

2019

## The ILC's Past Practice on Progressive Development and Codification of International Law—An Empirical Analysis Focusing on the Law of the Sea, Law of Treaties and State Responsibility

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Online ISSN: 2643-7759

### Recommended Citation

Patrícia G. Teles, *The ILC's Past Practice on Progressive Development and Codification of International Law—An Empirical Analysis Focusing on the Law of the Sea, Law of Treaties and State Responsibility*, 13 FIU L. Rev. 1027 (2019).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol13/iss6/7>

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**THE ILC’S PAST PRACTICE ON PROGRESSIVE  
DEVELOPMENT AND CODIFICATION OF INTERNATIONAL  
LAW—AN EMPIRICAL ANALYSIS FOCUSING ON THE LAW  
OF THE SEA, LAW OF TREATIES AND STATE  
RESPONSIBILITY**

Patrícia Galvão Teles\*

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**I. INTRODUCTION**

This paper corresponds to a written version of the presentation made at the Symposium that took place in October 2018 at Florida International University to celebrate the 70th Anniversary of the International Law Commission (ILC). The theme of the Symposium was “The Role and Contributions of the International Law Commission to the Development of International Law in the Past/Next 70 Years: Codification, Progressive Development, or Both?”

The objective of the panel I had the honor to participate in was to discuss the ILC’s past practice on progressive development and codification of International Law, so as to set the scene for the broader discussion on the sort of “existential” question that faces the ILC at 70 for its future work regarding topics on its agenda and the fulfillment of the ILC’s mandate regarding the codification and/or progressive development of International Law.

Having in mind the Statute and the mandate of the ILC, the goal of the presentation at the Symposium was—rather than to promote an abstract debate on the notions of progressive development and codification—to present an empirical brief study of the ILC’s past practice regarding the two main tasks of its mandate, which are mentioned in Article 13.1.a of the United

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Nations Charter<sup>1</sup> and defined in Article 15 of the ILC Statute in the following manner:

“*[P]rogressive development* of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “*codification* of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.<sup>2</sup>

Given the limited time for the presentation, the brief empirical study was focused on three key areas of International Law that the ILC has worked on, that also correspond to three major projects accomplished so far by the ILC: the Law of the Sea (1956); the Law of Treaties (1966); and the Law of State Responsibility (2001). The empirical study was based essentially in the analysis of the commentaries adopted by the ILC together with these projects at the first and/or second reading stages. The usual method of work of the ILC entails a first reading, which is adopted by the ILC and then sent to Governments for observations, before a second and final reading that completes the work of the ILC on a given topic.

Commentaries written on first reading may include minority views within the ILC, as well as a description of alternative solutions sought, while commentaries to draft articles adopted on second reading reflect only the decisions and positions taken by the ILC as a whole. Only the commentaries were looked at and not doctrinal sources or the case-law of the International Court of Justice or other international courts and tribunals. Thus, the aim was to find out *if and how the ILC itself characterized its work* on the above mentioned three topics *for the purposes of its mandate of progressive development and codification of International Law*. Based on the findings of such study, some conclusions are drawn at the end.

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<sup>1</sup> “The General Assembly shall initiate studies and make recommendations for the purpose of: promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.” U.N. Charter art. 13, ¶ 1.a.

<sup>2</sup> G.A. Res. 174(II), Statute of the International Law Commission, art 15 (Nov. 21, 1947) (emphasis added) (as amended by subsequent resolutions).

## II. LAW OF THE SEA

One of the initial projects developed by the ILC related to the Law of the Sea. The United Nations Convention on the Law of the Sea (UNCLOS) of 1982, which contains a comprehensive regime on the Law of the Sea that is currently in force and even considered as a “Constitution” of the Oceans, was not based on a draft initially prepared by the ILC. However, its predecessors—the Geneva Conventions of 1958 on different aspects of the Law of the Sea—were based on drafts initially prepared by the ILC.

The ILC worked intensively on this topic between 1949 and 1956. It produced a single set of Draft Articles with commentaries on the Law of the Sea in 1956.<sup>3</sup> In 1958, having as basis the Draft Articles prepared by the ILC, four Geneva Conventions were concluded relating to the Territorial Sea and the Contiguous Zone, the High Seas, the Continental Shelf and the Fishing and Conservation of the Living Resources of the High Seas.

