
Selection of Works for the International Law Commission: A Brief Assessment after 75 Years

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The selection of topics to be included in the long-term program of work is a part of the working methods of the International Law Commission. A good selection of topics provides a good start to the Commission's work and fulfills its double function of the progressive development and codification of international law. The process of selecting works for the long-term program of work now faces numerous challenges such as the appearance of new areas of international law and the increased engagement of States and international organizations in the preparation of new conventions outside the Commission's channel. The challenges call for further improvement of criteria for the selection of works to preserve and enhance the quality of the Commission's work. This article will briefly highlight the process of the selection of works in the Commission's history and focus on the implementation of criteria for the selection of topics used during various times, and their advantages and limitations.

Keywords

International Law Commission, Codification, Progressive Development, Selection of Works

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I. Introduction

Nearly eight decades have passed since the International Law Commission (ILC) was created in 1947. As a subsidiary of the UN General Assembly (UNGA), the ILC has the function of discharging the UNGA's responsibilities under Article 13, paragraph 1 of the UN Charter, namely the encouragement of "the progressive development of international law and its codification" by creating an excellent platform for international cooperation and promoting a rules-based order. The ILC in its history has meaningfully contributed to realizing this objective as well as to sustaining international peace and security based on the UN Charter.

To carry out this task, the first issue for the Commission is to list the topics to be dealt with.¹ A good selection of topics is the starting point for its long-term work. A good selection determines the quality of the Commission's outcomes in meeting the urgent needs of States and promoting the progressive development and codification of international law. The selection of works as a part of the working methods of the Commission now faces numerous challenges such as the appearance of unprecedented areas of international law and the increased engagement of States and Non-State Actors (NSAs) in the preparation of new conventions outside the Commission's channel. The challenges call for further improvement of the criteria for selecting the works to preserve and enhance the quality of the Commission's work.²

Against this backdrop, this research tries to examine the process, criteria, and influencing factors behind the selection of topics for the Commission's long-term program of work. This article is composed of four parts including Introduction and Conclusion. Part two will briefly highlight the process of the selection of works in the Commission's history. Part three will discuss the implementation of the 1998 criteria which consists of different factors affecting the selection of topics, as well as their advantages and limitations. Part four will conclusively give some suggestions on how to improve the process of the selection of works in the future.

1 UN, *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission, Memorandum by Secretary-General*, Int'l Law Comm'n, U.N. Doc. A/CN.4/1/Rev.1, ¶ 19, https://legal.un.org/ilc/documentation/english/a_cn4_1_rev1.pdf.

2 Danae Azaria, *The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE 173 (United Nations ed., 2021).

II. Selection of Works for the International Law Commission

The “Survey of International Law in Relation to the Work of Codification of the International Law Commission” submitted by the Secretary-General in 1949 was the first survey document for the purpose of the selection of works for the Commission.³ The memorandum surveyed nine fields of international law⁴ and recommended 25 topics for starting the Commission’s work.⁵ Based on this memorandum, the ILC provisionally selected 14 topics for codification.⁶ The period from 1949 to 1971 can be said to be the time mainly focusing on the codification of international law by the ILC resulting in many significant achievements such as the 1958 Geneva Conventions on the Law of the Sea and the 1969 Vienna Convention on the Law of Treaties.

In 1971, the situation changed dramatically in the world politics when communist China (Beijing) replaced the UN Security Council’s permanent membership with the nationalistic (Kuomintang) government in Taiwan. Furthermore, the emergence of the new developing countries as well as the new composition of the Commission affected the selection of topics, which shifted from a technical to a political direction. The number of international lawyers and diplomats who comprised the members in the Commission gradually increased. They paid more attention to the political and practical aspects of the selected topics, as compared to their predecessors who mainly favored the method of codifying international law.⁷ Scientific-technological developments also promoted new rules of law for such activities in untouched areas as the protection of the environment. New challenges require an early resolution rather than patiently following the process of developing an international treaty through the Commission’s mechanism: drafting articles, convening conferences, conducting

3 UN, *supra* note 1.

4 The nine fields are: The General Part of International Law; States in International Law; Jurisdiction of States; The Individual in International Law; The Law of Treaties; The Law of Diplomatic Intercourse and Immunities; The Law of Consular Intercourse and Immunities, The Law of State Responsibility and The Law of Arbitral Procedure.

5 *Report of the International Law Commission to the General Assembly*, 4 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/925 (1949), reprinted in [1949] 1 Y.B. Int’l L. Comm’n 280, ¶ 15, U.N. Doc. A/CN.4/SER.A/1949.

6 *Id.* at 281, ¶¶ 16-7.

