

PROGRESSIVELY DEVELOPING AND CODIFYING INTERNATIONAL LAW: THE WORK OF THE INTERNATIONAL LAW COMMISSION IN ITS 68TH SESSION

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1 Introduction

The 68th session of the International Law Commission (the Commission), held in 2016, was a significant one for the Commission. First, on a more substantive level, the Commission adopted a final text on a major topic, namely the protection of persons in the event of disasters on the second reading and also completed a first reading of yet two other topics, namely the identification of customary international law as well as subsequent agreements and practice in relation to treaty interpretation.¹ Secondly, at an institutional level, 2016 marked the final year of the quinquennium – the term of the 34-member Commission expired at the end of 2016.² On 3 November 2016, the General Assembly elected new members for the term beginning 1 January 2017.³

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¹ The Commission has a two-stage approach to the adoption of texts. Once a full text with commentaries is completed, the Commission adopts the text on a first reading. This text is transmitted to states for comments and observations. On the basis of those comments and observations, the Commission then makes the necessary amendments and adopts the text on a second and final reading. It is this text that is submitted to the General Assembly to signal the completion of the topic.

² See Note by the Secretary-General 'Election of the Members of the International Law Commission' A/71/90 (7 June 2016).

³ The following individuals were elected: Ali bin Fetais Al-Marri (Qatar), Carlos J Argüello Gómez (Nicaragua), Bogdan Aurescu (Romania), Yacouba Cissé (Côte d'Ivoire), Concepción Escobar Hernández (Spain), Patrícia Galvão Teles (Portugal), Juan Manuel Gómez-Robledo (Mexico), Claudio Grossman Guilloff (Chile), Hussein A Hassouna (Egypt), Mahmoud Daifallah Hmoud (Jordan), Huikang Huang (China), Charles Chernor Jalloh (Sierra Leone), Roman Anatolyevitch Kolodkin (Russia), Ahmed Laraba (Algeria), Marja Lehto (Finland), Shinya Murase (Japan), Sean David Murphy (United States), Hong Thao Nguyen (Viet Nam), Georg Nolte (Germany), Nilüfer Oral (Turkey), Hassan Ouazzani Chahdi (Morocco), Ki Gab Park (Republic of Korea), Chris Maina Peter (United Republic of Tanzania), Ernst Petrič (Slovenia), Aniruddha Rajput (India), August Reinisch (Austria), Juan José

Although there are numerous fora, including the General Assembly itself, with the mandate to develop international law, the Commission remains the pre-eminent body for the codification and progressive development of international law. As in previous sessions,⁴ the work of the Commission has continued to show a balance between so-called specialist topics and pure public-international-law topics.⁵ The agenda of the Commission for the 68th session included specialist topics such as the protection of the atmosphere, the protection of the environment in relation to armed conflict and the protection of persons in the event of disasters. International criminal-law related topics, considered by the Commission during this session, included crimes against humanity and the immunity of officials from foreign criminal jurisdiction. The agenda also included pure public-international-law topics on the identification of customary international law, subsequent agreements and practice regarding the interpretation of treaties, provisional application of treaties and the recently added *jus cogens*.

This review of the work of the Commission during its 68th session focuses on those topics on which significant progress was made or which raised controversial issues. For that reason, I discuss topics on which a complete text was adopted, either on its first or second reading, namely the protection of persons, the identification of customary international law and subsequent agreement and practice regarding treaty interpretation. I also provide information on the topic considered for the first time by the Commission, namely *jus cogens*. Other topics reviewed in this contribution are crimes against humanity and protection of the atmosphere. Although the Special Rapporteur on the immunity of state officials from foreign criminal jurisdiction presented a report,⁶ the report could not be issued in all the official languages in time to

Ruda Santolaria (Peru), Gilberto Vergne Saboia (Brazil), Pavel Šturma (Czech Republic), Dire D Tladi (South Africa), Eduardo Valencia-Ospina (Colombia), Marcelo Vásquez-Bermúdez (Ecuador), S Amos Wako (Kenya) and Michael Wood (United Kingdom). See http://legal.un.org/ilc/elections/2016election_outcome.shtml (accessed 20 December 2016).

⁴ For a review of previous sessions, 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* 205; and 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.

⁵ See Commission 'Report on the Work of the Sixty-Eighth Session (2016)' A/70/10 (2 May–10 June and 4 July–12 August 2016) GA OR 70th Session Suppl No 10.

