

---

# The ILC's New Way of Codifying International Law, the Motives Behind It, and the Interpretive Approach Best Suited to It

LUIGI CREMA

## 1 Introduction

Over the past two decades, the International Law Commission (ILC) has taken an original approach to its 'progressive codification' activity.<sup>1</sup> For the most part, in defining international law, the ILC has tended to set aside the attempt to draft articles and pursue binding rules,<sup>2</sup> expressing instead a descriptive conception of its own work, mostly dedicated to the general framework (i.e., sources, interpretation of norms, responsibility), where specialised, codified in written treaties, regimes operate. This course is not necessarily an independent shift by the ILC itself but reflects the expectations of states nowadays with respect to the commission. To ponder the work of the ILC is an exercise in both understanding how the commission composed by independent experts understands its job and understanding how states look to govern the international community. This chapter aims at reflecting on the activity of the ILC and analysing its transformation over the past decades. In particular, it looks at the way it has, in agreement with the international community of states, interpreted its role, in particular of distilling written restatements of customary law, capturing and crystallising the otherwise often murky and erratic international practice.

<sup>1</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 13(1)(a); UNGA, 'Statute of the International Law Commission' (21 November 1947) UNGA Res 174 (II) (as amended by UNGA Res 485 (V) (12 December 1950), 984 (X) (3 December 1955), 985 (X) (3 December 1955) and 36/39 (18 November 1981)) art 1.

<sup>2</sup> P Weil, 'Le droit international en quête de son identité' (1992) 237 RdC 9, 11 ff; see also, with more provocative tones, P Weil, 'Vers une normativité relative en droit international?' (1982) 86 RGDIP 5, 5 ff; M Goldmann, 'Relative Normativity' in J d'Aspremont & S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 740.

The ILC lately tends to avoid the progressive development of law, rather providing restatements of international practice and scholarly doctrines on given topics. In other words, the ILC looks more and more to the codification of customary rules in written, not binding, form rather than aiming at shaping future practice through new treaties. In recent decades, the ILC has come to rarely draft articles aiming at becoming treaties. It occasionally works with this aim, but the success rate of ILC draft articles turning into a treaty in force has been statistically negligible over the past quarter century. Today, the drafting of written material rules tends to happen on different, bilateral or regional, tables, but not at the ILC.

Sections 2 and 3 of this chapter are dedicated to parsing the activity of the ILC and looking at the contemporary revolution in how it carries out its activity of codification, where the key aspect of the activity of codification is not the creation of treaties, but rather the synthesis of existent practice in order to assist the judicial bodies. Notably, its efforts to create general codifications of law have become outdated. In part, the new course of the ILC is geared toward the creation of guidelines, in part toward the scholarly study of topics of general interest, and in part, finally, toward codifying draft articles aiming at becoming treaties – but without going toward any international conference that intends to negotiate a final text.

All these materials have in common the fact of offering written rules, the binding status of which is not clear, and of creating questions about how to assess their contents. As non-binding restatements of international practice, they (both as guidelines and as articles that do not materialise into a convention) amount to a restatement of practice and are, therefore, open for the assessment of the content of the rule they express as is the case for customary rules. Since they are in written form, in an international law document or a document governed by international law, they call for interpretation using the tools of written international law – Article 31–33 of the Vienna Convention on the Law of Treaties (VCLT), which is, nowadays, used not only to interpret treaties, but also every act of international law.<sup>3</sup> This chapter has several aims. The first is to illustrate the presence and extent of the shift described here, with a look at the factual grounds. The second is to reflect on the reasons for this transformation. The last is to reflect on the interpretive approach

<sup>3</sup> L Crema, *La prassi successiva e l'interpretazione del diritto internazionale scritto* (Giuffrè 2017) 3–6.

toward the work of the ILC in defining non-binding (but written) guidelines and articles (that do not become treaties).

In order to do this, the next pages will be dedicated to providing an overview of the work and evolution of the ILC approach to codification and development of international law (Sections 2 and 3), its legality under the UN Charter and the ILC Statute (Section 4), and its possible reasons and purposes (Section 5). The chapter will close with an assessment of its effective impact in the work of international courts and tribunals (Section 6), and explain what are the goals and principles which the ILC should consider in carrying out this new course and the interpretive approach that best suits it.

## 2 A Brief Survey of the Kind of Activities of the ILC Since the Beginning of Its Work: 1949–2020

Since 1949, when the ILC began its operations, it has addressed many different issues, particularly concerning the sources of international law and the law of international relations. As of 1 July 2020, counting its works on the most-favoured-nation clause (MFN clause) as two separate works, the ILC had completed forty-three topics.<sup>4</sup> Five topics were discontinued or not pursued further.<sup>5</sup> Eight topics are still under consideration.<sup>6</sup>

Looking only at the concluded topics, in sixteen cases, *the ILC approved articles that eventually were brought to a diplomatic conference and culminated in a multilateral treaty*. Some of them are well known: the law of treaties, the 1958 conventions on the law of the sea, the works on the succession of treaties, and many others, up to the works on international criminal law, which resulted in the Rome Statute of 1998.<sup>7</sup> The most recent works of this kind were those dedicated to state immunity, completed in

<sup>4</sup> ILC, 'Analytical Guide to the Work of the International Law Commission' (ILC, 10 December 2019) <<http://legal.un.org/ilc/guide/gfra.shtml>> accessed 1 March 2021.

<sup>5</sup> Fundamental rights and duties of States; Status, privileges and immunities of international organisations, their officials, experts, *etc*; Right of asylum; Juridical régime of historic waters, including historic bays; shared natural resources (oil and gas).

<sup>6</sup> Provisional application of treaties; Peremptory norms of general international law (*jus cogens*); General principles of law; Succession of States in respect of State responsibility; Immunity of State officials from foreign criminal jurisdiction; Protection of the environment in relation to armed conflicts; Protection of the atmosphere; Sea-level rise in relation to international law.

<sup>7</sup> Law of the sea – regime of the high seas; Law of the sea – regime of the territorial sea; Diplomatic intercourse and immunities; Consular intercourse and immunities; Special missions; Law of treaties; Succession of States in respect to treaties; Succession of States in respect of matters other than treaties; Representation of States in their relations with

1991, which led to the adoption of the United Nations (UN) Convention on Jurisdictional Immunities of States and their Property, in 2004.

