

The International Law Commission (ILC) at 75 years old:

Time to assert its unique status and freshen up

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The International Law Commission (ILC) was established in 1947 following an attempt to systematise the codification and development of international law. The ILC is now composed of thirty-four experts elected to the position who shall be of ‘recognized competence in international law’² and representing the main forms of ‘the principal legal systems of the world’³. The ILC has established itself as a major contributor to the modern world of international law and has fulfilled its purpose of promoting the progressive development and codification of international law.

Some say, however, that the golden period of codification is over, so as the role of the ILC. Since the beginning of the 21st century, only one convention has been adopted based on the work of the ILC⁴. Rather, the ILC has diversified the forms of its work products being guidelines, principles and conclusions as well as taken a new role as an interpreter of international law⁵.

As the ILC will celebrate its 75th anniversary with the new quinquennium - 2023-2027, those who will be elected at the upcoming election in November 2021 should ensure that the Commission continues its legacy and achieves its future success. The 75-year-old ILC must reaffirm its unique position as a promoter of international rule of law, while freshening up with new topics which correspond to the pressing concerns of the international community.

The challenges facing the ILC are twofold: first, there are too many topics on the ILC’s current agenda and secondly, the Commission needs to strengthen

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² ILC Statute, Art. 2.

³ ILC Statute, Art. 8.

⁴ UN Convention on Jurisdictional Immunities of States and their property (2004)

⁵ Danae Azaria, ‘Codification by Interpretation’: The International Law Commission as an Interpreter of International Law, *European Journal of International Law*, Volume 31, Issue 1, February 2020, Pages 171–200.

its relationship with the UN Member States of the Sixth Committee, which is linked to the ILC's working methods.

With a mandate⁶ so broad like no other sectoral bodies, it is no doubt that the role of the ILC remains relevant for codifying and drafting rules based on State practices. The Commission carefully examines State practices of all regions of the world and crystallises them into principles of international law. The ILC's core strength comes from its unique status as a subsidiary organ of the General Assembly, representing diverse legal systems and backgrounds of the whole international community as well as the privileged channels of communication with the UN Member States. Member States should therefore make the most of those values and the ILC must take full advantage of its exceptional stance.

To build on its legacy and ensure future success, the ILC must have the right topics on its agenda, striking a balance between traditional topics of codification and contemporary complex issues such as sea level rise. The ILC could also revisit its achievements through the lens of the modern world. The latest trend is to provide extensive interpretation of the past core work of the Commission, especially on the Vienna Convention on the Law of Treaties, such as the work on reservation, subsequent agreements and subsequent practices and provisional application. But it is also time to freshen up the Treaty Law to cope with the digital era and give a thought to the contemporary use of non-legally binding instruments.

The ILC should not shy away from modern-day difficult topics and leave them in the hands of sectoral organisations or some powerful and resourceful exclusive clubs. It should lend its expertise to the service of all States, urging them to address common concerns to ensure equitable principles of international law. The ILC's work is known for being well-balanced and meaningful to all UN Member States, rather than one-sided norms imposed by a small group of countries.

In this regard, the fair and equitable treatment standard in international investment law which has long been on the ILC long-term programme of work is an excellent candidate. The application of this existing standard has been widely diverse. The duty of States needs to be clear in its content and have a unified standard as it touches upon the limit of the conducts of States. Protection should be provided to foreigners when doing business in Member States, while the right to regulate must be exercised in a regulated manner to offer certainty both for States and their private counterparts. Under the auspices of the ILC, an appropriate balance among diverse interests of all States of all levels of development can be achieved since all the State practice would be discussed by experts representing different legal systems of the world with rich experiences from academics and practitioners.

⁶ ILC Statute, Art. 1.

Turning to the relationship between the ILC and Member States and other bodies, since the ILC is part of a bigger multilateral system, it should work with other organs and mechanisms to ensure that the international community is equipped with adequate legal tools. The Commission may consult, if it considers it necessary, 'with any of the organs of the United Nations on any subject which is within the competence of that organ', as well as 'with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions'⁷.

