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# *The Future in the Past? The Replication of Existing Treaty Language in the Making of the ILC's Draft Articles on Crimes against Humanity*

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## Abstract

*Treaty-making often occurs through the reuse of existing legal solutions. Instead of creating new language, drafters often replicate past treaty wording in the instrument under negotiation. The Draft Articles on Prevention and Punishment of Crimes against Humanity (DACaH), formulated by the International Law Commission (ILC or the Commission), were an example. This article evaluates the ILC's reliance on past treaty language to produce the DACaH. In addition to assessing some contextual reasons why, and the manner in which, the Commission used such a drafting approach, this article notes that, given its mandate as an expert body subsidiary to the United Nations General Assembly, the ILC may face specific challenges while using this technique. Taking the DACaH as a case study, the article also explores some pragmatic and normative considerations that may motivate or impact the replication of past treaty language in international law-making. In conclusion, the ILC's reliance on existing treaty wording to craft the DACaH was deeply consequential as it was part of the Commission's broader goal of placating states via the adoption of an effective, but minimalist and conformist, set of draft articles with greater chances of becoming a widely adhered to treaty.*

## 1 Introduction

As Alan Watson stated, 'to a truly astounding degree law is rooted in the past'.[1] Written international law is no exception. Quite often, those responsible for drafting a new international instrument do not start this process from a clean slate, aimed at

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1 A. Watson, *Legal Transplants: An Approach to Comparative Law* (1993), at 95.

creating entirely new wording and legal solutions from scratch, but often rely on previously adopted treaties from which they borrow language to be copied and pasted into the draft under negotiation, with or without textual alterations.[2] In international economic law, this approach has become so widespread that scholars even describe some treaty language in this field as 'boilerplate', the term used in contract law to refer to standardized text.[3]

Notwithstanding its extensive use in practice and its theoretical implications, the borrowing of previous treaty language as an international law-making technique lacks a comprehensive theory on why, when and how to use this drafting approach.[4] The limited scholarship on this matter has three main features. First, international law publicists often rely on the much more developed scholarship on boilerplate in domestic contracts to base some of their conclusions regarding international law-making.[5] Yet the reliance on past treaty language in international law can differ from its use in domestic jurisdictions to the point that findings applicable to national law, especially contract law, may not always be accurately transposed to international law. Besides the fact that analogies between contracts and treaties could be problematic as such,[6] scholarship on contract law often tackles the issue of boilerplate through the lens of the consumer-company dichotomy.[7] This perspective is not necessarily analogous to the dynamics in place during treaty-making at the international level.

Second, perhaps due to the more prominent use of copy and paste in the field, international economic law stands out as the international legal branch with the most robust body of academic works on this issue.[8] Although understandable, the focus on

2 Allee and Elsig, 'Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements', 63(3) *International Studies Quarterly* (*ISQ*) (2019) 603, at 603; Carstens, 'Interpreting Transplanted Treaty Rules', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (2015) 229, at 232.

3 Peacock, Milewicz and Snidal, 'Boilerplate in International Trade Agreements', 63(4) *ISQ* (2019) 923; Poulsen and Waibel, 'Boilerplate in International Economic Law', 115 *American Journal of International Law* (*AJIL*) *Unbound* (2021) 253; Waibel, 'Fair and Equitable Treatment as Boilerplate', 30(1) *American Review of International Arbitration* (2019) 85.

4 Ronald Dworkin stated: '[A]nalogy without theory is blind. An analogy is a way of stating a conclusion, not a way of reaching one, and theory must do the real work.' Dworkin, 'In Praise of Theory', 29 *Arizona State Law Journal* (1997) 353, at 371. The same may be said about using previous treaty language as a drafting technique in international law-making.

5 See, e.g., Encarnacion, 'Boilerplate Indignity', 94(4) *Indiana Law Journal* (2019) 1305; Baird, 'The Boilerplate Puzzle', 104(5) *Michigan Law Review (MLR)* (2006) 933.

6 E. Raftopoulos, *The Inadequacy of the Contractual Analogy in the Law of Treaties* (1990); Hertogen, 'The Persuasiveness of Domestic Law Analogies in International Law', 29(4) *European Journal of International Law* (*EJIL*) (2018) 1127, at 1137–1138.

7 See, e.g., M.J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2012); Gilo and Porat, 'The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects', 104(5) *MLR* (2006) 983.

8 Allee and Elsig, *supra* note 2, at 605; Peacock, Milewicz and Snidal, *supra* note 3; Poulsen and Waibel, *supra* note 3; Waibel, *supra* note 3; Alschner and Skougarevskiy, 'Mapping the Universe of International Investment Agreements', 19 *Journal of International Economic Law* (2016) 561. For some rare examples of studies on this topic not focused on economic law, see Carstens, *supra* note 2; Sivakumaran, 'Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law

international economic law neglects the potential specificities of applying this drafting technique to other international law branches, particularly those in which the use of identical language is less widespread than in economic law. Third, scholarship has mainly addressed the traditional law-making setting in the form of diplomatic negotiations between state representatives, overlooking the 'scientific' law-making by technical bodies composed of independent members acting in their personal capacity.[9] One additional layer of unique challenges and features could be uncovered by examining these technical bodies. Therefore, since states and organizations will likely continue to worship at the altar of past language, greater finesse in our understanding of this drafting technique is of fundamental importance.

This article will analyse the use of past treaty language by the International Law Commission (ILC or Commission), the principal subsidiary organ of the United Nations (UN) General Assembly (UNGA) for the progressive development and codification of international law. As a case study, the article centres on the ILC's reliance on this drafting approach to produce the Draft Articles on Prevention and Punishment of Crimes against Humanity (DACaH or Draft).[10] The Commission finalized this Draft on its second reading on 22 May 2019,[11] with the recommendation that the UNGA or an international conference of plenipotentiaries adopt a convention based on the DACaH.[12] At the time of writing in January 2023, the Draft was still pending before the UNGA Sixth Committee.

Although the drafting of the DACaH was not the first time that the ILC has relied on past wording to produce its outcomes,[13] this Draft deserves a dedicated assessment. The way in which the Commission used existing language to formulate the DACaH

of Disaster Relief', 28(4) *EJIL* (2017) 1097, at 1116–1117; Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste Approach"', 9(1) *International Organizations Law Review* (2012) 53; Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law', 27 *Ecology Law Quarterly* (2001) 1295.

9 For some rare examples of studies not focused on diplomatic law-making, see Sivakumaran, *supra* note 8, at 1116–1117; Ahlborn, *supra* note 8.

10 International Law Commission (ILC), Draft Articles on Prevention and Punishment of Crimes against Humanity, with Commentaries (DACaH), Report on the Work of Its Seventy-first Session, UN Doc. A/74/10 (2019), at 23.

11 ILC, 3468th Meeting, UN Doc. A/CN.4/SR.3468, 22 May 2019, at 14.

12 ILC, 3499th Meeting, UN Doc. A/CN.4/SR.3499, 5 August 2019, at 4.

13 For example, the Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/37/10, 1982, and the Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10, 2011, mirror, *mutatis mutandis*, the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, and the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 2001, respectively. The Draft Articles on the Law of Transboundary Aquifers, UN Doc. A/63/10, 2008, have several provisions analogous to the Convention on the Law of the Non-Navigational Uses of International Watercourses 1997, 2999 UNTS 77, which was adopted based on a set of ILC draft articles. The use of past language in the Draft Articles on the Protection of Persons in the Event of Disasters, UN Doc. A/71/10, 2016, was less prominent. Still, the ILC used analogies with international humanitarian law to formulate this draft. Möldner, 'Responsibility of International Organizations: Introducing the ILC's DARIO', 16 *Max Planck Yearbook of United Nations Law* (2012) 281, at 322–323; F. Bordin, *The Analogy between States and International Organizations* (2018), at 35–47; Sivakumaran, *supra* note 8, at 1116–1117.

was unique in comparison to other instances in which the ILC has referred to past wording. While, in previous works, the Commission mainly has relied on language from its own outcomes or treaties based on its outcomes, which has dealt with closely related matters,[14] the ILC went much further with the DACaH, systematically foraging throughout the vast universe of conventions addressing crimes to find language that would be both suitable for crimes against humanity and acceptable to states.[15] Ultimately, the Commission's use of past language greatly impacted the Draft's legal content.[16]

This article proceeds as follows: section 2 describes and evaluates the ILC's reliance on existing treaty language to formulate the DACaH; section 3 addresses some pragmatic and normative considerations for using this drafting approach and their application to the specific context of the DACaH; and section 4 contains the final remarks.

## 2 The ILC's Use of Past Treaty Language to Formulate the DACaH

In his 2013 proposal for the topic of crimes against humanity before the ILC, Sean Murphy had already suggested relying on language from conventions covering other crimes as the way forward to tackle the topic.[17] In their initial reaction at the UNGA Sixth Committee, states warned that the drafting of the DACaH had to be carried out prudently. Special concern was voiced as to the need to avoid conflicts with existing treaty regimes, in particular the Statute of the International Criminal Court (Rome Statute).[18] This position motivated Murphy, now as the special rapporteur on crimes against humanity, to reaffirm in his first report that '[a] convention on crimes against humanity should build upon the text and techniques of relevant existing treaty regimes'.[19] This statement fundamentally informed the ILC's drafting approach in producing the DACaH, to the effect that the use of past treaty language was central to framing the legal content of the Draft.

This article will examine three elements: (i) some context-based reasons that could justify the ILC's reliance on past treaty language; (ii) the way in which the Commission selected and used existing wording to formulate the DACaH; and (iii) some implications of this specific drafting approach that are unique to the ILC as a technical body subsidiary to the UNGA.

[14] The exception was the Draft Articles on the Protection of Persons in the Event of Disasters. See note 13 above.

[15] DACaH, *supra* note 10, at 23; ILC, Fourth Report on Crimes against Humanity (Fourth Report), UN Doc. A/CN.4/725 (2019), para. 19.

[16] See section 2.B.

[17] ILC, 'Annex II: Crimes against Humanity (Mr. Sean D. Murphy)', 2(2) *ILC Yearbook* (2013) 93, at 95.

[18] ILC, First Report on Crimes against Humanity (First Report), UN Doc. A/CN.4/680 (2015), para. 17; Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 3.

[19] First Report, *supra* note 18, para. 20.

## A *Why?*

The ILC's widespread use of past treaty language in drafting the DACaH – in addition to the considerations addressed in the following section[20] – could be justified by at least four contextual reasons: (i) the existing vast body of treaties addressing crimes; (ii) the reduced number of ILC draft articles that became widely adhered to treaties; (iii) the turmoil under the topic 'Obligation to extradite or prosecute (*aut dedere aut judicare*)'; and (iv) the current unfavourable political climate towards international law.

First, the ILC had at its disposal a broad and robust body of treaty law on crimes from which to derive inspiration to formulate the DACaH. One could highlight the wave of treaties addressing crimes in the 1970s and 1980s[21] as well as the more recent adoption of statutes of international and hybrid criminal courts[22] and new conventions on crimes, such as the 2000 UN Convention against Transnational Organized Crime (UNCTOC) and the 2003 UN Convention against Corruption (UNCAC).[23] It is not surprising that the ILC took advantage of this available material.

Second, the fact that some ILC draft articles never became widely adhered to treaties still echoes in the hallways of the Commission. The ILC experienced a 'golden era' of codification between the late 1950s and the early 1970s,[24] but, all in all, the Commission has struggled to deliver draft articles that have later been transformed into treaties with extensive adherence.[25] Although such a purely numerical approach falls short of describing the ILC's true impact and significance,[26] this record can assist in understanding why the Commission adopted the more secure pathway of relying on past treaty wording as a strategy to enhance the DACaH's acceptability among states and its prospects of becoming a treaty.[27]

Third, the ILC faced difficulties in relation to the recent topic 'Obligation to extradite or prosecute (*aut dedere aut judicare*)'. The outcome initially intended was a set of draft articles.[28] However, the topic was derailed after special rapporteur Zdzislaw Galicki proposed the inclusion of a provision recognizing customary law as a source

[20] See section 3.

[21] In 1997, Cherif Bassiouni identified 323 of them. M.C. Bassiouni (ed.), *International Criminal Law Conventions and Their Penal Provisions* (1997), at 1.

[22] One could mention the following courts: the International Criminal Tribunal for the former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994), the International Criminal Court (1998), the Special Panels for Serious Crimes in East Timor (2000), the Special Court for Sierra Leone (2002), the Extraordinary Chambers in the Courts of Cambodia (2003) and the Special Tribunal for Lebanon (2007).

[23] United Nations Convention against Transnational Organized Crime (UNCTOC) 2000, 2225 UNTS 209; United Nations Convention against Corruption (UNCAC) 2003, 2349 UNTS 41.

[24] Šturma, 'The International Law Commission and Its Impact: Some Comments', in United Nations (UN) (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (2021) 154, at 155.

[25] Secretariat of the ILC, 'Introduction', in UN, *supra* note 24, 1, at 14–19.

[26] *Ibid.*

[27] Murphy, 'Striking the Right Balance for a Draft Convention on Crimes against Humanity', *Just Security*, 17 September 2021, available at www.justsecurity.org/78257/striking-the-right-balance-for-a-draft-convention-on-crimes-against-humanity/.

[28] ILC, Second Report on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), UN Doc. A/CN.4/585 (2007), paras. 18–19; ILC, Third Report on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), UN Doc. A/CN.4/603 (2008), paras. 110–111.

of the obligation *aut dedere aut judicare*.[29] This proposal received a negative response from both the ILC and the UNGA Sixth Committee.[30] Following Galicki's failure to get re-elected to the ILC in 2011,[31] the Commission decided that, instead of appointing a new special rapporteur, the topic should be finalized by a working group.[32] The latter ultimately determined that the outcome should be a 15-page report, not draft articles.[33] A similar fate in the topic of crimes against humanity would have been disastrous for the prospect of the immediate adoption of a convention on this subject matter. Thus, by using past treaty language, special rapporteur Murphy evaded any determination on the customary nature of the DACaH's content,[34] avoiding the criticism that Galicki's proposal had faced. Considering that the topic of *aut dedere aut judicare* ended in the same year that Murphy embarked on his own topic (2014), one can assume that the former offered valuable lessons to the latter.

Fourth, the ongoing crisis of multilateralism and the related unfavourable political climate towards international law[35] have adjudicatory and law-making implications that are significant for the DACaH. In the adjudicatory realm, this political climate entails that the past optimism regarding international criminal tribunals, especially towards the International Criminal Court (ICC), has been replaced by less romanticized assessments and expectations.[36] One can also see that national prosecutions have received more weight and priority in this context.[37] This adjudicatory dimension could *a priori* favour the adoption of a global convention on crimes against humanity, as this treaty's overall goal would be to strengthen national criminal legal systems and horizontal cooperation among states.[38] On the other hand, in the law-making realm, the ongoing crisis of multilateralism has entailed stagnation in traditional international law-making.[39] This trend might *a priori* hinder the prompt transformation of

[29] ILC, Fourth Report on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), UN Doc. A/CN.4/648 (2011), para. 95.

[30] ILC, Final Report of the Working Group on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), UN Doc. A/CN.4/L.844 (2014), para. 10.

[31] ILC, 2011 Election of the International Law Commission, 2016, available at https://legal.un.org/ilc/elections/2011election.shtml.

[32] ILC, Report of the Working Group on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), UN Doc. A/CN.4/L.829 (2013), para. 10.

