The role of the UN in the codification and progressive development of international law

CHAPTER VIII: THE ROLE OF THE UN IN THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

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Introduction

Today, it is unanimously considered as a matter of course that, despite the UN not being conceived as a 'legislative body,'[2] they are – and have been all along – the leading agent for the codification and progressive development of international law.[3]

At the bare minimum, following the relatively short and unsuccessful interlude of the League of Nations,[4] the UN has represented the political and legal forum where the Member States engage in multilateral diplomatic practice and *opinio juris* originates, intersects, clashes or combines with one another to create, modify, uphold or repeal international obligations.[5] This contextual role for the UN has been vividly emphasised, more than thirty years ago, by George Abi-Saab with respect to the formation of customary international law (CIL).[6] He saw the UN as a catalyst for a centralised form of codification and the orderly and 'conscious' development of CIL,[7] stressing how:

> 'l'universalisation de la communauté internationale, plutôt que d'accroître à son image l'hétérogénéité du processus coutumier, a conduit paradoxalement à sa centralisation et à sa concentration dans le cadre du système des Nations Unies.'[8]

In the context of development and growth lasting long after the post-war reconstruction period, the East-West and North-South tensions prevailing then had indeed not prevented, but rather prompted, this process of centralisation of international law-making in search for newly shared legal parameters that would govern international relations in a divided world.[9] Times have changed, and are still fast-changing in terms of challenging the primacy of multilateral diplomacy. Against this background, it seems appropriate to take stock of the evolution of the forms and shapes of international law making through and by the UN over more than 75 years of life, also with a view to appreciate the prospects of the way forward.

As the point of departure, reference is to be made to the provisions of the UN Charter which expressly lay down the role of the UN in the codification and progressive development of international law.[10] Art 13(1) provides that:

> 'The General Assembly shall initiate studies and make recommendations for the purpose of:

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[2] See for all, Oscar Schachter, 'United Nations Law' [1994] 88 AJIL 1.

[3] See Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) re-edited as 'The Development of International Law by the Political Organs of the United Nations' in Rosalyn Higgins (ed), *Themes and Theories* (OUP 2009) 153. See also Carl-August Fleischhauer and Bruno Simma, 'Article 13' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (vol I, 3rd edn, OUP 2012), 527ff.

[4] On the contribution of the League of Nations to the codification and development of international law, see Shabtai Rosenne, 'Codification Revisited after 50 Years' [1998] 2 Max Planck YB United Nations L 1, 2-3.

[5] See Higgins (n 3) 153ff.

[6] Georges Abi-Saab, 'Course générale de droit international public' (1987) 207 Recueil des Cours 15, 173ff.

[7] ibid 177.

[8] ibid 177-178. See also René-Jean Dupuy, 'Coutume sage et coutume sauvage' in Charles Rousseau (ed), *La communauté international: Mélanges offerts à Charles Rousseau* (Pedone 1974) 84ff.

[9] The point was well captured by Antonio Cassese since the first edition of his seminal textbook *International Law in a Divided World* (Clarendon Press 1986).

[10] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms (…).'

Attention is usually exclusively paid to para 1(a), and the International Law Commission (ILC) together with the outcome of its work.[11] However, it would be wrong to assume that this covers the role of the UN exhaustively in promoting the codification and development of international law on the whole spectrum of areas referred to under para 1(b). Indeed, para 2 adds that 'the further responsibilities, functions and powers of the GA with respect to matters mentioned in para 1(b) above are set forth in Chapters IX and X.' As to Ch IX, it may be recalled that Art 55 provides that:

'[T]he United Nations shall promote:
a) higher standards of living, (…) economic and social progress and development;
b) solutions of international economic, social, health, and related problems (…); and
c) universal respect for, and observance of, human rights and fundamental freedoms (...)'

The main takeaway from the combination of these two provisions is that, next to the General Assembly (GA), all the other principal organs of the UN – more or less directly – partake in the codification and progressive development of international law. By way of anticipation, one is to recall the Secretary-General (SG), with his authoritative reports on the widest range of areas, from the maintenance of peace and security to sustainable development; the Economic and Social Council (ECOSOC), especially through its resolutions in the field of human rights; the Security Council (SC), eg in the development international criminal law with the adoption of the Statutes of international ad hoc tribunals established under Ch VII resolutions; and the International Court of Justice (ICJ), primarily, but not exclusively, through its *obiter dicta* in contentious cases and advisory opinions.[12]

Further to this introductory section, the present contribution is organised in four parts. First, it will provide an overview of the contribution of the UN principal organs to the codification and progressive development of international law. This part will be divided into two legs: the first one will consider the contribution of the GA and, to a minor extent, of the ECOSOC, while the second one will briefly address the contribution of the SC.

Secondly, the analysis will focus on the ILC and the forms of codification stemming from its work. Here the blurred nature of the dividing line between 'codification' and 'progressive development,' as enshrined in the ILC Statute, will be emphasised.

Thirdly, the contribution will refer to the role of the ICJ and other UN-related international adjudicative bodies, with special regard to the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) in the elucidation and development of CIL.

Finally, a few general considerations will be made pulling the strings of the analysis of the existing practice on the role of the UN in the field, also with a view to considering the prospects for the way forward at a time of enhanced instability and a major concern for the common interests of Nation-States and peoples in the International Society.

The Contribution of UN Principal Organs to the Codification and Development of International Law

[11] See, *inter alia*, The United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill 2021). And see Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007), 171ff and Thomas M Franck and Mohamed Elbaradei, 'The Codification and Progressive Development of International Law: A Unitary Study of the Role and the Use of the International Law Commission' [1982] 76 AJIL 630.

[12] The role of the UN specialized agencies in the development of a large area of international regulation should also not be forgotten, see Schachter (n 2) 5-6.

The GA (and the ECOSOC)

Since its inception, the GA has drawn general attention as epitomising the impact of international organisations, and their resolutions, on the consolidation and development of international law.[13] This is no accident, given its near universal participation and its power to address virtually any matter.[14]

From a cumulative perspective, GA resolutions unquestionably partake in the creative and developing process of international law as – at one and the same time – authoritative pieces of multilateral diplomatic practice and the expression of *opinio juris* by those States that have positively taken part in their adoption. As the late Judge James Crawford put it:

> '[W]hen [GA resolutions] are concerned with general norms of international law, acceptance by all or most members constitutes *evidence* of the opinions of governments in what is the widest forum for the expression of such opinions.'[15]

The ICJ, amongst other international adjudicative bodies, has consistently corroborated this view. It may be worth recalling how, addressing the customary nature of the prohibition of the use of force in *Nicaragua v United States of America*, it observed that

> '[*O*]*pinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions (…).'[16]

In this particular instance, the Court was concerned with the assessment of an attitude corroborating the existence of a given custom. However, States' attitude vis-à-vis the adoption of a GA resolution may, by the same token, be instrumental in generating a new piece of custom as long as the resolution in question cajoles widespread State practice in conformity with its contents in the long run.

This amounts to saying that the well-known threefold possibility of coincidence between CIL and a convention, as spelled out by the ICJ in the 1969 the *North Sea Continental Shelf* case – that is, the custom-evidentiary, crystallising, and generating functions[17] – applies to GA resolutions just as well as with regard to codification conventions.[18] As also pointed out by Sir Michael Wood, when it comes to the identification of CIL, there is no relevant distinction between treaties and resolutions, since '[s]uch written texts may [both] reflect already existing rules of customary international law (codification of *lex lata*); they may seek to clarify or develop the law (progressive development); or they may state what would be new law.'[19]

This is not at odds with the general statement, reiterated by the ILC in its *Draft conclusions on identification of customary international law*, to the effect that 'a resolution adopted by an international organisation (…) cannot, by itself, create customary international law.'[20] Indeed, no custom-evidentiary, crystallising or generating function would be performed by a GA resolution in and of itself, but only in combination with other widespread elements of practice and *opinio juris* consistent with the conduct recommended in the relevant resolution, or resolutions.

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[13] From Yuen-Li Lang, 'The General Assembly and the Progressive Development of International Law' [1948] 42 AJIL 66 to Brian D Lepard, 'The Role of the United Nations General Assembly Resolutions as Evidence of *Opinio Juris*' in Brian D Lepard, *Customary International Law: A New Theory with Critical Applications* (CUP 2012) 208ff.

