PROGRESSIVELY DEVELOPING AND CODIFYING INTERNATIONAL LAW: THE WORK OF THE INTERNATIONAL LAW COMMISSION IN ITS SIXTY-SEVENTH SESSION

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Introduction

The forums in which international law can be codified and progressively developed are increasing. The International Maritime Organisation, the Food and Agriculture Organisation[2] and the UN Convention on Biological Diversity,[3] are but examples of forums in which international law, particularly in the form of treaties, is made and developed. The General Assembly of the United Nations, having the competence to codify and progressively develop international law,[4] has in recent times, asserted its law-making competence: examples are the recently adopted Arms Trade Treaty and the General Assembly's decision to embark on a process towards a new treaty on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction.[5] However, even with all these forums for codification and progressive development of

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1 For a comprehensive list of all IMO conventions see http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx (accessed 20 February 2016). Other organisations that routinely conclude their own conventions include the International Civil Aviation Authority and the United Nations Education, Scientific and Cultural Organisation.

2 See e.g. 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

3 See e.g. 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity.

4 See art 13 of the Charter of the United Nations.

5 UN General Assembly *Resolution on Oceans and the Law on the Sea: Development of an International Legally-binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/Res/69/292 (adopted on 9 June 2015).

international law, the International Law Commission (hereinafter the 'Commission') remains pre-eminent for this purpose.

The work of the Commission at its sixty-seventh session,[6] as in the previous session, again reflects the balance between pure international law subjects and more specialist topics. Specialist topics on which the Commission was engaged included the protection of the atmosphere, and the protection of the environment in relation to armed conflict. During the sixty-seventh session the Commission finalised its work on a further specialist topic — the most-favoured-nation (hereinafter 'MFN') clause. The agenda also included more run of the mill, pure public international law subjects, such as the identification of customary international law and subsequent agreements and subsequent practice in the interpretation of treaties. The agenda also included international criminal law-related topics, namely crimes against humanity and immunity of state officials from foreign criminal jurisdiction. In addition, the topic *jus cogens* was added to the agenda and the present author was appointed Special Rapporteur for the topic.[7]

In this contribution, I provide a brief account of the Commission's work during its sixty-seventh session. Given the number of topics on the agenda of the Commission the focus is on those topics about which significant decisions were made. I will, therefore, discuss the following: the MFN clause, crimes against humanity, identification of customary international law, subsequent practice and subsequent agreements and the protection of the atmosphere. The draft articles adopted on the immunity of state officials are not significant, as such, but the importance of the topic warrants some brief remarks. It is important to emphasise at the beginning that the work on various topics is often carried over from previous sessions — the only exception in the current session is the topic of crimes against humanity. This contribution reflects the work of the Commission *only* during the sixty-seventh session. Aspects addressed, for example, in the sixty-sixth session are not addressed here, save where it is necessary to explain a particular decision.[8]

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6 See *Report of the International Law Commission, Sixty-Seventh Session* (4 May–5 June and 6 July–7 July 2015), General Assembly Records, Seventieth Session, Supplement No 10 A/70/10.

7 *Report of the International Law Commission, Sixty-Seventh Session* (note 6 above) para 286.

8 For a discussion of the Commission's work during the sixty-sixth session see D Tladi 'Progressive development and codification of international law: The work of the International Law Commission during its sixty-sixth session' (2013) 38 *South African Yearbook of International Law* 124.

The Most-Favoured-Nation clause

The Commission's work on the 'most-favoured-nation clause' topic commenced in 2008 and was considered by the Commission through the use of a study group which is considered to be a less formal way of working. The approach of the study group involves members producing informal working papers on different subjects relating to the topic and holding discussions on the basis of the papers. The MFN study group was initially co-chaired by Rohan Perera and Don McRay.[9] All in all, between 2009 and 2013, the study group considered seventeen papers on various issues.[10] During the sixty-seventh session the Commission concluded its work on the topic.

In 1978 the Commission adopted the draft articles on most-favoured-nation clauses (hereinafter the '1978 draft articles').[11] In the most recent consideration of the topic the Commission did not adopt any draft articles — at any rate, the consideration of the topic through the study group precluded the possibility of draft articles adopted by the Commission. Instead, the outcomes of the topic consist of three main documents, namely a procedural report of the Commission outlining how the work was carried out, a set of five 'summary conclusions' and a very detailed report of the study group from which the summary conclusions adopted by the Commission are sourced.