[33] Final Report on the Obligation to Extradite or Prosecute, *supra* note 30, para. 11.

[34] Fourth Report, *supra* note 15, para. 19; DACaH, *supra* note 10, at 23.

[35] Pellet, 'Values and Power Relations: The "Disillusionment" of International Law?', 34 *KFG Working Paper Series* (2019) 1, at 4–5; Krieger, 'Populist Governments and International Law', 30(3) *EJIL* (2019) 971; Lupel, 'The Multilateralism Index: Measuring Transformation in a Time of Crisis and Uncertainty', *IPI Global Observatory*, 9 January 2023, available at https://theglobalobservatory.org/2023/01/the-multilateralism-index-measuring-transformation-in-a-time-of-crisis-and-uncertainty/.

[36] Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', 11(3) *Journal of International Criminal Justice* (*JICJ*) (2013) 505, at 506–508.

[37] C. Stahn, *A Critical Introduction to International Criminal Law* (2019), at 413.

[38] DACaH, *supra* note 10, at 23.

[39] The author acknowledges that there are numerous reasons besides the crisis of multilateralism to the complex phenomenon of the stagnation in traditional international law-making. See Pauwelyn, Wessel and Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25(3) *EJIL* (2014) 733; Kravik, 'An Analysis of Stagnation in Multilateral Law-Making – and Why the Law of the Sea Has Transcended the Stagnation Trend', 34(4) *Leiden Journal of International Law* (*LJIL*) (2021) 935.

the DACaH into a convention. Hence, the ILC's heavy reliance on past treaty wording could be seen as a strategic use of the momentum created by the adjudicatory dimension to cautiously propose language and legal solutions for the Draft that are familiar to states and with which they would be more willing to engage. Ultimately, this strategy aimed at increasing the DACaH's chances of bypassing the stagnation trend in international law-making.[40]

## B *How?*

The ILC's use of previous treaty language shaped the DACaH in two main ways: in a positive manner by leading to the replication of previously adopted language in the Draft and in a negative manner by refusing to include specific proposals of provisions in the DACaH because such suggested provisions could not be found in previously adopted treaties on crimes.[41] Both of these perspectives were deeply consequential in defining the Draft's content. On the one hand, as noted by the special rapporteur, '[e]very provision in the [DACaH] has a direct lineage in existing treaties'.[42] On the other hand, the ILC rejected altogether numerous proposals by states since these suggestions did not reflect the language used in treaties addressing crimes.[43]

As a corollary of its reliance on past wording, the ILC acknowledged that, '[w]hile some aspects of [the Draft] may reflect customary international law, codification of existing law is not the objective of these draft articles'.[44] As already noted,[45] the Commission was mainly indifferent to, and did not evaluate in detail, whether the proposed provisions coincided with customary law or state practice more broadly.[46] Charles Jalloh has indicated that, in the specific context of crimes against humanity, this outcome was a logical and necessary course of action, given the lack of widespread state practice on these offences and the DACaH's gap-filler purpose.[47]

The ILC clarified that its 'objective [was rather] the drafting of provisions that would be both effective and likely acceptable to states, based on provisions often used in widely adhered to treaties addressing crimes, as a basis for a possible future convention'.[48] Thus, in terms of methodological approach, instead of mapping existing and emerging customary rules on crimes against humanity, the ILC's work focused mainly

[40] ILC, Remarks by Nolte, 3353rd Meeting, UN Doc. A/CN.4/SR.3353, 8 May 2017, at 14 ('the Special Rapporteur had tried to meet that challenge [posed by the current unfavourable political climate] by proposing certain well-known and proven models and by leaving out certain potential sticking points').

[41] The words 'positive' and 'negative' are used here without implying any value judgement.

[42] Murphy, *supra* note 27; ILC, Fourth Report on Crimes against Humanity, Addendum (Fourth Report Addendum), UN Doc. A/CN.4/725/Add.1 (2019).

[43] Fourth Report, *supra* note 15, paras. 36, 38, 39, 52, 57, 66, 70, 72, 114, 125, 127, 150, 156, 166, 167, 170, 172, 173, 174, 179, 186, 190, 191, 216, 217, 223, 225, 231, 244, 247, 261, 262, 265, 266, 267, 281, 290, 291, 293, 305.

[44] *Ibid.*, para. 19; DACaH, *supra* note 10, at 23.

[45] See section 2.A.

[46] Fourth Report, *supra* note 15, paras. 19, 200; DACaH, *supra* note 10, at 23.

[47] Jalloh, 'The International Law Commission's First Draft Convention on Crimes against Humanity: Codification, Progressive Development, or Both?', 52 *Case Western Reserve Journal of International Law* (*CWRJIL*) (2020) 331, at 349–354.

[48] DACaH, *supra* note 10, at 23; Fourth Report, *supra* note 15, para. 19.

on determining which existing language in conventions addressing other crimes could be replicated in the DACaH, which linguistic or substantial adaptations in such wording, if any, should be added and which proposals of provisions should be rejected for not reflecting past treaty language or not fitting the DACaH's purpose and scope.

The ILC's drafting approach for the DACaH can be divided into two phases: (i) a filtering mechanism to determine, from the bulk of existing treaty language, which wording could be considered eligible for inclusion in the Draft and (ii) the merit-based decision on which of this eligible language should be effectively added to the DACaH.[49]

### *1 The Filtering Mechanism*

The ILC used a filtering mechanism to select which available language was eligible for inclusion in the DACaH. This mechanism was essentially threefold: (i) whether the treaty language in question was 'often used', (ii) whether the borrowed language originated from 'treaties addressing crimes' and (iii) whether the relied-upon treaties were 'widely adhered to'.[50] The establishment of these requirements could be seen as an attempt by the ILC to curb arbitrariness and strengthen the legitimacy of its drafting process.[51] Yet the Commission did not provide much abstract reasoning on these selection requirements, especially regarding central questions such as how many times a particular provision needed to be repeated in different treaties to be considered 'often used' and how many states parties a treaty was required to have to be considered 'widely adhered to'.

Despite the lack of theoretical details outlining its drafting approach, the ILC's application of this filtering mechanism offered a diagnostic of its content. To distil this diagnostic, the author carried out an empirical assessment of the document 'Crimes against Humanity: Table of Relevant Treaty Provisions' (Table of Relevant Treaty Provisions), the Annex II of the special rapporteur's fourth report.[52] This table contains a list of treaties and other instruments on which the ILC based itself to provisionally adopt the DACaH on first reading in 2017. Although this document was not 'meant to be an exhaustive list of the treaties referred to by the Commission',[53] it offered an overall picture of the body of treaties used by the ILC to craft the DACaH's content. One can extract valuable findings on the Commission's filtering mechanism by assessing this list of relied-upon instruments.[54] The author also consulted the

[49] The ILC did not apply this clear-cut separation into two distinct phases in a rigorous and express manner in its work pertaining to the DACaH. The author established this division for analytical purposes, taking into account the nature and objective of the requirements used by the ILC to select existing treaty language for inclusion in the Draft.

[50] DACaH, *supra* note 10, at 23; Fourth Report, *supra* note 15, para. 19.

[51] On the relationship between legitimacy and the methods of treaty-making, see A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 99–103; Azaria, 'The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making', in UN, *supra* note 24, 172.

[52] Fourth Report Addendum, *supra* note 42, at 2.

[53] *Ibid.*

[54] As for the number of states parties of each treaty discussed in this section, the author presented the number provided by the ILC as of 9 November 2018, the time of the drafting of the DACaH.

special rapporteur's four reports when necessary to offer context to the findings of this empirical study.

The ILC applied the 'often used' requirement of its filtering mechanism with limited consistency. In fact, most of the DACaH's provisions derived from multiple instruments with similar wording, confirming its recurrent use in different treaty regimes, albeit with some linguistic variations.[55] Yet some provisions of the Draft originated from a limited number of treaties, entailing that they could hardly be considered to have been based on repeatedly used language. The most extreme examples of this situation are Article 2 (definition of crimes against humanity) and Article 12(3) (reparation to victims) of the DACaH, which were each based on a single treaty provision – that is, Article 7 of the Rome Statute[56] and Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) respectively.[57] One could also mention Article 5 (*non-refoulement*),[58] Article 6(8) (liability of legal persons),[59] Article 13(10) (enforcement of sentence following the requesting state's national law),[60] Article 13(13) (obligation to consult the requesting state in extradition proceedings)[61] and Article 14 (mutual legal assistance)[62] of the DACaH as well as paragraphs 17–19 (transfer of detainee for testimony)[63] and paragraph 20 (costs of executing a request of mutual legal assistance)[64] of the DACaH's Annex, which were all based on language used in two to three treaties only.

Figure 1 depicts the number and legal nature of the instruments that the ILC used to determine the content of each provision of the DACaH. A cross-provision comparison based on Figure 1 reveals that the number of relied upon instruments for each clause differed substantially from provision to provision, varying from two to 24 documents. Most of the provisions (nine out of 15), had a foothold in

[55] See, e.g., DACaH, *supra* note 10, Article 4 (obligation of prevention), Article 7 (establishment of national jurisdiction), Article 9 (preliminary measures when an alleged offender is present), Article 10 (*aut dedere aut judicare*) and Article 11 (fair treatment of the alleged offender). Fourth Report Addendum, *supra* note 42, at 10–13, 23–29, 31–45.

[56] Fourth Report Addendum, *supra* note 42, at 7–9. Figure 1 indicates that Article 2 of the DACaH was based on two treaties. This is because Article 2(3) was based on the Rome Statute, *supra* note 18, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984, 1465 UNTS 85. However, the definition of crimes against humanity as such (Article 2(1)–(2), DACaH) was, indeed, based solely on the Rome Statute.

[57] While Article 12(3) of the DACaH proposed a comprehensive reparative framework, inspired by Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) 2006, 2716 UNTS 3, other conventions on crimes addressed only compensation. Fourth Report Addendum, *supra* note 42, at 49; ILC, Third Report on Crimes against Humanity (Third Report), UN Doc. A/CN.4/704 (2017), para. 190.

[58] Fourth Report Addendum, *supra* note 42, at 14.

[59] *Ibid.*, at 22.

[60] *Ibid.*, at 58.

[61] *Ibid.*, at 60.

[62] *Ibid.*, at 61–65.

[63] *Ibid.*, at 80–82.

[64] *Ibid.*, at 83.

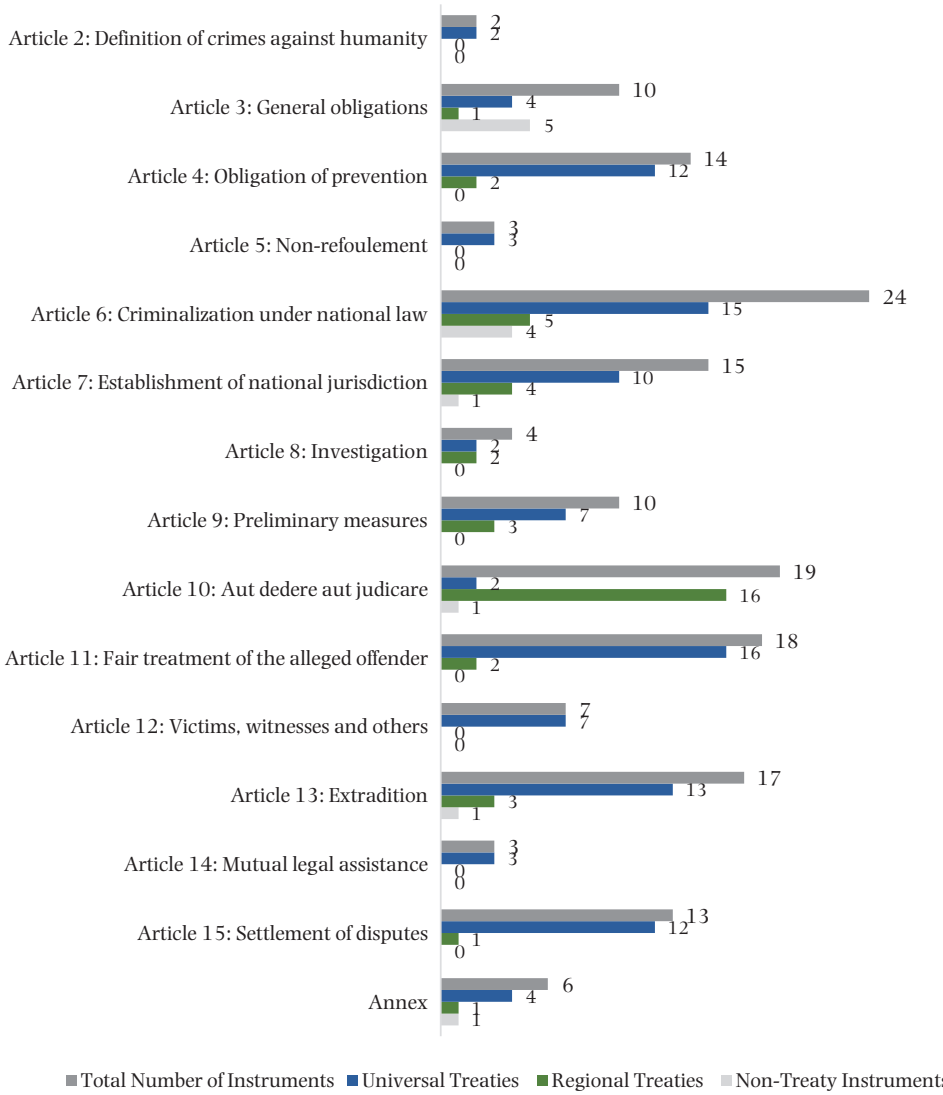


**Figure 1:** *Number and nature of the instruments the ILC used to formulate each provision of the DACaH*

10 or more instruments. The total average was 11 instruments per provision. Accordingly, the degree of repetition that a particular language formulation needed to have in order to pass the ILC's filtering mechanism varied, with no explicit or precise threshold.

As for the second requirement of the filtering mechanism (reliance on 'treaties addressing crimes'), the ILC did not rely only on treaties. In total, the Commission

referred to 54 different documents: 47 treaties (21 regional treaties[65] and 26 universal ones[66]) and seven non-treaty instruments, which do not have contracting parties as such.[67] Nevertheless, as discussed in more detail below, these non-treaty instruments were never used alone to inform the content of a provision of the DACaH. Rather, they were always used alongside treaties with analogous language.[68] Regarding subject matter, the ILC showed consistency, relying primarily on instruments containing criminal law-related provisions.[69] Human rights treaties were overall not considered, except those with such penal provisions.[70] Nevertheless, the Commission took into

[65] The term 'regional' in this article usually refers to treaties adopted under the auspices of regional organizations. A caveat should be added: due to its limited number of states parties (United States, Soviet Union, France and United Kingdom), the Charter of the Nuremberg Tribunal, an annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 1945, 82 UNTS 280, was classified here as a regional treaty, even though it was not adopted by a regional organization as such. As for the origin of the regional treaties the ILC referred to, they can be classified as follows: African (three treaties: Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa 1977, 1490 UNTS 89; OAU Convention on the Prevention and Combating of Terrorism 1999, 2219 UNTS 179; African Union Convention on Preventing and Combating Corruption 2003, 2860 UNTS 113); American (six treaties: Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance 1971, 1438 UNTS 191; Inter-American Convention to Prevent and Punish Torture (IACAT) 1985, (1986) 25 ILM 519; Inter-American Convention on Forced Disappearance of Persons 1994, (1994) 33 ILM 1529; Inter-American Convention on International Traffic in Minors 1994, (1994) 33 ILM 721; Inter-American Convention against Corruption 1996, (1996) 35 ILM 724; Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials 1997, (1998) 37 ILM 143); Arab (two treaties: Arab Convention on the Suppression of Terrorism 1998, League of Arab States, 22 April 1998; Convention of the Organization of the Islamic Conference on Combating International Terrorism 1999, Res. 59/26-P, Annex, 1 July 1999); Asian (one treaty: Association of Southeast Asian Nations Convention on Counter-Terrorism 2007, 3200 UNTS); European (eight treaties: European Convention on Mutual Assistance in Criminal Matters 1959, 472 UNTS 185; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes 1974, (1974) 13 ILM 540; European Convention on the Suppression of Terrorism 1977, (1976) 15 ILM 1272; Criminal Law Convention on Corruption 1999, (1999) 38 ILM 505; Convention on Cybercrime 2001, (2002) 41 ILM 282; Council of Europe Convention on Action against Trafficking in Human Beings 2005, (2006) 45 ILM 12; Council of Europe Convention on the Prevention of Terrorism 2005, CETS No 196, UN Reg No I-44655; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011, (2012) 51 ILM 106); and other (one treaty: Charter of the Nuremberg Tribunal).

