# IMMUNITIES, CRIMES AGAINST HUMANITY AND OTHER TOPICS IN THE 69TH SESSION OF THE INTERNATIONAL LAW COMMISSION

Dire Tladi*

## 1 Introduction

In 2013, the previous editor of the *South African Yearbook of International Law,* Professor Neville Botha, invited me to provide an annual contribution to the *Yearbook* on the work of the International Law Commission (hereinafter the Commission). The current contribution will be the fifth. It is my hope that this contribution provides readers of the *Yearbook* insight into the work of the Commission – insights that might not be easily obtained by readers of the Commission's report, without being present at the Commission's sessions. From the 2018 volume onwards, the editors will ask other members of the Commission to contribute their observations on the work of the Commission.

The 69th session of the Commission, held in 2017, was an eventful one. It was the first year of the quinquennium (the five-year term of the Commission). With the beginning of the new quinquennium, the Commission welcomed to its fold 13 new members. The change in the membership brought with it both uncertainty and promises of a new beginning.

The introduction of new members brought uncertainties, because it was unclear how these new members would affect the dynamics of the Commission. The Commission was in the midst of engaging in important topics and at critical stages in its deliberations on those topics. Because their approaches to, and views on, international law were unknown, the potential impact of these members on the work of the Commission was also unknown. Would the new members disrupt or promote progress in the work of the Commission? Conversely, the introduction of new members also brought with it the promise of a new beginning for the Commission, with fresh ideas to the complex issues on the agenda of the Commission. As will be shown in this contribution, the new members on the Commission had an immediate – and in my view positive – impact on the work of the Commission.

* Professor of International Law, University of Pretoria. Member of the UN International Law Commission.

The year 2017 was also a significant one in terms of progress on some important topics on the agenda of the Commission.[1] In particular, fundamental developments were recorded on the topics 'Crimes against Humanity' and 'Immunity of State Officials from Foreign Criminal Jurisdiction'. There were also important developments concerning the work of the Commission on the topic '*Jus Cogens*'. Other topics considered by the Commission include 'Provisional Application of Treaties', 'Protection of the Atmosphere', and 'Protection of the Environment in Relation to Armed Conflict'. In addition, the Commission decided to include a new topic on its agenda, namely 'Succession of States in respect of State Responsibility'. A number of topics were also placed on the long-term programme of work of the Commission. However, given the relative importance of the topics, the current contribution will focus on the developments by the Commission on the topics 'Crimes against Humanity' and 'Immunity of State Officials from Foreign Criminal Jurisdiction'. Sequentially, the next section will describe the developments concerning the topic 'Immunity of State Officials from Foreign Criminal Jurisdiction'. Thereafter, the third section will provide an update on the developments relating to the topic 'Crimes against Humanity'. The fourth section will then briefly highlight developments on some other topics on the agenda of the Commission, while the last section will provide some brief concluding remarks.

## 2 Immunity of State Officials from Foreign Criminal Jurisdiction

### *2.1 The Fifth Report of the Special Rapporteur*

The fifth report of the Special Rapporteur was actually submitted to the Commission during the 68th session in 2016.[2] The report, however, had not been submitted in sufficient time to enable translation into all official languages and was thus only available in the original language (Spanish) and English. The French-speaking members of the Commission objected to considering the report without the French version. In fact, some English-speaking members, including myself, objected to considering the report since the English version had only been made available a week before the debate was scheduled to have taken place. The Commission therefore agreed that the debate would begin for those members who wished to comment, but that the debate would remain open for the

1 See *Report of the International Law Commission on the Work of its 69th Session,* General Assembly Official Records, 72nd Session, Supplement No. 10 (A/72/10).

2 *Fifth Report of the Special Rapporteur (Concepción Escobar Hernández) on Immunity of State Officials from Foreign Criminal Jurisdiction* (A/CN.4/701).

69th session in 2017. It was also agreed that no draft articles would be transmitted to the drafting committee prior to the conclusion of the debate in 2017.

The fifth report of the Special Rapporteur, Concepción Escobar Hernández, (hereinafter the fifth report) focused on *the big issue* of exceptions to immunity. Over the years, many members of the Commission had expressed the view that the question of whether there exist exceptions to immunity for specific crimes was the most important (and sensitive) question.[3] Seen from that perspective, the fifth report was the most important submitted by the Special Rapporteur and the objection of considering it without sufficient time should be seen in that light.

In the report, the Special Rapporteur proposed one draft article. Given the importance of the question of exceptions, and the intensity of the debate, it is worth reproducing the draft article in whole:

**Draft Article 7**[4]

1. Immunity shall not apply in relation to the following crimes:
   (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;
   (ii) Corruption-related crimes;
   (iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.
2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.
3. Paragraph 1 and 2 are without prejudice to:
   (i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;
   (ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State.

The basic approach of the Commission on this topic has been to make a distinction between two types of immunities, namely immunity *ratione*

3 See *Report of the International Law Commission on the Work of its 67th Session,* General Assembly Official Records, 70th Session, Supplement No. 10 (A/70/10) paras 198–199.

4 *Fifth Report on Immunities* (n 2 above) para 248.