7 Alain Pellet, *The International Law Commission - what is it for?* [La Commission du Droit international, pour quoi faire?], in BOUTROS BOUTROS-GHALI: A BOOK OF FRIENDS AND DISCIPLES – PEACE, DEVELOPMENT, DEMOCRACY [Boutros Boutros-Ghali Amicorum Discipulorumque Liber - Paix, développement, démocratie] 585 (1998); Fernando Bordin, *Reflections of Customary International Law: The authority of codification conventions and ILC Draft Articles in International Law*, 63:3 INT’L & COMP. L. Q. 550 (2014).

negotiations, as well as the process of accession to the new convention.⁸

States do not want to be too tied up by their commitments in the ever-changing world, either. While treaties are only valid for the parties who have ratified them, soft law can be invoked by multiple parties. States thus prefer to strengthen international law through soft law or “non-legislative codifications.”⁹ By way of Resolution 1505 (XV) of December 12, 1960, titled “Future work in the field of the progressive development and codification of international law,” the General Assembly noted that it was necessary and desirable to survey the present state of international law. Resolution 1505(XV) required an identification of new topics susceptible of codification or conducive to progressive development. It also asked for considering whether priority should be given to the topics already included in the Commission’s list or for a broader approach in the selection of any of these topics.¹⁰

However, it was not until 1971 that the second survey of topics for the long-term program of work of the ILC was conducted. There were two reasons for this survey. One is to review a new list of topics that may be included in its long-term program of work and that are susceptible to codification or conducive to progressive development, taking into account the General Assembly’s recommendations and the international community’s current needs. And, the other is to exclude those topics on the 1949 list which were no longer suitable for treatment.¹¹

The second survey recognized the achievements of the Commission after 22 years of work: the experience gained in the progressive development and codification of the law, focusing on such new areas as the law of outer space or the law relating to the environment. It did not propose a list of topics like the 1949 version, but gave an overall assessment of 17 areas of law¹² and suggested priority for topics in every field. Essentially, the ILC transitioned into a new period from the foundational codification of general international law to the thematic codification in each specific field of international law.¹³

Although the sources of selected topics may vary immensely, ranging from the

8 Shinya Murase, Concluding Remarks, in *SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE* 437 (United Nations ed., 2020).

9 See generally NILS JANSEN, *THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATIONS IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 1-138 (2010).

10 G.A. Res. 1505(XV), U.N. Doc. A/RES/1505(XV), pmb., ¶ 1.

11 *Report of the International Law Commission to the General Assembly*, 25 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/8010/Rev.1 (1970), reprinted in [1970] 2 Y.B. Int’l L. Comm’n 309, U.N. Doc. A/CN.4/SER.A/1970/Add.1.

12 *Id.* at 9-99.

13 Keun-Gwan Lee, *Recalibrating the Conception of Codification in the Changing Landscape of International Law*, in *SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE* 183 (United Nations ed., 2020); Bordin, *supra* note 7, at 538-46.

assignment of topics by the General Assembly, recommendations of international organizations or the requirements of States, the decision to include them in the long-term program of the ILC's work depends ultimately on the careful verification by the members of the Commission before submission of selected topics to the General Assembly for adoption. To facilitate this task, a Working Group for the long-term program of work (WGLP) has worked under the direction of the ILC since 1992. The task of the Working Group is to consider the priority of a limited number of topics suggested by the ILC members and its Secretariat, to adopt or reject certain topics, and to recommend the topics to the Bureau and Plenary meetings of the Commission for the final decision before submission to the General Assembly for inclusion in the work program of the Commission.¹⁴

The 1996 survey by the Secretariat¹⁵ classified general fields of public international law, subdividing them into already completed topics, topics under consideration by the ILC, and possible topics for future work. Under the recommendation of the WGLP at the 66th session of the Commission, held in 2014, the second review and update of the list of possible topics (using the 1996 list as a starting point) was carried out in 2015-16.¹⁶ Taking account of subsequent developments in international law, a list of potential topics for the Commission is not exhaustive. The review of the topics that have not been touched upon in the traditional lists of 1949 and 1971, and the inclusion of new potential topics accompanied by brief explanatory notes made by the Secretariat should be expected by the end of each quinquennium.

In the meantime, the Working Group would continue to consider any topics that individual members may submit. The three-phase process of the selection of topics, consisting of: the identification of possible topics; the preparation of a short paper on a given topic; and the preparation of a more detailed syllabus, applied by the Working Group was welcomed by the ILC.¹⁷ A short paper might assist governments in the discussion process to include potential topics that meet their needs for the long-term program of work of the Commission.

The new procedure requires precise criteria to guide the selection process. The

14 *Report of the International Law Commission to the General Assembly*, 47 U.N. GAOR Supp. No. 10, at 54, ¶¶ 368-9, U.N. Doc. A/47/10 (1992), reprinted in [1992] 2 Y.B. Int'l L. Comm'n 54, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (Part 2).

15 *Report of the International Law Commission to the General Assembly*, 51 U.N. GAOR Supp. No. 10, annex II, at 133-6, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int'l L. Comm'n 133, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

16 *Report of the International Law Commission to the General Assembly*, 69 U.N. GAOR Supp. No. 10, at 164-5, ¶¶ 271-2, U.N. Doc. A/69/10 (2014), reprinted in [2014] 2 Y.B. Int'l L. Comm'n 164, U.N. Doc. A/CN.4/SER.A/2014/Add.1 (Part 2).