It is important to emphasise that the latter document — the detailed report — was not adopted by the Commission and therefore does not constitute a product of the Commission. It is a report of the study group, which is a limited sub-body of the Commission. Only the summary conclusions of the study group were adopted. That said, the Commission did 'welcome with appreciation' the final report and 'commended [it] to the attention of the General Assembly, and encouraged its widest possible dissemination'.[12] The decision not to adopt the report was not based on lack of support for the content of the report but rather on the fact that the Commission, as a whole, had not had an opportunity to study the contents of the reports in any great depth.

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9 From 2012, with Mr Perera no longer on the Commission, the Study Group was chaired by Mr McRay.

10 'Final report of the Study Group on the Most-Favoured-Nation Clause', Annex to the *Report of the International Law Commission, Sixty-Seventh Session* (note 6 above).

11 'Draft articles on most favoured nation clauses' in *Yearbook of the International Law Commission* (1978) vol II part II: *Report of the Commission to the General Assembly on the Work of its Thirtieth Session* 16.

12 See para 41 of the *Report of the International Law Commission, Sixty-Seventh Session* (note 6 above).

The general thrust of the study group's work and the summary conclusion adopted by the Commission were interpretative in nature. In other words, the study group recognises that, in essence, the meaning to be given to MFN clauses should be dependent on interpretation, relying on the international law rules of interpretation. The study group used as a point of departure the 1978 draft articles and then considered developments subsequent to the adoption of the draft articles. In particular, the study group focused on MFN clauses in multilateral treaties, particularly GATT and the WTO, as well as bilateral investment treaties.[13] The study group highlighted issues of interpretation that arise from MFN clauses, especially relating to the beneficiaries of MFN clauses, the meaning of 'no less favourable', and the scope of MFN clauses. With respect to the scope of the MFN clause, the study group focused on the famous *Maffezini* decision.[14]

After a detailed study the study group adopted its summary conclusions, which, in turn, were adopted by the Commission. The first of the summary conclusions is that MFN clauses 'remain unchanged in character' from the 1978 draft articles.[15] However, while the 1978 draft articles should be the basis of interpreting MFN clauses, those articles 'do not provide answers to all the interpretative issues that can arise with MFN clauses'.[16] The Commission therefore, in a second summary conclusion, emphasised the 'importance and relevance of the Vienna Convention on the Law of Treaties', noting that the interpretation of MFN clauses is to be undertaken on the basis of the Vienna Convention rules of interpretation.[17] The summary conclusions spell out other aspects of MFN clauses that are to be determined through the application of the rules of treaty interpretation, including the 'scope and nature of the benefit that can be obtained under an MFN provision',[18] and the applicability of MFN clauses to dispute settlement provisions.[19] On this latter point, which is described in the summary conclusions as bringing 'a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by the parties', the Commission emphasises that the rules of interpretation of treaties continue to apply in the determination

13 See paras 41–66 of the 'Final Report of the Study Group' (note 10 above).

14 *Emilio Agustin Maffezini v Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction) ICSID Case no ARB 97/7 (25 January 2000) ICSID Rep vol 5 396.

15 See para 42(a) of the *Report of the International Law Commission, Sixty-Seventh Session* (note 6 above).

16 Ibid.

17 Id para 42(b).

18 Id para 42(c).

19 Id para 42(d).

of whether the MFN clause applies to the dispute settlement provision.[20] However, in the light of the *Maffezini* decision which held that an MFN clause was applicable to dispute settlement, the Commission encourages states to be explicit about the applicability or not of MFN when drafting such dispute settlement clauses, since 'explicit language can ensure that an MFN provision' does not apply to dispute settlement provisions contrary to the wishes of the parties.[21]

Crimes against humanity

The topic, 'crimes against humanity', was included in the Commission's programme in 2013, with Sean Murphy appointed as Special Rapporteur. During the current session, the Commission had before it a rather detailed report presented by the Special Rapporteur.[22] The report provided a general background, including a historical account of the development of the crime against humanity as an international crime. It also provided an analysis of the duties of prevention, criminalisation and interstate co-operation with respect to other, comparable crimes, as well as examining the definition of crimes against humanity. The report proposed two draft articles.

It is apposite to point out that, unlike other topics before the Commission, the purpose of the Special Rapporteur is not to identify existing rules of international law relating to crimes against humanity with the view to their codification as draft articles. Rather, the purpose of the project is to identify possible provisions for a draft convention which may or may not reflect rules of customary international law. The aim of the analysis of other instruments and other forms of practice, therefore, is principally to find inspiration for what a Convention might look like. Indeed, the preference of the Special Rapporteur was to refer to the text as a Draft Convention, but the Commission decided to refer to draft articles while accepting the Special Rapporteur's approach of not necessarily seeking the codification of existing rules.