[66] See, e.g., note 73 below.

[67] They were the Charter of the Tokyo Tribunal 1946, TIAS No 1589; Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/CN.4/34, 1950; Draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/CN.4/88, 1954; Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/10, 1996; Model Treaty on Mutual Assistance in Criminal Matters, GA Res. 45/117, 14 December 1990; Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, 32 ILM 1159 (1993); Statute of the International Criminal Tribunal for Rwanda 1994, 33 ILM 1598 (1994).

[68] See Figure 1.

[69] As exceptions, the ILC relied on the Convention Relating to the Status of Refugees 1951, 189 UNTS 150, and the Vienna Convention on Consular Relations 1963, 596 UNTS 261, to frame the provisions on *non-refoulement* and consular assistance of the DACaH, respectively. However, the Commission referred to conventions addressing crimes alongside these two treaties. DACaH, *supra* note 10, Arts. 5, 11(2); Fourth Report Addendum, *supra* note 42, at 14, 43-45.

[70] Such as the ICPPED, *supra* note 57, and the CAT, *supra* note 56.

account treaties on a wide variety of offences, such as genocide, apartheid, taking of hostages, acts against the safety of civil aviation, torture, drug and human trafficking, terrorism, transnational organized crime, corruption and enforced disappearance.[71]

Finally, concerning the 'widely adhered to' criterion of the filtering mechanism, it is striking that the ICPPED was the treaty most referred to by the ILC (used 23 times), even though it had only 59 states parties as of the DACaH's drafting.[72] The reliance on regional treaties, with a geographically limited scope of adherence, and on non-treaty instruments, which inherently lack contracting parties, could also be problematic in light of this criterion. However, the ILC tackled these concerns: except for Article 12(3) of the DACaH (reparation to victims), the ILC always used the ICPPED, regional treaties and non-treaty instruments alongside universal treaties with broad state adherence. In addition, universal treaties had a prominent role in informing the DACaH's content. Except for the 1985 Inter-American Convention to Prevent and Punish Torture, the top 10 treaties most referred to by the ILC had a universal scope.[73] In absolute numbers, of the 262 times that the ILC referred to an instrument to determine the content of the DACaH in the Table of Relevant Treaty Provisions, it referred to a universal treaty 200 times (76 per cent), to a regional treaty 44 times (17 per cent) and to a non-treaty instrument 18 times (7 per cent).[74]

Figure 1 confirms that, in general, regional and non-treaty instruments were not pivotal in informing the DACaH's content. In Figure 1, Article 3 (general obligations) and Article 10 (*aut dedere aut judicare*) stand out as exceptions to this finding, as data from the Table of Relevant Treaty Provisions indicate that non-treaty instruments and regional treaties, respectively, influenced these two provisions to a significant degree. However, the special rapporteur's reports disclose that these two provisions were crafted after numerous universal treaties that were not listed in the Table of Relevant Treaty Provisions.[75] Thus, data from the table should be taken with caution in this particular instance.

As for the referred to universal treaties (not counting regional treaties and non-treaty instruments), the average number of states parties in all universal treaties used by the ILC was 144 (75 per cent of total UN membership). Excluding the ICPPED, due to its

71 Fourth Report Addendum, *supra* note 42.

72 *Ibid*.

73 The top 10 treaties most referred to were the ICPPED, *supra* note 57 (59 states parties/ used 23 times by the ILC); UNCTOC, *supra* note 23 (189 states parties/ used 21 times); UNCAC, *supra* note 23 (186 states parties/ used 21 times); CAT, *supra* note 56 (165 states parties/ used 20 times), 1999 International Convention for the Suppression of the Financing of Terrorism 1999, 2178 UNTS 197 (188 states parties/ used 14 times); International Convention for the Suppression of Terrorist Bombings 1997, 2149 UNTS 256 (170 states parties/ used 13 times); International Convention against the Taking of Hostages 1979, 1316 UNTS 205 (176 states parties/ used 11 times); Convention for the Suppression of Unlawful Seizure of Aircraft 1970, 860 UNTS 105 (185 states parties/ used 10 times); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 1973, 1035 UNTS 167 (180 states parties/ used 10 times); Rome Statute, *supra* note 18 (123 states parties/ used nine times); and the IACAT, *supra* note 65 (18 states parties/ used nine times).

74 Fourth Report Addendum, *supra* note 42.

75 First Report, *supra* note 18, paras. 85–88; Third Report, *supra* note 57, paras. 158–167; Fourth Report, *supra* note 15, para. 207.

disproportionally low number of contracting parties, the top 10 most used universal treaties had a notably broad adherence: the average number of states parties was 174 (90 per cent of total UN membership).[76] Without the ICPPED, the absolute number of contracting parties of the top 10 most used universal treaties varied from 123 to 189 states parties.[77] The top 10 most referred to universal treaties combined amounted to 152 (76 per cent) mentions out of the total number of 200 mentions that the ILC made to universal treaties in producing the DACaH. Therefore, the Commission primarily relied on treaties whose adherence encompasses the vast majority of UN membership.[78] The most impactful universal treaties in the determination of the legal content of the DACaH, based on how often the ILC referred to them (used 85 times by the Commission combined or 42.5 per cent), were the ICPPED (11.5 per cent), the UNCTOC (10.5 per cent), the UNCAC (10.5 per cent) and the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) (10 per cent).[79]

In conclusion, the ILC applied its filtering mechanism with a limited degree of consistency and rigour. This finding, aligned with the absence of a clear theoretical explanation of the three requirements for selecting past wording, reveals that such a mechanism was not intended to be, nor was it employed by the Commission as, an absolute and rigid test but, rather, as a flexible and general outline that could be set aside when required by other compelling factors. Notwithstanding, in an overall assessment, the ILC ensured that most of the provisions of the DACaH derived from language used in universal treaties with broad adherence, addressing all sorts of different crimes. The threshold of repetition of eligible language was less uniform, but most of the provisions of the DACaH were based on at least 10 instruments with comparable language.

### *2 The Inclusion of Eligible Language in the DACaH*

The ILC's use of past treaty wording was not limited to mapping eligible language. It also encompassed the merit-based judgement of which of this pre-selected wording should be transplanted into the DACaH and which linguistic adaptations, if any, should be added. The ILC's commentaries on the Draft offer guidance on how the Commission implemented this judgement. It seems that the ILC applied two cumulative requirements: (i) whether the language would be 'effective' in the specific context of a convention for the prevention and punishment of crimes against humanity and (ii) whether the resulting provision would be 'likely acceptable to states'.[80] Considering these two requirements, the ILC carried out a legal and political assessment on the feasibility of reproducing certain past treaty language in the DACaH. The first requirement centred on the legal appraisal, evincing that the replication of past wording was

[76] If one adds the ICPPED, the average adherence of the top 10 universal treaties most referred to falls to 162 states parties (84 per cent of the total UN membership).

[77] See note 73 above.

[78] The exception to this trend was the ICPPED due to its limited adherence.

[79] For the number of times the ILC referred to each of these treaties, see note 73 above.

[80] DACaH, *supra* note 10, at 23; Fourth Report, *supra* note 15, para. 19.

not automatic but was preceded by the Commission's technical evaluation of whether the language borrowed from treaties addressing other crimes would be appropriate in the specific context of crimes against humanity. The second requirement encompassed the political appraisal under which the ILC prejudged whether states would agree with a purported provision and opted to include in the DACaH only provisions deemed acceptable to states. The ultimate goal was to ensure a widely accepted future convention on crimes against humanity.[81] The special rapporteur indicated that the Commission's plan was not to adopt 'a far-reaching treaty text, loaded up with all sorts of "wish list" items, so as to articulate highly progressive legal policy, yet knowing that states likely would not adopt such an instrument'.[82]

Besides the reaction of states in their written comments and speeches in the UNGA Sixth Committee, the question of acceptability was in practice often associated with the above-mentioned 'widely adhered to' criterion.[83] This meant that, if the borrowed language originated from a convention on another crime with significant adherence, the ILC presumed that its inclusion in the DACaH would be acceptable to states.[84] The Commission's logic was straightforward: if states had accepted a legal solution in the past regarding another crime, they would likely accept it now when the same solution was applied to crimes against humanity.[85] On the other hand, the acceptability appraisal of the DACaH's provisions in which the Commission departed from existing treaty wording[86] was less clear. This fact, and the limited degree of consistency and rigour in the application of the filtering mechanism, did not go unnoticed by some members of the ILC, who criticized the perceived arbitrariness and lack of transparency in the reliance on past language.[87] Aniruddha Rajput, for example, argued that 'it was not clear why some provisions from existing treaties had been used as they stood, while others had been altered and still others had been ignored completely'.[88]

### C *Implications*

The replication of past treaty language in diplomatic negotiations[89] or by a technical body of independent experts, such as the ILC, can create distinct challenges and

[81] This acceptability pre-judgement was very prominent, for example, for the replication of the definition of crimes against humanity from Article 7 of the Rome Statute in Article 2 of the DACaH; the decision not to add overly prescriptive language on the different forms of individual criminal responsibility in Article 6(2) of the DACaH; the broad standard of cooperation in the context of mutual legal assistance under Article 14(1) of the DACaH; and the non-inclusion of certain unsettled issues, such as immunity and civil jurisdiction. Fourth Report, *supra* note 15, paras. 55, 137, 261, 146, 149.

[82] Murphy, *supra* note 27.

[83] See section 2.B.1.

[84] Fourth Report, *supra* note 15, paras. 137, 179, 247, 261–262, 266–267.

[85] Murphy, *supra* note 27 ('there is nothing unusual about the ILC's text; the only thing new is the application of such provisions to crimes against humanity').

[86] See section 3.B.2.a.ii.

[87] ILC, Remarks by Forteau, 3297th Meeting, UN Doc. A/CN.4/SR.3297, 12 May 2016, at 3; ILC, Remarks by Michael Wood, 3298th Meeting, UN Doc. A/CN.4/SR.3298, 13 May 2016, at 15; ILC, Remarks by Escobar Hernández, 3350th Meeting, UN Doc. A/CN.4/SR.3350, 3 May 2017, at 3.

[88] ILC, Remarks by Rajput, 3454th Meeting, UN Doc. A/CN.4/SR.3454, 30 April 2019, at 14.

[89] Whether in a conference of plenipotentiaries or in an international organization.

considerations. Legal experts acting in an individual capacity and state delegates following instructions from their capitals can both fall prey to biases and broader political influences. Still, such factors do not always operate similarly or comparably in these two distinct settings.[90] For instance, as a legal expert body, the ILC engages in 'lawyers' law, not politicians' law',[91] in the sense that the Commission has less room for political bargains and compromises over highly controversial issues.[92] In addition, the ILC does not propose treaties ready for adoption and ratification as state representatives usually do. Instead, the Commission often produces, among other outcomes,[93] embryonic draft articles that require further negotiation and action by states themselves within the UNGA Sixth Committee or elsewhere.[94] The ILC does not have the final word regarding a treaty in the making; such an ultimate decision always lies with the states.

The unique institutional position in which the ILC finds itself – as a subsidiary organ of the UNGA – can impact its use of past treaty wording as a drafting technique. Two aspects will be discussed in this regard: (i) the advisory role of the ILC and (ii) the expected deference by the Commission to state practice.

### *1 The Advisory Role of the ILC*

It has been argued that the ILC should act with restraint in order not to replace or unduly encroach on the role of states as the main codifiers of international law.[95] According to this view, the Commission should limit itself to offering expert legal information to states so that they can make well-informed choices about the topic in question and act upon the ILC's suggestions.[96] This limitation would not prevent the ILC from using past treaty language, but it can affect how the Commission may apply this technique. The selection of which existing wording to use and when to depart from existing language and create new legal solutions may entail policy choices that should be ultimately reserved for states. Even though the ILC might strive for the acceptability of its own suggestions and choices, it should not act with tunnel vision that would deprive states of all available alternatives.[97] As noted by Alain Pellet, 'there must be no confusion: acceptability does not mean servility. As legal experts, the role of the ILC

[90] For an assessment of the particular role of experts in international law, see D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2016).

[91] Pellet, 'Responding to New Needs through Codification and Progressive Development', in V. Gowland-Debbas (ed.), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in International Legislative Process* (2000) 13, at 16; Tomuschat, 'The International Law Commission: An Outdated Institution', 49 *German Yearbook of International Law* (*GYIL*) (2006) 77, at 81 ('it is lawyers' law upon which [the ILC] can pronounce authoritatively').

[92] Chen, 'Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law-Maker', in UN, *supra* note 24, 233, at 263.

[93] Cogan, 'The Changing Form of the International Law Commission's Work', in R. Virzo and I. Ingravallo (eds), *Evolutions in the Law of International Organizations* (2015) 275.

[94] Voulgaris, 'The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development', 33(3) *EJIL* (2022) 761, at 772.

[95] *Ibid.*, at 772–773; Pellet, *supra* note 91, at 16.

[96] Pellet, 'Between Codification and Progressive Development of the Law: Some Reflections from the ILC', 6(1) *International Law Forum du Droit International* (2004) 15, at 20.

[97] *Ibid.*

members is to explain why a concept is logically and legally necessary and they should not accept that consistency be sacrificed for reason of a supposed non-acceptability. Then, but only then, the States have to take their responsibility and decide'.[98]

This call for restraint based on the advisory role of the ILC might raise doubts as to the appropriateness of the Commission's pre-judgement on the acceptability by states of the provisions in the DACaH. As previously indicated,[99] this pre-judgement has gone beyond a legal appraisal and entered the political terrain of assessing how states would receive certain issues if included in the Draft. Thus, the acceptability of a legal issue or solution became an inner component of the Commission's drafting approach in order to determine the DACaH's legal content, in line with the ultimate goal of adopting a widely adhered to convention on crimes against humanity.[100]

The critical question here is whether, by acting in such a manner, the ILC fell short in its role and mandate of assisting states in their codification effort.[101] As discussed in more detail below,[102] this approach led to the inclusion in the DACaH of provisions deemed overly conservative, presenting a minimal common ground widely acceptable by states. Moreover, aligned with the lack of corresponding past treaty language, the acceptability pre-judgement led to the avoidance of some pending and controversial legal questions relevant to crimes against humanity, including civil proceedings and the inapplicability of amnesties and immunity from foreign criminal jurisdiction to these offences.[103] Some commentators[104] and ILC members[105] criticized the Commission's refusal to embark on merit-centred discussions on how to tackle these

[98] *Ibid*. For a different position, see Lauterpacht, 'Codification and Development of International Law', 49(1) *AJIL* (1955) 16, at 29 ('unlike codification in other fields, codification of international law must be substantially legislative in nature. It must consist essentially in inducing governments (or some governments) to accept new law').