⁶ 'Fifth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction / Concepción Escobar Hernández, Special Rapporteur' A/CN.4/701 (14 June 2016).

have a proper debate. The Commission therefore decided to allow those members who wished to express a view, to do so on the understanding that the debate will not be closed, that the Special Rapporteur would not respond to the debate and that no draft articles will be referred to the drafting committee. The debate will thus continue during the 69th session. For that reason, this contribution will not address that topic, though it remains an important one on the agenda of the Commission.

2 Topics on which complete texts have been adopted

2.1 *Protection of Persons in the Event of Disasters*

In 2014, during the 66th session, the Commission adopted a complete set of draft articles with commentaries on the topic of the protection of persons in the event of disasters.⁷ The set of draft articles was transmitted to states for their consideration. The purpose of the draft articles was, purportedly, the facilitation of ‘adequate and effective response to disasters that meets the essential needs of persons’ affected by disasters.⁸ The set of draft articles also emphasised that persons affected by disasters are entitled to ‘respect for their human rights’.⁹ The draft articles are purportedly based on the duty to co-operate. Draft article 8 thus provides that states and other entities ‘shall cooperate among themselves’ to protect persons affected by disasters. The set of draft articles then proceeds to provide for and describe different aspects of co-operation required to promote the protection of persons in the event of disasters.¹⁰ However, in addition to the co-operation-based approach, the draft articles also establish a rights-duty approach as between affected states and other states, that is duties between the affected states and third states. For example, draft article 13 provides that where the ‘disaster exceeds its national response capacity’ the affected state ‘has *the duty* to seek assistance’ from other actors (own emphasis), while draft article 14 provides that ‘consent to external assistance shall not be arbitrarily withheld’.

It may be recalled that when the Commission adopted the draft articles on the protection of persons in the event of disasters on its first reading

⁷ See ‘Text of the Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries’ in chap IV of the Report (note 5 above) (5 May–6 June and 7 July–8 August 2016).

⁸ *Id* draft art 1.

⁹ *Id* draft art 6. The draft articles also require the respect and protection of ‘the inherent dignity of’ affected persons (draft art 5).

¹⁰ *Id* draft arts 8, 9 and 10.

in 2014, I criticised the approach of the Commission.¹¹ In particular, in the review of the work of the Commission during its 66th session, I noted that the approach of establishing rights and duties between the affected state and other states and entities (hereafter simply referred to by the shorthand ‘horizontal rights-duty approach’) – which is not the same as a rights-duty approach between the affected states and its population – had no basis in the practice of states or general international law.¹² I further observed in that review that the commentaries misrepresented the content of the sources on which this horizontal rights-duty approach was derived.¹³ Lastly, I recalled that ‘states will have an opportunity to consider’ the draft articles and to make necessary comments and that, if the concerns pertaining to the rights-duty approach persist, the Commission ‘might well need to realign the draft articles’.¹⁴ Two years later states have submitted their comments and the Commission has considered those comments. The questions that arise are, first, whether states, in their comments, did in fact make observations regarding the consistency with international law of the Commission’s draft articles on the protection of persons in the event of disasters, and second, if so, whether the Commission took the opportunity to re-align the text.

As to the first question, unfortunately, only fourteen states provided comments to the Commission by the deadline.¹⁵ Two additional comments were received from the United States and Mexico subsequent to the deadline.¹⁶ My criticism concerning the consistency with international law of the Commission’s draft articles, was picked up by Australia in its comments. In what might at first glance appear to be an approval of the text, Australia expressed the hope that ‘[i]nsofar as [the draft articles] ... consolidate existing rules of international law’, they will ‘serve as a *guide* for states’.¹⁷ The phrase ‘insofar as’ suggests that in some respects the draft articles go beyond the current state of international law. It is also noteworthy that Australia did not call for the draft articles to be respected or complied with, but only expressed the hope that they will ‘guide’ state

¹¹ Tladi (2013) (note 4 above) 139.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Id.* 140.

¹⁵ Commission ‘Protection of Persons in the Event of Disasters: Comments and Observations Received from Governments and International Organizations’ A/CN.4/696 (14 March 2016). The states that commented were Australia, Austria, Cuba, the Czech Republic, Ecuador, Germany, the Netherlands, Qatar, Switzerland and Finland (the latter also on behalf of Denmark), Iceland, Norway and Sweden.

¹⁶ ‘Additional Comments and Observations Received from Governments’ A/CN.4/969/Add.1 (28 April 2016).