On the basis of the Special Rapporteur's report, the general debate in plenary, and the work of the Drafting Committee, the Commission provisionally adopted four draft articles.[23] The first draft article, 'Scope',

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20 Ibid.

21 Id para 42(e).

22 *First Report of the Special Rapporteur, Mr Sean D Murphy, on Crimes against Humanity* A/CN4/680.

23 See text of the 'Draft articles on crimes against humanity' provisionally adopted by the Commission, para 116 of the *Report of the International Law Commission, Sixty-Seventh Session* (note 6 above). For the text of draft articles with commentaries, see para 117.

simply provides that the draft articles 'apply to the prevention and punishment of crimes against humanity'.[24] While the provision seems rather simple and straightforward, there are a number of issues that arise from it that should be taken into account. For one thing, there is the issue of the possible coverage of other core crimes, for example, war crimes and genocide. As discussed in the contribution on the work of the Commission at the sixty-sixth session,[25] the design of the project has been criticised (including by the present author) for its non-inclusion of other crimes. It is unnecessary to repeat that debate save to point out that the Commission decided to continue working on the basis that the scope be limited to crimes against humanity.[26] Moreover, while the purpose of the consideration of the topic is to address interstate relations (horizontal) as opposed to the Rome Statute's (vertical) relationship, this is not clear from the scope. The scope simply addresses itself as being applicable to 'the prevention and punishment of crimes against humanity' without excluding international courts and tribunals, such as the Rome Statute. Thus, on its terms, the scope provision permits the application of the draft articles to, for example, the International Criminal Court. The exclusion is done only in the commentary where the following understanding is recorded

> the present draft articles will avoid any conflicts with the obligations of States arising out of constituent instruments of international or 'hybrid' … criminal courts and tribunals, including the International Criminal Court (hereinafter 'ICC'). Whereas the Rome Statute establishing the ICC regulates the relations between the ICC and its State Parties (a 'vertical' relationship), the focus of the present draft articles will be on the adoption of national laws and inter-state cooperation (a 'horizontal' relationship).[27]

Draft article 2, 'General Obligation', provides that crimes against humanity, 'whether or not committed in times of armed conflict, are crimes under international law, which States undertake to prevent and punish'. There are three main elements to this provision. First, the provision confirms that crimes against humanity can be committed in both peace time and during armed conflict. Second, the provision confirms that crimes against humanity are crimes under international

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24 Art 1 of the 'Draft articles on crimes against humanity' (note 23 above).

25 Tladi (note 8 above).

26 The minority view is reflected in the commentary to the draft articles as follows: 'Although a view was expressed that this topic might include [genocide, war crimes and the crime of aggression] as well, the Commission decided to focus on crimes against humanity'. See para 2 of the *Commentary to draft article 1*.

27 See para 4 of the *Commentary to draft article 1*.

law. Finally, the provision states that states have a duty to prevent and punish such crimes. The first two elements appear to reflect the current state of law, while the third does not — or at the very least does not purport to state the current state of the law.

With respect to the first element, that is, that crimes against humanity are crimes whether committed during armed conflict or not, it is important to clarify that armed conflict here includes both international and non-international armed conflict.[28] The Commission felt it necessary to be explicit that crimes against humanity can be committed during an armed conflict because in some instruments, including the Nürnberg Charter and the Statute of the International Criminal Tribunal for the Former Yugoslavia, crimes against humanity are linked to the existence of a conflict.[29] However, the general trend is not to require a link to an armed conflict.[30] That crimes against humanity are crimes under international law is a principle that has been recognised since Nürnberg.[31]

The language used to capture the third element is slightly different. The first two elements, that crimes against humanity can be committed in the absence of an armed conflict and that they constitute crimes under international law, are presented as *lex lata*, both as a matter of drafting and in the explanation advanced in the commentaries. However, the third element, that there is a duty to prevent and punish such crimes, is not presented as a legal obligation under general international law. The fact that states '*undertake* to prevent and punish' suggests a 'contractual' obligation arising from the treaty to be adopted if states

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28 See paras 5 and 7 of the *Commentary to draft article 2*.

29 See for discussion, para 5 of *Commentary to draft article 2*.

30 See para 9 of the *Commentary to draft article 2* ('while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal court and tribunals, including the Rome Statute'). The commentary considered, amongst other things, art 3 of the Statute of the International Criminal Tribunal for Rwanda and art 7 of the Rome Statute of the International Criminal Court, neither of which contain the link with armed conflict.