[14] See UN Charter, art 10.

[15] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019), 40 italics added.

[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [188].

[17] *North Sea Continental Shelf* [1969] ICJ Rep 3 [63].

[18] See also Higgins (n 3) 158-59.

[19] Third Report on identification of customary international law by Michael Wood, Special Rapporteur, ILC 67th Session (2015) UN Doc A/CN.4/682, 45, para 28.

[20] Report of the ILC on the work of its Seventieth session, UN GAOR 73rd Session Supp No 10 UN Doc A/73/10 (2018), 121, Conclusion 12(1).

Another truism which, nonetheless, seems often overlooked, is that GA resolutions, in addition to indicating States' *opinio juris* on the existence of a certain custom, may also provide terms of reference for ascertaining the *specific content* of such custom.

Again, the most authoritative statement to that effect is to be found in the *Nicaragua v United States of America*. Here, the Court relied on the *Declaration on the principles of international law concerning friendly relations and cooperation among States*, annexed to GA Res 2625 (XXV) of 1970, in order to assess the scope of the customary ban on the use of force as encompassing the organising, training, funding and arming of irregular forces with a view to carrying out acts fuelling civil war or terrorism in a foreign State.[21]

The ICJ ruling of 1997 in the *Gabčíkovo-Nagymaros* project seems to have gone very much in the same direction. Here, the Court invited the parties to reinterpret the 1977 Treaty on a joint infrastructural project on the Danube having regard to:

> '[N]ew norms and standards [that] have been developed, set forth in a great number of *instruments* over the last two decades. Such norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'[22]

Here the Court clearly referred also to legally non-binding 'instruments' in the field of international environmental law which were produced under the aegis of the UN, as complemented by other elements of international practice, including articulated conventional practice. Such instruments – with special regard to the seminal Rio Declaration adopted at the end of the 1992 UN Conference on Environment and Development –[23] gave rise to substantiated new norms which constitute the building blocks of the then emerging principle of sustainable development.[24]

One may also recall how GA resolutions have formidably contributed to the codification and progressive development of human rights law. Suffice to recall the *Universal Declaration on Human Rights*, almost unanimously adopted by the GA in 1948,[25] and which served as the drafting basis for the two 1966 UN Covenants;[26] the 1963 *Declaration on the Elimination of All Forms of Racial Discrimination*[27] which played the same role with respect to the homonymous 1966 Convention;[28] the 1967 *Declaration on the Elimination of Discrimination against Women*[29] in relation to the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*;[30] the 1975 *Declaration on the Protection of All Persons from being Subjected to Torture and Other Inhuman Treatment or Punishment*[31] in relation to 1984 *Convention against Torture*;[32] and the 1959 *Declaration of the Rights of the Child*[33] in relation to the much-awaited 1989 *Convention on the Right of the Child*.[34]

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[21] *Nicaragua v United States of America* (n 16) [188], [191].
[22] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, [140] italics added.
[23] See Report of the United Nations Conference on Environment and Development (3-14 June 1992) UN Doc A/CONF.151/26 (vol I), Annex I.
[24] See, for all, Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, CUP 2018) 21ff.
[25] UNGA Res 217 (III) (10 December 1948) UN Doc A/RES/217(III). Out of the 58 Member States, 48 voted in favour, 8 abstained from voting and 2 were absent.
[26] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 April 1976) 993 UNTS 3.
[27] UNGA Res 1904 (XVIIII) (20 November 1963) UN Doc A/RES/1904(XVIII).
[28] (Adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 1.
[29] UNGA Res 2263 (XXII) (7 November 1967) UN Doc A/RES/2263(XXII).
[30] (Adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1.
[31] UNGA Res 3452 (XXX) (9 December 1975) UN Doc A/RES/3452(XXX).
[32] (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[33] UNGA Res 1386 (XIV) (20 November 1959) UN Doc A/RES/1386(XIV).
[34] (Adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Another interesting example pertains to the way in which the body of international law on the treatment of aliens has been gradually reshaped by the adoption of a series of ECOSOC and GA resolutions throughout the 1950s, '60s and '70s,[35] setting then the framework for a New International Economic Order (NIEO).[36] The cumulative effect of such resolutions led to the conditional lawfulness of expropriation, subject to the avoidance of discrimination and arbitrariness and the payment of some kind of appropriate compensation, possibly falling short of the full value of the expropriated assets. Against the traditional so-called 'Hull formula' requiring 'full prompt and effective compensation' for expropriation,[37] the countervailing principle, upheld at the time by the increasing majority in the plenary UN organ, was that of permanent sovereignty over natural resources and of the right for States to autonomously regulate economic activities on their territory, without exception for those carried out by foreign companies.[38]

The fall of the Berlin Wall, with the disruption of the former Soviet Union, and the new attitude of a large number of developing States, geared towards attracting foreign investments curbed, even reversed, the impact of the NIEO resolutions on the CIL process on the treatment of foreign direct investments starting from the 1990s.[39]

Over the last two decades, an increasing number of study reports by special representatives of the SG in different areas, from economic law to human rights law, and debates and negotiations in UN subsidiary organs, including United Nations Commission on International Trade Law Working Groups, seem to reflect a new change of the attitude of States in the matter which is formidably reminiscent of the NIEO debate and, possibly, of its impact on the customary discourse on the topic.[40]

These brief considerations show how the drafting and adoption of GA resolutions, or even just officially recorded debates within the context of plenary UN organs, may reflect – or even give impulsion to – the swinging pendulum of the dynamics which determine international law-making progress, if only eliciting States' *opinio juris* (including *opinio necessitatis*).

The SC

Despite its limited membership and specific competence in the field of international peace and security, the SC contribution to the progressive development of international law, or even its consolidation, should not be underestimated.[41] SC resolutions, especially those legally binding under Ch VII on all member States, may boast high probative value as evidence of existing international obligations, and may provide the foundation for custom.[42]

One may recall the *Tadić* case, where the Appeals Chamber of the ICTY observed that:

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[35] See, *inter alia*, UNGA Res 1720 (XVI) (19 December 1961) UN Doc A/RES/1720(XVI), UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/RES/1803(XVII), UNGA Res 3201 (S-IV) (1 May 1974) UN Doc A/RES/3201 and ECOSOC Res 1956 (LIX) (25 July 1975) UN Doc E/RES/1956.

[36] See, for all, Robin C A White, 'A New International Economic Order' (1975) 24 ICLQ 542.

[37] On the 'Hull formula' see Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, OUP 2022), 4ff.

[38] On this point see ibid, 6.

[39] See, extensively, Doreen Lusting, 'From the NEIO to the International Investment Law Regime' in Doreen Lusting, *Veiled Power: International Law and Private Corporation 1886-1981* (OUP 2020), 179ff.

[40] See, for instance, United Nations Commission on International Trade Law, 'Report of Working Group III (Investor-State Dispute Settlement Reform), Forty-first session, UN Doc A/CN.9/1086 (13 December 2021) and Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' UN Doc A/HRC/8/5 (7 April 2008).

[41] On this point see Gregory H Fox and others, 'The Contribution of the United Nations Security Council Resolutions to the Law of Non-international Armed Conflict: New Evidence of Customary International Law' (2018) 67 American U L Rev 649. And see Boyle and Chinkin (n 11) 229ff.

[42] Higgins (n 3) 159. On the 'law-making function' of the SC see, *inter alia*, Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175 and Jan Wouters and Jed Odermatt, 'Quis Custodiet Consilium Securitatis? Reflections on the Lawmaking Powers of the Security Council' in Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014), 71ff.

