I. Introductory Observations

The mandate of the International Law Commission (hereinafter: ILC) was defined by the UN General Assembly (hereinafter: GA) in its resolution 174 (II) of 21 November 1947. According to this text, the ILC “shall have for its object the promotion of the progressive development of international law and its codification”, i.e. to assist the GA in the task entrusted to it in almost similar terms under Article 13 (1) (a) of the UN Charter (hereinafter: Charter). Although a number of amendments were adopted in later years, this key determination has not been modified. On the other hand, the membership of the ILC was progressively increased from originally 15 to 34. With this composition, the ILC has continued without interruption to this very date. In 2007, it will hold its 59th session. Thus, it would seem that the ILC is a permanent institution, closely tied to the world organization and destined to function as a component part of it forever.

And yet, no institution can be automatically assured of its existence. Its raison d’être must at any time be susceptible of being justified in light of its record. When proceeding to such an assessment, account must be taken not only of the actual performance of the body concerned, but also of the factual context in which it is called upon to operate. Even a successful institution may lose the ground on which it is predicated specifically through its achievements. When the ILC convened for the first time in 1949, large parts of international law still made up of customary law. There existed few multilateral conventions determining the general legal framework of the international community outside and beyond the principles laid down in the Charter itself. On the basis of the stock-taking effort made on that occasion, a first programme of work was immediately established.\(^1\) According to that strategy, the lacunae found to exist have largely been filled. There is no need to mention at this stage the legal instruments which were brought into existence through the work carried out by the ILC. To date, diplomatic and consular relations are governed by conventions which have been widely ratified by States, the law of treaties has found its codification in a convention which,

although its formal acceptance leaves much to be desired, has won unchallenged authority as a true reflection of the law as it stands, the principles of State responsibility were set out in articles which the GA took note of in 2001, and the ILC ended its quinquennium 2002 to 2006 by concluding its work on topics as important for the general framework of international law as unilateral acts and diplomatic protection. Thus, the field open for new initiatives has considerably shrunk. The ILC cannot be sure of having for all times a “natural” agenda. Of course, legal problems will always arise. But in the future such problems may progressively find themselves enmeshed in a tight network of existing written rules and principles which then will have to be adapted to the new challenges rather than to be invented ex nihilo.

At the same time, questions may be warranted as to the way in which the ILC has handled the tasks entrusted to it. The coming into office of a new UN Secretary-General provides also a good opportunity to look into the effectiveness of the body which is to begin its new quinquennium with a fresh membership in 2007. A former insider who is now an outsider may have the necessary degree of impartiality to express views that should not from the very outset be dismissed as lacking the necessary expertise.

II. The Composition

1) Regional Composition

It is a truism to state that international law arises from the interaction among all of the members of the international community. Whereas a century ago international law was shaped almost exclusively by the practice of a few leading nations, such dominance has become unacceptable in the globalized world of today which rests on the principle of sovereign equality of States. There can be no doubt that even today powerful nations can exert a profound impact on the substantive contents of the international legal environment. But when it comes to officially making new rules under a well-regulated procedure, account must be taken of all the voices present in the world. Consequently, Article 8 of the ILC’s Statute rightly provides that “in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured”. This basic determination was implemented by GA resolution 36/39 of 18 November 1981 which laid down quotas for each of the five regions recognized in the practice of the UN. According to

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this scheme, the group of Western Europe and Other States (WEOG), e.g., is entitled to eight seats while Eastern Europe has been endowed with three seats. To date, this configuration has remained untouched notwithstanding the political upheavals that occurred in 1990/1991. It may appear somewhat astounding that currently members from the European Union may be elected either on the ticket of Western Europe or on that of Eastern Europe. In pure quantitative terms, Europe has a small edge over the other regions of the world. The Eastern European Group and the WEOG represent together (52 members) 0.27 of the total membership of the UN while in the ILC they account for 0.32 of the membership. However, this small divergence seems to be amply justified not only by the important contributions which in the past have been made by members in particular from the WEOG, but also by the diversity of the legal systems to be encountered in the European region.

No seats are reserved for persons nominated by permanent members of the Security Council. For many decades, it was considered an unwritten rule that nonetheless they should always be represented on the ILC by one of their nationals. This pragmatic convention was for the first time departed from when in 1986 the British candidate, Sir Ian Sinclair, failed to obtain the necessary majority, at that time because of the troubled relationship between the United Kingdom and Latin America. A second mishap of a similar nature occurred in 2006 when the US candidate, Michael J. Matheson, was left behind the other candidates from the WEOG. Thus, for the first time in its history, the ILC will have to carry out its work without any direct US involvement. Although the motives lying behind the rejection of the US candidate may be comprehensible, the Iraq war providing the most obvious explanation, one may fear that this absence will rather weaken the ILC. The US might be tempted to look at the outcome of its work as being irrelevant for itself. For the sake of the authority of international law, it would appear to be imperative to have the leading nations of the world closely associated to its formation processes. The rejection of the US candidate comes at a time when the US is also absent from the Human Rights Council, the new principal organ in the field of human rights which has replaced the former Commission on Human Rights. Again, this absence has not proven to be salutary for the work of that body. Third world countries will have to consider very carefully whether they prefer to vent their anger over certain conduct of the US or whether they conceive of the effectiveness of the UN machinery as a priority that should prevail over any other considerations. In any event, ILC will start its new period of office somewhat debilitated.

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4 Established by GA resolution 60/251, 15 March 2006.
As far as its professional composition is concerned, the ILC has always consisted of a mix of lawyers from different backgrounds. Governmental officers, academic lawyers, judges, ambassadors and even cabinet ministers have been among its members. In principle, members of the ILC should be independent although this requirement has not been specified in its Statute.\(^5\) While discharging their duties within the ILC, they are not subject to instructions. The ILC is not a diplomatic conference – which by necessity would have to be open to all member States. On the other hand, the ILC is not supposed to be an arena where individuals may cultivate their personal predilections. Texts elaborated by the ILC must on the one hand reflect the state of the art – *ars juris* -, but they must at the same time be acceptable to a vast majority of States.\(^6\) This double constraint should never be overlooked although it may often be irritating in that it entails the need for many compromises where clear-cut answers might be more desirable. And yet, it is precisely the mixed professional composition of the ILC which acts as a catalyst of reason. Academics are primarily interested in scholarly coherence and clarity, while political lawyers are more inclined to take into account the possible responses of the General Assembly and thereafter of all States taken individually. Thus, it would be wrong to conclude that a person discharging in his/her country high governmental functions cannot validly be a member of the ILC because his/her independence will necessarily be compromised.\(^7\) In this regard, no changes are needed. The only requirement is that even practitioners should have a level of qualification which permits them meaningfully and competently to contribute to the drafting work of the ILC.