31 See, e.g. art 1 of the 1954 Commission's 'Draft Code of Offences against the Peace and Security of Mankind' *Yearbook of the International Law Commission* (1954) vol II: *Documents of the Sixth Session Including the Report of the Commission to the General Assembly* 150 ('Offences against the peace and security of mankind, as defined in this Code [art 2 of the Code includes crimes against humanity as one such offence], are crimes under international law, for which the responsible individuals shall be punished'). Art 1 of the Commission's 1996 'Draft Code of Crimes against the Peace and Security and the Security of Mankind' *Yearbook of the International Law Commission* (1996) vol II, part II: *Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session* 17.

decide to transform the Commission's text into a Convention. Indeed, it is noteworthy that the Commentary to draft article 2 offers no authority for the proposition that there is such a duty, while it does offer authority and justification for the first two elements.

Draft article 3, provisionally adopted by the Commission, defines crimes against humanity 'for the purposes of the' draft articles. The definition presented by the Commission is taken, *verbatim*, from the definition of crimes against humanity in article 7 of the Rome Statute except for 'three non-substantive' changes.[32] Firstly, the initial paragraph of draft article 3 begins with '[f]or the purpose of the present draft articles' while article 7 of the Rome Statute begins with '[f]or the purpose of this Statute'.[33] Secondly, this same change is reflected in the third paragraph of draft article 3.[34] Finally, in the Rome Statute acts of persecution are criminalised as crimes against humanity when perpetrated 'in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'.[35] The phrase 'any crime within the jurisdiction of the Court' is replaced with 'in connection with the crime of genocide or war crimes'. Although based on the Rome Statute definition, the commentaries to draft article 3, nonetheless, provide detailed authority justifying the adoption of that definition.

While the Commission decided to remain faithful to the definition of crimes against humanity in the Rome Statute, it was felt that states should be granted a degree of discretion. Draft article 3, therefore, includes a 'without prejudice clause', which states that the definition adopted 'is without prejudice to any broader definition provided for in any international instrument or national law'.[36] The primary objective of this clause was to ensure that if a state wished to bring more forms of conduct under the umbrella of crimes against humanity then it should be able to do so. Some members of the Commission, however, were concerned that such a discretion might affect the ability of states to enter into mutual legal co-operation initiatives if the definitions were dissimilar. In explaining the clause the Commission advanced the following observation

> if a State wishes to adopt a broader definition, the present draft articles do not preclude it from doing so. At the same time, an important objective of the draft articles is the harmonization of national laws, so that they

32 See para 1 of the *Commentary to draft article 3* of the 'Draft articles on crimes against humanity' (note 23 above).

33 Para 8 of the *Commentary to draft article 3*.

34 Ibid.

35 Art 7(1)(h) of the 1998 Rome Statute of the International Criminal Court.

36 Para 4 of draft article 3 of the 'Draft articles on crimes against humanity' (note 23 above).

may serve as the basis for robust inter-State cooperation. Any element adopted in national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.[37]

Identification of customary international law

The Commission has proceeded with its work on the identification of customary international law in an atypical fashion. In the normal course of events a Special Rapporteur presents a report on the salient issues of a topic and proposes draft articles, conclusions, or guidelines. These proposed texts are considered in the Drafting Committee and, if adopted there, are presented to the Commission accompanied by commentaries for provisional adoption. In the case of the identification of customary international law, the draft conclusions adopted by the Drafting Committee have been presented to the Commission for information, that is, the Commission has taken note of them but has not adopted them. The result of this approach is that the Drafting Committee has adopted a full set of draft conclusions which have been taken note of by the Commission but have not yet been adopted.[38] In the light of this, and given the provisional nature of the draft conclusions so far adopted, this section will reflect only on some of the controversial issues that were considered during the sixty-seventh session by the Drafting Committee.

One of the most controversial issues, stemming from the discussions in the sixty-sixth session, was the question of 'double-counting', that is, whether the same material could be used for both practice and *opinio iuris*. Some members of the Commission took the view that to permit, for example, a single resolution, statement, or diplomatic note to serve as both evidence of practice and *opinio iuris* would serve to diminish the importance of the two-element approach, which the Commission had already determined to be the basic approach.[39] In truth this is a false problem. If one considers that the two constituent elements serve different purposes, then it should not be objectionable to use as evidence the same material. A diplomatic note expressing the decision by a state to behave in a particular way is undoubtedly practice. To the extent that this same diplomatic note, in addition to expressing a decision about

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37 Para 41 of the *Commentary to draft article 3*.

