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The ILC at Its 70th Anniversary: Its Role in International Law and Its Impact on U.S. Jurisprudence

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THE ILC AT ITS 70TH ANNIVERSARY: ITS ROLE IN INTERNATIONAL LAW AND ITS IMPACT ON U.S. JURISPRUDENCE

Siegfried Wiessner* & Christian Lee González**

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It is the International Law Commission’s (“ILC”) “birthday” celebration, and one is expected to bring presents to such events. As an international law scholar and an outsider to the institution, my best presents are hopefully constructive comments in the nature of analysis, critique, suggestions, and positive statements of encouragement. Such comments aim to be informative, practical, and helpful. By necessity, all of them depend on one’s perspective, the role that one perceives a lawyer should have in society, one’s observational standpoint, one’s jurisprudence, etc.

Most of our perspectives derive from a positivist framework.¹ Even if we assume the role of a problem-solver, as in the respected New Haven Approach to law,² we still need to deal with the practical needs of the legal environment. The application of law often entails—and even requires—at least some of the concerns and analytical tools of positivism. Legislation and other decision-making processes generally, however, are different and not

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¹ Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L. 302, 302 (1999).

² See generally HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992); W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575, 576 (2007).

wholly amenable to such an approach; that is where New Haven displays its greatest strength.³

From this perspective, we take stock of the “birthday kid” and its accomplishments—the ILC. It is a creature of the states and a part of the optimistic San Francisco construct of the world community after the cataclysm of World War II. It was more the *beginning* of something than the *culmination* of various antecedents, and it has subsequently made a greater number of inroads than the few discernible paths leading to its creation. In what follows, I will first make some observations on the history of the ILC’s twofold institutional mandate. Second, I will present the results of empirical research on the direct and indirect impact of the ILC on U.S. jurisprudence and legal scholarship. Lastly, I will furnish the reader with an assessment of the ILC’s current challenges in fulfilling its mandate to codify and “progressively develop” international law and some recommendations to address them.

I. THE ILC: ITS MANDATE AND ITS PERFORMANCE

At its inception, the ILC was primarily seen as a laboratory for the *codification* of international law.⁴ It was established in 1947 by the General Assembly to undertake its mandate—under Article 13(1)(a) of the Charter of the United Nations—to “[i]nitiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”⁵ Shifting from its early focus on drafting conventions,⁶ it now mostly aims at developing non-binding instruments of a highly influential character, as in the case of subsequent agreements and practice regarding the interpretation of treaties,⁷ or the identification of rules of

³ Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT’L L. 316, 320 (1999); Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PAC. L. REV. 45, 47–48 (2010).

⁴ “[S]tating . . . what the law is” is the Commission’s “primary task, and it is probable that the Commission will wish to adhere to it wherever possible.” U.N. Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory Work within the Purview of Article 18, Paragraph 1, of the International Law Commission*, ¶ 108, U.N. Doc. A/CN.4/1/Rev.1 (Feb. 10, 1949) [hereinafter *Survey of International Law*].

⁵ U.N. Charter art. 13, ¶ 1.a.

⁶ In 2002, David Caron still wrote: “Draft conventions are the dominant working style of the ILC.” David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT’L L. 857, 862 (2002).

⁷ *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, [2018] 2 Y.B. Int’l L. Commission 2, U.N. Doc. A/73/10, http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_11_2018.pdf&lang=EF.

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customary international law⁸ and other sources such as general principles of law and *jus cogens*. Besides its work on sources, the clarification and development of key substantive and procedural rules of international law are also part of the agenda.

The ILC has virtually exhausted its original list of topics, which included many of the subjects of immediate interest to States at the time. In its first session, in 1949, it reviewed 25 topics for possible inclusion in a list of topics for study, on the basis of a survey of international law prepared by the Secretariat.⁹ Following that, the ILC drew up a provisional list of fourteen topics selected for codification, to wit:

1. Recognition of States and Governments;
2. Succession of States and Governments;
3. Jurisdictional immunities of States and their property;
4. Jurisdiction with regard to crimes committed outside national territory;
5. Regime of the high seas;
6. Regime of territorial waters;
7. Nationality, including statelessness;
8. Treatment of aliens;
9. Right of asylum;
10. Law of treaties;
11. Diplomatic intercourse and immunities;
12. Consular intercourse and immunities;
13. State responsibility; and
14. Arbitral procedure.¹⁰

Much of this work has been successfully accomplished, often resulting in important innovations in the international constitutive process, as exemplified by the 1969 Vienna Convention on the Law of Treaties,¹¹ the 1961 Vienna Convention on Diplomatic Relations,¹² the 1963 Vienna Convention of Consular Relations,¹³ the 1998 Rome Statute of the

⁸ *Draft Conclusions on Identification of Customary International Law*, [2018] 2 Y.B. Int'l L. Commission 2, U.N. Doc. A/73/10, http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF.

⁹ *Survey of International Law*, *supra* note 4, ¶ 25.

¹⁰ *Summary Records of the First Session 12 April – 9 June 1949*, [1949] Y.B. Int'l L. Commission 1, ¶ 3, U.N. Doc. A/CN.4/SER.A/194.

¹¹ May 23, 1969, 1155 U.N.T.S. 331.

¹² Apr. 18, 1961, T.I.A.S. No. 12,587, 500 U.N.T.S. 95.

¹³ Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

International Criminal Court,¹⁴ and the 2001 Articles on State Responsibility,¹⁵ to mention but a few of the ILC's outstanding accomplishments.

In fact, by 2010, only four of the topics envisioned in 1949 had not been fully dealt with either by means of a report or a final draft thereof.¹⁶ Work on these topics continues.¹⁷ In its 66th session in 2014, for example, the ILC adopted draft articles on the expulsion of aliens, and the 2018 work program includes:

- Crimes against humanity;
- Immunity of State officials from foreign criminal jurisdiction;
- Provisional application of treaties;
- Protection of the environment in relation to armed conflicts;
- Protection of the atmosphere;
- Peremptory norms of general international law (*jus cogens*);
- Succession of States in respect of State responsibility; and
- General principles of law.¹⁸

The ILC has thus accomplished so very much, and its impact on international law generally and around the globe is indisputable.

II. THE ILC'S IMPACT ON U.S. JURISPRUDENCE

Somewhat more disputable, however, is the ILC's impact on domestic law, particularly in the United States ("U.S."). Despite recent research on the impact of United Nations ("U.N.") documents on U.S. jurisprudence,¹⁹ no analogous work seems extant addressing ILC contributions specifically. Looking at American case law and legal journals referring to the ILC or its

¹⁴ July 17, 1998, 2187 U.N.T.S. 90. For its place in the arena of international law, see LINDA E. CARTER, MARK A. ELLIS & CHARLES CHERNOR JALLOH, *THE INTERNATIONAL CRIMINAL COURT IN AN EFFECTIVE GLOBAL JUSTICE SYSTEM* (2016).