*personae* and immunity *ratione materiae*.[5] Draft article 7, proposed by the Special Rapporteur, seems to be based on this distinction. In paragraph 1, the draft article provides that there is no immunity for certain serious crimes. In paragraph 2, however, immunity *ratione personae* is excluded from the application of the exception in paragraph 1. Thus, according to the proposal of the Special Rapporteur, there are no exceptions to immunity *ratione personae.* It is worth pointing out, even at this early stage, that it would have been much simpler to have a single paragraph specifying that exceptions apply to immunity *ratione materiae.*

The fifth report traces practice, in particular national legislation and case law, in search of exceptions. With respect to national legislation, the report refers to several domestic legislative acts on jurisdictional immunities.[6] In this regard, the report identifies the legislation in the United States (US), Canada and Spain as providing relevant state practice.[7] However, with the exception of the Spanish legislation, the legislation of all these states, focus on civil immunities of states. For example, according to the report, the US legislation contains an exception to the immunity of a 'foreign State' in the case of torture and extrajudicial killing and other crimes.[8] On its terms, the exception does not apply to an official of a foreign state. The fifth report's account of the Spanish

5 See draft arts 3 and 4 of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, *Report of the International Law Commission on the Work of its 56th Session,* General Assembly Official Records, 68th Session, Supplement No. 10 (A/68/10). Immunity *ratione personae* applies to heads of state, heads of government and ministers of foreign affairs and applies to all acts, private and official, while the relevant person holds that office. Immunity *ratione materiae,* on the other hand, applies to all officials, but is limited to official acts. Unlike immunity *ratione personae,* immunity *ratione materiae* attaches to the act even after the official in question no longer holds that particular office. Moreover, a person enjoying immunity *ratione personae* may, when he or she no longer holds the office of head of state, head of government or minister of foreign affairs, enjoy immunity *ratione materiae* for official acts performed while in that office.

6 *Fifth Report on Immunities* (n 2 above) para 44. The report, for example, refers to legislation from the United States (Foreign Sovereign Immunities Act of 1976), the United Kingdom (State Immunity Act of 1978), Singapore (State Immunity Act of 1979), Pakistan (State Immunity Ordinance of 1981), South Africa (Foreign States Immunities Act of 1981), Australia (Foreign States Immunities Act of 1985), Canada (State Immunity Act of 1985), Argentina (Jurisdictional Immunity Foreign States in Argentine Courts Act of 1995), Japan (Civil Jurisdiction of Japan with Respect to a Foreign State Act of 2009), and Spain (Privileges and Immunities of Foreign States, International Organisations with Headquarters in Spain or Offices in Spain and International Conferences and Meetings Held in Spain Organic Act of 2015).

7 Id para 46.

8 Id para 47, quoting s 1605A inserted into the Foreign Sovereign Immunities Act by the Torture Victim Protection Act. See also para 49, referring to Canada's State Immunity Act ('Under the Act, a State included on the terrorism support list will not be immune from the jurisdiction of Canadian courts as regards proceedings brought against it for support for terrorism or for terrorist activities'.)

Organic Act seems to apply to criminal proceedings.[9] However, even the Spanish legislation is not as broad as it might seem at first. The Spanish legislation applies only to cases in which there is 'an international norm to prosecute a person for the commission of international crimes' and cases where Spain is required to 'respond to a request for cooperation from the International Criminal Court'.[10] The fifth report also refers to legislation from different countries implementing the Rome Statute.[11] The weight of practice implementing treaty rules should, however, be treated with some caution when determining rules of customary international law.[12]

Having considered national legislation, the fifth report proceeds to assess whether any exceptions to immunity can be gleaned from international judicial decisions.[13] With respect to immunity *ratione personae* the fifth report relies, in the main, on the International Court of Justice's judgment in the *Arrest Warrant* case.[14] The fifth report also refers to the *Jurisdictional Immunities* case*,* which unambiguously stands for the principle that there are no exceptions to immunities even for so-called *jus cogens* crimes.[15] Again, it should be mentioned that the relevance of this case is merely analogical since it pertains, first, to the immunities of the state itself and, second, to immunities in the context of civil proceedings. In addition to judgments of the International Court of Justice, the fifth report also refers to judgments of the European Court of Human Rights.[16] Yet, without exception, each of these cases pertain to immunity in the context of civil proceedings.[17] While the report also dedicates a number of pages to the jurisprudence of international criminal tribunals relating to immunities, for the most part these pertain not to immunity from the jurisdiction of national courts, but to immunity

9 Id paras 50–51.
10 Id para 51.
11 Id paras 55–59.
12 *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, Judgment of 20 February 1969, 1969 ICJ Reports 3 para 75.
13 *Fifth Report on Immunities* (n 2 above) para 60.
14 *Case Concerning the Arrest Warrant of 11 April 2000,* Judgment of 14 February 2002 ICJ Reports 3.
15 *Jurisdictional Immunities of the State,* Judgment of 3 February 2012, 2012 ICJ Reports 99 para 270.
16 *Fifth Report on Immunities* (n 2 above) para 87.
17 Id. The cases referred to in the *Fifth Report* include *Al-Adsani v United Kingdom,* Application No. 35763/97, Judgment of the European Court of Human Rights, Grand Chamber 21 November 2001; *Mcelhinney v Ireland,* Application No. 31253/93, Judgment of the European Court of Human Rights, Grand Chamber 21 November 2001*; Kalogeropouolous and Others v Greece and Germany,* Application No. 59021/00, Judgment of the European Court of Human Rights 12 December 2002; and *Jones v United Kingdom,* Application No. 34356/06, Judgment of the European Court of Human Rights 18 September 2009.

from the jurisdiction of international criminal tribunals. The one exception is, perhaps, *Blaškić,* where, *obiter dictum,* the court refers to both 'immunity from national or international jurisdiction'.[18]

Having described the thrust of judicial decisions of international criminal tribunals, the fifth report next turns to national judicial practice.[19] In the section on judicial decisions of national courts, the fifth report relies on cases concerned with both civil and criminal proceedings – according them almost equal weight. Key criminal cases referred to in the report include *Pinochet* (the United Kingdom)*, Bouterse* (the Netherlands), *Ariel Sharon and Amos Yaron* (Belgium), *A v Office of the Public Prosecutor* (Switzerland), *Fujimori* (Chile) and *Eichmann* (Israel).[20] Significantly, the fifth report also refers to cases in which national courts tried persons ostensibly with immunity, without expressly relying on an exception to immunity.[21] In a legal environment where there is an over-reliance on quotes, this is an extremely important, yet underrated, source of state practice. For some (unexplained) reason, the fifth report provides '[s]eparate analysis' of decisions of the US cases.[22] From the analysis of the US cases, the fifth report suggested that there were some cases that supported exceptions to immunity *ratione materiae* for serious international crimes, while exceptions for immunity *ratione personae* were virtually unsupported. The only possible exception to this latter trend was the South African case of *Minister of Justice v Southern African Litigation Centre*,[23] where the implications were that, unlike any other jurisdiction anywhere else in the world, South African courts had determined not to recognise immunity *ratione personae* for Rome Statute crimes. It is important to point out, however, that as a matter of customary international law, the South African Supreme Court of Appeal

18 *Prosecutor v Blaškić,* Judgment of the International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, IT-95-14-AR, 29 October 1997.