17 *Report of the International Law Commission to the General Assembly*, 71 U.N. GAOR Supp. No. 10, at 217, ¶ 311, U.N. Doc. A/71/10 (2016), reprinted in [2016] 2 Y.B. Int'l L. Comm'n 217, U.N. Doc. A/CN.4/SER.A/2016/Add.1 (Part 2).

preliminary requirement of 1992 for the individual members who intended to proceed with the topic was very simple. They are just asked to focus on outlining the nature of the topic and documenting including: (1) any applicable treaties, general principles, or relevant national legislation or judicial decisions; and (2) existing doctrine.¹⁸ To improve this procedure, the new criteria for selecting topics in 1998 are suggested as follows.

- a. the topic should reflect the needs of the States with respect to the progressive development and codification of international law;
- b. the topic should be sufficiently advanced in terms of State practice to permit progressive development and codification;
- c. the topic is concrete and feasible for progressive development and codification; and
- d. the topic should not be limited to traditional topics, but could also extend to those that reflect new developments in international law and pressing concerns of the international community as a whole.¹⁹

Those criteria are expected to reduce the uncertainty and assist in the selection of topics.

III. Implementation of the 1998 Criteria for Selecting Topics through the Long-term Program of Work of the ILC

A. Integration of Progressive Development and Codification in Selecting Topics

From the very beginning, whether the ILC had two separate or integrated methods of work involving progressive development and codification was a point of contention. If only considering the provisions of the ILC Statute, the two rules of managing the selection of topics for the Commission are envisaged to be separate as can be seen in

18 *Report of the Planning Group on the Programme, Procedures, and Working Methods of the International Law Commission*, U.N. Doc. A/CN.4/L.473/Rev.1, at ¶ 24 (1992).

19 *Report of the International Law Commission to the General Assembly*, 53 U.N. GAOR Supp. No. 10, at 110, ¶ 553, U.N. Doc. A/53/10 (1998), reprinted in [1998] 2 Y.B. Int'l L. Comm'n 110, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 2).

Sections A and B of Chapter II of the ILC Statute.²⁰

The progressive development of international law which has not yet been sufficiently developed in the practice of States has only been initiated following a proposal from the General Assembly.²¹ A similar proposal can be submitted by the UN members, the principal organs of the UN other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement.²² Those proposals emerged are usually of a political nature in order to satisfy the urgent needs of the international community. In case of codification, meanwhile, the Commission is entitled to proactively conduct surveys on the entire field of international law, so as to select desirable topics and submit draft articles dealing with prioritized questions to the General Assembly.²³

The survey of 1949 mainly paid attention to how to fulfill the mandate of “selecting topics for codification” prescribed in Article 18 of the ILC Statute.²⁴ Some opinions highlighted the Commission’s responsibility to ensure the precise character of its products.²⁵ Others observed the use of draft conclusions, draft guidelines and other forms of soft law instruments rather than draft articles in the final outcomes of the Commission as a signal of the exhaustion of traditional topics for codification in international law and the start of a new phase concentrating on the progressive development of international law.²⁶ From 1981 to 2024, only two draft articles of the ILC served as basic documents for negotiating the conventions that entered into force: the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses; and the 1998 Statute for an International Criminal Court.²⁷

The year 2025 marks a significant milestone in the Commission’s journey to fulfill its mandate of codifying and progressively developing international law with

20 Statute of the International Law Commission (ILC Statute), U.N. Doc. A/RES/174 (II) (1947).

21 ILC Statute art. 16. It reads: “When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow in general a procedure on the following lines...”

22 *Id.* arts. 16-17.

23 *Id.* arts. 18-20. The vote made in 1949 has an affirmative response to the question: “Has the Commission competence to proceed under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2.” See *Report of the International Law Commission on the Work of Its First Session*, U.N. Doc. A/CN.4/13 (1949), at 280, ¶¶ 12–20, reprinted in [1949] 1 Y.B. Int’l L. Comm’n 280, U.N. Doc. A/CN.4/SER.A/1949.

24 U.N. Doc. A/CN.4/13 and Corr.1–3 (1949), at 279, ¶ 9.

25 Pellet, *supra* note 7, at 593-5. See also ILC, *Report of the Planning Group on the Programme, Procedures, and Working Methods of the Commission and Its Documentation*, U.N. Doc. A/CN.4/L.664/Rev.1 (2004), at ¶ 3, https://digitallibrary.un.org/record/526757/files/A_CN.4_L.664_Rev.1-EN.pdf. It reads “The topic is precise and presents a theoretical and practical utility in terms of codification and progressive development of international law.”

26 Murase, *supra* note 8, at 2017-8.

27 Another case is the 2004 Convention on Jurisdictional Immunities of States and Their Property which was adopted (without a vote) by the UNGA Resolution 59/38 (Dec. 2, 2004) and opened for signature on January 17, 2005.

the launch of two new treaty negotiation processes: Prevention and Punishment of Crimes against Humanity (Crimes Against Humanity) and the Protection of Persons in the Event of Disasters.²⁸ The ILC practice has proved that the Commission has never separated the function of codification from the one of the progressive development of international law in the selection and realization of topics.²⁹ The purpose of codification is to facilitate the enforcement of existing rules of law affirmed by State practice. But codification does not mean freezing existing laws or making them immobile. Codification forms the basis for revising present rules and proposing new rules to meet the fresh needs of the international community.

