1997

Is Codification in Decline?

Stephen C. McCaffrey
Pacific McGeorge School of Law

Follow this and additional works at: http://scholarlycommons.pacific.edu/facultyarticles

Part of the International Trade Law Commons

Recommended Citation

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
Is Codification in Decline?†

By Stephen McCaffrey*

I. Introduction

I am deeply honored and pleased to have the opportunity to contribute to this publication in honor of Stefan Riesenfeld. I hope I do not reflect too negatively upon him when I say that Steve was, more than any of my other teachers and friends, my mentor. It was he who arranged with Konrad Zweigert, in a very Old World kind of way, for me to spend a year at the Max Planck Institute for Private International and Comparative Law in Hamburg—a year that helped shape my career and enormously enriched my life. It was he who encouraged me to accept a nomination to serve on the International Law Commission of the United Nations (ILC), a nomination that took me by complete surprise. And it was and is he who, through his constant example of renaissance lawyering and relentless researching, inspires me and many others to aim, however futilely, toward the same lofty standard.

Steve's well-known work in the field of international law, together with his support for my own endeavors in that area, prompt me to address in this Article a subject that has been of concern at the close of the twentieth century: the health of efforts within the United Nations to codify and progressively develop international law. This seems an appropriate time to examine the issue because the body chiefly responsible for this task, the ILC, will celebrate the fiftieth anniversary of its establishment in 1997. Before turning to the subject at hand, a bit of background on the ILC is necessary.

† This Article is based in part on a paper given at the ILA American Branch-ASIL International Law Weekend, November 4, 1995.

* Professor of Law, University of the Pacific, McGeorge School of Law. Member, U.N. International Law Commission, 1982-1991. I am grateful to Robert Rosenstock for his comments on a draft of this Article. Any errors are my responsibility.
II. Background: The International Law Commission

The International Law Commission was established by the U.N. General Assembly in 1947\(^1\) in partial implementation of Article 13, paragraph 1, of the United Nations Charter.\(^2\) That Article provides that the General Assembly is to “initiate studies and make recommendations for the purpose of: encouraging the progressive development of international law and its codification.”\(^3\)

This language is carried over into the ILC’s statute, the constituent instrument of the Commission that regulates its activities.\(^4\) Between its first meeting in 1949 at Lake Success, New York, and the present, the ILC has considered some twenty-seven topics and subtopics of international law. The ILC’s work has formed the basis of such fundamental instruments as the 1958 Geneva Conventions on the Law of the Sea,\(^5\) the Vienna Conventions on Diplomatic\(^6\) and Consular\(^7\) Relations, and the Vienna Convention on the Law of Treaties.\(^8\)

The thirty-four members of the Commission\(^9\) are elected for concurrent five-year terms by the General Assembly, after nomination by governments. They serve in their individual capacities as experts on international law, not as representatives of governments. According

---

2. U.N. CHARTER art. 13, para. 1.
9. The Commission has been enlarged three times: from 15 to 21 in 1956; to 25 in 1961; and to 34 in 1981. THE WORK OF THE INTERNATIONAL LAW COMMISSION, supra note 3, at 7.
to the ILC's Statute, "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." As a practical matter, this provision is implemented by the General Assembly through a "gentlemen's agreement" that assigns a certain number of seats on the ILC to each of the five regional groups used by the United Nations to assure proper geographic representation on committees: Africa, Asia, Eastern Europe, Latin America, and Western Europe and Others. In recent years the Commission has typically met for one twelve-week session in Geneva from May through July. All members are rarely present for a given day's meeting, an average attendance being in the low twenties.

The Commission prepares drafts on subjects, or "topics," that the General Assembly authorizes the ILC to study, although the topics themselves are usually suggested by the Commission. The ILC's work products typically take the form of draft conventions. The Commission's work has, on the whole, been quite influential. Not only has it formed the basis of a number of central international agreements, as already mentioned, it also constitutes an important part of the "legislative history" or travail préparatoire of those instruments. And even if the Commission's work on a topic has not been completed, it may be referred to by governments and commentators as evidence of rules of general international law, or at least as proposed rules de lege ferenda, on a given subject.