¹⁷ Comments and Observations (note 15 above) 5 (own emphasis).

behaviour, suggesting something less than a legal obligation. What is implied in this statement, is stated explicitly in the following paragraph, where Australia cautions that

[t]o the extent that the draft articles also seek to progressively develop the law relating to the protection of persons in the event of disasters, Australia would encourage further discussion as to whether the *proposed creation of new duties for States or the novel application of principles drawn from other areas* represent the most effective approach. Australia emphasises that...progressive development of the law in this field pursued too rapidly may raise an impediment to achieving...consensus.¹⁸

Australia continued to caution that there should be 'a careful balance struck between those elements of the draft articles which may encroach on the core international law principles of state sovereignty and non-intervention as against the likelihood that their implementation will result in tangible protection of human beings in times of disasters.'¹⁹

The United States was equally critical in its comments. It expressed its 'concern' that some of the draft articles 'appear to articulate new legal "rights" and "duties", or to represent inaccurately the existing obligations of states'.²⁰ In particular, the United States observed that the draft articles 'appear to represent attempts to develop the law progressively without specifically acknowledging this intention'.²¹

To be fair, the draft articles did receive some support from a number of states.²² However, even states that expressed support for the draft articles did not express the view that the content reflects the state of international law as it stands. The Czech Republic, which expressed support for the draft articles, observed that they 'struck a balance among the principles of non-intervention and sovereignty...humanitarian principles', without expressing any view concerning the legal basis of this balance or the consistency of the draft with international law.²³

It seems, therefore, safe to say that criticism persists. Indeed, that view seems to be recognised by the Special Rapporteur in his final report to the Commission.²⁴ Nevertheless, he, in essence, recommends that

¹⁸ Ibid (own emphasis).

¹⁹ Ibid.

²⁰ See Additional Comments and Observations (note 16 above) 21.

²¹ Ibid.

²² See, eg, Comments and Observations (note 15 above) 5–6 (the Czech Republic, Finland, Germany and the Netherlands).

²³ Ibid. See, also, the statements by Finland, Germany and the Netherlands (6).

²⁴ 'Eighth Report [of the Special Rapporteur, Valencia-Ospina] on the Protection of Persons in the Event of Disasters' A/CN.4/697 (17 March 2016) para 11: 'The United States and Israel expressed reservation regarding the resort to a

these criticisms be ignored when he states that he

[sees no need at the present late stage, when the Commission is about to embark upon the second reading process, to make a recommendation, based upon general comments and observations, on his approach to the topic, which after arduous discussion has been essentially adopted by the Commission and has received wide support by States.²⁵

As a result, the Commission adopted the same text as that adopted on the first reading, but with minor tweaks here and there.²⁶ For example, with respect to the duty to seek assistance, the word ‘manifestly’ is now inserted so that it is only where the ‘disaster manifestly exceeds’ the national response capacity of the affected state, that the ‘duty’ to seek assistance arises. It is true that many states support the current horizontal rights-duty inclination. However, it must be remembered that the standard by which the Commission ought to adopt its text is not the ‘most desirable’ or ‘best-policy’ option. Instead, the Commission should seek the law where it exists and progressively develop it where it does not. The presentation of policy preferences as law is neither codification nor progressive development. Whether the failure by the Commission to accurately reflect the state of law will harm the prospects of the draft articles, remains to be seen.

2.2 *Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*

The topic on subsequent agreements and subsequent practice in relation to treaty interpretation, is aimed at providing clarity on article 31(3)(a) and (b) of the 1969 Vienna Convention on the Law of Treaties.²⁷

rights-duty approach...Trinidad and Tobago supported a rights-duty approach, *but expressed the belief that such an approach could apply between the affected State and its population only* (own emphasis).

²⁵ Ibid.

²⁶ I did not participate in the adoption of the draft articles and commentaries, since the Commission was not willing to reconsider the overall rights-duty approach. See ‘Summary Records of the Meetings of the International Law Commission’ A/CN.4/SR.3332. The substantive comments were echoed by another member of the Commission, Mr Sean D Murphy, although he decided that he would participate in an attempt to bring the text more in line with international law.

²⁷ Art 31(3) of the 1969 Vienna Convention on the Law of Treaties provides as follows:

‘There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation’.

The Commission adopted a full set of draft conclusions on subsequent agreements and subsequent practice in relation to treaty interpretation during its 68th session.²⁸ It will be recalled that many of the draft conclusions, with their commentaries, had already been provisionally adopted by the Commission.²⁹ For that reason, the Commission only had three provisions — proposed by the Special Rapporteur in his report —³⁰ for consideration at the 68th session.

First, the Special Rapporteur proposed a draft conclusion providing that the pronouncement of expert bodies — defined as ‘bod[ies] consisting of experts serving in their individual capacity’ and ‘established under a treaty’ — constituted subsequent practice.³¹ Second, the Special Rapporteur further proposed a provision regarding decisions of national courts.³² Third, he proposed an addition to a previously adopted draft conclusion 4, which would add ‘official conduct in the application of the treaty, after its conclusion’ as constituting ‘other subsequent practice’ as a supplementary means of interpretation under article 32 of the Vienna Convention.