2) The ILC as a Lawyers’ Body

In a long-term perspective, some thought should, however, be given to the limitations *ratione materiae* which the ILC cannot overcome. The ILC is a body made up entirely of lawyers. Therefore, it is lawyers’ law upon which it can pronounce authoritatively. Whenever specialist knowledge is required for the regulation of a specific subject matter, the ILC is not the best qualified institution to assume the relevant task.\(^8\) Thus, at an early date already the legal problems related to outer space were entrusted to a specialized body, the United Nations

\(^7\) The ILC received its first female members in 2002, the Chinese diplomat Hanqin Xue and the Portuguese Paula Escarameia. During the quinquennium 2007 to 2011, it will have three female members, alongside the two persons just referred to also the Swede Marie Jacobsson.
Committee on the Peaceful Uses of Outer Space. While the ILC played a pivotal role in preparing drafts for the first codification of the law of the sea, which took place at the First Law of the Sea Conference in Geneva in 1958 (UNCLOS I), it soon turned out in the ensuing decade that the codificatory work performed in Geneva, which rested almost exclusively on the law as it stood at that time, did not suffice to meet the new challenges posed by technological developments. A comprehensive set of rules for the uses of the high seas required rules on the protection of the marine environment, on scientific research, on protection of fisheries, on the exploitation of the resources of the seabed or beneath the seabed, etc. For this aim to achieve, it was necessary to rely on expert knowledge from the different disciplines involved outside the narrow field of the law in force which could not be the guideline for an innovative overhaul of the existing regime. To be sure, Article 16 (c) of the Statute of the ILC provides that the ILC “may consult with scientific institutions and individual experts”. However, such a loose relationship constitutes no viable basis for a rule-setting process in which the specific expertise must be present at all stages until the very last minute of the drafting of the relevant instrument.

Acknowledging its restricted expertise, the ILC confined itself to stating just very basic rules when it elaborated the draft for the Convention on the Law of the Non-navigational Uses of International Watercourses, which the GA approved in 1997. Concerning groundwater, a new topic not yet finalized, the current rapporteur, the Japanese member Chusei Yamada, has followed the same route in his proposals which he has already submitted to the plenary, without going too much into details. In fact, regarding such subjects the ILC must exercise great restraint, given its lack of extra-juridical knowledge. Invariably, such instruments require further implementing rules in order to become truly operational.

In its work programme for the coming years the ILC has included, inter alia, “Protection of personal data in the transborder flow of information”. With this choice, it will obviously become deeply involved in the law of data protection, which has evolved as a fairly

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10 GA resolution 51/99, 21 May 1997. To date, the convention has received no more than 14 ratifications, mostly from lower riparian States. Turkey has continually manifested its rejection of the Convention.
11 Coming from an island State, he embodies impartiality par excellence.
autonomous branch of the law in recent decades. One may doubt whether the expertise of the members of the ILC will provide it with sufficient authority to tackle the topic in a competent manner. To date, no special rapporteur has been appointed. It will fall to the new ILC, which will convene in May 2007, to carry out the necessary exploratory research in order to verify the suitability of the topic for codification or progressive development of the law. The proposal as it has now materialized in the work programme shows very clearly that the number of general topics that call for study by an expert group of international lawyers is fairly limited and is fast approaching its final point.\(^{14}\)

III. The Balance Sheet

The Statute of the ILC leaves wide room for the ILC to make determinations as to the form the outcome of its work should take. According to Article 23, the ILC may recommend to the GA

“(a) To take no action, the report having already been published;
(b) To take note of or adopt the report by resolution;
(c) To recommend the draft to Members with a view to the conclusion of a convention;
(d) To convocate a conference to conclude a convention.”

Thus, the Statute refrains from expressing any preference. It is the inherent logic of the draft concerned which should be determinative of the form to which recourse should be had. It stands to reason that the conclusions of the Study Group of the ILC on “Fragmentation of International Law: Difficulties from the Diversification and Expansion of International Law”, adopted by the plenary in 2006, could not possibly become the subject of an international convention. Analytical research of that kind is normally carried out by academic lawyers. Given its adoption by the ILC, the conclusions of the Study Group have acquired a higher degree of authoritativeness. In any event, however, such reflection on the structure of general international law is hardly suitable for the setting of rules in written form. Wisely, therefore, the ILC restricted itself to requesting that the study be made available on its web site and be published in its Yearbook. Its potential influence would in no way be enhanced by introducing it as international legislation through a multilateral treaty.

1) Treaties

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\(^{13}\) ILC Report 2006, UN doc. A/61/10, para. 22.

\(^{14}\) In contrast, two other topics, namely “Immunity of State officials from foreign criminal jurisdiction”, and “Extraterritorial jurisdiction” are ideal for ILC in that they represent typical lawyers’ law; see below p. xx.
In the past, Special Rapporteurs mostly insisted on their draft being recommended to the GA for the conclusion of an international convention. To see a draft transformed into a convention was considered to be the most felicitous and prestigious outcome of a drafting exercise. Close observation reveals that the number of conventions that have in fact been concluded on the basis of a draft elaborated by the ILC is fairly small.

