The International Law Commission as a sui generis organ?

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Danae Azaria's article is set to be an essential reference for the study of the International Law Commission's (ILC) mandate concerning the codification and progressive development of international law. In particular, she aptly identifies and gives a name to the recent practice of "codification by interpretation". I would like to contribute to this fascinating debate with a brief reflection on a question that is parallel to her object of analysis, concerning the formal status of the ILC. By identifying what the ILC is, we can also shed light on the normative nature of its work, including its interpretative pronouncements. First, I will explain the importance of the matter. Then, I will move on to discuss how the ILC's status as an organ of the United Nations (UN) is relevant for understanding the normative nature of its work. Finally, I will criticize the ILC for its lack of self-reflection by stressing its meaning for legal positivism.

Why the International Law Commission's status affects its mandate to interpret international law

The uncertainty of the ILC's status directly affects the normative nature of its interpretative pronouncement. By uncertainty, I mean that the ILC itself struggles to acknowledge its own role in the codification and progressive development of international law. Indeed, on multiple occasions, the ILC shied away from including references to its pronouncements' normative status in its outputs. For instance, it is evident that the ILC's interpretative pronouncements have an outstanding role in the identification of customary norms. As *Azaria* contended, they are an

> "offer […] to states with a view of triggering their reaction within and outside the UN system" that "may eventually lead to an agreement […] concerning the content of CIL [customary international law] rules." (at p. 200).

However, the 2018 Conclusions on the Identification of International Customary Law do not mention the work of the ILC itself, despite that the issue was extensively debated in the Commission. Luíza Leão Soares Pereira wrote a very interesting article recalling these debates and contending that the ILC was correct in not including its own work under Conclusion 14 on "teachings of the most highly qualified publicists of the various nations". Notwithstanding, she stressed that the ILC should have addressed its work in a separate conclusion concerning its peculiar role in identifying customary law.

Azaria's article perfectly explains why the interpreting activity of the ILC is central in the codification and progressive development of international law and why its role should be acknowledged by the ILC itself. I claim that the absence of a category under which to subsume ILC pronouncements is caused by its formal status as an

organ of an international organization. As such, it is affected by the unclear status that international organizations have in the sources of international law.

The International Law Commission as an organ of the United Nations

The ILC was established in 1947 by Resolution 174 (II) of the UN General Assembly. It is a subsidiary organ of the UN General Assembly, and all its activities are attributed to the UN. As to their status as "rules of the organization", there is no difference between ILC pronouncements and, let's say, Security Council resolutions. Indeed, the ILC itself defines "the rules of the organization" as including

> "the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization" (article 2 ARIO).

This assertion helps to contextualize Azaria's paper in the framework of the long-lasting debate on the status of the normative outputs of international organizations in the sources of international law. This broad topic includes issues such as the interpretation of Security Council resolutions, the role of General Assembly resolutions in the formation of customary law, or, indeed, the interpreting activity of the ILC. The differences between these issues cannot be stressed enough. However, they all share the same unclarity concerning the role of international organizations in the formation of international law. For instance, it is incoherent that the International Court of Justice (ICJ) never clearly defined the role of international organizations in the identification of customary rules (here, for instance, concerning self-determination), even if the Court itself is an organ of the UN and it has a preeminent role in their formation (ILC Conclusion 13).

By clarifying the status of the category of "rules of international organizations", we also clarify their role in the sources of international law. Obviously, ICJ judgments have a different impact on international law than, for instance, staff regulations, but it is important to distinguish between their equal formal status and the fact that an instrument might be more relevant than another. An analogy with domestic systems might be useful to clarify this argument, because, in this case, international law does not distinguish between executive, legislative, judicial, or other forms of state practice (ILC Conclusion 5). It is nonetheless clear that the specific weight of each form of practice is considerably different. This is valid for ILC pronouncements, as *Azaria* commented by quoting the ILC:

> "the weight to be given to them depends on qualitative factors, such as 'the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output'" (at p. 198).

And it is also valid for other instruments, like General Assembly Resolutions. For instance, the importance of the Universal Declaration on Human Rights is a clear example of how the role of each instrument differs.

Azaria introduces a helpful angle to the analysis of the ILC's interpretative pronouncements by conceptualising them as "offers" and focusing on the reactions

of states to these offers. It should resonate further in the context of international organizations and the theory of sources. The core of my argument is that the role of international organizations in the sources of international law should not be fragmented into very different instruments (resolutions, judgments, ILC pronouncements…) all pertaining to them. Clearly, they do have different material impact. However, their formal nature is the same and they have the same capacity to contribute to the sources of international law. A very useful category that thus deserves more analysis is “rules of international organizations”.

Conclusion: Self-reflection and legal positivism

By way of conclusion, I would like to stress the importance of not considering the ILC as a *sui generis* organ that cannot be compared with others. Its ‘technical’ nature does not make it an actor above the playing field that looks at how the game is unfolding to determine its rules. I believe that this is a lack of self-reflection concerning its own role, caused by a wrong approach to legal positivism. *Azaria* explains well what positivism entails by distinguishing between

> “the assumption that there is one correct interpretation” and its application, “which is concerned with bringing about the consequences of a rule to the facts” (at p. 176).

The ILC’s role is to find the correct interpretation, but this does not make the ILC an “objective” actor that does not apply international law. Its activity involves both norm interpretation and norm application. The distinction between the two is a foundational principle, but the one cannot be found without the other. For instance, the reports of the Special Rapporteurs, the discussions within the Commission and the commentaries are based on both interpretation and application. Self-reflection means realizing that the ILC is a player of the game with its subjective perspectives on the application of international law. This does not undermine its mission. Quite the opposite, it is the lack of self-reflection that does it.
