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SYMPOSIUM ON 150 YEARS OF THE INSTITUT DE DROIT INTERNATIONAL AND THE INTERNATIONAL LAW ASSOCIATION: CAUSE FOR CELEBRATION OR CONCERN?

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1873 marks a turning point for the discipline of international law. The failure of both sides in the Franco-Prussian War (1870–1871) to honor the first Geneva Convention, along with the success of the Alabama arbitration (1872) in resolving long-standing disputes between the United States and United Kingdom, prompted leading international lawyers in 1873 to establish both the Institut de Droit International (IDI) and the International Law Association (ILA). Each organization was founded to promote the codification of international law. As significantly, they embodied the *esprit d'internationalité* of the times, and in important ways their creation marks the professionalization and modernization of the then-fledgling discipline of international law. The 150th anniversary of these organizations provides an opportune time to compare and contrast their impact and take stock of their complex legacies.

Given the prominence of these organizations' members, not to mention international lawyers' fascination with the history of their discipline, the topic is surprisingly underexplored. Researchers have produced thoughtful histories of the founding of each organization,[1] and several writings trace the influence of one of these bodies in particular substantive areas,[2] or even across several areas.[3] But few, if any, scholars have sought to undertake a more general comparison of these organizations to each other,[4] let alone other codification bodies. The contributions to this symposium begin to fill this gap and, by way of example, suggest the outlines of a more systematic comparative assessment of these two organizations.

The symposium opens with a contribution by Xiaohang Chen, of Peking University Law School.[5] Chen carefully details the immediate historical events that prompted the creation of the IDI and ILA, as well as both similarities

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[1] *E.g.*, Irwin Abrams, *The Emergence of the International Law Societies*, 19 Rev. Pol. 361 (1957); Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 (2001).

[2] Sienho Yee, *Territory in the Work of the Institut de Droit International*, 21 Chin. J. Int'l L. 219, 254 (2022); Georg Nolte, *The Resolution of the Institut de Droit International on Military Assistance on Request*, Revue Belge de Droit International 241 (2012).

[3] Each organization produced an edited volume to mark its centennial. *See, e.g.*, Livre du Centenaire 1873–1973: Evolution et perspectives du droit international (1973); The Present State of International Law and Other Essays: Written in Honor of the Centenary Celebration of the International Law Association 1873–1973 (Maarten Boss & International Law Association eds., 1973), and similar volumes will mark the sesquicentennial anniversaries. The current symposium aims to provide a more scholarly, and less celebratory, account of these bodies.

[4] One informative exception is Karin van Leeuwen, *Organizing Legal Internationalism: The Institut de Droit International, the International Law Association and the League of Nations*, *in* The League of Nations and International Law (Haakon A. Ikonomou, Karin van Leeuwen & Morten Rasmussen eds., forthcoming).

[5] Xiaohang Chen, *The Institutionalization of International Law at a Crossroads: Pacifists, Jurists, and the Creation of the ILA and the IDI*, 117 AJIL Unbound 204 (2023).

and differences in the motivations of the founders of each body. The ILA was largely a product of the peace movement, which sought the legalization of dispute settlement, the codification of international law, and the abolition of war. From the start, the ILA adopted an open membership policy, and sought to influence national legislation and policy. The IDI, in contrast, from the start consisted of a small group of highly accomplished jurists. This body embraced a more technocratic, and more elitist, approach to the codification of international law, and avoided direct involvement in domestic political matters. Chen notes that, despite overlapping memberships and shared interests, the two organizations soon pursued different strategies of legal reform. In particular, the jurists associated with the IDI thought that the ILA's push for the rapid codification of international law was neither practicable nor desirable, and pursued a more "scientific" approach to codification. Chen highlights the importance of these foundational moments, and argues that both organizations remain on paths that started one hundred and fifty years ago.