[99] See section 2.B.2.

[100] In fact, assessing political acceptability as an inner component of the ILC's drafting process was not endemic to the DACaH, but has been described as a persistent feature in the ILC's work throughout the decades. See Voulgaris, *supra* note 94, at 778; B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977), at 132–133; J. S. Morton, *The International Law Commission of the United Nations* (2000), at 112.

[101] Voulgaris answered in the affirmative, claiming that, given the ILC's focus on the acceptability of the DACaH, 'it is highly unlikely that the Commission's articles will be converted to a convention'. Voulgaris, *supra* note 94, at 778.

[102] See section 3.B.2.a.

[103] Third Report, *supra* note 57, paras. 281–284, 286–289, 297; Fourth Report, *supra* note 15, paras. 146, 149, 303–305.

[104] Jalloh, *supra* note 47, at 397–400; Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes against Humanity', 16(4) *JICJ* (2018) 683, at 696–700; Kreß and Garibian, 'Laying the Foundations for a Convention on Crimes against Humanity: Concluding Observations', 16(4) *JICJ* (2018) 909, at 939–952; Relva, 'Three Propositions for a Future Convention on Crimes against Humanity: The Prohibition of Amnesties, Military Courts, and Reservations', 16(4) *JICJ* (2018) 857, at 860–868; Nouwen, 'Is There Something Missing in the Proposed Convention on Crimes against Humanity? A Political Question for States and a Doctrinal One for the International Law Commission', 16(4) *JICJ* (2018) 877, at 898–903, 906–907.

[105] ILC, Remarks by Escobar Hernández, 3366th Meeting, UN Doc. A/CN.4/SR.3366, 1 June 2017, at 8; ILC, Remarks by Jalloh, 3366th Meeting, UN Doc. A/CN.4/SR.3366, 1 June 2017, at 7.

'unwelcome' issues in the context of crimes against humanity. Sarah Nouwen noted that, although these complex legal questions might be discussed in future state negotiations, it could be too late to sufficiently address the fundamental issues at stake at that time.[106]

Yet, instead of broad political appraisals that could erode its legitimacy, the ILC often centred its acceptability pre-judgement on the assumption that, as long as the proposed provisions could find a foothold in widely adhered to treaties on other crimes, the states would likely agree to such provisions when they were incorporated into the DACaH.[107] It remains to be seen if this assumption proves to be reliable, primarily whether states will concur with the Commission's proposals to transplant legal solutions from treaty regimes concerning other offences to the specific context of crimes against humanity. Hence, the exercise of identifying repetitive provisions on other crimes and assessing their applicability to crimes against humanity – as the ILC did in this topic – should not be taken for granted as it may likely imply progressive development of international law.[108] Michael Wood even stated 'that for the most part [the DACaH] represent new law'.[109] In addition, the resistance by a few states in the UNGA Sixth Committee to the prospect of immediately transforming the DACaH into a treaty reveals that achieving universal political willingness to develop the law in the direction suggested by the ILC might be challenging.[110] This is an important finding given the standard consensus rule for decision-making in the UN.[111]

### *2 The ILC's Deference to State Practice*

One usually expects the ILC to take the states' practice and expectations into account in implementing its mandate.[112] Under this assumption, the ILC's reliance on past treaty language as the primary method to address a particular topic could receive backlash. As occurred with the DACaH, this drafting approach may not encompass an empirical analysis of existing practice on the subject matter in question and could entail the replication of legal solutions from treaty law even when there is no representative state

[106] Nouwen, *supra* note 104, at 907.

[107] See section 2.B.2. This framing of the acceptability pre-judgement in terms of widely adhered to past treaty language could be perceived as an attempt by the ILC to place its choices regarding the DACaH in the universe of political decisions that are tolerable to be taken by lawyers involved in a codification or progressive development project. Voulgaris, *supra* note 94, at 773.

[108] Jalloh, *supra* note 47, at 352.

[109] Wood, 'The UN International Law Commission and Customary International Law', Gaetano Morelli Lectures, 'Sapienza' University of Rome (2017), para. 12, available at www.scienzegiuridiche.uniroma1.it/sites/default/files/varie/GML/2017/GML_2017-Wood.pdf.

[110] Sadat, 'Little Progress in the Sixth Committee on Crimes against Humanity', 54 *CWRJIL* (2022) 89, at 98–101.

[111] *Ibid.*, at 104–105.

[112] Ramcharan, *supra* note 100, at 88–89; Alabrune, 'Presentation by François Alabrune', in UN, *supra* note 24, 51, at 52–53.

practice backing them.[113] Unsurprisingly, states[114] and ILC members[115] that expected greater reliance on state practice in the topic of crimes against humanity criticized the DACaH for falling short in this regard. Thus, assessing the acceptability of a proposed draft article in terms of existing treaty language alone could be misleading, especially considering the position of states that demand deference to existing practice in the ILC's work.

Shinya Murase expressed reservation about the ILC's use of past treaty language and the related indifference to customary law, claiming that this would exceed the Commission's mandate.[116] He contended that the special rapporteur 'was acting as if the Commission had been asked by the General Assembly to draw up new legal rules on crimes against humanity'.[117] According to Murase, the ILC would be authorized to use past treaty language alone, with no need to determine whether the proposed rule had customary status, only when responding to an express request of the UNGA to draft a new convention on a given topic, which was not the case for crimes against humanity.[118] The special rapporteur responded by arguing that such a limitation cannot be found in the ILC Statute nor in its practice and, in any case, that Murase's narrow approach would severely inhibit the ILC's ability to assist states in the codification and progressive development of international law.[119]

Conclusively, the distinctive role of the ILC and its institutional dependency on the UNGA Sixth Committee can bring unique challenges and considerations for using previous treaty language as a drafting approach, difficulties that state representatives might not face or might face differently in diplomatic negotiations. The scope of these endemic challenges and considerations remains open as the precise contours of the mandate of the ILC and of its relationship with the UNGA Sixth Committee are highly disputed.[120]

[113] See section 2.B.

[114] UN, Remarks by Geng (China), 8th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/76/SR.8, 13 October 2021, para. 54; UN, Remarks by Bhat (India), 8th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/76/SR.8, 13 October 2021, para. 95; UN, Remarks by Bagherpour Ardekani (Iran), 20th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/72/SR.20, 25 October 2017, para. 34.

[115] ILC, Remarks by Murase, 3296th Meeting, UN Doc. A/CN.4/SR.3296, 11 May 2016, at 11–12; ILC, Remarks by Huang, 3352nd Meeting, UN Doc. A/CN.4/SR.3352, 5 May 2017, at 9–11.

[116] Remarks by Murase, *supra* note 115, at 11–12.

[117] *Ibid.*

[118] *Ibid.* Murase's concerns may echo Nikolaos Voulgaris' conclusion that '[s]ince the ILC is not *prima facie* a legislative organ, state authorization to engage in "legislation" must be given in unequivocal terms and cannot be presumed when not clearly endorsed'. Voulgaris, *supra* note 94, at 779.

[119] ILC, Remarks by Murphy (Special Rapporteur), 3301st Meeting, UN Doc. A/CN.4/SR.3301, 19 May 2016, at 4; Statute of the International Law Commission (ILC Statute), GA Res. 174 (II), 21 November 1947.

[120] Rosenne, 'The Role of the International Law Commission', 64(4) *AJIL* (1970) 24; Ziemele, 'The Functions of the International Law Commission: Identifying Existing Law or Proposing New Law?', in UN, *supra* note 24, 265; Rodiles, 'The International Law Commission and Change: Not Tracing but Facing It', in UN, *supra* note 24, 115; Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee', 49 *GYIL* (2006) 107.

## 3 Considerations for the Use of Past Treaty Language as a Law-Making Technique and Their Application to the DACaH

This article assesses some considerations previously ascertained by scholars that may motivate or impact the use of past treaty language as a drafting technique.[121] The considered factors are arranged into two groups: pragmatic and normative considerations. This separation is more analytical than empirical because, in international practice, the evaluated pragmatic and normative factors may interact with each other in multiple and complex ways. On the one hand, the pragmatic considerations consist of factors centred on the outcome of the treaty-making process as such as well as the time, costs and other practical constraints of such a process. They refer to the objective of adopting a treaty that will likely achieve broad state adherence following an efficient drafting process. On the other hand, normative considerations are factors that refer to how the use of past wording can affect the efficiency and integrity of international law as an instrument of social regulation, either in the micro-perspective of the instrument under negotiation or in the macro-perspective of the international legal system as a whole. Departing from a particular value position, the normative factors refer to the quality of the obligational content of the instrument under negotiation seen as an end in itself (micro-perspective) and in light of international law as a whole in a systematic sense (macro-perspective).

The analysis of each consideration, whether pragmatic or normative, follows a similar structure. First, the author describes, in general terms, the existing scholarly treatment of the factor in question, usually referring to law-making in the context of diplomatic negotiations between states. Second, the author applies this assessment, *mutatis mutandis*, to the specific context of the DACaH.

### A *Pragmatic Considerations*

This section will discuss two pragmatic considerations for using past treaty language: (i) the efficiency of the law-making process and (ii) the level of state support for the proposed treaty.

#### *1 The Efficiency of the Law-making Process*

##### (a) General assessment

Treaty-making can be time-consuming and inefficient, requiring protracted discussions for years, if not decades.[122] The use of past treaty wording can assist in tackling this challenge. The replication of familiar legal language may reduce the costs and duration of the treaty-making process as this drafting technique may lessen the

[121] This article does not aim at being exhaustive in identifying these factors.

[122] Neuhold, 'The Inadequacy of Law-Making by International Treaties: "Soft Law" as an Alternative?', in W. Rudiger and V. Roeben (eds), *Developments of International Law in Treaty Making* (2005) 39, at 40–43.

amount of debate among delegates, moving the negotiation along swiftly.[123] Claire Peacock, Karolina Milewicz and Duncan Snidal tested this contention in an empirical study focused on the use of repetitive language in preferential trade agreements.[124] They found that efficiency-related considerations were the leading factors in motivating states to use past language in treaty-making.[125]

### (b) Assessment in light of the DACaH

The rapid completion of the DACaH, ideally on first reading, was an important goal of the ILC.[126] Although the Draft was ultimately adopted on second reading, the Commission still succeeded in terms of promptness, as the DACaH were finalized with 'lightning speed'[127] in only 61 months (approximately five years).[128] An empirical survey by the author[129] disclosed that, out of the 26 sets of draft articles finalized by the ILC since its creation, the DACaH was the sixth fastest set of draft articles ever to be produced by the Commission.[130] Figure 2 depicts the survey's findings. The ILC's total

[123] Allee and Elsig, *supra* note 2, at 605, 611; Carstens, *supra* note 2, at 232–233; Poulsen and Waibel, *supra* note 3, at 254.

[124] Peacock, Milewicz and Snidal, *supra* note 3.

[125] *Ibid.*, at 395.

[126] ILC, Remarks by Murphy (Special Rapporteur), 3354th Meeting, UN Doc. A/CN.4/SR.3354, 9 May 2017, at 3.

[127] Jalloh, *supra* note 47, at 348.

[128] On 18 July 2014, the ILC included the topic 'Crimes against humanity' in its programme of work and appointed Sean Murphy as the special rapporteur. On 5 August 2019, the ILC decided to recommend the adoption of a convention by the United Nations General Assembly or by an international conference of plenipotentiaries on the basis of the DACaH. ILC, 3227th Meeting, UN Doc. A/CN.4/3227, 18 July 2014; ILC, 3499th Meeting, UN Doc. A/CN.4/SR.3499, 5 August 2019.

[129] The survey determined the amount of time taken by the ILC to produce each of its 26 draft articles. The author considered draft conventions and the draft statute as 'draft articles' but excluded final outcomes not aimed at becoming binding instruments, such as draft conclusions, reports, principles and so on. This limitation was made due to the distinct political and legal considerations that may have been at stake when the final outcome was ultimately aimed at becoming a binding instrument. Although the ILC delivered 29 individual sets of draft articles, for the purposes of this survey, the author counted as one the batches of drafts articles produced and delivered together within a certain topic. As such, the Draft Convention on the Elimination of Future Statelessness (DCEFS), UN Doc. A/CN.4/88, 1954, and the Draft Convention on the Reduction of Future Statelessness (DCRFS), UN Doc. A/CN.4/88, 1954, both produced under the topic 'Nationality including Statelessness', were counted as one. Similarly, the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, UN Doc. A/44/10, 1989, and the two Draft Optional Protocols, all three produced under the topic 'Status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier', were also counted as one. Considering this criterion, the total number of draft articles was 26 (instead of 29). In addition, the author adopted as the initial and final markers for the purpose of counting time, respectively: (i) the appointment of a special rapporteur or the creation of a working group or (sub)committee on the topic, whichever happened first and (ii) the last meeting of the ILC in which the draft articles in question were discussed. The author collected the data from the official meeting records, annual reports and analytical guides of the ILC available on its website at https://legal.un.org/ilc/texts/texts.shtml.

[130] The five sets of draft articles that bested the DACaH were: (i) Draft Articles on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons, UN Doc. A/8710/Rev.1, 1972: two months; (ii) DCEFS and DCRFS, *supra* note 129: 36 months; (iii) Draft Articles on Diplomatic Intercourse and Immunities, UN Doc. A/CN.4/117, 1958: 47 months; (iv) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10, 2001: 49 months; and (v) Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, UN Doc. A/54/10, 1999: 60 months.

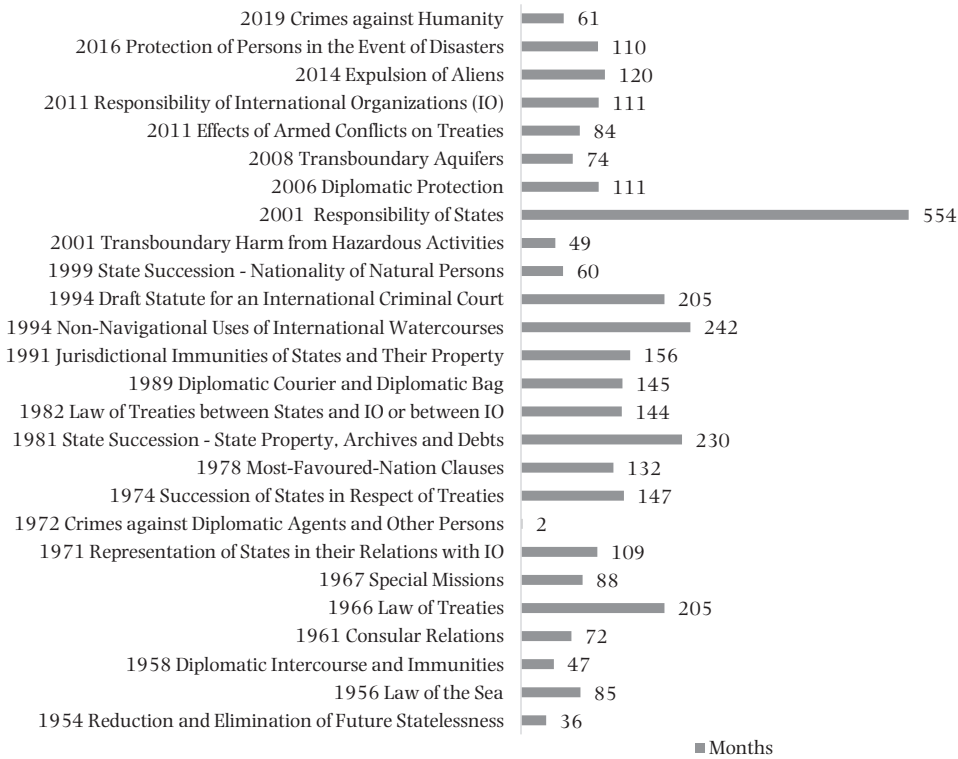


**Figure 2:** *Time in months to produce each of the ILC's 26 sets of draft articles*

average time per topic resulting in the draft articles was 129.92 months (10.82 years); the DACaH rank 53 per cent above this average. Limiting the survey to the seven sets of draft articles delivered by the ILC in the past 20 years (2002–2022), the DACaH still rank highly: the average time in the past 20 years was 95.86 months (7.99 years) per topic; the DACaH rank 36 per cent above this figure.