In twelve cases the ILC produced draft articles that *did not later become* (or, have not yet become) *the object of an initiative toward the adoption of a multilateral treaty*.<sup>8</sup> The most famous example is that of the articles on state responsibility for internationally wrongful acts in 2001.<sup>9</sup> The more recently concluded works could, in theory, still become the object of a diplomatic conference to complete a multilateral treaty: the draft articles on prevention and punishment of crimes against humanity were just adopted by the ILC, in 2019, although several states, including Egypt, Russia and Turkey, had already manifested opposition to this project.<sup>10</sup> At the moment, however, these twelve works have never undergone the difficult path of an international diplomatic conference aiming at reaching a treaty. So, while they are formulated in articles, as definitions and obligations, their binding effect has never been crystallised by any binding treaty.

Three topics *produced guidelines or principles*.<sup>11</sup> Except for the ‘reservations saga’, where the adoption of guidelines was proposed during the

international organizations; Treaties concluded between States and international organizations or between two or more international organizations; Nationality including statelessness; Jurisdictional immunities of States and their property; Draft code of offences against the peace and security of mankind (Part I); Draft code of crimes against the peace and security of mankind (Part II) – including the draft statute for an international criminal court; Law of the non-navigational uses of international watercourses; Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law.

<sup>8</sup> For example State Responsibility (2001); Expulsion of Aliens (2014); Diplomatic Protection (2016); Crimes against Humanity (2019).

<sup>9</sup> Already since 2007, and then periodically, the United Nations General Assembly (UNGA) leaves open the possibility of convening an international conference with a view to adopting a convention; see UNGA Res 62/61, ‘Responsibility of States for Internationally Wrongful Acts’ (6 December 2007) UN Doc A/62/446; more recently, UNGA Res 74/180, ‘Responsibility of States for Internationally Wrongful Acts’ (18 December 2019) UN Doc A/RES/74/180.

<sup>10</sup> See the final draft articles in ILC, ‘Report of the International Law Commission on the Work of Its 71st Session’ (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 10–140.

<sup>11</sup> ILC, ‘Title and Texts of the Preamble and the Draft Principles on the Allocation of Loss Arising Out of Hazardous Activities Adopted by the Drafting Committee on Second Reading’ (1 May–9 June and 3 July–11 August 2006) A/CN.4/L.686 and Corr.1; ILC, ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto’ [2006/II – Part Two] YBILC 161; ILC, ‘Guide to Practice on Reservations to Treaties, with Commentaries’ (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10/Add.1.

extremely lengthy working sessions, for all the other topics, the ILC intended from the beginning to produce this result.

Six topics *culminated in studies*. The first, on the evidence of customary law, led by Manley Hudson in 1950, concludes with a series of recommendations on the publication of state and international practice. The others are more recent and concern the so-called fragmentation of international law, the principle of *aut dedere aut iudicare* and the MFN clause, a highly controversial topic in arbitrational awards on international investments.<sup>12</sup> Two other topics, on subsequent agreements and subsequent practice and on the identification of customary international law, were not discussed by a study group but in the ordinary procedure of work. However, like a study group, they produced a set of *conclusions*.<sup>13</sup>

*The six remaining topics* are difficult to place in a single category. They include: those on international criminal jurisdiction and on the multilateral treaties concluded under the aegis of the League of Nations, which were structured as legal opinions and lack the depth of a proper study;<sup>14</sup> the works on the soft codification of the Nuremberg principles and on the 'model rules' of arbitration procedure (which, with the proper distinctions, could be grouped with works to establish guidelines);<sup>15</sup> the brief work on the formation process for multilateral treaties; and the earliest study on reservations, which was, *de facto*, rolled into its work on the law of treaties a few years later.<sup>16</sup>

These classifications can be further refined and specified, according to the specific procedure and content adopted for each particular topic,<sup>17</sup> but, for the purpose of this chapter, it is enough to generically differentiate

<sup>12</sup> Ways and Means for Making the Evidence of Customary International Law More Readily Available (1950); Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006); Obligation to Extradite or Prosecute (*aut dedere aut iudicare*) (2014); Most-Favoured-Nation Clause (Part Two) (2015).

<sup>13</sup> Identification of Customary International Law (2015); Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties (2016).

<sup>14</sup> Question of International Criminal Jurisdiction; Extended Participation in General Multilateral Treaties Concluded under the Auspices of the League of Nations.

<sup>15</sup> Formulation of the Nürnberg Principles; Arbitral Procedure.

<sup>16</sup> Review of the Multilateral Treaty-Making Process; Reservations to Multilateral Conventions.

<sup>17</sup> See for example SD Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' in M Ragazzi (ed), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 29, 36 ff.

between works dedicated to attempts at codification, and other kinds of works.

At this time, July 2020, the ILC is working on eight topics.<sup>18</sup> The three works on sources are intended to produce soft law; those on the provisional application of treaties are geared toward the formulation of ‘guidelines’; those on *jus cogens* and general principles are geared toward ‘conclusions’.<sup>19</sup> The three works on the environment are similarly organised: the topic about the protection of the environment during armed conflicts is intended to produce ‘draft principles’; the topic on the protection of the atmosphere aims at producing ‘draft guidelines’; while the ILC on 21 May 2019 established a study group on sea-level rise in relation to international law.<sup>20</sup> Only two topics are intended to produce articles: the one on the succession of states in respect of state responsibility, and the one on the immunity of state officials from foreign criminal jurisdiction.

### 3 A Close-Up on the Work of the ILC in the Third Millennium

If we consider only the time period between the year 2000 and today, the numbers are particularly revealing of a shift toward an express intention of the ILC and the UN General Assembly (UNGA) to produce soft law or treaties on international law, rather than draft articles for new multilateral conventions.

*Five works adopted guidelines or principles.* These included the guiding principles on unilateral acts and on loss from transboundary harm arising out of hazardous activities, both from 2006,<sup>21</sup> as well as the

<sup>18</sup> Provisional application of treaties; Peremptory norms of general international law (*jus cogens*); General principles of law; Immunity of State officials from foreign criminal jurisdiction; Protection of the environment in relation to armed conflicts; Protection of the atmosphere; Sea-level rise in relation to international law; Succession of States in respect of State responsibility.