¹⁵ G.A. Res. 56/83 (Dec. 12, 2001). For details, see Siegfried Wiessner, *The Articles on State Responsibility and Contemporary International Law*, in 34 *THESAURUS ACROASIAM* 241, 247–276 (Kalliopi Koufa ed., 2006).

¹⁶ ALINA KACZOROWSKA, *PUBLIC INTERNATIONAL LAW* 71 (4th ed. 2010) (discussing the recognition of states and governments; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and right of asylum).

¹⁷ For details on all topics considered, see *Programme of Work*, INT'L LAW COMM'N, <http://legal.un.org/ilc/programme.shtml> (last visited Jan. 18, 2019).

¹⁸ INT'L LAW COMM'N, <http://legal.un.org/ilc/> (last visited Jan. 23, 2019).

¹⁹ See, e.g., Paul Hellyer, *U.N. Documents in U.S. Case Law*, 99 L. LIBR. J. 73, 73 (2007).

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work—whether *directly* or *indirectly*—enough empirical data exists to allow for certain informative inferences.²⁰

A. *Direct Impact on Cases and Legal Scholarship*

Of the 9,929 officially and unofficially published cases in the U.S. dealing with or mentioning “international law,” sixty-five (0.67%) directly reference the ILC.²¹ Such a low number is somewhat surprising, since the ILC is among the few bodies whose statements may constitute evidence of international law under the Statute of the International Court of Justice, a status shared only with the International Law Association (“ILA”) and the Institut de Droit International (“IDI”).²²

As to the *content* of the references,²³ the 65 cases cite to the ILC’s work on a variety of topics, such as international torts and crimes, including the Articles on State Responsibility (31.5%); diplomatic and consular relations (31.5%); borders and the law of the sea, particularly the Continental Shelf Convention (26%); treaty interpretation, including the effect of reservations (4%); the measurement of monetary damages in arbitral awards (3%); as well as the Nuremberg Principles and procedural aspects of law, including the rule of exhaustion of administrative remedies (4%). Few as they are, however,

²⁰ The following statistics are based on citations and references to: Category (1): the “International Law Commission” (and alternatively, “ILC”); and Category (2): the International Law Commission’s work product, each instrument searched under various name combinations (i.e., “Vienna Convention on Consular Relations” or, alternatively, “Convention on Consular Relations”). The data was gathered by searching the full-text and other Boolean combinations in Westlaw’s database of federal and state cases, as well as its database for secondary source law reviews and legal journals. The search combinations were conducted with strict discrimination (i.e., “International Law Commission,” or “‘International’ AND ‘law’ AND ‘commission,’” screening results individually for false positives) on November 15, 2018. The search of primary sources was designed to include all federal, state, and territorial cases, and that of secondary sources to include only law reviews, legal journals, and the *Second*, *Third*, and *Fourth Restatements on Foreign Relations*. If a case or legal article contained multiple references to Category (1), only one instance was counted, but multiple and separate references to Category (2) were all counted. Furthermore, instances were counted whether they quoted the ILC or any of its work product, merely cited to it in a footnote, or merely mentioned it in the text without citation or quotation. The data was stratified and represented in different ways, as shown in the tables attached, discriminating for different variables in different contexts. Overall, of a total of 9,929 cases mentioning the term “international law,” only sixty-five make direct reference to the ILC (Category (1)), while 2,102 cases (excluding the 65 Category (1) cases) make indirect reference to the ILC (Category (2)). Case references were counted only once for these purposes, so a total of 2,167 cases can be said to make reference to and be somehow impacted by the ILC in the United States. Overall, 4,357 law review and legal journal articles make direct reference to the ILC (Category (1)). Indirect references (Category (2)) were not measured.

²¹ For a list, see *infra* Table 1.

²² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 reporters’ notes 1 (AM. LAW INST. 1987) [hereinafter RESTATEMENT THIRD].

²³ See *infra* Table 2.

these areas are representative of those topics of jurisprudence on which the ILC has been most influential.²⁴

As to the *types of document* cited, 49% of cases cite to ILC reports, 44% to its draft articles, guidelines, and conventions, 32% to the ILC's Yearbook, 20% to its commentaries, and 7% to its meeting records.

As to the *frequency* of the cases,²⁵ a slight trend of *increased* reference to the ILC is perceptible. Since 41% of the cases have been decided since 2001 alone, this represents four times as many cases as ever before.²⁶ The earliest case dates from 1957, *Power Authority of N.Y. v. Federal Power Commission*,²⁷ where the majority positively referenced on its main text an ILC report used as a subsidiary source of law on the topic of treaty interpretation. The latest dates from 2016, *Republic of Argentina v. AWG Group Ltd.*,²⁸ where the majority, on its main text, positively referenced the ILC's Draft Articles on State Responsibility with respect to the nature of damages in arbitration awards, regarding them as a statement of customary international law.

As to the *manner* of reference, fifty-three cases (88%) cite the ILC with approval, four (6%) do so negatively, and four (6%) do so neutrally. Moreover, in most cases (95%), it is the majority on the bench referencing the ILC, not the dissent. Most of the time such references are made on the main text of the opinion (66%), as opposed to a mere footnote (24%), although sometimes courts will do both (9.2%). Thus, when resorting to the ILC, American courts generally recognize it as authoritative—and even dispositive—in certain areas of international law.

As to the *forum* making such references,²⁹ only a bare majority of courts (52%) directly citing the ILC are of an appellate nature. The ILC's work appears to be of no less significance to the daily, on-the-ground litigation in trial courts referencing it (48%). Despite an overwhelming majority (93.5%) of the cases taking place at the federal level, due to federal question jurisdiction, a small number of cases have taken place at the state level (6.5%). Notably, six of the seven U.S. Supreme Court cases directly referencing the ILC have done so approvingly, meaning that the highest court

²⁴ For a representative list of cited documents, see *infra* Table 3.

²⁵ See *infra* Table 4.

²⁶ The frequency of cases by decade is as follows: 1951–1960 (2%), 1961–1970 (14%), 1971–1980 (15.3%), 1981–1990 (15.3%), 1991–2000 (12.3%), 2001–2000 (35%), and 2011–2018 (6.1%). The decades from 1951–2000 yield an average of 11.78% which, when compared to the aggregate frequency of the years since 2001 (41.1%), represents an overall frequency almost four times lower than the current trend.

²⁷ 247 F.2d 538 (D.C. Cir. 1957).

²⁸ 211 F. Supp. 3d 335 (D.D.C. 2016).

²⁹ See *infra* Table 5.

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of the land recognizes the ILC as authoritative. These observations must, of course, be seen in light of the relatively small number of extant cases directly referencing the ILC.

