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The International Law Commission's Soft Law Influence

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THE INTERNATIONAL LAW COMMISSION’S SOFT LAW INFLUENCE

Elena Baylis*

I.	Introduction.....	1007
II.	The ILC and Soft Law	1009
	A. Advantages of Soft Law for the ILC’s Mission	1011
	B. Institutional Advantages of the ILC for Producing Soft Law	1014
III.	The ILC’s Soft Law Influence and Audience.....	1016
	A. Influence	1016
	B. Audience.....	1019
IV.	Influencing a Global Legal Audience.....	1021
	A. Key Factors.....	1021
	B. Extending the ILC’s Influence	1022
V.	Conclusion	1025

I. INTRODUCTION

During much of its history, the International Law Commission (“ILC”) primarily finalized its work in the form of draft conventions or draft articles with an eye to their negotiation and adoption as treaties, although it did also release soft law¹ documents such as principles and draft declarations.

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¹ ANTONIO CASSESE, INTERNATIONAL LAW 196 (2d ed. 2005) (“Soft law” is “a body of standards, commitments, joint statements, or declarations of policy or intention . . .”). There is an extensive literature on the definition, scope, and legitimacy of soft law, as well as its implications for international law regimes and international relations. *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 173 (2010) (defining soft law as “a continuum, or spectrum, running between fully binding treaties and fully political positions.”); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 540, 551 (Walter Carlsnaes et al. eds., 2002) (defining soft law as “instruments or rules that have some indicia of international law but lack explicit and agreed legal bindingness.”); Dinah Shelton, *Soft Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68, 69 (David Armstrong ed., 2008) (defining soft law as “a type of social rather than legal norm. . . . [including] any written instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior.”); *see also* Jan Klabbbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT’L L. 167 (1996) (critiquing soft law as “those instruments which are to be considered as giving rise to legal effects, but do not (or not yet, perhaps) amount to real law.”).

However, since the 1990s, the ILC has increasingly produced soft law; even when it has released draft articles, it has not always sought to have those draft articles immediately considered for adoption as a convention. Thus, over time, the balance of the ILC's work product has transitioned from being predominantly oriented toward development of hard law² to predominantly comprising soft law, although it has continued to include both.³

Scholars assessing the work of the ILC between 2008 and 2015 commented on this change in the ILC's practice. According to their analysis, this shift represented an appropriate acquiescence in a general global trend away from a preference for hard law norms enshrined in treaties and toward soft law norms that are more susceptible of gradual development, interpretation, and evolution. They also characterized this new strategy as a reaction specifically to the failure of some conventions developed from the ILC's draft articles to secure substantial numbers of ratifications, and to repeated United Nations General Assembly ("UNGA") reluctance to negotiate treaties based on the ILC's draft articles and recommendations. All in all, the scholarly consensus was that the transition toward soft law could revive the ILC's relevance in the face of declining state interest in developing multilateral treaties as a mode of global law-making.⁴

Since then, this soft law trend has continued. Between 2016 and 2018, the ILC finalized three soft law works: a Final Report of the Study Group on the Most-Favored Nation Clause, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, and Draft Conclusions on Identification of Customary International

² See Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 197, 198 (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2012). In contrast to soft law, hard law is understood to impose legally binding obligations; treaties are a quintessential example of hard law. *Id.*

³ Jacob Katz Cogan, *The Changing Form of the International Law Commission's Work*, in EVOLUTIONS IN THE LAW OF INTERNATIONAL ORGANIZATIONS 275, 277–78 (Roberto Virzo & Ivan Ingravallo, eds., 2015) (noting only one instance of the ILC producing draft articles and recommending that the UNGA use them as the basis for treaty negotiation between 1999 and 2015); Michael Wood, *The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: Festschrift in Honour of Gerhard Hafner 373, 376, 378–79 (Isabelle Buffard et al., eds., 2008) (noting two instances of the ILC producing draft articles and recommending that the UNGA use them as the basis for treaty negotiation between 1999 and 2008); see also Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product*, in THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE 29, 34–35 (Maurizio Ragazzi ed., 2013).

⁴ Cogan, *supra* note 3, at 286; Murphy, *supra* note 3, at 33–34; Wood, *supra* note 3, at 377 (noting instances in which the Sixth Committee has not followed the Commission's recommendations); see also Kristina Daugirdas, *The International Law Commission Reinvents Itself?*, 108 AM. J. INT'L L. UNBOUND 79, 79 (2014).

2019] *The International Law Commission's Soft Law Influence* 1009

Law.⁵ In that timeframe, it concluded only one product intended for disposition as hard law, the Draft Articles on the Protection of Persons in the Event of Disasters, which it recommended be considered for a convention.⁶ Of the topics that make up the ILC's pending work in progress, most are being pursued as soft law projects.⁷

This essay explores the implications of the ILC's transition toward a greater emphasis on soft law. It first argues that soft law is an effective vehicle for the ILC's mission of codifying and progressively developing international law, and that, likewise, the ILC is well-structured to produce soft law. It then observes that the ILC's soft law has in fact been influential on an audience of diverse global legal actors. Finally, it contends that the ILC can best serve its core purposes by recognizing this widespread soft law audience and taking steps to engage with it more robustly.

II. THE ILC AND SOFT LAW

While there is considerable debate about the exact nature of the distinction between hard law and soft law,⁸ for purposes of this article focusing on the work product of the ILC, what is most significant is the difference in the forms and in the approval processes for hard law and soft law outputs. In the ILC context, hard law constitutes treaties that are negotiated and ratified on the basis of draft articles produced by the ILC. In contrast, soft law may be issued in several formats, including draft articles not recommended for conversion to a treaty, principles, guidelines, and so on. There is no negotiation or ratification process for the ILC's soft law, although there are multiple opportunities for state input and the ILC does typically request that the UNGA endorse its soft law work. Also important to

⁵ Int'l Law Comm'n, *Texts, Instruments, and Final Reports*, U.N., <http://legal.un.org/ilc/texts/texts.shtml> (last updated Aug. 30, 2018).