On the one hand, the progressive development of international law through legislation encourages the spread of new rules of law among States. In turn, they make a basis for codification in the future.³⁰ In existing laws, there are elements to promote the progressive development of new rules. With time and the support of State practice, however, some elements in the new rule may be transmissive to the codified rule.³¹ The distinction between the two working methods on progressive development and codification of rules prescribed in the ILC Statute has an academic value rather than practical implication.

On the other, draft articles are the main form of final products of the ILC without distinction for the progressive development or codification process. The forms other than draft articles such as draft guidelines, draft conclusions, draft principles, or model rules are envisaged by Article 23 under Section B, Chapter II of the ILC Statute that provides for codification. The 1998 criteria acknowledged the parallel existence and implementation of both functions in selecting new topics. Criteria (b) has not distinguished the degree of State practice required for either codification or progressive development. It gives the ILC the freedom to decide whether State practice is sufficiently advanced to permit progressive development and codification. This observation can be drawn from several examples of the ILC's recent practice in selecting topics.

28 United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity, U.N. Doc. A/C.6/79/L.2/Rev.1 (Dec. 4, 2024); Draft Resolution on Protection of Persons in the Event of Disasters, U.N. Doc. A/C.6/79/L.16 (Dec. 12, 2024).

29 *Report of the International Law Commission to the General Assembly*, 26 U.N. GAOR Supp. No. 9, at 7, U.N. Doc. A/8410/Rev.1 (1971), reprinted in [1971] 2 Y.B. Int'l L. Comm'n 7, U.N. Doc. A/CN.4/SER.A/1971/Add.1 (Part 2). It reads reads: "...the distinction between "codification" and "progressive development," as the methodological basis for the approach to be taken by the Commission, has not been maintained in the practice of the Commission".

30 Pellet, *supra* note 7, at 604.

31 *Id.* at 592. See also Donald McRae, *The Work of the International Law Commission, 2007-11: Progress and Prospects*, 106:2 AM. J. INT'L L. 322-334 (2017); UN, *SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE* 278 (2021).

Concerning the notion of “fundamental values” which is referred to by draft conclusion 2 of the report on “Peremptory norms of general international law (*jus cogens*),” six out of 60 States expressed the view that the concept “is not grounded on a sufficient basis of State practice.”³² A few states commented that the elements of draft conclusion 2 do not correspond to the Vienna Convention on the Law of Treaties, and that the development of the concept “fundamental values” goes beyond what was originally envisaged in Articles 53 and 54 of the Vienna Convention on the Law of Treaties.³³

However, many other countries including Spain observed that notwithstanding “the doubts of a few States,” it was clear that peremptory norms “reflect and protect the fundamental values of the international community.”³⁴ The difference in the States’ comments has not prevented the ILC from accepting the recommendation of maintaining the element of “fundamental values” in draft conclusion 2, which refers to “Nature of peremptory norms of general international law (*jus cogens*).”³⁵ The Special Rapporteur, D. Tladi, who was later elected to a judge of the International Court of Justice in 2024, observed that “Behind or underlying each peremptory norm, were particular fundamental values.”³⁶ He further noted that “These values are not static and will change with time.”³⁷

The selection of the topic of “Sea-level rise in relation to international law” illustrates an exception from the distinct procedure envisaged by the ILC Statute. It is a result of parallel proposals, from the discussion of the Fourth Report on the Protection of the Atmosphere, examined during the 69th session of the ILC in 2017³⁸ and from the proposal of the Government of the Federated States of Micronesia dated January 31, 2018 to the ILC for the inclusion of this topic on the Long-Term Program of Work of the International Law Commission entitled “Legal implications of Sea level Rise.”³⁹

32 Dire Tladi (Special Rapporteur), *Fifth Report on Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/CN.4/747 (2022), at 17, ¶ 46.

33 *Id.* at 8.

34 *Id.* at 21, ¶ 57.

35 *Report of the International Law Commission on the Work of Its Seventy-Third Session*, U.N. Doc. A/77/10 (2022), at 18.

36 *Supra* note 32.

37 *Draft Report: Chapter IV - Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/CN.4/L.960/Add.1 (2022), at 7, ¶ 7.

38 Summary Record of the 3355th Meeting of the International Law Commission, U.N. Doc. A/CN.4/SR.3355 (May 10, 2017), at 19. Intervention of Mr. Nguyen: “He further proposed that the topic of the sea level rise should be included in the Commission’s long-term programme of work.”

39 *Syllabus: Reparation to Individuals for Gross Violations of International Human Rights Law*, U.N. Doc. ILC(LXX)/LT/INFORMAL/1 (Jan. 31, 2018), at 1.

A Study Group of five Members of the ILC was established and the topic was included in the program of work by the Commission's decision at its 3467th meeting on May 21, 2019.⁴⁰ Noticeable is that the topic was selected at a stage where State practice had not yet sufficiently advanced to permit progressive development and codification. It was chosen rather on the reflection of the needs of the States, in particular of the Western Pacific States,⁴¹ following new developments in international law and pressing concerns of the international community as a whole.

It is clear that, instead of following the distinction made in the ILC Statute, the Commission has been maintaining the tradition of integrating or combining progressive development and codification in the selection process of topics.⁴² Any attempt to make a distinction between the two methods of work could lead to the risk of opening "Pandora's Box" with unforeseen consequences.