Of 4,357 law review and legal journal articles directly referencing the ILC, a majority (38%) relies on the Vienna Convention on the Law of Treaties, a second group (26%) refers to the U.N. conventions on the law of the sea, a third group (10%) references the Draft Articles on the Responsibility of States, and the rest deal with instruments like the Vienna Convention on Consular Relations and the Draft Articles on the Succession of States, among others.³⁰ Overlappingly, the majority (48%) of articles invoke ILC documents to engage with general principles of law, a second group (46%) engages with customary international law, and a third group (38%) addresses treaty law. Notably, the *Second*, *Third*, and *Fourth Restatements of Foreign Relations Law of the U.S.* aggregately make forty-four direct references to the ILC.³¹ Most of such references (22%) concern treaty law. The rest concern international torts and crimes (14%), state responsibility (14%), diplomatic immunity (11%), the sources of international law (9%), and a host of other minor topics, respectively.

Overall, in the context of judicial decisions, and despite the almost negligible amount of extant published and unpublished opinions directly referencing the ILC (less than 1%), the frequency with which such references are being made is clearly increasing. Relevantly, the trend is well within the previously identified trend of increasing references to U.N. documents generally.³² The 1% amount does not necessarily imply a lack of impact for two reasons: First, to take just one comparative metric, in 2018 the U.S. saw upwards of 100,000 federal cases, and upwards of 70,000 appellate cases specifically, which represents an 18% decrease since 2009.³³ Since most direct ILC references by the judiciary take place at the appellate level and in federal fora, this larger background is informative: the sheer number of cases heard at any given time is immense, when compared to other jurisdictions. Second, a better indicator is that six Supreme Court cases have approvingly and directly referenced the ILC. Moreover, if law review and legal journal articles, along with the *Second*, *Third*, and *Fourth Restatements on Foreign Relations Law*, are any indication of the direct academic impact the ILC has

³⁰ See *infra* Table 6.

³¹ See, e.g., RESTATEMENT THIRD, *supra* note 22, at §§ 102–03, 206–09, 221, 301, 311–12, 334, 336, 404, 464–66, 522, 601, 701–02, 711, 801, 901, 904–05; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 1, 28, 165, 183–84 (AM. LAW INST. 1965); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 101–02, 104–06, 217, 402, 457 (AM. LAW INST. 2017).

³² Hellyer, *supra* note 19, at 86.

³³ *Federal Judicial Caseload Statistics 2018*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> (last visited Jan. 6, 2018).

had in the U.S., the data suggests that it is exponentially higher in this context than in the judicial one, and displays a reliance on ILC documents in areas in which the ILC has been remarkably successful.

B. Indirect Impact on Cases and Legal Scholarship

The data on indirect impact tells a different story. At least 2,102 officially and unofficially published judicial opinions indirectly reference the ILC by citing, quoting, relying on, or discussing the ILC's work product or instruments heavily influenced by it, even if failing to mention the ILC.³⁴ The majority of such cases (51%) refer to the Vienna Convention on Consular Relations. A second group (12%) refers to the Vienna Convention on Diplomatic Relations. A third group (9%) refers to the Convention on the High Seas. A fourth group (7%) refers to the Vienna Convention on the Law of Treaties. The rest refer to several instruments, including the Convention on the Continental Shelf, the Protocol Concerning the Compulsory Settlement of Disputes, and the Convention on the Prevention and Punishment of Crimes, among others. The two largest groups show a disproportionate impact by the ILC on U.S. jurisprudence in the area of diplomacy. A stratification of data by type of forum is also informative. Although the overwhelming majority of such cases take place in the federal system,³⁵ some ILC documents (or heavily influenced instruments) are relied on evenly or almost evenly by federal and state courts alike. These include the Convention on Fishing and Conservation (50%–50%), the Convention on the Continental Shelf (64%–36%), and the Convention on Consular Relations (69%–31%). The reasons for such similar reliance are somewhat obvious: states are directly implicated in disputes concerning their sovereign rights over natural resources and territory, whether battling other states, foreign sovereigns, or their own federal government, and much litigation against or by diplomats or consuls takes place in the courts of the states where such officials commute or reside.

Although the number of cases making *direct* reference to the ILC surveyed above is almost negligible (less than 1%), the number of cases making *indirect* references to the ILC is not (21%). A sizable number of indirect impact instances, coupled with a negligible but increasing number of direct references, allows for the reasonable inference that the ILC's impact on limited areas of international law in U.S. jurisprudence is indisputable in the context of diplomatic relations, for example, and moderate or increasing in other areas.

³⁴ See *infra* Table 7.

³⁵ See *infra* Table 8.

III. ASSESSMENT AND RECOMMENDATIONS

Given its extraordinary record of accomplishment internationally, the question arises: Has the ILC been too successful? Has it exhausted its mandate?³⁶ As documented above, only four of the topics in its original plan of work have not been fully examined yet, although they are currently being considered. Should the ILC close shop now? Should it just serve out its term as a residual mechanism, similar to the specialized international criminal tribunals of the 1990's? Also, should the ILC limit its agenda, as suggested by some, to rather non-controversial and technical issues? After all, there are very few topics that can be considered non-controversial and on which all states concerned would have similar, uncontested positions. Would we otherwise simply be wasting our time? Again, I will speak to this from the perspective of an outsider who does not know the inner workings of the body, the pressures from States, and so on. I'd like to offer some comments on the present and future of this body, which may just restate, at times, some of the suggestions made before.

Codification is not the only work the ILC was created to perform. Its mandate includes—on at least an equal footing—making recommendations and “[e]ncouraging the progressive development of international law.”³⁷ As proven by its initial agenda and subsequently addressed topics, one can observe, however, a mounting reluctance by the ILC to sign onto legislative projects addressing novel issues facing the world. Instead, big intergovernmental conferences have been convened to hammer out policy regarding the new challenges facing the international system, a recent example being the Paris Conference on Climate Change.

One reason for this development may be the membership of the body. A conclave of traditional legal scholars,³⁸ chosen by states, and mostly wedded to the jurisprudence of positivism, the ILC may feel more qualified to delve into the yonder world of doctrinal delimitations, rather than the concrete universe of rule-making on increasingly complex empirical

³⁶ For thought-provoking analysis, see Christian Tomuschat, *The International Law Commission—An Outdated Institution?*, 49 GERMAN Y.B. INT'L L. 77 (2006).

³⁷ See U.N. Charter, *supra* note 5.

³⁸ *Statute of the International Law Commission 1947* as adopted by GA Res. 174 (II), Art. 2, ¶ 1 (Nov. 21, 1947) provides that the members of the Commission “shall be persons of recognized competence in international law.” According to the ILC’s website, “the members of the Commission are persons who possess recognized competence and qualifications in both doctrinal and practical aspects of international law. The membership of the Commission often reflects a broad spectrum of expertise and practical experience within the field of international law, including international dispute settlement procedures. Members are drawn from the various segments of the international legal community, such as academia, the diplomatic corps, government ministries and international organizations.” *Membership*, INT’L LAW COMM’N (May 2, 2018), <http://legal.un.org/ilc/ilcmembe.shtml>.

problems. One example might be the regulation of the global resource of the Internet in the crucible between privacy, freedom of access and expression, and the protection of national security. Another reason is that the ILC may feel less competent or authorized to make such policy determinations under the guise of the “progressive development” of international law.