38 See text of the United Nations General Assembly *Identification of customary international law: Text of the draft conclusions provisionally adopted by the Drafting Committee* A/CN4/L869.

39 See draft conclusion 2 titled 'Basic Approach': 'To determine the existence and content of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio iuris*).'

conduct, also specifies that such decision is based on the belief that the conduct is permissible or required by customary international law, then that note can be used to show acceptance as law. In recognition of this possibility the Drafting Committee added a second paragraph to draft conclusion 3, which provides that the two constituent elements for the identification of customary international law are 'to be separately ascertained', and that that there must be 'an assessment of evidence for each element'. This compromise text was in response to members of the Commission who wanted to exclude, *a priori*, the use of the same material for both elements. The report of the Chairman of the Drafting Committee, the content of which should influence the commentary, records the compromise as follows

> The second sentence ['an assessment of evidence for each element'] covers the issue sometimes referred to as 'double counting', which gave rise to much debate within the Commission. This sentence expresses a logical consequence of the statement in the first sentence ['separately ascertained']. In order to ascertain separately the existence of each element there must be an assessment of evidence for each element — *most often different evidence*. There was general agreement within the Drafting Committee, however, that, in assessing the existence of a general practice or acceptance of law, *it should not be excluded that, in some cases, the same material might be used* to ascertain practice and *opinio iuris* ... .[40]

During the consideration of the topic in the sixty-sixth session there was heated debate about the authors of practice, that is, whether states were the only authors of practice or whether international organisations and even non-governmental organisations could be authors of practice.[41] During the sixty-seventh session the Drafting Committee decided to add a third paragraph to the draft conclusion 4,[42] which provides that the conduct 'of other actors is not practice that contributes to the formation,

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[40] Statement of the Chairman of the Drafting Committee for the Identification of Customary International Law, Mr Mathias Forteau (29 July 2015), available at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_cil.pdf&lang=EF (emphasis added) (accessed 20 November 2016).

[41] See for discussion Tladi (note 8 above) 127–128.

[42] The first paragraph states as follows: 'The requirement, as a constituent element, of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law'. The second paragraph provides the following exception: 'In certain cases, the practice of international organisations also contributes to the formation, or expression, of rules of customary international law'.

or expression, of rules of customary international law, but may be relevant when assessing the practice' of states and international organisations.

Another major remnant of the debate from the sixty-sixth session concerned the question of inaction. During the sixty-sixth session, the question of inaction was addressed in connection with general practice, that is, whether inaction could amount to practice. During the sixty-seventh session, the debate focused on the relevance of inaction for *opinio iuris*. The Drafting Committee adopted the following paragraph

> Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio iuris*), provided that States were in a position to react and the circumstances called for some reaction.

The focus of the Commission during the sixty-seventh session in relation to customary international law was on the significance of certain materials for the identification of customary international law. The Drafting Committee adopted four draft conclusions on specific materials relevant for the identification of customary international law. These draft conclusions are on treaties,[43] resolutions of international organisations and intergovernmental conferences,[44] decisions of courts and tribunals,[45] and teachings.[46] The Drafting Committee had lengthy debates about the formulation of draft conclusion 11 which looks at the significance of treaties for the identification of customary international law, but there was general agreement on the principle proposed by the Special Rapporteur based on the judgment of the International Court of Justice in the *North Sea Continental Shelf cases*.[47] Draft conclusion 11 thus provides that a 'rule set forth in a treaty may reflect a rule of customary international law' if such a treaty rule codified an existing rule of customary international law,[48] led to the crystallisation of a rule of customary international law that had started to emerge,[49] or has given rise to practice that is accepted as law.[50] Draft conclusion 11 also states that the fact that a provision is reflected in many treaties may suggest

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43 Draft conclusion 11 of the *Draft conclusions on the identification of customary international law* (note 38 above).

44 Draft conclusion 12.

45 Draft conclusion 13.

46 Draft conclusion 14.

47 *North Sea Continental Shelf cases (Germany v Denmark; Germany v the Netherlands)* (Judgment) (1969) ICJ Rep 3 paras 60 et seq.

48 Draft conclusion 11(1)(a) of the *Draft conclusions on the identification of customary international law* (note 38 above).