With respect to pronouncements of expert bodies, the proposal provided that ‘subsequent agreements and subsequent practice’, as defined, ‘may arise from, or be reflected in, pronouncements of’ expert bodies.³³ The text proposed by the Special Rapporteur further provided that pronouncements of expert bodies ‘may contribute to the interpretation of [a treaty under its mandate] when applying articles 31, paragraph 1 and 32’ of the Vienna Convention.³⁴ This proposed text, which is not as clear as it could be, was intended to convey that expert-body pronouncements may contribute to the ordinary meaning of the words of a treaty, in their context and in light of the object and purpose of the treaty which are the elements of treaty interpretation found in Article 31(1) of the Vienna Convention. With respect to decisions of domestic courts, the proposal of the Special Rapporteur advanced a number of propositions. First, the draft proposed by him intimated that decisions

²⁸ See the text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (Report (note 5 above) A/71/10 (GA OR 71st Session Suppl No 10) 120 (chap VI).)

²⁹ For earlier reviews of the work of the Commission on this topic, see Tladi (2013) (note 4 above) 131–133; and Tladi (2015) (note 4 above) 218–219.

³⁰ ‘Fourth Report of the Special Rapporteur, Georg Nolte on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties’ A/CN.4/694 (7 March 2016).

³¹ *Id* Annex 47 regarding the proposed draft conclusion 12.

³² *Ibid* regarding the proposed draft conclusion 13.

³³ *Ibid* regarding the proposed draft conclusion 12(2).

³⁴ *Ibid* regarding the proposed draft conclusion 12(3).

of domestic courts 'in the application of a treaty may constitute relevant subsequent practice' for the purpose of interpretation.³⁵ Second, the proposed text proceeded to direct domestic courts on what to do when interpreting a treaty.³⁶ These directions to domestic courts included that domestic courts should consider the following:

- that subsequent agreements and practice 'are not binding as such';
- that such subsequent agreement and practice may support a narrow or wide interpretation;
- that domestic courts should make a clear distinction between subsequent practice that does not have the agreement of the parties, but that may nonetheless be used as a subsidiary means of interpretation on the one hand and, on the other hand, subsequent agreement and practice under article 31(3) requiring agreement of the parties; and
- that domestic courts should carefully seek to identify whether subsequent practice establishes the agreement of the parties regarding its interpretation.

With regard to the definition of subsequent practice and the proposed addition to the draft conclusion, the Commission did not object to the idea behind the text, but found that the drafting could be improved. Eventually, the Commission decided to add a paragraph to the effect that 'other' subsequent practice, 'as supplementary means of interpretation under article 32' consisted of 'conduct by one or more parties in the application of the treaty'.³⁷ The text seeks to emphasise that while subsequent practice under article 31(3) of the Vienna Convention must establish the agreement of (all) the parties, practice that does not establish such agreement may still be relevant, but then only as a supplementary means of interpretation.

With respect to the pronouncement of expert treaty bodies, the Commission sought to clarify and simplify the text. It sought, first, to add context by making provision for a number of principles that were not, as such, relevant for subsequent practice.³⁸ Secondly, the Commission sought to simplify the language regarding subsequent practice. The

³⁵ Ibid regarding the proposed draft conclusion 13(1).

³⁶ Ibid regarding the proposed draft conclusion 13(2).

³⁷ Draft conclusion 4(3) of the draft conclusions on subsequent agreements and subsequent practice (note 28 above).

³⁸ Ibid. Draft conclusion 12(1) provided a definition for an 'expert treaty body'; draft conclusion 13(2) determined that the relevance of a pronouncement depends on the treaty establishing such a body; and draft conclusion 13(4) recognised that, beyond effects as subsequent agreement or subsequent practice, pronouncements of expert treaty bodies may have other effects.

provision was therefore redrafted to suggest that a pronouncement by an expert body 'may give rise to, or refer to, a subsequent agreement or subsequent practice under article 31(3), or other subsequent practice under article 32' of the Vienna Convention.³⁹ The essence of this provision is to recognise that a pronouncement by an expert treaty body may, after the pronouncement, generate ('give rise to') a subsequent practice or agreement or may be based on ('refer to') a subsequent practice or agreement that existed prior to the pronouncement. The important point, however, is that, for the purposes of the interpretation, it is the subsequent agreement or practice of states that is relevant.⁴⁰

With respect to the directions to domestic courts, the Commission did not agree with the Special Rapporteur on the necessity for such a provision. The provision is in many respects awkward, because, while the content is correct, it is unclear why those directions should be directed at domestic courts only. Surely, to the extent that the provision summarised the relevance and application of subsequent agreement and subsequent practice, those directions ought to apply to an interpreter, whether a government official interpreting a treaty, an academic writing an article, a domestic court or, for that matter, an international court or tribunal. In the end, the Commission opted not to include any text in this regard.