Often the *modus operandi* of the ILC has been documentary, retrospective, and overall different from the research methodology necessary to develop new laws. The New Haven approach to jurisprudence I mentioned before has been used successfully for forward-looking lawmaking, drawing from the empirical tools for analysis and problem-solving found in the social sciences, environmental and social impact studies, etc. Some of these necessary intellectual tasks may exceed the qualifications or resources of the ILC, as its members are chosen essentially for their legal expertise,³⁹ and budget constraints abound in the U.N. The question of its mandate and its proper interpretation resurfaces: What *can* and *should* the ILC do?

The mandate of the ILC speaks of codification and progressive development, and it is not limited to efforts to restate the status quo. Indeed, the latter simply cannot be, since circumstances change. Life itself changes around us. A self-imposed restriction to preserving the status quo would, in fact, be a *choice*. And a *political* one at that. Codification is always an exercise in making law, since even the seemingly neutral “identification” of rules of customary international law or general principles of law involves, by necessity, the closing of gaps in state practice, the interpretation of *opinio juris*, and so on. Article 18 of the Vienna Convention on the Law of Treaties—i.e., the obligation not to defeat the object and purpose of a treaty prior to its entry into force—is a case on point.⁴⁰

Codification responds to the perceived need for coherent and systematic regulation. As Napoleon’s Civil Code did two centuries ago, it aims at *anticipating*—and thus covering—*every* event in the field of regulation that *may* take place, rather than just relying, as in the common law, on interstitial law-making from the bottom up. “Progressive development”: is it only a procedural concept? I suggest that the U.N. Charter already left behind the vision of international law as a transactional enterprise merely facilitating communications and trade between countries. One must ask oneself: “Progressive development” toward *what*? Toward *which* goals?

Unlike the League of Nations, the United Nations’ guiding principles—as formulated in Article One of its Charter—include respect and promotion

³⁹ Tomuschat made that point: “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.” Tomuschat, *supra* note 36, at 81.

⁴⁰ Vienna Convention on the Law of Treaties, *supra* note 11, art. 18.

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of human rights and the self-determination of peoples. This precept can and should give the *orientation* for codification and development that is so desperately needed. It can and should constitute a guiding light for the values-based international law so eloquently invoked today. One such value is self-determination. It includes, through the process of decolonization, the voice of peoples who have been excluded from the initial formulation of the rules of customary international law. Codification and, thereby, review and adaptation of customary international law to their needs is an indispensable part of their integration into the international legal system of today. Progressive development would in some way depart from the state-centered paradigm — the old system of international relations. It would not only increase the number of state participants but also establish the goal of law as one serving human beings, not the other way around.⁴¹ Ultimately, the substantive goal of law is, or ought to be, the flourishing of human beings.⁴²

This idea is not alien to the ILC, as it included “*jus cogens*” in its present work plan⁴³ and addressed it in Article 53 of the Vienna Convention on the Law of Treaties.⁴⁴ Even if one would want to take this notion down a notch from the optimistic and hopeful conception of Alfred Verdross—which came out of the natural law tradition⁴⁵—and require the consent of virtually all countries,⁴⁶ at least the topic is part of the ILC’s work program. And so is the definition of a “crime against humanity.”⁴⁷ Such developments are to be applauded.

Still, politically charged topics are often avoided, despite the clear and increasing need to address them: cybersecurity, environmental protections, and so on. Sometimes this is unavoidable due to a lack of subject-matter expertise, since one would want to involve specialists in the field, but resources are lacking. With respect to Internet privacy, for example, the ILC would benefit from, if not depend on the counsel of experts in electronic communications. In today’s global society, there is a great need for the

⁴¹ Siegfried Wiessner, *Introduction, in* GENERAL THEORY OF INTERNATIONAL LAW 1, 73 (Siegfried Wiessner ed., 2017).

⁴² *Id.* at 26.

⁴³ *Programme of Work, supra* note 17.

⁴⁴ Vienna Convention on the Law of Treaties, *supra* note 11, art. 53.

⁴⁵ Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937) (defining peremptory law as the “ethical minimum recognized by all the states of the international community”).

⁴⁶ Art. 53 conceives of *jus cogens* as “a norm accepted and recognized by the international community of States as a whole[.]” Vienna Convention on the Law of Treaties, *supra* note 11, art. 53. The recognition requirement arguably distances it from its origin in natural law.

⁴⁷ *Programme of Work, supra* note 17.

protection of online privacy.⁴⁸ The topic should not be automatically excluded from the ILC's agenda, and, in fact, it has not been. The ILC's long-term program of work of 2006 included the item "Protection of personal data in transborder flow of information,"⁴⁹ the goal being to "elaborate general principles that are attendant in the protection of personal data," since "although there are differences in approach, there is a commonality of interests in a number of core principles."⁵⁰ State representatives questioned the inclusion of such a "highly complex and technical subject," one already considered in other fora and subject to "significant unresolved political and policy debates."⁵¹ As of today, the topic is still included in the long-term program of work,⁵² but no special rapporteur has been appointed, and the likelihood of it being put on the actual program of work appears slim.⁵³

Unless deemed unfeasible for a lack of resources or expertise,⁵⁴ the topic's study should, however, not be discarded for any reasons involving political controversy between members of the global community. There is now, for example, a European Data Protection Regulation,⁵⁵ in effect since

⁴⁸ Cf. Lingjie Kong, *Data Protection and Transborder Data Flow in the European and Global Context*, 21 EUR. J. INT'L L. 441, 442 (2010) ("[T]he international community longs for a feasible and effective global legal framework to maintain free flow of personal data across national boundaries, and to safeguard rights of the data subjects in spite of their residence or nationalities.").

⁴⁹ Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 425 (2006).

⁵⁰ *Id.* at 498.

⁵¹ See, e.g., the statement by U.S. State Dep't Legal Adviser John B. Bellinger III before the U.N.'s 6th Committee:

We see less utility for work by the Commission on the proposed topic of Protection of Personal Data in Transborder Flow of Information. This is a highly complex and technical subject, which is being considered in several other fora and about which there remain significant unresolved political and policy debates. We also question whether the topic meets the Commission's criteria for addition to the long-term agenda or active consideration in that it does not appear to be "sufficiently advanced in stage in terms of State practice to permit progressive development and codification."

Legal Adviser Bellinger's Statement Before UN 6th Committee (ILC Report) Re "Diplomatic Protection", U.S. DEP'T OF STATE (Oct. 25, 2006), <https://www.state.gov/s/l/2006/98281.htm>.