Nonetheless, the relationship between the use of past language and the DACaH's swift drafting should be taken with caution. The gathered data does not support a finding that the use of past wording was the sole cause for the Draft's rapid completion. Although other factors could also be identified,[131] the reliance on past language certainly played a role alongside these additional factors as issues that would likely involve protracted debate were swiftly decided upon or dismissed according to the use of this approach. One can reasonably assume that, if the ILC had decided to draft new wording for the provisions of the DACaH or investigate its customary status, it would have taken longer to finalize the Draft, if not prevented its completion altogether.

[131] Such as: (i) the special rapporteur's decision to write only four reports on crimes against humanity; (ii) the fruitful engagement with states and other stakeholders throughout the drafting of the DACaH; and (iii) the development and specification of norms on crimes against humanity over decades, through national legislation and case law of international, hybrid and domestic courts.

The DACaH's definition of crimes against humanity in Article 2 may illustrate this contention.[132] Virtually all participating states,[133] as well as scholars,[134] supported the ILC's early decision to copy and paste, with minor alterations, the definition from Article 7 of the Rome Statute to the DACaH.[135] Opening the definition as a whole for discussion or attempting to create a new one would likely have given rise to heated and lengthy debate at the ILC and the UNGA Sixth Committee.

In addition, as previously noted,[136] the use of past wording also allowed the ILC to avoid some controversial issues. For better or worse, the circumvention of these unsettled questions impacted the duration of the DACaH's drafting process at the ILC. The issue of amnesty was an example. Based on the approach taken in prior treaties addressing crimes, the special rapporteur proposed in his third report not to include a provision on amnesties in the DACaH.[137] Given the initial divergence of views on this point at the ILC's plenary meetings, especially concerning the distinction between blanket and conditional amnesties,[138] some members of the Commission suggested that the Secretariat should produce a study to substantiate their future, in-depth discussions.[139] However, the Drafting Committee did not assess the question of amnesty in substance, and this study was not even requested from the Secretariat.[140] This outcome was criticized by a few ILC members who believed that the discussion of this topic was rushed.[141] During the DACaH's second reading, some ILC members revisited the question of amnesty in plenary but mostly to defend the non-inclusion of a related provision in the DACaH.[142] Ultimately, the special rapporteur's initial proposal

[132] DACaH, *supra* note 10, Art. 2.

[133] Fourth Report, *supra* note 15, para. 55.

[134] Sadat, *supra* note 104, at 696.

[135] For an assessment of the shortcomings of this definition, see *ibid.*; Bolton, 'The Proposed Convention on the Prevention and Punishment of Crimes against Humanity: Developments and Deficiencies', in M. Bergsmo and S. Tianying (eds), *On the Proposed Crimes against Humanity Convention* (2014) 369, at 376–385.

[136] See section 2.C.

[137] Third Report, *supra* note 57, para. 297.

[138] On the distinction between blanket and conditional amnesties, see Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in K. Ambos, J. Large and M. Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development* (2009) 19; Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?', 12(4) *LJIL* (1999) 1001.

[139] ILC, Remarks by Grossman Guiloff, 3351st Meeting, UN Doc. A/CN.4/SR.3351, 4 May 2017, at 10; ILC, Remarks by Saboia, 3351st Meeting, UN Doc. A/CN.4/SR.3351, 4 May 2017, at 10; ILC, Remarks by Peter, 3352nd Meeting, UN Doc. A/CN.4/SR.3352, 5 May 2017, at 8. Contrariwise, Michael Wood maintained that this study was unnecessary and that the ILC should not pursue the matter of amnesty further due to its complexity and largely political nature. ILC, Remarks by Michael Wood, 3352nd Meeting, UN Doc. A/CN.4/SR.3352, 5 May 2017, at 4.

[140] ILC, Remarks by Rajput (Chairman of the Drafting Committee), 3366th Meeting, UN Doc. A/CN.4/SR.3366, 1 June 2017, at 6–7.

[141] ILC, Remarks by Escobar Hernández, 3366th Meeting, UN Doc. A/CN.4/SR.3366, 1 June 2017, at 8; ILC, Remarks by Jalloh, 3366th Meeting, UN Doc. A/CN.4/SR.3366, 1 June 2017, at 7.

[142] ILC, Remarks by Nolte, 3455th Meeting, UN Doc. A/CN.4/SR.3455, 1 May 2019, at 13; ILC, Remarks by Galvão Teles, 3456th Meeting, UN Doc. A/CN.4/SR.3456, 2 May 2019, at 4; ILC, Remarks by Petrič, 3457th Meeting, UN Doc. A/CN.4/SR.3457, 3 May 2019, at 10; ILC, Remarks by Escobar Hernández, 3457th Meeting, UN Doc. A/CN.4/SR.3457, 3 May 2019, at 16; ILC, Remarks by Laraba, 3458th Meeting, UN Doc. A/CN.4/SR.3458, 7 May 2019, at 7. On the other hand, Jalloh supported the inclusion in the DACaH of an outright prohibition to amnesties covering crimes against humanity. ILC, Remarks by Jalloh, 3458th Meeting, UN Doc. A/CN.4/SR.3458, 7 May 2019, at 14.

prevailed, and the Draft was completed in 2019 with no provision on amnesty, even though the ILC briefly addressed this issue in the commentaries.[143]

It remains to be seen whether the reliance on past language will also result in speediness in the long run outside of the ILC, ensuring the swift adoption of the DACaH as a treaty and its subsequent rapid entry into force and implementation. At the time of writing, this has not been the case. In light of the divergent positions of a few resistant states, the DACaH were stuck at the UNGA Sixth Committee under examination for three years (2019–2021), with no concrete measure towards their adoption as a treaty.[144] A specific process and timeline were agreed upon by the Sixth Committee in November 2022, aimed at securing a final decision on the fate of the DACaH by the end of 2024.[145]

### *2 The Level of State Support for the Proposed Treaty*

#### (a) General assessment

The use of past treaty language has been pointed out as potentially helpful in securing state support for an instrument under negotiation. Commentators have identified at least two factors in this regard. First, language replication can constitute a solid political and legal foothold for the proposed treaty, increasing its persuasiveness.[146] Anne-Marie Carstens noted that the use of previous language allows treaty negotiators to 'piggyback' on the success of the copied treaty.[147] This observation is, of course, a road that goes both ways. Reliance on language borrowing can backfire because states nonparties to the copied treaty can oppose the instrument under negotiation if the latter's content is based largely on the former's.[148] Accordingly, the use of previous language might act as a bridge to transfer the support and the opposition regarding the treaty whose wording is being borrowed to the treaty under negotiation. This finding indicates that the choice of which instrument or provision should be replicated is of fundamental importance.

Second, some scholars have observed that the drafters' reliance on past language might lure states to the new treaty because this reliance can offer a certain degree of predictability in its interpretation and application.[149] Assuming that courts value prior interpretations, Lauge Poulsen and Michael Waibel have argued that 'the boilerplate character of a provision might caution against reading much into the specific

[143] DACaH, *supra* note 10, at 95–98.
[144] Sadat, *supra* note 110.
[145] GA Res. A/RES/77/249, 9 January 2023.
[146] ILC, Remarks by Rajput, 3454th Meeting, UN Doc. A/CN.4/SR.3454, 30 April 2019, at 14; ILC, Remarks by Petrič, 3457th Meeting, UN Doc. A/CN.4/SR.3457, 3 May 2019, at 8. Contrariwise, Huikang claimed that the use of past language would result in lack of state support. ILC, Remarks by Huikang, 3458th Meeting, UN Doc. A/CN.4/SR.3458, 7 May 2019, at 4.
[147] Carstens, *supra* note 2, at 233.
[148] The same effect might occur with transplanting into the instrument under negotiation language from treaty provisions with multiple reservations. The reserving states might once again oppose the transplanted provisions that they previously reserved in the borrowed treaties and that are now in the new treaty.
[149] Alschner and Skougarevskiy, *supra* note 8, at 566; Poulsen and Waibel, *supra* note 3, at 255.

intent of the provision, and facilitate interpreting boilerplate as intentionally standardized'.[150] Peacock, Milewicz and Snidal have noted that using familiar language 'can reduce uncertainty about the likely legal interpretation and impact of an agreement as states can draw on past experience with familiar clauses to better anticipate their consequences'.[151] They also have observed that reliance on past wording allows the drafters to incorporate into the new treaty best practices learned through trial and error in the application of the replicated instruments.[152]

However, instead of promoting the incorporation of lessons learned through experience, the use of past language could also have the opposite effect. As noted by Todd Allee and Manfred Elsig, such a drafting technique can become an automatic exercise, implemented as part of bureaucratic routine.[153] In this scenario, the replication of past language is transformed into an uncritical and dysfunctional exercise of copy and paste. This blind and automatic use of past language can overlook limitations, ambiguities and gaps concretely identified during the application of the replicated treaties, especially by international and national courts. Allee and Elsig also have noted that this mechanical use of previous wording could lead states to not fully appreciate what they are introducing into their treaties, being unaware of possible negative consequences in the future.[154]

In addition, as observed by Carstens, relying on past language might entail particular difficulties for interpreting the treaty drafted under this approach, to the point that any sense of certainty or predictability regarding the meaning of the copied provisions should not be overestimated.[155] Carstens relied on the variety of opinions and interpretative approaches in the International Court of Justice's (ICJ) advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*[156] to demonstrate that the replication of past language alone will not necessarily lead an

[150] Poulsen and Waibel, *supra* note 3, at 255.

[151] Peacock, Milewicz and Snidal, *supra* note 3, at 925.

[152] *Ibid.*

[153] Allee and Elsig, *supra* note 2, at 605.

[154] Allee and Elsig mentioned the example of South Africa, which incorporated dispute settlement language from its bilateral investment treaty with the United Kingdom into treaties with other states. It was only years later, when South Africa was sued for a massive amount, that it realized the high costs of that decision. *Ibid.* In a broader finding, Poulsen noted this uncritical borrowing of language as a dangerous trend in investment treaties in developing states. L.N.S. Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2015), at 19; Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties', 58(1) *ISQ* 2014 1.

[155] Carstens, *supra* note 2, at 247; see also *MOX Plant (Ireland v. United Kingdom) – Order of Provisional Measures*, 3 December 2001, ITLOS Reports (2001) 95, para. 51; ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), para. 12.

[156] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73. The impact of the use of past language in treaty interpretation was central to this case because the text of the provision of the host agreement between the World Health Organization (WHO) and Egypt that was the object of the advisory opinion mirrored the host agreement between the WHO and Switzerland, which in turn was originally patterned on the host agreement between the International Labour Organization and Switzerland.

informed interpreter to the initially desired interpretation from the borrowed treaty.[157] She identified the following factors that could give rise to this outcome: situations of 'incomplete borrowing';[158] revisions in the copied language; poor draftsmanship by the negotiators; a lack of publicity, transparency or accessibility of the *travaux préparatoires;* and the absence of a clear indication of the original treaty from which the copied wording was taken.[159] Therefore, reproducing past language alone may not be enough to ensure the replication of a desired interpretation or meaning in the new treaty, giving rise to unexpected results during the new treaty's application.

(b) Assessment in light of the DACaH

As previously indicated,[160] the special rapporteur was careful in basing most of the DACaH on treaties with broad adherence, aimed at piggybacking the Draft on the success of the borrowed instruments. It appears that, so far, the ILC's efforts have paid off as the large majority of the UNGA Sixth Committee considered the DACaH an appropriate starting point for negotiations on a convention on crimes against humanity, even though a small group of states showed resistance to these negotiations and to the Draft as such.[161] It remains to be seen how states will react to the DACaH's legal content during the forthcoming negotiations at the Sixth Committee[162] and, hopefully, at the conference of plenipotentiaries, particularly which provisions initially proposed by the ILC will 'survive' these negotiations and find their way into the future convention on crimes against humanity.

The transfer of past treaty language also meant, at times, the transfer of opposition from the borrowed treaty to the DACaH. An example was the use of language from the Rome Statute in some key provisions of the Draft.[163] The comparatively more limited adherence to the Statute (123 states parties) motivated a few non-state parties[164] and at least one ILC member[165] to oppose using the wording from the Rome Statute. However, the overwhelming majority of states and ILC members supported the use of

[157] Carstens, *supra* note 2, at 240–243, 245–247.

[158] According to Carstens, '[i]ncomplete borrowing occurs where the source rule has been adopted without corresponding provisions that are necessary to its application or understanding. This may occur either because the drafters of the treaty under interpretation failed to transfer all the corresponding provisions from the source treaty or because the adapted context does not possess the necessary framework for the rule without the addition of further provisions'. *Ibid.*, at 234.

[159] *Ibid.*, at 243, 246–247.

[160] See section 2.B.1.

[161] Sadat, *supra* note 110, at 97–105.

[162] GA Res. A/RES/77/249, 9 January 2023.

[163] Fourth Report Addendum, *supra* note 42, at 3–4, 8–9, 16–17, 20, 48.

[164] UN, Remarks by Abdelaziz (Egypt), 8th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/76/SR.8, 13 October 2021, para. 44; UN, Remarks by Puentes (Cuba), 8th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/76/SR.8, 13 October 2021, para. 51; UN, Remarks by Geng (China), 8th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/76/SR.8, 13 October 2021, para. 54.