The Commission's method of work is essentially as follows. The ILC appoints one of its members special rapporteur for each of the topics on its agenda. This individual may or may not have particular expertise in the subject matter involved. In fact, it is understood that special rapporteurships should be distributed more or less equitably among the five regional groups. Special rapporteurs submit reports, usually annually, containing sets of draft articles with supporting commentary and other material. The Commission discusses these reports in plenary session then decides whether articles contained in the report are ready for referral to its Drafting Committee. Articles referred to that committee are discussed and reformulated, in theory

10. ILC Statute, supra note 4, art. 8, at 2.
taking into account the debate in the full Commission. Articles adopted by the Drafting Committee are then referred back to the full membership for action. Those articles approved by the Commission at this stage are said to be adopted "on first reading." When a complete set of articles has been adopted in this way it is sent via the U.N. Secretary-General to governments for their comments. These are taken into account by the Commission in giving the articles a "second" and final reading.

It is not unusual for this entire process, from the beginning of work to completion of second reading, to take ten years or more for any one topic. The ILC then transmits the draft articles to the General Assembly together with a recommendation concerning their final form. The General Assembly has a range of choices available to it in this regard. It may decide, as it has on a number of occasions in the past, to convene a conference of plenipotentiaries for the purpose of concluding a convention on the basis of the ILC's draft. It may convene itself as a "conference" for the same purpose, as it has done on several occasions.12 It may decide that the draft articles would more appropriately take the form of a set of model rules. Or it may simply do nothing with them.

The Commission reports annually to the Sixth (Legal) Committee of the General Assembly on the work accomplished at its sessions.13 The Commission's report is discussed in the Sixth Committee each fall and summary records of these debates are made available to the Commission. Thus, rather than functioning in ivory-tower isolation, the ILC is regularly apprised of the views of governments on its work. It ordinarily takes these views into account in its future work, to the extent they are relevant. All of this should add up to a success story. But the ILC's early successes have been mitigated by the less than enthusiastic reception of some of its more recent efforts.

III. Trouble in Geneva City?

There are troubling signs that the codification of international law may be on the decline. During what might be referred to as the "golden age" of codification the ILC prepared drafts for the centrally

12. For example, with regard to the protection of diplomats, see infra note 51, and international watercourses, see infra note 47.
important agreements referred to earlier: the four 1958 Geneva Conventions on the Law of the Sea, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, and the 1969 Vienna Convention on the Law of Treaties. But other conventions concluded on the basis of ILC drafts have not been terribly successful. These include: the Convention on the Reduction of Statelessness (entered into force on December 13, 1975, but has less than twenty parties); the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (not in force; there are thirty ratifications but thirty-five are needed for the treaty to enter into force); the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (not in force; there are four ratifications and fifteen are needed); and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not in force; there are twenty-three of the required thirty-five ratifications). One other agreement, the Vienna Convention on Succession of States in Respect of Treaties, has only recently entered into force, thanks to the new states that saw a need for it in the wake of the dissolution of the Soviet Union and Yugoslavia. In addition to this less than enviable record, two of the drafts the ILC has recently reported back to the General Assembly remain lodged, if not interred, there. These are the Commission’s draft articles on the Status of the Diplomatic Courier and the Diplomatic Bag

---

14. See supra notes 5-8 and accompanying text.
16. There were 19 parties, 5 signatories to this agreement as of Feb. 7, 1996. Id. at 176.
18. There were 30 parties, 21 signatories as of Feb. 7, 1994. Id. This convention is discussed further below. See infra text at note 44.
21. There are 23 parties, 38 signatories. Id.
23. Id. art. 49(1). At present there are 15 parties, 20 signatories. Id.
not Accompanied by Diplomatic Courier,24 and on Jurisdictional Immunities of States and their Property.25 The former was probably still-born—i.e., dead on referral to ILC—and was therefore fated to go nowhere in the General Assembly. It is generally thought that this was a pet topic of the Soviet Union, which wanted expanded protection and facilities for its couriers. This unfortunate story is an excellent example of why topics that interest only a small number of states, however powerful, are not appropriate subjects for codification and therefore should not be referred to the ILC.

The same may also be true of the latter topic, Jurisdictional Immunities, also known as sovereign immunity. If the Courier and Bag was a Soviet topic, Jurisdictional Immunities was surely a western one. Codifications of the “restrictive theory” of sovereign immunity in 1976 in the United States26 and 1978 in the United Kingdom27 led the way for similar enactments in other countries.28 The 1972 European Convention on State Immunity29 and decisional law in a number of western and other countries30 provided additional impetus for this project. However, the development of the “restrictive” theory of sovereign immunity was resisted by a number of states. The Soviet Union and its allies were particularly vigorous in insisting that states enjoyed “absolute” immunity from the jurisdiction of courts of other states.