⁵² *Programme of Work*, *supra* note 17. "Topics included in the long-term programme of work are not automatically included in the programme of work of the Commission and their date of inclusion is not an indication of the order in which the work on those topics will be undertaken. The inclusion of a topic in the programme of work requires a separate decision by the Commission to that effect." *Id.*

⁵³ Christopher Kuner, *Regulation of Transborder Data Flows under Data Protection and Privacy Law: Past, Present and Future*, OECD DIGITAL ECONOMY PAPERS NO. 187 1, 25 (2011), <http://www.kuner.com/my-publications-and-writing/untitled/kuner-oecd-tbdf-paper.pdf>. This goes both to the prospect of a convention and of a model law. Christopher Kuner, *An International Legal Framework for Data Protection: Issues and Prospects*, 25 COMPUTER L. & SECURITY REV. 307 (2009).

⁵⁴ Cf. Tomuschat, *supra* note 36, at 82: "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." *Id.*

⁵⁵ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of

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May 25, 2018, that has already spurred action by businesses around the world—Google, Facebook, and others—with a view to ensuring that customers in various parts of the world are not treated differently.⁵⁶ Within the U.S., the State of California is trying to follow the regulatory lead of the European Union.⁵⁷ Looming political controversy in such areas accentuates rather than diminishes the need for progressively developing international law.

This is reinforced by the fact that, even if the Commission limited itself to exploring purportedly politically “neutral” topics, it is still bound to venture into arenas that remain within the confines of the battlefield of politics. Take, for example, the ILC’s draft principles on the protection of the environment in relation to armed conflict, provisionally adopted in 2018.⁵⁸ Principle 6 essentially states that indigenous peoples’ lands should be protected from the environmental impact of military action.⁵⁹ The special status of indigenous peoples in international law, however, has virtually never been discussed by the ILC, and may still be too controversial to be placed on its agenda.

such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 (EU).

⁵⁶ Particularly the “threat of fines for violating GDPR – up to €20 million or 4% of annual global revenue – have led many companies, including Facebook, to simply apply GDPR standards to all users.” Grace Dobush, *EU Regulators Have a New Plan to Keep Google and Facebook in Line: Regulate Them Like Traditional Telecoms*, FORTUNE (July 5, 2018), <http://fortune.com/2018/07/05/eu-regulators-facebook-google-regulation-gdpr/>. The U.K. already issued its first GDPR notice against Aggregate IQ Data Services. Charlie Osborne, *Facebook Could Face \$1.63bn Fine Under GDPR over Latest Data Breach*, ZDNET (Oct. 2, 2018), <https://www.zdnet.com/article/facebook-could-face-billions-in-fines-under-gdpr-over-latest-data-breach/>. Google and its parent company, Alphabet, have been fined €4.34bn (£3.8bn). Michael Baxter, *EU Fines Google £3.8 Billion, and That’s Without a Data Breach*, GDPR: REPORT (July 19, 2018), <https://gdpr.report/news/2018/07/19/eu-fines-google-3-8-billion-and-thats-without-a-data-breach/>.

⁵⁷ The California Consumer Privacy Act of 2018 (AB 375), scheduled to enter into force on January 1, 2020, was signed into law by Governor Jerry Brown on June 28, 2018. *California Enacts Broad Privacy Laws Modeled on GDPR*, SIDLEY (June 29, 2018), <https://www.sidley.com/en/insights/newsupdates/2018/06/california-enacts-broad-privacy-laws-modeled-on-gdpr>. It is designed to emulate the GDPR, giving consumers more transparency regarding and control over their data, including detailed disclosure requirements for companies collecting data about California residents. *Id.*

⁵⁸ Marja Lehto (Special Rapporteur), Int’l Law Comm’n, First Rep. on Protection of the Environment in Relation to Armed Conflicts on Its Seventieth Session, U.N. Doc. A/CN.4/720, at 65–67 (2018).

⁵⁹ *Id.* at 65. Draft principle 6:

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.
2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

A different and instructive approach has been taken by the ILA. A private body founded back in 1873, it is comprised by about 4,000 members, mostly academics and lawyers in private practice and government.⁶⁰ According to the American Law Institute's 1987 *Restatement on Foreign Relations Law*, the ILA's resolutions enjoy authority as subsidiary means for the determination of rules of international law under Article 38(1)(d) of the Statute of the ICJ on equal footing with the resolutions of the ILC and the IDI.⁶¹ As Graf Vitzthum stated, the global resolutions of a body as qualified and diverse as the ILA are stating a rare consensus amongst, at times, radically different cultures and value traditions, and thus should be especially appreciated and valued.⁶² The ILC has itself accorded the same authoritative status of its own proceedings to those of the ILA in the context of customary international law identification, for example.⁶³

Interestingly, in 2006, the ILA established a 30-member expert committee tasked with examining the rights and status of indigenous peoples under international law. Using traditional methodologies for identifying customary international law, and focusing on state practice and *opinio juris*, the committee submitted a detailed interim report in 2010⁶⁴ and a final report in 2012,⁶⁵ concluding that indigenous peoples hold customary international law rights to their traditional lands and resources, autonomy, and cultural

⁶⁰ The International Law Association, now headquartered in London, was founded in Brussels in 1873. *About Us*, INT'L LAW ASS'N, <http://www.ila-hq.org/index.php/about-us> (last visited Jan. 15, 2018). Its objectives are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law." *Id.* The ILA has consultative status, as an international non-governmental organization, with various United Nations specialized agencies. *Id.* Its membership, presently about 4,000, "ranges from lawyers in private practice, academia, government and the judiciary, to non-lawyer experts from commercial, industrial and financial spheres, and representatives of bodies such as shipping and arbitration organisations and chambers of commerce." *Id.*

⁶¹ RESTATEMENT THIRD, *supra* note 22, at § 103 reporters' notes 1.

⁶² Wolfgang Graf Vitzthum, *Begriff, Geschichte und Quellen des Völkerrechts*, in *VÖLKERRECHT* 72, ¶ 147 (Wolfgang Graf Vitzthum ed., 3d ed. 2004).

⁶³ For the determination of "teachings of the most highly qualified publicists of the various nations" under Article 38(1)(d) of the ICJ Statute, the ILC does not refer to individual scholars, but to the collective authority of a diverse and highly qualified community of scholars in the Institut de Droit International and the International Law Association. Int'l Law Comm'n, Memorandum by the Secretariat, Identification of Customary International Law: Ways and Means for Making the Evidence of Customary International Law More Readily Available, U.N. Doc. A/CN.4/710, ¶¶ 72–73 (Jan. 12, 2018); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at ¶ 63, commentary to Conclusion 14, ¶ 5 (2016).

⁶⁴ INT'L LAW ASS'N, THE HAGUE CONFERENCE, RIGHTS OF INDIGENOUS PEOPLES, INTERIM REPORT (2010), <http://www.ila-hq.org/index.php/committees> (scroll down to "Index of Former Committees" and follow "Rights of Indigenous Peoples (2006-2012)," then select "Documents").

⁶⁵ INT'L LAW ASS'N, SOFIA CONFERENCE, RIGHTS OF INDIGENOUS PEOPLES, FINAL REPORT (2012), <http://www.ila-hq.org/index.php/committees> (scroll down as in note 64).