If Chen emphasizes continuity over time, Sara Dezalay, of the Université Catholique de Lille, emphasizes change.[6] Specifically, she adopts a sociological framework that focuses on the shifting role that legal knowledge, as evidenced by scholarly expertise and accomplishment, plays in the codification of international law. Dezalay notes that the professional profiles of many of the international lawyers active in early codification efforts were marked by "multi-positionality," meaning that these individuals were both distinguished academics and politically connected. Thus, they were sufficiently distant from governments to assert that they embodied law's autonomy from politics and represented the "*conscience juridique du monde civilisé*," yet sufficiently close to European political elites that their efforts were relevant and influential.

Dezalay traces the shifting value of academic expertise over time through two distinct processes. First, she highlights the changing professional profiles of participants in codification efforts. Examination of the professional profiles of those who serve as judges and counsel at the Permanent Court of International Justice and International Court of Justice in its early years reveals the importance of "a scholarly form of [professional] capital."[7] Since the 1980s, in contrast, the international lawyers who sit on and appear before the International Court of Justice are identified more through their roles as private attorneys associated with large multinational law firms than as legal academics. Similarly, the professional profiles of lawyers appointed by states to the Permanent Court of Arbitration's list of arbitrators reveals a shift over time from an emphasis on academic distinction to social and professional characteristics more associated with professional arbitrators, who tend to be associated with large corporate law firms. Second, and relatedly, Dezalay highlights the shifting locus of codification efforts, from bodies such as the ILA and IDI, where academic expertise has traditionally been highly valued, to international arbitration, where affiliation with high-profile firms brings greater social and professional capital than does academic prestige. The essay thus underscores an under-appreciated shift over time from the dominance of scholar-codifiers to practitioner-codifiers.

How, then, should one evaluate the legacies of these institutions? One might trace their treatment over time of a particularly important issue or set of issues, as Georges Abi-Saab and Julia Emtseva do in their contributions. Abi-Saab, a former international judge and member of the Graduate Institute for International and Development Studies, and an Honorary Member of the IDI, focuses on the IDI's treatment of "the colonial phenomenon," i.e., both the expansion of colonialism during the first seventy five years of the IDI's existence, and the decolonialization movement following the end of World War II.[8] In neither time period did the IDI advance progressive values. Abi-Saab notes that the IDI's mission statement itself distinguishes between the "civilized world" and the

[6] Sara Dezalay, *Legal Knowledge as Social and Political Capital*, 117 AJIL UNBOUND 210 (2023).

[7] *Id.*

[8] Georges Abi-Saab, *The Institute of International Law and the Colonial Phenomenon*, 117 AJIL UNBOUND 216 (2023).

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rest of humanity, a conceptual and epistemological distinction that helped provide the justification for colonial expansion by European powers. Thus, during its early years, the IDI's work product did much more to legitimate occupation and colonialism than to challenge or undermine it. Likewise, following the conclusion of World War I, the IDI missed several opportunities to condemn the colonial phenomenon or to highlight the human rights of those subject to colonial rule.

The IDI similarly had ample opportunities to address the colonial phenomenon following the conclusion of World War II. Yet Abi-Saab explains that despite the UN Charter's promise of self-determination, the rise of international human rights law, and the wave of decolonization starting in the 1960s, the IDI failed to keep pace with international legal and political developments, and in particular failed to advance the right of peoples to political and economic self-determination. Despite this rather sobering history, Abi-Saab nonetheless closes on a note of cautious optimism, noting that with a broadening and diversification of the Institut's membership, it is possible that it will play a more constructive role in addressing current and future global challenges.

Julia Emtseva likewise provides a critical appraisal of the IDI's work product.[9] Emtseva, of the Max Planck Institute for Comparative Public Law and International Law, links these shortcomings to the rather homogeneous nature of the IDI's membership. She notes that the Institut's membership is restricted in number and has always been overwhelmingly European. Moreover, its original members were all male, and it has been slow to move toward gender balance, as its first female member was elected in 1948, and the second in 1975. Membership has become somewhat more diverse in recent decades, yet is still very far from being geographically and demographically representative.

