Art. 13 (1) (a) of the UN Charter (→ Charter of the UN) authorizes the → General Assembly to initiate studies and make recommendations for the purpose, inter alia, of “encouraging the progressive development of international law and its codification”. The General Assembly was thus assigned the role of a motor for the development of international law (→ International Law and the UN) (Tomuschat 1991). In fulfilment of this obligation, the General Assembly established with Resolution A/RES/174 (II) of 21 November 1947 a subsidiary organ, the International Law Commission (ILC), whose statute – in its original version – is included in the annex of the founding resolution. The ILC convened for its first session in 1948.

The above-mentioned mandate of the General Assembly for the development of international law has thus been taken over by the ILC in its Statute (UN Doc. A/CN.4/4/Rev.2 (1982)). It is further defined in Art. 15 of the Statute: while “codification” is understood as a “more precise formulation and systematization of rules of international law” in fields where there already has been extensive and consolidated state practice, jurisprudence and academic teaching, the term “progressive development” implies the “preparation of draft conventions on subjects, which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.” (Art. 15 ILC Statute) The ILC Statute attaches to this distinction certain procedural consequences, which, however, remain irrelevant in practice, since the Commission recognized at a very early stage, that a “mechanical” codification of hitherto existing international customary law and of general principles of law through written formulation, is not practicable. Indeed the process of identification of such unwritten law requires creative complementing of legal norms. However, the work of the ILC is not limited to this “restatement” function of codification. It also aims at the consolidation of hitherto unwritten international law by adapting its content to the changing needs of today’s increasingly universalized community of states, i.e. the progressive development of international law. Therefore, the ILC generally avoids in its reports statements as to which of the two above mentioned methods it has used in particular, although most of its areas of work and the corresponding results can be attributed – at least in their tendency – to the one or the other function, codification or progressive development of international law.

Originally the ILC consisted of 15 members. This number was increased in several steps to currently 34 – above all in order to assure an adequate representation of Third World countries. This is in accordance with the rules of the ILC Statute, according to which the Commission as a whole should guarantee the representation of the “main forms of civilization and of the principal legal systems of the world” (Art. 8). The current geographical key for the distribution of seats (cf. GA resolution A/RES/36/39 of 18 November 1981) attributes to the → regional groups in the UN the following number of representatives: Western Europe and others: 8; Africa: 8 or 9; Asia: 7 or 8; Latin America 6 or 7; Eastern Europe: 3 or 4. Candidacies of members of the ILC are proposed to the General Assembly by the member
states. They are elected by the Assembly for a five-year term and are eligible for re-election. They should be generally acknowledged experts of international law. Although the statute remains silent on the status of the members, the members of the Commission do not exercise their duties within the ILC as representatives of their countries of origin but as independent experts, i.e. they are not subject to instructions from their governments. Neither do they work as UN employees.

The Commission meets every year in Geneva for a period of around three months, more recently divided into two sessions.

The subjects which are discussed at the ILC are mostly chosen in agreement between the ILC and the General Assembly (Sixth Committee). Once the initial choice has been made, a working group normally takes over the issue and sets guidelines for the further proceedings. Thereafter, the ILC appoints one of its members as a Special Rapporteur who is assigned the most important task, which is to report to the plenary (as a rule every year) on his analysis of the topic. At a certain stage of “maturity”, these reports will contain draft articles. These are discussed in the plenary, to be subsequently handed over to a drafting committee. This body is to frame the proposals of the rapporteur in the light of the opinions expressed in the plenary debate and then to present a revised text. This revised text will then again be discussed in the plenary. Finally, the draft is voted on in the ILC at first reading.

After every session, the results of the ILC’s work are reported to the Sixth Committee of the General Assembly (→ Committees, System of) for examination and UN member states are asked to comment on the draft. In this way, since the Commission documents its work in detail in its annual reports, the member states are given already at an early stage the opportunity to observe the development of the drafts, and to accompany them with critical comments. Unfortunately they generally make insufficient use of this opportunity, which is regrettable, for only intensive feedback from the governments can ensure that the Commission’s drafts will later gain acceptance by a representative group of states. Taking the comments received into consideration, the ILC further deliberates upon the drafts before finally voting on them in a second reading and forwarding it again to the General Assembly.

The decision on the further fate of the Commission’s products then lies in the hands of the General Assembly. It can organize a diplomatic conference which will then elaborate a convention on the basis of the ILC draft and which – in case it is successful – might adopt the final text of a convention and open it for signature. Alternatively, the General Assembly can adopt a draft convention by its own decision. Another possibility would be its adoption as a “soft law” text. In exceptional cases, ILC drafts have only been taken note of by the General Assembly.

The procedure thus described is very complicated and extremely tedious. Normally it takes years, and sometimes even decades, from the choice of a subject and the appointment of a special rapporteur until the adoption of draft articles. This is due to factors such as changes of special rapporteurs, the concentration of the ILC work on other issues and the hesitant reaction of states during the intermediate phases of a project. However, whenever the Commission has been requested by the General Assembly to accelerate its procedure, it has always fulfilled this demand and has presented a draft within a short timeframe, as for example its draft of the Statute of an International Criminal Court (→ ICC). Furthermore, the work of the ILC often influences the practice of states and international jurisprudence (particularly that of the International Court of Justice, → ICJ) already before its formal conclusion. Thus it continuously contributes to the development of customary international law.

In 1998 the ILC celebrated its 50th anniversary. In retrospect, the Commission has undoubtedly been more suc-