The ILC eventually came down on the “restrictive” side,31 but it quickly became evident that its draft was caught in a double-bind: the states that had resisted the restrictive approach continued to do so

27. State Immunity Act, 1978, ch. 33 (Eng.).
30. See the decisions from Argentina, Australia, Belgium, Egypt, France, Germany, Italy, the Netherlands, Pakistan, the United Kingdom, and the United States, discussed in the ILC’s commentary. Draft Articles on Jurisdictional Immunities of States and their Property, supra note 29, at 76-84.
31. See id. at 13.
(although the opposition of the former Soviet bloc was blunted somewhat by the introduction of free market economies in Eastern Europe and other parts of the world); and the western countries, which many had presumed would embrace the draft, were in fact wary of it because it was not perfectly congruent with their national legislation and practice, and contained perceived concessions to the "absolute theory" school. The result has been that the draft articles on which the Commission labored so hard upon for so many years\textsuperscript{32} remain stuck in the Sixth Committee, six years after they were initially transmitted to it by the ILC. Prospects for this project do not seem bright in light of governments' inability to decide what to do with it.

Another political "hot potato" was the Draft Code of Crimes Against the Peace and Security of Mankind.\textsuperscript{33} An outgrowth of the Nuremberg and Tokyo trials following the Second World War, the Draft Code was to settle once and for all the controversy over trying the Nuremberg and Tokyo defendants and others for "crimes," some of which had not yet been defined as such under international law. The Draft Code would provide a definitive codification of those crimes and update the list to take into account developments since 1945. The ILC produced such a code in 1954,\textsuperscript{34} but it set off such a storm of controversy in those early cold war years that the project was shelved—ostensibly for lack of an accepted definition of "aggression." It was taken off the shelf after the General Assembly adopted the Definition of Aggression in 1974,\textsuperscript{35} and the ILC resumed work on the project in 1983. The Commission adopted a set of twenty-six draft articles on first reading in 1991 and completed work on the Draft Code in 1996 by adopting a slimmed-down text consisting of twenty articles.

From the early 1950s the project has been politicized, making it difficult for the ILC to work objectively. The Soviet bloc and African states generally saw the Draft Code as an opportunity to make life difficult for western countries, many of which are former colonial powers or are intensively involved, through their nationals, in economic activities in Third World countries. Thus the Code as adopted

\textsuperscript{32} The ILC received the preliminary report of the first special \textit{rapporteur} in 1979 and completed work on the project in 1991. \textit{Id.} at 12.


\textsuperscript{34} \textit{Id.}

on first reading in 1991 included articles on such politically sensitive subjects as *apartheid,*\(^3^6\) colonialism\(^3^7\) and intervention.\(^3^8\) The fears of many countries, principally western ones, that these provisions might be abused for political advantage, coupled with the demise of the Soviet Union by the time the first reading of the draft was completed, led to a significantly toned-down final version of the Code. The articles on the subjects mentioned above have disappeared, as have articles on threat of aggression, mercenaries, terrorism, drug trafficking, and environmental harm. The Draft Code that emerged consists of fifteen articles on such “general” subjects as superior orders, obligation to extradite or prosecute, double jeopardy and defenses, but only contains five articles defining actual offenses. To be sure, some of these articles, such as Article 18, Crimes Against Humanity\(^3^9\) concern entire categories of crimes.\(^4^0\) Nonetheless, this was also true of the version provisionally adopted in 1991. The hard fact remains that only five crimes emerged from the Code’s second reading—and one of those, crimes against United Nations and associated personnel, was a new provision, added after the first reading.

The rather radical pruning of the 1991 draft may not be such a bad thing, however. One of the chief purposes of the second reading process is to give the ILC an opportunity to take into account the comments of governments on the draft adopted on first reading. This enhances the likelihood that ILC products will prove acceptable to governments and will guide them in their future relations with regard to the topic in question. It seems obvious that the ILC received a clear message from governments concerning the list of crimes, and acted on that message.

But why was the message so clear, and why did it not come earlier? The answer must lie in the international political changes of the late 1980s and early 1990s. International society does not often witness developments as revolutionary as the dissolution of a superpower. Yet it might be argued that law is supposed to be a stabilizing
influence in international society; it is not supposed to change with the political winds. If a body of norms as fundamental as a "code of crimes against the peace and security of mankind" can be so radically transformed as rapidly as the ILC's project was, the argument might continue, something must be wrong somewhere.

This might well be the case. The problem may well have been the decision to refer the project back to the ILC in the first place, after the debacle in 1954; during the 1980s, it appeared, and certainly appears in retrospect, that the subject was simply not "ripe" for codification—at least if the "new crimes" that had emerged since Nuremberg were to be included. On the other hand, the Draft Code as it finally emerged does serve the project's original purpose (providing a concrete set of norms under which individuals could be judged) and—while it might not go as far as some countries would like—it should command general acceptance because it sticks to offenses upon which there is universal agreement.