> 'Of great relevance to the formation of *opinio juris*, to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations, are certain resolutions unanimously adopted by the Security Council.'[43]

Similarly, in its 2008 advisory opinion on the *Unilateral Declaration of Independence in Respect of Kosovo*, the ICJ referred to the SC practice to corroborate the non-existence under CIL of a general prohibition against unilateral declarations of independence.[44]

Other important law-making contributions emerging from the SC practice relate to human rights obligations of non-State actors, the status of Peace Agreements ending non-international armed conflicts, and issues regarding post-conflict reconstruction, especially with respect to 'democratic transitions.'[45]

The SC has also unquestionably contributed to the progressive development and consolidation of international criminal law.[46] The actual establishment of the ICTY and International Criminal Tribunal for Rwanda (ICTR), through Ch VII legally binding resolutions,[47] was not only so very politically remarkable, but the adoption of the Statutes of those Tribunals, attached to the resolutions in point represented a key contribution to the codification of international criminal law paving the way to the adoption of the ICC. Those Statutes laid down rules which at the time could be said to pertain to the progressive development of international criminal law, procedural and substantive, with special regard to certain crimes against humanity. This achievement was all the more remarkable when one considers that, back then, a first codification project of international crimes had been hanging for decades between the ILC and the GA.[48]

Further to such direct contribution, two indirect forms of contribution to the consolidation and development of international criminal law stemming from these resolutions should be considered. The first one flows from the case law which the ICTY and the ICTR have developed over the years – especially in the elaboration and finessing of international criminal procedural law – which derive their authority from Ch VII based resolutions.[49]

The second indirect contribution can be said to have operated by contrast. Namely, in the sense that the piecemeal approach to international criminal law and justice by setting up ad hoc tribunals has prompted by contrast the need for a permanent and treaty based international criminal court. One which was actually established under the aegis of the UN and whose Statute largely benefitted from the lessons learned from the experience of the operation of both ICTY and ICTR.[50]

The Contribution of the ILC to the Codification and Development of CIL

Importance of the ILC Work and Its Relations with International Case Law

[43] *Prosecutor v Tadić* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) 133
[44] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, [81].
[45] See Fox and others (n 41) 671ff.
[46] See David Scheffer, 'The United Nations Security Council and International Criminal Justice' in William A Schabas (ed), *The Cambridge Companion on International Criminal Law* (CUP 2015) 178ff.
[47] Respectively, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 and UNSC Res 955 (8 November 1994) UN Doc S/RES/955.
[48] Reference is here made to the *Draft code of crimes against the peace and security of mankind (Part I)*. The project was basically suspended already in the mid '50s, see UNGA Res 1186 (XII) (11 December 1957) UN Doc A/RES/1186.
[49] See, for instance, Ivan Simonovic, 'The Role of the ICTY in the Development of International Criminal Adjudication' [1999] 23 Fordham Intl L J 440.
[50] Reference is obviously made to the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. On the relationship between the ICTY and the ICTR and the International Criminal Court, see further Staurt Ford, 'The Impact of Ad Hoc Tribunals on the International Criminal Court' in Milena Sterio and Michael Sharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and ICTR's Most Significant Legal Accomplishments* (CUP 2019), 307ff.

As anticipated, Art 13(1)(a) of the UN Charter mandates the GA to 'initiate studies and make recommendations for the purpose of (…) encouraging the progressive development of international law and its codification.' In order to follow up on this provision, in 1947 the GA established the ILC,[51] whose mandate bestows particular value to its work when it comes to affirming the existence and content of CIL. It is, therefore, no wonder that international courts and tribunals frequently rely on the ILC work as a key authority for the purposes of identifying and corroborating pieces of CIL in a wide range of areas of international law.

By way of example, one may recall the ICJ in *Nicaragua* v *United States of America* regarding the existence and scope of the customary ban on the use of force,[52] *Gabčíkovo-Nagymaros*, concerning the application criteria of the state of necessity,[53] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* with regard to individual responsibility under international law,[54] *Jurisdictional Immunities of the State* as to State immunity and the doctrine of intertemporal law;[55] the ITLOS, especially in *Activities in the Area*, with respect to State responsibility and liability under international law;[56] the European Court on Human Rights in *Behrami and Saramati v France* and the Inter-American Court on Human Rights in *Gutiérrez and Family v Argentina* with respect to the attribution of States' conducts;[57] and ICSID tribunals, for example, in *Conoco Phillips v Venezuela* concerning 'full reparation' and compensation.[58]

Most interestingly for our purposes, reference to the ILC work, and the level of authority accorded thereto, is usually made irrespective of the format of the end product of its work, with special regard to the circumstance of whether it was reviewed and adopted at a diplomatic conference as a codification convention, or simply attached to a GA resolution endorsing it as such.[59] The Commission's commentary to its draft articles is also often relied upon.

This naturally enhances the authority of the ILC, despite concerns being raised by some States over the lack of their express consent to any given ILC product.[60] Having special regard to the ILC work resulting in the adoption of instruments attached to GA resolutions, the same caution applies which was expressed by Sir Michael with respect to GA resolutions as a means to identify customary law, to the effect that 'the circumstances surrounding the[ir] adoption [are also important]. These include, in particular, the method employed for adopting the resolution; the voting figures (where applicable); and the reasons provided by States for their attitude toward the resolution in question, *i.e.*, during the negotiation, or in an explanation of vote, or another kind of statement.'[61]

On a separate, but related point, it has occurred that judicial reference to ongoing ILC work would inhibit its progress. This is what happened when in *Gabčíkovo-Nagymaros* the ICJ referred to Draft Art 33 of the law of

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[51] UNGA Res 174 (II) (21 November 1947) UN Doc A/RES/174.
[52] *Nicaragua v United States of America* (n 16) [190].
[53] *Gabčíkovo-Nagymaros Project* (n 22) [50].
[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, [173]
[55] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, [55]-[56], [58], [64], [69], [77], [89], [93].
[56] *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011 10, [169].
[57] *Behrami and Behrami v France and Saramati v France, Germany and Norway* [GC] (Decision on Admissibility) Apps Nos 71412/01 and 78166/01 (ECtHR, 31 May 2007), [28]-[34] and *Case of Gutiérrez and Family v Argentina* (Merits, reparation and costs) Inter-American Court of Human Rights Series C No 271 (25 November 2013), [78], fn 163.
[58] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013), [339].
[59] As predicted by Sir Hersch Lauterpacht already in 1949, see Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' [2014] 63 ICLQ 535, 542-543.
[60] Danae Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law' [2020] 31 EJIL 171, 173. In particular, see the position of China, in the sense that 'in order for (…) the draft guideline[s] to apply (…) there would need to be pre-existing rules of international law,' UN Doc A/C.6/72/SR.23 (17 November 2017), 9, para 55; the position of Spain, in the sense that 'the Commission should always make it clear whether it was acting on a *lex lata* or *lex ferenda* basis, and it should avoid giving the impression of creating law,' UN Doc A/C.6/72/SR.24 (30 November 2017), 7, para 41; and the position of Switzerland, in the sense that, given its authority, 'the ILC should be careful in distinguish between codification and progressive development of CIL as clearly as possible,' UN Doc A/C.6/72/SR.22 (27 November 2017), 12, para 86.
[61] Third Report on identification of customary international law by Michael Wood (n 19) para 49.

State responsibility on state of necessity as evidentiary of CIL.[62] That reference 'froze' the very restrictive configuration of the general rule on state of necessity – in Draft Art 25, then, now Draft Art 33 – thus preventing the ILC from amending the text on second reading in more flexible terms, as it was mined to do.[63]

Comparative Considerations, in Functional Terms, between 'Conventional' and 'Soft-Law' Forms of Codification by the ILC

Art 15 of the ILC Statute provides that:

> '[T]he expression "progressive development of international law" is used for convenience as meaning 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. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.'[64]

As it has been emphasised by the very ILC, the distinction between codification and progressive development has 'proved unworkable and could be eliminated in any review of the Statute.'[65] As put it by Sir Robert Jennings, 'codification properly conceived is itself a method for the progressive development of the law.'[66]

Indeed, whenever CIL is transcribed and consolidated, it is inevitably interpreted and specified, and this inevitably affects its content.[67] This ties in with the considerations made above on the different relationships between CIL and written instruments, as spelled out by the ICJ in relation to codification conventions.[68] Namely, those of recognition, crystallisation or generation of CIL. The dilemma thus arises as to which format – whether 'conventional' or 'soft' – would be best for the ILC end-products. One would suggest two basic methodological considerations that might drive this choice.[69]

The first one refers to the inadequacy of any *a priori* preference between the two options. This translates into a rejection of any rigid 'natural law' or 'legal positivist' approach to codification.[70] A natural law approach to the sources of law considers legal rules as 'natural' when the actors in a given society are brought together by a relative homogeneity of interests, uses and customs. Accordingly, all members of that society would naturally feel bound by those uses and customs, regardless of their separate consent to them. In a divided society, or in areas where that society is divided, a positivist-voluntarist approach is naturally followed, whereby the process of formation, or consolidation of CIL becomes a negotiated law-making process.[71]

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[62] *Gabčíkovo-Nagymaros Project* (n 22) [50]-[53].

