

TREATIES AND RESPONSIBILITY:
SELECTED TOPICS IN THE CURRENT WORK OF THE
UNITED NATIONS INTERNATIONAL LAW COMMISSION

Seminar description

In 2008, the United Nations International Law Commission (ILC) will celebrate its 60th anniversary. This seminar will examine the role of this institution in the codification and progressive development of international law.

The first part of the seminar will introduce students to the mandate, structure and working methods of the ILC. Through an analysis of the two principal achievements of the Commission in the fields of treaty law (Vienna Convention of the Law of Treaties) and responsibility (Articles on State Responsibility), students will be invited to discuss the difficulties involved in the process of codification and the latter's interaction with State practice and judicial decisions (including judgments of the International Court of Justice).

The second part of the seminar will focus on the topics currently under consideration by the ILC. Students will familiarize themselves with the main legal issues involved in each topic (covering a wide range of fields of international law) and debate on the challenges faced by the Commission. Each topic will be examined in view of determining what could be the value-added of a codification by the ILC and the expected outcomes of its work.

The overall objective of the seminar will be a reflection on law-making and the impact of the work of the ILC in contemporary international law, with the underlying question whether the ILC is becoming a *de facto* law-maker at the international level.

Outline of the Course

Part One **The International Law Commission and the Codification of International Law**

Unit 1: Introduction: Codifying International Law

Introduction to the course. Concepts of codification and progressive development. The use of codification (Bentham v. Savigny). The problem of codification in international law. The relationship between customary law and treaties of codification (with reference to the *North Sea Continental Shelf* cases). Possible means of codification in international law.

Historical perspective. Past efforts of codification. Private codifications. International institutions aimed at codification. The idea behind the creation of the ILC.

Required readings:

- R. Ago, "Some New Thoughts on the Codification of International Law", in E.G. Bello and B.A. Ajibola (eds.), *Essays in Honour of Judge Taslim Olawale Elias, Volume. I*, Dordrecht, 1992, pp. 35-61;
- E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", in *Collected Courses of The Hague Academy of International Law*, vol. 159 (1978-I), pp. 9-34 (Chapter 1).

Additional readings:

- K. Marek, "Thoughts on Codification", *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 31, 1971, pp. 489-520 [for further discussion];
- H. Owada, "The International Law Commission and the Process of Law-Formation", in United Nations, *Making Better International Law: The International Law Commission at 50. Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, New York, 1998, pp. 167-180 [for further discussion];
- G. Abi-Saab, "La Commission du droit international, la codification et le processus de formation de droit international", in *ibid.*, pp. 181-200 [for further discussion].

Unit 2: The International Law Commission (ILC): What It Is, What It Does, How It Works

The ILC. Status within the United Nations. Mandate. Composition (election and identity of its members). Internal structure. Programme of work. Working methods. Selection of topics. Possible outcomes of its work. Is the ILC fit for its purpose?

Required readings:

- Browse the website of the ILC (www.un.org/law/ilc), in particular the "Introduction" section;
- Statute of the International Law Commission (in http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf);
- Sir Arthur Watts, *The International Law Commission 1949-1998. Volume I*, Oxford, 1999, pp. 1-20 (Introduction).

Additional readings:

- United Nations, *The Work of the International Law Commission, Volume I*, 7th edition, 2007, Parts I and II, pp. 1-82 [for further information];
- B. Graefrath, “The International Law Commission Tomorrow: Improving its Organization and Methods of Work”, *American Journal of International Law*, vol. 85, 1991, pp. 595-612 [for further discussion];
- C.W. Pinto, “The International Law Commission: Methods of Work and Selection of Topics”, in United Nations, *Making Better International Law: The International Law Commission at 50. Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law*, New York, 1998, pp. 233-255 (in particular Annex III) [for further discussion].

Unit 3: A Case of “Hard” Codification: The Vienna Convention on the Law of Treaties

The law of treaties before the work of the ILC. The codification of the law of treaties by the ILC. The Vienna Conference and the adoption of the Vienna Convention. Identification of the differences between the text proposed by the ILC and the Convention. Has the Vienna Conference harmed, or rather improved, the original product by the ILC?

What is customary in the Vienna Convention? Elements of certain codification (e.g., conclusion and entry into force of treaties, interpretation, etc.). Elements of alleged progressive development (e.g., reservations, invalidity of treaties conflicting with *jus cogens*). The dispute settlement mechanism.