19 *Fifth Report on Immunities* (n 2 above) para 60; para 109.

20 *Fifth Report on Immunities* (n 2 above) para 60; para 114 (fn 230). *R v Bartle and the Commissioner of Police for the Police and Others, Ex Parte Pinochet,* Judgment of the UK House of Lords of 24 March 1999; *Prosecutor-General of the Supreme Court v Desiré Bouterse,* Judgment of the Supreme Court of the Netherlands of 18 September 2001; *HSA v VSA, Decision Related to the Indictment of Ariel Sharon, Amos Yaron and Others*, Court of Cassation of Belgium 12 February 2003; *A v Office of the Public Prosecutor of the Confederation,* Judgment of Federal Criminal Court of Switzerland 25 July 2012; and *Attorney-General v Eichmann,* Judgment of the Supreme Court of Israel 29 May 1969.

21 Id para 114 (fn 233).

22 Id para 119. These include the famous *Samantar v Yousuf*, Judgment of the US Supreme Court 1 June 2010 and *Letelier v Chile*, Judgment of the US District Court 11 March 1980.

23 *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*, Judgment of the South African Supreme Court of Appeal, 2016 (3) SA 317 (SCA).

seemed to acknowledge that there was a duty to recognise immunity *ratione personae* even for international crimes, but that, in the court's view, the legislature had decided to chart a different path.[24]

On the basis of the comprehensive analysis, the Special Rapporteur proposed draft conclusion 7.

## *2.2 Consideration of the Report by the Commission*

Immunities under international law, in particular the question of whether international law recognises exceptions to procedural immunities, has been one of the most topical and sensitive international law issues in recent times.[25] It will thus come as no surprise that the debate on the fifth report was robust and intense. While a few members of the Commission expressed disagreement with the content of the report and the proposed draft article, other members expressed agreement with the proposed draft article, but not with the methodological approach of the Commission. Most members, including both those that supported the proposed draft article and those that opposed it, had difficulty with the language of the proposed draft article.

The members that opposed the draft article suggested that the Special Rapporteur had not presented any material to support the conclusion that there were exceptions to immunities under general international law, nor provided any support for a trend in that direction.[26] These members, for example, referred to judgments of the international and regional courts in which immunity was upheld. They noted that while there were some cases in which immunity was denied, these cases were few and far between. Finally, some of these members suggested that

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24 D Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 310–338.

25 See D Tladi 'Immunity in the era of "criminalisation": The African Union, The ICC and international law' (2015) 58 *Japanese Yearbook of International Law* 17, referring to J Foakes *The Position of Heads of State and Senior Officials in International Law* (2014); D Akande and S Shah 'Immunities of state officials, international courts and foreign domestic courts' (2010) 21 *European Journal of International Law* 815–852; C Wickremasignhe 'Immunities enjoyed by officials of states and international organisations' in M Evans (ed) *International Law* (2010); R van Albeek *Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (2008); and A Cassese 'When may senior officials be tried for international crimes? Some comments on the *Congo v Belgium* case' (2002) 13 *European Journal of International Law* 853–875.

26 Those members that opposed both the methodology and the draft article were: Mr Sean Murphy (A/CN.4/SR.3362), Sir Michael Wood (A/CN.4/SR.3360); Mr Roman Kolodkin (A/CN.4/SR.3361), Mr Aniruddha Rajput (A/CN.4/SR.3363), Mr Ahmed Laraba (A/CN.4/SR.3363), Mr Georg Nolte (A/CN.4/SR.3362), and Mr Huikang Huang (A/CN.4/SR.3364).

while the draft article proposed was not *lex lata,* it could be included as 'new law', but only if it were accompanied by strong procedural safeguards. Thus, it was argued, the draft article ought to be considered together with procedural safeguards, which the Special Rapporteur had stated would be the subject of a future report.[27]

Other members, me included, took the view that while the practice outlined in the report might not be extensive and/or widespread, from a legal and policy perspective the content of draft article 7, though not necessarily the formulation, was justified.[28] These members argued that the fight against impunity, as well as a general trend towards the limitation of immunity to promote accountability, justified the inclusion of a provision excluding immunity *ratione materiae* for serious international crimes. On the view that the consideration of draft article 7 should be put on hold until the Special Rapporteur presented procedural guidelines, members in support of the content of draft article 7 questioned the appropriateness of this linkage. In a mini-debate,[29] I stated that I was unconvinced that the link between procedural aspects and the question of exceptions to immunity *ratione materiae* necessitated deferring the discussion. In particular, I observed that there is a link between all provisions and it was not clear why a new approach was being taken whereby exceptions are treated differently from other provisions.[30]

One provision proposed by the Special Rapporteur that I did not support was proposed draft article 7(3). The provision, while drafted as

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27 See, especially, Mr Murphy (A/CN.4/SR.3362).

28 In addition to the current author (A/CN.4/SR.3361), these members were Mr Claudio Grossman Guiloff (A/CN.4/SR.3364), Mr Mahmoud Hmoud, Mr Charles Jalloh (A/CN.4/SR.3362), Ms Marja Lehto (A/CN.4/SR.3362), Mr Shinya Murase (A/CN.4/SR.3362), Mr Argüllo Gomez (A/CN.4/SR.3364), Mr Yacouba Cissé (A/CN.4/SR.3362), Ms Patrícia Galvão Teles (A/CN.4/SR.3361), Mr Juan Manuel Gómez-Robledo (A/CN.4/SR.3363), Mr Hussein Hassouna (A/CN.4/SR.3361), Mr Hong Thao Nguyen (A/CN.4/SR.3360), Ms Nilüfer Oral (A/CN.4/SR.3363), Mr Hassan Ouazzani Chahdi (A/CN.4/SR.3364), Mr Ki Gab Park (A/CN.4/SR.3360), Mr Chris Maina Peter (A/CN.4/SR.3363), Mr Juan José Ruda Santaloria (A/CN.4/SR.3362), Mr Gilberto Vergne Saboia, Mr Eduardo Valencia-Ospina (A/CN.4/SR.3361), Mr Pavel Šturma (A/CN.4/SR.3362) and Mr Marcelo Vásquez-Bermúdez (A/CN.4/SR.3362).