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heritage. In Resolution No. 5/2012 on the Rights of Indigenous Peoples,⁶⁶ these findings were adopted by the ILA's Plenary Assembly with emphatic support.⁶⁷ Besides indigenous rights, the ILA presently addresses important global issues, such as Protection of Privacy in Private International and Procedural Law, Sustainable Development and the Green Economy in International Trade Law, International Law and Sea Level Rise, and Global Health Law.⁶⁸

It was said by another panelist earlier today that the ILC's work is "soft law full of hard law." This describes the ILA's work as well. It has to be recognized that the work products of the ILC, treaty or non-treaty, command a possibly greater influence in the international legal system, as they are closer to the pulse of state practice and *opinio juris*, due to the ILC's constant interaction with and feedback from governments within the framework of the United Nations General Assembly's Sixth Committee. Still, the ILA's work shows that a functionally equivalent body of arguably similarly situated scholars can, in fact, address politically charged topics.⁶⁹ My birthday wish for the ILC, a body of unique experience, expertise, and prestige, is to encourage its members to address the most salient issues of our global community with a proactive understanding of its mandate: one that maximizes everyone's access to a legal order that respects and fosters human dignity around the world.

⁶⁶ Int'l Law Ass'n Res. No. 5/2012, *Rights of Indigenous Peoples* (2012), <http://www.ila-hq.org/index.php/committees> (scroll down as in note 64).

⁶⁷ Siegfried Wiessner, *The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012*, in *DER STAAT IM RECHT. FESTSCHRIFT FÜR ECKART KLEIN ZUM 70. GEBURTSTAG* 1357, 1364 (M. Breuer et al. eds, Duncker & Humblot, Berlin, 2013).

⁶⁸ *Committees*, INT'L L. ASS'N, <http://www.ila-hq.org/index.php/committees> (last visited Jan. 14, 2019).

⁶⁹ Institutional strictures might limit the ILC in serving as an avenue to accommodate modern more democratized, more inclusive, and more privatized forms of law-making as described in W. Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century*, in *GENERAL THEORY OF INTERNATIONAL LAW* 158–66 (Siegfried Wiessner ed., 2017).

Appendix⁷⁰

Table 1: U.S. Cases Directly Referencing the ILC
767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to United Nations, 988 F.2d 295 (2d Cir. 1993) (“767”);
Ahmed v. Hoque, No. 01 Civ. 7224 (DLC), 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002) (“Hoque”);
Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279 (11th Cir. 1999) (“Aquamar”);
Republic of Arg. v. AWG Grp. Ltd., 211 F. Supp. 3d 335 (D.D.C. 2016) (“AWG”);
Republic of Arg. v. BG Grp. PLC, 715 F. Supp. 2d 108 (D.D.C. 2010) (“BG”);
Civil Aeronautics Bd. v. Island Airlines, Inc., 235 F. Supp. 990 (D. Haw. 1964) (“C.A.B.”);
City of N.Y. v. Permanent Mission of India to United Nations, 376 F. Supp. 2d 429 (S.D.N.Y. 2005) (“City of N.Y.”);
Compagnie Noga D’Importation Et D’exp. S.A. v. Russian Fed’n, 361 F.3d 676 (2d Cir. 2004) (“Noga”);
Derise v. Chevron USA, Inc., No. Civ. A. 6:03–2067, 2005 WL 5988688 (W.D. La. May 16, 2005) (“Derise”);
Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (“Exxon”);
Doe v. Nestle, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (“Nestle”);
Doe I v. Lui Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (“Qi”);
Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (“Unocal”);
Fernandez v. Fernandez, 545 A.2d 1036 (Conn. 1988) (“Fernandez”);
Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986) (“Barry”);
Flatow v. Islamic Republic of Iran, 202 F.R.D. 35 (D.D.C. 2001) (“Flatow”);
Gilmore v. Palestinian Interim Self-Gov’t Auth., 675 F. Supp. 2d 104 (D.D.C. 2009) (“Gilmore”);
Gross v. Ger. Found. Indus. Initiative, 499 F. Supp. 2d 606 (D.N.J. 2007) (“Gross”);

⁷⁰ We have organized the data found in the subsequent tables as follows: Table 1 lists all of the U.S. cases that make direct reference to the ILC. At the end of each case citation in the table there is a one-word abbreviation that stands for the case. Tables 2, 4, 5, 6, 7, and 8, describe findings on a host of subject matters and categories. Each category is footnoted, and each such footnote mentions the cases that correspond to each category by noting the one-word abbreviation given to the case name in Table 1. This is to allow the reader to consult the specific case, if interested in a certain category, and not clutter or extend the scope of this paper with repetitive, full citations. Table 3 simply lists most of the documents cited by these U.S. judicial opinions in referencing the ILC.

Heaney v. Gov't of Spain, 445 F.2d 501 (2d Cir. 1971) ("Heaney");
Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965) ("Hellenic");
In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005)
("Orange");
In re Alexandravicus' Estate, 199 A.2d 662 (N.J. Super. Ct. App. Div. 1964)
("Alexandravicus");
In re Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985)
("Demjanjuk");
In re S. Afr. Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009) ("South
African");
Jacobson v. Kalama Servs., 128 F. Supp. 2d 644 (D. Haw. 2000) ("Kalama");
Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007)
("Khulumani");
Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) ("Kiobel");
Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981)
("Kunstsammlungen");
McKesson Corp. v. Islamic Republic of Iran, 116 F. Supp. 2d 13 (D.D.C. 2000)
("McKesson");
De Los Santos Mora v. New York, 524 F.3d 183 (2d Cir. 2008) ("Mora");
Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970) ("Laird");
People v. Corona, 259 Cal. Rptr. 524 (Cal. Ct. App. 1989) ("Corona");
Power Auth. of N.Y. v. Fed. Power Comm'n, 247 F.2d 538 (D.C. Cir. 1957)
("Power");
Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) ("Robinson");
Salazar v. Burrech, 47 F. Supp. 2d 1105 (C.D. Cal. 1999) ("Salazar");
Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) ("Sanchez-Llamas");
Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) ("Sarei I");
Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) ("Sarei II");
State v. Marley, 509 P.2d 1095 (Haw. 1973) ("Marley");
Swarna v. Al-Awadi, 622 F.3d 123 (2d Cir. 2010) ("Swarna");
Tabion v. Mufti, 877 F. Supp. 285 (E.D. Va. 1995) ("Tabion");
Tachiona v. Mugabe, 186 F. Supp. 2d 383 (S.D.N.Y. 2002) ("Tachiona");
Transnational Mar., Inc. v. Republic of Bangladesh, 1975 A.M.C. 1411
(S.D.N.Y. 1975) ("Transnational");
Treasure Salvors, Inc. v. Abandoned Sailing Vessel, 408 F. Supp. 907 (S.D. Fla.
1976) ("Treasure I");
Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel,
569 F.2d 330 (5th Cir. 1978) ("Treasure II");
United States v. Alaska, 521 U.S. 1 (1997) ("Alaska I");
United States v. Alaska, 236 F. Supp. 388 (D. Ala. 1964) ("Alaska II");

