

**CHALLENGES OF
CONTEMPORARY INTERNATIONAL LAW
AND INTERNATIONAL RELATIONS**

***LIBER AMICORUM
IN HONOUR OF ERNEST PETRIČ***

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THE ILC ADRIFT? SOME REFLEXIONS FROM INSIDE

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Dr Ernest Petrič, a most distinguished Slovenian lawyer, has been my esteemed colleague for five years in the International Law Commission (ILC) of the United Nations, which he chaired with great distinction and authority in 2009. Since I am retiring from the Commission after a membership of 22 years, I have deemed it appropriate to take the occasion of the *Festschrift* in honour of my friend and colleague to offer some reflexions on the present and future of the ILC.

To my regret these reflexions are somewhat disillusioned: neither the composition nor the achievements of the Commission are commensurate with the aura it still possesses. It is clear that the Member States of the United Nations (and their representative in the Sixth Committee of the General Assembly) bear the main responsibility in this situation; however, and more in depth, the question arises whether the ILC as it was conceived during the late 1940s still answers the needs of the contemporary world, more than sixty years later.

While, contrary to the Sixth Committee,¹ the ILC has shown its ability to reform its methods of work and to try to adapt them to the requirements of the General Assembly², the obvious excesses and growing weaknesses of the Commission mainly affect its composition (I.) and the topics on its agenda (II.).

Pogačnik, M. and others (ed.): Challenges of Contemporary International Law and International Relations – Liber Amicorum in Honour of Ernest Petrič, p. 299-312

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¹ A. Pellet, "General conclusions", SFDI, Colloque d'Aix-en-provence, *La codification du droit international*, Pedone, Paris, 1999, pp. 338-340.

² Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session (1996) (A/51/10), *Yearbook ... 1996*, vol. II (Part Two) and Report of the Commission to the General Assembly on the Work of its Sixty-Third Session (2011) (A/66/10).

THE COMPOSITION OF THE ILC

Disrespect and disappearing honoraria

When it was created – by Resolution 174 (II) of the General Assembly adopted on 21 November 1947 – the ILC was conceived as a technical body for the progressive development and the codification of public international law as a whole. It was composed of fifteen experts elected in their personal capacity by the General Assembly, who were supposed to be paid at the same level and according to the same system as the Judges *ad hoc* of the ICJ³ – that is on the basis of 1/365th of the salary received by the Members of the Court. They are now supposed to receive symbolic honoraria fixed to one US dollar per year⁴ (following a constant decrease of their fees in constant dollars from 1950 on).

This might seem anecdotic; it is nevertheless extremely revealing from at least two points of view:

- *First*, it shows how little respect the ILC members enjoy from the States – nothing to do anymore with the Judges in The Hague indeed;
- *Second*, the absence of any remuneration is a threat over the independence and/or devotion to the work of the members of the Commission: civil servants have to continue to depend only on their national salaries and advocates or other workers of the private sector either must be ready to lose quite a lot of money during the ten to twelve weeks of the session of the Commission, or will be absent, or will have to reconcile their professional activities with their *pro bono* functions in the ILC.

This is even more true for the special rapporteurs who are the backbones of the Commission, receive little assistance from the Secretariat (not for lack of skill and talents: the civil servants of the Codification Division who serve in the Secretariat are extremely well qualified – and I dare say, quite often, more than ILC members themselves... but for lack of resources), and no compensation at all for an extremely demanding work. And, as far as I can see, the situation has rather worsened in this respect during my 22 years in the Commission.

Qualifications of the Members

This, I must admit, is not the case concerning the qualifications of the members of the Commission which, as an average, tend to be rather equal from one quinquennium (the term for membership is five years renewable) to another and, I would think, has even rather improved these last years especially due to the re-

³ Following the adoption of Resolution 485 (V) by the General Assembly on 12 December 1950 which increased the amount of the initial honoraria.

⁴ A/RES/56/272, 27 March 2002.

markable quality of several members from Latin America. However, globally, the quality of to-day's membership hardly sustains the comparison with that of the members of the three first decades, when the Commission included the most prominent international lawyers of the time – when they were not Judges in the ICJ.

This decrease in the average quality of the membership too is a sign of the disregard of the States for the Commission: they nominate and elect persons who can be good diplomats but have limited knowledge in public international law or, even worse, politicians – including Ministers of Justice or Attorney-Generals – who see the Commission as a rewarding line on their international C.V. but who do not appear – or nearly not – in the Commission during a full session (or several sessions). This is the case for at least four members of the actual Commission (2007-2011).⁵

In a way, this absenteeism can be seen as a good thing: the number of the members of the Commission has increased from 15 to 34 since 1947 and, clearly, this number is too high to enable in depth discussions on quite technical matters. It remains that it is a sign of disinterest for the Commission from the members in question and from their nominating States.