<sup>19</sup> The work on general principles is leaning in this direction, see ILC, ‘Report of the International Law Commission on the Work of Its 69th Session’ (1 May–2 June and 3 July–4 August 2017) UN Doc A/72/10 224–25 [4].

<sup>20</sup> ILC, ‘Report of the International Law Commission on the Work of Its 71st Session’ (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 340–41.

<sup>21</sup> On the *Unilateral acts of States* the ILC adopted ILC, ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto’ (n 13); ILC, ‘Report of the International Law Commission on the Work of Its 58th Session’ (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10; see ILC, ‘Title and Texts of the Preamble and the Draft Principles on the Allocation of Loss Arising out of Hazardous Activities Adopted by the Drafting Committee on Second

guidelines on the reservations to treaties, from 2011. Upon close consideration, the (endless) works on reservations, which lasted a full eighteen years, produced something more than a basic set of guidelines, but rather something closer to scholarship: the *Guide to Practice on Reservations to Treaties*.<sup>22</sup> The works on practice and successive agreements and on the identification of customary law resulted in the definitive adoption of 'Conclusions'.<sup>23</sup> Three works were intended from the beginning to be eminently scholarly. They included, first of all, that on the fragmentation of international law, which began in 2000 and was completed in 2006<sup>24</sup>. It contains forty-two final conclusions, and the study group itself, at the close of the working sessions, brought the centrality of the over 250-page overall doctrinal work to attention of the UNGA, on the basis of the conclusions themselves: 'The Study Group stressed the importance of the collective nature of its conclusions. It also emphasized that these conclusions have to be read in connection with the analytical study, finalized by the Chairperson, on which they are based.'<sup>25</sup> Second is that on the *aut dedere aut judicare* principle, completed in 2014, which produced a slim document of less than twenty pages.<sup>26</sup> Last is that on the MFN clause,

Reading' (n 11). While the first half of works on the International Liability for Transboundary Harm ended up in a project of articles – 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities', ILC, Official Records of the General Assembly, 56th Session, Supplement No. 10, UN Doc A/56/10 – in which the UNGA contemplated the possibility of adopting an international convention, about this second part the ILC merely recommended the UNGA to approve the draft principles, and asked states to implement further domestic and international initiatives able to make them effective.

- <sup>22</sup> ILC, 'Guide to Practice on Reservations to Treaties, with Commentaries' (n 11) which has an introduction and an annex with further conclusions and recommendations.
- <sup>23</sup> ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11; ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11.
- <sup>24</sup> ILC, 'Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682.
- <sup>25</sup> ILC, 'Report of the International Law Commission on the Work of Its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 176 [237].
- <sup>26</sup> ILC, 'Final Report: Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' (5 May–6 June and 7 July–8 August 2014) UN Doc A/CN.4/L.844; see also UNGA Res 69/118, 'Report of the International Law Commission on the Work of Its 66th Session' (10 December 2014) UN Doc A/RES/69/118 calling for the widest dissemination of the ILC Report.

from 2015.<sup>27</sup> Like the case before, this study group produced a brief document, containing a concise commentary, just over thirty pages long, on the practice of states that followed the ILC's earlier works on the same subject.<sup>28</sup> Even Nolte's work on subsequent practice and agreements began, in 2008, in the form of a study group on 'Treaties over time,' falling *de facto* into the body of work on fragmentation and aiming to complete it with a reflection on the other two parts of Article 31(3) of the 1969 Vienna Convention on the Law of Treaties.<sup>29</sup> However, as noted above with regard to Pellet's work on reservations, Nolte's and Wood's works are short commentaries with sets of conclusions which make them halfway between the guidelines, and the conclusions of scholarly studies. Therefore, even if some of these topics were not discussed by dedicated study groups, a total of six of the ILC's recent works involve studies that are chiefly academic.

Since 2000, only six works culminated in the adoption of draft articles, later approved by the UNGA, but never brought to the preparation of an international convention, nor to the convocation of a diplomatic conference.<sup>30</sup> The last international conventions which were entirely based on the work of the ILC or which greatly benefited from it are the already mentioned 2004 UN Convention on immunity of States (which originated in a topic completed in 1991), and the 1998 ICC Rome Statute (the preparatory works of which relied on the parallel works of the ILC on criminal law).<sup>31</sup> Only *two topics*, diplomatic protection and protection of persons in the event of disasters, culminated in draft articles that are under discussion (and have been for some years) to potentially become an international convention.

<sup>27</sup> Most-Favoured-Nation Clause (Part Two) (67th Session, 2015).

<sup>28</sup> ILC, 'Final Report: Study Group on the Most-Favoured-Nation Clause' (4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/L.852.

<sup>29</sup> In 2008 the ILC created a Study Group on *Treaties over Time*; ILC, 'Programme, Procedures and Working Methods of the Commission, and Its Documentation' (1997) reproduced in [1996/II – Part Two] YBILC 84 [351–52]; UNGA Res 63/123, 'Report of the International Law Commission on the Work of Its 60th Session' (11 December 2008) UN Doc A/RES/63/123. In 2012, the ILC then changed the format of the topic during its 64th Session, in 2012.

<sup>30</sup> State responsibility (2001); Responsibility of international organizations (2011); International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (2013); Expulsion of aliens (2014); Diplomatic protection (2016); Crimes against Humanity (2019). In all these cases the ILC requested the UNGA to consider the adoption of an international convention.

<sup>31</sup> For a concise summary of the relationship between the ILC and the Rome Statute see Murphy (n 17) 30–1.

As already briefly described above, of the eight topics that are still open and under discussion in July 2020, six are not connected with any plans to draft articles. All works on sources and on the environment are intended to produce soft law (guidelines, principles, of studies with conclusions), and only two of the topics currently under discussion aim at adopting draft articles (whose legal bindingness still needs to be proved through the test of time and of an international convention, or through the test of courts, recognising them as the expression of customary rules).<sup>32</sup>

#### 4 The Legality of the New Path Taken by the Commission

This change of direction by the ILC is striking: the production of draft articles is dwindling. First, as a preliminary observation, it must be noted that, while this ILC approach geared toward academic work and drafting of guidelines is new, it is also legal under the UN framework. Article 1(1) of the 1947 Statute of the International Law Commission provides: 'The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.' This provision echoes the meaning of 'progressive development of international law' of Article 13 of the UN Charter<sup>33</sup> and seems to extend to *any activity* which aims at developing and codifying international law. It is true that Article 15 of the same statute specifies what is meant by 'progressive development of international law': 'In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions.'