29 A mini-debate in the Commission refers to a situation where one member seeks to respond directly, and immediately, without waiting for his speaking slot in the debate, to the comments of another member.

30 (A/CN.4/SR.3362): 'Mr Tladi, referring to Mr Murphy's suggestion that draft article 7(1)(i) should be considered in tandem with procedural aspects, said that the example of the case involving Mr Barak seemed to pertain not so much to the question of exceptions as to the question of what constituted an official act. The Commission had already adopted a definition of "an official capacity" without having to examine procedural aspects of immunity. In fact, in the past, it had not been unusual for the Commission to adopt draft articles before addressing other related aspects of a topic.' See also Mr Jalloh (A/CN.4/SR.3362): '… while he understood that Mr Murphy's proposals were aimed at minimising differences of opinion within the Commission,

a 'without prejudice clause' appeared to be intended to affect the on-going dispute concerning the relationship between article 27 and article 98 of the Rome Statute and customary international law.[31] Different views were also expressed about the enumerated crimes. It was not, for example, clear how the determination was made to include corruption-related crimes but not sexual exploitation, human trafficking, the crime of apartheid or aggression.[32]

The normal procedure of the Commission is that after a debate, if there were general or broad consensus on the thrust of proposed draft texts, the Commission would refer the texts to the drafting committee. However, after the conclusion of the debate, a member of the Commission, Sean Murphy, proposed that the Commission not take a decision on referring the draft to the drafting committee until the following session (2018), when the Commission would have before it the sixth report addressing procedural safeguards.[33] In his statement, he repeated that the national judicial practice referred to in the report 'did not support the text proposed in draft article 7' and that there was 'virtually no case law that supported various aspects of draft article 7'.[34] After a heated exchange, the Commission moved to have an indicative vote,[35] resulting in the decision to refer draft article 7 to the drafting committee.

In the deliberations in the drafting committee, many of the issues canvassed in the plenary debate were repeated, turning the drafting committee into a mini-plenary. At the end, however, the drafting committee adopted a simplified version of draft article 7, which reads as follows:

**Article 7**

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
   (a) crimes of genocide;
   (b) crimes against humanity;

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it seemed somewhat hazardous to discuss procedural mechanisms before the Special Rapporteur had submitted her sixth report.' See further Mr Hmoud (A/CN.4/SR.3362): 'the question of whether there were substantive exceptions or limitations had nothing to do with procedure.'

31 This statement led to an interesting mini-debate initiated by Mr Jalloh in which he supported the Special Rapporteur's inclusion of draft article 7(3). See Mr Jalloh (A/CN.4/SR.3361).

32 See Mr Jalloh (A/CN.4/SR 3362) and Mr Tladi (A/CN.4/SR3361).

33 Mr Murphy (A/CN.4/3365).

34 Ibid.

35 An indicative vote in the Commission is a practice in the Commission to reach a decision without a vote. It is conducted by a showing of hands, and the view of the majority is taken as consensus.

(c) war crimes;
(d) crime of *apartheid*
(e) torture;
(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned are to be understood according to their definitions in treaties enumerated in the annex to the present draft article.

A few things are worth pointing out about the draft article prepared by the drafting committee. First, there is now a logical basis for the list of crimes, which includes only those crimes that can be referred to as *jus cogens* crimes. Thus, 'corruption-related crimes' and the general crime against the person and property have been excluded, while the crime of apartheid has been included. Second, draft article 7 is now more streamlined and direct with one substantive paragraph referring to immunity *ratione materiae*. Third, the 'without prejudice clause' proposed by the Special Rapporteur relating to cooperation with the ICC was not included.

At the time of taking action on draft article 7, proposed by the drafting committee, some members called for a vote and provided explanations of their votes before the vote.[36] Many of the members repeated their views that under international law as it currently stood there were no exceptions to the laws on immunity and that the report did not provide any practice in support of the exception.[37] In addition to these reasons, one member, Huikang Huang, suggested that the draft article should not be adopted since powerful states and members of the Commission representing such powerful states, opposed the draft article.[38]

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[36] Mr Kolodkin (A/CN.4/SR.3378), Mr Murphy (A/CN.4/SR.3378), Sir Wood (A/CN.4/3378), Mr Huang (A/CN.4/SR. 3378); Mr Rajput (A/CN.4/3378), Mr Petrič (A/CN.4/3378) and Mr Nolte (the Chairman) (A/CN.4/3378).

[37] See, for example, Mr Kolodkin (A/CN.4/SR.3378): 'draft article 7 was a construction based on quasi-legal theoretical premises neither having a basis in or reflecting existing international law, nor did it reflect any real, discernible trend in State practice and international jurisprudence.' Mr Murphy (A/CN.4/SR.3378): 'could join consensus on the adoption of draft article. The essential problem was that the exceptions identified in the draft article were not grounded in existing international law, nor could it be said that there was a trend towards such exceptions.' Sir Wood (A/CN.4/SR.3378): 'was of the view that the text did not reflect existing international law nor a trend, was not desirable as new law and should not be proposed to States' and; Mr Rajput (A/CN. 4/SR.3378): 'It was clear from the statements in plenary that there was neither support in State practice nor any trend.'