⁶ *Id.* The draft articles and this recommendation are currently under consideration by the Sixth Committee.

⁷ Its work on protection of the atmosphere and provisional application of treaties are being developed in the form of draft guidelines; its work on peremptory norms is being developed in the form of draft conclusions; and its work on protection of the environment in relation to armed conflicts is being developed as draft principles. Sean D. Murphy, *Anniversary Commemoration and Work of the International Law Commission's Seventieth Session*, 113 AM. J. INT'L L. 90, 96–104 (2019). The topics of succession of states in respect of state responsibility and immunity of state officials from foreign criminal jurisdiction are being developed into draft articles and so could be finalized either with or without recommendations for adoption as conventions. *Id.* at 104–06; Sean D. Murphy, *Crimes Against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission*, 111 AM. J. INT'L L. 970, 981–88 (2017). One current initiative, the Draft Articles on Crimes against Humanity, has been expressly designated as being produced with an eye to adoption as a treaty. *Id.* at 970–71.

⁸ See *supra* notes 1–2.

this analysis is the extent and nature of various global actors' reliance on the ILC's soft law, discussed in detail below.

The functions of soft law overlap considerably with the ILC's commitment to contribute to the codification and progressive development of international law.⁹ While soft law norms "do not impose legally binding obligations," they "may . . . lay the ground, or constitute the building blocks, for the gradual formation of customary rules or treaty provisions."¹⁰ Furthermore, under some circumstances, soft law "may be regarded as declaratory, or indicative, of a customary rule, or instead as helping to crystallize such a rule."¹¹ Soft law may also help to shape state practice, or to direct decisionmakers', scholars', and advocates' attention in such a way as to encourage constructive development of the law. In addition, "secondary soft law" interprets and applies existing hard law.¹² Increasingly, actors in the global community have treated soft law norms as persuasive authority.¹³

As such, apart from the aforementioned pragmatic considerations about the likelihood that the UNGA will proceed on and states will ratify a proposed convention, there are numerous substantive reasons that the ILC might deem a soft law format to be the most effective way for it to serve its function of codifying and progressively developing international law with regard to a particular topic at a particular time.¹⁴ I highlight here several factors that relate directly to the nature of soft law, and in particular, to the overlap of soft law's role in enabling the evolution of international law with the core

⁹ While article 15 of the ILC statute linked its progressive development function to hard law, in the form of creation of a draft convention, and its codification function to soft law, in the form of other types of outputs, that lockstep connection has lapsed with the partial collapse of the distinction between progressive development and codification itself. Wood characterizes the previous tendency to default to treaties as the mode of encapsulating the ILC's work as "a hangover from the 'codification movement' . . . , a limited view of what 'codification' involved, and a particular view of the advantages of treaty law over customary international law." Wood, *supra* note 3, at 383. The ILC determines what form its work will take on a case by case basis, without indicating whether it considers a particular project or particular provisions to be progressive development or codification.

¹⁰ Cassese, *supra* note 1, at 196.

¹¹ Cassese contends that this analysis should be the same whether assessing a principle enshrined in soft law or a principle generally. *Id.* at 196–97.

¹² Shelton, *supra* note 1, at 70 ("Secondary soft law includes the recommendations and general comments of international supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other *ad hoc* bodies, and the resolutions of political organs of international organizations applying primary norms. Most of this secondary soft law is pronounced by institutions whose existence and jurisdiction is derived from a treaty and who apply norms contained in the same treaty.").

¹³ Wood, *supra* note 3, at 381 (noting the soft law functions served by the Draft Articles on Responsibility of States for Intentionally Wrongful Acts).

¹⁴ Michael Wood suggests a series of relevant factors, including those listed here and others. *Id.* at 383–84.

functions of the ILC. In addition, as discussed at the end of this list, just as these can be understood as reasons that the ILC might elect a soft law format to encapsulate its norms, these considerations also suggest reasons that the ILC is particularly well-suited as an institution to produce soft law.¹⁵

A. Advantages of Soft Law for the ILC's Mission

One factor is the maturity of the existing international law on the topic. In areas of law that are still evolving, adoption of a convention might be premature from the perspective of legal development, as it would not allow for continued modification of the norms through practice.¹⁶ Soft law also provides a more flexible environment for states to implement and adapt nascent norms on a case-by-case basis. In such instances, the ILC can use soft law to codify existing norms and promulgate others in the spirit of progressive development, without halting the development process or discouraging engagement by states.¹⁷

Relatedly, principles, guidelines, and other such alternative formats also tend to make space for the ILC to address norms that are at different stages of stability and consensus.¹⁸ Several scholars have noted that the draft articles format may tend to suggest that all the articles are equally well-established as customary international law, even if there is a range of consensus on various articles; this is both because of the expectations created by the use of that format and because such articles are by their nature declaratory in tone.¹⁹ In contrast, other formats allow for a broader range of expressed certainty in the tone of various provisions and may invite further analysis and adaptation. For example, the ILC's Guide to Practice on Reservations to Treaties was

¹⁵ There is an extensive literature concerning the reasons states might prefer soft law to hard law and the relevant theories of international law and international relations. *See, e.g.*, Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901 (1999); Guzman & Meyer, *supra* note 1; Klabbers, *supra* note 1; Raustiala & Slaughter, *supra* note 1, at 550–51; Shaffer & Dunoff, *supra* note 2, at 202–07. Here, I focus on incentives for the ILC as an institution that is committed to effective international legal development.

¹⁶ Wood, *supra* note 3, at 383–84.