Other ILC activities, not geared toward the conclusion of international conventions, would appear to be excluded. However, the same provision adds, further down, that: 'the expression "codification of international

<sup>32</sup> Succession of States in respect of State Responsibility; Immunity of State Officials from Foreign Criminal Jurisdiction.

<sup>33</sup> Article 13(1)(a) of the UN Charter: 'The General Assembly shall initiate studies and make recommendations for the purpose of: promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.' On the intertwining of the activity of *codification* and *progressive development* of international law by the ILC see J Sette Câmara, 'The International Law Commission: Discourse on Method' in R Ago (ed), *Le droit international à l'heure de sa codification: études en l'honneur de Roberto Ago*, Vol 1 (Giuffrè 1987) 477–89; Murphy (n 17) 31–32; see also ILC, 'Formation and Evidence of Customary International Law, Elements in the Previous Work of the International Law Commission that Could Be Particularly Relevant to the Topic, Memorandum by the Secretariat' (5 May–7 June and 8 July–9 August 2013) UN Doc A/CN.4/659, 147–48.

law” is used for convenience as meaning the more precise *formulation and systematization of rules of international law*, in fields where there already has been extensive State practice, precedent and doctrine.<sup>34</sup> Article 20 of the ILC Statute directs the commission to prepare draft articles with a commentary containing reference to precedents and other relevant data, such as treaties, judicial decisions and doctrine. In this way, the statute opens up to any activity characterised by in-depth study of international scholarship and practice, even when it does not result in the elaboration of draft articles, but in the adoption of guidelines, conclusions, principles or mere studies.<sup>35</sup>

While the treaty-oriented work under Article 23 of the commission statute has, in some sense, been shelved because draft articles no longer end up in international conventions, the ILC’s work in preparing non-binding guidelines and draft articles ends up exercising the option described by Article 24 to make the evidence of customary law more readily available. Guidelines are technically non-binding, but their importance should not be underestimated. As written summaries of state practice, which look at selected practice and generalise it, the ILC guidelines have potential to be considered as stating binding customary law.

## 5 Attempts to Uncover the Reasons for the Transformation: The Context of the Fragmentation of International Law

There are many reasons for this evolution, which touch on a variety of different, though interconnected, planes. The first is a sort of renunciation

<sup>34</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993, art 15 (emphasis added); see also A Tanzi, ‘Le forme della codificazione e lo sviluppo progressivo del diritto internazionale’ in G Nesi & P Gargiulo (eds), *Luigi Ferrari Bravo: Il diritto internazionale come professione* (Editoriale Scientifica 2015) 152 ff.

<sup>35</sup> In 1996 the ILC Working Group on the Long-Term Programme adopted a set of three criteria in order to select new 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. ILC Study Group, ‘Programme, Procedures and Working Methods of the Commission, and Its Documentation’ (n 29) [238]. In 2014 the secretariat proposed a new list of topics, maintaining these criteria: ILC, ‘Long-Term Programme of Work: Review of the List of Topics Established in 1996 in the Light of Subsequent Developments, Working Paper Prepared by the Secretariat’ (2 May–10 June and 4 July–12 August 2016) UN Doc A/CN.4/679/Add.1.

of the work of imposing solutions on contested topics, instead embracing the work of restating international practice (codification of international law). Any hopes that the ILC would *create* law and propose (and, therefore, impose) it upon states have been extinguished, and the ILC has settled into taking merely descriptive, rather than prescriptive, positions. Using the terminology of the UN Charter, the ILC has taken a step back with regard to *developing* law, settling on its mere *codification*. The decisive event pushing in this direction took place during the long development of the articles on the responsibility of states and its final epilogue. After decades of discussions, James Crawford, pointing to the clashing viewpoints of different governments on the contents of Article 19 of Roberto Ago's 1996 draft articles (responsibility of states for international crimes), eliminated the article itself and moved the draft forward toward its leaner final version.<sup>36</sup>

Another reason is the fragmentation of the international community, and of international law in many of its forms. There are more states and, concomitantly, more state practice, and, therefore, there are more interests to try to converge into a single rule.<sup>37</sup> Moreover, there is a greater number of states aiming at leading the international community: following after the stability of the bipolar phase,<sup>38</sup> and the euphoric moment that followed the fall of the Berlin Wall (during which international law was sometimes framed as the tool of a unipolar world)<sup>39</sup> diminished, their place was taken by a multipolar situation that was, at the very least, much more complex than the previous one,<sup>40</sup> if not actually a full-blown 'international disorder'.<sup>41</sup> Vast international conferences and multilateral treaties became difficult to imagine.

<sup>36</sup> ILC, 'First Report on State Responsibility by Mr James Crawford, Special Rapporteur' (24 April 1998) UN Doc A/CN.4/490 and Add 1-7 [52 ff]; G Arangio-Ruiz, 'Fine prematura del ruolo preminente di studiosi italiani nel progetto di codificazione della responsabilità degli Stati: specie a proposito di crimini internazionali e dei poteri del Consiglio di sicurezza' (1998) 71 RivDirInt 110.

<sup>37</sup> G Abi-Saab, 'La coutume dans tous ses états ou le dilemma du développement du droit international général dans un monde éclaté' in R Ago (ed), *Le Droit international à l'heure de sa codification: études en l'honneur de Roberto Ago* (Giuffrè 1987) 61.

<sup>38</sup> KN Waltz, 'The Stability of a Bipolar World' (1964) 93(3) *Daedalus* 881.

<sup>39</sup> AM Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *AJIL* 205; F Fukuyama, 'The End of History?' (1989) 16 *The National Interest* 3. Fukuyama later explained that international cooperation, in particular in the EU, represents the real expression of the end of history, absorbing in democratic procedures all previous traditions and disagreements in F Fukuyama, 'The History at the End of History' (*Guardian*, 3 April 2007) <<https://bit.ly/2ZEKDPK>> accessed 1 March 2021.

<sup>40</sup> M Happold (ed), *International Law in a Multipolar World* (Routledge 2011).