What are the Draft Code's present prospects? It is difficult to tell. The Commission itself seemed uncharacteristically dubious when, contrary to usual practice, it failed to make a concrete recommendation to the General Assembly concerning the ultimate fate of the Code. The Commission's standard recommendation is that the draft articles in question form the basis of a multilateral treaty on the subject. In this case, the ILC, after considering various forms the Code could take, recommended only that "the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code." It may be that, given the current popularity among the United States and its allies of the idea of a standing international criminal court (ICC), the Draft Code—especially in its new, lean form—has a chance of metamorphosing from caterpillar to butterfly. It may, that is, prove to be the primary basis upon which those accused of "crimes against the peace and security of mankind" are prosecuted. But given the Draft Code's troubled past, not to mention the ICC's uncertain future, this is by no means assured.

While the projects just discussed may have unclear prospects, they at least made it from the ILC to the General Assembly. Sometimes a topic dies in the Commission itself. This was the case with "Relations between States and International Organizations (Second Part of the Topic)." This project dealt with the status, privileges, and

41. Id. para. 48, at 14.
immunities of international organizations and their personnel. It constituted the “second part” of the topic dealt with by the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character, discussed above. As there indicated, the Convention itself was not a resounding success. The Commission noted that “States had been slow to ratify the [1975] Convention or adhere to it and doubts had therefore arisen as to the advisability of continuing the work undertaken in 1976 on the second part of the topic . . . , a matter which seemed to a large extent covered by existing agreements.” Therefore, after allowing the project to consume too much of its time and resources, probably more out of deference to the special rapporteur than because of any merit of the topic itself, the Commission finally delivered the coup de grace in 1992, deciding not to consider the topic further unless instructed otherwise by the General Assembly. The latter lost no time in endorsing the Commission’s decision, evidently agreeing that prospects for the topic were not bright. Originally an outgrowth of the ILC’s work on diplomatic relations, the two parts of this project encumbered the Commission’s agenda from 1963 to 1992. That there is little to show for this expenditure of ILC resources, including opportunity costs, prompts one to wonder whether and how the problem could have been avoided.

Two projects that may have brighter futures have recently been referred to the General Assembly. They are the Law of the Non-Navigational Uses of International Watercourses and the Draft Statute for an International Criminal Court. The former has been referred by the General Assembly to a Working Group of the Whole of the Sixth Committee, which is charged with elaborating a framework convention on the basis of the ILC’s draft. That body has not completed its consideration of the draft articles as of this writing. Even if

---

42. The Work of the International Law Commission, supra note 3, at 75.
the Working Group of the Whole succeeds in arriving at an acceptable text, it remains to be seen whether it will gain sufficient ratifications to make it effective. But at least the project, which had a rather long gestation period within the Commission, did emerge from the ILC and does deal with a subject of acknowledged importance. And regardless of what becomes of the negotiations in the General Assembly, the ILC’s draft articles will continue to provide guidance to states and international financial institutions with regard to international watercourse problems and projects.

The Draft Statute for an International Criminal Court is a project that shows what the ILC is capable of doing if it has clear direction from governments and does not get bogged down in its own procedures. In the context of its work on the Draft Code, the Commission began in the early 1990s to consider the outlines of a draft statute of an international criminal court. The General Assembly encouraged the Commission to continue studying this issue. At its 1992 session, the ILC established a Working Group charged with performing this task. The Working Group’s mandate was extended during the following two sessions and in 1994 it completed the Draft Statute, consisting of sixty articles. Since, as noted earlier, most projects take the Commission at least ten years to complete this was swift action indeed. The only topic disposed of more quickly, the protection of diplomatic agents, was also dealt with by a Working Group rather than through the normal special rapporteur system. The Draft Statute will doubt-


49. For the history of the ILC’s efforts in this regard, see The Work of the International Law Commission, supra note 3, at 29-34. The General Assembly had requested the ILC in 1989 to “address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under the [Draft Code]….” G.A. Res. 44/39, U.N. GAOR, 44th Sess., 72d plen. mtg., Supp. No. 49 (1989). The impetus for the resolution came from drug trafficking. Id.