[165] ILC, Remarks by Nguyen, 3455th Meeting, UN Doc. A/CN.4/SR.3455, 1 May 2019, at 7 (Nguyen is national of Viet Nam, a non-state party to the Rome Statute).

language from the Statute as a means to ensure consistency between the DACaH and the ICC's system.[166]

The deference to past treaty language also implied that the ILC failed, at times, to tackle difficulties identified during the application of the borrowed wording. An example was the replication of the expression 'pursuant to or in furtherance of a state or organizational policy' from Article 7(2)(a) of the Rome Statute into the definition of crimes against humanity in Article 2(2)(a) of the DACaH.[167] The ICC has struggled to interpret and apply this requirement, leading to notable divergence and confusion in the Court's jurisprudence, especially concerning the scope of the term 'policy' and the nature of an organization in order to demonstrate the existence of an 'organisational policy'.[168] To add difficulty to the discussion, 'the customary law status of the policy element is hotly debated'.[169] One might expect that the application of this element by domestic authorities will be similarly challenging.[170] However, by deferring to the agreed wording in the Rome Statute, the ILC lost – or deliberately passed on – the opportunity to suggest a more straightforward and precise language for the DACaH[171] or delete the policy element altogether.[172]

In addition, Carstens' findings on the complex relationship between unpredictability in interpretation and the use of past treaty wording may apply to the DACaH. Apart from an indication in the preamble of the DACaH that the definition of crimes against humanity was based upon Article 7 of the Rome Statute, the Draft lacks references to which treaties the Commission borrowed from, even though the special rapporteur's reports and the ILC's commentaries contain such indications. The revisions of the copied language by the Commission[173] as well as the possible subsequent substantial changes in the Draft's content at the UNGA Sixth Committee and the conference of plenipotentiaries may also lead to unpredictable outcomes during the interpretation and application of the proposed convention on crimes against humanity.

Considering that the primary addressees of this convention will be national authorities,[174] they may face challenges of their own in referring to the *travaux préparatoires*, including the unavailability of these materials in their language, difficulties in accessing the drafting history and lack of expertise regarding treaty-making. Furthermore, due to the specific elements of crimes against humanity and their

[166] Fourth Report, *supra* note 15, paras. 20–21.

[167] DACaH, *supra* note 10, at 37–42.

[168] W. Schabas, *International Criminal Court: A Commentary on the Rome Statute* (2nd edn, 2016), at 157–164; Ambos *et al.*, 'Article 7 Crimes against Humanity', in K. Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th edn, 2021) 135, at 254–264.

[169] Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', *Ntaganda* (ICC-01/04-02/06-2666-Red), Appeals Chamber, 30 March 2021, Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda's Appeal, para. 99.

[170] Chaitidou, 'The ICC Case Law on the Contextual Elements of Crimes against Humanity', in M. Bergsmo and S. Tianying (eds), *On the Proposed Crimes against Humanity Convention* (2014) 47, at 100–101.

[171] As proposed by Mexico and Chile. Fourth Report, *supra* note 15, para. 69.

[172] As proposed by Estonia. *Ibid.*

[173] See section 3.B.2.b.ii.

[174] DACaH, *supra* note 10, at 23.

differences in comparison to other crimes, the transplantation to the DACaH of language and legal solutions from treaties addressing other crimes might lead to legal and political results that differ from the ones existing in the interpretation and application of the borrowed treaties.[175]

## B *Normative Considerations*

This section presents three normative considerations for the use of past treaty language as a law-making technique: (i) the harmonization of international law; (ii) the development of international law; and (iii) the use of past language as an instrument of dominance.

### *1 Harmonization of International Law*

#### (a) General assessment

Commentators have observed that reliance on existing treaty language might promote systemic harmonization in international law.[176] Peacock, Milewicz and Snidal have noted that using past language 'may counteract legal fragmentation, as it reduces potential rule incompatibility'.[177] Poulsen and Waibel have observed that the use of analogous wording in different treaties could create a 'network effect', in the sense that a legal finding regarding one treaty can reverberate and apply to all those other treaties that share the same language.[178] Referring to investment law specifically, Wolfgang Alschner and Dmitriy Skougarevskiy have indicated that, despite the fragmentation of this legal field into thousands of agreements, the widespread use of similar language has ensured that investment law has common principles, rules and decision-making processes at a global level.[179]

Carstens turned to interpretation, indicating that the repetition of treaty language may motivate an interpreter to forage through the earlier, copied treaties to get inspiration from how they have been interpreted.[180] She concluded that this could minimize

[175] The ILC has often justified the use of language from treaties dealing with crimes that are different from crimes against humanity on the assumption that the replicated legal solution could be applied to any crime. This reasoning justified, for example, mirroring Arts. 13 and 14 of the DACaH (extradition and mutual legal assistance, respectively) on Arts. 44 and 46 of the UNCAC, respectively. Third Report, *supra* note 57, paras. 83, 152.

[176] Peacock, Milewicz and Snidal, *supra* note 3, at 925, 935; Alschner and Skougarevskiy, *supra* note 8, at 565. Allee and Elsig cautiously agree, on a tentative level, with the harmonizing potential of relying on past language, but they pointed to the need for more research. Allee and Elsig, *supra* note 2, at 611.

[177] Peacock, Milewicz and Snidal, *supra* note 3, at 935.

[178] Poulsen and Waibel mentioned as an example of this 'network effect' the consequences of *Case C-284/16 (Slovak Republic v. Achmea)*, in which the Court of Justice of the European Union ruled in 2018 that boilerplate language on investor-state arbitration in the Netherlands-Slovakia Bilateral Investment Treaty 1991, 2242 UNTS 205, was invalid under European Union (EU) law. This ruling had a reverberating effect, potentially impacting all treaties within the EU with analogous language. Accordingly, more than 100 of these treaties were terminated soon after, via the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union 2020, (2021) 60 ILM 99. Poulsen and Waibel, *supra* note 3, at 255.

[179] Alschner and Skougarevskiy, *supra* note 8, at 565.

[180] Carstens, *supra* note 2, at 231, 242.

the risk of divergent interpretations, ultimately promoting the systemic integration of international law.[181] The ICJ already referred to the existence of similar wording in two different treaties as a reason to give the same interpretation to both.[182] However, as Carstens noted in her analysis of the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, this outcome will not always happen due to the potential influence of factors internal and external to the replication of past language as an approach to law-making.[183]

### (b) Assessment in light of the DACaH

A vital concern of the ILC and states was that the DACaH should not conflict with the legal regimes of other conventions addressing crimes nor with the statutes of international criminal courts and tribunals, especially the Rome Statute.[184] The borrowing of past language was deliberately chosen to assist in achieving this goal.[185] The special rapporteur went even further, affirming that 'rather than conflict with other treaty regimes, a well-designed convention on crimes against humanity could help fill a gap in existing treaty regimes and, in doing so, simultaneously reinforce those regimes'.[186]

During the debate at the ILC, Donald McRae noted that conflict avoidance might not be the same as harmonization, and, unlike the special rapporteur's optimistic remark above, he indicated that replicating existing language in the DACaH might instead weaken the borrowed regimes. Cognizant that the main target of the proposed convention on crimes against humanity will be domestic authorities and referring specifically to the replication of wording from the Rome Statute, McRae expressed concern that this replication 'would lead to a patchwork of interpretations in the different national courts'.[187] In his view, copy-pasting the Rome Statute may create more opportunities for national courts to provide divergent meanings for the same language, parallel to the ICC's own interpretation of the Statute.[188] In essence, McRae appears to apply Carstens' conclusions on unpredictability in interpretation in a broader, more systemic perspective.[189] McRae's and Carstens' observations raise an interesting empirical query for future investigation: measuring the level of uniformity in the interpretation and application of different conventions on crimes that contain analogous language by the domestic courts of different states. This inquiry touches upon the core of the scholarly claim that relying on past treaty wording may promote harmonization

[181] *Ibid.*, at 231.
[182] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment, 11 September 1992, ICJ Reports (1992) 350, para. 374; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment, 2 February 2017, ICJ Reports (2017) 3, para. 91.
[183] Carstens, *supra* note 2, at 233–235. See section 3.A.2.a.
[184] DACaH, *supra* note 10, at 22–23; Third Report, *supra* note 57, para. 197; First Report, *supra* note 18, para. 20.
[185] First Report, *supra* note 18, paras. 20–26.
[186] *Ibid.*, para. 26.
[187] ILC, Remarks by McRae, 3298th Meeting, UN Doc. A/CN.4/SR.3298, 13 May 2016, at 14.
[188] See also Chaitidou, *supra* note 170, at 100–101.
[189] See section 3.A.2.a.

within international law, disclosing the need for further empirical investigation to support this contention.

Like McRae, Michael Wood also went beyond conflict avoidance during the debate on the DACaH at the ILC, turning to the more fundamental question of coherence and systematicity in law-making. Agreeing with the special rapporteur's reliance on past wording, Wood indicated that, 'unless there was a pressing need to make changes, the [ILC] should not depart from the language used in earlier, widely accepted conventions, as to do so could lead to uncertainty by appearing to call into question the accepted understanding of existing provisions'.[190] Wood appears to imply, *a contrario*, that the replication of past language can promote harmonization by reinforcing the legitimacy and validity of the copied instruments. Alschner and Skougarevskiy assessed Wood's remark in the context of investment law, confirming that, in a legal field with significant homogeneity in treaty language, instances of omission or variation from the standard language may be legally meaningful, evincing a deliberate decision to deviate from the mainstream understanding or being indicative of a shift or evolution in the existing system.[191] Future research could explore Wood's contention more in depth, especially in sub-branches of international law with less textual homogeneity than investment law.

### *2 Development of International Law*

The replication of past treaty wording as a drafting technique might impact the development of international law in two perspectives: (i) at the macro level, referring to the international legal system as a whole, and (ii) at the micro level, referring to the particular instrument under negotiation, especially whether its legal content is suitable in light of the instrument's purported *raison d'être*.

#### (a) Development of international law at the macro level

##### i) General assessment

Allee and Elsig have claimed that relying on previous wording implies a 'status quo bias', as strategically minded drafters may feel less inclined to depart from past practices that states and their domestic veto players have approved.[192] Over time, the repetition of a specific language may also lead to its greater rigidity and stability, making it more difficult for states and other stakeholders to alter this wording or replace it altogether. As noted by David Kennedy, '[m]ost struggles [in global political and economic life] have already been won and lost, their outcomes matters of accepted fact, patterns of past struggle woven into the fabric of stability'.[193] Recurring treaty language may be a means to stabilize these patterns of past victories and defeats. Thus, repetitive wording in treaty law may be stranded in inertia to the point that it could require tremendous political capital

[190] ILC, Remarks by Michael Wood, 3454th Meeting, UN Doc. A/CN.4/SR.3454, 30 April 2019, at 13.
[191] Alschner and Skougarevskiy, *supra* note 8, at 565.
[192] Allee and Elsig, *supra* note 2, at 605.
[193] Kennedy, *supra* note 90, at 7.

and 'courage, energy, and imagination'[194] to open for reconsideration these instances of settled language.[195]

From a particular value position, this finding can operate in two ways *vis-à-vis* the development of international law: (i) in a positive manner by consolidating past developments in treaty law or (ii) in a negative manner by hindering new developments. As for the former, the use of previous language can be applied as a means to perpetuate, in distinct and successive treaties, breakthroughs for the development and strengthening of international law. The past wording's persuasiveness can help to justify the non-inclusion in the treaty under negotiation of regressive proposals that would compromise the more progressive existing language.

On the other hand, Allee and Elsig have pointed out that, in their attempt to find the future in the past, states may insist on replicating the content of treaties adopted years or decades ago whose language does not reflect the current circumstances and needs of the international community.[196] The persuasiveness of past language and the lack of political will to change it may result in the reproduction of incomplete or anachronistic treaty provisions, leading to the perpetuation of questionable conventional regimes. States may also rely on the non-existence of corroborating past language to bar the introduction of innovative and more up-to-date provisions in instruments under negotiation or to refuse to resolve pending legal issues.[197] As a result, the new treaty can be born obsolete; be outdated even before its adoption.[198] Instead of channelling ongoing improvements in the international legal system, treaties formulated with archaic language can neglect or, even worse, block these advancements.[199] The reliance on previous wording can chain states to the past while they are building the future.

ii) Assessment in light of the DACaH

The drafting of the DACaH by the ILC was rich in examples of how the use of past language can impact – positively and negatively – the development of international law at the macro level. On the one hand, the ILC, at times, has deliberately departed from the golden cage of past language to adopt what one would consider a more progressive or at least balanced approach. For instance, the Commission decided to delete the 'obsolete'[200] and 'underinclusive'[201] definition of gender found in Article 7(3)

[194] *Ibid.*
[195] *Ibid.*
[196] Allee and Elsig, *supra* note 2, at 611.
[197] Dire Tladi raised this point regarding conflicting requests of extradition, an issue not addressed in the DACaH. ILC, Remarks by Tladi, 3348th Meeting, UN Doc. A/CN.4/SR.3348, 1 May 2017, at 8.
[198] Allee and Elsig, *supra* note 2, at 611.
[199] UN, Survey of International Law in Relation to the Work of Codification of the International Law Commission, UN Doc. A/CN.4/1/Rev.1 (1949), para. 13 ('[c]odification which constitutes a record of the past rather than a creative use of the existing materials – legal and others – for the purpose of regulating the life of the community is a brake upon progress').
[200] ILC, Crimes against Humanity: Comments and Observations Received from Governments, International Organizations and Others (Comments and Observations), UN Doc. A/CN.4/726 (2019), at 37.
[201] *Ibid.*, at 33.

of the Rome Statute[202] and have no definition in the DACaH.[203] This approach can give room for states to adopt more progressive approaches on gender identity if they so desire. Article 11(2)(a) of the DACaH recognizes the possibility of a stateless person's receiving consular assistance from any 'state which, at that person's request, is willing to protect that person's rights'. This provision goes beyond Article 36 of the 1963 Vienna Convention on Consular Relations, which does not address stateless persons.[204] The DACaH also innovated by proposing an absolute *non-refoulement* obligation[205] and a more comprehensive system of reparations in the context of crimes against humanity.[206] The ILC also captured some cutting-edge developments in international criminal law, such as corporate criminal liability and the non-application of statutory limitations to crimes against humanity.[207]

The special rapporteur also used past language to reject China's reactionary proposal[208] to reintroduce the existence of an armed conflict as a mandatory contextual element of crimes against humanity.[209] This suggestion, if accepted, would have significantly narrowed the scope of this offence since its occurrence during peacetime

[202] Art. 7(3) of the Rome Statute, *supra* note 18, defines 'gender' as 'the two sexes, male and female, within the context of society'. For a critical assessment of this definition, see Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?', 18 *Harvard Human Rights Journal* (2005) 55.

[203] DACaH, *supra* note 10, at 45–46. Some states suggested that the DACaH should have no definition of gender, such as Brazil, Canada, the United Kingdom and Slovenia. Comments and Observations, *supra* note 200, at 32, 33; UN, Remarks by Macleod (United Kingdom), 23rd Meeting, UNGA Sixth Committee, UN Doc. A/C.6/74/SR.23, 28 October 2019, para. 106; UN, Remarks by Mahnič (Slovenia), 25th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/74/SR.25, 30 October 2019, para. 35. On the other hand, a small group of states insisted that the DACaH should retain the verbatim wording from Art. 7(3) of the Rome Statute, in deference to the language agreed upon by states in this treaty. UN, Remarks by Azimov (Uzbekistan), 26th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/74/SR.26, 31 October 2019, para. 32; UN, Remarks by Abdelaziz (Egypt), 26th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/74/SR.26, 18 November 2019, para. 3; UN, Remarks by Metelitsa (Belarus), 24th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/74/SR.24, 13 November 2019, para. 75; UN, Remarks by Diakite (Senegal), 27th Meeting, UNGA Sixth Committee, UN Doc. A/C.6/74/SR.27, 29 November 2019, para. 13. Some states proposed that the ILC should include a new definition, updated in light of the ongoing developments on gender identity, such as Argentina, Belgium, Bosnia and Herzegovina, Chile, Costa Rica, Estonia, Liechtenstein, Malta and the Nordic countries. Comments and Observations, *supra* note 200, at 30, 31, 32, 35, 37, 40, 42, 50. Eventually most of these states supported the ILC's decision to delete the definition of gender from Art. 7(3) of the Rome Statute and to include no definition. For an analysis of the ILC's decision, see Santos de Carvalho, 'The Powers of Silence: Making Sense of the Non-definition of Gender in International Criminal Law', 35 *LJIL* (2022) 963.