[63] On this point see Attila Tanzi, 'Necessity, State of' (January 2021) in Anne Peters (ed) *Max Planck Encyclopedia of Public International Law* (online edn).

[64] Resolutions adopted by the General Assembly during its 2nd session, UN GAOR 2nd Session UN Doc A/159 (1948), 109.

[65] Report of the ILC on the work of its Forty-eight session, UN GAOR 51st Session Supp No 10 UN Doc A/51/10 (1996), 84, para 147(a).

[66] Robert Y Jennings, 'The Progressive Development of International Law and its Codification' [1947] 24 British YB Intl L 301, 302. See also Hersch Lauterpacht 'Codification and Development of International' [1955] 49 AJIL 16, 29: 'Codification of international law must be substantially legislative in nature.'

[67] As the late Judge Roberto Ago emphasised: 'Codifer le droit a toujours signifié le modifier en partie, et parfois même profondément,' 'La codification du droit international et les problèmes de sa réalisation' in Maurice Batteli and others (eds), *Recueil d'études de droit international en hommage à Paul Guggenheim* (Institut Universitaire de Hautes Études Internationals 1968), 94.

[68] Ibid.

[69] The author previously formulated these considerations in Attila Tanzi, 'Le forme della codificazione e sviluppo progressivo del diritto internazionale' in Giuseppe Nesi and Pietro Gargiulo (eds), *Luigi Ferrari Bravo. Il diritto internazionale come professione* (Editoriale Scientifica 2015), 151ff.

[70] See Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia UP 1964), 78: 'Any attempt to stamp a particular social order as being consonant with nature, and correspondingly, another as being contrary to nature, is a disguised way of giving the halo of perpetuity and sacrosanctity to a particular political or legal philosophy.'

[71] On this point, see the lucid and highly topical reflections on the distinction between customary and treaty law in Eduardo Jiménez de Aréchaga, 'Custom' in Antonio Cassese and others (eds), *Change and Stability in International Law-making* (Gruyter 1988), 1ff.

The second methodological consideration, which flows from the first one – and is akin to that alluded to in relation to the relative authority of GA resolutions according to the circumstances of their adoption and their contents –[72] points at the need to take into account all the relevant circumstances pertaining to the ILC work on any given topic, at any given point in time. One such circumstance may depend on whether the ILC is pursuing a codification exercise proper, or aims at facilitating the interpretation and application of previously codified rules. Another circumstance may pertain to the subject matter being dealt with and the degree of development and consolidation of CIL in that area.

Most importantly, an account should be taken of the historical-political context existing at the time when the process of codification is being carried out**.** That is to say that any *a priori* choice as to which would be the best approach in the matter should give way to a pragmatic approach to be calibrated according to the effective, or perceived, needs of consolidation of any given body of international law by the International Society at any given point in time, which largely depends on the attitude of States at that time about international regulation in general.

The initial phase of the life of the UN was marked by the majority of Western Countries in the GA and a prevailing common law approach to international law-making. This translated into a prevailing taste, at the time, for non-conventional forms of codification. This is epitomised by the Western reliance on the GA *Universal Declaration on Human Rights*[73], not only as 'a common standard of achievement,' as enunciated therein, but also as a piece of consolidation of the body of international human rights law, under the legal umbrella of Arts 1 and 55 of the Charter.[74]

The swing pendulum in the 'codification trends' of the work of the ILC confirms the inherent relativity of the choice of the most appropriate format – whether 'conventional' or 'soft.'[75] By definition, the swinging changes are of a gradual nature and never hard and fast, but they are nonetheless detectable. As to the original taste for soft-law instruments by the ILC, one may recall the *Draft declaration of the rights and duties of States* (1948),[76] the *Principles of international law recognised in the Charter of the Nürnberg Tribunal* (1950)[77] the *Report on reservations to multilateral conventions* (1951),[78] and the *Model rules on arbitral procedure* (1958).[79] Even though, as we shall see, the ILC had already begun working preparing draft articles in view of the conventional outcome of its work, one may detect a shift towards the increasing voluntaristic trend at the end of the 1950s. This is epitomised by its work on treaty law. While, until 1959, under the guidance of Sir Gerald Fitzmaurice as Special Rapporteur on the topic, the prevailing view was to finalise a non-conventional, principles-based 'code of a general character,'[80] just two years later, following the appointment of Sir Humphrey Waldock as Special Rapporteur, the ILC announced that 'its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention.'[81]

Thus, in accordance with such voluntaristic trend, from the 1950s to the 1970s the most employed form of codification was that of draft articles, possibly geared toward the adoption of a codification convention. Among the first examples in that direction, one may recall the *Draft Convention on the Elimination of Future*

[72] Ibid.
[73] fn 25.
[74] This position was strongly supported by one of the 'fathers' of the Declaration, René Cassin, see 'La Déclaration Universelle et la mise en œuvre des Droits de l'Homme' (1955) 79 Recueil des Cours 290ff. On this point see also, more generally, Antonio Cassese, *Human Rights in a Changing World* (Temple UP 1990).
[75] On this point, see also Lusa Bordin (n 59) 538ff.
[76] Report of the ILC on the work of its First session, UN GAOR 4th Session Supp No 10 UN Doc A/CN.4/13 and Corr. 1-3 (1949), 286ff.
[77] Report of the ILC on the work of its Second session, UN GAOR Fifth Session Supp No 12 (A/1316) UN Doc A.CN.4/34 (1950), 374ff.
[78] Report of the ILC on the work of its Third session, UN GAOR Sixth Session Supp No 9 (A/1858) UN Doc A/CN.4/48 and Corr.1 & 2 (1951), 125ff.
[79] Report of the ILC on the work of its Tenth session, UN GAOR 13th Session Supp No 9 (A/3859) UN Doc A/CN.4/117 (1958), 83ff.
[80] Report of the ILC on the work of its Eleventh session, UN GAOR 14th Session Supp No 9 (A/4169) UN Doc A/CN.4/SER.A/1959/Add.1 (1959), 91.
[81] Report of the ILC on the work of its Thirteenth session, UN GAOR 16th Session Supp No 10 (A/4843) UN Doc A/CN.4/41 (1961), 128.

Statelessness (1954),[82] the *Draft Articles concerning the law of the sea* (1956),[83] the *Draft Articles on diplomatic intercourse and immunities* (1958),[84] and the *Draft Articles on the law of treaties* (1966).[85] All these ILC works eventually served as the bedrock for the negotiation and adoption of a number of significant UN codification Conventions.[86]

In the following decades, while continuing to resort to the adoption of draft articles mainly, the ILC – often upon impulsion by the GA – has enhanced the combination between codification of existing progressive development of CIL, especially since the waning of the Cold War through the 1980s and after its end. Examples from that period include the *Draft Articles on the law of treaties between States and international organisations, or between international organisations* (1982),[87] the *Draft Articles on the law of the non-navigational uses of international watercourses* (1993),[88] the *Draft Articles on State Responsibility* (2001),[89] and the *Draft Articles on prevention of transboundary harm from hazardous activities* (2001).[90] The former two were further negotiated and adopted as codification Conventions,[91] whereas the latter two where endorsed by GA resolutions.[92]

Interestingly, the authority of either set of instruments as evidentiary of CIL has been very much considered on a par with each other, irrespective of their conventional, or non-conventional format. On the one hand, suffice to recall how the 1997 UN *Convention on the Law of Non-Navigational Uses of International Watercourses*, with special regard to the equitable and reasonable utilisation principle, was relied upon by the ICJ only four months after its adoption,[93] thus, long years before its entry into force, so much so that the latter has been considered uninfluential for the purposes of its function of consolidation of customary international water law.[94] On the other hand, one may mention the innumerable times in which international courts and tribunals, as well diplomatic practice, have referred to the *Draft Articles on State Responsibility* as plainly evidentiary of customary law.[95]