The Draft Articles prepared by the ILC in 1956 contained Draft Article 71 regarding the “Exploration of the Continental Shelf and exploitation of its natural resources.”<sup>4</sup> This Draft Article later became Article 5 of the Continental Shelf Convention of 1958.<sup>5</sup>

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<sup>3</sup> Text adopted by the International Law Commission at its eighth session, in 1956, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (para. 33). *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. No. 9, at 1, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. INT’L L. COMM’N 253, U.N. Doc A/CN.4/SER.A/1956/Add.1 (future pincites will reference the page of the yearbook in which the report is reprinted) [hereinafter Law of the Sea Draft].

<sup>4</sup> *Id.* at 299:

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.

2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources, establish safety zones at a reasonable distance around such installations, and take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and permanent means for giving warning of their presence must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

<sup>5</sup> Continental Shelf Convention art. 5, June 10, 1964, 499 U.N.T.S. 311:

In Paragraph 1 of the Commentary, the following was stated:

The *progressive development* of international law, which takes place against the background of established rules, must often result in the modification of those rules by reference to new interests or needs. The extent of that modification must be determined by the relative importance of the needs and interests involved. To lay down, therefore, that the exploration and exploitation of the continental shelf must never result in any interference whatsoever with navigation and fishing might result in many cases in rendering somewhat nominal both the sovereign rights of exploration and exploitation and the very purpose of the articles as adopted.

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1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.
  2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.
  3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.
  4. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.
  5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.
  6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.
  7. The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.
  8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.

The case is clearly one of assessment of the relative importance of the interests involved. Interference, even if substantial, with navigation and fishing might, in some cases, be justified. On the other hand, interference even on an insignificant scale would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation of the continental shelf. While, in the first instance, the coastal State must be the judge of the reasonableness—or the justification—of the measures adopted, in case of dispute the matter must be settled on the basis of article 73, which governs the settlement of all disputes regarding the interpretation or application of the articles.<sup>6</sup>

This instance is the only meaningful reference in the whole of the commentaries to substantive issues of progressive development or codification.

It is interesting to note that the ILC added a new dimension to the definition of progressive development originally contained in the Statute, by referring that progressive development must often result in the modification of established rules by reference to new interests and needs and that the extent of that modification must be determined by the relative importance of the needs and interests involved.

### III. LAW OF TREATIES

The work on the Law of Treaties has possibly been one of the most significant contributions of the International Law Commission so far. The Draft Articles on the Law of Treaties of 1966, which work started in 1949, were the basis for the Vienna Convention of the Law of Treaties of 1969. In the Draft Articles adopted in Second Reading with Commentaries,<sup>7</sup> there is no explicit distinction between progressive development and codification in the text of the commentaries, which contain general references to the task to “codify the modern law of treaties.”

We would propose to concentrate on two particular Draft Articles, which contain important features of the current Law of Treaties but that, at

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<sup>6</sup> Law of the Sea Draft, *supra* note 3, at 299 (emphasis added).

<sup>7</sup> Text adopted by the International Law Commission at its eighteenth session, in 1966, and submitted to the General Assembly as part of the Commission's report covering the work of that session (para. 38). The report, which also contains commentaries on the draft articles, appears in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION vol. II 1966. *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n 187, U.N. Doc. A/CN.4/SER. A/1966/Add. 1.

the time of their drafting generated significant discussion. The first one is Draft Article 50 dealing with *jus cogens* and later became Article 53<sup>8</sup> of the Vienna Convention on the Law of Treaties. The second is Draft Article 59 on fundamental change of circumstances that subsequently became Article 62<sup>9</sup> of the Vienna Convention on the Law of Treaties.