[204] Fourth Report, *supra* note 15, para. 215; Vienna Convention on Consular Relations, *supra* note 69.

[205] DACaH, *supra* note 10, Art. 5; Jöbstl, 'An Unforeseen Pandora's Box? Absolute Non-Refoulement Obligations under Article 5 of the ILC Draft Articles on Crimes against Humanity', *EJIL: Talk!* (20 May 2019), available at www.ejiltalk.org/an-unforeseen-pandoras-box-absolute-non-refoulement-obligations-under-article-5-of-the-ilc-draft-articles-on-crimes-against-humanity/.

[206] DACaH, *supra* note 10, Art. 12(3); Third Report, *supra* note 57, paras. 186–195.

[207] DACaH, *supra* note 10, Arts. 6(8), 6(6).

[208] UN, Remarks by Xu (China), 22nd Meeting, UNGA Sixth Committee, UN Doc. A/C.6/70/SR.22, 6 November 2015, para. 64.

[209] Although Art. 6(c) of the Charter of the Nuremberg Tribunal linked crimes against humanity to the existence of an armed conflict, a relevant breakthrough in Art. 7 of the Rome Statute was the confirmation that these crimes can occur in both armed conflicts and peace time.

would be legally impossible. The special rapporteur dismissed China's proposal by simply recalling 'the very strong support in favour of closely adhering to the definition of crimes against humanity that appears in article 7 of the Rome Statute of the International Criminal Court'.[210] Accordingly, the reliance on past language was employed to prevent the inclusion of an alteration in the DACaH that would severely limit the definition of crimes against humanity. This episode was an example of a strategical use of past wording by the ILC to further consolidate a development in international law and set aside a regressive proposal.

However, for some commentators, the DACaH are still overly conservative despite these progressive elements.[211] Amnesty International has noted that 'some clauses [of the DACaH] appear to reflect the lowest common denominator acceptable to all states and not the most protective provisions the community of states should aspire to'.[212] Claus Kreß and Sévane Garibian also pointed out that, instead of confronting critical legal questions, the DACaH provide the convenient (perhaps too convenient) solution of simply avoiding them entirely.[213] As already indicated,[214] the ILC's reliance on past language played a role in barring the inclusion of provisions dealing with important unresolved legal issues, such as amnesties,[215] military jurisdiction[216] and immunity from foreign criminal jurisdiction.[217]

Another noteworthy absence is the right to the truth. Argentina, Liechtenstein and Uruguay asked the ILC to include this right in the DACaH,[218] even suggesting the replication of language from Article 24(2) of the ICPPED.[219] The special rapporteur rejected this proposal by arguing that 'such a right is not typical [in] treaties addressing crimes' and that the precise scope of the right to the truth remains unclear, especially

[210] Fourth Report, *supra* note 15, para. 57.

[211] Relva, 'The Draft Convention on Crimes against Humanity Should Enshrine the Highest Standards of International Law', *Just Security* (4 October 2021), available at www.justsecurity.org/78430/the-draft-convention-on-crimes-against-humanity-should-enshrine-the-highest-standards-of-international-law/ ('the draft convention is silent on some fundamental legal issues, and some clauses set out only the lowest common denominator'); Ferstman and Lawry-White, 'Participation, Reparation, and Redress: Draft Article 12 of the ILC's Draft Articles on Crimes against Humanity at the Intersection of International Criminal Law and Human Rights Law', 16(4) *JICJ* (2018) 813, at 819–820; ILC, Remarks by Murase, 3453rd Meeting, UN Doc. A/CN.4/SR.3453, 29 April 2019, at 10 ('some of the definitions contained in the [DACaH] did not reflect the practice that had been developed since the adoption of the Rome Statute in 1998'). For a contrary position, see ILC, Remarks by Huang, 3352nd Meeting, UN Doc. A/CN.4/SR.3352, 5 May 2017, at 11 ('the draft articles were unduly idealistic and full of noble elements that bore little relation to the complex and cruel reality of international relations').

[212] Amnesty International, UN: Time Has Come to Turn the Draft Articles on Prevention and Punishment of Crimes against Humanity, Duly Amended, into a UN Convention: Public Statement, Doc. IOR 40/3150/2020 (2020), available at https://www.amnesty.org/en/documents/ior40/3150/2020/en/.

[213] Kreß and Garibian, *supra* note 104, at 957.

[214] See sections 2.C and 3.A.1.b.

[215] Third Report, *supra* note 57, paras. 286–289, 297; Fourth Report, *supra* note 15, para. 305.

[216] ILC, Second Report on Crimes against Humanity, UN Doc. A/CN.4/690 (2016), para. 189.

[217] Third Report, *supra* note 57, paras. 281–284.

[218] Comments and Observations, *supra* note 200, at 102, 104, 108.

[219] Art. 24(2) states: 'Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.'

in the specific context of crimes against humanity.[220] The fact that the right to the truth reflects adopted language from the ICPPED and that 'there is a clear trend towards recognising a right to the truth in cases of gross human rights violations'[221] was to no avail. Given that Article 12(3) of the DACaH (right to reparation of victims) was based solely on wording from Article 24(4) and (5) of the ICPPED,[222] one might assume that the still controversial nature of the right to the truth was the main factor that led to its non-inclusion in the DACaH.

The criticism based on the perceived conservative and conformist nature of the DACaH's content should not come as a surprise. In addition to the ILC's reliance on past treaty language as such, the special rapporteur acknowledged that a central goal in the topic of crimes against humanity was states' acceptability and minimalism in content by 'respecting certain limits on what states would likely accept in a new convention'[223] and producing a small number of 'straight-forward, unadorned provisions that succinctly target discrete' issues.[224] However, the more crucial pending question is whether, despite this minimalist and conformist stance, the ILC delivered a treaty proposal that is adequate to attain the prevention and punishment of crimes against humanity effectively.[225]

### (b) Development of international law at the micro level

#### i) General assessment

In order to benefit from the advantages associated with the use of existing treaty language as a law-making technique, the drafters of a new treaty may be motivated to use past language at any cost. They may transform the drafting process into a Procrustean bed by disregarding or even distorting the subject matter of the treaty under negotiation as a means to allow the replication of previously adopted language in the draft.[226] The result might be an ineffective treaty, which is incapable of achieving its purported *raison d'être*. The finalized text might be rich in watered-down or untailored provisions whose legal content and scope are incapable of addressing the specificities of the treaty's own subject matter.[227] The treaty might be proven insufficient or inadequate as soon as the disputes arising from it reach a certain level of complexity. In this sense, the price of uniformity and coherence in the systemic perspective could be specificity in the *cas d'espèce*.

[220] Fourth Report, *supra* note 15, para. 231; see also Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?', 88 *International Review of the Red Cross* (2006) 245.

[221] ECtHR, *Case of Janowiec and Others v. Russia*, Appls. nos. 55508/07 and 29520/09, Judgment of 21 October 2013, Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, para. 9.

[222] Fourth Report Addendum, *supra* note 42, at 49. See section 2.B.1.

[223] Murphy, *supra* note 27.

[224] *Ibid.*

[225] *Ibid.*

[226] Allee and Elsig, *supra* note 2, at 605; Carstens, *supra* note 2, at 233–235.

[227] Carstens, *supra* note 2, at 235; Bergsmo and Tianying, 'A Crimes against Humanity Convention after the Establishment of the International Criminal Court', in M. Bergsmo and S. Tianying (eds), *On the Proposed Crimes against Humanity Convention* (2014) 1, at 15.

To avoid these harmful consequences, replicating past language should not be automatic.[228] Due consideration must be given to the different subject matter and the specific context of the treaties and provisions from which the language is borrowed.[229] It is imperative to ascertain, with the greatest thoughtfulness, whether a previously adopted treaty language can be replicated in the treaty under negotiation.[230] The necessary linguistic or material revisions should be introduced, or the language should even be rejected altogether if inappropriate to the new treaty.[231] Care must be taken to avoid drafting treaties that do not reflect the very object that states are trying to regulate or the goals that they are attempting to achieve.[232]

Admittedly, the concerns expressed here on the need to tailor the borrowed language come from the optimum assumption that negotiators share the value position that they should produce the most efficient and suitable instrument possible. There is also the assumption that negotiators have at their disposal all necessary means to achieve such a tailored instrument, including political will from states and the means to assess the appropriateness of the existing language in light of the specific instrument under negotiation. However, one must acknowledge that other factors could be at play in certain treaty negotiations, resulting in a different value position among the drafters[233] or the insufficiency of means, technical or otherwise, to evaluate the suitability of the available language and tailor it to the draft at hand. As discussed below,[234] the negotiators might lack expertise and the time to engage in such an exercise or be influenced by political factors leading them to incorporate certain untailored available language.

ii) Assessment in light of the DACaH

Some ILC members[235] and states[236] have highlighted the need for caution to avoid blind mechanization in using past language while drafting the DACaH. Portugal noted that the ILC 'should resist the temptation of simply transposing already existing regimes that were not designed for the specific context and legal nature of crimes against humanity'.[237]

[228] Allee and Elsig, *supra* note 2, at 605.
[229] Carstens, *supra* note 2, at 235; ILC, Remarks by Hassouna, 3349th Meeting, UN Doc. A/CN.4/SR.3349, 2 May 2017, at 6.
[230] Carstens, *supra* note 2, at 235.
[231] *Ibid.*, at 232–235; Remarks by Hassouna, *supra* note 229, at 6.
[232] Allee and Elsig, *supra* note 2, at 605; ILC, Remarks by Jalloh, 3350th Meeting, UN Doc. A/CN.4/SR.3350, 3 May 2017, at 8.
[233] As an example of a different value standpoint, in the 1990s, former communist states rushed to tighten their trade relations with Western states via agreements. For those former communist states, the priority was not to craft meaningfully tailored treaties but, rather, to rely on largely unaltered past language to achieve the conclusion of numerous treaties as soon as possible. In this case, due to political and economic incentives, it seems that quantity was the critical factor. Allee and Elsig, *supra* note 2, at 611; Poulsen and Waibel, *supra* note 3, at 254.
[234] See section 3.B.3.a.
[235] ILC, Remarks by Hassouna, 3298th Meeting, UN Doc. A/CN.4/SR.3298, 13 May 2016, at 3; ILC, Remarks by Park, 3349th Meeting, UN Doc. A/CN.4/SR.3349, 2 May 2017, at 8.
[236] Such as Portugal and Sierra Leone. Comments and Observations, *supra* note 200, at 15, 17.
[237] *Ibid.*, at 15.

One point that sparked great division in the ILC was which language to replicate in the extradition and mutual legal assistance provisions of the DACaH.[238] The special rapporteur proposed mirroring the lengthy provisions on the subject from the UNCAC.[239] Some ILC members expressed concern about this suggestion due to the inherent differences between corruption and crimes against humanity.[240] Georg Nolte argued that, instead of following the long-form model of the UNCAC, the DACaH could have followed the short-form model more common in treaties whose subject matter is closer to crimes against humanity,[241] such as Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide or Article 8 of the CAT. In the opposite vein, other ILC members supported the special rapporteur's approach, arguing that, since provisions on extradition and mutual legal assistance are procedural in nature, they could be applied to any crime.[242] In the end, the special rapporteur's suggestion prevailed.[243]

The ILC also introduced changes in the language used in the DACaH or dismissed proposals altogether to tailor the existing legal solutions to the Draft's specific object and purpose. For instance, language derived from the Rome Statute was modified insofar as the DACaH and this Statute differ in objectives: while the Rome Statute was adopted to establish a new and permanent international criminal jurisdiction, the Draft aims to introduce rules targeted at the domestic authorities mandated to implement judicial cooperation with other states and to investigate and prosecute crimes against humanity.[244] Language from treaties dealing with different crimes was rejected or modified to better fit the DACaH's focus on crimes against humanity.[245]

[238] ILC, Remarks by Murphy (Special Rapporteur), 3354th Meeting, UN Doc. A/CN.4/SR.3354, 9 May 2017, at 3–5.

[239] Third Report, *supra* note 57, paras. 83, 152.

[240] ILC, Remarks by Nguyen, 3349th Meeting, UN Doc. A/CN.4/SR.3349, 2 May 2017, at 11; ILC, Remarks by Park, 3349th Meeting, UN Doc. A/CN.4/SR.3349, 2 May 2017, at 8; ILC, Remarks by Tladi, 3454th Meeting, UN Doc. A/CN.4/SR.3454, 30 April 2019, at 4; ILC, Remarks by Escobar Hernández, 3350th Meeting, UN Doc. A/CN.4/SR.3350, 3 May 2017, at 3; ILC, Remarks by Pavel Šturma, 3351st Meeting, UN Doc. A/CN.4/SR.3351, 4 May 2017, at 11.

[241] ILC, Remarks by Nolte, 3353rd Meeting, UN Doc. A/CN.4/SR.3353, 8 May 2017, at 14.

[242] ILC, Remarks by Rajput, 3353rd Meeting, UN Doc. A/CN.4/SR.3353, 8 May 2017, at 11; ILC, Remarks by Reinisch, 3350th Meeting, UN Doc. A/CN.4/SR.3350, 3 May 2017, at 7; ILC, Remarks by Kolodkin, 3351st Meeting, UN Doc. A/CN.4/SR.3351, 4 May 2017, at 3.

[243] DACaH, *supra* note 10, Arts. 13–14.

[244] *Ibid.*, at 23. The following examples of modifications were made under this reasoning: (i) the connection with other core crimes as an element of persecution found in Art. 7(1)(h) of the Rome Statute was deleted in Art. 2(1)(h) of the DACaH; (ii) while the original text of the DACaH's provision on the responsibility of commanders (Art. 6(3)) was based verbatim on Art. 28(a) of the Rome Statute, it was later replaced by a more streamlined provision; and (iii) unlike Art. 67 of the Rome Statute, Art. 11 of the DACaH does not contain a detailed list of rights to which a suspect or defendant is entitled. Fourth Report, *supra* note 15, paras. 92, 142, 212.

[245] For example, in its reaction to Art. 6(8) of the DACaH (liability of legal persons), France proposed that this provision should mirror the lengthy and detailed language from Art. 5 of the International Convention for the Suppression of the Financing of Terrorism 1999, 2178 UNTS 197. The special rapporteur rejected France's suggestion by recalling that, since 'article 5 was crafted in the context of an act (financing of terrorism) that frequently involves legal persons (financial institutions), such … greater detail in that context may have been especially warranted'. Thus, Art. 6(8) of the DACaH contains a much more streamlined language in comparison to said Art. 5. Fourth Report, *supra* note 15, para. 156.

Furthermore, the ILC did not include some proposals by states under the argument that the Draft's objective 'is not to repeat detailed provisions of human rights law nor to seek to prescribe detailed rules of national criminal law beyond what is necessary to ensure that crimes against humanity are incorporated into national law and that jurisdiction is established and exercised over them'.[246]

These adaptations and rejections disclose the ILC's resolve to ensure that the replication of past language in producing the DACaH was properly executed and that the outcome was an adequate set of draft articles. In any case, as further discussed below,[247] it appears impossible to separate these adaptations and rejections and their different justifications from the ILC's own institutional values and viewpoints in tackling the topic of crimes against humanity, particularly the Commission's goal of adopting a conformist and minimalist set of draft articles.