Now that a complete set of draft conclusions has been adopted on first reading, states will have a full year to study it and to provide written inputs, which the Commission will then (hopefully) take into account in finalising the draft conclusions.

2.3 *The Identification of Customary International Law*

The identification of customary international law was handled differently from other topics. Whereas, normally, the Commission would adopt draft texts with commentaries in each session, in the case of the identification of customary international law, the Commission only took note of the draft conclusions adopted by the drafting committee. This is mainly because there were no commentaries accompanying the draft conclusions. As a result, there was a full set of draft conclusions that had been adopted by the drafting committee, but not by the Commission during its 67th session. For this reason, the fourth report of the Special Rapporteur did not propose any draft conclusions.⁴¹ The report did, however, propose an amendment to some provisions that had previously been agreed to. In particular, the Special Rapporteur proposed that

³⁹ Ibid draft conclusion 13(3).

⁴⁰ Ibid para 9 of the commentary on draft conclusion 13.

⁴¹ 'Fourth Report of the Special Rapporteur, Michael Wood on Identification of Customary International Law' A/CN.4/695 (8 March 2016).

'conduct in connection with resolutions' should be deleted from draft conclusion 6 (regarding forms of practice).⁴² However, the Commission declined to accept this proposal for fear that this would downplay the important role of resolutions in the making and identification of customary international law. The main focus of the Commission during the 68th session was, therefore, on the adoption of a set of commentaries prepared by the Special Rapporteur to accompany the draft conclusions.

On the whole, the process of adopting the commentaries on the draft conclusions was relatively uncontroversial, mainly because the Special Rapporteur, before formally submitting the commentaries for scrutiny, had informally circulated the draft commentaries to several members eliciting their comments, and had then requested informal consultations. As a result, many of the substantive issues had been ironed out before the formal process of adopting the commentaries took place. Nonetheless, a few substantive issues, some of which had been the subject of controversy when the draft conclusions themselves were being considered, remained. For example, it may be recalled that in his second report, the Special Rapporteur had proposed, concerning the requirements for practice, that 'due regard is to be given to the practice of states whose interests are specially affected'.⁴³ The Commission, however, declined to include such a provision in the draft conclusions. The Special Rapporteur proposed to insert similar language in the commentary to the draft conclusions. In the end, after some consultation, the Commission settled on the following formulation:

In assessing generality [of practice], an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely will be concerned with the alleged rule have participated in the practice.⁴⁴

The draft conclusions on the identification of customary international law, together with their commentary, have now been adopted by the Commission on its first reading and are awaiting comments by states.

3 *Jus Cogens*

The topic of *jus cogens* was included in the programme of work during the 67th session of the Commission with the current author appointed

⁴² Id Annex.

⁴³ Tladi (2013) (note 4 above) 129.

⁴⁴ See para 4 of the commentary to draft conclusion 9 of the draft conclusions on the 'Identification of Customary International Law' (chap V) of the Report (note 5 above).

as Special Rapporteur.⁴⁵ The Commission considered this topic for the first time during its 68th session and on the basis of the first report by the Special Rapporteur.⁴⁶

The first report of the Special Rapporteur addressed mainly conceptual issues, such as the nature and definition of *jus cogens*. It also sought to trace the historical evolution of *jus cogens*. Finally, the report raised a number of methodological issues. It is useful to begin with the latter.

The first methodological question concerned whether the topic would (or should) provide an illustrative list of norms. The syllabus adopted by the Commission on the topic included, as a third element of issues to be studied, the provision of an illustrative list.⁴⁷ Nevertheless, several states, including South Africa, when commenting on the decision by the Commission to include the topic on its agenda, expressed concern that an illustrative list, no matter how carefully crafted, would eventually come to be seen as a *numerus clausus* and impede the development of the law in this area.⁴⁸ Other states, however, expressed support for the inclusion of an illustrative list. The first report of the Special Rapporteur itself, while remaining non-committal, observed that the provision of an illustrative list may have the effect of ‘blurring the fundamentally process-oriented nature of the topic by shifting focus towards the legal status of particular norms’.⁴⁹ Against this background, the report invited the Commission to debate the question whether the Commission should aim to provide an illustrative list. Members of the Commission were divided on the question of the provision of such a list.⁵⁰ It is anticipated that the Special Rapporteur will revert to the issue in future reports.