[38] Mr Huang (A/CN.4/SR.3378): 'Three of the four members representing the Group of 7 of major advanced economies were against it and the fourth's view [here referring to the Japanese member, Mr Murase] were not in line with his Government's view. All four members representing Permanent Members of the Security Council were

Members supporting the draft article explained their positions after the vote.[39] In addition to expressing support for the adoption of draft article 7, some members expressed dissatisfaction at the failure of the drafting committee and the Commission to include the crime of aggression in the list of crimes for which exceptions to immunity *ratione materiae* applied.[40] Several members also expressed strong objections to Mr Huang's explanation of the vote, which was interpreted as suggesting that powerful states should have a larger say in the making of international law and that members of the Commission represented the states of their nationality.[41]

The Commission adopted draft article 7 as proposed after a recorded vote – a rare occurrence in the work of the Commission. Twenty-one

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opposed to it, as were at least 6 of the 11 members from the Group of 20.'

39 Mr Tladi (A/CN.4/SR.3378), Mr Hmoud (A/CN.4/SR.3378), Mr Jalloh (A/CN.4/SR.3378), Mr Murase (A/CN.4/SR.3378), Mr Cissé (A/CN.4/SR.3378), Mr Hassouna (A/CN.4/SR.3378), Mr Ouazzani Chahdi (A/CN.4/SR.3378), Ms Escobar Hernández (A/CN.4/SR.3378) and Mr Nguyen (A/CN.4/SR.3378).

40 Mr Tladi (A/CN.4/SR.3378): 'There was no legal reason whatsoever that other crimes had been included, yet aggression, a crime that had featured in the work of the Commission since 1950, had been excluded. If the criteria by which crimes had been included concerned their *jus cogens* nature, there was no question that the crime of aggression ought to have been included. … If the criterion by which crimes were included was gravity, there was again no question that the crime of aggression ought to have been included … There was no reason that the crime of aggression had been singled out for exclusion. The only thing that he could see … was that it was a crime most likely to be committed by the powerful. The Commission had just taken the decision that the most powerful ought to be beyond the reach of justice.' Mr Hmoud (A/CN.4./SR3378): 'would have preferred aggression to be included … Although it could be an act of State, it was a criminal act committed by an individual. In that sense it was different from other crimes of international concern committed by individuals when exercising governmental authority such as crimes against humanity or war crimes.' Mr Jalloh (A/CN.4/SR.3378): 'not convinced by the explanations given by the Special Rapporteur in her fifth report on immunity as to why she wished to exclude the crime of aggression. The other core Rome Statute crimes, namely genocide, crimes against humanity and war crimes, had been included in the list of exceptions contained in draft article 7, but, arguably the most serious crime known to international law, the crime of aggression had been excluded.' Mr Murase (A/CN.4/SR.3378): 'wished to express dissatisfaction over the fact that the crime of aggression had not been included in draft article 7', and Mr Hassouna (A/CN.4/SR.3378): 'would have strongly supported the inclusion of the crime of aggression. Mr Ouazzani Chahdi (A/CN.4/SR.3378): 'voted in favour of draft article 7 but was disappointed at the politicised climate surrounding the discussion and deplored the fact that the crimes of aggression and corruption had not been included in the list of exceptions to immunity.' Mr Park (A/CN.4/SR.3378): 'believed the crime of aggression should have been included in the list of exceptions', and Mr Nguyen (A/CN.4/SR.3378): 'wished to express his deep regret that the crime of aggression had not been included in the list of exceptions to immunity, even though that crime had more serious and negative consequences for many countries than other crimes, such as the crime of apartheid.'

41 Mr Gómez-Robledo (A/CN.4/SR.3378) and Mr Ruda Santaloria (A/CN.4/SR3378).

members voted in favour of the draft article,[42] with one abstention[43] and eight members voting against the adoption of draft article 7.[44] It should be mentioned that not only was the draft article supported by the majority of the members of the Commission, there is also sufficient practice in support of the exception to immunity *ratione materiae.* The third report on *jus cogens,* focusing on the consequences of *jus cogens,* augments the rich fifth report on immunity by providing an exposition of further relevant material supporting an exception to immunity *ratione materiae* for *jus cogens* crimes.[45]

## 3 Crimes against Humanity

The consideration of the third report on crimes against humanity was not as eventful or contentious as the consideration of the topic on immunities.[46] Nonetheless, it was noteworthy because the Commission managed to adopt a full set of draft articles on crimes against humanity. The fifth report itself proposed seven draft articles and a preamble.[47] Of these, the most important (and lengthiest) were draft article 11 on extradition and draft article 13 on mutual legal assistance. The former had 13 paragraphs, while the latter had a massive 28 paragraphs. In addition, the report proposed a text on *non-refoulement* (draft article 12), victims and witnesses (draft article 14), relationship to competent international criminal tribunals (draft article 15), obligations of federal states (draft article 16) and inter-state dispute settlement (draft article 17).

The main provisions proposed in the third report on extradition and mutual legal assistance, were fairly uncontroversial, at least in respect to content. The provisions were, in fact, simply lifted from the UN Convention on Corruption.[48] The criticism of this text fell into two categories. First, there were a few members of the Commission that felt that the 'cut-

42 Members voting in favour: Mr Argüello Gómez, Mr Cissé, Ms Escobar Hernández, Ms Galvão Teles, Mr Gómez-Robledo, Mr Hassouna, Mr Hmoud, Mr Jalloh, Ms Lehto, Mr Murase, Mr Nguyen, Ms Oral, Mr Ouazzani Chahdi, Mr Park, Mr Peter, Mr August Reinisch, Mr Ruda Santaloria, Mr Saboia, Mr Tladi, Mr Valencia-Ospina and Mr Vásquez-Bermúdez.

43 Mr Šturma.

44 Mr Huang, Mr Kolodkin, Mr Laraba, Mr Murphy, Mr Nolte, Mr Petrič, Mr Rajput and Sir Wood.

45 *Third Report of the Special Rapporteur (Dire Tladi) on Peremptory Norms of General International Law (Jus Cogens)* (A/CN.4/714).

46 *Third Report of the Special Rapporteur (Sean D Murphy) on Crimes against Humanity* (A/CN.4/704).