One may in the first place count as an outstanding achievement of the ILC the conclusion of the four Law of the Sea Conventions at UNCLOS I in 1958. In preparation of the Conference, the ILC had submitted a single text consisting of 73 articles and commentaries thereon. Although the Conference decided to split up that bundle, dividing it into four separate instruments, it remains that the great bulk of the substance of those four Conventions had been pre-shaped by the ILC. It was only the anticipation that States would react differently to the various chapters of the single draft which prompted the Conference to resort to that technique of separation. In fact, the following years showed that acceptance of the four instruments varied greatly. Eventually, the instrument with the greatest number of ratifications became the Convention on the High Seas (63 parties)\(^{15}\) whereas the Convention on Fishing and Conservation of the Living Resources of the High Seas\(^{16}\) remained confined to 38 ratifications. All in all, this record looks fairly poor from today’s viewpoint but in the sixties of the last century the number of States was still rather limited. Only 86 delegations had participated in UNCLOS I. And it became soon clear that the four Conventions drawn up by the Conference would soon have to be overhauled in their entirety. But this does not diminish the praise deserved by the ILC. In particular the provisions governing the regime of the high seas were a few years later transposed almost literally to the UN Law of the Sea Convention of 1982.\(^{17}\)

Two other pages of pride for the ILC are the Vienna Convention on Diplomatic Relations\(^{18}\) as well as the Vienna Convention on Consular Relations.\(^{19}\) The two Conventions follow very narrowly the texts proposed by the ILC. Their resonance in the international community has been overwhelmingly positive. While originally the socialist States had manifested a certain reluctance to ratify the Consular Convention, rejecting particularly the provisions on consular assistance to individuals, that picture changed gradually until in 1989 Belarus, the Soviet

\(^{15}\) UNTS 450, 11.
\(^{16}\) UNTS 559, 285.
\(^{17}\) UNTS 1833, 3.
\(^{18}\) Of 18 April 1961, UNTS 500, 95, currently 185 States parties.
\(^{19}\) Of 24 April 1963, UNTS 596, 261, currently 171 States parties.
Union and Ukraine deposited their instruments of ratification almost at the same time (March and April 1989) when the great change occurred in the East-West relationship. The two Conventions are almost unanimously considered as having consolidated the legal position to such an extent that their provisions constitute by now at the same time international customary law. Very few States have not adhered to the Consular Convention. Among them is Israel, probably because of the same grounds that had prompted the socialist States to remain aloof from it.

Another convention on the list of pride is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. This is one of the legal instruments elaborated under the auspices of the UN, designed to combat terrorism. Nobody can have a real interest in jeopardizing or even destroying international diplomacy as a necessary tool for the facilitation of international intercourse by committing attacks on diplomats or promoting such attacks. Therefore, the generous response to the Convention needs hardly any explanation. Even Iran, Libya, and Syria have submitted to that Convention, which means that there do not exist any principled objections against it, the outstanding ratifications rather being explained by the general tardiness of smaller countries in joining the ratification process with regard to multilateral conventions at universal level.

Much less impressive is the record of the Convention on Special Missions, the third one of the great instruments in the field of official relations between and among States. Concluded in 1969, the Convention remains at a level of no more than 38 States parties. Not a single one of the permanent members of the Security Council has seen fit to accept it. Thus, it can hardly be said to embody generally accepted rules. According to what has been openly manifested by many governments, the breadth of the privileges and immunities granted to special missions has become a potent deterrent. More than 37 years after its adoption by the GA, there is hardly any hope that the Convention might gain fresh momentum. It will therefore be necessary, in each and every actual case, to review with the utmost care the provisions of the Convention in order to find out whether they constitute no more than conventional law,

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21 We note, for instance, that Angola, Chad, the Central African Republic and Nigeria are among the missing States.
22 Of 8 December 1969, UNTS 1400, 231.
binding only on the contracting States, or whether they can additionally be considered as representing customary law.\textsuperscript{23}

A somewhat similar case is the Vienna Convention on the Representation of States in Their Relation with International Organizations of a Universal Character,\textsuperscript{24} the next one in the series of instruments covering envoys of States performing international functions. The Convention is not yet in force, not having reached the minimum threshold of 35 ratifications as specified in its Article 89. Again, it is the generous granting of privileges and immunities which has prompted particularly those States where the UN and its specialized agencies have established their headquarters in the world to turn their back on the Convention. Neither Austria nor Switzerland or the United States have ratified it - nor has France (UNESCO) or Kenya (UNEP) done so. For all of these countries, the fact that also observer missions should benefit from extended preferential treatment has turned out to be the major stumbling block.\textsuperscript{25}

Even further down the line one finds the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag not Accompanied by Diplomatic Courier (1989). This draft has never materialized as an international convention. When it was received by the GA, the response was extremely reserved. The GA decided to hold informal consultations,\textsuperscript{26} a statement which was reiterated in 1990 and 1991. Since no enthusiasm could be elicited among the States members of the world organization, the GA eventually decided in 1995 to shelve the project for good.\textsuperscript{27} Once more, it was an excessive zeal in conferring rights and privileges on the courier and prohibiting any effective controls of the diplomatic bag which sealed the fate of the draft. Originally, the suspicion prevailed that the draft rules were designed to afford socialist countries large room for uninhibited spying activities which impelled a large majority from agreeing to the holding of a diplomatic conference.\textsuperscript{28} Today, it


\textsuperscript{24} Of 14 March 1975.


\textsuperscript{26} GA resolution 44/36, 4 December 1989.

\textsuperscript{27} GA resolution 50/416, 11 December 1995.

is in particular the fear of terrorist activities sailing under the cover of diplomatic intercourse which impedes the Draft Articles from being taken up again.  

The lesson to be drawn from the experience of the ILC in law-making in the field of diplomatic and consular relations is quite clear. States accept only balanced solutions which reflect the practices as they are observed in day-to-day transactions. Formulae which purport to make great leaps forward or which tend to favour one side over the other, the sending State over the receiving or host State, have no chance of being accepted. The ILC is therefore well-advised to monitor the work of its Special Rapporteurs very closely, not permitting any tendentious departures in the interest of a specific group of States.

Coming back to the success story of the ILC, no comment is necessary to state that the Vienna Convention on the Law of Treaties may be counted as one of the highpoints of its history. After a number of renowned international lawyers had presented masterful studies but had not come to grips with the task of actual drafting of operative articles, the ILC moved quickly ahead under the guidance of its Special Rapporteur Sir Humphrey Waldock (1961 to 1966). Although the draft contained as bold a provision as article 50, stating that a treaty conflicting with a peremptory norm of international law (jus cogens) is void, it sailed without any great changes through the 1969 Vienna Conference. In the following years, adherence was at first hesitant. To date, its formal status still leaves much to be desired. With 108 States parties, it has not even reached the level of two thirds of the UN membership. Among the absentees are France and the United States, France because it has continually shown its aversion against the concept of jus cogens, the United States on account of reasons which are not entirely clear, probably because the VCLT considerably restrains the power of States to enter reservations to multilateral treaties. Notwithstanding the quantitatively poor record regarding its reach ratione personae, the VCLT is considered to reflect almost completely general international
Thus, it has been relied upon by the International Court of Justice in a number of decisions.  