B. Needs and Pressing Concerns of the International Community

The products of the ILC should reflect the needs of each State and the international community as a whole. This requirement is rooted in the Commission's functions as a subsidiary body of the General Assembly for the progressive development and codification of international law. The codification of international law aims to register existing unwritten rules which serves as to reflect social reform and progress.⁴³ However, the role of the ILC is not restrained to drafting articles for conventions, but involved in the development of new laws. The political character of the selection process may be emphasized in this regard.

The Report of 1998 extended new criteria for the selection of topics. The topic chosen by the ILC should not be limited to traditional themes, but extend to those reflecting new developments in international law and pressing concerns of the international community as a whole. These criteria require a common effort: on the one hand from States, the General Assembly and other specialized international organizations, while, on the other, from the Working Group Members for the long-term program of works. In the ILC's history, some topics were selected through

40 Summary Record of the 3467th Meeting of the International Law Commission, U.N. Doc. A/CN.4/SR.3467 (May 21, 2019), at 19.

41 Hong Thao Nguyen, *Sea Level Rise and the Law of the Sea in the Western Pacific Region*, 13:1 J. E. ASIA & INT'L L. 121-42 (2020).

42 UN, MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50: PROC. OF THE UNITED NATIONS COLLOQUIUM ON PROGRESSIVE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW 376 (1998); Azaria, *supra* note 2, at 174 ("any topic may include both instances of codification and of progressive development to varying degrees").

43 Yuen-li Liang, *The Progressive Development of International Law and its Codification under the United Nations*, in PROC. ASIL ANN. MEETING 24-40 (1947).

requests of or invitations from the General Assembly. The following are the examples:

1. The principles of International Law recognized in the Charter and the Judgment of the Nürnberg Tribunal (completed in 1950 by way of a request made by the General Assembly in 1947)
2. The Evolution of the idea of an international criminal jurisdiction (completed by way of an invitation from the General Assembly in 1950)⁴⁴
3. A draft code of offenses against the peace and security of mankind (selected through both a request (1947) and an invitation (1981), with the topic being completed from the 34th to 48th sessions (1982-96))⁴⁵

However, the General Assembly's orders have been few and sporadic in the history of the ILC. Until now, the General Assembly has only sent 16 requests and invitations, seven of which were made in the very early years of the Commission.⁴⁶ Other words such as "instructed, directed, entrusted" was also used.⁴⁷ Nevertheless, due to the urgent nature of the orders, the topics were completed in record time. An example is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents adopted in 1973. It was based on the study of the ILC in response to the request made in General Assembly's Resolution 2780 (XXVI) of December 3, 1971.⁴⁸

Another example relates to the draft statute for an international criminal court which was adopted by the ILC in 1994 in response to the invitation made by the General Assembly in Resolutions 45/41 of November 28, 1990 and 46/54 of December 9, 1991.⁴⁹ The exceptional case of prolonged drafting is the Draft Articles on the Law of the Non-navigational Uses of International Watercourses submitted in 1994, responding to the recommendations of the General Assembly made in 1959 and 1970.⁵⁰

Proposals by countries can also generate discussions in the Commission on the selection of appropriate topics. Discussions on the aforementioned Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was kicked off following the proposal of the Mission of

44 G.A. Res. 260 B (III), U.N. Doc. A/RES/260(III)B (Dec. 9, 1948).

45 G.A. Res. 36/106, U.N. Doc. A/RES/36/106 (Dec. 10, 1981).

46 10 topics were requested (Topics 1.5; 1.8; 6.2; 8.3; 8.4; 9.1; 9.4; 9.5; 9.6; 9.10) and 6 topics were invited by the General Assembly (Topics 1.6; 4.1; 5.1; 7.2; 7.4; 7.5). These numbers correspond to the number within the Annex-table.

47 G.A. Res. 178 (II), U.N. Doc. A/RES/178(II) (Nov. 21, 1947).

48 G.A. Res. 3166 (XXVIII), U.N. Doc. A/RES/3166(XXVIII) (Dec. 14, 1973).

49 G.A. Res. 45/41, U.N. Doc. A/RES/45/41 (Nov. 28, 1990); G.A. Res. 46/54, U.N. Doc. A/RES/46/54 (Dec. 9, 1991).

50 G.A. Res. 1401 (XIV), U.N. Doc. A/RES/1401(XIV) (Nov. 21, 1959); G.A. Res. 2669 (XXV), U.N. Doc. A/RES/2669(XXV) (Dec. 8, 1970).

the Netherlands to the United Nations on May 14, 1970.⁵¹

In 2011, the Commission received a written suggestion from Portugal that the topic “Hierarchy in International Law” should be considered.⁵² To be selected, a suggestion from an individual State must reflect the needs of the international community. The suggestion will be selected only through the discussion at the ILC and reported to the 6th (Legal) Committee. Any topic included in the Commission’s long-term program of work should be considered at the 6th Committee’s meeting and finally accepted by a resolution of the General Assembly. The application of the 1998 criteria of “new developments in international law and pressing concerns of the international community as a whole” is not straightforward, as illustrated by the following examples.