¹⁷ In contrast, the currently pending Draft Articles on Crimes Against Humanity, which are expected to be recommended for development into a treaty, represent a mature topic well-suited to a hard law format. There have now been several decades of prosecutions of this crime, which is accordingly well-established and is also generally accepted. In addition, international criminal law scholars and advocates have long called for a treaty defining crimes against humanity, to put it on an equal footing with the other core international crimes of genocide and war crimes and to avoid fragmentation in the definition of this crime by the many international, hybrid, and national courts that hear such cases. *See, e.g.*, FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2011).

¹⁸ Daugirdas, *supra* note 4, at 80.

¹⁹ *Id.* at 79–80; Murphy, *supra* note 3, at 34–35.

characterized by the ILC as a “toolbox,” which suggests opportunities for states to pick and choose among its guidelines; the Guide also contains recommendations concerning best practices that are framed as suggestions rather than requirements.²⁰ Thus, while draft articles do represent soft law if relied on in their own right rather than serving as the basis for a treaty, soft law also offers a range of alternative forms that may present expressive advantages.²¹

A third reason is that the process of negotiating and ratifying a treaty may be detrimental to the quality or perceived legitimacy of the concerned norms. The ILC’s work and its end products are primarily shaped by an interest in the law as such, in its role as an expert body. Since the process of negotiating a treaty will inevitably be driven at least in part by national interests, changes introduced during those negotiations may not be improvements from a legal development perspective, but rather may reflect political compromises. In addition, if the treaty does not garner many ratifications, that public demonstration of a lack of support may undermine the perceived legitimacy of the concerned norms. Thus, if the quality or perceived legitimacy of the norms would be at risk during a treaty negotiation process, a soft law format that can stand on its own merits may be the better option.²²

In contrast, rather than serving as an alternative to a treaty, secondary soft law functions as a mechanism for elaborating on existing hard law. For example, the ILC’s recent soft law project producing Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties elaborates on its previous hard law project developing draft articles that became the Vienna Convention on Treaties.²³

²⁰ Daugirdas, *supra* note 4, at 81.

²¹ While I have framed this question as one of effective expression and degrees of stability or consensus, this consideration has also been framed as one of distinguishing between codification and progressive development. The ILC does not typically specify which provisions it deems to be progressive development and which it deems codification, although it has done so at times in its commentaries. Daugirdas, *supra* note 4, at 79–80; Murphy, *supra* note 3, at 34–35. This distinction is often unclear in practice, and there are pros and cons to such signaling. In my view, this consideration is not about categorizing provisions as codification or progressive development, nor about determining their relative authority, but rather about accurately conveying the current stability and scope of norms and appropriately encouraging further adaptation and development of those norms.

²² This concern has been repeatedly raised by states when considering whether to open negotiations to develop draft articles into a convention. Wood, *supra* note 3, at 381 (discussing the reasons for the United Kingdom’s resistance to negotiating a convention); U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/71/79, at 2, 4, 7–8 (April 21, 2016) (comments of Australia, Finland, and the United Kingdom).

²³ See Int’l Law Comm’n, Rep. on Draft Conclusions on Subsequent Agreements and Subsequent Practices in Relation to the Interpretation of Treaties, U.N. Doc. A/73/10 (2018); Int’l Law Comm’n, Draft

2019] *The International Law Commission's Soft Law Influence* 1013

Several other ongoing ILC soft law projects also interpret this convention.²⁴ In this context, using a soft law format avoids any risk of perceived conflict with the binding terms of the treaty.

A final factor is that the implementation of international law norms often depends on an internalization of those norms into state bureaucracies and private institutions, and on the decisions of the many actors that carry out those norms to align policies and practices with them. While this may occur top-down after ratification of a treaty, it may also develop bottom-up, as on-the-ground actors identify soft law norms as useful in guiding their work and ascertain how best to adapt and implement them in their contexts. Thus, soft law allows for decisions about whether and how implementation should be carried out to be made by the expert practitioners who do the concerned work, rather than by political actors who are focused on political aims and are not necessarily experts in the work at hand. It also allows for the eventual evolution of the norms based on that bottom-up practice.²⁵

These considerations reflect several interconnected realities that make soft law a valuable mechanism for the ILC's purposes of codification and progressive development of international law, and in many instances a more appropriate format than a treaty. First, when international law norms develop in an evolutionary fashion, they do so in contexts that may be predominantly legal, bureaucratic, or action-oriented, rather than in predominantly political contexts, and this may be to their benefit. Second, hard law products titrate norms through the political processes of negotiation and ratification; soft law products allow for the possibility of testing the norms in use before, or instead of, subjecting them to evaluation by political elites. As such, both political considerations and legal development considerations suggest that recommendation of a treaty should only occur at the right moment, when further evolution is not desired, when fragmentation is feared, and when

Articles on the Law of Treaties (1966); *see also* Shelton, *supra* note 1, at 70 (discussing secondary soft law).

²⁴ *See, e.g.*, Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, annex at 274–82 (2014); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, annex III, at 199–201 (2011).

²⁵ *See generally* EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 13–26 (2005); Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 67–68 (2009); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 128–29 (2005). This is not to say, of course, that there will be no political considerations at play in the determination of whether and how to implement those norms on the ground, but rather, that those decisions may be made in a bureaucratic or action-oriented context, rather than in a political context.

political interests favor the concerned norms.²⁶ When this is not the case, seeking a treaty would be unwise, and a soft law structure will better contribute to the development of international law. Finally, as discussed further below, the advantages that hard law has over customary law or developing legal norms are diminished by the act of crystallizing soft law in a singular, written form. Then, the distinction becomes a matter of authority and durability, rather than clarity or accessibility.

B. Institutional Advantages of the ILC for Producing Soft Law

Just as soft law is often an effective mechanism for the ILC's aims, so the ILC is also particularly well-suited as an institution to produce soft law. Its structure, work processes, and expertise amplify the benefits of soft law and offset its weaknesses. Hard law gains its authority through explicit state agreement; soft law must gain adherents through its utility, credibility, and persuasive value.

