res. 174 (II) (Nov. 21, 1947); amended in Res. 485(V) (Dec. 12, 1950); Res. 984(X) (Dec. 3, 1955); Res. 985(X) (Dec. 3, 1955); Res. 36/39 (Nov. 18, 1981).

[5] Statutes of the Institute of International Law, Art. 5(1) (*adopted* Sept. 10, 1873).

[6] *Id.* Art 1(1).

[7] In a fictional work, Dire Tladi, Blood in the Sand of Justice (2013), a fictional International Criminal Court prosecutor describes UN elections as "a mixture of political games, diplomatic endeavours, bureaucratic [b**%sh*&], with the search for competence served as garnish."

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is a high proportion which may affect the authoritativeness of the outputs of the Commission.[8] The criticism against government lawyers, which I do share, is based, it seems, on two assumptions: government lawyers lack objectivity; and, whether due to lack of time or relevant skills, they are not able to demonstrate the necessary rigor. The sheer size of the Institut, 177 members, makes it difficult to assess the proportion of diplomatic lawyers in its membership, but anecdotally academics dominate the membership and there seems to be a relatively lower proportion of government lawyers. The Institut, therefore, is not often the subject of this allegation. The problem with the criticism against government lawyers, however, is that academics too may have subject-matter biases or biases based on nationality. Moreover, while *it may be* true that government lawyers may have less time to dedicate to the work of the Commission, the perspective of government lawyers does serve to inject some practical expertise in codification activities of both entities, thus avoiding overly theoretical outputs. At any rate, it seems plausible that the so-called high proportion of government lawyers in the Commission as compared to the Institut, is because of the election process and the role of states in both nominating and electing members.

There are other membership-related issues that appear to be common to the Commission as well as the Institut. These include the lack of representation of women in the Commission as well as the Institut,[9] and questions of racial representation in the special rapporteurships of the two bodies. These are not discussed here mainly due to space limitations but also because the impact of this underrepresentation on outputs is not as obvious.[10]

Substantive Products

The substantive products of both entities are influenced by their respective mandates. The mandates of the Institut and the Commission are, in most important respects, quite similar, namely the codification and progressive development of international law. Yet, in several respects, the mandate of the Institut is broader than that of the Commission. The first difference is that, while the Commission's mandate is, in practice, limited to public international law, the mandate of the Institut extends to private international law.[11] Thus, in its seventy-five-year history, the Commission has never undertaken a study on a private international law topic, while the Institut has engaged in several topics of private international law.[12] Yet even this difference should not be overstated; after all, by far the majority of the Institut's work has, in fact, been in public international law and some of the private international law topics have concerned the relationship between public and private international law.

Indeed, a cursory review of the work of the Commission during its seventy-five-year history reveals that many of the topics studied by the Commission have also been studied by the Institut. These include the Commission's work on diplomatic immunities (see Institut's Diplomatic Immunity 1895); Expulsion of Aliens (see Institut's Admission and Expulsion of Aliens 1892); Regime of the Territorial Sea (see Institut's Definition and Status of the Territorial Sea 1894 and the Distinction Between the Regime of the Territorial Sea and the Regime of Internal Waters 1957); Effects of Armed Conflicts on Treaties (see the Institut's Effects of War on Treaties 1912), and The Law of Non-navigational Uses of International Watercourses (see the Institut's Utilisation of Non-maritime International Watercourses Other Than for Navigation, 1961).

[8] *See, e.g.*, Monica Pinto, *The Authority and the Membership of the Commission in the Future*, *in* SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION, *supra* note 1, at 369, stating that "it may be difficult for them to avoid approaching their work from a semi-official perspective."

[9] *See generally id.* at 370; Schrijver, *supra* note 3, at 423.

[10] See, however, Tladi, *supra* note 2, suggesting that the poor gender representation can have an impact on the work. See also, on both gender and race, Dire Tladi, *Representation, Inequality, Marginalisation, and International Law-Making: The Case of the International Court of Justice and the International Law Commission*, 8 UC IRVINE J. INT'L TRANSNAT'L & COMP. L. 60, 82–85 (2022).

[11] Statute of the International Law Commission, *supra* note 4, Art. 1(2); Rules of the Institute of International Law, Art. 9 (Sept. 9, 2017).

[12] *See* Schrijver, *supra* note 3, at 424 et seq.

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More significantly for the purposes of commenting on their respective relationships with states, both bodies have influenced each other's work resulting in a degree of similarity in the outcomes of their studies.[13] While there are many instances of a generally similar approach between the two bodies,[14] one prominent example concerns the law of treaties applicable to international organizations. In 1973, the Institut adopted a resolution stating that the "provisions of the Vienna Convention on the Law of Treaties . . . are in principle applicable to" treaties concluded by international organizations.[15] Just over ten years later, the Commission adopted the Draft Articles on the Law of Treaties Between States and International Organisations or Between International Organisations adopting a similar approach. Given the fact that there is a large overlap in the membership of the two bodies (previous section), it is unsurprising that there would, in general, be similarity in the content of the works.