In the selection process⁵³ and the outcome of the topic on the “Protection of atmosphere,”⁵⁴ the “pressing concern” was always underlined. Nevertheless, the selection was completed only with very strict conditions through the 2013 Understanding⁵⁵ proposed by some members due to concerns about the interference of the topic with relevant political negotiations on climate change. The failure to mention the basic principles of environmental law in the draft such as the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights, has made this report fall short of expectations.

The difference of views on the degree of the “pressing concern” of discussed topics also provides an obstacle. In 2017, the WGLP refused to accept the proposal on “Legal Principles applicable to the Land Boundary-making process” that followed the suggestions of the Secretariat on “Principles on border delimitation” (2010) and “Land boundary delimitation and demarcation” (2016).⁵⁶ The importance of the topic of the “territorial domain of States” was raised in the 1949 and 1971 surveys including significant existing State practice and jurisprudence.

To avoid any misunderstanding in dealing with the territorial acquisition disputes and to make the topic more concrete, practical and feasible, the Secretariat recommended the ILC “to address a narrower subset of issues, limited to the legal principles applicable to the land boundary delimitation and demarcation, to guide

51 Pellet, *supra* note 7, at 594.

52 U.N. Doc. A/CN.4/679 (Mar. 5, 2015), at 7.

53 U.N. Doc. A/66/10 (2011), annex II, at 189, ¶ 1.

54 ILC, *Report of the International Law Commission of its Seventieth Session*, U.N. Doc. A/73/10 (2018), at 158.

55 ILC, *Yearbook Report 2013*, U.N. Doc. A/68/10 (2013), ch. XII, ¶ 168.

56 U.N. Doc. A/CN.4/679/Add.1 (Mar. 31, 2016), at 13 & 21.

and assist Governments in dealing with those matters.”⁵⁷ The “Land Boundary delimitation and demarcation” was the second topic on the list of ongoing studies carried out by the African Union Commission on International Law (AUCIL) in 2017.⁵⁸ However, the objection was based on the degree of the “pressing concern.” The guidelines for land boundary settlements may be a pressing concern for the African and Asian continents but not for other geographical places where boundaries are stable. Accordingly, the question was deemed not a priority.

Another example involved the discussion on the topic of “Self-Determination Rights.” Some argue that it is only associated with the process of decolonization, not with post-decolonization,⁵⁹ while others suggest that elucidating the legal definition of the “Rights of People on Self-Determination” be important in order for the ILC to provide legal guidance on practical issues faced by member states.⁶⁰ All topics discussed or selected by the ILC contain both technical and political aspects. It is not the political factor that determines whether or not a topic is chosen, but rather its practicality and the likelihood of whether the Commission can reserve its neutrality when examining the legal aspects of the topic.

The 1998 criteria (d) should provide more guidance on the degree of urgency or pressing concern, considering the ratio between traditional and contemporary development issues. To meet the pressing concerns of States, it is necessary to encourage proactive proposals from States and the General Assembly; improve the relationship between the ILC and member States of the 6th (Legal) Committee; and above all, promote the proactivity of the Commission in giving guidelines or conclusions on solving the world’s practical and urgent issues, in addition to those of a theoretical nature. A responsive topic must be treated in a single quinquennium, not for 2-3 quinquenniums as it is now.

C. No Duplication with the Work of Other Bodies

To fulfill its functions for the progressive development and codification of international law, the ILC may send a questionnaire to the governments, inviting them to supply, within a fixed period, data and information relevant to the topics included in the plan

57 *Id.* at 13, ¶ 32.

58 *Statement by Representatives of the African Union Commission on International Law*, in Summary Record of the 3376th Meeting, U.N. Doc. A/CN.4/SR.3376 (July 18, 2017), ¶¶ 36, 46, reprinted in [2017] 1 Y.B. Int’l L. Comm’n 244-5, U.N. Doc. A/CN.4/SER.A/2017.

59 Syllabus on Self-Determination of Peoples (Revised ed. 2017), proposed by Mr. Kigab Park, U.N. Doc. ILC(LXIX)/WG/LT/INFORMAL/1 (Apr. 17, 2017).

60 *Id.*

of work.⁶¹ It sets the ILC as the permanent body apart from other research bodies in drafting pivotal instruments of public international law on the ground of State practice. With the emergence of numerous organizations and intergovernmental bodies mandated to draft treaties on highly specialized issues, the Commission is fully aware that it is no longer the sole institution entrusted with the drafting of international conventions, particularly on specific areas of international law.

The technological developments put the ILC in a disadvantaged position in comparison with expert committees⁶² or ad hoc groups, which possess not only legal knowledge but also deep technical expertise - particularly in specialized fields of international law such as environmental protection, healthcare, and biodiversity. In response, the Commission has strengthened its collaboration with technical experts, inviting them to present reports and participate in its sessions. Since 1973, especially, the tendency to assign multilateral and professional topics to expert committees or ad-hoc groups have been enforced. The ILC was not entrusted to prepare the negotiation text for the UN Third Conference on the Law of the Sea, even though it was the author of the draft text for the Geneva Conference on the Law of the Sea. A Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction was assigned that task.⁶³

In relation to the new issue of cybercrime, the open-ended intergovernmental expert group played a primary role in conducting a comprehensive study on cybercrime.⁶⁴ The new Convention on the Use of Information and Communications Technologies for Criminal Purposes (Convention on Cybercrime) will be open for signature at a formal ceremony in Hanoi in 2025.⁶⁵