The ILC has the resources and established work processes to enable it to research and consolidate widely dispersed examples of state practice, court decisions, and other evidence of customary law or developing legal norms, to draft those norms in concise and precise terms, and to produce nuanced commentaries explaining and documenting its findings and conclusions. Further, a defining feature of the ILC's work process is its direct and robust engagement with states, which have the opportunity not only to provide information to the ILC, but also to discuss its drafts in the Sixth Committee and to provide written comments; this debate and commentary is considered and incorporated by the concerned Special Rapporteur and Drafting Committee in developing a final draft of the eventual product. Thus, while the ILC's soft law products do not have the explicit agreement of states, they do possess the imprimatur of states' consideration, analysis, and input.

In addition to its work processes, the ILC's known expertise and longstanding reputation lend credibility to its work product. In considering the ILC's role, Watts noted that "[o]n particular topics the authority which underlies [the ILC's] work . . . has been influential in consolidating the law: and more generally, its intellectual approach to establishing coherent bodies of rules in different areas has given an overall solidarity to international law which was previously lacking."²⁷ Finally, the ILC's regular reporting on its work in its yearbooks and public engagement with the Sixth Committee

²⁶ Wood, *supra* note 3, at 381 ("[I]t is difficult to see what would be gained by the adoption of a convention. The [Draft Articles on Responsibility of States for Intentionally Wrongful Acts] were already proving their worth and were entering the fabric of international law through State practice, decisions of courts and tribunals and the writings of publicists.").

²⁷ *Id.* at 383.

2019] *The International Law Commission's Soft Law Influence* 1015

provides a degree of transparency, which is further amplified by the analysis in its commentaries.

In particular, through its deployment of these resources, expertise and transparency, the ILC's soft law outputs render customary and developing norms distinct and readily accessible to potential users, as distinct and as accessible as hard law. In general, "[t]reaties are often clearer and more stable than the rules of customary law, or at least thought to be so."²⁸ However, in instances in which the ILC has consolidated customary law or emerging legal norms in a singular, written form, this soft law product is likely to be just as exact and certain as a treaty. In this way, the ILC's soft law texts are distinct from customary law and other norms that have not been so codified. Accordingly, courts, bureaucrats, NGOs, and others considering matters to which the concerned norms are relevant may find the ILC's articulation of those norms renders those norms more immediately useful.

The ILC's involvement also facilitates a dynamic relationship between hard law and soft law over time. Because it has the ability to return to different aspects of topics at different moments, its soft law norms can more readily be developed into new hard law, or alternatively, it can deploy new soft law to elaborate on prior hard law.²⁹ As such, it can consider its global audience's response to its work and then respond by leveraging whichever form will most effectively promote its mission of developing international law. In addition, its robust engagement with states and the UNGA's endorsement of its soft law ameliorate somewhat the distinction between hard law to which states have directly acceded and soft law to which they have not, by offering its audience the assurance that states have at least thoroughly considered and weighed in on the concerned soft law norms. Thus, rather than forming sharply contrasting alternatives with distinctly differing results, the ILC's hard law and soft law can be seen as intersecting, interactive, and interrelated.³⁰

²⁸ Wood, *supra* note 3, at 384. Another distinction between treaties and customary law that is not addressed by the ILC's work is their status in domestic law, which is significant before national courts. *Id.*

²⁹ For example, the ILC issued the Draft Articles on Responsibility of States for Internationally Wrongful Acts as soft law without recommending they be adopted as a convention. Since then, the UNGA has repeatedly sought reports on tribunals' use of the draft articles and state comments on their view of the articles, with an eye to their potential future negotiation as a convention. G.A. Res. 71/133 (Dec. 13, 2016); G.A. Res. 68/204 (Dec. 16, 2013); G.A. Res. 65/19 (Dec. 6, 2010); G.A. Res. 62/61 (Dec. 6, 2007); G.A. Res. 59/35 (Dec. 2, 2004). In addition, as discussed above, the ILC is currently considering several topics relating to the Vienna Convention on Treaties.

³⁰ Compare Klabbbers, *supra* note 1 (sharply distinguishing hard law and soft law), with Shelton, *supra* note 1, at 68 ("The distinction [between hard law and soft law] may not be as significant as expected . . .").

III. THE ILC'S SOFT LAW INFLUENCE AND AUDIENCE

A. Influence

If the ILC's shift toward soft law is indeed increasing its relevance in its core role of codifying and progressively developing international law, we would expect to see signs that its soft law offerings are in fact influencing legal actors. This influence might be seen in a variety of contexts, such as in citations from decision-makers like courts, arbitration panels, and treaty bodies; in scholars' analysis; in the policies and practices of governmental and intergovernmental organizations; in the advocacy carried out by NGOs; in informal circulation through network and community connections; and of course, in formal circulation by the UNGA through resolutions of support or other actions. By their nature, some of these uses are more readily observed than others. In particular, citations in published decisions and scholarship are publicly available, whereas institutional practice and informal circulation are impossible to access except through interviews or participant observation within the concerned organizations.

Several empirical studies suggest that the ILC's soft law is widely publicly cited. Danae Azaria's study of the International Court of Justice's citation of ILC documents and commentaries has found extensive ICJ reliance on the ILC's work.³¹ Similarly, a study of investment tribunal awards in 2009 found that ILC rules, including soft law, were treated as evidence of customary law by such tribunals.³² In addition, at the request of the UNGA, the UN Secretary-General has produced a report on citations to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (which the ILC did not recommend be developed into a convention and so are cited in their own right as soft law). The most recent version of this report lists 159 citations to the Draft Articles by a variety of courts, tribunals, and commissions, including by:

the International Court of Justice; the International Tribunal for the Law of the Sea; the WTO Appellate Body; international arbitral tribunals; the African Court on Human and Peoples' Rights; the African Commission on Human and Peoples' Rights; the European Court of Human Rights; the

³¹ Danae Azaria, *The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making, in 70 YEARS OF THE INTERNATIONAL LAW COMMISSION—DRAWING A BALANCE FOR THE FUTURE*, at 4–5 (forthcoming 2019) (draft on file with author) (finding that the ICJ has relied on ILC sources in 22 cases to address 39 legal questions).