Like Abi-Saab, Emtseva links the IDI's "elite" membership to an "elitist" worldview that not only reflected Western values but also embraced the needs of European economic and imperial expansion. Emtseva argues that these Eurocentric understandings are revealed and reproduced in the IDI's projects, including its work on international humanitarian law. Emtseva suggests that the Institut's activities in this domain were less an effort to promote and codify humanitarian values, than "centered on safeguarding the European political order."[10] Thus, by way of example, the IDI's early work in this area supported European colonial projects, and even the IDI's 1969 resolution on the distinction between military and non-military objectives was drafted in a way that favored actors with the resources to develop or obtain advanced weaponry, and disfavored armies of weaker states and irregular forces. It is notable that Emtseva foregrounds the biases in and limitations of the Institut's work on the laws of war, as this is one of the substantive areas in which the Institut has been most active, and most influential, over its history. Implicit in Emtseva's argument is the notion that similar biases are present in the IDI's other work products.

Examining the work product regarding certain substantive bodies of law is not the only way to consider the legacy of codification bodies; one might also examine their institutional legacies, a strategy deployed by Juan Pablo Scarfi in his contribution.[11] Scarfi, of the Catholic University of Chile, traces the influence of the ILA and, especially, the IDI on the institutionalization of international law in the Americas. Scarfi explains how the American Institute for International Law (AIIL) emerged as both a response to and a reaction against the two existing codification organizations. Like the ILA, the organizational structure of the AIIL contemplated the creation of national societies, pursued deep engagement with political elites, and sought to influence public opinion. Also, like the ILA, the AIIL did not have a limited membership, and instead sought to recruit broadly among

[9] Julia Emtseva, *Unveiling the "Legal Conscience of the Civilized World": A Critical Look at the Institut de Droit International*, 117 AJIL UNBOUND 221 (2023).

[10] *Id.* at 224.

[11] Juan Pablo Scarfi, *The IDI, the ILA, and their Impact on the Institutionalization of International Law in the Americas: Resonances and Dissonances*, 117 AJIL UNBOUND 226 (2023).

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international lawyers located across the Americas. All three organizations focused on the codification of international law.

In other ways, however, the AIIL reflected a break with the primarily-European codification bodies. Specifically, while the IDI's substantive agenda reflected and advanced "the imperial projection of the European standard of civilization,"[12] the AIIL sought to advance a distinctly American version of international law. This vision was less formalist than that of the IDI; it also de-emphasized traditional notions of sovereignty, instead advocating for competing notions such as international society and continental solidarity. While the AIIL dissolved in 1943, its work helped shape the content of the Charter of the Organization of American States and the Inter-American Human Rights system. Scarfi argues that the AIIL's work and achievements can be understood as indirect legacies of the IDI and ILA.

Yet another strategy for evaluating the legacies of the two codification bodies is by adopting a comparative approach, as Dire Tladi does in his contribution.[13] Tladi, of the University of Pretoria, as well as a former member and Chair of the International Law Commission (ILC), a member of the Executive Council of the ILA, and a member of the IDI, is well-placed to undertake such a comparison, and his essay focuses on the IDI and the ILC. Tladi highlights the relationship of each body to states. He argues that the ILC's close relationship with states is an important lens through which to view the two bodies. For example, the ILC's members are elected by the UN General Assembly, which can lead to the politicization of elections. Moreover, ILC members serve for renewable five-year terms, meaning that some members may be tempted to tailor their positions to enhance their prospects for re-election. In addition, states often elect a relatively large number of diplomats to the ILC, which might be seen as a drawback, but might also "inject some practicality" into the ILC's work product. The IDI's members, in contrast, are elected by the existing membership. In theory, this produces elections that are not politicized, and driven by merit; in practice it may simply produce a different politics. Moreover, membership in the IDI is potentially lifelong, which may produce a greater degree of independence from states among members than is found at the ILC. Finally, the IDI has a higher percentage of academics than does the ILC, which may mean that the IDI's work product has a higher level of analytic rigor, but which may also lead at times to proposals that are not entirely practicable.