Required readings:

- Vienna Convention on the Law of Treaties, 23 May 1969;
- S. Rosenne, “*A Posteriori* Reflections on the Vienna Convention on the Law of Treaties”, in *Estudios de derecho internacional: Homenaje al Profesor Miaja de la Muela, Volume I*, Madrid, 1979, pp. 441-455.

Additional readings:

- I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, Manchester, 1984, Chapter I (“The scope of the Convention and its relationship to customary law”), pp. 1-28 [for further discussion];
- S. Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention*, Leiden, 1970, pp. 30-91 [for further information].

Unit 4: A Case of “Soft” Codification: The Articles on State Responsibility

The law of State responsibility before the work of the ILC. The codification of State responsibility by the ILC. A “Copernican revolution”: the codification of secondary norms. The emergence of international responsibility as a separate topic of international law.

What is customary in the ILC Articles? Elements of certain codification (e.g., attribution, content of responsibility). Elements of alleged progressive development (e.g., invocation of responsibility by States other than the injured State, including counter-measures; responsibility for violations of *jus cogens*).

Required readings:

- Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC in 2001;

- J. Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", *American Journal of International Law*, vol. 96(4), 2002, pp. 874-890.

- Additional readings:*
- P.-M. Dupuy, "A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and the Codification of the Law of Responsibility", *European Journal of International Law*, volume 13, No. 5, pp. 1053-1082 [for further discussion];
 - B. Simma, "Bilateralism and Community Interest in the Law of State Responsibility", in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, Dordrecht, 1989, pp. 821-844 [for further discussion];
 - Y. Matsui, "The Transformation of the Law of State Responsibility", in *Thesaurus Acroasium*, vol. 20, 1993, pp. 5-65 (reproduced in R. Provost (ed.), *State Responsibility in International Law*, Dartmouth, 2002, pp. 3-63) [for further information and discussion].

Unit 5: Strengths and Problems of a New Codification: The Articles on Diplomatic Protection

History of diplomatic protection. A reminder of the main judicial pronouncements on diplomatic protection (including *Mavrommatis*, *Nottebohm*, *Barcelona Traction*, *ELSI*, *Ahmadou Sadio Diallo*). Is diplomatic protection still relevant at the dawn of the 21st century? Diplomatic protection and investments. Diplomatic protection and human rights.

The return of the ILC to the issue of diplomatic protection: what is left of the latter once State responsibility has been codified? Elements of codification in the articles adopted by the ILC. Elements of progressive development (e.g., diplomatic protection for stateless persons and refugees; the question of the *obligation* of the State to exercise diplomatic protection).

- Required readings:*
- J. Dugard, "Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission", in *Australian Year Book of International Law*, vol. 24, 2005, pp. 75-91;
 - Articles on Diplomatic Protection, in *Report of the ILC on the work of its fifty-eighth session (2006)*, pp. 16-21.

- Additional readings:*
- Commentaries to the Articles on Diplomatic Protection, in *Report of the ILC on the work of its fifty-eighth session (2006)*, pp. 22-100 [for further information];
 - International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment of 24 May 2007* (reproduced in <http://www.icj-cij.org/docket/files/103/13856.pdf>) [for illustrative purposes].

Unit 6: The Impact of Codification: In Search of the Ideal Outcome for the Work of the ILC

The influence of the Vienna Convention and the Articles on State responsibility on State practice and international case-law. Case studies: the use by the ICJ of the Vienna Convention articles on treaty interpretation and of the Articles on attribution of conduct of private individuals (in light of the *Nicaragua*, *Tadic* and *Genocide* cases). Is there a real difference in the application of the two types of codification? Respective advantages and drawbacks of hard and soft codification.

Should the Articles on State responsibility and the Articles on Diplomatic Protection become a convention? Discussions on the issue at the Sixth Committee of the General Assembly.

Required readings:

- S.M. Schwebel, “The Inter-Active Influence of the International Court of Justice and the International Law Commission”, in C.A. Armas Barea *et al.* (eds.), *Liber Amicorum “In Memoriam” of Judge José María Ruda*, The Hague, 2000, pp. 479-505;
- *Report of the Secretary-General on Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, UN Doc. A/62/62, paras. 62-67 and A/62/62/Add.1, para. 3 (click on “Documentation for this item” in <http://www.un.org/ga/sixth/62/RespSt.shtml>);
- *Report of the Secretary-General on Responsibility of States for Internationally Wrongful Acts, Comments and Information Received from Governments*, Un Doc. A/62/63, pp. 1-2 (comments by the Czech Republic) and 3-7 (comments by Norway, Portugal and the United Kingdom), and A/62/63/Add.1 (comments by the United States) (click on “Documentation for this item” in <http://www.un.org/ga/sixth/62/RespSt.shtml>).