Independence of the Members

Curiously, the independence of the members of the Commission is not expressly provided for by its Statute – Article 8 only provides that “[a]t the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required.”⁶ However, the fact that the members must be independent experts clearly is “a general practice recognized as law” – but a very commonly breached practice.

It is clearly incompatible with such a requirement to have as members of the ILC:

- Six directors of legal affairs of the Ministry of Foreign Affairs in their respective countries;
- Six Ministers of Justice or equivalent (such as Attorney or Solicitors General); and
- Seven ambassadors or other diplomats in duty⁷.

In other words, a majority of the candidates were disqualified for running for the election at the time they were nominated by their Government.

⁵ By way of examples, in 2010, five members have attended less than one quarter of the public meetings (usually these members do not participate at all in the afternoon private meetings – Drafting Committee and Working Groups) – this was also true for a fifth member but due to illness. Of these five members one was a private barrister; one was the Legal Adviser of the Minister of Foreign Affairs of his country and the three others were Attorney-General or Solicitor-General in their countries. The other four members who attended less than half the meetings had the same kind of professional origins.

⁶ And Art. 2, para. 1, provides that the members « shall be persons of recognized competence in international law ».

⁷ This list has been established on the basis of the occupation declared by the members on their *curriculum vitae* at the time of their candidacy.

It is sometimes said that this introduces a fair balance in the global membership of the ILC: these professionals would bring a touch of realism which would happily moderate the irresponsible legal imagination of the academics. It is certainly true that there is some advantage in having some "double-cap" members and I must admit that some of them have played a very positive role as "go-betweens" between the ILC and the Sixth Committee⁸, but one thing is to have some able individuals, with strong personality, helping both organs to understand better the other's point of view, quite another thing is the sweeping transformation of the Commission into a body of States' representatives.

Besides the fact that this is clearly incompatible with the very idea of a body of independent experts, this is far from being innocuous in terms of the working methods of the Commission: as seen above, these members (who mainly – but not exclusively – come from Africa and Asia) are much more absent than their colleagues and usually participate much less actively in the work of the Commission and this tends to destroy the real balance which was envisaged when the Commission was created: a dialogue between a body of independent experts and another body, the Sixth Committee, composed of the representatives of the Member States of the UN; if the States "speak" at the Commission, the process stammers – and even more so when the ILC members represent their State within the Sixth Committee. And even if there is some excess in describing academics as unavoidably "irresponsible" – there are many practitioners of international law among the professors, there are other possibilities to balance their alleged untrustworthiness than to put the ILC under the tutelage of States' representatives (in particular, I acknowledge the usually very positive role of *former* diplomats or *former* legal advisers, which is such a possibility).

It must also be acknowledged that independence is a state of mind nearly as much as an issue of functions and I have seen (rarely however – and usually not on matters important for their country) high civil servants taking positions different from their Governments, while it also happens that academics can be suspected of relaying the views of their own States. But the *plerumque fit* is to the opposite.

And in some cases, the behaviour of some members acting as representatives of their Government is purely outrageous. The newly elected Chinese Member of the ILC gave a rather shameful example of such conduct during the 63rd session of the Commission (2011). Taking the floor at the very end of the session on the topic of "Reservations to Treaties", he used a threatening and intimidating language to force the Commission to withdraw from the commentary of the "Guide to Practice" on reservations to treaties any mention of the role of China before the restoration of all the rights of the People's Republic of China and the recognition of the representatives of its Government as the only representative of China to the UN by resolution 2758 (XXVI) of 25 October 1971. Although this was clearly in contradiction with a

⁸ During my long participation in the ILC this has been the case in particular of Ambassadors Calero-Rodriguez (Brazil), P.S. Rao (India) or Yamada (Japan) who have all played such a useful role of "go-betweens".

scientific analysis, the Commission partly yielded to this *diktat* without too much regard for the integrity of its mandate.⁹

THE TOPICS DEALT WITH BY THE ILC

The Selection of the Topics

Another aspect of the disinterest of States for the ILC transpires through the choice of topics to be dealt with by the ILC.