³² Moshe Hirsch, *Sources of International Investment Law 12* (July 21, 2011) (unpublished research paper), <https://ssrn.com/abstract=1892564> (citing awards that themselves cite ILC soft law).

2019] *The International Law Commission's Soft Law Influence* 1017

Inter-American Court of Human Rights; and the Special Tribunal for Lebanon.³³

Furthermore, even a selective search of publicly available documents unearths many examples of use of ILC soft law by courts, treaty bodies, states, scholars, and others. Concerning the above-mentioned Draft Articles on Responsibility of States for Internationally Wrongful Acts, James Crawford has observed that:

States as well as non-State litigants are increasingly relying on the articles and commentaries, and international courts and tribunals are treating them as a source on questions of State responsibility.³⁴

In addition to the courts and tribunals listed above, the Draft Articles have also been cited by the World Bank,³⁵ parties before the United Nations Human Rights Committee,³⁶ the United Nations Committee on Economic, Social and Cultural Rights,³⁷ and various scholars,³⁸ among others.³⁹

³³ U.N. Secretary General, *Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, U.N. Doc A/71/80, at 5 (2016).

³⁴ James R Crawford, *State Responsibility*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093> (last updated September 2006).

³⁵ SIOBHÁN MCINERNEY-LANKFORD ET AL., HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS 24 (2011).

³⁶ Human Rights Comm., Views of the Human Rights Comm. Under Article 5 (4) of the Optional Protocol to the Int'l Covenant on Civil and Political Rights, Concerning Communication No. 2022/2011, CCPR/C/113/D/2022/2011, annex at 5 n.7 (Aug. 20, 2015).

³⁷ Comm. on Econ., Soc. and Cultural Rights, Views Adopted by the Comm. at Its Sixty-Second Session, Concerning Commc'n No. 14/2016, U.N. Doc. E/C.12/62/D/14/2016, at 13 n. 12, (Dec. 19, 2017) [hereinafter Views Concerning Commc'n No. 14/2016]; Comm. on Econ., Soc. and Cultural Rights, Views Adopted by the Comm. under the Optional Protocol to the Int'l Covenant on Econ., Soc. and Cultural Rights, Concerning Commc'n No. 4/2014, ¶ 6.7, U.N. Doc. E/C.12/59/D/4/2014 (Nov. 24, 2016) [hereinafter Views Concerning Commc'n No. 4/2014].

³⁸ Benoit Mayer, *Obligations of Conduct in the International Law on Climate Change: A Defence*, REV. EUR., COMP. & INT'L ENVTL. L. (forthcoming 2018) (manuscript at 10 n.87) (available at <https://ssrn.com/abstract=3156067>); Jesse L. Reynolds, *An Economic Analysis of Liability and Compensation for Harm from Large-Scale Solar Climate Engineering Field Research in Solar Climate Engineering*, 5 CLIMATE L. 182, 199 n.33 (2015), <https://ssrn.com/abstract=2630934>; Charles-Emmanuel Côté, *From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada Under CETA and TPP Investment Chapters* 14 n.94 (July 18, 2016) (unpublished manuscript) (available at <https://ssrn.com/abstract=2857148>).

³⁹ See also Donald K. Anton, *The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17)*, 7 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y, 241, 251 n.45 (citing *The M/V "Saiga"* (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 1999, 10, ¶¶ 169–71 (applying "article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility . . ."); Crawford, *supra* note 34 (noting citations

Other soft law products are also influential. The Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities have been cited by International Court of Justice parties and judges⁴⁰ and by entities participating in a case before the International Tribunal for the Law of the Sea,⁴¹ and have been discussed by environmental law scholars.⁴² The Conclusions of the Work of the Study Group on the Fragmentation of International Law have been cited by states parties before the Committee on the Elimination of Discrimination against Women,⁴³ by states parties before the European Court of Human Rights, by the European Court of Human Rights itself,⁴⁴ and by others.⁴⁵ Other soft law documents issued by the ILC have also been extensively cited and discussed.⁴⁶

by ICSID and other investment tribunals, WTO arbitral panels, and other courts and tribunals previously mentioned).

⁴⁰ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665, ¶ 190 (Dec. 16); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), 2015 I.C.J. Rep. 665, 3 nn.10 & 13, 5 n.23, 6 nn.28–30 (Dec. 16) (separate opinion by Bhandari, J.), <https://www.icj-cij.org/files/case-related/150/18860.pdf>.

⁴¹ Anton, *supra* note 39, at 17–18 (citing submissions by the International Union for the Conservation of Nature and Stichting Greenpeace Council).

⁴² PHILLIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 710 (2012); Reynolds, *supra* note 38, at 202, 207; Caroline E. Foster, *The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities: Privatizing Risk*, 14 REV. EUR. COMP. & INT'L ENVTL. L. 265 (2005), <https://ssrn.com/abstract=1336329>; Gou Haibo, *ILC Proposal on the Rule of the Origin State in Transboundary Damage*, in CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY: LEGAL REMEDIES FOR TRANSBOUNDARY POLLUTION 108 (Michael G. Faure & Song Ying, eds., 2008).

⁴³ Comm. on the Elimination of Discrimination Against Women Dec. 12/2007, U.N. Doc. CEDAW/C/44/D/12/2007, ¶¶ 9.3 n.6 & 10.2 (Aug. 4, 2009).