51. The Working Group was established at the ILC’s 1972 session and completed work on a set of draft articles at the same session, which was adopted by the Commission. In 1973 the Sixth Committee elaborated a draft convention on the subject which was adopted by the General Assembly on Dec. 14, 1973, as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The Convention is annexed to G.A. Res. 3166 (XXVIII), reprinted in The Work of the
The ILC’s current agenda presents a mixed picture, in terms of the prospects of the topics it contains. Incredible as it may seem, two of them have been around since the very beginning. On the same day that it established the Commission, the General Assembly requested it to prepare a draft code of offenses against the peace and security of mankind. As we have just seen, the ILC has finally managed to free itself of this troublesome topic. The other project, state responsibility, has been on the Commission’s program of work since its first session in 1949; the ILC completed the first reading of its articles on this subject in 1996. Other topics are new: the law and practice relating to reservations to treaties, and state succession and its impact on the nationality of natural and legal persons, both of which were added to the Commission’s program of work in 1993. While by no means as venerable as the Draft Code and state responsibility, the one other item on the ILC’s agenda is looking increasingly like a permanent fixture: international liability for injurious consequences arising out of acts not prohibited by international law (international liability) has been under active consideration by the Commission since 1980. Thus, with the launching of the Draft Code, the ILC is left with four topics on its active agenda (three new ones are to be added in the near future). Will these projects prove to be the salvation of codification?

Certainly not all of them. Topics dealing with “responsibility,” broadly speaking, have always been difficult ones. I include under this rubric not only state responsibility itself, but also international liability and the Draft Code. The difficulty stems not so much from any shortcoming of the ILC as from the uneasiness of governments with the idea of clarifying the circumstances under which they, or their offi-
cials, will be held accountable under international law. As noted above, the Commission finally managed to complete the first reading of its articles on state responsibility in 1996.\textsuperscript{57} It has requested that governments submit their comments on the draft by January 1, 1998, after which it will give the articles a second reading. Second readings ordinarily do not take more than two years, but state responsibility is anything but an ordinary topic.\textsuperscript{58} Especially in light of the fact that part one of the draft has not been touched since it was completed in 1980,\textsuperscript{59} and because of the highly sensitive nature of the topic, the second reading may take longer than usual. When it is completed, it is difficult to imagine that a convention will be concluded on the basis of the ILC's work. Be that as it may, the project has already been influential and is one in which the ILC can justifiably take pride. Moreover, a treaty may not be the most appropriate final form of the Commission's work in the case of this particular topic. An authoritative codification of the law in this field by the ILC, endorsed in an appropriate resolution by the General Assembly, could in fact have more impact than a treaty subscribed to by a small minority of the world's nations.

The future of international liability does not look even this bright. A difficult topic from the beginning (how can there be "liability" for harm caused by "non-prohibited" acts?),\textsuperscript{60} international liability has resisted the attempts of two successive special \textit{rapporteurs} to capture and domesticate it—in the sense of defining the topic and bringing it under sufficient control that members of the Commission and governments will feel comfortable with it. In 1996, however, the ILC turned to the Working Group procedure for this topic as well in an effort to complete a text prior to the departure of the then special \textit{rapporteur}, who would leave the Commission after the 1996 session.\textsuperscript{61} The effort

\textsuperscript{57} Id. at 124.
\textsuperscript{58} For proof of this, one need only look as far as the extraordinary resignation of the most recent special \textit{rapporteur}, Gaetano Arangio-Ruiz, at the ILC's 1996 session. Id.
\textsuperscript{59} Id. at 122.
\textsuperscript{60} The possibility that a state may be under an obligation to provide compensation for harm resulting from a "non-wrongful" act was recognized in Article 35 of the Commission's articles on state responsibility. That Article provides as follows: "Preclusion of the wrongfulness of an act of a State by virtue of the provisions of [certain articles in the chapter on Circumstances Precluding Wrongfulness] does not prejudice any question that may arise in regard to compensation for damage caused by that act." Report of the International Law Commission on the Work of its Thirty-Second Session, [1981] 2(2) Y.B. Int'l L. Comm'n 34, U.N. Doc. A/Cn.4/8SER.A/1980/Add.1, pt.2.
\textsuperscript{61} The special \textit{rapporteur}, Julio Barboza, was not a candidate for re-election to the Commission for its next term of office. That this would be the case is implicitly recognized
was successful. The Working Group drafted a set of twenty-two articles, some nineteen of which had been approved by the Commission, at least in substance, at previous sessions. The Working Group’s text is perhaps not so ambitious as some earlier conceptions of the topic might have been, but it provides a sound basis for future work by the ILC and, more importantly, provides states with a concrete text upon which to comment. Whether the Commission will be able to agree on a text for adoption on first reading is unknown. However, while this might have seemed a remote possibility even several years ago, it now seems a rather good one. But even if the ILC is able to adopt a final text, it seems doubtful that it will have a significant life after the Commission. The practice of states has demonstrated that the last thing they are prepared to contemplate is anything remotely resembling strict liability, yet this is precisely the brush with which the international liability topic has long been tarred.