In this respect (and also in relation with the process of elaborating drafts), the Statute of the Commission makes a distinction between issues of "progressive development of international law" (defined as "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") and those relating to the "codification of international law" (in the meaning of "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine").¹⁰ In principle, topics relating to progressive development should be referred to the Commission by the General Assembly,¹¹ while concerning codification, Article 18 provides that:

1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not.
2. When the Commission considers that the codification of a particular topic is necessary and desirable, it shall submit its recommendations to the General Assembly.
3. The Commission shall give priority to requests of the General Assembly to deal with any question."

As it is well known, this differentiation has been abandoned in practice – and for good reasons¹². All topics are selected following the same general scheme and

⁹ See A/CN.4/SR.(10 August 2011) and A/CN.4/SR. (11 August 2011). As the Special Rapporteur on the topic on Reservations to Treaties, I am partly responsible for this climb-down; but I must also say that, although my colleagues were virtually unanimous to criticize in private or during the meeting of the enlarged Bureau summoned to handle this delicate situation, the conduct of Mr Huang, who behaved as the arrogant representative of China, the latter met but a few audible protests in public plenary meetings – with some bright exceptions it is true.

¹⁰ Article 15.

¹¹ Article 16.

¹² See e.g.: A. Pellet, "Responding to New Needs through Codification and Progressive Development" (Keynote Address), in V. Gowlland-Debbas ed., *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in International Legislative Process*, Kluwer, La Haye, 2000, pp. 13-23; or "Between Codification and Progressive Development of the Law: Some Reflections from the ILC", *Forum du droit international* 2004, pp. 15-24.

the ILC studies them through the same process (or processes¹³). While during the first years of the Commission, priority was clearly given to the instructions given by the General Assembly, it is now the ILC which selects its own topics, even if, very occasionally, the Assembly has taken an initiative¹⁴. The basic process is two stages.

First, the ILC decides whether to include a topic in its long-term programme of work. To that end, the Planning Group¹⁵ of the Commission constitutes – and has reconstituted each year since 1992 when it was first instituted¹⁶ – a Working Group on the Long-Term Programme of Work which was established in order “to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission”¹⁷. As explained by the Commission in its *Report for 2011* quoting from its *Report for 1998*, both the Planning Group and the Working Group on the Long Term Program of Work are “guided by the recommendation of the Commission at its fiftieth session (1998) regarding the criteria for the selection of the topics:

- (a) The topic should reflect the needs of States in respect of the progressive development and codification of international law;
- (b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;
- (c) The topic is concrete and feasible for progressive development and codification;

[and]

... the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.^{18,19}

In view of implementing these criteria, “[a]t its forty-fourth session [1992], the Commission embarked upon a more rigorous procedure for the selection of topics. A Working Group provisionally identified 12 topics as possible subjects

¹³ The processes of progressive development/codification are now somehow differentiated; but this differentiation is not essentially dictated by the Statute's dichotomy – see below.

¹⁴ This was the case for the drafting of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (see A/RES/27805XXVI, 3 December 1971) and, in some respect, of the Statute of the ICC – although, even in that occasion, the General Assembly can hardly have been seen as having required the ILC to prepare a draft Statute (see e.g. A/RES/45/41, 28 November 1990, instructing the ILC to “consider further and analyse the issues raised in its [ILC's] report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism”); in a certain measure, the ILC somehow twisted the Assembly's arm in this respect.

¹⁵ The Planning Group was established by the Commission in 1975 “to study the functioning of the Commission and formulate suggestions regarding its work” (Report of the Commission to the General Assembly on the Work of its Twenty-Seventh Session (1975) (A/10010/Rev.1), *Yearbook ... 1975*, vol. II, p. 184, para. 140).

¹⁶ *The Work of the International Law Commission, United Nations Publications*, 2007, 7th ed., vol. 1, p. 22.

¹⁷ Report of the Commission to the General Assembly on the Work of its Forty-Fourth Session (1992) (A/47/10), *Yearbook ... 1992*, vol. II (Part Two), p. 54, para. 368.

¹⁸ Report of the Commission to the General Assembly on the Work of its Forty-Fourth Session (1992) (A/47/10), *Yearbook ... 1992*, vol. II (Part Two), p. 110, para. 553.

¹⁹ *Report of the Commission to the General Assembly on the Work of its Sixty-Third Session (2011)* (A/66/10), pp. 289-290, para. 366.

of later work, and individual members were asked to write a short synopsis outlining the nature of the topic, the subject-matter to be covered, and the extent to which the topic was already dealt with in treaties or private codification projects by bodies such as the International Law Association or the Institut de Droit International. These outlines were published, and it was on the basis of the outlines that the Commission recommended at its forty-fifth session – and the General Assembly agreed – that work should begin on the topics of the law and practice relating to reservations to treaties and on State succession and its impact on the nationality of natural and legal persons.²⁰ This same procedure is still in force²¹ and is satisfactory.