Notwithstanding this overall convergence, there are sometimes divergences suggesting that the Institut is more open to a progressive approach. Compare for example, the Commission's Guidelines on the Protection of the Atmosphere and the Institut's Resolution on Transboundary Pollution. While the Institut's work contains broad obligations concerning the prevention of pollution, the Commission's text, where such protections are included, is laced with caveats and tentativeness.[16] The progressiveness of the Institut in environmental matters compared to that of the Commission is also reflected in the Institut's 1997 Resolution on the Environment, which includes provisions such as "every human being has a right to live in a healthy environment" (Article 2),[17] a provision which does not exist in any ILC text. This is particularly striking given that the Commission's Guidelines were adopted more than three decades after the Institut's Resolution. Another example that may be referred to is the topic of immunities. Article III of the Institut's 2009 Resolution on Immunity states, without any qualifiers, that immunity *ratione materiae* does not apply to international crimes.[18] The Commission's first reading text does not apply to all international crimes and is qualified by a whole section on "safeguards" designed to limit the impact of the ouster of immunity.[19] It seems fair to assume that the willingness of the Institut to go further is made possible by independence from states.

A related issue concerns the choice of topics that the two bodies are willing to take on. While the Commission's mandate allows it to consider any topic of international law, it generally shies away from "controversial" or "highly political" topics. It is, for example, simply unthinkable that the Commission might, at this point, take on a topic such as the prohibition on the use of force (or self-defense), the powers (and limits) of the Security Council or humanitarian intervention—all topics that the Institut has studied.[20] Similarly, for several years the Commission declined to place universal jurisdiction on its agenda mainly because it was seen as controversial and sensitive by some members. Indeed, even a topic like self-determination was deemed too controversial and political for inclusion in the Commission's long-term program of work. Even within particular topics, the Commission has often

[13] *Id.* at 423

[14] *Id.*

[15] Institut de Droit International, Resolution on the Application of the Rules of General International Law of Treaties to International Agreements Concluded by International Organisations, Art. I (1973).

[16] Int'l L. Comm'n, Draft Guidelines on the Protection of the Atmosphere (2021); Institut de Droit International, Resolution on the Environment (Sept. 4, 1997).

[17] Resolution on the Environment, *supra* note 16.

[18] Institut de Droit International, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes (2009).

[19] Int'l L. Comm'n, Immunity of State Officials from Foreign Criminal Jurisdiction (First Reading), UN Doc. A/CN.4/L.96 (May 31, 2022).

[20] *See, e.g.*, Institut de Droit International, Present Problems on the Use of Armed Force in International Law—Humanitarian Action, Self-Defence (2007); Authorisation of the Use of Force by the United Nations (2011).

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excluded "controversial" issues from consideration. Examples include the decision of the Commission not to address the use of force related issues in the *jus cogens* topic as well as the decision to exclude a number of important principles from the protection of the atmosphere topic (e.g., precautionary principle, the polluter pays principle, and common-but-differentiated responsibilities principle).

To avoid controversy, the Commission is also very deliberative in placing a topic on its agenda. In 2020, during the height the COVID pandemic, a member of the Commission proposed that the Commission study epidemics and international law and requested that, extraordinarily, the Commission make that decision intersessionally. The Commission declined this request. Subsequently, in 2021, two members proposed the topic for inclusion on the long-term program but to date, the Commission has still not done so. This can be contrasted with the Institut which, on the suggestion of a member, placed the topic on its agenda and adopted a set of articles, all in 2020. Another significant difference in the mandates of the two bodies is that, in addition to codification and progressive development, the Institut is also mandated to contribute "within the limits of its competence, either to the maintenance of peace or to the observance of the laws of war."[21] This permits the Institut to, for example, issue statements on ongoing activities with the objective of having an impact not only on the body of law but on current events. The Institut, for example, issued a declaration on March 1, 2022 on aggression in Ukraine, plainly stating that actions of the Russian Federation were "contrary to the most fundamental principles of international law."[22] Needless to say, while there is nothing preventing the Commission from adopting such statements, it is unlikely that the Commission would ever be able to adopt such a decision, in part because there is nothing in the Statute that explicitly provides for it, but in the main because its relationship with states means that it will seek to avoid entering into the political fray.

Tentative Conclusions

One of the key differences between the Commission and the Institut is the close relationship between the former and states, a relationship that the Institut does not have. What impact this difference has on the two bodies cannot be definitively determined in a short contribution such as this one. However, it may affect the composition of the two bodies and the proportion of government lawyers in each body. More substantively, it may affect the types of topics addressed, and in particular their degree of sensitivity.

[21] Statutes of the Institute of International Law, *supra* note 5, Art. 1(2)(d).

[22] Institute of International Law, Declaration on Aggression in Ukraine, para. 1 (Mar. 1, 2022).

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