United States v. Alaska, 352 F. Supp. 815 (D. Ala. 1972) (“Alaska III”);
United States v. Alaska, 497 F.2d 1155 (9th Cir. 1974) (“Alaska IV”);
United States v. Al Bahlul, 820 F. Supp. 2d 1141 (USCMCR 2011) (“Al Bahlul”);
United States v. California, 447 U.S. 1 (1980) (“California I”);
United States v. California, 381 U.S. 139 (1965) (“California II”);
United States v. Cole, 717 F. Supp. 309 (E.D. Pa. 1989) (“Cole”);
United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000) (“Duarte-Acero”);
United States v. Enger, 472 F. Supp. 490 (D.N.J. 1978) (“Enger”);
United States v. Hasan, 747 F. Supp. 2d 642 (E.D. Va. 2010) (“Hasan”);
United States v. Kostadinov, 734 F.2d 905 (2d Cir. 1984) (“Kostadinov”);
United States v. Louisiana, 389 U.S. 155 (1967) (“Louisiana I”);
United States v. Louisiana, 394 U.S. 11 (1969) (“Louisiana II”);
United States v. Maine, 469 U.S. 504 (1985) (“Maine”);
United States v. Postal, 589 F.2d 862 (5th Cir. 1979) (“Postal”);
United States v. Quemener, 789 F.2d 145 (2d Cir. 1986) (“Quemender”);
United States v. Ray, 423 F.2d 16 (5th Cir. 1970) (“Ray”);
Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (“Villeda”);
Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (“Wiwa”).

Table 2: Topics Involved in ILC References Made by U.S. Courts Listed on Table 1	
Subject Matter of Case:	Frequency:
International Torts/Crimes ⁷¹	31.5%
Consular Relations ⁷²	31.5%
Borders and Law of the Sea ⁷³	26%
Treaty Interpretation ⁷⁴	4%
Other ⁷⁵	4%
Arbitration Awards ⁷⁶	3%

Table 3: Representative List of Documents Cited in ILC References Made by U.S. Cases Listed in Table 1
<p>Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001);</p> <p>Int'l Law Comm'n, Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, U.N. Doc. A/46/10 (1991);</p> <p>Draft Articles on Succession of States in Respect of State Property, Archives and Debts;</p> <p><i>Rep. of the Int'l Law Comm'n on the Work of Its Forty-Eighth Session, 6 May–26 July 1996</i>, U.N. GAOR Supp. No. 10, U.N. Doc. A/51/10 (1996), <i>reprinted in</i> 2(2) INT'L L. COMM'N Y.B. 30 (1996);</p> <p><i>Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind, Rep. of the Int'l Law Comm'n on the Work of its Forty-Eighth Session</i>, 51 U.N. GAOR Supp. No. 10, U.N. Doc. A/51/10 (1996);</p> <p>Rep. of the Comm'n to the General Assembly on the Work of Its Forty-Sixth Session, <i>reprinted in</i> [1994] 2(2) INT'L L. COMM'N Y.B. 1, 43;</p> <p>Int'l Law Comm'n, Draft Articles on Consular Relations Adopted by the International Law Commission at its Thirteenth Session, Art. 36(2), U.N. Doc</p>

⁷¹ Kiobel; South African; Gilmore; Marley; BG; Sarei I; Sarei II; Khulumani; Unocal; Exxon; Al Bahlul; Orange; Qi; Nestle; Demjanjuk; Wiwa; Kunstsammlungen; Quinn; Laird; and Villeda.

⁷² Barry; Swarna; Aquamar; Heaney; Salazar; Tachiona; Corona; Hoque; Transnational; Cole; Tabion; Alexandravicus; Fernandez; Sanchez-Llama; Hellenic; Mora; Kostadinov; 767; Enger; and City of New York.

⁷³ Louisiana II; C. A. B.; California I; Treasure I; Treasure II; Alaska I; Alaska II; Alaska III; Alaska IV; California II; Louisiana I; Kalama; Quemener; Maine; Postal; Ray; and Hasan.

⁷⁴ Duarte-Acero; Power; and Gross.

⁷⁵ Flatow; McKesson; and Derise.

⁷⁶ AWG and Noga.

A/CONF.25/6 (1936) *reprinted in* LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 237 (1966);

Articles Concerning the Law of the Sea, U.N. Doc. A/C.6/L.378, p. 45, n. 1 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 4;

U.N. Secretariat, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc. A/CN.4/143, *reprinted in* [1962] 2 Y.B. INT'L L. COMM'N 1, 13;

Principles of Int'l Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries, 5 U.N. GAOR Supp. No. 12, U.N. Doc. A/1316, ¶¶ 126–27 (1950);

Documents of the Tenth Session Including the Report of the Comm'n to the General Assembly, [1958] 2 Y.B. INT'L L. COMM'N 78, 99;

Statute of the International Law Commission, UN Doc. A/CN.4/4/Rev.2 (1982);

Special Rapporteur, *Rep. on the Law of Treaties by J. N. Briery*, 41, 42–43, U.N. Doc. A/CN.4/23 (Apr. 14, 1950);

Rep. of the Comm'n to the General Assembly on the Work of the Thirty-Fourth Session, *reprinted in* [1981] 2(2) INT'L L. COMM'N Y.B. 2;

Draft Articles on Succession of States in Respect of State Property, Archives and Debts, U.N. Doc. A/CONF.117/14 (1983);

Second Report on the Regime of the Territorial Sea, Fifth Session, (May 18, 1953);

Diplomatic Intercourse and Immunities, *Projet de codification du droit relatif aux relations et immunités diplomatiques*, U.N. Doc. A/CN.4/91, *reprinted in* [1955] 2 Y.B. INT'L L. COMM'N 9, 11, U.N. Doc. A/CN.4/SER.A./1955/Add.1;

Diplomatic Intercourse and Immunities, Memorandum prepared by the Secretariat, U.N. Doc. A/CN.4/98, *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 129, 132, U.N. Doc. A/CN.4/SER.A./1956/Add.1;

Summary Records of the International Law Commission, [1958] 1 Y.B. INT'L L. COMM'N 110;

Int'l Law Comm'n, *Rep. on Diplomatic Intercourse and Immunities*, U.N. GAOR, 13th Sess., Supp. No. 9, U.N. Doc. A/3859 (1958);

Documents of the Eighth Session including the Report of the Comm'n to the General Assembly, [1956] 2 Y.B. INT'L L. COMM'N 1;

Articles Concerning the Law of the Sea, U.N. Doc. A/C.6/L.378, p. 45, n. 1 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 265.

Int'l Law Comm'n, *Second Rep. on Diplomatic Protection*, ¶ 35, UN Doc. A/CN.4/514/ (Feb. 28, 2001);

Int'l Law Comm'n, *Sixth Rep. on State Responsibility*, ¶ 52, UN Doc. A/CN.4/302 (Apr. 15, June 7, and July 14, 1977);

Int'l Law Comm'n, *Rep. on Diplomatic Protection*, ¶ 173, UN Doc. A/ CN.4/96

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(1956);
Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, 51 U.N.
 GAOR Supp. No. 10, U.N. Doc. A/51/10 (1996).