Other methodological questions addressed in the report concerned the relative weight to be accorded to different materials on *jus cogens*. During the debate there was general agreement that the work of the Commission ought to be based on the normal mixture of practice, in the form of state practice, decisions of international courts and tribunals, as well as literature. A question that arose in the debate was whether the topic should be limited to treaty law or whether it should also include

⁴⁵ ‘Report of the International Law Commission on the Work of its 67th Session’ A/70/10 (4 May–5 June and 6 July–7 August 2015) GA OR Suppl No 10 para 286.

⁴⁶ ‘First Report on *Jus Cogens* by Dire Tladi, Special Rapporteur’ A/CN.4/693 (8 March 2016).

⁴⁷ For the proposal by D D Tladi, see ‘*Jus Cogens*’ Annex to the ‘Report of the International Law Commission Sixty-sixth Session’ A/69/10 (5 May–6 June and 7 July–8 August 2014) GA OR Suppl No 10 274–282.

⁴⁸ Id para 9.

⁴⁹ Id para 16.

⁵⁰ Report (note 5 above) para 116.

other areas of international law. While some members felt that the Commission's consideration of the topic should be limited to treaty law, the general view was that the Commission should seek to address all aspects of the topic of *jus cogens*.

In addition to these methodological issues, substantive issues were also raised during the debate. One substantive issue concerned the title of the topic. Some members of the Commission questioned the very name of the topic.⁵¹ It was pointed out that *jus cogens* norms also exist in domestic law and that, as currently formulated, the topic may be seen to include *jus cogens* in domestic law. It was agreed that the Special Rapporteur would, in his next report, propose a new name for the topic.

The first report proposed three draft conclusions. The first proposed draft conclusion was on the scope of *jus cogens*.⁵² The second proposed draft conclusion consisted of two paragraphs. The first paragraph sought to express the idea that rules of international law are generally not *jus cogens*, but rather *jus dispositivum* and could, therefore, generally, 'be modified, derogated from or abrogated by agreement of states'. The second paragraph of the second proposed draft conclusion set out that the *jus cogens* rules were an exception to this general rule and could, therefore, 'only be modified, derogated from or abrogated by rules having the same character'. The third proposed draft conclusion described the general nature of *jus cogens*. It generated the most debate and for that reason is reproduced in full here:

1. Peremptory norms of international law (*jus cogens*) are those norms of general international law accepted and recognised by the international law community of States as a whole from which no modification, derogation or abrogation is permitted.
2. Norms of *jus cogens* protect the fundamental values of the international law community, are hierarchically superior to other norms of international law and are universally applicable.

The content of the first proposed draft conclusion was generally accepted, with the discussion within the Commission focussing mainly on the drafting. In contrast, members of the Commission generally rejected the contents of the second proposed draft conclusion. Some suggested that it went beyond the scope of the topic. In the light of the sustained

⁵¹ See Candiotti 'Summary Record of the Meetings of the International Law Commission' A/CN.4/SR.3317 (8 July 2016) 10 ff.

⁵² 'First Report on *Jus Cogens*', (note 46 above) para 74. The first draft conclusion proposed by the Special Rapporteur provided as follows: 'The present draft conclusions concern the way in which *jus cogens* rules are to be identified and the legal consequences flowing from them'.

criticism, the Special Rapporteur decided not to request its referral to the drafting committee.⁵³

As already mentioned, the third proposed draft conclusion attracted the most attention. The first paragraph of this draft conclusion raised mainly drafting issues, with many members of the Commission suggesting that the Commission ought to use language consistent with the Vienna Convention. The views on the second paragraph were divided. While the majority of the members supported the content of paragraph 2 of draft conclusion 3, several members of the Commission expressed criticism of its content, suggesting that the elements were not supported by practice. Without repeating the details of that debate, it is worth pointing out here that the report provided relevant examples of practice supporting the three elements.⁵⁴ Moreover, the Commission itself had elsewhere recognised the universal application and hierarchical superiority of *jus cogens*.⁵⁵ While those members of the Commission that rejected the contents of paragraph 2 of draft conclusion 3 proposed by the Special Rapporteur also objected to the transmission of the draft conclusions to

⁵³ However, the second draft conclusion received some support. See Caflich 'Summary Record of the Meetings of the Commission' A/CN.4/SR.3314 (8 July 2016) 9 ff.