⁴⁴ Hassan v. United Kingdom, 2014 Eur. Ct. H.R. at ¶ 87; Nat'l Union of Rail, Mar. & Transp. Workers v. United Kingdom, 2014 Eur. Ct. H.R. at ¶ 2 (Wojtyczek, J., concurring); X & Others v. Austria, 2013 Eur. Ct. H.R. at ¶ 22 (Casadevall, J., Ziemele, J., Kovler, J., Jočienė, J., Šikuta, J., De Gaetano, J. & Sicilianos, J., jointly dissenting in part); Andrejeva v. Latvia, 2009 Eur. Ct. H.R. at ¶ 17, (Ziemele, J., dissenting in part).

⁴⁵ JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW 90 (2016); JENNIFER E. FARRELL, THE INTERFACE OF INTERNATIONAL TRADE LAW AND TAXATION 213 (2013); MCINERNEY-LANKFORD ET AL., *supra* note 35, at 24; Gearóid Ó Cuinn & Stephanie Switzer, *Ebola and the Airplane – Securing Mobility Through Regime Interactions and Legal Adaptation*, 32 LEIDEN J. INT'L L. 71, 73 n.25, 76 n.52 (2019); Kal Raustiala, *Institutional Proliferation and the International Legal Order*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 293, 311–12 (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2012).

⁴⁶ For example, the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations have been cited in a variety of cases, scholarly writings, and policy documents. *E.g.*, Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. 153, ¶ 141 (October 1); BENITO MÜLLER ET AL., EUROPEAN CAPACITY BUILDING INITIATIVE, UNILATERAL DECLARATIONS: THE MISSING LEGAL LINK IN THE BALI ACTION PLAN 24 (2010), https://eurocapacity.org/downloads/Unilateral_Declarations_English_May_2010.pdf; Mayer, *supra* note

B. Audience

One inevitable implication of this widespread reliance is that the audience for soft law is not solely states, but also other global legal and policy actors.⁴⁷ In assessing the purpose of the ILC's shift toward soft law, Jacob Cogan concluded that the ILC was envisioning for itself an audience beyond the member states of the UNGA, including the many different types of actors that constitute the international community and that make decisions or take actions relevant to the concerned legal standards.⁴⁸ This brief survey of citations of the ILC's work lends credence to the claim that, whether the ILC intended this result or not, it has in fact reached global legal actors that include, but are not limited to, the political representatives of states in the Sixth Committee. Significantly, while the ILC reports its soft law products to the Sixth Committee and seeks its support for them, those soft law norms do not require the approval of states to take effect in the way that hard law norms do; rather, their legitimation and impact depend on their use by this extended global legal community.

This conclusion also comports with theoretical and empirical models of international law-making processes, which emphasize the significance of an enormous variety of legal actors playing diverse roles in developing and implementing international legal norms. Across various areas of international law, scholars have argued that legal development does not necessarily proceed top-down, from the international to the domestic, but rather, occurs through iterative engagement among numerous actors at numerous levels; likewise, legal development is not wholly state-centered, but may be driven by interactions among peers in varied governmental, intergovernmental, non-governmental, and private settings.⁴⁹ By way of example, theories and studies

38, at 9 n.86; Suyash Paliwal, *The Binding Force of G-20 Commitments*, 40 YALE J. INT'L L. ONLINE 1, 7 n.30 (2014), <https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2016/09/paliwal-the-binding-force-of-g-20-commitments-2h1zooz.pdf>.

⁴⁷ The findings discussed above are under-representative. The searches were not intended to be comprehensive, and in addition, they include only those users who can be readily identified through searches in online databases, thereby artificially excluding a variety of potential users including government lawyers, bureaucrats, and NGOs.

⁴⁸ Cogan, *supra* note 3, at 9.

⁴⁹ E.g., Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 864–65 (2006); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 24 (2002); Levit, *supra* note 25; Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 773 (2006); Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks? Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409, 433–34 (2008); Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 455–56 (2007). See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

of transnational networks and communities affirm their significance to legal development through information-sharing, collaboration, and creation of shared practices.⁵⁰ A study based in organizational theory highlights the roles played by expert practitioners and institutional structures in enforcing international legal norms.⁵¹ Transnational legal process theory emphasizes the importance of internalization of norms into bureaucratic and domestic systems.⁵² Global legal pluralism highlights the legitimacy of processes and practices developed at all levels of law, whether formal or informal, and by all kinds of actors, whether official or unofficial, in contributing to the formation of legal standards.⁵³

It is important to emphasize, however, that this global legal acceptance and implementation, while not dependent on prior formal ratification by states, is nonetheless closely connected with state engagement and acceptance. The ILC's choice of topics is often at the behest of states; it regularly reports to and receives feedback from states in the the Sixth Committee; it diligently researches the practice of states; and it consistently seeks the support of the UNGA for its soft law outputs. It is impossible to imagine that a set of norms promulgated by the ILC that met with widespread state rejection would nonetheless be accepted and implemented by other legal actors. Thus, it is not that other actors are displacing states as the ILC's soft law audience, but rather, that other actors are joining states as that audience.⁵⁴

⁵⁰ Adler, *supra* note 25; Elena Baylis, *Function and Dysfunction in Post-Conflict Justice Networks and Communities*, 47 VAND. J. TRANSNAT'L L. 625, 625 (2014) [hereinafter Baylis, *Function and Dysfunction*]. See generally Elena Baylis, *What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives*, 14 WASH. U. GLOBAL STUD. L. REV. 243 (2015); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007).

⁵¹ Laura Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1, 1–2 (2007).

⁵² Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203–05 (1996).

⁵³ Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1155–56 (2007).