Table 4:
Frequency of ILC Direct References in U.S. Cases by Decade

Time Period:	Frequency:
1951–1960 ⁷⁷	2%
1961–1970 ⁷⁸	14%
1971–1980 ⁷⁹	15.3%
1981–1990 ⁸⁰	15.3%
1991–2000 ⁸¹	12.3%
2001–2010 ⁸²	35%
2011–2018 ⁸³	6.1%

Table 5:
Type of Court Directly Referencing the ILC Listed in Table 1

Type of Court:	Percentage of Instances:
Federal Supreme Court ⁸⁴	10.7%
Federal Appellate Circuit Court ⁸⁵	35.3%
Federal District Court ⁸⁶	46%

⁷⁷ Power.

⁷⁸ Alexandravicus; Louisiana I; Louisiana II; Hellenic; C.A.B.; Ray; Laird; Alaska II; and California II.

⁷⁹ Marley; Postal; Enger; Transnational; California I; Alaska III; Alaska IV; Treasure I; Treasure II; and Heaney.

⁸⁰ Kostadinov; Kunstsammlungen; Cole; Quinn; Corona; Fernandez; Demjanjuk; Maine; Barry; and Quemander.

⁸¹ Salazar; Kalama; Alaska I; Aquamar; Tabion; 767; Duarte-Acero; and McKesson.

⁸² Kiobel; Flatow; South African; Gilmore; BG; Khulumani; Sarei I; Unocal; Orange; Qi; Nestle; Noga; Mora;

Wiwa; Sanchez-Llamas; Villeda; City of N.Y.; Swarna; Hoque; Hasan; Tachiona; Derise; and Gross.

⁸³ Sarei II; AWG; Exxon; and Al Bahlul.

⁸⁴ Louisiana II; Sanchez-Llamas; California I; California II; Alaska I; Louisiana I; and Maine.

⁸⁵ Kiobel; Sarei II; Khulumani; Sarei I; Unocal; Exxon; Postal; Mora; Kostadinov; Hellenic; Duarte-Acero; 767; Aquamar; Treasure II; Quinn; Power; Barry; Ray; Heaney; Quemander; Alaska IV; Noga; and Swarna.

⁸⁶ Flatow; South African; Gilmore; BG; McKesson; Orange; Qi; Nestle; Demjanjuk; Enger; Wiwa; City of N.Y.; Tabion; Kunstsammlungen; Hasan; C.A.B.; Villeda; Treasure I; Gross; Alaska II; Transnational; Laird; Kalama; Salazar; Hoque; Alaska III; Cole; Tachiona; and Derise.

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Other Federal ⁸⁷	1.5%
State Supreme Court ⁸⁸	5%
State Appellate Court ⁸⁹	1.5%
State Trial Court ⁹⁰	0%

Table 6: U.S. Law Review and Legal Journal Articles Directly Referencing the ILC Distributed by Document Cited	
Title:	Frequency:
Draft Articles on State Responsibility ⁹¹	10%
Draft Articles on Jurisdictional Immunities ⁹²	1%
Vienna Convention on Law of Treaties ⁹³	38%
Vienna Convention on Consular Relations ⁹⁴	5.8%
U.N. Convention on the Law of the Sea ⁹⁵	26%
Draft Articles on Succession of States ⁹⁶	.2%
Draft ICC Statute ⁹⁷	6%
Draft Code on Crimes against the Peace ⁹⁸	9%
Principles of International Law Recognized in the Charter of the Nuremberg Tribunal ⁹⁹	4%

⁸⁷ Al Bahlul.

⁸⁸ Marley; Alexandravicus; and Fernandez.

⁸⁹ Corona.

⁹⁰ Zero cases.

⁹¹ 449 articles.

⁹² 40 articles.

⁹³ 1,671 articles.

⁹⁴ 254 articles.

⁹⁵ 1,128 articles.

⁹⁶ 10 articles.

⁹⁷ 264 articles.

⁹⁸ 381 articles.

⁹⁹ 173 articles.

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Table 7: ILC-Produced or ILC-Influenced Documents Cited by U.S. Courts Without Express Reference to the ILC	
Document Cited:	Number of Instances:
Vienna Convention on Consular Relations	1,087
Convention on the Law of the Sea	196
Vienna Convention on the Law of Treaties	143
Vienna Convention on Diplomatic Relations	246
Convention on the Territorial Sea	77
Convention on the High Seas	186
Convention on Fishing and Conservation	2
Convention on the Continental Shelf	39
Protocol Concerning the Compulsory Settlement of Disputes	38
Convention on the Reduction of Statelessness	3
Convention on Special Missions	2
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons	24
Convention on the Jurisdictional Immunities of States	1
Draft Declaration on Rights and Duties of States	0
Draft Code of Offenses Against the Peace	0
Draft Articles on Diplomatic Protection	1
Principles of International Law Recognized in the Charter of the Nuremberg Tribunal / Nuremberg Principles	57
Draft Articles on State Responsibility	0

Table 8: Type of Court Referencing ILC Documents Listed on Table 7	
Document Cited:	Forum Frequency Federal Court / State Court:
Vienna Convention on Consular Relations ¹⁰⁰	69% / 31%
Convention on the Law of the Sea ¹⁰¹	94% / 6%
Vienna Convention on the Law of Treaties ¹⁰²	88% / 12%
Vienna Convention on Diplomatic Relations ¹⁰³	91% / 9%
Convention on the Territorial Sea ¹⁰⁴	84% / 16%
Convention on the High Seas ¹⁰⁵	94% / 6%
Convention on Fishing and Conservation ¹⁰⁶	50% / 50%
Convention on the Continental Shelf ¹⁰⁷	64% / 36%
Protocol Concerning Compulsory Settlement of Disputes ¹⁰⁸	76% / 24%
Convention on the Reduction of Statelessness ¹⁰⁹	100% / 0%
Convention on Special Missions ¹¹⁰	100% / 0%
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons ¹¹¹	100% / 0%
Convention on the Jurisdictional Immunities of States ¹¹²	100% / 0%

¹⁰⁰ 752 in federal court, 333 in state court, two in other U.S. territories.

¹⁰¹ 185 in federal court, 11 in state court.

¹⁰² 126 in federal court, 10 in state court.

¹⁰³ 223 in federal court, 23 in state court.

¹⁰⁴ 65 in federal court, 12 in state court.

¹⁰⁵ 174 in federal court, 12 in state court.

¹⁰⁶ One in federal court, one in state court.

¹⁰⁷ 25 in federal court, 14 in state court.

¹⁰⁸ 29 in federal court, nine in state court.

¹⁰⁹ Three in federal court.

¹¹⁰ Two in federal court.

¹¹¹ 24 in federal court.

¹¹² One in federal court.