Additional readings:

- *Report of the Secretary-General on Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, UN Doc. A/62/62 and Add.1 (other paragraphs) [for further information];
- Sir Ian Sinclair, *The International Law Commission*, Cambridge, 1987, Chapter III (“The Contribution of the Commission to the Development of International Law”), pp. 120-145 [for further discussion];
- J. Crawford and S. Olleson, “The Continuing Debate on a UN Convention on State Responsibility”, *International and Comparative Law Quarterly*, vol. 54(4), 2005, pp. 959-971.

Part Two

Topics in the Current Agenda of the International Law Commission

Unit 7: Filling Gaps in Past Codifications 1: Reservations to Treaties

Identifying the gap: why has the ILC returned to the topic of reservations and what is the objective of its current work on the issue? The guidelines adopted to date by the ILC.

The issue of validity and effects of reservations. History of reservations in the law of treaties (the traditional approach, the inter-american regime, the *Reservations to the Genocide Convention* regime, the Vienna Convention regime). A closer examination of the relevant provisions of the Vienna Convention: articles 19-23. The problem of validity, in particular in case of conflict of the reservation with the object and purpose of the treaty.

Required readings: - Articles 19-23 of the Vienna Convention on the Law of Treaties;

- Draft Guidelines on Reservations to Treaties provisionally adopted so far by the ILC, in *Report of the ILC on the work of its fifty-ninth session (2007)*, pp. 46-66;
- *First Report on the Law and Practice Relating to Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur*, UN Doc. A/CN.4/470 of 30 May 1995, paras. 96-125.

Additional readings:

- *Report of the ILC on the work of its fifty-ninth session (2007)*, Chapter IV (“Reservations to Treaties”), pp. 15-121 [for further information];
- *Preliminary Conclusions of the ILC on Reservations to Normative Multilateral Treaties Including Human Rights Treaties*, in *Yearbook of the ILC 1997, Vol. II*, pp. 56-57, para. 157 [for further discussion];
- Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6 [for illustrative purposes].

Unit 8: Filling Gaps in Past Codifications 2: Effects of Armed Conflicts on Treaties

Identifying the gap: article 73 of the Vienna Convention. The problem of armed conflicts in relation to treaties in a historical perspective. State practice in the field.

Examination of the draft articles adopted by the Commission. The notion of “armed conflict” in this context. The indicia of susceptibility to termination or suspension of treaties in case of armed conflict. Human rights and environmental protection in times of armed conflict: the law of armed conflict as *lex specialis* (in light of the ICJ’s *Nuclear Weapons* and *Wall* advisory opinions). The operation of treaties on the basis of necessary implication from their object and purpose.

Required readings:

- Article 73 of the Vienna Convention;
- *Report of the ILC on the work of its fifty-ninth session (2007)*, Chapter VII (“Effects of Armed Conflicts on Treaties”), pp. 154-177 (including the text of the draft articles adopted to date).

Additional readings:

- *The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine. Memorandum of the Secretariat*, UN Doc. A/CN.4/550 of 1 February 2005 [for further information];
- Institut de Droit International, *The Effects of Armed Conflicts on Treaties*, resolution adopted at the Session of Helsinki, 1985 (reproduced in: http://www.idi-iil.org/idiE/resolutionsE/1985_hel_03_en.PDF) [for further discussion];
- B. Broms, “The Effects of Armed Conflicts on Treaties (Fifth Commission), Preliminary Report”, in *Yearbook of the Institut de Droit International*, vol. 59-I, 1981, p. 224 and ff [for further discussion].

Unit 9: More than Just a Sequel: Responsibility of International Organizations

A two-topic codification. The main topic as a follow-up on the Articles on State responsibility: the responsibility of international organizations. Examination of the relevant articles and identification of the main differences between the two drafts. The second topic: the relationship between the responsibility of States and that of international organizations. Identification of the draft articles on this second topic and of the contentious issues involved.

Case study: the *Behrami and Saramati* cases before the European Court of Human Rights. Were the customary rules of responsibility of international organizations, as codified by the ILC, applied correctly? Practical implications of the decision by the Court.