All of the successive complementary conventions have fared less well. The Vienna Convention on Succession of States in respect of Treaties of 23 August 1978 has attained 21 ratifications after more than a quarter of a century. Two main reasons may be cited to explain that modest participation. On the one hand, most States see succession, which means either enlargement or fragmentation, as an eventuality which does not regard them. Ratification of the Convention might even be interpreted as the acknowledgement by a government that it is not sure of the stability of its political regime. Thus, India and Nigeria have not even signed the Convention whereas other States which at first signed it, later decided not to deposit an instrument of ratification (Côte d’Ivoire, Pakistan, Senegal, Sudan). Politically, the Convention might indeed be seen as an encouragement to secession. On the other hand, the Convention has attracted criticism because of its resolute stance in favour of “newly independent States”. The ILC wished to give such States absolute freedom in determining whether to continue an existing treaty bond. Yet this principle of “clean slate” has also had a deterrent effect on treaty adherence. It is worth noting that the Convention has received strong backing from all the States succeeding to the former Yugoslavia and has also been endorsed by the two successor States of Czechoslovakia. It is hard to believe, however, that for the time being it can hope for a revival.

The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 (“VCLT II”) has not yet come into force, the threshold of 35 ratifications not having been attained, although the approval rate is better than in the case of the Convention onSuccession (28 States and 12 International Organizations which, however, do not count for that purpose). Once again it is not difficult to identify the reasons for the meager record. Governments are not really convinced that it is necessary to ratify the “VCLT II”. Generally, they apply directly or by analogy the provisions of the VCLT. In fact, the VCLT II follows very closely its

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35 UNTS 1946, 3.
36 See Andreas Zimmermann, Staatennachfolge in völkerrechtliche Verträge, 2000, xx.
predecessor, introducing few substantive departures from the former regime, of which the replacement of the term “ratification” by “act of formal confirmation” is one of the most prominent ones but has only a symbolic significance. It would have been possible to condensate the few changes in an additional protocol. Instead, the ambition prevailed to produce an autonomous set of rules – which was seen by the international community more or less as an encumbrance of the legal landscape.\textsuperscript{38}

One may again speak of a success story with regard to the work of the ILC in the field of international criminal law although the ILC cannot claim that an international treaty emerged as a direct result of its work. In its early years, it codified the “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”.\textsuperscript{39} Thereafter, on the basis of that codification, it formulated a “Draft Code of Offences against the Peace and Security of Mankind”\textsuperscript{40}. During the time of the cold war, no practical consequences could be expected from that exercise. After the demise of the socialist regimes in central and eastern Europe, the way was finally free for constructive efforts at establishing a system of international criminal prosecution. In 1994, the ILC completed a “Draft Statute for an International Criminal Court”,\textsuperscript{41} and in 1996 it finalized its work on the “Draft Code of Crimes against the Peace and Security of Mankind” on second reading.\textsuperscript{42} None of these two drafts has as such been transformed into an international convention, but they both served as blueprints for the elaboration of the Rome Statute of the International Criminal Court.\textsuperscript{43} Without the ILC Draft Statute being available, the Rome Statute could not have been finalized as quickly as it happened at the Rome Conference in June and July 1998. None of the topics assigned to the ILC has been more intimately linked to general political developments in international relations. The ILC had again started working on the Draft Code of Crimes as from 1982 without being convinced initially that it might ever come to any useful results. It was only the great change of 1989/1990 which put an end to the stalemate.

\textsuperscript{37} See the comparison between the rules of the Convention and the practice in Eastern Europe after the disintegration of the Soviet Union and Yugoslavia by Theodor Schweisfurth, Das Recht der Staatensukzession. Berichte der Deutschen Gesellschaft für Völkerrecht, vol. 35, 1996, 49, 191 \textit{et seq.}

\textsuperscript{38} See Giorgio Gaja, A “new“ Vienna Convention on Treaties between States and International Organizations or between International Organizations: a critical commentary, BYIL, vol. 58, 1988, 253 \textit{et seq.}

\textsuperscript{39} YILC 1950 II, para. 97.

\textsuperscript{40} YILC 1954 II, reprinted in: The Work of the ILC (note 1), 168.

\textsuperscript{41} YILC 1994 II, Part Two, 20.

\textsuperscript{42} YILC 1996 II, Part Two, 17.

\textsuperscript{43} Of 17 July 1998, UNTS 2187, 3, currently 104 States parties.
On the negative side of the balance sheet, one finds from the early years furthermore the “Draft Articles on Most-Favoured-Nation Clauses” of 1978, a project under the suspicion of being designed to open access to the advantages of the European Economic Community to socialist States without any kind of reciprocity, as well as the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1983, which is not yet in force, having attracted no more than seven ratifications. Here again, the same reasons as already mentioned are determinative: governments do not normally think it necessary or advisable to consider any dramatic changes with regard to their territories. Nonetheless, the Convention may serve a useful purpose when it comes to such unforeseen events, of course only as a guideline since a convention so sparsely ratified can only operate as a source of inspiration.

A number of more recent texts are in the pipelines. Due to their young age, one cannot expect them to have already been embraced by a considerable number of States. Therefore, they should just be mentioned. The 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which has met with the interest of a number of lower riparian States (14 parties), the 2001 “Draft Articles on Prevention of Transboundary Harm from Hazardous Activities”, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (3 parties) as well as the 2006 “Draft Articles on Diplomatic Protection”. The future of these texts cannot be forecast. On the whole, States seem to have become rather tired of the tight network of international obligations which progressively restrict their sovereign freedom of action. Therefore, they do not hasten to bring new treaties into force, rather being inclined to watch for a considerable number of years what advantages they may expect of formal acceptance of the instrument concerned which they, in any event, often resort to as a guideline for their conduct.