The two new topics, reservations to treaties and the impact of state succession on nationality, appear to have some promise. There is an undeniable need for clarification of the law in the latter field in light of the major dissolutions of states that have occurred in the last decade. The interest of the new states in the 1978 Vienna Convention bears witness to this fact. The former topic is enormously complex and has taken on new importance in recent decades as states increasingly use multilateral treaties to legislate in fields of current significance. It is therefore practically certain that the Commission’s work on reservations will make an important contribution, especially in light of the ILC’s decision that the project should take the form of “a guide to practice” that would, “if necessary, be accompanied by model clauses . . .” This decision seems both realistic and appropriate, in light of the difficulty of amending the existing treaties in the field and of the fact that a draft in this form would actually be useful to states.

While this brief survey has concluded on a rather positive note, it is inescapable that after a number of signal achievements in core areas of international law up to the late 1960s, the Commission has worked on or completed a number of drafts that have not fared so well. To
use a nautical analogy, some have not made it out of the shipyard, some have been completed but never launched, some could be com­pleted only as miniature versions of the original project, and some sank soon after being launched. It seems appropriate at this juncture, after nearly a half-century of ILC work, to attempt to identify some of the reasons for this checkered history.

V. Why is Codification Experiencing Problems?

Just as the United Nations is often blamed for everything from famine to civil strife and other forms of armed conflict, so too the ILC presents a convenient target for those dissatisfied with the process of codification and progressive development of international law. While the Commission is doubtless partly responsible, however, just as in the case of the United Nations itself, when all is said and done the ILC can only accomplish what states want it to. Thus a large share of the responsibility for problems with such topics as the Draft Code, state responsibility, the courier and bag, relations between states and international organizations, jurisdictional immunities and international liability can be laid squarely at the feet of governments. As has been seen, some of these topics should never have been referred to the ILC at all. Governments, through their delegations to the Sixth Committee, must resist the temptation to rid themselves of politically controversial topics by shunting them off onto the ILC. To the extent that the two can be kept separate, political matters should be dealt with in the political organs of the United Nations, legal ones in the ILC and other legal bodies. In addition, states simply must take a greater interest in the Commission’s work if that work is to make the kind of contribution to strengthening the rule of law that it is capable of. Government responses to ILC questionnaires and to adopted articles and drafts are woefully paltry. For example, the Commission generally receives comments from fewer than thirty governments—roughly fifteen percent of U.N. member states—on one of its drafts adopted on first reading. Since one of the unique features of the ILC is its capability to engage in dialogue with governments, if and to the extent that states are silent, the Commission will increasingly resemble pri-

66. In the case of its draft on international watercourses, for example, the ILC received comments from a total of 21 governments on the articles adopted on first reading. See The Law of the Non-Navigational Uses of International Watercourses, Comments and Observations Received from States, U.N. Doc. A/CN.4/447, Addis. 1, 2 & 3 (1995).
vate bodies such as the International Law Association and the Institute of International Law.

It is also sometimes said that all of the topics that are truly suitable for codification and progressive development have already been considered by the ILC. The Commission’s work in the areas of the law of the sea, treaties, and diplomatic relations is often pointed to in this connection. The implication is that the Commission has fulfilled its purpose and its mandate should be terminated. But this thesis oversimplifies the situation. It is probably true that the topics that were most ripe for and amenable to codification were disposed of during the first two decades or so of the ILC’s existence. But that does not mean that there is no value in attempting to codify and progressively develop topics that may present more difficulty than those successfully completed earlier on. In fact, it is arguable that it is precisely these topics, for which rules may not be so clear and agreement not so widespread, on which the Commission can render the greatest service. The thesis is also disproved by, for example, the successful work performed by the ILC on the draft statute for an international criminal court and the promising topics the Commission has recently begun to study. In addition, it is inevitable that new needs will arise in the field of codification and progressive development that are not presently foreseen. The ILC should be available to address those needs when called upon by the General Assembly to do so.

But there is another sign that the Commission, and the codification process, is not moribund: the new vigor introduced into ILC proceedings by its changing methods of work.