What is much less satisfactory is, again, the way the Sixth Committee deals with the decisions of the Commission in this respect: some (a few number) delegations react to it but usually without making a distinction between the two phases: they comment the long-term programme as if it were the agenda and that is the end of the question. No recommendation, no priority, no real interest – and not the slightest proposition or suggestion for new topics²²...

The *second* phase of the process is the inclusion on the agenda of the Commission. Although the Commission itself sometimes mixes up both stages²³, they are clearly distinct²⁴ and, very naturally, some topics which were included on the long-term programme in the past are still there since they are not seen as a priority. Quite naturally, a number of topics which were included in the long-term programme of work in the past (some of them since 1949) are still there, and this is also true for several which have been added in the 1970s²⁵ and in 2006²⁶.

But, here again, with the uncertain exception of the International Criminal Court,²⁷ during the last two decades at least, the General Assembly has not sug-

²⁰ Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session (1996) (A/51/10), *Yearbook ... 1996*, vol. II (Part Two), pp. 87-88, para. 164.

²¹ For the most recent example, see ILC Report for 2011 (A/66/10) (*op. cit.* fn. 19), p. 289, paras. 365-369, and the Annexes to the Report concerning the five new topics listed on the long-term programme of work.

²² See above, fn. 14.

²³ Report of the Commission to the General Assembly on the Work of its Forty-Fifth Session (1993) (A/48/10), *Yearbook ... 1993*, vol. II (Part Two), pp. 95-97, paras. 425-439.

²⁴ For a recent example, see the decision of the ILC identifying at its fifty-second session (2000), the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme (Report of the Commission to the General Assembly on the Work of its Fifty-Second Session (2000) (A/55/10), *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729), followed four years later by its inclusion on the agenda (Report of the Commission to the General Assembly on the Work of its Fifty-Sixth Session (2004) (A/59/10), p. 306, para. 364).

²⁵ See the "General Scheme" of possible topics included in the Report on the long-term programme of work that the ILC annexed to its Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session (1996) (A/51/10), *Yearbook ... 1996*, vol. II (Part Two), pp. 133-136 (Annex II). This scheme makes a census of the various topics proposed for inclusion in the long-term programme of work, including those which had been included at that time but not put on the agenda or not yet completed.

²⁶ Jurisdictional immunity of international organizations; Protection of personal data in trans-border flow of information; Extraterritorial jurisdiction; Ownership and protection of wrecks beyond the limits of national maritime jurisdiction are still included in the long-term programme of work and still not on the Commission's agenda (See: Report of the Commission to General Assembly on the Work of its Fifty-Eighth Session (2006) (A/61/10), p. 425, para. 257).

²⁷ See above, fn. 14.

gested the least topic for inclusion on the agenda and very few States have made proposals to this aim. The General Assembly contents itself to "take note" of²⁸ – or, in the best of the cases, to "endorse"²⁹ – the "decision of the Commission" without any comments nor instructions even though it can happen that some of these topics were quite strongly criticized during the debates in the Sixth Committee.

The Appropriateness of the Topics

In spite of the care apparently taken in the selection of the topics dealt with by the ILC, the appropriateness of the topics thus selected is debatable; this is demonstrated by the (hardly polite) disinterest of the community of the States in the Sixth Committee in regard to this matter as well as by the unenviable future of most of the recent ILC drafts.³⁰

It is clear that the selection of a topic by the sole ILC, even if approved by the General Assembly, does not guarantee such an outcome as shown by too many projects stillborn adopted by the Commission and on which the General Assembly confined itself to "draw attention" or the consideration of which it postponed.³¹ As Paul Reuter explained in 1972, "[t]he choice of topics presents difficult problems. It entails not only a technical evaluation of the scope of the subject-matter, but also a practical evaluation of the interest it might have for Governments and a political evaluation of the chances of reaching a wide consensus on the basic issues. Members of the Commission are clearly qualified to make the first of those three evaluations, but they might try to express themselves cautiously on the other two points."³²

The question of the choice of topics is a subject for a distinct study in itself.³³ Suffice it to say that all too often, the Commission succumbs to the temptation of attractive and "fashionable" topics for which it is not well equipped or prepared.