At the turn of the 1980s and 1990s, moreover, with the establishment of a Western legal and cultural hegemony, the conventional format also began to appear obsolete in the face of the (momentary) homogeneity of values within the International Society. Already in 1988, Roberto Ago had prophesied that:

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[82] Report of the ILC on the work of its Sixth session, UN GAOR 9th Session Supp No 9 (A/2693) UN Doc A/CN.4/88 (1954), 140ff.
[83] Report of the ILC on the work of its Eight session, UN GAOR 11th Session Supp No 9 (A/3159) UN Doc A/CN.4/104 (1956), 253ff.
[84] Report of the ILC on the work of its Tenth session, UN GAOR 13th Session Supp No 9 (A/3859) UN Doc A/CN.4/117 (1958) 78ff.
[85] Report of the ILC on the work of its Eighteenth session, UN GAOR 21st Session Supp No 9 (A/6309/Rev.1) UN Doc A/CN.4/191 (1966) 169ff.
[86] Respectively: Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175, the four 1958 Geneva Conventions on the Law of the Sea (Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, Convention on Fishing and Conservation of the Living Resource (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285, Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311), the Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 and the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[87] Report of the ILC on the work of its Thirty-fourth session, UN GAOR 37th Session Supp No 10 UN Doc A/37/10 (1982) 17ff.
[88] Report of the ILC on the work of its Forty-sixth session, UN GAOR 29th Session Supp No 10 UN Doc A/49/10 (1994) 89ff.
[89] Report of the ILC on the work of its Fifty-third session, UN GAOR 56th Session Supp No 10 UN Doc A/56/10 (2001) 26ff.
[90] ibid 145ff.
[91] Respectively, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organization (adopted 21 March 1986, not entered into force yet) (1986) 24 ILM 543 and the Convention on the Law of Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 2999 UNTS 77.
[92] Respectively, UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 and UNGA Res 56/82 (18 January 2002) UN Doc A/RES/56/82.
[93] *Gabčíkovo-Nagymaros Project* (n 22) [58].
[94] On this point see Attila Tanzi, 'The UN Convention on International Watercourses as a Framework for the Avoidance and Settlement of Waterlaw Disputes' (1998) 11 LJIL 441.
[95] In addition to the cases already mentioned above, it is possible to recall *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2015] ICJ Rep 3, [102]-[105], *Ilaşcu and others v Moldova and Russia* [GC] (Judgment) App No 48787/99 (ECtHR, 8 July 2004) [319]-[321] and *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) [149]. The identification between CIL and the ILC's work on State responsibility is such that, as James Crawford observes, 'The ILC Articles represent the modern framework of state responsibility,' *State Responsibility: The General Part* (CUP 2014) 45.

> '[I]l n'y a plus aujourd'hui de raisons pour que le droit international abandonne ses structures ouvertes traditionnelles pour se réfugier dans le cadran clos d'un droit entièrement conventionnel. [U]n vaste horizon s'ouvre encore devant la poursuite, de nos jours, de la codification du droit international. Celle-ci changera vraisemblablement de formes et de méthodes. Elle n'en sera pas moins précieuse pour autant.'[96]

However, the distinguished jurist could not foresee that the end of the clash of ideologies, instead of favouring the comeback of a natural law approach to international law, would end up in an even more complex and multipolar world. Accordingly, today it seems that the choice between formally legally-binding and non-binding instruments has been stripped of any ideological-political connotation in favour of functional needs, which – as already alluded – pertain to the socio-political need and circumstances existing at the time and to the subject matter the ILC is dealing with. In the present context, over the last two decades, the diminished resort to the conventional format, no longer reveals a time of shared values in the International Society, but rather flags an alarming low rate of willingness among the international actors to assume fresh obligations. Already in 2006, while questioning the role of the ILC, Christian Tomuschat observed:

> 'States seem to have become rather tired of the tight network of international obligations which progressively restrict their sovereign freedom of action. Therefore, they do not hasten to bring new treaties into force, rather being inclined to watch for a considerable number of years what advantages they may expect of formal acceptance of the instrument concerned.'[97]

As a matter of fact, since the beginning of the century, the ILC appears to have more openly embraced the role of an informal 'progressive developer' of CIL. This is reflected in two empirical factors. The first one is that, even when using the draft articles model, the ILC has sometimes explicitly specified that the subject matter of codification did not necessarily correspond to the already settled CIL.[98] Examples include the *Draft Articles on the responsibility of international organisations* (2011)[99] and the *Draft Articles on the protection of persons in the event of disaster* (2016).[100] In the commentary to the *Draft Articles on the expulsion of aliens* (2014), the ILC even admitted that 'the entire subject area does not have a foundation in customary international law or in the provisions of conventions of universal value.'[101]

One may question the convenience for the ILC to push its own 'progressive development' agenda and draw up provisions in the absence of a clear practice that expresses a widely shared *opinio juris.*[102]

At the same time, it must be borne in mind that the ILC does not operate in a vacuum, but through constant interaction with the GA Sixth Committee.[103] This circumstance, also explains why the work of the ILC cannot be regarded as a mere subsidiary means for the 'determination of the rules of law,' of the kind of a scholarly

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[96] Roberto Ago, 'Nouvelles réflexions sur la codification du droit international' (1988) 92 Revue générale de droit international public 539, 573, 576.

[97] Christian Tomuschat, 'The International Law Commission: An Outdated Institution?' [2006] 49 German YB Intl L [77], [91].

[98] See further Yifeng Chen, 'Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law-Maker' in The United Nations (ed) (n 11) 249-250, fns 73, 77.

[99] 'It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility,' Report of the ILC on the work of its Sixty-third session, UN GAOR 66th Session Supp No 10 UN Doc A/66/10 (2011) 69-70, General Commentary, para 5.

[100] 'The draft articles contain elements of both progressive development and codification of international law,' Report of the ILC on the work of its Sixty-eight session, UN GAOR 71st Session Supp No 10 UN Doc A/71/10 (2016) 17-18, General Commentary, para 2.

[101] Report of the ILC on the work of its Sixty-sixth session, UN GAOR 69th Session Supp No 10 UN Doc A/69/10 (2014) 18, General Commentary, para 1.

[102] As Sir Ian Sinclair puts it: 'A codification convention that does not enjoy the support or approval of a significant group of states whose assent is necessary to the effective implementation of the convention is hardly likely to be regarded as being expressive of existing international law or general new law,' *The International Law Commission* (Grotius Publications Limited 1978) 215.

[103] On the 'organic relationship' between the ILC and the GA Sixth Committee, see Franklin Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee' [2006] 49 German YB Intl L 107.

forum, under Art 38(1)(d) of the ICJ Statute, but enjoys the greater normative authority. Besides, nothing prevents ILC draft articles from having a significant impact on States' conduct in the future, thereby setting in motion a CIL-generating process. And indeed, as Bertrand Ramcharan pointed out already in the 1970s, the ILC works may well facilitate and accelerate the formation of new customary rules in relation to the topic under consideration.[104]

The second element which is worth emphasising is that the increased combination of existing customary rules and progressive development of international law in the ILC work has coincided with the devising of an array of new forms of codification. True, the ILC work had resulted in non-conventional-aimed end-products well before the end of the Cold War, but this choice was mainly due to the fact that the subject matter did not suit a codification by 'articles.' Examples include the already mentioned *Draft declaration of the rights and duties of States* (1948)[105] and the *Model rules on arbitral procedure* (1958).[106] On the other hand, one may recall how over the last two decades the ILC has increasingly produced work which was purportedly not geared towards the adoption of conventional instruments irrespective as to whether the subject matter was suitable for conventional consolidation or not, through different formats, such as (*guiding*) *principles* (*applicable to unilateral declarations of States capable of creating legal obligations* (2006),[107] *on the allocation of loss in the case of transboundary harm arising out of hazardous activities* (2006)[108] and *on the protection of the environment in relation to armed conflicts* (under consideration);[109] *conclusions* (*on fragmentation of international law* (2006),[110] *on identification of customary law* (2018)[111] and *on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (2018);[112] *guides to practice* (*on reservations to treaties* (2011),[113] *guidelines* (*on protection of the atmosphere* (under consideration)[114] or *issue papers* (*on sea-level rise in relation to international law*) (under consideration).[115]

This declining resort to the draft articles model can therefore be ascribed to the already alluded increased recalcitrance by States to engage in processes leading towards the creation of clear-cut rights and duties for the acceptance or rejection of which they would become publicly accountable. Indeed, over the last three decades, only two codification conventions have resulted from the work of the ILC.[116] Namely, the United Nations Watercourses Convention,[117] and the United Nations Convention on Jurisdictional Immunities of States.[118] Separately, one may add the Rome Statute.