Summing up on the work devoted to the drawing up of international treaties, the picture as it has just been concisely described looks rather gloomy. Leaving aside the Rome Statute, which was elaborated by an intergovernmental conference, the last one of the texts conceived of as future conventions that has indeed entered into force as such is the Convention on Succession of States in respect of Treaties of 23 August 1978. All the later texts have either not been found suitable for the convening of an international plenipotentiary conference or have failed to muster the necessary majorities for their entry into force. Thus, since 28 years none of the drafts of the ILC has materialized as a treaty in force applicable in accordance with Article 38
(1) (a) of the Statute of the ICJ. This is a disillusioning finding which requires to be analyzed as to its reasons.

2) Declarations, Principles, Guidelines
The fact that it was not utterly successful in elaborating the texts of international conventions could not have escaped the attention of the members of the ILC. Consequently, in recent years a tendency can be observed which leads the ILC away from formal treaty law. Instead, on many occasions the ILC has preferred to opt for a soft-law instrument.

This tendency is not entirely new. It was already mentioned that the outcome of the ILC’s work is not necessarily an international convention (Statute, Article 23 (a) and (b)). To the extent that the ILC is called to act as a legal adviser for the GA, it is indeed absolutely legitimate, and even appropriate, to confine the results of its work to a statement of legal views. Thus, during its early years the ILC produced reports on “Ways and means for making the evidence of customary international law more readily available” and on “Extended participation in general multilateral treaties concluded under the auspices of the League of Nations”. Both topics did not lend themselves to a treaty-making exercise. The first topic amounted to a stock-taking description, and the second topic focused on the transition from the League of Nations to the UN. A report on “Reservations to Multilateral Conventions”, drawn up at the request of the GA in response to the advisory opinion of the ICJ in the Genocide case, could of course have served as the starting point for a normative approach to the topic. However, since the ILC planned to proceed to a comprehensive codification of the law of treaties, it could not have any interest in engaging in a partial exercise that would cover only a small part of the subject matter as a whole. The most interesting report of the earlier years is the report of a Working Group entitled “Review of the multilateral treaty-making process” which, in fact, amounted to a self-assessment of the ILC, of its techniques and procedures. The conclusions of that report show that the ILC was satisfied with its performance. It saw no need to reform its procedures, believing that those procedures were

44 YILC 1950 II, 367-374.
46 Wisely, the ILC concluded that quite a number of the instruments of the League of Nations, which had come into existence in a different world largely dominated by “Western” States, were without any interest for the new States that had sprung up from decolonization.
47 YILC 1951 II, 125-131.
48 ICJ Reports 1951, 15.
“well adapted for the object stated in Article 1 of its Statute.”\textsuperscript{50} In 1996, the ILC proceeded again to a comprehensive review of its procedures and working methods.\textsuperscript{51}

Reports where the ILC acts as legal counsel for the GA constitute rather an exceptional case. Whenever the ILC is given a truly “hard” topic which could be regulated in the form of an international treaty, there is always the alternative to confine the final outcome of the exercise to a declaration, to be adopted by the General Assembly, that would remain outside international law proper as not being endowed with juridical authority but could nonetheless serve as guideline and orientation. Here, the history of the ILC provides interesting examples of differing motivations for the choice of the class of soft law.

One of the first tasks assigned to the ILC was the drafting of a “Declaration on the Rights and Duties of States”.\textsuperscript{52} The ILC duly performed this task, drafting the requested declaration and submitting it to the GA. It would certainly have liked to continue its work on the topic. However, the GA did not wish to issue new instructions to the ILC without having received a sufficient number of relevant comments from member governments. Since interest was weak, governments not bothering to heed the call of the GA, it was decided to postpone the examination of the draft Declaration until a majority of the member countries would have submitted replies. This was the end of the exercise. It has never been touched upon again in subsequent years. One can only speculate about the reasons underlying that obvious lack of interest. One explanation could be that the topic was too abstract, too academic, given also the fact that the main features of State sovereignty are specified in Article 2 of the Charter.

It is much easier to understand the choice of a soft-law form for the “Model Rules on Arbitral Procedure” which the ILC adopted in 1958, submitting them to the GA as a part of its annual report.\textsuperscript{53} The Model Rules are meant to assist governments when drawing up agreements on arbitration. Governments should be absolutely free in shaping such agreements, but they should be able to rely on standard clauses that are fair and well-balanced. In particular, Article 3 of the Model Rules forestalls abuses which had emerged in international practice when socialist countries, in particular, simply refused to appoint “their” arbitrators.\textsuperscript{54} The Model

\textsuperscript{50} Ibid., 210, para. 101.
\textsuperscript{51}1996 ILC Report (note 9), paras. 140-250.
\textsuperscript{52}GA resolution 178 (III), 21 November 1947.
\textsuperscript{53}YILC 1958 II, reprinted in: The Work of the ILC (note 1), 174.
\textsuperscript{54}See ICJ, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinions of 30 March 1950 and 18 July 1950, ICJ Reports 1950, 65 and 221.
Rules provide that in such instances it falls to the President of the ICJ to make the requisite appointments. Nothing would have been gained by casting the Model Rules as binding treaty provisions. On the contrary, such rigidity would have frustrated the objectives sought to be attained through them.

The next example is provided by the “Draft articles on nationality of natural persons in relation to the succession of States”, adopted by the ILC in 1999. The ILC did in fact refrain from recommending the conclusion of an international convention. It confined itself to requesting that the draft articles should be adopted by the GA as a declaration.\(^{55}\) However, the GA did not even go that far. It simply took note of the draft articles, inviting governments “to take them into account”.\(^{56}\) Only a few years later, in 2004, did the GA request States parties to submit comments as to the advisability of concluding an international convention. The issue will again be taken up by the GA in 2008 at its 63\(^{rd}\) session. It is not entirely clear why the ILC did not from the very outset request that its draft articles be given the form of an international convention. The annual report of 1999 remains silent on the issue. One can only guess that within the international community as a whole interest in the topic was fairly low after practical solutions had already been found to the succession problems affecting the succession to the former Soviet Union, to the former Yugoslavia, and to the former Czechoslovakia. In any event, the ILC must have perceived that consent to a proposal to convene an international diplomatic conference would not be easily forthcoming. Apparently, many States regarded the draft articles as the reflection of a typical eastern European problem which was of little relevance for other regions. Although this assessment is certainly erroneous, the fact remains that the project was deemed to have a strong regional colouring.