It is likely that had the Commission been more careful when deciding the inclusion on its agenda of the topic on the "objective liability" and had the Sixth

²⁸ See e.g. A/RES/62/66, 8 January 2008, para. 7, taking note of the decision of the International Law Commission to include the topics "Protection of persons in the event of disasters" and "Immunity of State officials from foreign criminal jurisdiction" in its programme of work.

²⁹ See e.g.: A/RES/60/22, 6 January 2006, para. 5, "endorsing the decision of the International Law Commission to include the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)' in its programme of work."

³⁰ See Sub-Section (c) below.

³¹ See *Ibid.*

³² Observations of members of the International Law Commission on the Commission's long-term programme of work (A/CN.4/254) in Report of the Commission to the General Assembly on the Work of its Twenty-Fourth Session (1972) (A/87/10/Rev.1), *Yearbook ... 1972*, vol. II, pp. 206-207, para. 310.

³³ See e.g.: A. Pellet, "La Commission du Droit international, pour quoi faire?", *Boutros Boutros-Ghali Amicorum Discipulorumque Liber - Paix, développement, démocratie*, Bruylant, Bruxelles, 1998, pp. 595-600 (from which parts of the present text is inspired). See also: W. Pinto, "The International Law Commission: Methods of Work and Selection of Topics", in United Nations, *Making Better International Law: The International Law Commission at 50. Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, New York, 1998, pp. 233-255.

Committee been more concerned with the possibility of reaching a consensus they would simply not have retained the topic which only could reach a deadlock – and has done so: at best the two final drafts,³⁴ of which the General Assembly has taken note³⁵, deserve the not very encouraging label of “decaffeinated coffee”.³⁶ The Commission should not include in its long-term programme (and let again put on its agenda) such extremely politically sensitive topics, involving considerable economic interests, and requiring technical knowledge that the members of the ILC do not have. It is not codification *stricto sensu* (in the absence of any clear and consistent general practice); it is not even *progressive* development since it lacks a sound basis to start with and to “progressively develop”; it is pure negotiation; this is a job for diplomats, clearly not for a body composed exclusively of lawyers who do not represent their respective governments and who can hardly be considered as specialists in environmental protection (including a very large number of various fields such as: construction, supervision and management of dangerous facilities, insurance, geology, seismicity, energy nuclear, toxic substances, etc.).

No doubt that, under its Statute, the Commission may consult scientific institutions and independent experts³⁷, but this provision, which was hardly applied so far, is unlikely to enable to surround itself with all the technical advice that would be necessary. Moreover, the use of experts is expensive and it is hard to imagine that the United Nations may, in their current fiscal misery, provide the resources required to pay persons competent in the very numerous and diverse areas linked with the topic.

It is worth reminding in this regard that the 1982 Montego Bay Convention was the result of the efforts of a huge gathering of experts (among which lawyers were probably a minority), meeting many months for many years, and the topic of the “protection of the atmosphere” which the Commission has recently included on its agenda³⁸ may pose problems that are no less difficult or less sensitive than those the United Nations Conference on the Law of the Sea had to solve.

It is also true that the ILC performed with an acceptable result the codification and progressive development of the topic concerning the law of transboundary aquifers³⁹ but it would be dare devil to expect that this precedent would be easy

³⁴ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities: Report of the Commission to the General Assembly on the Work of its Fifty-Third Session (2001) (A/56/10), *Yearbook ... 2001*, vol. II (Part Two) pp. 144-170. Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities: *Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session* (2006) (A/61/10), pp. 101-182.

³⁵ A/RES/56/82, 18 January 2002 and A/RES/61/36, 18 December 2006.

³⁶ See cf BARBOZA (Julio), “State Crimes: A Decaffeinated Coffee”, in L. Boisson de Chazournes and V. Gowlland-Debbas (Eds.), *The International Legal System In Quest Of Equity And Universality*, Liber Amicorum, Georges Abi-Saab, The Hague/ London / Boston, Martinus Nijhoff Publishers, 2001, pp. 357-375.

³⁷ Article 16 (e).

³⁸ *Report of the Commission to the General Assembly on the Work of its Sixty-Third Session* (2011) (A/66/10), p. 289, para. 365 and pp. 315-329 –Annex B - S. Murase).

³⁹ See the *Report of the Commission to the General Assembly on the Work of its Sixtieth Session* (2008) (A/63/10), pp. 13-79 and A/RES/63/124, 15 January 2009.

to reproduce: the conjunction of an able exceptionally adroit Special Rapporteur (Ambassador Chusei Yamada) and of the gracious (and gratuitous) cooperation by experts from the UNESCO, alone explain this (relative)⁴⁰ success.