Paragraph 1 of the Commentary relating to Draft Article 50<sup>10</sup>—Treaties conflicting with a peremptory norm of general international law (*jus cogens*)—stated the following:

The view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain, although some jurists deny the existence of any rules of *jus cogens* in international law, since in their view even the most general rules still fall short of being universal. The Commission pointed out that the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*. Moreover, if some Governments in their comments have expressed doubts as to

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<sup>8</sup> Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 8 I.L.M. 679, 698–99 (entered into force Jan. 27, 1980):

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

<sup>9</sup> Vienna Convention on the Law of Treaties, *supra* note 8, art. 62:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

<sup>10</sup> *Draft Articles on the Law of Treaties with Commentaries*, *supra* note 7, art. 50: “A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

the advisability of this article unless it is accompanied by provision for independent adjudication, only one questioned the existence of rules of *jus cogens* in the international law of today. Accordingly, the Commission concluded that in codifying the law of treaties it must start from the basis that today there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character.<sup>11</sup>

Paragraph 3 of the Commentary to Draft Article 50 added the following:

The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.<sup>12</sup>

With regard to integrating the concept of peremptory norms of general international law (*jus cogens*) in the codification of the Law of Treaties, the position of the ILC seemed to be thus one of principle rather than based on the practice of States, which was in rapid development but not fully settled, at the moment of the elaboration of the Draft Articles, and that the full content of the rule would be later on worked out in State practice and jurisprudence of international tribunals.

With regard to Draft Article 59<sup>13</sup> on Fundamental Change of Circumstances, Paragraph 10 of the Commentary stated that:

Certain Governments in their comments emphasized the dangers which this article may have for the security of treaties unless it is made subject to some form of

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<sup>11</sup> *See id.* at 247.

<sup>12</sup> *See id.* at 248.

<sup>13</sup> *Id.* at 256–57, art. 59:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked: (a) As a ground for terminating or withdrawing from a treaty establishing a boundary; (b) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

independent adjudication. Many members of the Commission also stressed the importance which they attached to the provision of adequate procedural safeguards against arbitrary application of the principle of fundamental change of circumstances as an essential condition of the acceptability of the article. In general, however, the Commission did not consider the risks to the security of treaties involved in the present article to be different in kind or degree from those involved in the articles dealing with the various grounds of invalidity or in articles 57, 58 and 61. It did not think that a principle, valid in itself, could or should be rejected because of a risk that a State acting in bad faith might seek to abuse the principle. The proper function of codification, it believed, was to minimize those risks by strictly denning and circumscribing the conditions under which recourse may properly be had to the principle; and this it has sought to do in the present article. In addition, having regard to the extreme importance of the stability of treaties to the security of international relations, it has attached to the present article, as to all the articles dealing with grounds of invalidity or termination, the specific procedural safeguards set out in article 62.<sup>14</sup>

It is relevant to note that even with regard to more progressive or innovative solutions again provided by this Draft Article on Fundamental Change of Circumstances, the ILC emphasized that it was performing an exercise of codification and that if the provision is a matter of principle, even subject to a risk of abuse, such concerns could be alleviated by attaching to such norms adequate procedural safeguards that were also included in the Draft Articles.

#### IV. LAW OF STATE RESPONSIBILITY

The work of the ILC on State Responsibility has also been one of its most significant contributions. The topic was on the agenda of the Commission between 1954 and 2001.

Although so far no instrument was concluded under the auspices of the United Nations on the basis of prior drafts prepared by the ILC and the topic is still under consideration by the 6<sup>th</sup> Committee of the UN General

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<sup>14</sup> *Id.* at 260.

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Assembly,<sup>15</sup> it is worth looking at the Draft Articles with Commentaries adopted by the ILC upon First Reading in 1996 and on Second Reading in 2001.

Continuing with its past practice, the references in the commentaries to codification and/or progressive development are not abundant. However, the ILC does go a bit further than in the cases analyzed above regarding the Law of the Sea or the Law of Treaties.

In the Draft Articles with Commentaries adopted in First Reading in 1996,<sup>16</sup> the ILC referred to the following in Paragraph 12 of the commentary to Chapter II (The “act of the State” under International Law):

The Commission has thus set itself the task of determining what conduct international law actually attributes to the State, basing itself primarily on the findings which result from an examination of State practice and the decisions of international tribunals. It is this method by which the Commission will mainly be guided in drawing up the provisions of chapter II of this draft. The solutions derived from practice and judicial decisions will be supplemented, where necessary, by elements of progressive development.<sup>17</sup>

And Paragraph 13 of the commentary to Chapter III (Breach of an international obligation) added that:

Lastly, the Commission wishes to point out that, in preparing the material which is the subject matter of this new chapter of the draft, it relies, as in the previous chapters, on the inductive method followed by the Special Rapporteur in his reports. Thus State practice and international judicial decisions are analyzed and, on the basis of that analysis, the rules to be laid down are formulated. Nevertheless, account must be taken of the fact that, at least in regard to certain points, the wealth of precedents is not the same, for example, as it is for determining criteria for the attribution of an act to the State. Where necessary, therefore, this lack has to be made good by giving careful consideration, as a source of guidance for formulating certain rules, to the true

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<sup>15</sup> See G.A. Res. 71/133 (Dec. 13, 2016); G.A. Res. 68/104 (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); G.A. Res. 56/83 (Dec. 12, 2001).

<sup>16</sup> See Draft Articles on State Responsibility With Commentaries Thereto Adopted by the International Law Commission On First Reading (January 1997), [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_1996.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf).

<sup>17</sup> *Id.* at 18.

requirements of the contemporary international community and to the more authoritative ideas and tendencies which are emerging. In other words, the progressive development of international law sometimes has to take precedence over codification in the strict sense.<sup>18</sup>

In the introductory comments, thus, in the First Reading, the ILC recognized that its work on State Responsibility was mostly an exercise of codification, but where necessary supplemented or even giving way to progressive development where there is lack of precedent, requirements of the contemporary international community and tendencies which are emerging.

Nevertheless, it was still hesitant to openly qualify its work specifically with regard to the binary of codification and progressive development.

Perhaps the most striking example regards Draft Article 19<sup>19</sup> on “International Crimes and International Delicts” which was undoubtedly one of the proposals of the First Reading text of 1996 that generated more discussion, criticism, and even division. Even in this case, in the First Reading Commentaries, the ILC was not clear about the nature of its work, having put it in the following terms in Paragraph 73 of the commentary to Draft Article 19:

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<sup>18</sup> *Id.* at 87–88.

<sup>19</sup> *Id.* at 105–06:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime in that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from: (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid; (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

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In conclusion, the Commission wishes to emphasize that it is aware of the exceptional importance of the subject dealt with in this article. In the codification of the law of international responsibility, the adoption of a formulation which expressly recognizes the distinction between international crimes and international delicts is a step comparable to that achieved by the explicit recognition of the category of rules of *jus cogens* in the codification of the law of treaties. The Commission is therefore convinced that the representatives of Governments will devote very special attention to this article when discussing its report.<sup>20</sup>

Thus, the option of the ILC was to compare Draft Article 19 on International Crimes and Delicts to *Jus Cogens* and to draw the attention of State to the exceptional importance of this draft article.

As it is well known, Draft Article 19 on International Crimes and Delicts did not make it to the Second Reading text, due to the strong opposition of Member States in the UN Sixth Committee, which led to a change in approach in the Commission in the Second Reading. In the text of the Draft Articles with Commentaries adopted on Second Reading in 2001,<sup>21</sup> the Commission considered the distinction between crimes and delicts should be abandoned:

Accordingly, the present articles do not recognize the existence of any distinction between State “crimes” and “delicts” for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility.<sup>22</sup>

In the context of considering which would be the consequences flowing from *jus cogens* and *erga omnes* norms, the ILC took a step further in qualifying more explicitly its work, namely with regard to Articles 41 and 48 as progressive development, though in a general exercise of codification and

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<sup>20</sup> *Id.* at 132.

<sup>21</sup> Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc.A/56/10 (2001). Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

<sup>22</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* [2001] 2 Y.B. Int'l L. Comm'n 111.

progressive development on the law on State Responsibility, as it is stated in Paragraph 1 of the General Commentary:

These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.<sup>23</sup>

More specifically, with regard to Draft Article 41,<sup>24</sup> regarding “Particular consequences of a serious breach of an obligation under this chapter,” in Paragraph 3 of the Commentary, it is emphasized that:

Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact

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<sup>23</sup> *Id.* at 31, ¶ 1 (emphasis added).