Required readings:

- *Report of the ILC on the work of its fifty-ninth session (2007)*, Chapter VIII (“Responsibility of International Organizations”), pp. 178-220, paras. 325-344 (including the text of the draft articles adopted to date);
- Commentary to draft article 5 in *Report of the ILC on the work of its fifty-sixth session (2004)*, pp. 109-115;
- European Court of Human Rights, Grand Chamber, *Behrami and Behrami v. France (Application No. 71412/01) and Saramati v. France, Germany and Norway (Application No. 78166/01), Decision as to the Admissibility*, 2 May 2007 (in <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=behrami&sessionid=3402949&skin=hudoc-en>).

Additional readings:

- Report of the Working Group on Responsibility of International Organizations, in *Report of the ILC on the work of its fifty-fourth session (2002)*, paras. 465-488 [for further information];
- *Report of the ILC on the work of its fifty-fifth session (2003)*, Chapter IV (“Responsibility of International Organizations”), paras. 41-54 [for further information];
- *Report of the ILC on the work of its fifty-sixth session (2004)*, Chapter V (“Responsibility of International Organizations”), paras. 61-72 [for further information];
- *Report of the ILC on the work of its fifty-seventh session (2005)*, Chapter VI (“Responsibility of International Organizations”), paras. 192-206 [for further information];
- *Report of the ILC on the work of its fifty-eighth session (2006)*, Chapter VI (“Responsibility of International Organizations”) paras. 77-91 [for further information].

Unit 10: An Example of the Setting of a New Codification: Expulsion of Aliens

Expulsion as a right of the State and limitations to that right. Expulsion and human rights. State practice in the field.

The setting of the codification by the ILC. Scope: the identification and delimitation of the issue requiring codification. Definitions: the problem of defining the key terms. The relation of the topic with other issues in international law. Prospects of the work of the ILC in the field.

Required readings: - *Preliminary Report on the Expulsion of Aliens by Mr. Maurice Kamto, Special Rapporteur*, UN Doc. A/CN.4/554* of 2 June 2005;
- *Report of the ILC on the work of its fifty-ninth session (2007)*, Chapter VI (“Expulsion of Aliens”), pp. 132-153, paras. 184-265.

Additional readings: - *Report of the ILC on the work of its fifty-seventh session (2005)*, Chapter VIII (“Expulsion of Aliens”), paras. 242-274 [for further information];
- *Expulsion of Aliens, Memorandum by the Secretariat*, UN Doc. A/CN.4/565 (and Corr.1) of 10 July 2006, notably paras. 22-122 (“Scope of the topic”) [for further information];
- *Second Report on the Expulsion of Aliens by Mr. Maurice Kamto, Special Rapporteur*, UN Doc. A/CN.4/573 of 20 July 2006 [for further discussion].

Unit 11: Codifying Technical Subjects: Shared Natural Resources and Protection of Persons in the Event of Disasters

The specificities of these topics. Should the ILC engage into the codification of topics that require specialized technical or practical knowledge? If so, what means should the ILC use to attain a satisfactory codification in those fields?

Shared natural resources. Similarities with previous topics addressed by the ILC (international liability for injurious consequences arising out of acts not prohibited by international law; non-navigational uses of international watercourses). Political, economic and environmental aspects of the question of shared natural resources. The separation of the sub-topic of underground aquifers. The remaining challenge of codifying the use of oil and gas.

Protection of persons in the event of disasters. A Pandora’s box? Introduction to the extensive rules in the field (multilateral, bilateral, domestic). Identification of the main issues involved. Significance of the notion of “responsibility to protect” in this context.

Required readings: - *Fourth Report on Shared Natural Resources: Transboundary Groundwaters by Mr. Chusei Yamada, Special Rapporteur*, UN Doc. A/CN.4/580 of 6 March 2007;
- *Report of the ILC on the work of its fifty-ninth session (2007)*, Chapter V (“Shared Natural Resources”), pp. 122-131, paras. 155-183;
- Text of the draft articles on the law of transboundary groundwaters, in *Report of the ILC on the work of its fifty-eighth session (2006)*, pp. 185-192;
- *Report of the ILC on the work of its fifty-eighth session (2006)*, Annex C (“Protection of persons in the event of disasters”), pp. 464-488.

Additional readings: - Commentaries to the draft articles on the law of transboundary groundwaters, in *Report of the ILC on the work of its fifty-eighth session (2006)*, pp. 192-245 [for further information];
- J. Rainne, “The Work of the International Law Commission on Shared Natural Resources: the Pursuit of Competence and Relevance”, *Nordic Journal of International Law*, vol. 75(2), pp. 321-338 [for further discussion];

- International Federation of Red Cross and Red Crescent Societies, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva, 2007 (216 pages, reproduced in: http://www.uat.ifrc.org/what/disasters/idrl/research/publications.asp#desks_tudy) or its *Summary version* (28 pages, reproduced in: <http://www.uat.ifrc.org/Docs/pubs/idrl/desk-study/113600-idrl-deskstudy-low-en.pdf>) [for further information and discussion].