47 Id Annex II.

48 2004 United Nations Convention against Corruption (31 October 2003, A/58/422).

and-paste approach' resulted in an unnecessarily lengthy provision.[49] The main criticism, however, concerned the appropriateness of relying on the UN Convention on Corruption. Some members felt that given that crimes against humanity were different in nature to corruption, a different formula was warranted.[50]

The third report of the Special Rapporteur attracted the attention of members of the Commission, not only for what was contained in the report, but also for what was not included in the report, particularly since the Special Rapporteur had indicated that this would be his last report.[51] Several members argued that the draft articles should include a provision stating that immunities do not apply for crimes against humanity.[52] There were also some members who were of the view that the draft articles should provide for the non-applicability of amnesties in relation to crimes

49 Ms Escobar Hernández (A/CN.4/SR.3350): 'the Special Rapporteur's preference for those instruments was not explained in the report … The report, however, offered no answers to such key questions as whether the wording provisions on which the draft articles were based was reflected [in State practice] … Had such consideration been included in the third report, the Commission could have held a more in-depth discussion and based its decisions on factors that went beyond what could be seen as a copy-and-paste approach.' Mr Tladi (A/CN.4/SR.3348) and Mr Nguyen (A/CN.4/SR.3349) suggested combining some of the paragraphs. Mr Kolodkin (A/CN.4/SR.3351) expressed a preference for a shorter provision on extradition.

50 See, for example, Mr Murase (A/CN.4/SR.3349): 'The Special Rapporteur referred to the provisions of the United Nations Convention against Corruption relating to extradition, concluding that they were a "suitable basis" for the draft article and that their inclusion "appeared warranted". The Convention against Corruption was irrelevant to crimes against humanity.' Mr Park (A/CN.4/SR. 3349): 'the draft articles set out in the Special Rapporteur's report appeared to be largely based on the United Nations Convention against Corruption, particularly with regard to extradition and mutual legal assistance. While that might be the most desirable approach, crimes against humanity, unlike the act of corruption, occurred on a large scale and could involve multiple individuals. Moreover, some States recognised so-called universal jurisdiction for crimes against humanity, while such broad jurisdiction was generally not recognised for acts of corruption. Although the Special Rapporteur did not seem to take those differences into account, a more careful review was still necessary.' Mr Jalloh (A/CN.4/SR.3350).

51 Mr Hmoud (A/CN.4/SR.3348).

52 Mr Saboia (A/CN.4/SR.3348): 'would be grateful for clarification regarding the status of "remaining issues" … namely the concealment of crimes against humanity, immunity and amnesty.' Mr Murase (A/CN.4/SR.3349): 'The Special Rapporteur's approach to immunity left something to be desired … he did not properly explain why the draft articles simply ignored treaty provisions … that provided that State officials had international criminal responsibility or should be punished.' Ms Escobar Hernández (A/CN.4/SR.3350), Mr Jalloh (A/CN.4/SR.3350) and Mr Hmoud (A/CN.4/SR.3351): 'Without the inclusion of some form of provision barring immunity of State officials, there was a risk that States might invoke such functional or personal immunity to block prosecution or extradition.' Mr Šturma (A/CN.4/SR.3351) and Mr Saboia (A/CN.4/3351). However, Mr Hassouna (A/CN.4/SR.3349): 'shared the Special Rapporteur's view that the issues of immunity and amnesty were controversial and should therefore not be addressed.' Mr Park (A/CN.4/SR.3349).

against humanity.[53] Although the Special Rapporteur addressed these issues in his third report, he opted not to include draft articles on these issues.

The Commission did adopt a full set of draft articles on crimes against humanity on first reading. The texts of the main provisions proposed in the third report on extradition and mutual legal assistance, were adopted largely as proposed with some minor drafting amendments. The significant changes, however, related to the insertion of language designed to address the immunity and amnesty questions. With regard to immunity, the Commission inserted a paragraph into draft article 6 on criminalisation under national law, which reads as follows:

> Each state shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.[54]

The first comment to make about the paragraph is that it is written as a treaty text suggesting that it *would become* binding only as a treaty obligation and that it was not a codification of customary law.[55] Yet, it is clear from the commentary to draft article 6 that the paragraph is based on strong pedigree of practice and that it probably constitutes customary international law.[56] Second, the language is based on the first paragraph of the famous article 27 of the Rome Statute and article IV of the Genocide Convention.[57] While the paragraph was inserted in response to the arguments by some members for a provision on immunity, the paragraph itself is not concerned with immunity. As the commentary

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53 See Mr Jalloh (A/CN.4/3350), Mr Saboia (A/CN.4/SR.3351), Mr Ruda Santaloria (A/CN.4/SR.3352), Mr Hmoud (A/CN.4/SR.3351): 'did not share the Special Rapporteur's view that amnesty was not yet prohibited under customary international law.' Specifically responding to Mr Hmoud, see Mr Tladi (A/CN.4/3351): 'referring to Hmoud's assertion that the United Nations did not endorse peace agreements that provided amnesty for the most serious international crimes, it must be noted that in 2011, the United Nations Security Council had in fact endorsed the peace agreement between warring parties in Yemen.' See, however, Mr Hassouna (A/CN.4/SR.3349) and Mr Nguyen (A/CN.4/SR.3349).

54 Draft Articles on Crimes against Humanity (adopted on first reading), *Report of the International Law Commission on the Work of its 69th Session* (n 1 above) para 5 of draft art 6.

55 Alternative language confirming the customary nature of the rule may have been: 'States have a duty to take the necessary measures.'