At the same time, the ILC should revitalise its relationship with the Sixth Committee. At the last session of the Sixth Committee, the pending ILC draft articles on the expulsion of aliens, the protection of persons in the event of disaster and crime against humanity were on the agenda. What the Sixth Committee decided on such important topics is simply to defer its consideration for future sessions.

One can argue that it was due to the COVID-19 that participation by Member States was limited. The problem of deferral, however, is not new. Member States have too little time and resource to reflect on the report of the ILC. In fact, for the last five annual sessions of the Sixth Committee, there is an average of 26 agenda items per 6-week session. Roughly speaking, it would be one agenda item per day. As time is an essence when it comes to issues considered to be too political and controversial, the Sixth Committee prefers postponing an agenda because of the lack of consensus.

Should we worry about this phenomenon of lack of States' interest in the work of the ILC? Is it the quality of the ILC work that is at issue? If we look closer into the underlying problem, we will realise that Member States, even the most resourceful ones, cannot catch up with all the work of the distinguished members of the ILC. The report of the ILC is only one among many crucial agenda items presented to the Sixth Committee. Moreover, the number and highly technical aspects of the topics on the ILC's agenda require a lot of time and expertise for Member States to digest. Since all the time States have during the Sixth Committee annual session is only less than two weeks, most statements are made in a general manner rather than in response to particular concerns. In addition, there are also many agendas and activities during the so-called "legal week" for the Sixth Committee's delegates which often overshadow the work of the Commission.

To improve the situation, the ILC must, first, reduce the number of topics per session so that it could focus and expedite its work on the chosen topics. This in turn would allow States to study those topics more in depth and provide more specific comments or answers to the questionnaires requested by the ILC. Secondly, it is important to increase participation of legal advisers in the on-going work of the ILC. On the one hand, the ILC could aim to reach out to

⁷ ILC Statute, Art. 25 (1) and Art. 26 (1).

Member States in a more engaging way than just presenting reports. The streaming of the ILC's plenary meetings for the first time this present session through the UN WebTV is a good start in this direction. On the other hand, the ILC must listen actively to States' needs and concerns. In order to do so, more opportunities of engagement should be created at the personal, national, regional, and international levels, apart from the formal views received through formal channels.

At the personal and national level, following the path of many of their predecessors, distinguished members of the ILC can, through their networks, reach out to discuss the content of the current work of the Commission. They can help gather views from academics and practitioners within their circles and share them with other members of the Commission.

The ASEAN Directors-General of the departments of treaties and legal affairs luncheon initiated during Thailand's ASEAN Chairmanship in 2019 was a great example of an informal dialogue among top legal advisers of the region. Cross-regional fora such as the Asian-African Legal Consultative Organization (AALCO) can also be used more efficiently to engage with ILC members who are from African and Asia Pacific regions.

At the UN level, the ILC can benefit from intersessional meetings by using them as a workshop to prep legal advisers from Member States ahead of the annual Sixth Committee session. An informal format would create more conducive environment for a lively exchange. This can be done, for example during the time that the ILC is in session in Geneva or any other appropriate time. With the use of technology and online platform, wider participation becomes possible with less cost.

The work of the ILC should be the fruit of collective effort of all the ILC members. The innovative model of the study group on sea level rise with five rotating co-chairs, which also has the benefit of expediting the work those interdisciplinary issues to meet the pressing need of the international community, should be further explored.

In conclusion, a food for thought for those new members of the ILC who will be elected this November, it is time for a fresh start. After the November election, all members of the new quinquennium of the Commission could come together to make a strategic plan and schedule for the next five years of their tenure, which may include proposals ranging from organising intersessional meetings with legal experts from Member States, exploring new topics of interest of the Member States to preparing them for upcoming reports of the ILC. This way, the new ILC members will freshen the ILC up for its 75th year anniversary, while asserting its unique status to promote international rule of law for the benefit of humankind.