Quite another motivation lies behind the decision of the ILC to recommend to the GA, with regard to the “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, simply to “take note” of these Articles, with the caveat, however, that at a later stage the GA should consider the adoption of a convention.\(^{57}\) The GA followed this suggestion “without prejudice to the question of their future adoption or other appropriate action” It took this decision without a vote, in the Sixth Committee as well as in the Plenary.

\(^{55}\) 1999 ILC Report, UN doc. A/54/10, para. 44.  
\(^{56}\) GA resolution 55/153, 12 December 2000.  
\(^{57}\) 2001 ILC Report, UN doc. A 56/10, paras. 67, 72, 73.
At first glance, the modesty of the ILC might seem to be absolutely inadequate. The law of State responsibility was one of the topics which the ILC, at the very outset of its work in 1949, included in a list of topics suitable for codification. Actual work began in 1955 when the ILC appointed its Cuban member F.V. García Amador as Special Rapporteur. After the non-renewal of the mandate of Mr. García Amador, who had conceived of the topic essentially in terms of aliens’ law, the ILC in 1963 decided to modify the general orientation of the project by focusing on the general rules governing the responsibility of States. There is no need to point out that under this new heading several Special Rapporteurs tackled the topic in successive order. Roberto Ago achieved the feat of concluding the first part on the origins of international responsibility, and thereafter Willem Riphagen, Gaetano Arangio-Ruiz and James Crawford struggled to find answers to the consequences of international responsibility. It was James Crawford who, with an admirable personal effort, led the ILC to finalizing the project at the 2001 session of the ILC.

Was it wise to end the strenuous efforts deployed during almost half a century by abandoning the idea of concluding an international convention, preferring instead a soft-law form that would not even have the authority of the GA behind it? In fact, to “take note” is much less than to “adopt”. By taking note of a text submitted to it, the GA simply confirms that the work carried out by one of its subsidiary bodies has not been useless and that the task entrusted to it has been finalized. No judgment on the inherent qualities of the text concerned is expressed. Although individual delegations voiced their approval or their criticism, as the case may be, the GA as a collective body did not take a stand on the Draft Articles. Thus, the conclusive stage of the norm-setting process seems to be lacking.

And yet, the decision of the ILC may be called an extremely clever decision. First of all, the ILC believed that its draft comprised a well-balanced and satisfactory set of rules which could hardly be improved by any political body, either the GA itself or an international diplomatic conference. On the other hand, to continue the process in the General Assembly either with a view to adopting a declaration or with a view to convening an international conference was fraught with great risks. Even a proposal to have the GA adopt the Draft Articles as a declaration would have entailed long delays. It would have to be feared that the GA might set up a working group where all the discussions which had impeded the work of the ILC for many years would again be started. One of the eternal bones of contention was the concept of

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countermeasures in respect of which Third World countries still saw themselves as potential victims. Another litigious issue was the concept of “international crimes” which, in the final draft as adopted by the ILC in 2001, had been downgraded to “Serious breaches of obligations under peremptory norms of general international law” (Articles 40, 41). These and some other issues – introduction of punitive damages? – were of such explosive potential that the ILC deliberately wished to avoid involving the GA in a new stage of the debate in which all arguments had already been brought forward.\(^{59}\)

It seems that this strategy has worked out extremely well. The solutions found and suggested by the ILC have not been dissected once again. Notwithstanding some criticism, they have been generally accepted inasmuch as they largely reflect customary law that is binding in any event. Therefore, a certain consolidation of the law has been attained.\(^{60}\) In conducting day-to-day business, States take the Articles on State Responsibility as a guideline for their behaviour. The Articles are carried by the authority enjoyed by the ILC. International lawyers know what huge amount of hard work has gone into the text, which is not the outcome of an ad hoc reflection, but rests on mountains of diplomatic evidence. No individual government would have been capable of coming up with better alternatives.\(^{61}\)

The worst decision would have been to convene an international diplomatic conference. Inevitably, at such a conference every single provision of the draft would have been rehashed.\(^{62}\) And even if agreement had been reached on a text, the ratification process would have been extremely slow, much slower than in the case of the VCLT. The rules of the VCLT are needed for the practical purposes of treaty-making, the daily bread of foreign ministries. Instances of international responsibility leave much more leeway. Governments know, furthermore, that the rules drafted by the ILC reflect an “ideal type” (Max Weber) which has little to do with realities. The proposition that a responsible State “is under an obligation to make full reparation for the injury caused by the internationally wrongful act” (Article 31 (1)) neither corresponds to what actually occurs with regard to “small” nor to “large” injury of catastrophic dimensions. On the whole, it would have had to be expected that governments


\(^{60}\) Caron (note 59), 857 et seq., 867, even warns of relying on the Articles too easily.

\(^{61}\) On the pros and cons of codification in soft-law form see, in particular, Zemanek (note 25), 912 et seq.

\(^{62}\) See assessment by Zemanek (note 25), 912.
would show no real interest in binding themselves to comply with rigid rules as regards injury caused in inter-State dealings. Accordingly, it may be justified to assume that the authority of the Rules on State Responsibility is today much greater than if they had been reviewed once again by the General Assembly and thereafter by a diplomatic conference. All the challenges that have been directed come from academic sources which, at the political level, one may safely ignore. In sum, the decision of the ILC to content itself with being take note of was a sign of self-assurance. The ILC had submitted a text which could easily stand on its own feet, not requiring any blessing from above. Lastly, the text in its present form has the great advantage of not being subject to reservations – today the crux of many multilateral agreements.