⁵⁴ In considering whether to put forward the Draft Articles on State Responsibility for Internationally Wrongful Acts for development as a treaty, the UNGA has asked not only for state input but also for reports on courts and tribunals' use of the articles, suggesting that it recognizes the significance of this broader audience in legitimizing the concerned norms. U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, U.N. Doc A/71/80, at 5 (2016). Further, as noted above, states are not unitary actors, and soft law presents an opportunity for various actors within a state to engage with, assist in the development or modification of, and implement norms, rather than having political representatives of states at the UNGA be the sole gatekeepers for such norms. *Id.*

IV. INFLUENCING A GLOBAL LEGAL AUDIENCE

A. *Key Factors*

Several key characteristics have facilitated the ILC's influence on this global legal audience. As noted in the first section of this essay, the ILC's soft law documents enable legal actors to use customary and emerging legal norms without undertaking the arduous process of researching and analyzing different legal standards and practices; the ILC has done that work for them and has issued clear statements of the current state of the law. In addition, the ILC's work is widely accessible, as its final texts can be freely downloaded from its website. The ILC also has a strong reputation as an expert body. Its work processes, and in particular its careful consideration of numerous sources and its engagement with states, are transparent in its reporting and commentaries.⁵⁵ The ILC itself has noted its mandate, its thorough research process, and its active engagement with states and the UNGA as foundations for its authority.⁵⁶ The significance of these characteristics of utility, accessibility, expertise, comprehensive research and analysis, and reputation, to an institution's influence are confirmed by studies of persuasive authority in international and domestic courts. In brief, where those factors (among others) are present, courts are more likely to accept and deploy legal norms that they are not otherwise obligated to apply.⁵⁷

While the reasons that a decisionmaker, litigant, or scholar has chosen to cite a particular authority are rarely made explicit, there are hints that some of these characteristics have played a role in citations to the ILC's work. Certainly, the most fundamental reason that legal actors are relying on the ILC's soft law is that it is useful; these norms enable parties to a case to lend support to their argument, assist a decision-maker in grappling with a

⁵⁵ See generally Azaria, *supra* note 31.

⁵⁶ In considering the weight that its work product should be given by decisionmakers, the ILC has identified its sources, its stage of work, and states' responses as determining factors in assessing the authority of particular documents. Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law with Commentaries, U.N. Doc. A/73/10, at 22 (2018).

⁵⁷ There have been several studies of the persuasive influence of certain international courts over domestic courts; the relationship between these international and domestic courts is analogous to the position of the ILC vis-à-vis global legal actors, because the studied international courts develop legal norms but do not have authority over the concerned domestic courts to require them to adopt those norms. Elena Baylis, *The Persuasive Authority of Internationalized Criminal Tribunals*, 32 AM. U. INT'L L.R. 611, 625–26, 631–32 (2017) [hereinafter Baylis, *Persuasive Authority*]; Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 J. INT'L L. & POL. 871, 875–76 (2009); Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 300–06, 321–22 (1997).

contested legal issue, and provide fodder for scholarly analysis. In addition to the implicit value placed on the ILC's expertise and systematic research and analysis when legal actors cite to ILC sources as evidence of customary law or legal norms, some citations to ILC soft law explicitly rely on the expert discussion in the commentaries.⁵⁸ There are also indications that the ILC's soft law audience accepts the varying degrees of authority that the proffered norms possess and finds it useful to receive the ILC's statements even of norms that do not necessarily rise to the level of customary law; some citations treat the concerned principles or draft articles as authoritative declarations of states' obligations, while others analyze their customary nature or persuasive value.⁵⁹

Finally, concerning accessibility, one mechanism by which legal norms are circulated and put into use is through interconnections within transnational networks and communities.⁶⁰ These are difficult to trace through research into written documents, but even in the written resources, there are hints of such connections. Two of the attorneys representing Nicaragua in an ICJ case in which Nicaragua cited the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities were former ILC chairs, for example.⁶¹

B. *Extending the ILC's Influence*

In each of these areas, the ILC has processes in place that have served to promote its work and extend its influence, as described above. But because the ILC is an expert body of the Sixth Committee, its existing procedures primarily orient it toward that Committee, toward the UNGA, and toward the political representatives of states in those bodies as its primary audience.

⁵⁸ E.g., Views Concerning Commc'n No. 4/2014, *supra* note 37, at ¶ 6.7; Views Concerning Commc'n No. 14/2016, *supra* note 37, at 13 n.12.

⁵⁹ E.g., Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, at n.28–30 (Dec. 16) (separate opinion by Bhandari, J.); Anton, *supra* note 39, at 17–19. While the ILC has not generally held itself out as an authority in its work product, it has done so in its commentaries. For example, the text of the Draft Conclusions on Customary International Law itself does not explicitly list the ILC as a source of evidence of customary law, but in the commentaries, the Commission averred that “[t]he output of the International Law Commission itself merits special consideration in the present context.” Int’l Law Comm’n, *supra* note 58, at 22. Similarly, in an interim report on the ILC’s progress on the topic of *jus cogens*, the chairperson stated that the Committee had determined not to identify its work as evidence of a *jus cogens* norm in the draft conclusions, but instead, to mention its role in the commentaries. Chairperson of the Drafting Committee of the Int’l Law Comm’n, *Peremptory Norms of General International Law (Jus Cogens)*, at 4 (2018).

⁶⁰ Baylis, *Function and Dysfunction*, *supra* note 50, at 643.

⁶¹ Costa Rica v. Nicar. and Nicar. v. Costa Rica, 2015 I.C.J. Rep. at 672.

2019] *The International Law Commission's Soft Law Influence* 1023

While the Sixth Committee and the UNGA will always remain a primary audience for the ILC, they are not its only audience. In particular, a political process of approval by the Sixth Committee or the UNGA is not the determinative factor for the fate of the ILC's soft law work; rather, that depends on its diverse global audience, which includes but is not limited to states. In addition, while state practice and interests are key aspects of the information that the ILC needs to conduct its work, the practice and interests of other global legal actors also contribute to the development of legal norms and so are also important to the ILC's analysis.