The decline of the draft articles format is no surprise. It is the logical consequence of widespread 'treaty fatigue,'[119] whereby States are much less inclined to conclude large codification agreements than in the past. Conversely, recourse to more flexible forms is functional to the current international political scenario, largely characterised by States' inertia in the field of international law-making.

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[104] Bertrand G Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (Martinus Nijhoff Publishers 1977), 23-24.
[105] Report of the ILC (n 76) 286ff.
[106] Report of the ILC (n 79) 83ff.
[107] Report of the ILC on the work of its Fifty-eight session, UN GAOR 61st Session Supp No 10 UN Doc A/61/10 (2006), 366ff.
[108] Ibid, 110ff.
[109] See Report of the ILC on the work of its session, UN GAOR 69th Session Supp No 10 UN Doc A/69/10 (2014), 249ff.
[110] Report of the ILC (n 107), 403ff.
[111] Report of the ILC (n 20), 119ff.
[112] ibid, 12ff.
[113] Report of the ILC (n 60) 19ff.
[114] See Report of the ILC on the work of its Seventy-second session, UN GAOR 76th Session Supp No 10 UN Doc A/76/10 (2021), 9ff.
[115] See Report of the ILC on the work of its Seventieth session, UN GAOR 74th Session Supp No 10 UN Doc A/74/10 (2019), 340ff.
[116] Chen (n 98) 252.
[117] See above fn 91.
[118] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not entered into force yet) [2005] 44 ILM 801.
[119] Laurence Boisson de Chazournes, 'The International Law Commission in a Mirror: Forms Impact and Authority' in The United Nations (ed) (n 11) 141.

In this context, it is interesting to observe how international scholarship is re-interpreting and re-qualifying the work and role of the ILC, often emphasising, and sometimes overemphasising, its importance.

The recent decision by the GA to ask Member States their comments about the ILC draft articles being considered with a view to adopting a convention based on the ILC draft articles on *Protection of persons in the event of disasters, adopted by the GA at its 75th session in 2020, appears as a welcome development, based on the prevailingly positive response by the Member States.*[120] *One would wish that this would signal a revival of the awareness of the need for* multilateralism and international cooperation as a response to the increasing challenges against global security, including in the area of disaster prevention and relief. The COVID-19 pandemic could have served – together with the increasingly apparent impact of climate change worldwide – as a catalyst in that direction. A small, but significant indication of that effect may be drawn from the view expressed by some delegations that pandemics should qualify as a 'disaster' in accordance with the definition provided in Draft Art 3(a).[121]

Qualifying the ILC Work: A Critical Appraisal

Traditionally, the work of the ILC has been compared to a 'subsidiary means for the determination of rules of law,' pursuant to Art 38(1)(d) of the ICJ Statute. In particular, due to the composition of the body, the ILC work has been equated to the 'teaching of the most highly qualified publicists of the various nations.'
For instance, in the last edition of the *Brownlie's Principles of Public International Law*, James Crawford wrote that:

> 'A source analogous to the writings of publicists, and at least as authoritative, is the work of the ILC, including its articles and commentaries, reports, and secretariat memoranda.'[122]

Interestingly, this 'classic' approach was adopted by Sir Michael Wood himself in drafting the conclusions on the identification of CIL. In fact, in assessing the role of the ILC in this regard, he noted that:

> '[A]mong writings, special importance may be attached to collective works, in particular the texts and commentaries emerging from the work of the International Law Commission.'[123]

This stance, however, was not uncontroversial. A number of members of the ILC expressed the view that qualifying the work of the ILC as a mere subsidiary means does not adequately reflect its actual impact on the international customary making process.[124]

The latter view seems to have gained the upper hand. In the commentary to Part Five (*Significance of certain materials for the identification of customary international law*) of the *Draft conclusions on the identification of customary international law*, the ILC stated that:

> 'The output of the International Law Commission (…) merits special consideration (…). This flows from: the Commission's unique mandate [(…) to promote the progressive development of international law and its codification]; the thoroughness of its procedures [including the consideration of extensive surveys of State practice and *opinio juris*]; and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work).'[125]

However, this statement was somewhat mitigated by the following language:

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[120] The need for an ad hoc convention on the protection of persons in the event of disaster has been reiterated by the GA (Res 73/209 (20 December 2018) UN Doc A/RES/73/209), including its Sixth Committee (Un Doc A/C.6/76/SR.12, 13 and 29), and the SG (Protection of persons in the event of disasters, Report of the Secretary-General (21 July 2020) UN Doc A/75/214).
[121] See the remarks by the representatives from Singapore, Colombia, Portugal, China, El Salvador, Nigeria and Thailand offered during the GA 76th Session as reported in UN Doc GA/L/3640 (18 October 2021).
[122] Crawford (n 15) 41.
[123] Third Report on identification of customary international law by Michael Wood (n 19) para 65
[124] See further Azaria (n 60) 195ff
[125] Report of the ILC (n 20) 142, para 2

> 'The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.'[126]

Be that as it may, the work of the ILC unquestionably enjoys a privileged position among the authorities relied upon in diplomatic practice and in international case law. Professor Boisson de Chazournes has recently observed that 'the International Law Commission enjoys an authority *per se* (…) [and] is socially recognised as "the leading body with expertise in international law".'[127] She added that:

> '[The ILC] final products are often qualified as falling under article 38, paragraph 1 (d) of the Statute of the International Court of Justice, i.e. "highly qualified publicists". However, authority is dynamic in nature. It can be gained, it can be lost. It can increase, it can decrease over time. Nothing is set in stone. The Commission and States are the custodians of this authority, in the short-term but also in the longer term.'[128]

Other authors have gone one step further and provided new qualifications of the role of the ILC.

For instance, Danae Azaria has elaborated the thought-provoking idea of a 'codification-by-interpretation' paradigm in which she places the ILC in a special position.[129] According to this author, the ILC would be tasked with the mandate to interpret CIL where 'it cannot be presumed that interpretation is singularly an aspect of codification or exclusively one of progressive development.'[130] This supposedly 'new function,' however, would not entail providing a binding or authentic interpretation, but rather making an 'interpretative offer,' primarily to States, with a view to prompting their reaction within and outside the UN system.[131] To recall Danae's own words:

> 'The ILC's '*codification-by-interpretation*' paradigm takes the form of documents intended from their inception to remain non-binding, involves the *interpretation* of an existing treaty (…) and aims to reaffirm and develop the content of treaty rules over time and, through this process, to reaffirm and develop the content of CIL.'[132]

One cannot agree more on this relativistic approach to the ILC contribution to international law making as depending on the positivistic analysis of the changing attitude of States to the international law process in different international political junctures, in line with the present author's view expressed in 2015.[133] Such a relativistic approach to the matter in point seems all the more justified as the result of a legally positivistic analysis of the international social process in the light of the accelerated and abrupt tensions between fits of nationalistic unilateralism and the awareness of the need for enhanced multilateralism and international cooperation since then.

Another, more radical view, propounded by Yifeng Chen, goes so far as to qualify the ILC as an 'autonomous law-maker.'[134] Its alleged ultimate mission would be that of 'pursuing international *lex scripta* and the international rule of law'[135] separately from other UN, more *political* bodies. Basically, the idea would be that the ILC has increasingly resorted to progressive development as a tactic to develop new laws, and to keep itself occupied and relevant. As the same author puts it:

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[126] ibid
[127] Boisson de Chazournes (n 119) 151.
[128] ibid 152-153.
[129] Azaria (n 60) 188ff.
[130] ibid 188.
[131] ibid, 190ff.
[132] ibid 200.
[133] ibid, (n 62).
[134] Chen (n 98) 233ff.
[135] ibid 257.