VI. The ILC’s New Agenda for Reform

The election in the General Assembly in the fall of 1991 resulted in an unusually large change in Commission membership: beginning with the ILC’s 1992 session, fully half of the members were new. Probably in large part because of this change, the Commission almost immediately began to adopt new procedures in an effort to streamline its work. These included the formation of Working Groups to overcome obstacles to progress with regard to certain topics, the constitution of different Drafting Committees for different topics, and a return

to voting when necessary to resolve difficult issues. None of these procedures had so much as been tried in the previous decade.\textsuperscript{69} The Working Group device alone was responsible for producing the Draft Statute for an international criminal court and the set of articles on international liability. Any knowledgeable observer cannot but be struck by the increased pace of the ILC’s work.

As if to serve notice that it is determined to continue on this path at its 1996 session, the Commission drew up a detailed list of possible changes in its procedures “which might enhance its usefulness and efficiency.”\textsuperscript{70} While the list and the accompanying analysis\textsuperscript{71} were prepared in response to a request from the General Assembly,\textsuperscript{72} as noted above, the ILC had already embarked upon streamlining its methods of work without being prompted by its parent body. Among the Commission’s recommended changes are the following: the ILC should continue its practice of identifying issues on which it specifically seeks comment from the Sixth Committee, when possible in advance of the adoption of draft articles on the point; special \textit{rapporteurs} should be asked to indicate the nature and scope of work they plan for the next session, and they should make their reports available sufficiently in advance of the session at which they are to be considered; special \textit{rapporteurs} “should be asked to work with a consultative group of members;”\textsuperscript{73} debates in the plenary sessions of the Commission “should be reformed to provide more structure and to allow for an indicative summary of conclusions by the Chairman at the end of the debate, based if necessary on an indicative vote;”\textsuperscript{74} the current practice of different Drafting Committees for different topics should be maintained; “working groups should be more extensively used, both in an effort to resolve particular disagreements and, in appropriate cases, as an expeditious way of dealing with whole topics;”\textsuperscript{75} the ILC should revert to the earlier practice of a ten-week session and should experiment with

\textsuperscript{69} Attempts were made during the author’s tenure on the Commission to introduce some of these reforms, among others, but without success.
\textsuperscript{70} 1996 ILC Report, \textit{supra} note 13, at 196-97.
\textsuperscript{71} \textit{Id.} at 199-230.
\textsuperscript{73} 1996 ILC Report, \textit{supra} note 13, at 198.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} The recommendation continues: “in the latter case the Working Group will normally act in place of the Drafting Committee.” \textit{Id.}
splitting its session in 1998; and finally, consideration should be given to revising the Commission’s Statute.

Many of these ideas would formalize practices that are already in place, or that have at least been tried. Be that as it may, any Commission observer cannot help but be struck by how radically the ILC’s working methods have changed in less than ten years. The change seems clearly to be for the better, as the Commission’s increased output and responsiveness attest.

VII. Evaluation

The ILC seems to have embarked on the road to reforming its procedures, and it is doubtful that it will reverse itself in this regard in the near future. This is a positive step. It should commend itself to governments who seem of late to have turned away from the Commission to some extent. So long as the ILC remains vigorous and responsive, there is no reason to believe it cannot continue to render a valuable service to the General Assembly and the international community as a whole. The only wild card in this game is states themselves: do they want a close working relationship with the Commission, or would they just as soon not think too much about the law, since that will ineluctably lead them to think about their own legal obligations? Similarly, do states want an efficient and effective ILC that engages in codification and progressive development of the law in new fields (such as the environment) and those in which the law is less than clear (such as unilateral acts of states)?

Assuming that the answer to these questions is yes and that states show more willingness to engage in a close collaborative relationship with the ILC than they have in the recent past, what can the Commission itself do—or propose to the General Assembly that it be allowed to do—that might contribute to greater efficiency and effectiveness in its working methods?

Certainly one thing it can do is to keep the items on its active agenda down to a manageable number. In the 1980s the ILC had as many as thirteen items on its agenda. In 1996, the number was five. Assuming that the Commission receives reports from special rapporteurs on all topics, and that it discusses those reports in plenary—

76. See supra note 56.
as is its usual practice—it would barely have time to deal with five
topics during a given session, since discussion of one would consume,
on average, roughly two weeks.\textsuperscript{78} This would leave very little time for
discussion of any articles reported on by the Drafting Committee and
for consideration of the ILC’s report to the General Assembly.