<sup>24</sup> *Id.* at 113–14, art. 41. Draft Article 41:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.<sup>25</sup>

So with regard to Draft Article 41/1, the Commentary refers that it “may” reflect the progressive development of international law, but without taking a definitive position and allowing the law to further develop in this direction. Concerning Draft Article 48<sup>26</sup> on the subject of “Invocation of responsibility by a State other than an injured State,” Paragraph 12 of the Commentary clarified that:

Under paragraph 2 (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, paragraph 2 (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of

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<sup>25</sup> *Id.* at 114, ¶ 3.

<sup>26</sup> *Id.* at 126 art. 48. Draft Article 48:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party.<sup>27</sup>

And Paragraph 14 of the Commentary added that:

Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.<sup>28</sup>

With regard to Articles 48/2 and 48/3, the ILC was careful in stating that, in the first case, the article involves a measure of progressive development and, in the latter case, that the current text that contains basic legal consequences does not intend to preclude the future development of a more elaborate regime.

## V. CONCLUSION

The brief empirical analysis undertaken with regard to three major projects of the ILC regarding the Law of the Sea, Law of Treaties, and Law of State Responsibility illustrates the fact that the ILC has not qualified its own work as progressive development or codification on a systematic and thorough basis.

In the three key projects analyzed, in fact, it only seldom did it. When it did so, it did it in a careful, cautious, and wise manner, not only because in

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<sup>27</sup> *Report of the International Law Commission to the General Assembly*, at 127, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 127, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

<sup>28</sup> *Id.* at 116.

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practice the distinction between codification and progressive development is hard to perform in a rigorous way, but also because the ILC seemed to be conscious of the possibility of the continuing development of international law and to the catalyst effect its work may have on that development, given that the Draft Articles it produces may generate treaty rules that reflect customary international law.

Compared with other topics that have also been on the agenda of the ILC, only on very few occasions has the ILC decided it was appropriate to make a clear statement with regard to the status of progressive development of a certain project or of particular provisions. For instance, with regard to the topic “Responsibility of International Organizations,” the Draft Articles with commentaries adopted in 2011<sup>29</sup> clearly refer in Paragraph 5 of the General Commentary that:

The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility.<sup>30</sup>

This is probably one of the single occasions where the ILC clarified that the whole of the Draft Articles was rather in the nature of progressive development and thus did not have the same authority of those concerning State Responsibility.

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<sup>29</sup> *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/66/10 (2011), reprinted in [2011] 2 Y.B. Int'l L. Comm'n 46–47, U.N. Doc. A/CN.4/SER.A/2001/Add.1. Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 88), appears in *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

<sup>30</sup> *Id.*

On the topic of “Diplomatic protection”, in the Draft Articles adopted in 2006,<sup>31</sup> Paragraph 1 of the Commentary to Draft Article 19<sup>32</sup> entitled “Recommended Practice” stressed that:

There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to transformation into rules of law in the exercise of progressive development of the law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment. These practices are recommended to States for their consideration in the exercise of diplomatic protection in draft article 19, which recommends that States “should” follow certain practices.<sup>33</sup>

In this last case, the ILC has added a new possible dimension to its work that is neither codification nor progressive development, but recommended or desirable practices that States should follow when exercising the diplomatic protection on behalf of their nationals.

In conclusion, this brief analysis has shown that the ILC has exercised in the past its mandate of progressive development and codification in a wise, discrete and restrained manner. The ILC has privileged the adoption of good legal solutions that will sustain the test of time and respond to the interests of the international community. In this regard, it has sought to avoid the risk of freezing the development of international law by over-classifying its work as one or the other track of its inseparable and interlinked mandate of progressive development and codification.

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<sup>31</sup> *Report of the International Law Commission to the General Assembly*, at 94, U.N. Doc. A/61/10 (2006), reprinted in [2006] 2 Y.B. Int'l L. Comm'n 53, U.N. Doc. A/CN.4/SER.A/2006/Add.1. Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2006*, vol. II, Part Two.

<sup>32</sup> Draft Article 19:

A State entitled to exercise diplomatic protection according to the present draft articles, should: (a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; (b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and (c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

<sup>33</sup> *Report of the International Law Commission to the General Assembly*, at 94, U.N. Doc. A/61/10 (2006), reprinted in [2006] 2 Y.B. Int'l L. Comm'n 53, U.N. Doc. A/CN.4/SER.A/2006/Add.1.