Tladi also compares the substantive output of these two bodies; again, the ILC's closer relationship with states is central to the analysis. The IDI is therefore more apt to address "controversial" issues, including those involving use of force, than the ILC. Thus, the Institut issued a declaration condemning Russia's invasion of Ukraine, but it is highly unlikely that the Commission would adopt a statement on this or related issues. Many times, the approaches of the two bodies to substantive questions of international law is quite similar. Yet other times one can identify important divergences between the positions of the two bodies, for example on a number of environmental issues and questions related to state immunity. Reviewing these examples leads Tladi to conclude that "the Institut is more open to a progressive approach" to some doctrinal matters than is the ILC, again reflecting the differential relationship with states.[14]

Looking forward, both individually and collectively these essays expand and enrich our understanding of the history and legacies of the ILA and IDI. The range of questions that they address and methodologies that they employ also gesture toward new research avenues that scholars might pursue as these bodies celebrate their sesquicentennial. For now, however, where does the analysis contained in the thoughtful contributions to this symposium leave us?

[12] *Id.*

[13] Dire Tladi, *The International Law Commission, the* Institut, *and States*, 117 AJIL UNBOUND 231 (2023).

[14] *Id.*

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Reflecting on the devastating social and economic costs of World War I, Georges Clemenceau quipped that "war is much too important a matter to be left to the generals."[15] Contemporary international lawyers might ask whether the codification of international law is too important a matter to be left to states. Leading international lawyers of the late nineteenth century evidently thought so, and this belief prompted the founding in 1873 of both the IDI and the ILA. Social institutions do not last for 150 years unless they advance a meaningful social function. Yet, despite the prominence of their members, the quality of their reports and recommendations, and some very significant achievements, the contributions to this symposium suggest that the influence of the IDI and ILA on codification efforts over the last century and a half has been episodic, relatively limited, and not always salutary.

Precisely why this is the case is a large question beyond the scope of the contributions to this symposium. Perhaps this limited success reflects errors of judgment by leaders or members of these organizations. Alternatively, it may reflect a deeper conceptual flaw in the vision that animated creation of the two bodies, such as a failure to appreciate the distinction between the nature and scope of the institutional authority that states and international organizations possess, and the epistemic authority that learned bodies, such as the IDI and ILA possess.[16]

In a May 1919 address to the IDI, President Woodrow Wilson rather undiplomatically observed that:

> International law has perhaps sometimes been a little too much thought out in the closet. International law has—may I say it without offense?—been handled too exclusively by lawyers. Lawyers like definite lines. They like systematic arrangements. They are uneasy if they depart from what was done yesterday. They dread experiments. They like charted seas, and if they have no chart, hardly venture to under-take the voyage. Now we must venture upon uncharted seas . . . and therefore, we must have, I will not say the audacity, but the steadiness of purpose which is necessary in such novel circumstances.[17]

Wilson was speaking immediately after the end of World War I, at a time of great international ferment and experimentation. In seeking to limit the role of international lawyers—and international law associations—Wilson may have wanted to assert an exclusive role for states in international lawmaking processes. But 150 years after the founding of the IDI and ILA, such a position is not tenable. To varying degrees, international lawmaking and codification processes have become more inclusive since 1873. At a time when civil society's influence has never been greater—and when the value of technocratic expertise is called into question—the challenge for the IDI and ILA is to demonstrate both the "steadiness of purpose" and the creativity to enhance their contribution to the codification of international law.

[15] Georges Suarez, Soizante Années d'histoire Français, Clemenceau, Vol I: Dans la Mêlée (1932), *quoted in* Allan Mallinson, Too Important for the Generals: How Britain Nearly Lost the First World War (2016).

[16] *See, e.g.*, Anne Peters, *The American Law Institute's* Restatement of the Law*: Bastion, Bridge and Behemoth*, 32 Eur. J. Int'l L. 1377, 1378 (2022).

[17] Quoted in Michel Erpelding, *Introduction: Versailles and the Broadening of "Peace Through Law," in* Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I (Michel Erpelding, Burkhard Hess & Hélène Ruiz Fabri eds., 2019).

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