⁵⁴ See 'First Report on *Jus Cogens*' (note 46 above) paras 67–71. For example, the element of universal application is supported by the following authorities: *Military and Paramilitary Activities Case in and Against Nicaragua (Nicaragua v US)* 1986 ICJ Reports 14 para 190; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion of 28 May 1951) 1951 ICJ Reports 15 23; the separate opinion of Judge Moreno Quintana in *Application of 1902 Governing Guardianship of Infants (Netherlands v Sweden)* (Judgement of 28 November 1958) 1958 ICJ Reports 55 106; the separate opinion of Judge Cançado Trindade in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgement of 20 July 2012) 2012 ICJ Reports 422 para 102; and *Prosecutor v Jelisić* IT-95-10-T (ICTY, 14 December 1999) para 60. The element of hierarchical superiority was similarly well supported in *Prosecutor v Furundžija* IT-95-17/1 (ICTY, 10 December 1998); *Siderman de Blake v Republic of Argentina* 965 F 2d 699 (9th Cir 1992) 715; statement by Sweeney (United States) 'Official Records of the United Nations Conference on the Law of Treaties' A/Conf.39/11 (First Session, Vienna, 26 March–26 May 1968) Summary Records of the Plenary and of the Meetings of the Committee of the Whole, Fifty Second Meeting para 16; Sinclair (United Kingdom) in id Fifty-Third Meeting para 58. These same authorities also support the idea that norms of *jus cogens* protect or reflect the fundamental interests of the international community.

⁵⁵ See conclusions 6 and 55–56 of 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, adopted by the Commission at its 58th session in 2006' *Yearbook of the International Law Commission* (2006) II(2) para 253.

the drafting committee, the Commission decided to transmit the first and third draft conclusions to the drafting committee.

The drafting committee has since adopted the first proposed draft conclusion on scope.⁵⁶ With regard to the third proposed draft conclusion, the drafting committee first renumbered it as draft conclusion 2, since the second proposed draft conclusion was not referred to the drafting committee. The first paragraph, of what is now the second draft conclusion, was also reformulated by the drafting committee to track the contents of the second sentence of article 53 of the Vienna Convention.⁵⁷ The paragraph therefore provides a definition of *jus cogens*. The contents of what was paragraph 2 of the third proposed draft conclusion 3, remain under discussion in the drafting committee. However, several members of the drafting committee emphasised that the reformulation of paragraph 1 of the new second draft conclusion 'was acceptable...on the understanding that the content of paragraph 2 [of what used to be the third proposed draft conclusion] would appear in the Draft Conclusions, in some form.'⁵⁸ As with the customary-international-law project, the Special Rapporteur has elected not to present any commentaries until the full set of draft conclusions is available.

4 Other Topics

4.1 *Crimes against Humanity*

During the 67th session, the Commission adopted four draft articles regarding crimes against humanity. The first article was the provision concerning scope. Draft article 3 defined crimes against humanity by incorporating the definition in the 1998 Rome Statute of the International Criminal Court.⁵⁹ Draft article 2 set forth a general obligation 'to prevent and punish' crimes against humanity which, it proclaimed, were 'crimes under international law'. It is worth noting that while there was a positive proclamation that crimes against humanity were crimes under

⁵⁶ Id draft conclusion 1 (regarding scope) adopted by the drafting committee reads as follows: 'The Present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*)'.

⁵⁷ Id Para 1 of the second draft conclusion adopted by the drafting committee reads as follows: 'A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

⁵⁸ See the statement of the chairman of the drafting committee on *jus cogens* (9 August 2016) available at http://legal.un.org/ilc/documentation/english/statements/2016_dc_chairman_statement_jc.pdf (accessed 10 August 2017).

⁵⁹ See art 7 of the 1998 Rome Statute of the International Criminal Court.

international law, the duty to prevent and punish is formulated in a way that suggests a contractual or treaty-based duty — in other words, it is not an obligation under general international law, but would become an obligation for member states if the draft articles ever became a treaty. Draft article 2 provides that '[s]tates *undertake* to prevent and punish' (own emphasis). Draft article 4 then goes into detail on the first half of the obligation set out in draft article 2, namely the obligation to prevent crimes against humanity.

During the 68th session, the Commission continued to make progress on the elaboration of, what the Commission hopes, will become a convention on crimes against humanity. The Commission focused on the second half of the general obligation contained in draft article 2, namely the obligation to punish. The Commission adopted ten draft articles, all intended to facilitate the punishment of offenders committing crimes against humanity.⁶⁰

Draft article 5 provides for the criminalisation of crimes against humanity under national law. It builds on the recognition that such crimes are crimes under international law, but requires states to criminalise these also under national law. The article requires states to not only criminalise the commission of the crime, but also any attempt to commit crimes against humanity as well as the 'ordering, soliciting, inducing, aiding, abetting, or otherwise assisting in' the commission of crimes against humanity.⁶¹ The draft articles adopted by the Commission further require the establishment of national jurisdiction over crimes against humanity when the offence is committed on its territory, when the offender is a national or when the victims are nationals.⁶²

Although the draft articles do not require a state to establish (or exercise) universal jurisdiction, its provisions may permit the exercise of the latter.⁶³ The draft articles further provide for the establishment of an investigative capacity,⁶⁴ as well as the steps that must be followed where an alleged offender is found on a state's territory.⁶⁵ Importantly, the draft articles provide for the obligation to extradite or prosecute (*aut dedere aut judicare*).⁶⁶

⁶⁰ Text of the Draft Articles on Crimes against Humanity in Report (note 5 above) chap VII.