56 Id paras 28–32 of the commentary to draft art 6.

57 1998 Rome Statute of the International Criminal Court, art 27: 'This Statute shall apply equally to persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself

to draft article 6 correctly observes, the quoted paragraph, as the first paragraph of article 27 of the Rome Statute and article IV of the Genocide Convention, is concerned with the 'substantive defence'.[58] More to the point, the Commission stated that these provisions have 'no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction'.[59] However, this nuance was missed by Judge Marc Perrin de Brichambaut in his dissenting opinion in the ICC *South Africa Non-Cooperation* decision, who erroneously conflates procedural immunity with the question of the substantive defence of official capacity.[60]

What is particularly interesting about the adoption of this provision is the apparent inconsistency of the Commission in the same session. On the topic 'Immunity of State Officials from Foreign Criminal Jurisdiction', the Commission was able to adopt a provision providing for an exception to immunity in relation to, inter alia, crimes against humanity. Yet, in the same year, on the topic 'Crimes against Humanity', the Commission was unable to agree on an exception to immunity, settling, instead, on a paragraph providing that the official position is not a substantive defence.

The Commission was not able to reach agreement on a draft article on amnesty. However, as a compromise, it was agreed to refer to amnesty provisions in the commentary to draft article 10 on the duty to extradite or prosecute (*aut dedere aut judicare)*. In the commentary to draft article 10, the Commission recognised that the obligation to submit a case to prosecution – the key component of the *aut dedere aut judicare* obligation – might conflict with the ability of that state 'to implement an amnesty'.[61] The Commission noted that, with respect to prosecution before national tribunals, 'recently negotiated treaties … have not expressly precluded amnesties'.[62] The Commission further noted that, in contrast, regional courts and tribunals, as well as the Secretariat of

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constitute a ground for reduction of sentence.' Convention on the Prevention and Punishment of the Crime of Genocide, 1948, art IV: 'Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished whether they are constitutionally responsible rulers, public officials or other individuals.'

58 Draft Articles on Crimes against Humanity (n 47 above) para 30 of the commentary to draft art 6.

59 Id para 31 of the commentary to draft art 6.

60 *Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir*, (ICC-02/05-01/09), 6 July 2017, dissenting opinion of Judge Marc Perrin de Brichambaut paras 28–45. For an assessment of Judge Brichambaut's opinion, see D Tladi 'Of heroes and villains, angels and demons: The ICC AU tension revisited' (2017) *German Yearbook of International Law* (forthcoming).

61 Draft Articles on Crimes against Humanity (n 47 above) para 8 of commentary to draft art 10.

62 Id para 10 of commentary to draft art 10.

the United Nations, have determined amnesty provisions in relation to serious crimes, such as crimes against humanity, to be impermissible.[63] In concluding its analysis on amnesty, the Commission stated

> that an amnesty adopted by one State would not bar the prosecution by another State with concurrent jurisdiction. Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia,* in the light of that State's obligation under the present draft articles ...

This text is superbly non-committal. The first sentence goes without saying because, by definition, amnesty granted by one state can only bind that state. But, the second sentence avoids, completely, the essential question by engaging in circuitous logic. Are amnesties for crimes against humanity prohibited under the draft articles? The answer offered by the commentary is that whether they are prohibited or not, depends on their consistency with the draft articles. In short, the Commission may as well have said nothing on the issue.

The Commission adopted a full set of draft articles on first reading, with a detailed set of commentaries. The next step in the process is that states will have a full year to assess the draft articles and provide written comments to the Commission. The Commission would then, in 2019, reconsider the draft articles in the light of comments submitted by governments and make any necessary amendments prior to final adoption. The primary issues that should be considered by states as they consider the draft articles include whether the articles should be expanded to cover other crimes,[64] immunities and amnesty provisions.

## 4 Other Issues

In addition to immunity and crimes against humanity, the Commission also addressed *jus cogens*, the protection of the atmosphere and the provisional application of treaties. There were particularly important developments on the topics 'Peremptory Norms' and 'Protection of the Atmosphere'.

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63 Ibid.

64 The current author has consistently expressed the view that the regime being developed should address other serious crimes, including war crimes and genocide. For discussion in previous contributions, see D Tladi 'Progressively developing and codifying international law: The work of the International Law Commission in its sixty-seventh session' (2015) 40 *South African Yearbook of International Law* 210.

On the topic *'Jus Cogens'*, the Commission had before it the second report of the Special Rapporteur.[65] The second report was focused on the identification of norms of *jus cogens*. The report proposed six draft conclusions which, by taking article 53 of the Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention)[66] as a point of departure and state practice and decisions of international courts as basis, provided the elements for the identification of *jus cogens*. The draft conclusions provided for two main elements of peremptoriness.[67] First, the norm must be a norm of general international law; that is, it must apply generally and not only to specific states. Second, the norm must be recognised and accepted by the international community of states as a whole as one from which no derogation is permitted. The rest of the draft conclusions are dedicated to breaking down these basic elements. Thus, there were draft conclusions on general international law (draft conclusion 5); acceptance and recognition as a criterion (draft conclusion 6); international community of states as a whole (draft article 7); acceptance and recognition as distinct from acceptance and recognition for the purposes of customary international law and general principles of law, respectively (draft conclusion 8); and evidence of acceptance and recognition (draft conclusion 9). The report also proposed a name change of the topic, from '*Jus Cogens'* to 'Peremptory Norms of General International Law (*Jus Cogens*)'. The proposal for a name change was unanimously accepted.

The content of the draft conclusions was generally well received by the Commission. There was, however, some criticism that the text was repetitive and could be streamlined in the drafting committee. The Commission agreed to refer all six draft conclusions to the drafting committee. The main substantive point of debate, on which the Commission appeared to be evenly split, concerned the meaning of general international law. The Special Rapporteur had suggested that customary international law was the main manifestation of general international law and thus the main pathway to *jus cogens* norms[68] and that general principles of law could be a pathway to *jus cogens*.[69] With regard to treaty rules, the Special Rapporteur noted that while they

65 *Second Report of the Special Rapporteur (Dire Tladi) on Peremptory Norms of General International Law (Jus Cogens)* (A/CN.4/706).

66 1969 Vienna Convention on the Law of Treaties.

67 *Report on Peremptory Norms* (n 65 above) draft conclusion 4.

68 Id para 2 of draft conclusion 5: 'Customary international law is the most common basis for the formation of *jus cogens* norms of international law.'