<sup>41</sup> E Di Nolfo, *Il disordine internazionale: Lotte per la supremazia dopo la Guerra fredda* (Bruno Mondadori 2012); Franco Mazzei, *Relazioni Internazionali* (Egea 2016) 1.

Related to this enlargement of the actors playing at the international level is the explosion of legal scholarship, which offers several contexts for proposing diverging interpretations of the law, with an ever-growing number of reviews and specialised publications.<sup>42</sup> On the other hand, international law itself started losing its UN-centred simplicity: specialised international law regimes began to emerge with increasing frequency, with the relative proliferation of courts and tribunals, and the resulting ‘judicialisation’ of international law.

The recent work of the ILC has been dedicated to help international law to find its centre,<sup>43</sup> fighting back these centrifugal phenomena. The debate on fragmentation of international law began in 1993, when Edith Brown Weiss reflected on the difficult coordination in environmental law due to what she called ‘treaty congestion’.<sup>44</sup> It then gained momentum in 1995, when Robert Jennings, former President of the International Court of Justice (ICJ), shifted the attention from the possible clash of treaties to the possible interpretive conflicts between jurisdictions. He publicly warned of the dangers that could potentially flow from the introduction of new international tribunals.<sup>45</sup> It was the time of the creation of ad hoc criminal tribunals, of the Dispute Settlement Body of the World Trade

<sup>42</sup> A Roberts, *Is International Law International?* (Oxford University Press 2017). The topic has often been discussed by Joseph Weiler in several editorials of the *European Journal of International Law* dedicated to the hyper production of contemporary legal scholarship. John Louth tried to catalogue publications about international law in French, German and English, giving up for the enormous number of books and law reviews constantly published: J Louth, ‘How Much Public International Law Scholarship Is There?’ (*EJILTalk!*, 10 January 2017) <<https://bit.ly/3o3pTBq>> accessed 1 March 2021. Already in 1987, I Brownlie, ‘Problems Concerning the Unity of International Law’ in R Ago (ed), *Le Droit international à l’heure de sa codification: études en l’honneur de Roberto Ago* (Giuffrè 1987) 155–56, stressed the expansion and parochialisation of legal scholarship.

<sup>43</sup> This concern emerges clearly in J Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill Nijhoff 2014) 308–09.

<sup>44</sup> E Brown Weiss, ‘International Environmental Law: Contemporary Issues and the Emergence of a New World Order’ (1993) 81 *GeoLJ* 675, at 697. On a thorough description of the emergence of the issue of fragmentation of international law see T Treves, ‘Fragmentation of International Law: The Judicial Perspective’ (2007) 23 *Comunicazioni e Studi* 821.

<sup>45</sup> R Jennings, ‘The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers’ in L Boisson de Chazournes (ed), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (ASIL Publications 1995) 2, 5–6: ‘[T]hat is probably the main danger of proliferation, the fragmentation of international law; and by fragmentation I do not mean the very proper local variations for particular purposes. . . . It indicates the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented.’

Organization, of the Tribunal for the Law of the Sea and so on. How could international jurists respond to a danger of this kind? With 'strong' international law, made up of hierarchies and dogmas?

To a reader in 2020, the solution proffered in the year 2000 by another ICJ president, the French jurist Gilbert Guillaume, to make the ICJ the ultimate guarantor of the coherence of international law, seems somewhat naïve. While Guillaume did not go so far as to imagine the ICJ as a sort of Supreme Court of Cassation of the international legal order (indeed, he observed that appeals and cassation procedures are utilised only very rarely in international law),<sup>46</sup> he did believe that the court at The Hague should be accepted, at least, as a superior court, with the power to receive requests for clarification 'on doubtful or important points of general international law raised in cases before them', following the method of the reference for a preliminary ruling mechanism used by the Court of Justice of the European Union.<sup>47</sup>

The ILC's reaction to each of these evolutions and its response to these underlying issues over the past two decades have amounted to a total departure from the hierarchical approach of Guillaume. The ILC took stock of fragmentation, and, rather than seeing the proliferation of courts and tribunals as a threat, it saw it as an opportunity to deal with the explosion in the number of legal regimes, states and of legal scholarships: the ILC shifted its potential audience from governments gathered in a multilateral diplomatic conference to litigants and adjudicators. It provides them with guidelines dedicated to sources useful for adjudication, with a plausible, legitimate, common interpretive background in a body of expert scholarship useful for *decoding*<sup>48</sup> potentially conflicting interpretations of given rules.<sup>49</sup> It also proposes

<sup>46</sup> HE Judge G Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order' (*Speech to the Sixth Committee of the General Assembly of the United Nations*, 27 October 2000) 6 <[www.icj-cij.org/public/files/press-releases/1/3001.pdf](http://www.icj-cij.org/public/files/press-releases/1/3001.pdf)> accessed 1 March 2021. Then he concludes: 'This would, however, require a powerful political will on the part of States and far reaching changes in the Court, which would need to be given substantial resources. I am not certain whether such a will exists.'

<sup>47</sup> *ibid* 7.

<sup>48</sup> N Irti, *L'età della decodificazione* (Giuffrè 1978) played on the two possible meanings of the term '*decodificazione*' in Italian: the *dismantling* of the central role of the Italian Civil Code in many special regimes and the *decoding* of a message. Both meanings are well suited to contemporary international law.

<sup>49</sup> International law scholarship has a rather rich scholarship on the so-called soft law. See T Treves, 'International Law: Achievements and Challenges' in J Cardona Llorens (ed), *Cursos Euromediterraneos Bancaja de Derecho Internacional*, Vol 10 (Tirant lo Blanch 2006) 452–70; J d'Aspremont, 'Softness in International Law: A Self-Serving Quest'

(customary – and therefore binding?) restatements of practice about other general issues of international law, leaving it to *those called to adjudicate over a specific dispute* to provide the definitive answer on their legal bindingness.<sup>50</sup>

In order to achieve this, the ILC set about *weakening* general international law, in the philosophical sense that it reflects the thought established by a society that lacks consensus on ultimate values,<sup>51</sup> so to be flexible enough to encompass and serve the new, many, international law regimes. The term ‘weak’ is used here because the ILC has been characterised by an approach to defining the law that disregards the goal of final approval of strong, binding, treaties; weak because the power of orienting the conduct of states and adjudicators does not come from a command, but from persuasion, that is from the quality of a given study; weak because it assumes that the validity and authority of a rule does not come from the precision and clearness of its content, but rather from its structured interpretation.