The current fashion to propose the inclusion of human rights oriented topics on the long-term programme of work⁴¹ and the agenda⁴² has different but equally obvious disadvantages. On the one hand, the human rights specialists and activists do not consider favourably a "generalist" body like the ILC, to be willing to encroach on what they see as their 'private turf' and that they wish to preserve from external interference. Moreover, it must be admitted that the area is already covered by a dense network of conventions to which it is hardly possible to bring significant normative improvements; the only useful progresses in this field would probably be institutional – an aim that the Commission seems unable to reach: here again, these are inconceivable without detailed negotiations between States, particularly anxious not to engage lightly in this politically sensitive area. No doubt the ILC could prepare the basis for such negotiations, but it would not be serious to substitute them in the absence of careful listening to the NGOs, so numerous and influential in the field of human rights, and to engage in a dialogue with them; this is not excluded by the Statute of the Commission but, it would involve a revolution in its working methods. The Commission cautiously ventured in this field in 1997, following the review of the second report on reservations to treaties,⁴³ but the dialogue it had proposed with the treaty monitoring bodies, although finally fruitful, has been long and difficult⁴⁴ and human rights were only relatively marginal for this topic.

Rather than engaging in these ways, attractive as they may look by their (relative ...) novelty, but very likely coming to deadlocks, and yielding to popular topics which are beyond its purpose and skill, the Commission would probably be better advised to focus its activities on its traditional areas: sources; responsibility (*lato sensu*); immunities; statehood and, more generally, the status of subjects of international law; etc. For example, it is far to have exhausted the mystery of customary law – the topic on the "formation and evidence of customary international law" that it has just included on its long-term programme⁴⁵ perfectly fits

⁴⁰ The text of the draft articles is extremely general and could only be the framework for bilateral or regional agreements (see Art. 9 of the draft, *ibid.*, p. 23) and has not been yet transformed into a framework convention.

⁴¹ See e.g.: Protection of personal data in trans-border flow of information (2006).

⁴² See e.g.: Expulsion of aliens (2004), The obligation to extradite or prosecute (*aut dedere aut judicare*) (2005) and Protection of persons in the event of disasters (2007).

⁴³ Second report on reservations to treaties (1996) (A/CN.4/477 and Add.1), *Yearbook ... 1996*, vol. II (Part One), pp. 37-83.

⁴⁴ See e.g.: Third report on reservations to treaties (A/CN.4/491 and Add.1-6), *Yearbook ... 1998*, vol. II (Part One), p. 231, paras. 15-16, Fourth report on reservations to treaties (A/CN.4/499), *Yearbook ... 1999*, vol. II (Part One), pp. 129-130, paras. 8-13 and Sixth report on reservations to treaties (A/CN.4/518 and Add.1-3), *Yearbook ... 2001*, vol. II (Part One), pp. 142-143, paras. 21-29.

⁴⁵ *Report of the Commission to the General Assembly on the Work of its Sixty-Third Session* (2011) (A/66/10), p. 289, para. 365 and pp. 305-314 (Annex A – M. Wood).

both the purpose of the Commission and the competences of its members;⁴⁶ the same can be said concerning the (less ambitious) topic on the "provisional application of treaties".⁴⁷

By contrast, although topics like "protection of persons in the event of disasters" or "protection of the atmosphere" have found some resonance in the Sixth Committee, they are 'false good ideas', put forward with a desire to improve the image of the ILC, but ultimately more likely to tarnish it: because the Commission has neither the means nor the expertise to examine them in all their complex facets, such topics, too general to be useful, too abstract to bite on reality, should be decidedly banned from the programme of the Commission and, even more strictly, from its agenda.

The Future of the ILC Drafts

The choice of inappropriate topics may partly explain the decline of the ILC's record in terms of the number of treaties based on its draft articles.⁴⁸

Although it is certainly difficult to evaluate the success – or failure – of the ILC in view of its output, it must be recalled that up to now the Commission has submitted 38 final drafts (if one includes both the Code of Crimes and the Statute of the Criminal Court); these 38 reports have resulted in 17 Conventions (plus a number of optional protocols) but this figure includes the Geneva Conventions of 1958 which were four for the sole topic of the law of the sea and are now *de facto* replaced by the 'non-ILC' Montego Bay Convention.

This is apparently not a great achievement. But the picture is less dark than it looks: first, several of these treaties, beginning with the Vienna Convention on the Law of Treaties, are among the most important ever concluded; second, and above all, it is far from certain that the influence of the work of the ILC can be properly measured through these treaty statistics.