69 Id para 3 of draft conclusion 5: 'General principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law.'

could 'reflect' *jus cogens* norms, they themselves could not be the basis for *jus cogens* norms.[70] While most members agreed with the Special Rapporteur's proposal, other members thought that treaty law ought to be given greater prominence.[71]

The drafting committee adopted,[72] with some drafting changes, draft conclusions 4, 5, 6, 7 and 8.[73] Proposed draft conclusion 9 was not considered due to time constraints. With respect to the substantive issue concerning the bases of *jus cogens* norms, the drafting committee adopted a simplified text, which retains the pre-eminence of customary international law, but treats as equal the role of general principles and treaty law.[74] The draft conclusion provides, first, that '[c]ustomary international law is the most common basis for' *jus cogens* norms.[75] It also provides that '[t]reaty provisions and general principles of law may also serve as bases for' *jus cogens* norms.[76] During the 68th session, the Special Rapporteur had also proposed, as characteristics, that *jus cogens* norms were hierarchically superior to other norms, were universally applicable and protected fundamental values of the international community.[77] During the 69th session, the drafting committee reverted back to this proposal and was able to agree on draft conclusion 2:

> Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

In the next session, the Special Rapporteur will present a third report on the consequences of *jus cogens.*

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70 Id para 4 of draft conclusion 5: 'A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.'

71 See, for example, Mr Rajput (A/CN.4/SR.3369), Mr Šturma (A/CN.4/3370), Mr Kolodkin (A/CN4/3372) and Sir Wood (A/CN.4/SR.3372). See, *contra*, Mr Hmoud (A/CN.4/SR.3370) and Mr Murphy (A/CN.4/3369).

72 It will be recalled that the Special Rapporteur has requested to keep all draft conclusions within the drafting committee until the full set of draft conclusions has been completed. This request was reiterated in the second report.

73 See 'Statement of the Chairman of the Drafting Committee on Peremptory Norms of General International Law (*Jus Cogens)*', 26 July 2017, Annex.

74 Id draft conclusion 5.

75 Id para 1 of draft conclusion 5.

76 Id para 2 of draft conclusion 5.

77 *First Report of the Special Rapporteur (Dire Tladi) on Jus Cogens* (A/CN.4/693).

On the topic 'Protection of the Atmosphere', the Commission considered the fourth report of the Special Rapporteur.[78] The main theme of the fourth report was interrelationship and mutual supportiveness. In particular, the fourth report adopted four draft guidelines on guiding principles on interrelationship (draft guideline 9): interrelationship between the law on the protection of the atmosphere and international trade and investment law (draft guideline 10); interrelationship of law on the protection of the atmosphere with the law of the sea (draft guideline 11); and interrelationship of the law on the protection of the atmosphere with human rights law (draft guideline 12). The major criticism of the draft guidelines proposed in the fourth report was that these guidelines went beyond the scope of the topic and sought to address issues in other regimes, resulting in an oversimplification of complicated interrelationships between various rules of international law.[79] After a lengthy debate on whether to refer the draft guidelines to the drafting committee, the Commission decided to 'refer to the Drafting Committee all the draft guidelines … *on the understanding*' that the drafting committee would consider having 'one consolidated draft guideline … with two preambular paragraphs'.[80]

On the basis of the work of the drafting committee, the Commission adopted draft guideline 9 which, rather than focusing on broad areas of international law, addressed rules of interpretation and the law-making processes. The Commission also adopted two preambular provisions; one recognising the special situation of low-lying coastal areas and the other concerning the interests of future generations.

In 2017, the Commission also appointed new Special Rapporteurs. First, Ms Maria Lehto was appointed Special Rapporteur of the topic 'Protection of the Environment in relation to Armed Conflict'. This was necessitated by the fact that Ms Marie Jacobsson, the previous Special Rapporteur, had not stood for re-election. The Commission also decided to place the topic 'Succession of States in respect of State Responsibility' on its active agenda and appointed Mr Pavel Šturma as the Special Rapporteur. Finally, the Commission decided to place two topics on its long-term programme of work. On the basis of a syllabus prepared by Marcelo Vásquez-Bermúdez, the topic 'General Principles of Law' was

78 *Fourth Report of the Special Rapporteur (Shinya Murase) on the Protection of the Atmosphere* (A/CN.4/705 and Corr.1 )

79 Mr Tladi (A/CN.4/SR.3355), Sir Wood (A/CN.4/SR.3355), Ms Oral (A/CN.4/SR.3356), Mr Hmoud (A/CN.4/SR.3356), Ms Galvão Teles (A/CN.4/SR.3357), Mr Murphy (A/CN.4/SR.3358) and Mr Laraba (A/CN.4/SR.3359).

80 Chairman (A/CN.4/SR.3359).

placed on the long-term programme of work.[81] The topic 'Evidence before International Courts and Tribunals' was placed on the long-term programme of work on the basis of a syllabus prepared by Aniruddha Rajput.

## 5 Conclusion

In the year 2017, the Commission considered perhaps the most sensitive and topical issue in current international law, namely exceptions to immunity in relation to serious crimes. The adoption of draft article 7 is a significant development that has the potential to entrench the principle of exceptions to immunity for serious international crimes and strengthen accountability under international law. Surprisingly, in another important topic, 'Crimes against Humanity', the Commission was not able to agree on the non-application of immunities. The deep divisions in the Commission on the question of immunities, more narrowly, and values in international law, more broadly, were reflected in the fact that the Commission had to vote on the adoption of the exception to immunities, with members of the Commission offering strongly worded explanations of vote.

The Commission, heading into its 70th anniversary in 2018, is at a critical moment. In 2018, during the celebrations of its 70th year of existence, it will have to address other sensitive and complicated issues, such as the consequences of *jus cogens.* It will also finalise less sensitive, but equally important topics, namely the identification of customary international law and subsequent agreements and subsequent practice in relation to treaty interpretation.

81 *Report of the International Law Commission on the Work of its 69th Session* (n 1 above), Annexes.