Furthermore, the Marine Biodiversity in Areas Beyond National Jurisdiction (BBNJ) Working Group was set up by the UNGA in 2004 for the newly emerging task of the Law of the Sea.⁶⁶ The outcome of this process is the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction

61 ILC Statute art. 16(c).

62 E.g., WHO Expert Committee on Biological Standardization, WHO Expert Committee on Specifications for Pharmaceutical Preparations, Joint FAO/WHO Expert Committee on Food Additives. See WHO, Expert Advisory Panels and Committees, WHO Doc. WHA53.10 (2017), <https://www.who.int/docs/default-source/documents/ihr/expert-advisory-panels-and-committees-fact-sheet.pdf>.

63 EDMUND OŚMAŃCZYK, *ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS: N TO S* 1176 (2003).

64 UNODC, Open-ended Intergovernmental Expert Group Meeting on Cybercrime, <https://www.unodc.org/unodc/en/organized-crime/open-ended-intergovernmental-expert-group-meeting-on-cybercrime.html>.

65 UNGA, *Report of the Third Committee: Countering the use of information and communications technologies for criminal purposes*, U.N. Doc. A/79/460 (Nov. 27, 2024).

66 *Id.*

(BBNJ Agreement) adopted on June 19, 2023.⁶⁷ The selection of topics for the ILC should avoid any overlapping with the competence of the institutions concerned.⁶⁸ That is not to say that the ILC does not have the power to deal with similar topics from a legal perspective. In those cases, however, as the Commission's reports are complementary, they do not conflict with the research of other agencies.

The time factor can also influence the selection process of topics, as the Commission's decision-making process often requires extended deliberation. The process of deciding whether to adopt the proposal to draft a treaty on pandemic prevention and control in response to the outbreak of COVID-19 serves as a clear example. The COVID-19 pandemic has called for "a global response based on unity, solidarity and renewed multilateral cooperation."⁶⁹ To respond to the pandemic, international law is an effective tool to ensure international cooperation and multilateralism.⁷⁰ In 2020-21, some members of the ILC proposed to establish a Study Group to consider the topic of epidemics in international law with a sense of urgency in order to help the international community meet the challenges of the present and future epidemics.⁷¹ At the same time, L'Institut de Droit International (whose members include some members of the Commission) initiated the topic of "Epidemics, Pandemics and International Law."⁷²

On December 1, 2021, the World Health Organization (WHO) adopted a resolution⁷³ to establish an Intergovernmental Negotiating Body (INB) to strengthen pandemic prevention, preparedness and response. It decided that the body was "open

67 *Id.*

68 *Supra* note 15, annex II, at 133, ¶ 3.

69 G.A. Res. 74/270 pmb. (Apr. 2, 2020). (Global solidarity to fight the coronavirus disease 2019 (COVID-19)).

70 *Id.* at ¶ 1. *See* G.A. Res 74/274 (Apr. 20, 2020) (International cooperation to ensure global access to medicines, vaccines and medical equipment to face COVID-19; G.A. Res A/RES/74/L.92 (Sept. 10, 2020) (Comprehensive and Coordinated response to the Coronavirus (COVID-19) pandemic).

71 Protection of Persons from Epidemics, Proposal by Shinya Murase to the ILC Working Group on Long-term Programme of Work, 20 March 2020; Study Group on Epidemics in International Law, proposal by Claudio Grossman, Charles C. Jalloh, Thao Nguyen Hong to the ILC Working Group on Long-term Programme of Work, U.N. Doc. ILC(LXXII)/WG/LT/INFORMAL/2 (July 13, 2021).

72 Shinya Murase, *Report on Epidemics and International Law*, 2020, at 43 (L'Institut de Droit International, 2020), <https://www.idi-ii.org/app/uploads/2021/05/Report-12th-commission-epidemics-vol-81-yearbook-online-session.pdf>. *See also* IDI, New Commission: Epidemics and International Law, <https://www.idi-ii.org/en/nouvelle-commission-pandemies-et-droit-international>; Claudio Grossman, *Epidemics and International Law: The Need for International Regulation*, 29:2 U. MIAMI INT'L & COMP. L. REV. 206 & 227 (2022).

73 WHO, *The World Together: Establishment of an Intergovernmental Negotiating Body to Strengthen Pandemic Prevention, Preparedness and Response*, U.N. Doc. SSA2(5) (Dec. 1, 2021); On May 7, 2025, Member States of the World Health Organization have agreed to a global process to draft and negotiate a convention, agreement or other international instrument under the Constitution of the World Health Organization to strengthen pandemic prevention, preparedness and response. *See* WHO, *Pandemic prevention, preparedness and response accord* (May 7, 2025), <https://www.who.int/news-room/questions-and-answers/item/pandemic-prevention-preparedness-and-response-accord>.

to all Member States and Associate Members (INB) to draft and negotiate a WHO convention, agreement or other international instruments on pandemic prevention, preparedness and response, with a view to adoption under Article 19, or other provisions of the WHO Constitution as may be deemed appropriate by the INB.”⁷⁴ Experts of the WHO and the ILC are of the view that an assessment of international law as an effective tool in the response to epidemics would not be in conflict with the conclusion of a binding multilateral convention, rather it can act as a supplementary recommendation.⁷⁵