A second reform is one that is already contemplated. In fact, it
really consists of two different changes: shortening and splitting the
session. As noted earlier, the ILC has finally accepted the possibility
that it can function effectively—perhaps even more effectively—if it
does not have to do all of its work within one twelve-week session
each year. While twelve weeks in Geneva may sound attractive to
travel agents, it is far from optimal for the kinds of busy individuals
that are typically elected to the ILC. This helps to explain why only
about two-thirds of the membership is present on any given day of a
session, and why only a handful are generally present for an entire
session. Moreover, twelve solid weeks of intensive work and negotia-
tion takes its toll on the members that are present; it is not necessarily
conducive to collegial relations toward the end of the session when
difficult decisions must often be made. Thus the possibility of splitting
the ILC’s sessions should be seriously considered, as now recom-
mended by the Commission itself. Other United Nations bodies, such
as the Administrative Tribunal and the Human Rights Committee,
hold summer meetings in Geneva and winter meetings in New York.
Many Commission members would probably find it more feasible to
attend two shorter sessions than one long one. And even those who
presently attend the entire twelve-week session would likely find it
easier to sustain the required effort over two shorter periods. If the
ILC’s agenda were reduced to three or four items, two sessions of four
weeks each should be adequate. But the ILC has already shown that
it can accomplish much in a session of ten weeks.\textsuperscript{79}

The special \textit{rapporteur} system has already undergone changes—
especially through increased use of Working Groups—but should con-

\textsuperscript{78} This assumes that, as is usually the case, half of each working day is allocated to
the plenary session and half to the Drafting Committee or other subsidiary body.

\textsuperscript{79} The financial crisis of the United Nations forced a reduction in the length of the
ILC’s 1986 session to 10 weeks. However, during that session, the Commission completed
the first reading of two topics: jurisdictional immunities and the diplomatic courier and
bag. 1986 also happened to be the end of a five-year term. These considerations do not
prove that less time will make the ILC more productive, but they show that, when under a
certain amount of pressure, the ILC can function quite efficiently and effectively.
The system is not manifestly ill-suited to the Commission's needs, nor is it functioning defectively, in general. The ILC's work on any topic is entirely dependent upon the special rapporteur. If that individual is slow or late in submitting reports, fails to make proposals that attract majority support, or does not follow the clear wishes of the Commission, work on the topic can bog down. It is therefore especially important that the ILC, and special rapporteurs it elects, make every effort to implement the proposals noted above concerning the special rapporteur system. And it goes without saying that the Commission should take great care in deciding whom to elect to these critical positions.

The Commission's relationship with the Sixth Committee should also be examined carefully. While the relationship between governments and the ILC should be strengthened, as indicated earlier, in some respects the Commission should be given a longer tether from the General Assembly. With regard to reporting, for example, it does not seem necessary for the ILC to report in detail every year on everything it has done at a given session. This can lead to premature discussions in the Sixth Committee of matters that are still in gestation within the Commission. These discussions, in turn, can hamper the Commission as it attempts to formulate and clarify its ideas. More specifically, the ILC should consider not reporting on articles until an entire chapter of a draft is complete. It is difficult for the Sixth Committee to evaluate a small set of articles in isolation of their context, and the comments of governments will therefore not likely be of great help to the Commission.

Two final suggestions concerning the relationship between the ILC and the Sixth Committee: the latter should feel free to call upon the Commission to answer questions on points of law that are not, for whatever reason, suitable for referral to the International Court of Justice. Also, it should take greater advantage of the ILC's demonstrated ability to prepare drafts quickly on topics of current importance when asked to do so.

A welcome change has been the return to voting, where necessary. While voting may not be as collegial as decision-making by consensus, it allows ILC to make progress when a small minority of recalcitrant members would thwart it, and tends to produce articles that are less mushy, thus giving clearer guidance to states.

80. I will repeat here some of the proposals for reforming the special rapporteur system I made in McCaffrey, supra note 3, at 42-43.
Finally, the "Codification Division" of the Secretariat should be permitted to perform its intended function: serving the ILC. What has happened, for example, to the "surveys" of international law? The ILC has had to resort to, in effect, preparing its own in recent years. Much, if not most, of the time and resources of the Codification Division appears to be spent servicing committees of the General Assembly, to the detriment of the ILC. This seems to have been the product of the era of Soviet Directorship of Codification Division (that lasted until the early 1990s), when codification of general international law obviously was not popular with the Soviet Union. One of the results of this change in focus is that it has sometimes been difficult for special rapporteurs to obtain the necessary assistance from the Codification Division in the preparation of reports. Consequently, the special rapporteurs have, at least sometimes, had to use their own assistants exclusively. This cannot but impede the ILC's work. More of the resources of the Codification Division should therefore be redirected toward the ILC and (need it be said?) codification.

VIII. Conclusion

The International Law Commission has embarked upon a path of reform that augurs well for its future. In the end, however, only states can guarantee the continued health of the codification and progressive development of international law. It is the fervent hope of many Commission observers that they will be equal to the challenge.