49 Draft conclusion 11(1)(b).

50 Draft conclusion 11(1)(c).

that the rule is a rule of customary international law but that this is not necessarily the case.[51]

The adoption of the text on teachings was fairly uncontroversial. Draft conclusion 14 states that '[t]eachings of the most highly qualified publicists of the various nations may serve as subsidiary means for the determination of rules of customary international law'. First, 'publicists' refers to writers and jurists of international law, while the word 'teachings' was chosen because the format of the publicist's products vary and even include audio-visual material. While the text itself was not disputed, it did raise questions about the qualification standards 'of most highly qualified' resulting in caution from some members that this should not be understood as publicists from specific regions to the exclusion of other regions.[52]

With regard to the significance of courts and tribunals a number of issues arose. The first point to note is that decisions of courts and tribunals refer to both decisions of national courts and decisions of international courts. However, the Drafting Committee sought to make a clear distinction regarding the weight to be accorded to the different decisions. Thus, while the first paragraph of draft conclusion 13 states that '[d]ecisions of international courts and tribunals ... *are* a subsidiary means for the determinations of' rules of customary international law, the second paragraph notes that '[*r*]*egard may be had*, as appropriate, to decisions of national courts ... as a subsidiary means'.[53] With respect to the latter, it is also important to note the dual function of decisions of national courts in the context of customary international law.[54] Draft conclusion 6 and draft conclusion 10 list decisions of national courts as forms of practice and evidence of *opinio iuris* respectively, whereas in draft conclusion 13 decisions of national courts are relevant as a subsidiary means of identification of the rules of customary international law. The phrase 'as appropriate' was meant to indicate that the quality of the reasoning is important in determining whether to rely on a particular domestic decision, although presumably this should also apply to international decisions.

There was a significant degree of disagreement on paragraph 1 of draft conclusion 13, in particular, with respect to two issues. The first issue was the disagreement about whether to identify and single out the

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51 Draft conclusion 11(2).

52 Statement of the Chairman of the Drafting Committee (note 40 above) ('The Commentaries would clarify that that this should generally be understood broadly to include not only teachings from different countries, but also from different regions, as well as materials representative of the different legal systems'.)

53 Emphasis added.

54 Statement of the Chairman of the Drafting Committee (note 40 above).

International Court of Justice (ICJ). Some members were of the view that, since there was no institutional hierarchy between international courts, it would be inappropriate to single out the ICJ. In the end the Drafting Committee decided to include a specific reference to the ICJ, not for any doctrinal reason but mainly because of the institutional relationship between the ICJ and the Commission, the fact that the ICJ is a principal organ of the United Nations and the fact that it is the only international court with general competence. A second issue concerned whether the word 'subsidiary', which qualified judicial decisions as a source of law in article 38 of the Statute of the International Court of Justice, was appropriate in the draft conclusions. Some members argued that the word 'subsidiary' in article 38 should not be used since article 38 was concerned not with identification of rules but rather the 'application' of rules. The Drafting Committee, however, was concerned that omitting the word 'subsidiary', would suggest to the reader that the Commission was changing the rules of article 38 and providing international courts with the power to make law.

The Drafting Committee adopted a draft conclusion on the persistent objector and another on particular customary international law. The content of draft conclusion 16, on particular customary international law, was readily accepted. Apart from drafting choices there were only two issues that received attention in the course of the deliberations of the Drafting Committee. First, there was some contestation as to whether to use the phrase 'particular customary international law' or the more common usage of 'regional or local' customary international law. Linked to this was whether a particular custom could apply between states in different regions, for example, in the Commonwealth or even the G77. In the end, the Drafting Committee settled on 'particular customary international law'. Many of the implications of this phrase remain obscure, for example, would each state have to accept the practice as law? The draft conclusions do not answer these and other questions, and the statement of the Chairman of the Drafting Committee states only that 'Commentary will seek to capture the varied nuances'.[55]

It is understood that the Special Rapporteur will, during the sixty-eighth session, present a full set of draft conclusions with commentaries for the consideration of the Commission with a view to finalising the topic.

55 Ibid.

Subsequent agreements and subsequent practice in relation to treaty interpretation

At the start of the sixty-seventh session the Commission had adopted 10 draft conclusions on the topic of subsequent agreements and subsequent practice. The Commission had before it a report of the Special Rapporteur and a proposal for a draft conclusion on constituent instruments of international organisations. The Commission adopted the single draft conclusion of four paragraphs.[56] In essence, draft conclusion 11 considers the applicability of subsequent agreements and subsequent practice to constituent instruments of international organisations.

The first paragraph of draft conclusion 11 states that articles 31 and 32 of the Vienna Convention on the Law of Treaties 'apply to a treaty that is a constituent instrument of an international organisation'. This means that subsequent agreements and subsequent practice under article 31(3) of the Vienna Convention are, and subsequent practice as a subsidiary means of interpretation under article 32 may be, applied in the interpretation of such treaties.[57] The main question asked by members of the Commission was whether a special provision on constituent instruments was necessary at all. After all, the rules of treaty interpretation ought to apply to all treaties, irrespective of the type of the treaties. To the extent that any special rule may be applicable, this arises not from the type of treaty but from the text, context and object and purpose of the treaty, that is, whether any special rules are required ought to be determined from an interpretation of the treaty based on the normal rules of treaty interpretation.