Accordingly, just as communicating and engaging with the Sixth Committee has been and will continue to be critical to the ILC's work, so also, the ILC should proactively consult and connect to a greater extent with its broader soft law audience. This could include more robust and systematic engagement with tribunals, treaty bodies, courts, other UN entities, international law organizations, NGOs, advocacy organizations, bureaucrats, subject matter experts, and representatives of other concerned organizations.⁶² Such engagement is contemplated by the Statute of the International Law Commission, which authorizes the ILC to "consult 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"⁶³ and to "consult with scientific institutions and individual experts."⁶⁴ It would also build upon the existing practice of the ILC, which has undertaken such consultations from time to time.⁶⁵

The first and most important step is to recognize this global audience and consider how the ILC's processes might be adapted to better engage with it, including in gathering information, designing outputs, and publicizing its work. I offer some preliminary thoughts and examples below, but the ILC itself is in the best position to assess how it could benefit from this broader engagement and how its existing processes might most appropriately be adapted.

⁶² The ILC does regularly meet with certain tribunals and codifying institutions, including "the President of the International Court of Justice, the Committee of Legal Advisers on Public International Law of the Council of Europe, [and] the African Union Commission on International Law," among others. More rarely, it consults with other entities, such as the International Committee of the Red Cross. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, chapter II, ¶ 26, U.N. Doc. A/72/10 (2017).

⁶³ Statute of the International Law Commission, art. 26(1) (1947). In addition, consultation with states, the UNGA, and other concerned UN organs is a mandatory part of the ILC's procedures under the Statute. *See id.* at arts. 16–24.

⁶⁴ Statute of the International Law Commission, art. 16(e) (1947).

⁶⁵ *See* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, chapter II, ¶ 26, U.N. Doc. A/72/10 (2017).

First, I would suggest that the ILC could consult systematically with a variety of legal actors both in the process of selecting each topic and in considering the existing legal practice and substantive norms for each subject. Presently, this does not appear to be a regularized part of the ILC's work, although it does carry out such discussions upon occasion.⁶⁶ There would be several benefits to such a process. The ILC would gain the knowledge and practical expertise of the actors working in these areas.⁶⁷ In addition, participation in the development process is likely to encourage those legal actors to make use of the eventual output. At a minimum, they will be aware of the ILC's work on the subject. Legal actors who are involved in the development of a norm are typically more likely to disseminate and share that norm with others through informal networks and community associations.⁶⁸

The ILC could also proactively publicize its work to a variety of legal communities, institutions, and actors, in addition to making its work freely available on its website. Just what kind of measures must be taken and how extensive they must be to effectively reach a legal actor depends on the context, and in particular on the resources of the intended audience. For some audiences, translation into additional languages might make the ILC's work more accessible; for audiences with limited internet access or research capacity, affirmatively circulating key documents might facilitate consideration and use.⁶⁹ The ILC could also raise the profile of new soft law

⁶⁶ Int'l Law Comm'n, *About the Commission: Relationships with Other Bodies*, U.N. (January 11, 2019), <http://legal.un.org/ilc/activs.shtml>. In addition, reports from the U.N. Human Rights Committee indicate meetings concerning the ILC's work on treaty reservations and interpretation of treaties. Rep. of the Human Rights Comm., U.N. Doc. A/73/40, at 9 (2018); Rep. of the Human Rights Comm., U.N. Doc. A/66/40, vol. I, at 3 (2011). A 2010 study found that the ILC has consulted with NGOs only sporadically. Steve Charnovitz, *New Opportunities for Nongovernmental Actors in the International Law Commission* (2010) (unpublished manuscript) (on file with the George Washington Univ. Law Sch.), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1443&context=faculty_publications. The ILC's mandatory processes focus on states; the ILC's criteria for topic selection focus on ascertaining state needs and state practice, not the interests and practice of other legal actors. Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, ch. III, ¶ 37, U.N. Doc. A/73/10 (2018).

⁶⁷ It would also gain from diversifying its sources of input beyond what is possible from the Commission members themselves. While the ILC has considerable geographic diversity in its membership, its gender diversity remains limited, for example. Also, Charnovitz notes the benefits of getting input from NGO actors to complement the typical governmental and intergovernmental experience at the ILC. Charnovitz, *supra* note 66.

⁶⁸ Baylis, *Function and Dysfunction*, *supra* note 50, at 680; Daugirdas, *supra* note 4, at 82. However, this is dependent on those consultations going well and being perceived by the participants to be constructive; past consultations have apparently not always proceeded smoothly, so the separate question of how to make those consultations functional from the perspective of all participants is also important. Charnovitz, *supra* note 66, at 4.

⁶⁹ Baylis, *Persuasive Authority*, *supra* note 57, at 626.

2019] *The International Law Commission's Soft Law Influence* 1025

documents with scholarly and practitioner communities by holding public or online events when its work product is finalized.⁷⁰

V. CONCLUSION

The previous consensus of scholars who observed the ILC's transition to a greater emphasis on soft law was that this change would expand the ILC's audience and influence. This expectation has been borne out by the widespread use of the ILC's soft law by courts, treaty bodies, and scholars, as well as by states in their capacity as legal actors. Of course, the ILC has continued to produce valuable hard law, such as its highly anticipated forthcoming Draft Articles on Crimes Against Humanity, which are intended to be developed into a convention. But by producing soft law as well as hard law, the ILC is making effective use of its particular strengths and expertise. The ILC's involvement increases the clarity and accessibility of international law norms and promotes a dynamic, synergistic relationship between hard law and soft law that contributes to the effective development of international law.

In order to build on its existing soft law influence, the ILC should acknowledge its vast global audience and tailor its processes and practices to better reach this community. The global legal actors that constitute this audience could contribute to the ILC's norm development process by conveying their own experience and expertise. Likewise, the ILC will enhance its credibility and gain new proponents by taking account of a broader range of perspectives in its processes. The ILC could also develop mechanisms to circulate its work to a variety of legal actors.

By its nature, soft law is intended to spark the development of international law through iterative processes of practice and norm consolidation. By leveraging this format, the ILC better serves its aims of codifying and progressively developing international law.

⁷⁰ Charnovitz, *supra* note 66, at 5.