> 'The legislative function of the International Law Commission could be appreciated in light of constitutionalisation of international law, where the constitutional role of the Commission could possibly be construed as *a trustee for the development of the international rule of law* (…).'[136]

Three general remarks largely intertwined with each other can be made with respect to these new daring postures. The first one is that the work of the ILC is certainly more authoritative than the teaching of the most highly qualified publicists.[137] This is due to the intrinsic authority of the ILC, to the persuasiveness of its works – always supported by a thorough analysis of international practice – and to the widespread reference that other actors on the international stage, especially international courts and tribunals, make to its work.[138] As already noted, the ILC does not act in a vacuum, and its work is directed and shaped throughout the interaction with the GA Sixth Committee. Thus, it benefits, at least in part, from a unique governmental 'consensual halo.'

The second remark, which flows from the last consideration, is that no theory on the normative value of the work of the ILC can downplay the importance of the role of States' consent in codifying, developing or even interpreting CIL, which is regarded nas o less important a matter by States. So much so that they leave it for themselves or to international adjudication based only on consensual jurisdiction.

Lastly, one cannot help the diminished role of the ILC in the codification of international law. Its prominently driving function from the 1950s, throughout the 80s, drew its *raison d'être* on a number of factors that nowadays have lost ground, or even waned.

Firstly, the then new East-West and North-South divisions at the time of the Cold War and decolonisation required the renegotiation of fundamental bodies of international law involving key international legal institutions, such as those on treaty law, the law of consular and diplomatic relations, all of which were essential in order to ensure the coexistence between States in a divided International Society.

Secondly, next to the codification of such basic international legal institutions, increasingly new issues emerged, whose international regulation was felt necessary by the UN Members States together with an enhanced need for retaining the political negotiation ownership from the beginning of the process, thus subtracting it from the ILC. A number of reasons contributed to that effect, especially, new awareness of the policy importance for the substantive exercise of national sovereignty and the non-exclusively legal, but also scientific and economic, relevance of a number of issues requiring codification and progressive development, thus involving governmental expertise beyond that from the legal services of the Ministries of Foreign Affairs. This accounts, for example, for the UN codification of the law of the sea to have taken place outside the ILC,[139] after the adoption of the four 1958 Geneva Conventions,[140] just like the ongoing negotiation process on the 'Biodiversity Beyond National Jurisdiction.'[141] The same considerations apply to much of process of consolidation of international environmental law through key UN authoritative conferences and conventions.[142] This holds true despite the ILC

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[136] ibid 264, italics added.

[137] 'Viewing codification conventions and ILC draft articles as individual instances of State practice or the work of law professors does not fully account for the role that these texts play in international legal argument,' Lusa Bordin (n 59), 537. See ibid, 546ff

[138] See ibid, 549ff

[139] See extensively Robert R Churchill, 'The 1982 Convention on the Law of the Sea' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015), 26ff. See also Tullio Treves, 'Law of the Sea' (April 2011) in Anne Peters (ed) *Max Planck Encyclopedia of Public International Law* (online edn): 'The approach adopted in the procedure was that of consensus on ever broadening 'package deals.' The objective was to maintain the unity of the law of the sea by producing a single convention on which there would be universal consensus and to which reservations would not be permitted,' para 19.

[140] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, Convention on the High Seas Zone (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285 and Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

[141] See UNGA Res 72/249 (19 January 2018) UN Doc A/RES/72/249.

[142] Such as the Stockholm Declaration (Report of the United Nations Conference on the Human Environment (Stockholm 5-16 June 1972), UN Doc A/CONF.48/14/Rev.1 (1973) 21) and the Rio Declaration (n 23).

having been tasked in recent years with the consolidation of basic legal principles also pertaining to general, or specific, aspects, of international environmental law.[143]

Thirdly, in the historical period under consideration, the task of codification and progressive development of international law would naturally fall on the ILC as a prominent legal UN body, against the background of scant jurisprudential elucidation and application, let alone development of international law at the time, apart from the previous activity of the Permanent Court of International Justice, inevitably constrained in time by the limited number of States accepting its jurisdiction. The case could be made that the increased reliance on international adjudication and arbitration, together with the proliferation of international adjudicative forums since the 1980s has increasingly produced authoritative jurisprudential statements that are widely relied upon by States in their diplomatic claims and defences, which are reminiscent of the kind of flexible legal process in common law systems when consolidation of the law was not felt so much necessary through legislation.

The Role of 'UN Courts and Tribunals'

In line with these last remarks, it seems appropriate to make a quick reference to the role of the ICJ as the 'principal UN judicial organ,'[144] as well as of other UN-related international courts and tribunals, in the codification and progressive development of CIL. This is a stand-alone *locus classicus* of international scholarship and would deserve a full-length discussion.[145] The analysis will be confined here to very few selective considerations.

First of all, it is worth recalling that nowhere in the UN Charter – nor in the ICJ Statute, which is an integral part thereof[146] – is the Court endowed with any international law-making or consolidation power, acting as a source of international rights and duties for all UN Member States. First of all, under Art 38(1) of the ICJ Statute, its function 'is to decide in accordance with international law such disputes as are submitted to it,' while, under Art 59, its decisions 'has no binding force except between the parties and in respect of that particular case.' *Mutatis mutandis*, this applies to all UN related, or unrelated, international adjudicative bodies.

However, this does not mean that the Court does not contribute to the codification and development of international law. In particular, the 'developmental value' of ICJ judgments is usually to be found in the so-called *obiter dicta*, that is statements or passages that do not directly affect the resolution of the dispute before it. Thus, in the famous 1970 *Barcelona Traction* dictum, the ICJ took the opportunity, *a latere*, to put its seal on the existence of *erga omnes* obligations as 'the obligations of a State towards the international community as a whole.'[147] In so doing, the ICJ substantively complemented the overly abstract language of Art 53 of the 1969 Vienna Convention on the Law of Treaties on *jus cogens*. Also, in its *ratio decidendi*, the ICJ may well have brought about significant development of the law, despite some understandable criticism about this approach in a legal system deprived of the *stare decisis* principle.

Be that as it may, the ICJ contribution is undeniable to maritime delimitation parameters, so much so that States have generally relied upon them, both by incorporating them into the United Nations Convention on the Law of the Sea,[148] and accepting its jurisprudential interpretation, on a case-by-case basis. One may refer to the case law

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[143] See especially the *Draft Articles on prevention of transboundary harm from hazardous activities* (n 90), *the Guiding principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities* (n 108), the *Guidelines on protection of the atmosphere* (n 114), *the Guiding principles on the protection of the environment in relation to armed conflicts* (n 109) and the *issue papers on sea-level rise in relation to international law* (n 115).

[144] See UN Charter, art 92 and Statute of the ICJ, art 1.

[145] See, for instance, Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) as re-printed by CUP in 2011. See also Philippe Cahier, 'Le role du juge dans l'élaboration du droit international' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski* (Kluwer Law International 1996), 353ff and Christian J Tams and James Sloan (eds), *The Development of International Court by the International Court of Justice* (OUP 2013).

[146] UN Charter, art 92.

[147] *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, [33].

[148] See arts 15, 74 and 83.

started by the landmark *North Sea Continental Shelf* case[149] and continued, amongst others, in *Fisheries Jurisdiction* cases,[150] *Continental Shelf (Tunisia/Libya)*[151] and *Continental Shelf (Libya/Malta).*[152] The ICJ's more recent case law in maritime delimitation embedded in equity is also worth noting, with special regard to *Jan Mayen,*[153] *Maritime Delimitation in the Black Sea,*[154] *Territorial and Maritime Dispute*,[155] and *Maritime Dispute.*[156]

The ICJ has also contributed to the development of CIL in the exercise of its advisory function[157]. One may recall, for instance, how the *Genocide Convention* advisory opinion significantly elaborated on new criteria for the admissibility of reservations to treaties, despite that lack of an express provision to that effect in the Convention.[158]

The contribution of UN international courts and tribunals to the elucidation and development of international law is not limited to the ICJ. Over the last 25 years of activity, the ITLOS has contributed to the progressive development of the law of the sea and international environmental law in areas such as freedom on the high seas, illegal unreported and unregulated fishing, and the environmental impact assessment obligation and the principle of sustainable development.[159]

The ICTY can well be said to have laid out the foundations of contemporary international criminal law. Among others, special mention is to be made to the *Tadić* case, where Judge Cassese – presiding the Appeals Chamber – basically 'forged' the customary rules of international humanitarian law governing non international armed conflict.[160]