Suffice it to recall that ILC drafts may exert a considerable influence even before they are completed. Just think, in this respect, of the remarkable impact of the Articles on State Responsibility even before they were adopted on first re-

⁴⁶ Ironically this topic is mostly advocated by those same persons who harshly criticized the former topic on unilateral acts of States (see *Report of the Commission to the General Assembly on the Work of its Fifty-Eighth session* (2006) (A/61/10), pp. 362-381). The pros and cons are just the same!

⁴⁷ *Report of the Commission to the General Assembly on the Work of its Sixty-Third Session* (2011) (A/66/10), p. p. 289, para. 365 and pp. 330-334 (Annex C – G. Gaja).

⁴⁸ On this issue see in particular Ch. Tomuschat, "The International Law Commission – An Outdated Institution?", *GYBIL* vol. 97, 2007, pp. 77-105 (and more particularly pp. 81-100); Michael Wood, "The General Assembly and the International Law Commission: What happens to the Commission's Work and Why?", in *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden, Martinus Nijhoff, 2008, pp. 373-388; or A. Pellet, "Between Codification and Progressive Development of the Law: Some Reflections from the ILC", *op. cit.* fn. 12.

ading⁴⁹. One could even go as far as to say that they are part of the 'constitutional law' of the international society; not in the formal acceptance of the word 'constitution' (this would correspond more to the UN Charter or the very rare existing peremptory norms of general international law), but in the substantive sense: they are part of the legal basis in which the international society is rooted.

While it is quite usual to measure the success of the ILC based on the number of conventions it has inspired and the ratifications or signatures they have collected. This is a simplistic view: the influence of its drafts is not limited to the circle of States Parties to these treaties. Moreover, the obligation is not the only manifestation of the legal norm, which may also recommend, encourage, authorize, warn. Although not the source of obligations (or prohibitions) the soft law exercises a significant influence on the behaviour of its recipients, and one might think that if some topics call for a study by the Commission, they do not require necessarily the conclusion of a convention properly speaking. It must be noted in particular that neither Article 16 of the Statute concerning the progressive development, nor Article 23 on the codification, impose or imply such an outcome and the second of these provisions even explicitly considering alternatives: the publication of a report or a resolution of the General Assembly.

It is therefore perfectly acceptable that the work of the ILC do not lead to a convention or even a draft convention. At least three recent examples show that its studies can deliberately lead to something else than the adoption of a convention without constituting a failure or useless work:

- As regards the topic "nationality in relation to the succession of States", it was agreed from the very beginning that the draft articles should not necessarily be included in a treaty⁵⁰, and the draft articles have been annexed to Resolution 55/153 of the General Assembly of 30 January 2001⁵¹ and should not lead to the adoption of a convention⁵²;
- Similarly, it was agreed from the very beginning that the topic of reservations to treaties would lead to the adoption of a guide to practice that is not conventional in nature⁵³ and this is what effectively happened: at its sixty-third session (2011), the Commission has adopted the Guide to Practice on Reservations to Treaties and recommended "to the General Assembly to take note of the Guide to Practice and ensue its widest possible dissemination"⁵⁴;

⁴⁹ ICJ, Judgment of 25 September 1997, *Gabcikovo/Nagymaros Project*, I.C.J. Report 1997, p. 54, par. 79. See more generally: "Introduction - The Achievement of the International Law Commission", in ILC, *International Law on the Eve of the Twenty-First Century*, United Nations, New York, Sales NE E/F 97.V4, pp. 1-18.

⁵⁰ Report of the Commission to the General Assembly on the Work of its Forty-Ninth Session (1997) (A/52/10), *Yearbook ... 1997*, vol. II (Part Two), p. 14; see also the Report of the Commission to the General Assembly on the Work of its Forty-Eight Session (1996) (A/51/10), *Yearbook ... 1996*, vol. II (Part Two), p. 76, para. 88.

⁵¹ A/RES/55/153, 30 January 2001, para. 2.

⁵² A/RES/63/118, 15 January 2009, para. 4.

⁵³ Report of the Commission to the General Assembly on the Work of its Forty-Ninth Session (1997) (A/52/10), *Yearbook ... 1997*, vol. II (Part Two), pp. 45-46, para. 58.

⁵⁴ Report of the Commission to the General Assembly on the Work of its Sixty-Third Session (2011) (A/66/10), p. 18, para. 72.