One may doubt whether a similarly positive judgment can be applied to two recent drafts, both adopted in 2006, the “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations”, and the “Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities”. A remarkable degree of lack of conviction transpires from the formula adopted for transmission of the first draft to the GA. The ILC “commended the “Guiding Principles” to the attention of the GA”, which is even below the request to “take note” of a draft. Indeed, the ILC was not sure whether it had reached results that were commensurate with the efforts it had deployed for ten years, struggling to come to grips with a difficult topic. During that long period, it could never reach a full consensus as to whether the topic should comprise solely declarations of a specific type, declarations designed to produce legal effects, or whether the entire gamut of unilateral acts should be reviewed. Additionally, some members kept thinking that the two concepts of estoppel and silence should be encompassed in the subject matter. Originally, the Special Rapporteur thought of paralleling the VCLT, which soon proved to be unfeasible. Given the never-ending controversies, a working group at the 58th session in 2006 decided eventually to assemble a few elements on which a minimum consensus could be reached. Quite obviously, the ILC was not satisfied with the outcome of the project but did not wish to carry it over to a new quinquennium. In fact, the Special Rapporteur was not re-elected so that it would have been necessary to appoint a successor who could take over the burdensome responsibilities for which no persuasive answers had been found during an entire decade.

As far as the topic of international liability is concerned, the ILC recommended to the GA to “endorse” the “Draft principles” by a resolution.\textsuperscript{65} The observer is first of all struck by the cautious choice of title which the ILC eventually made. The word “liability”, which had been at the centre of long-lasting debates since the topic “International liability for injurious consequences arising out of acts not prohibited by international law” had been included in the current work programme in 1978, has disappeared. It had emerged during the entire lifetime of the relevant discussions not only in the ILC itself, but also in the GA that States regarded the topic with open mistrust. In fact, objective liability or liability based on risk would be a newcomer in international law, apart from the field of nuclear energy where, however, liability is channelled to the operator and where the amounts due in case of actual damage have been limited. Consequently, the ILC could be sure that any proposal that would go beyond the lowest common denominator would be doomed from the very outset. Thus, the central proposition is framed as follows (Principle 4 (1)):

“Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.”

The principles fall undoubtedly within the scope of progressive development of the law. They demonstrate, at the same time, how arduous it is to proceed on that path, provided that no urgent reasons militate in favour of enacting a regime that is absolutely reliable as a source of law in the sense of Article 38 (1) of the Statute of the ICJ.

Currently, the ILC deals with another topic, namely “Reservations to treaties”, which can be traced back to the fact that the treatment of reservations in the VCLT is to some extent defective. In particular, the VCLT fails to state unequivocally what effect, if any, may be produced by reservations which are incompatible with the object and purpose of a treaty. The dilemma caused by this specific legal configuration is obvious. In order formally to be on the safe side, one could amend the VCLT or conclude a supplementary protocol. However, to amend a treaty which has already entered into force would be an arduous undertaking. It could also be foreseen that States would not at all feel pressed to accept a supplementary protocol. Therefore, it may indeed be the right decision to envisage the adoption of a guide to practice in the form of guidelines which are easily understandable and which could be relied upon by treaty-making authorities in all States. Although the initiative is laudable, it seems

\textsuperscript{65} 2006 Report of the ILC (note 61), para. 63.
that the work on that topic has acquired dimensions which exceed its real importance. The ILC commenced its work in 1994, 12 years ago, and still the end of its work is not yet in sight although, after the submission of ten reports by the Special Rapporteur, Alain Pellet from France, the pace of the deliberations seems to have increased. In any event, the drafting process will come to its end some time during the current quinquennium of the ILC (2007-2011).

IV. Future Work

Concerning the other topics which at the end of the 2006 session of the ILC still remained on its agenda, it is clear that for any set of rules emerging from the ongoing drafting process the chances are slim that an international convention might be the end result. Since the regime of State responsibility has taken the simple form of articles supported by no other authority than that of the ILC itself, the same fate will await the rules to be drawn up on the responsibility of international organizations, which do not partake of a higher degree of urgency. The “Effects of armed conflicts on treaties” will amount to a complement to the VCLT which, as explicitly stated in Article 73, refrained from pronouncing on the issue. However, the topic is not broad enough to warrant the conclusion of a specific treaty. As far as “The obligation to extradite or prosecute” is concerned, the main question will be to explore whether the relevant clause which can to date be found in many international agreements, in particular in all of the treaties intended to provide assistance in the fight against terrorism, has by now crystallized as customary international law. This does constitute an interesting issue, but is not suitable as a topic of codification in conventional form, due to its fairly limited scope ratione materiae. Lastly, doubts may also be nurtured regarding the topic “Expulsion of aliens” which the ILC started dealing with in 2005. Although a highly interesting Preliminary report was submitted by the Special Rapporteur, the Cameroonian member Maurice Kamto, the question cannot be avoided whether the ILC provides the rights forum for a topic which is strongly related to the field of human rights and therefore falls also within the scope of competence of the Human Rights Council.

A mixed forecast can be made with regard to the new programme of work, adopted by the ILC in 2006. “Immunity of State officials from foreign criminal jurisdiction”, “Jurisdictional immunities of international organizations” and “Extraterritorial jurisdiction” pertain to the core substance of international law where many lacunae have led to doubts and

uncertainties. Here, conventional regimes would be highly desirable, all the more so since extraterritorial jurisdiction is more and more abused by powerful nations to strengthen their influence in the world with the help of their judicial branches of government. On the other hand, “Protection of persons in the event of disaster”, where the (a) right to humanitarian assistance will play a pivotal role, and “Protection of personal data in the transborder flow of information” may both lead the ILC into an impasse, in particular because of the specialist expertise that would be required in order to deals with these topics successfully. Therefore, what one can expect at the most is again guiding principles, i.e. soft law.

V. Working Methods
A short glance at the working methods of the ILC may usefully supplement the picture just portrayed. The way in which the work should be organized is loosely outlined in Article 16 of the Statute. In any event, a rapporteur (“Special Rapporteur”) must be appointed, who bears the main responsibility for the treatment of the topic under study. At the same time, the Statute provides for the appointment of other members requested to work with the Special Rapporteur (Statute, article 16 (d)). In general, the ILC has chosen to establish first of all a working group tasked with defining the main contours of the topic. It is on the basis of that groundwork that the Special Rapporteur will commence his individual work. This procedure was followed, e.g., with regard to “Non-navigational uses of international watercourses”, where a report of a Sub-Committee laid the foundations, to be followed by reports of Special Rapporteurs Kearney (one), Schwebel (three), Evensen (two), MacCaffrey (seven) and Rosenstock (two), and also with regard to “Jurisdictional immunities of States”, where a 1978 report of a Working Group became the point of departure for eight reports of Special Rapporteur Sucharitkul and two reports of Special Rapporteur Ogiso.