The special provisions on constituent treaties, according to the Commentary to the draft conclusion, are justified on the basis of article 5 of the Vienna Convention on the Law of Treaties.[58] Article 5 states that the application of the provisions of the Convention in relation to constituent treaties is 'without prejudice to any relevant rules of the organisation'. The reality, however, is that the extent to which special rules of an organisation require different rules of interpretation or a special approach to the interpretation of the constituent treaty depend on whether the constituent treaty itself allows (or requires) such different

56 Text of the draft conclusion on subsequent agreements and subsequent practice in relation to the interpretation of treaties, provisionally adopted so far by the Commission *Report of the International Law Commission, Sixty-Seventh Session* (note 6 above) para 128. For the text of the draft conclusions with commentaries see para 129.

57 See draft conclusion 1.

58 See para 4 of the *Commentary to draft conclusion 11*.

rules of interpretation. The Commission, nonetheless, concluded that such special rules were warranted.

One special rule, provided for in paragraph 2 of draft conclusion 11, provides that subsequent agreements and subsequent practice 'may arise from, or be expressed in, the practice of an international organisation in the application of its constituent instrument'. It is important to emphasise that both qualifiers, that is, 'arise from' and 'expressed in', do not justify the conclusion that it is the practice of the international organisation that constitutes subsequent practice or subsequent agreements. Rather, 'arise from' means that the practice of an international organisation may encourage parties to a treaty to engage in conduct that may become subsequent practice or subsequent agreements. On the other hand, 'expressed in' simply means that the subsequent practice or agreements of parties to a treaty may be reflected in the practice of a treaty. In both instances, however, it is the practice of the parties to a treaty that is at issue.[59]

An issue of intense debate, both in the plenary and the Drafting Committee, concerned whether the subsequent practice of an international organisation *itself* could constitute 'subsequent practice' for the purposes of article 31(3) of the Vienna Convention. Certainly some of the proposed text, including the text originally proposed by the Special Rapporteur, seemed to suggest that possibility. Some members — including the present author — objected to such a possibility, noting that such an interpretation would not be consistent with article 31(3) of the Vienna Convention. This did not mean, however, that 'subsequent practice' could not in its own right contribute to the interpretation of the treaty. As paragraph 3 of draft conclusion 13 states, the practice of an international organisation 'may contribute to the interpretation' of the constituent instruments when in the search for the ordinary meaning, context and object and purpose of the treaty, that is, not as an authentic interpretation of the parties to the treaty.

Other decisions

The topic 'the protection of the atmosphere' has had a somewhat turbulent start within the Commission. First, in 2012, a few members of the Commission objected to the inclusion of the topic. In 2013, after intense negotiation, the Commission agreed to include the topic subject to conditions, including that the topic would not deal with certain issues

[59] See the *Commentary to draft conclusion 13*: 'Either variant of the practice in an international organisation may reflect subsequent agreements or subsequent practice by the *States Parties* to the constituent treaty …' (emphasis added).

such as the polluter pays principle, the precautionary principle, liability of states, and the common but differentiated responsibilities principle. However, the list above includes all the core elements of the principles of international law relevant to the protection of the atmosphere. The conditions also precluded consideration of climate change issues. In 2014 the Commission declined to refer the Draft Guidelines proposed by the Special Rapporteur because, in the view of a number of members, the Special Rapporteur had ignored the conditions on which the inclusion of the topic on the agenda of the Commission was based.

During the sixty-seventh session, the Commission managed to adopt three Guidelines and some of the preambular paragraphs. Guideline 1 includes definitions of atmosphere, atmospheric pollution, and atmospheric degradation. Guideline 2 mainly reproduces the conditions agreed to in 2013.[60] It is Draft Guideline 5 that sets out an obligation. Paragraph 1 of Draft Guideline 5 provides that 'States have the obligation to cooperate ... for the protection of the atmosphere from atmospheric pollution and atmospheric degradation'. The second paragraph of Draft Guideline 5 provides that 'States should cooperate' to enhance 'scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation'. With the adoption on 12 December 2015 of the Paris Agreement[61] some of the political tensions that have made this topic so controversial for the Commission may subside, if only slightly. The future consideration of the topic by the Commission will, it is hoped, be dominated less by political positions and more by legal convictions with a view to producing a legal text that reflects the legal principles relevant to the protection of the atmosphere.