First, the ILC affirms the unity of the international system, not as a single set of binding, material rules, but by proposing the formal unity of its rules dedicated to the determination and establishment of international law. It furnishes parties to a dispute and adjudicators with a common legal ground of principles and guidelines to deal with the sources of international law. At the same time, the ILC has overcome the threat of the explosion of legal scholarships in order to propose, with its guidelines and commentaries, the unification of reasoning about the law, by creating a *unique context* for its interpretation: a sort of ‘official scholarship’.<sup>52</sup> The ILC’s series of works on the sources of international law and the interpretation of written law is very clear on this: it is, quite simply, the attempt to state a single line of orthodoxy on secondary rules

(2008) 19 EJIL 1075; A Pellet, ‘Les raisons du développement du *soft law* en droit international: choix ou nécessité?’ in P Deumier & JM Sorel (eds), *Regards croisés sur la soft law en droit interne, européen et international* (LGDJ 2018) 177–92.

<sup>50</sup> The operation that Martti Koskenniemi described as the core of international law, see M Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (2nd ed, Cambridge University Press 2005) 474 ff.

<sup>51</sup> Echoing the term used about postmodern thought by PA Rovatti & G Vattimo (eds), *Il pensiero debole* (Feltrinelli 1983).

<sup>52</sup> On this is still relevant what has been observed by PM Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1998–99) 31 NYUJIL&Pol 791; see also Koskenniemi (n 50) 474 ff.; A Pellet & D Müller, ‘Article 38’ in A Zimmermann & CJ Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, Oxford University Press 2019) 914–15.

of international law (according to the Hartian meaning), and to create a line of official scholarship. It both fosters and creates the internal point of view on law and creates an official legal context in which to assess the contents of rules.<sup>53</sup> This official scholarship (a doctrine that distils other doctrine and practice) is: authoritative<sup>54</sup> (because of the credibility and plurality of its source – the ILC of the UN); easily accessible (an easy internet search is all it takes); and open to be used and adopted by anyone involved in a dispute.

Second, the ILC looks at different courts and tribunals as an opportunity to develop international law outside the traditional codifications<sup>55</sup> – every kind of international law, including material law, not just law dedicated to the sources and their interpretation. Their work can turn soft law (both when it is truly soft law and when it comes in the form of draft articles) into customary law, even in the absence of global agreements.

The ILC approach can be summarised, in essence, to be that of experts whose chief aim is to study and summarise, without imposing anything and without even challenging governments, the UNGA or the Sixth Committee to elaborate international agreements. They leave it to counsels and attorneys, who represent states or private parties before the international tribunals to cite the texts they have produced. Above all, their work falls to the hands of judges and arbitrators who, in the chambers of their respective tribunals, decide what to use, keep or reject of what they have produced. It is redundant to observe that often this process is facilitated by the efficient shuttle-service between Geneva and the seats of arbitration or the tribunals serving the commissioners and

<sup>53</sup> HLA Hart, *The Concept of Law* (3rd ed, Oxford University Press 2012) 115–16, 258.

<sup>54</sup> A Pellet, 'L'adaptation du droit international aux besoins changeants de la société internationale' (2007) 329 RdC 9, 42.

<sup>55</sup> The relevance of courts and tribunals in shaping contemporary international law has been abundantly explored. Less attention, however, has been attracted by the ILC. In a collected work expressly dedicated to the new ways of producing international law, C Brölmann & Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) many areas of international law have been examined such as environmental law and human rights; the creative role of international and domestic courts and tribunals and of monitoring bodies (M Tignino, 'Quasi-Judicial Bodies' 242). The ILC's new role did not attract many comments. The same lack of a specific interest emerges by looking at J d'Aspremont & S Besson (eds), *Oxford Handbook of the Sources of International Law* (Oxford University Press 2017); or at M Goldmann (n 2). On the contrary see S Villalpando, 'Gli strumenti della codificazione del diritto internazionale nell'età della codificazione light' in A Annoni, S Forlati & F Salerno (eds), *La codificazione nell'ordinamento internazionale e dell'unione europea* (Editoriale Scientifica 2019) 259.

the former commissioners of the ILC, the *very-visible college* of international lawyers.<sup>56</sup>

In order for something to become law in the new millennium, it does not need to pass through long and fraught negotiations, beholden to political positions that are too far apart and, by this time, nearly irreconcilable. When states and other entities involved in a dispute use the ILC's work product, the third party called upon to adjudicate specific disputes in the concrete can then grant final prescriptive power to an indication contained in a soft-law text or a text that stalled in the draft articles phase.<sup>57</sup> This route is ultimately more practical than reopening long and often fraught negotiations with the over 190 invited states, and faces less risk of compromise, or even failure. Not even references for a preliminary ruling are necessary, as Guillaume had predicted. The authority of law does not come from a multilateral effort, nor from a clear command of a rule, or from a theory of sources, but rather from a shared discourse about law, and a recognised authority charged to settle a dispute.

The success of the 2001 Articles on the Responsibility of States is illustrative and paved the road: if the work is useful and well done, there is an 'audience out there' ready to adopt it and implement it. Crawford and the ILC had put forward not guidelines, but rather articles – but the outcome is analogous – settling for codifying, rather than developing, international law, and leaving the issues of making the rules binding and any potential development of the law to others – particularly international courts and tribunals.

## 6 A Look at the Practice of International Courts and Tribunals

Under this new approach, draft articles and works of soft law and scholarship naturally flow into the work of international courts and tribunals. Courts and tribunals use some of the articles and conclusions

<sup>56</sup> As opposed to O Schachter, 'The Invisible College of International Lawyers' (1977–78) 72 NWULR 217; about one-third of the ICJ judges have previously been ILC members, compare MJ Aznar & E Methymaki, 'Article 2' in A Zimmermann & CJ Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, Oxford University Press 2019) 303.