### *3 The Use of Past Treaty Language as an Instrument of Power*

#### (a) General assessment

Some scholars have argued that treaty negotiators often use previous language as 'a means of exerting power over legal design to improve a party's bargaining position, to spread its preferred rules, or to promote its normative ideals'.[248] Peacock, Milewicz and Snidal have indicated that the inherent persuasiveness derived from the fact that states have previously adopted the existing language could make the replicated wording seem non-negotiable to 'the effect of influencing [negotiators] to accept another state's preferred legal solutions or to risk derailing negotiations altogether'.[249] These power-related factors led to the intuitive assumption that '[h]igh-income states have the greatest ability to achieve their desired legal outcome in negotiations as their substantial legal expertise combined with their economic capacity enables them to influence reluctant partners into accepting their preferred language'.[250] Taking the perspective of resource-constrained states, Allee and Elsig have indicated that these countries might replicate language produced by high-income states due to their lack of capacity to carry out lengthy negotiations or lack of expertise necessary to create new legal solutions.[251] Allee and Elsig also relied on the assumption that developing states frequently base their institutional and normative design choices on prominent models and 'socially constructed beliefs about what is appropriate' in order to corroborate the developing states' perceived deference to treaty language originated from the Global North.[252]

[246] Fourth Report, *supra* note 15, paras. 68, 157. This reasoning justified the non-inclusion of provisions reflecting, for example, the *in dubio pro reo* and the *ne bis in idem* principles, suggested by the Nordic countries and Chile, respectively. *Ibid.*, paras. 68, 206.

[247] See section 3.B.3.b.

[248] Peacock, Milewicz and Snidal, *supra* note 3, at 925; see also Allee and Elsig, *supra* note 2, at 605–606.

[249] Peacock, Milewicz and Snidal, *supra* note 3, at 925.

[250] *Ibid.*, at 926.

[251] Allee and Elsig, *supra* note 2, at 606.

[252] *Ibid.*

These findings indicate that the choices of which language should be replicated, which linguistic adaptations should be added and when to innovate and create entirely new legal solutions may rest on positions of force and coercive struggle.[253] After all, the inclusion or exclusion of a particular language in a treaty is not always a legal or scientific decision but, rather, a choice based on value and interest judgements by the states and their negotiators.[254] Ultimately, decisions on the replication of existing language may constitute manifestations of power, be it power bestowed in the drafting authority or in the background structures and biases that render some outcomes more likely to prevail than others.[255]

However, recent empirical studies may shed new light on the understanding of how power impacts the use of previous language in international law-making. Peacock, Milewicz and Snidal's research on preferential trade agreements has led to the remarkable conclusion that 'powerful states' decision to use boilerplate text in their provisions [on non-trade issues] is not consistently related to their own performance in that issue area'.[256] They have found that the primary reason for the use of past language in the international context has instead been its efficiency gains and incorporation of accumulated knowledge.[257] In turn, Allee and Elsig's study confirmed the role of 'power as an important mechanism of treaty-language diffusion' and the rush by high-income states to use repetitive treaty language as a means to control the design of global trade governance, particularly on emerging issues.[258] Nevertheless, their research also disclosed that, even though capacity constraints and lack of experience play a role, 'developing countries are facing competitive pressures that lead them to draw upon templates from peer countries' rather than templates from prominent states and institutions of the Global North.[259]

Although these puzzling findings can have a disruptive effect on existing scholarship, the authors of these two empirical studies acknowledged the limited reach of their investigation. They called for additional research to properly put their conclusions in context and add finesse to their scope.[260]

### (b) Assessment in light of the DACaH

Elements of subjectivity and bias also played a role in the ILC's drafting of the DACaH. Martti Koskenniemi's indeterminacy thesis is helpful to understand this phenomenon.

[253] Kennedy, *supra* note 90, at 7.
[254] Schachter, 'International Law in Theory and Practice', 178(5) *Recueil des Cours* (1982) 13, at 96.
[255] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 606–607; Schachter, 'The Nature and Process of Legal Development in International Society', in R. St. J. MacDonald and D.M. Johnston (eds), *The Structure and Process of International Law* (1983) 745, at 751–754.
[256] Peacock, Milewicz and Snidal, *supra* note 3, at 935.
[257] *Ibid.*
[258] Allee and Elsig, *supra* note 2, at 611.
[259] *Ibid.*
[260] *Ibid.*; Peacock, Milewicz and Snidal, *supra* note 3, at 935.

Koskenniemi argued that, despite international law's fundamental indeterminacy,[261] one can still identify specific trends in the international legal system, leading to an overall consistency and even predictability in institutions' decisions.[262] He explained this finding in terms of 'structural bias',[263] referring to 'the way in which patterns of fixed preference are formed and operate inside international institutions'.[264] The existence of such biases reveals that the decisions of international institutions are not random but quite the opposite: they are determined by the institutions' preferences in terms of normative outcomes or distributive choices.[265] In this perspective, international institutions are repurposed as 'projects that cater for special audiences with special interests and special ethos'.[266]

Structural biases operate at all levels to move international law in the direction that the institution in question sees as appropriate, transforming the international legal system into an arena for these competing preferences.[267] More often than not, institutions do not state their preferences explicitly, hiding them behind a claim that their decisions are objectively truthful or inevitable.[268] Institutions may employ their own vocabulary or 'politics of re-definition'[269] to make their preferences appear necessary or neutral when, in fact, they are questionable, arbitrary and partial.[270] As Koskenniemi remarked, '[i]t may not be sufficient simply to occupy the place of decision. One may also want to ensure that the decisions seem to emanate from some external logic or method that is neutral among the participants, that what is at work is not really "one's" method but the universal (or "scientific") method – or, even better, that at work is not a "method" at all but *reality* itself'.[271]

The ILC's structural bias may be a valuable element to appreciate its use of past treaty language in the topic of crimes against humanity and the resulting DACaH. The special rapporteur was upfront by stating that the objective of this topic was to craft an effective, but conformist and minimalist, set of draft articles that would appease

[261] Koskenniemi, *supra* note 255, at 21–22. In light of its indeterminacy, Koskenniemi concluded 'that international law is singularly useless as a means for justifying or criticizing international behaviour'. *Ibid.*, at 67.

[262] *Ibid.*, at 606–607.

[263] *Ibid.*, at 607.

[264] Koskenniemi, 'The Politics of International Law: 20 Years Later', 20 *EJIL* (2009) 7, at 9.

[265] Koskenniemi, *supra* note 255, at 606–607.

[266] Koskenniemi, *supra* note 264, at 9.

[267] Koskenniemi, *supra* note 255, at 610.

[268] Koskenniemi, *supra* note 264, at 11–12.

[269] Koskenniemi defined the 'politics of re-definition' as 'the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias. Here, only imagination sets the limit'. *Ibid.*, at 11.

[270] Koskenniemi referred to this phenomenon as 'hegemonic contestation': '[T]he process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents. … To think of this struggle as hegemonic is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the universal preference.' Koskenniemi, 'International Law and Hegemony: A Reconfiguration', 17(2) *Cambridge Review of International Affairs* (2004) 197, at 199.

[271] Koskenniemi, *supra* note 264, at 11–12.

most states and rapidly be transformed into a widely adhered to treaty.[272] The cost of such an objective was the refusal to incorporate some proposals deemed as too progressive or controversial, even when they were backed by existing language (such as the right to the truth) or could be perceived by some as essential to deliver a genuinely state-of-the-art convention on crimes against humanity.[273] Whether to a greater or lesser degree, the ILC's reliance on past language consistently played a role in barring the inclusion of these 'unwelcome' issues.

The ILC's use of past treaty wording as the primary drafting technique set the ground for the resulting conformist DACaH. Much more than a cause for the conformist content of the Draft, reliance on past language was the vehicle employed by the ILC to transform its institutional stance towards placating states and staying away from divisive questions into legal and technical reasoning. In other words, this drafting approach became the technical vocabulary used by the ILC to implement its interest and agenda to deliver a conformist and minimalist DACaH.[274] To use Koskenniemi's terms, the reliance on past language was the 'external logic or method'[275] employed by the ILC to justify its choices of what it deemed acceptable.

Therefore, the ILC's decision to use past treaty language as its main drafting approach was not an arbitrary or random choice. This decision was also not based on legal or scientific rationale alone. The Commission's decision was tailored to a 'special audience'[276] on which the ILC could not turn its back: the states at the UNGA Sixth Committee. This fact derives from the Commission's unique institutional position and the Sixth Committee's central role in implementing the ILC's outcomes and recommendations.[277] The drafting of the DACaH confirmed that the dependence of the Commission on the Sixth Committee is not an external factor in the production of its outcomes but, rather, an internal factor that may tilt the scale in the ILC's determination of the legal content of its outcomes.[278] One also wonders to what degree the ILC was forced into a corner on the topic of crimes against humanity as the immediate adoption of a treaty was perceived from the start as the only desirable outcome on this topic.[279]

In this regard, it is worrisome that, in response to McRae's criticism that 'there was no objective basis for deciding what should be included [in the DACaH] and what should not',[280] the special rapporteur argued that the filtering mechanism to assess

[272] Murphy, *supra* note 27.
[273] See section 3.B.2.a.ii.
[274] See Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', 27 *Sydney Law Review* (2005) 5, at 11.
[275] Koskenniemi, *supra* note 264, at 11–12.
[276] *Ibid.*, at 9.
[277] See sections 2.A and 2.C.
[278] Ramcharan, *supra* note 100, at 132–133; Morton, *supra* note 100, at 112.
[279] Murphy's Proposal of Topic, *supra* note 17, at 93. Georg Nolte summarized the ILC's level of pressure in drafting the DACaH as follows: '[I]f a convention on crimes against humanity was not widely ratified, or if the ratification process languished for a long time, it might affect the working and perception of international criminal justice more generally. The Commission had no option but to make the project a success.' ILC, Remarks by Nolte, 3353rd Meeting, UN Doc. A/CN.4/SR.3353, 8 May 2017, at 15.
[280] ILC, Remarks by McRae, 3298th Meeting, UN Doc. A/CN.4/SR.3298, 13 May 2016, at 13.

the eligibility of treaty language to be included in the DACaH[281] constituted 'an objective basis for action in the context of the current project'.[282] This characterization of the ILC's reliance on past wording could be problematic in empirical and analytical terms. From an empirical perspective, as already indicated,[283] the filtering mechanism was not conceived or used by the ILC as an absolute and rigid test but, rather, as a general guide or framework that the Commission applied with flexibility. Some provisions that found their way into the DACaH would likely have failed to pass the filtering mechanism if the latter were applied more strictly. This finding indicates that, to some degree, the key question was not the issue of departing from or changing widely used legal solutions and provisions *per se* but which solutions and provisions the ILC was willing to change or incorporate into the DACaH. This is not to say that the ILC should have necessarily applied the filtering mechanism in a stricter manner. The central point here is to indicate that labelling such a mechanism and the requirements therein as an 'objective basis for action' can be misleading.

From an analytical perspective, presenting the reliance on past language as 'an objective basis' could lead to the inaccurate view that the application of this drafting technique was the result of neutral reason.[284] The reliance on past language was a choice by the ILC derived from its own institutional biases. This drafting approach should be seen as a means for the Commission to achieve its politically loaded goal of adopting a conformist set of draft articles that states at the UNGA Sixth Committee would most likely not refuse to engage with. Following a value decision informed by *realpolitik* experience,[285] the ILC deliberately chose to rely on past language to ensure the success of the DACaH in an adverse political climate as well as the Commission's own institutional relevance as a promoter of the codification and progressive development of international law.[286]

## 4 Final Remarks

Instead of navigating the uncharted waters of creating new legal solutions and vocabulary, drafters of international legal instruments often rely on familiar language, sometimes provisions that states and courts have been interpreting and applying for years or even decades.[287] Several factors may prompt such an outcome, including

[281] See section 2.B.1.

[282] ILC, Remarks by Murphy (Special Rapporteur), 3301st Meeting, UN Doc. A/CN.4/SR.3301, 19 May 2016, at 5.

[283] See section 2.B.1.

[284] As noted by Koskenniemi, '[f]ormalism can no longer be blind to its own politics. Having shed the pretensions of objectivity it must enter the political terrain with a programme of openness and inclusiveness, no longer interpreted as effects of neutral reason but of political experience and utopian commitment'. Koskenniemi, '"The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law', 65(2) *Modern Law Review* (2002) 159, at 174.

[285] See sections 2.A and 2.C.

[286] In fact, Voulgaris pointed out that 'policy considerations have taken centre stage in the day-to-day work of the ILC'. Voulgaris, *supra* note 94, at 774; see also Morton, *supra* note 100, at 112.

[287] Alschner and Skougarevskiy, *supra* note 8, at 566.

perceived practical and legal advantages and *realpolitik* forces associated with using past treaty language as a law-making technique. These factors also apply to the ILC, especially for drafting the DACaH. However, as a technical body subsidiary to the UNGA, these considerations may operate differently in the Commission when compared to the traditional diplomatic setting of international law-making.

For the topic of crimes against humanity, in which the immediate adoption of a treaty was perceived from the start as the only desirable outcome, the ILC chose to rely on existing treaty language to craft the DACaH not on a purely objective or neutral basis but, rather, cognizant of its peculiar institutional position, the surrounding political environment and the potential difficulties that this Draft might face on its way to becoming a treaty.[288] The value judgement employed by the ILC in this regard was caution as disclosed by the framing of its use of past language in a narrow manner, aimed at producing an effective but minimalist and conformist set of draft articles that would be most likely acceptable to states. Ultimately, this choice opened two flanks for contradictory criticism against the DACaH. On the one hand, some stakeholders perceived the Draft as too progressive since it lacked a foothold in customary law or state practice more broadly.[289] On the other hand, some accused the ILC of going too far in its minimalism and deference to the states, resulting in an overly conservative Draft that fails to capture relevant and necessary developments in international law.[290] This varied reaction might affect the DACaH's normative authority and prospects of rapidly becoming a treaty.[291]

In general, given that the adoption and entry into force of a treaty drafted by means of an improper reliance on past wording could be self-defeating, states should consider whether having an outdated, vague and ineffective treaty is better than having no treaty at all.[292] This is a challenging assessment to make. Murphy himself wrote, in reference to the DACaH, that 'the ultimate goal is not to just have a convention, nor even to have widespread adherence to it, but to have a convention that meaningfully and effectively increases the prevention and punishment of atrocities'.[293] As the final masters of their convention on crimes against humanity, states have the ultimate power to assess the appropriateness of the ILC's dependence on past language, especially whether this drafting technique has given rise to a legal regime in the DACaH that is capable, to paraphrase Murphy, of meaningfully and effectively enhancing the prevention and punishment of crimes against humanity. States should decide the fate of the DACaH fully cognizant that the use of past wording is profoundly consequential, having a significant impact on the protection of human beings and communities plagued by atrocities and on the development and effectiveness of the international legal system as a whole.

[288] See sections 2.A and 2.C.
[289] See section 2.C.2.
[290] See section 3.B.2.a.ii.
[291] Voulgaris, *supra* note 94, at 781.
[292] Simma, 'Consent: Strains in the Treaty System', in MacDonald and Johnston, *supra* note 255, 484, at 487–494.
[293] Murphy, *supra* note 27.