However, in the recent past the ILC has progressively realized that this method, according to which the Special Rapporteur is de facto the “master” of his topic, the other members being confined to commenting on his/her proposals, constitutes an obstacle that unnecessarily prevents the ILC from fully tapping the expertise present in its ranks. A quantum leap was realized when in 1971 the ILC was entrusted with elaborating a set of draft articles on the protection of diplomatic agents, providing for criminal prosecution of any perpetrators of criminal attacks against that group of persons. Deliberately, the ILC abstained from

68 See our earlier criticism (note 8), 184.
69 GA resolution 2780 III (XXVI), 3 December 1971.
appointing a Special Rapporteur and finalized its work during the ensuing session in 1972 mainly through a Working Group. When in 1990 the ILC was invited to “consider … and analyze” the question of an international criminal jurisdiction, it likewise decided that in view of the urgency of the matter, it should not follow the “leisurely” pace of the traditional method, involving instead all members willing to engage their best efforts. Thus, in 1992 and again in 1993 and 1994, it was decided to establish a Working Group that would carry forward the drafting process during the session. While formally the Special Rapporteur, Doudou Thiam from Senegal, remained competent for the sub-topic as part of the overall topic “Code of crimes against the peace and security of mankind”, Abdul Koroma first and in 1994 James Crawford were appointed as chairmen of the Working Group. Under their direction, the Working Group was able to make rapid progress. Since the proposals were each time openly discussed, they received their final shape even without going to the Drafting Committee. Thus, in only two years, a complete draft for a statute of an international criminal court could be drawn up.

This positive example was followed a couple of times in the following years. The topic of State succession in respect of nationality saw a close cooperation between the Special Rapporteur and four successive working Groups (1995, 1996, 1998, 1999) Regarding State responsibility, a Working Group assisted the Special Rapporteur during the first two years of his work (1997 and 1998), and also with regard to international liability a Working Group involved itself in the drafting process in 2002 and 2004, while the Special Rapporteur submitted three reports in 2003, 2004 and 2006. It is from this fruitful cooperation that the “Draft principles on the allocation of loss in the case of transborder harm arising out of hazardous activities” emerged. The ILC also wished to repeat its happy experience with working groups when it started tackling the topic of unilateral acts/declarations. It established Working Groups in 1997, 1998, 1999, 2003, 2004, 2005 and 2006. Unfortunately, this time the experience was less auspicious in that the members of those groups were unable to define a consensual position.

Generally, however, the ILC should be encouraged to include the Special Rapporteur in an institutional framework, a “group of friends” or other body, however its name, designed not only to assist the Special Rapporteur, but also to see to it that his work move forward in the

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right direction. It is very clear that a number of projects failed because too much leeway had been left to the member in charge of the topic. Thus, the topic of “Most-Favoured-Nation Clauses” was from the very outset tilted towards the interests of socialist States by Special Rapporteurs Ustor and Ushakov, and the same calamity happened when the courier and the diplomatic bag were entrusted to Special Rapporteur Yankov from Bulgaria. Had the work of those Special Rapporteurs been under the concomitant control of a working group, those imbalances would not have occurred.

It should be added, lastly, that the task of those who wish to observe the work of the ILC from outside has been greatly facilitated in recent year by a carefully drafted comprehensive presentation of all the materials produced by the ILC itself and the relevant documents from the GA. Thus, it is now easy to follow any law-making process through its different stages. For Third World countries, in particular, this modality of electronic publication is of invaluable worth.

VI. Concluding Observations

From its very first day of existence, the ILC has struggled to find its right place in the international community as a law-setting body. It is obvious that in the world of today, where the network of legal rules has become ever more tight, the ILC must adapt to the changing circumstances. There is definitely much less room for new international treaties, precisely because on the basis of the work of the ILC the codification process has covered large areas which beforehand were the domain of customary law. However, it would be erroneous to believe that norm setting by framing “principles” or “guidelines” should be valued as only second-rate. Sometimes, codification in the form of a soft-law instrument may prove as effective or even more effective than a treaty which after its launching receives only a hesitant response from the international community. General Assembly resolution 2625 (XXV) and the “Articles on responsibility of States for internationally wrongful acts” demonstrate that it is not so much the formal binding force of a legal instrument which ensures its authority as a determinative parameter in international relations. Broad international consensus is irreplaceable as support of a rule of international law.

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72 This was indeed devised as a general recipe by the ILC itself, see 1996 ILC Report (note 9), paras. 191-195, 217.
73 Still in 2002, Caron (note 59), 862, wrote: “Draft conventions are the dominant working style of the ILC”.
74 See also Thomas M. Franck, Legitimacy in the International System, AJIL, vol. 82, 1988, 705, 726.
The new tendency, which places greater emphasis on substance than on form, has prompted States to shy away from committing themselves in matters which do not directly affect their interests. Not without reason, they feel that on general issues the law should to some extent be flexible. To lay down rigid rules is certainly the right device in matters of environmental protection, regarding fishing quotas, taxation and immigration. Yet the field of general international law, which is the field assigned to the ILC, requires mostly wide margins of \textit{bona fide} discretion. On this ground, too, the greater presence of informal instruments in the production of the ILC is not regrettable.

However, it may well be that in the future the ILC will not any longer have a fixed programme that should be disposed of year after year according to a pre-determined schedule. Since the structural needs of codification have been largely satisfied after many decades of intense work, the ILC will probably more often have to face up to actual urgencies as legal counsel of the GA. Thus, the rhythm of sessions may become more irregular, which makes rational planning difficult. In any event, the ILC should not be abandoned as a permanent body that stands prepared to tackle any request for legal assistance. It would be fatal to convene a special legal panel for each and every new problem. The great advantage of the ILC is that it constitutes a body whose composition establishes a fair balance between all of the different regions of the world, and whose members have learned to cooperate with one another in a peaceful and constructive manner. Thus, together with the ICJ, the ILC guarantees that international law remains an effective instrument determining the conduct of all relevant actors in the international field.