<sup>57</sup> CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850, 860, already observed the advantage offered by soft-law codifications, which is not given by the simplicity of its drafting (negotiations are as hard as for treaties), but in avoiding the further complication of the phases of approval ratification and entrance into force of international conventions. Similarly see also Tanzi (n 34) 154–55.

of the ILC as stating customary rules, or as subsidiary means in the sense of 38(1)(d) of the ICJ Statute.<sup>58</sup> They also use the conclusions of the ILC without qualification. In other cases, the ideas of the ILC are cited by the parties, but ignored by the court or tribunal. Leaving aside the briefs submitted by parties, which make references useful to make their cases, but looking only at the reasoning of courts and tribunals themselves, we can find some illustrative decisions.

As far as draft articles are concerned, along with the 2001 articles on the responsibility of states mentioned above (and their 1997 predecessors whose use in the *Gabčíkovo-Nagymaros* case<sup>59</sup> has been already widely commented),<sup>60</sup> we can also look at how the ICJ used the draft articles on diplomatic protection, produced by the ILC in 2007, in the *Diallo* case.<sup>61</sup> In that case, despite the fact that a provision put forward by the ILC drew criticism from some governments (Article 1),<sup>62</sup> the ICJ applied it as an expression of customary law.<sup>63</sup> To determine that something is customary law requires a review of the practice, under which the lack of homogeneity of the practice and lack of consensus among states ordinarily would not have allowed for the formulation of a customary rule. The same draft articles were also cited by an investment tribunal in 2014.<sup>64</sup>

One example of successful regulatory cooperation between the ILC and international tribunals involving soft law is the now consistent case law of investment tribunals with regard to the guiding principles on the unilateral declarations of states capable of creating legal obligations. These have been applied in various cases to interpret unilateral acts, although without

<sup>58</sup> Pellet & Müller (n 52) 914–15.

<sup>59</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 39–41 [50–53].

<sup>60</sup> Pellet & Müller (n 52) 914.

<sup>61</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582 [39].

<sup>62</sup> ILC, 'Comments and Observations Received from Governments' (27 January, 3 & 12 April 2006) UN Doc A/CN.4/561 and Add 1–2, 37–38.

<sup>63</sup> *Ahmadou Sadio Diallo* 582 [39]: 'The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission [...], diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' The ICJ then did not specify whether Article 11 of the same draft articles reflected customary international law [93].

<sup>64</sup> *Serafin García Armas, Karina García Gruber v Venezuela* (Decision on Jurisdiction of 15 December 2014) PCA Case No 2013–3 [173].

a declaration of customary law status.<sup>65</sup> One International Center for the Settlement of Investment Disputes (ICSID) tribunal, in the case *Total v. Argentina*, gave extensive consideration to the principles in question and, while it did not determine that they were customary law, dedicated an in-depth analysis to them, underscoring their relevance even when interpreting ‘domestic normative acts relied upon by a foreign private investor’.<sup>66</sup>

Last, if we consider the scholarly activities of the ILC, in a very high number of cases the parties invoked study group reports in their briefs. Even if we only look at the reasoning of the judicial bodies themselves, it is clear that study groups, too, have had an impact on the activities of courts and tribunals. The study on the MFN clause, although brought to a close only recently (2015), has already been referred to extensively. The study was brought to bear, in particular, on the merits of a highly controversial issue, that is, the question of whether or not the MFN clause extends to compromissory clauses, starting with *Maffezini v. Spain*.<sup>67</sup>

It is not surprising, therefore, that international investment tribunals immediately latched onto the study and incorporated it into their reasoning. For example, in the *AIIY Ltd v. Czech Republic* decision (2017), the tribunal concisely observed: ‘The Tribunal is of the view that an MFN clause can, a priori, apply to dispute settlement. The Final Report of the ILC Study Group on the Most-Favoured-Nation clause is instructive in this respect.’<sup>68</sup> In the award *Le Chèque Déjeuner v. Hungary*, two key passages of the Tribunal’s reasoning on the interpretation of the MFN clause are dedicated entirely to quoting and commenting upon the ILC report.<sup>69</sup> Even the dissenting opinion by Marcelo Kohen attached to the

<sup>65</sup> *Mobil Corporation Venezuela et al v Venezuela* (Decision on Jurisdiction of 10 June 2010) ICSID Case No ARB/07/27 [89]; *CEMEX Caracas Investments BV e CEMEX Caracas II Investments BV v Venezuela* (Decision on Jurisdiction of 30 December 2010) ICSID Case No ARB/08/15 [81–82]; *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (Second Partial Award of 30 August 2018) PCA Case No 2009–23 [7.84].

<sup>66</sup> *Total SA v Argentine Republic* (Decision on Liability of 27 December 2010) ICSID Case No ARB/04/1 [132], see in general [131–34].

<sup>67</sup> *Emilio Agustín Maffezini v Kingdom of Spain* (Award of 25 January 2000) ICSID Case No ARB/97/7; M Paporinskis, ‘MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?’ (2011) 26(2) ICSID Review 14.

<sup>68</sup> *AIIY Ltd v Czech Republic* (Decision on Jurisdiction of 9 February 2017) ICSID Case No UNCT/15/1 [95–96]; see also [97] which uses the final report of the study group to confirm the proposed interpretation of a clause.

<sup>69</sup> *Le Chèque Déjeuner and CD Holding Internationale v Hungary* (Decision on Preliminary Issues of Jurisdiction of 3 March 2016) ICSID Case No ARB/13/35 [165–66] & 209–10.

decision is substantially built around references to the ILC report on the MFN clause.<sup>70</sup>

The study on fragmentation, published in 2006, attracted a great deal of scholarly attention, and a less enthusiastic reception by courts and tribunals. Nonetheless, it is easy to find examples in which they refer to it. In the annulment decision *Tulip v. Turkey*, for instance, an ICSID Annulment Committee formulated the proper way that human rights obligations should be integrated into the interpretation of a state contract through extensive reference to the ILC report on fragmentation.<sup>71</sup> Moreover, in the award on jurisdiction of the *RREEF v. Spain* case, the tribunal referred extensively to the scholarly work on fragmentation.<sup>72</sup>

Not all the work produced by the ILC in its 'new era' has met with success. One example is its work on reservations, which culminated in 2011, after nearly twenty years, both in a set of guidelines (soft law) and in a thorough scholarly document (the guide). These documents have had practically no impact on international case law. Neither the ICJ nor the investment tribunals have used it, and the Strasbourg Court has only mentioned it in a single case, already eight years old.<sup>73</sup>

The work of the ILC can also have effects that are not as easily detected as the effects of a citation: its influence may remain in the form of an undercurrent, or an international court may prefer to apply customary law as it is described by the ILC without making explicit reference to the work of the ILC itself. Consider, for example, the 2012 case *Habré*, in which the ICJ ruled on the *erga omnes* nature of the convention's obligations forbidding torture. The ICJ did not mention the articles on state responsibility, but only the customary international law on that

<sup>70</sup> *Venezuela US, SRL v Venezuela* (Interim Award on Jurisdiction on the Respondent Objection to Jurisdiction *Ratione Voluntatis* of 26 July 2016) CPA Case No 2013-34, Dissenting Opinion of Professor Marcelo G Kohen.