Another important topic on which there was little progress in the sixty-seventh session is the topic 'immunity of state from the foreign criminal jurisdiction'. To date the Commission has adopted important decisions about the topic concerning the overall structure. In particular, the Commission has noted that there are two types of immunities, namely immunity *ratione personae* and immunity *ratione materiae*.[62]

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60 Para 2 of Draft Guideline 2 provides that the Guidelines 'do not deal with, but are without prejudice to, questions concerning the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries ...'. Para 3 of the Draft Guideline states that the Draft Guidelines 'do not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States'.

61 See Paris Agreement on Climate Change FCCC/CP/2015/L.9/Rev.1 (12 December 2015).

62 See draft articles 3 and 5 of the *Draft Articles of State Officials from Foreign*

The Commission further decided that the troika — heads of state, heads of government and the Minister for Foreign Affairs — are entitled to immunity *ratione personae* for the duration of their term of office.[63] It is clear in the view of the Commission there are no general exceptions (save for waiver) with respect to immunity *ratione personae*, including for so-called *jus cogens* crimes; the question that remains to be answered is whether the Commission will decide that there are exceptions for immunity *ratione materiae.*

It was expected that during the sixty-seventh session the Special Rapporteur would present a report addressing the issue of exceptions. The Special Rapporteur, instead, presented a report focusing on the scope of immunity *ratione materiae* and the definition of 'acts performed in official capacity'. The Commission did not adopt the proposed draft articles although the Drafting Committee adopted two provisions. Paragraph (f) of draft article 2 provides that 'an act performed in any official capacity' means an act performed by a state official in the exercise of state authority. Draft article 6, on the scope of immunity *ratione materiae,* mirrors draft article 4 on the scope of immunity *ratione personae.*[64] Paragraph 1 of draft article 6 provides that 'State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity', whereas paragraph 2 states that such immunity 'continues to subsist after the individuals concerned have ceased to be State officials'. Paragraph 3, for its part, provides that any person that enjoyed immunity *ratione personae* would, 'after their term of office has come to an end, continue to enjoy immunity *ratione materiae* with respect to acts performed in an official capacity during their term of office'. It is anticipated that during the sixty-eighth session the Commission will consider the crucial question of exceptions to immunity *ratione materiae.*

The Commission had on its agenda the topics 'the protection of the environment in relation to armed conflict' and 'provisional application of treaties'. The Commission did not adopt any texts on these topics although the Drafting Committee did adopt some guidelines with respect

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Criminal Jurisdiction provisionally adopted by the Commission Report of the International Law Commission, Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014) General Assembly Records Seventieth Session Supplement No 10 A/70/10 para 131.

63 See draft articles 3 and 4.

64 Para 1 of draft article 4 provides that the troika 'enjoy immunity *ratione personae* only during their term of office'; para 2 provides that immunity *ratione personae* 'covers all acts performed, whether in a private or official capacity'; and para 3 provides that the 'cessation of immunity of *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*'.

to both. The consideration of these topics is still in its infancy and more detailed assessments of the Commission's work on them will be presented in the future. It is anticipated that in the next contribution on the work of the Commission some consideration of the important topic of *jus cogens* will be included.

Concluding remarks

The Commission continues to be seized with very important (and sometimes politically sensitive) topics as it engages in the codification and progressive development of international law. Topics such as immunity of state officials, the protection of the atmosphere and crimes against humanity are politically sensitive. Work on the equally sensitive topic of *jus cogens* has yet to commence. At the same time, although topics such as the identification of customary international law, subsequent practice and subsequent agreements, and provisional application do not rouse the same type of political sensitivities, their importance ought not to be underestimated. After all it is these topics that provide the ground rules that allow for the further consideration of the more sensitive topics.

The sixty-eighth session of the Commission will provide both challenges and opportunities. First, the Commission is likely to finalise its consideration of the topic 'the protection of persons in the event of disasters', which was not considered in the sixty-seventh in order to allow states the opportunity to comment on the full set of draft articles adopted on first reading. The Commission is likely to adopt on first reading a full set of draft conclusions on the identification of customary international law and possibly on the topic 'subsequent agreements and subsequent practice'. The sixty-eighth session, however, will be the last session of the quinquennium — the five-year term of the Commission — with elections being held in November 2016. The final year of the quinquennium is traditionally the time when the Commission is at its busiest: though many issues were not addressed during the current session, it should be expected that these will be addressed during the sixty-eighth session.