Unit 12: Incursions into International Criminal Law 1: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)

Aut dedere aut judicare from Grotius to the International Criminal Court. Comparison of various treaty provisions providing for the obligation to extradite or prosecute: can these provisions be grouped in a single model of *aut dedere aut judicare*?

Does the obligation to extradite or prosecute have a customary character? What is the content of the obligation (is it alternative? should one of the constitutive elements have priority)? The relationship of *aut dedere aut judicare* with universal jurisdiction. The question of the “triple alternative” (i.e., the surrender of the alleged offender to an international criminal tribunal). What should be expected from this codification?

Required readings:

- Preliminary report on the obligation to extradite or prosecute (“*aut dedere aut judicare*”) by Mr. Zdzislaw Galicki, Special Rapporteur (UN Doc. A/CN.4/571 of 7 June 2006);
- *Report of the ILC on the work of its fifty-ninth session (2007)*, Chapter IX, pp. 221-228.

Additional readings:

- M.C. Bassiouni and E.W. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht, 1995, pp. 3-69 (Part I: The Duty to Extradite or Prosecute as a Rule of Conventional and Customary International Law) [for further discussion]
- C. Enache-Brown and A. Fried, “Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law”, *McGill Law Journal*, vol. 43(3), 1998, pp. 613-633 [for further discussion].

Unit 13: Incursions into International Criminal Law 2: Immunity of State Officials from Foreign Criminal Jurisdiction

The classical approach to immunity of State officials: absolute immunity. The New Deal: the tension between an essential individual interest of the State (sovereignty) and an essential common interest of the international community as a whole (combating impunity for the most serious international crimes). The core issue: should heads of State (and other State officials) be immune from prosecution for serious international crimes? Review of the main judicial cases in the field (Nuremberg and Tokyo, *Eichmann*, *Pinochet*, *Arrest Warrant*). Is there a danger in codifying the rules on immunity of State officials? What should be expected from this codification?

- Required readings:*
- *Report of the ILC on the work of its fifty-eighth session (2006)*, Annex A (“Immunity of State officials from foreign criminal jurisdiction”), pp. 436-454;
 - International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment of 14 February 2002*, *ICJ Reports 2002*, pp. 3-35.

- Additional readings:*
- Sir Arthur Watts, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, *Collected Courses of The Hague Academy of International Law*, vol. 247 (1994-III), pp. 9-130 [for further discussion];
 - *Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet*, 24 mars 1999, in *International Legal Materials*, vol. 38, 1999, p. 581 and ff [for illustrative purposes].
 - Bianchi, A., “Immunity v. Human Rights: The Pinochet Case”, 10 *European Journal of International Law*, vol. 10, 1999, pp. 237-277 [for further information].

Unit 14: ... And Now? The Future of the International Law Commission

Future topics for the ILC. Assessment of the proposed topics for future consideration. Identification of current gaps in the codification of international law. What should be the role of the ILC in filling such gaps?

The role of the ILC in international law-making. Is there a shift from “hard” to “soft” codification? What is the status of articles of the ILC that have not been adopted in a convention? Is there a danger in leaving the identification of rules of customary international law by the ILC without further review by an international conference? Is there a tendency by international tribunals to surrender the identification of customary rules to the ILC? Has the ILC become a *de facto* law-maker in international law?

- Required readings:*
- *Report of the ILC on the work of its fifty-ninth session (2007)*, Chapter X (“Other decisions”), pp. 229-247;
 - C. Tomuschat, “The International Law Commission: An Outdated Institution?”, *German Yearbook of International Law*, vol. 49, 2006, pp. 77-105.

- Additional readings:*
- K. Zemanek, “Codification of International Law: Salvation or Dead End?”, in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago. Volume I*, Milan, 1987, pp.581-601 [for further discussion];
 - G. Hafner, “The International Law Commission and the Future Codification of International Law”, *ILSA Journal of International and Comparative Law*, volume 2(3), 1996, pp. 671-677 [for further discussion];
 - A.E. Boyle and A.V. Lowe (rapporteurs), “Report of the Study Group on the Future Work of the International Law Commission”, in M.R. Anderson *et al.* (eds.), *The International Law Commission and the Future of International Law*, British Institute of International and Comparative Law, London, 1998, pp. 1-51 [for further discussion].