<sup>71</sup> *Tulip Real Estate and Development Netherlands BV v Turkey* (Decision on Annulment of 30 December 2015) ICSID Case No ARB/11/28 [86-92]. In particular, at [88-89], observed:

The ILC has discussed Article 31(3)(c) of the VCLT extensively in its Fragmentation Report. In doing so, its Study Group has referred to that provision as a 'master key' to the house of international law. . . . The ILC Study Group has rejected any suggestion that tribunals should restrict themselves to the treaty upon which their jurisdiction is based and which constitutes the treaty under dispute.

<sup>72</sup> *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Spain* (Decision on Jurisdiction of 6 June 2016) ICSID Case No ARB/13/30 [82].

<sup>73</sup> *Toniolo v San Marino and Italy* ECtHR App No 44853/10 (26 June 2012).

topic.<sup>74</sup> The reasoning, however, clearly reflects the formulation laid out in the ILC's work.

The decision whether or not to make explicit reference to the source of inspiration for a given rule clearly falls to the discretion of the adjudicating body, and reveals that the choice to specify the 'places' in which certain choices are formed and crystallised falls under the policy for legitimising its own work product that a judicial body decides to adopt. At the same time, it also reveals that the influence of the ILC's work cannot be assessed by merely tallying up explicit references, but may also extend beyond them.

### 7 The 'Principle of Quotability', the Relevance of Official Scholarship and the Importance of an Interpretive Approach Favourable to the *travaux* of the ILC

On the whole, we can conclude that, during this time of transformation of international society, the ILC is orienting its activities toward 'dialogue' with states, other parties and international judicial bodies during a dispute and aims less to elaborate draft conventions. As for the works dedicated to the sources of international law, unity is not reached through an order, nor a shared bedrock of values, but rather through the construction of a common technical language available to international actors and courts, and through reason, which we all still have in common in a fragmented world.

As for the drafting of material rules of international law, the ILC suggests, litigating entities propose, and the courts pick up what they find to be of value and crystallise it into a customary rule.

The ILC's shift from being prescriptive in its work to being scholarly and descriptive, in which the commission decided to address chiefly courts and tribunals instead of elaborating new international conventions, created the need for the commission's activities to attain 'quotable' results. Quotability means generating an expression of the law (in the subtle form of guidelines or the stronger form of draft articles) that provides a third party – a state, a private entity invoking the protection of a treaty, a judge or arbitrator – with a reference which, notwithstanding the fact that it is not necessarily binding, is succinct, clear and immediately applicable.

<sup>74</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, 449–50 [68–69].

In light of this, we may draw three final observations. First, even when the ILC does not intend to create draft articles, but aims at articulating soft law, it is important that the commission not fall into overly descriptive passages in an attempt to avoid making choices unsupported by practice, resulting in tools too unwieldy to apply. When it comes to the documents' quotability, the ability to make clear choices in the face of non-homogeneous practice is more important than the exhaustiveness of the studies. It is, above all, in this regard that the activity of the ILC must not spill over into works that fail to take a position on controversial topics. The 2011 *Guide to Practice on Reservations to Treaties*, which has had very little impact so far in international litigation, is illustrative.<sup>75</sup> The more the ILC aims to make its work exhaustive, at the expense of choosing preferable solutions, the more difficult it is for those who adjudicate cases to make use of the conclusions it adopts.

Second, it is important for the ILC to address issues that are relevant on the practical (judicial, especially) plane, and not only those related to the general framework of the sources and their interpretation. Its study of the MFN clause is emblematic here. While its scope was more limited than that of other recently undertaken studies on sources, it had an immediate impact on international arbitral awards because it stepped in to provide order and clarity in an issue on which investment arbitrations had run aground with conflicting solutions. From this point of view, at the risk of making a false prediction, highly practical studies on hotly debated issues seem destined to have a greater future impact than scholarly analysis on, say, general principles of law, which would serve only the function of offering an official context for assessing international law sources.

Third, the existence of ILC quotable guidelines or articles spares adjudicators from the heavy work of demonstrating the existence of widespread practice and *opinio juris* and becomes a practical tool to find a guiding legal principal orienting the decision of the adjudicator, and/or giving legitimacy to it – a reference to an external authority is always more legitimate than taking what would appear to be an arbitrary position by adjudicators.

However, the principle, guideline or draft article can be recalled and applied without an extended analysis of the possible nuances of the text

<sup>75</sup> See, however, M Gervasi, 'The ILC Guide to Practice on Reservations to Treaties Put to the Test in the *Hossam Ezzat* Case before the African Commission on Human and Peoples' Rights' (2019) 102 RivDirInt 109.

only if the litigating parties are not contesting it. In case of disagreement, the customary nature of the non-binding written provision requires the interpreter *not* to start from the text or the object and purpose, *à la* VCLT, but rather from the international practice generating it. Unfortunately, it is not common to find a discussion of the appropriate interpretive method of the non-binding provisions of the ILC in international rulings. In the already mentioned *Diallo* judgment of 2007, an approach keen on customary law would have pushed the ICJ toward an investigation of the *travaux préparatoires* of that provision, that is, the practice analysed by the ILC and the reactions of governments to it. This would have brought to light that the provision was hotly contested and far from being customary. But the ICJ in that case did not follow the rationale behind restatements of customary rules, but merely looked at the text of a rule, as if it were dealing with a conventional rule, binding for the parties, whose text was sufficiently clear. While this attitude can be accepted as an expression of the deciding power of courts, it does not reflect the customary nature of the process leading to it.