As already alluded to, judicial activism raises legitimacy concerns since, lacking the *stare decisis* principle in international law, international adjudicative bodies are not formally endowed with the power of 'developing law.'[161] And they are well aware of this. Thus, the ICJ has repeatedly stated that:

> '[T]he Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down';[162]

and that:

> '[T]he Court['s] task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules (...). [I]t states the existing law and does not legislate.'[163]

Leaving aside this controversial problem,[164] it should not be forgotten that the codification/progressive development potential of UN international courts and tribunals is always dependent on how States will react to

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[149] See fn 17, [157]ff.
[150] *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) [1974] ICJ Rep 3 and *Fisheries Jurisdiction (Germany v Iceland)* (Merits) [1974] ICJ Rep 175.
[151] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Merits) [1982] ICJ Rep 18.
[152] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Merits) [1985] ICJ Rep 13.
[153] *Maritime Delimitation in the Area between Greenland and Jan Mayen* [1993] ICJ Rep 38.
[154] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 61.
[155] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624.
[156] *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3. Having regard to land delimitation, see *Frontier Dispute* [1986] ICJ Rep 554
[157] See, generally, Teresa F Mayr and Jelka Mayr-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2016) 76 Zaörv 425.
[158] *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 27.
[159] See, generally, Kriangsak Kittichaisree, 'ITLOS's Jurisprudential Contributions: Present and Future' in Kriangsak Kittichaisree, *The International Tribunal for the Law of the Sea* (OUP 2021)175ff.
[160] *Prosecutor v Tadić* (n 43) [96]ff. See further, Michael P Scharf, 'How the Tadic Appeals Chamber Decision Fundamentally Altered Customary International Law' in Sterio and Sharf (eds) (n 50) 59ff.
[161] See, generally, Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 945ff.
[162] *Fisheries Jurisdiction* (n 150) [45]
[163] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [18]
[164] See, for instance, Alain Pellet, 'Decision of the ICJ as Sources of International Law?' (2018) 2 Gaetano Morelli Lecture Series 7.

judgments. That is, ultimately, to the manifestation of their will, either expressly or – as it is often the case – tacitly.

Concluding Remarks

I will conclude with a few strictly legal comparative considerations about going down, either the soft-law or conventional route,[165] and few general policy considerations.

Among the advantages of going for the adoption of a soft-law instrument it would seem to figure its expeditiousness. However, similar diplomatic exercises often prove to be as lengthy and complex as the negotiation of a treaty.[166] Awareness by the negotiators of good faith considerations and the principle of estoppel account for extreme caution even in a soft-law drafting context.

Secondly, the choice of a non-binding instrument would seem more agile and faster also for the purposes of its implementation, modification and termination. Such instruments do not require ratification, but the diffused practice of provisional application of treaties may partly mitigate the comparative advantage of the former kind of instruments. Besides, sidestepping the domestic legislator may involve public law problems of lack of transparency and publicity of the instrument in question. This may involve difficulty in providing domestic budgetary support for implementation purposes, when needed.

As to modification and termination, aside from the avoidance of cumbersome treaty-making procedures through the adoption of soft-law instruments, the fact remains that a unilateral change of policy may not justify the instant reverse of the good faith obligations of non-contradiction or estoppel, and, anyhow, may not allow for the derogation from customary obligations when enshrined in the soft-law instrument in question.

As to the general policy dimension of the choices in question, I will avoid recapitulating the salient aspects of the contribution to the codification and progressive development of international law by the GA – including through the ILC –, the ECOSOC, the SG, the SC, the ICJ, as well as by other UN-related courts. It is worth emphasising, however, how any achievement in this area is hardly the product of the UN as an independent international actor, but as the forum and catalyst for the expression of the attitude of Member States.

Accordingly, reflecting on the international law-making process within the UN may be key, not only to understanding the current state of health of the International Society, but also to catching a glimpse through the crystal ball of what the future of international law holds, at least in the short-medium term.

Cyclically, all legal systems experience periods of crisis that reflect critical phases of the underlying social process. As mentioned, the shift from a more value-homogeneous to a more ideologically divided International Society impacts the choice of the kind of legal methods for the development of the international legal process, favouring a more legal positivist, or voluntarist, attitude, as opposed to a more jus-naturalistic one. different approaches to the matter have been followed in different historical periods. However, in the long term, the two approaches seem to flow into a common terminus in the wider course of international law-making.

Today's worldwide critical social and political juncture appears to be – at one and the same time – produced and aggravated by the States' difficulty to find sufficiently widely shared societal values, both between and within themselves. The fact that, against this lack of societal homogeneity, the legal process is marked by a high degree of openness to the negotiation and adoption of soft-law instruments may be somewhat confusing unless it is explained, as above, with the recalcitrance by States to assume new legal obligations, while betraying a significant degree of awareness of the need for regulation of an international response to global threats to the international peace and security, including non-military ones. Such threats are generally shared and feared, contrary to the

[165] See further elaboration by the present author on the point at issue in *Introduzione al diritto internazionale contemporaneo* (6th edn revised and amended, CEDAM 2022) 176-181.
[166] See Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' [1989] 38 ICLQ 850

ways and means for their solution. Over the last few decades, the unilateral proactive pursuit of perceived shortcuts, or negligent inertia, has prevailed.

This situation is worrisome, especially in the light of the new, and old, global challenges that the International Society is increasingly facing. As to the new ones, suffice to think of the still dragging pandemic, climate change and its multifaceted detrimental effects, unbalanced demographic growth and the finite character of natural resources essential to an adequate standard of living for all. Against this backdrop, the UN has become the depositary of the goodwill and normative aspirations of its often two-faced Members, which are torn between nationalism and international cooperation.

In such vein, the UN organs, especially the ILC, with its non-governmental composition, venture towards the codification and development of international law against the oscillating attitude of States. The choice of the topics of its recent and ongoing endeavours – the *protection of the atmosphere* (under consideration),[167] the *protection of the environment in relation to armed conflict* (under consideration),[168] the *protection of persons in the event of disaster* (2016)[169] and the *sea-level rise* (under consideration)[170] – is no coincidence.

States' increasing recalcitrance to assume new legal obligations which they fear to lack the capacity to live up to accounts for the need for the ILC work to take a different path from the 'conventional' forms of codification, rather opting for general studies, possibly combined with operative language in terms of 'principles' or 'conclusions.' The ILC recommendation to the GA on the elaboration of a convention on the protection of persons in the event of a disaster on the basis of the relevant draft articles epitomises its full awareness that States and their consent still command the international legal process, especially where the topic under consideration is characterised by a lack of practice or a fragmented legal framework.[171]

Obviously, aside from the exception of Ch VII SC resolutions, the UN, including the ILC, do not, and cannot, create international law in and of themselves. However, they participate in shaping the contents of an authoritative 'normative offer' addressed to the UN Members States. From such a perspective, the UN legal process provides a more coherent systematisation and generalisation of previous practice and can channel the efforts to ensure that the International Society may address issues of particular urgency.[172] Ultimately, it is for States, individually, to take up or turn down such normative offers.[173]

Responsible, reasonable and equitable national civil societies may hold the government accountable for their choices, or the lack of them. Inevitably, disoriented and fragmented civil societies would leave the International Society disoriented and fragmentated, just as well. Though, civil societies may exert such a positive, or negative, impact on governments only where the rule of law, through representative and participatory constitutional democracy, is upheld.

This provides sufficient reason for scholars and practitioners to continue their engagement in their professions and disseminating the rule of law in its reasonable and equitable configurations, keeping conscious though, that the legal process does not produce the social process, but *vice versa*.

[167] See Report of the ILC (n 114) 84ff.
[168] See Report of the ILC (n 109) 249ff.
[169] Report of the ILC (n 100) 12ff.
[170] See Report of the ILC (n 115) 340ff.
[171] See Report of the ILC (n 61) 13, para 46
[172] For instance, apart from the ILC, the need for an ad convention on the protection of persons in the event of disaster has been reiterated by the GA (Res 73/209 (20 December 2018) UN Doc A/RES/73/209), including its Sixth Committee (Un Doc A/C.6/76/SR.12, 13 and 29), and the SG (Protection of persons in the event of disasters, Report of the Secretary-General (21 July 2020) UN Doc A/75/214).
[173] Schachter (n 2) 5