- More recently – and probably more questionably⁵⁵, the Commission has developed a new practice consisting in creating “study groups” respectively on “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”⁵⁶; “Treaties over time”⁵⁷; and “The Most-Favoured-Nation clause”⁵⁸.

This being said, the poor record of the Commission in having its drafts transformed into treaties in recent times is nevertheless a worrying signal of the disinterest of the States for the ILC and its work and of the likely unresponsiveness of its work to the contemporary needs of the international community.

Indeed there is the *magnum opus* on State responsibility⁵⁹. But it has remained under the form of (draft) Articles – even if the General Assembly took note of them; and from my point of view this half way is fortunate: had a diplomatic Conference been conveyed, no doubt that all which makes it a success – the very fortunate balance between conservative rules and some prudent step forwards would have been ‘killed’ by the conservative coalition which would no doubt have been formed if such a Conference had been summoned. In letting the Articles live their own life there is a little chance that the balance be preserved. And, for the rest, what? The only topic which had some ambition – unilateral acts of States – has been killed in its *status nascendi*;⁶⁰ the shared natural resources has given birth to a decent but limited draft on the Law of International Aquifers⁶¹; the Guide to

⁵⁵ Although I consider that the outcome of the first study thus realized – on the “fragmentation” of international law (see below fn 56) – is rather successful.

⁵⁶ As for the adoption of the topic, see: Report of the Commission to the General Assembly on the Work of its Fifty-Fourth Session (2002) (A/57/10), *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518 and A/RES/57/21, 21 January 2003, para. 2; final outcome: Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session (2006) (A/61/10), pp. 400-423 and A/RES/61/34, 4 December 2006, para. 4.

⁵⁷ Inclusion on the Commission's agenda: Report of the Commission to the General Assembly on the Work of its Sixtieth Session (2008) (A/63/10), p. 355, para. 353 and A/RES/63/123, 11 December 2008, para. 6. In 2011, the Chairman of the Study Group presented nine preliminary conclusions Report of the Commission to the General Assembly on the Work of its Sixty-Third Session (2011) (A/66/10), pp. 281-284, para. 344.

⁵⁸ Inclusion on the Agenda: Report of the Commission to the General Assembly on the Work of its Sixtieth Session (2008) (A/63/10), p. 355, para. 354 and A/RES/63/123, 11 December 2008, para. 6. In 2010, “[t]he Study Group affirmed its intention not to prepare any draft articles or to revise of the 1978 draft articles. Instead, further work will be undertaken under the overall guidance of the Co-Chairmen of the Study Group to put together a draft report providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate make recommendations, including model clauses.” Report of the Commission to the General Assembly on the Work of its Sixty-Third Session (2011) (A/66/10), p. 288, para. 362.

⁵⁹ To which the ILC draft articles on diplomatic protection (Report of the International Law Commission on the Work of its Fifty-Eighth Session (2006) (A/61/10), pp. 13-100) and on the responsibility of international organisations (Report of the Commission to the General Assembly on the Work of its Sixty-Third Session (2011) (A/66/10), pp. 52-172) can hardly be compared both because of their more limited scope and their lesser quality.

⁶⁰ The Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations were adopted in 2006 (see the Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session (2006) (A/61/10), pp. 369-381).

⁶¹ See above, fn. 39.

Practice on Reservations to Treaties is a hopefully useful but very technical instrument. And several of the on-going projects are not very promising.

But again, the ILC does not bear the exclusive responsibility for this situation – and probably not the main one. The real truth is that States – which have virtually proposed *no* topic to the ILC during the two last decades (even the draft Statute of the ICC was more or less an invention of the ILC itself) – have no project, no design, and no ambition for the ILC. And I am afraid that this holds true for international law as a whole: they do not “trust” international law; at worst they breach its rules (but this has always been the case: not “breachable” rules are not legal rules); at best they consider it as useful tool for day-to-day conduct but, “World Peace through World Law”, “Development through a New International Legal Order”, clearly appear as slogans of a remote past⁶². But the ILC was established in that context. It could be a good idea to adapt it to the changes which have occurred since its creation in 1947. For the time being, the ILC continues as if nothing had changed. If it is not profoundly reformed and “rethought”, it will persist to vegetate and its influence, its authority and its credibility to inexorably decline...

⁶² I borrow part of this conclusion to my paper to the Fourth Biennial Conference organised by ESIL and the University of Cambridge in 2010. (“Less is More: International Law of the 21st Century - Law without Faith”, in J. Crawford & S. Nouwen (ed.), *Select Proceedings of the European Society of International Law*, Hart Publishing, vol. 3, 2011 – forthcoming).