The ILC should be prudent and cautious in selecting topics that have already been handled by another body. The selection of the topic on “Succession of States in respect of State responsibility” in 2016⁷⁶ after the adoption of L’Institut de Droit International’s 2015 resolution on State Succession in Matters of State Responsibility⁷⁷ puts the Commission in a difficult position. The minimal State practice (notably from European States), the duplication of L’Institut’s resolution, and the unclear final form of the outcome of the topic gave rise to concerns among States about the topic’s utility.⁷⁸ In light of the difficulties faced in the work on this topic, the Commission, at its 75th session, decided to establish a Working Group at its 76th session (2025) to draft a report that would bring the work of the Commission on the topic to an end without the appointment of a new Special Rapporteur.⁷⁹ This decision was made following the proposal of the Working Group to consider various possible ways forward to complete the work of the topic.

The selection of a good and practicable topic depends on many other factors such as: the appointment of a Special Rapporteur(s); the equal allocation of topics to Members from different geographical areas; the implementation time (during one or several quinquennia, the number of topics discussed in a quinquennium, e.g., 8 topics considered in the 2017 session); the ripeness of State practice; and the readiness of the Commission. For example, the topic of “Recognition of States and Governments,” while appearing in the 1949 list, has yet to be discussed.

⁷⁴ *Id.* at 1.

⁷⁵ U.N. Doc. ILC(LXXIII)/WG/LT/INFORMAL/3 (July 19, 2022).

⁷⁶ At its 3354th meeting, on May 9, 2017, the topic was included in the long-term programme of work of the Commission during its sixty-eighth session (2016), based on the proposal contained in annex B to the report of the Commission. See *supra* note 17.

⁷⁷ MARCELO KOHEN & PATRICK DUMBERY, *THE INSTITUTE OF INTERNATIONAL LAW’S RESOLUTION ON STATE SUCCESSION AND STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 178 (2019).

⁷⁸ UNGA, *Report of the International Law Commission on the work of its seventy-second session* (2021), U.N. Doc. A/Cn.4/746 (Feb. 28, 2022), at 8, ¶¶ 42-3. It states: “The utility of the topic given the paucity and inconsistency of State practice was questioned.”

⁷⁹ *Report of the International Law Commission on the Work of Its Seventy-fifth Session*, U.N. Doc. A/79/10 (2024), ¶ 39.

IV. Conclusion

The selection of topics for the ILC's work has faced many challenges in response to geopolitical changes and the development of international law. The Commission has not limited itself to traditional topics, but has expanded to reflect new developments in international law and pressing concerns of the international community as a whole. The ILC's operational practice affirms the indistinguishability between the progressive development and codification of international law. The codification process includes seeds for the modification of existing rules and future development, while the progressive development of international law facilitates the codification of new rules. In contemporary world, the balance of the two functions in the selection and handling of the ILC's topics tips slightly in favor of the progressive development of international law.

The ILC needs to involve itself broadly in the topics that more greatly reflect the needs of States in respect of the progressive development and codification of international law. The Commission is not the primary organ to make law on behalf of the international community, but its study will help shed light on new concepts of international law, shaping the direction for maintaining peace, justice, and a rules-based order. Depending on the importance, size and difficulty, the codification of a time-honored question of international law requires a long time to complete, while new topics are emerging shortly. The ILC should also shorten the time it takes to prepare a report on urgent issues considering that many of them could quickly become dated and lose their relevance. Further, the Commission should strengthen its partnerships with other expert bodies to expand its ability to study specific, concrete, and feasible issues as well as to reduce the duplication with other research bodies' topics.

While draft articles are still the main final form of products of the ILC as prescribed in its Statute, the use of other "soft forms," such as draft guidelines, draft conclusions, draft principles, or model rules will increasingly prevail in the recent practice of the Commission. The determination of the final form of expression from the beginning greatly affects the progress and outcome of the topic. It needs to be shaped early and included in the selection process.

The ILC has some autonomous powers in selecting topics. In this regard, however, the final decision rests with the General Assembly and its member States. To improve the quality of topics selected in meeting the urgent requirements of states, it is crucial to improve the relationship between the ILC and the 6th (Legal)

Committee. The holding of the first part of a session during each quinquennium in New York will facilitate direct contact between legal advisers of States and members of the Commission during the 6th Committee's meetings to help better understand the needs and requirements of States. Side-event activities help show the intention of the ICL and encourage new orders from States and the General Assembly.⁸⁰

The selection of topics is neither just a technical process, nor limited to assessing the level of State practice sufficiently permitted for the progressive development and codification of international law. Rather, it includes a practical assessment of the interests of States as well as the possibility of reaching a common consensus on key issues in the international community. It requires serious, independent work to face new emerging needs as well as the initiative of States and the General Assembly to better utilize the full potential of the ILC in realizing the task of progressive development and codification of international law.

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80 *Report of the International Law Commission on the Work of Its Seventy-third Session*, U.N. Doc. A/77/10 (2022), 347, ¶ 281.