⁶¹ Id draft art 5(2).

⁶² Id draft art 6(1).

⁶³ Id draft art 6(3), which provides that the draft articles 'do not exclude the exercise of any criminal jurisdiction established by the State in accordance with its national law'.

⁶⁴ Id draft art 7.

⁶⁵ Id draft art 8.

⁶⁶ Id draft art 9.

It is important to emphasise that the purpose of the Commission's work on crimes against humanity is not to codify existing international law. This is clear from the choice of words used to describe the obligations. These are 'contractual' obligations, suggesting that whatever obligations are provided for, would apply as a matter of treaty law. Thus, article 5 provides that states 'shall take the necessary measures to ensure that crimes against humanity constitute offences under its national law'. This same choice of words is used for other provisions.⁶⁷ The draft articles thus present 'progressive development' and the particular provisions adopted by the Commission are not intended to reflect existing obligations under international law except where this is clear from the drafting.

4.2 *The Protection of the Atmosphere*

After a slow and uncertain start, the work of the Commission on the topic of the protection of the atmosphere is also steadily progressing. After its inclusion in its agenda in 2013,⁶⁸ the Commission has considered three reports of the Special Rapporteur. During the 67th session, the Commission adopted draft guideline 1, containing definitions (or use of terms) and draft guideline 2, outlining the scope of the guidelines. During the 68th session, the Commission adopted six draft guidelines plus a preambular paragraph.⁶⁹

It will be recalled that draft guideline 2, regarding the scope of the topic, incorporated the 'understanding' on the basis of which the topic was included on the agenda of the Commission, namely that the topic 'will not deal with', but is 'without prejudice to questions concerning the polluter-pays principle, the precautionary principle, the common but differentiated-responsibilities principle, the liability of States...and the transfer of funds and technology to developing countries'. While this condition has served to restrict the ability of the Commission to provide a comprehensive account of the rules and principles of international law relating to the protection of the atmosphere, the Commission has, on the basis of the reports of the Special Rapporteur, been able to adopt some useful provisions, despite these having been drafted in hortatory terms. For example, draft guideline 6, adopted by the Commission, provides that the 'atmosphere should be utilized in an equitable and

⁶⁷ Id draft art 4, which provides that ('[s]tates undertake to prevent crimes'); draft art 5 ('[e]ach state shall take the necessary measures...'); and draft art 6 ('[e]ach State shall take the necessary measures to establish jurisdiction...').

⁶⁸ The particular difficulties of its inclusion are described in Tladi (2015) (note 4 above) 219–220.

⁶⁹ For the text of the draft guidelines on the protection of the atmosphere, see Report (note 5 above) chap VIII.

reasonable manner taking into account the interests of present and future generations'. The Special Rapporteur himself described the notion of equity in legal terms by referring to the 'principles of equity'.⁷⁰ The Commission was, however, able to adopt a preamble that recognised 'the special situation and needs of developing countries'.

The Special Rapporteur had proposed draft guideline 5 regarding sustainable utilisation. This proposal was adopted with some amendments to the language with a view to removing any suggestion of normativity in the language. Paragraph 2 of draft guideline 5, for example, states that '[s]ustainable utilisation of the atmosphere includes the need to reconcile economic development with the protection of the atmosphere'. As proposed by the Special Rapporteur, paragraph 2 of the guideline implicated international law by stating that 'it is required under international law to ensure a proper balance'.⁷¹ The important provision on environmental impact assessment proposed by the Special Rapporteur was similarly whittled down to the bare minimum. In his proposed draft guideline 4, the Special Rapporteur had proposed that '[s]tates have the obligation to take all measures that are necessary to ensure an appropriate environmental impact assessment' and linked this obligation with the objective of preventing, reducing and controlling 'the causes and impacts of atmospheric pollution'.⁷² Moreover, the proposal went on to further stipulate process-related criteria for the impact assessment, namely that the latter should 'be conducted in a transparent manner, with broad public participation'.⁷³ Draft guideline 5, adopted by the Commission, strips the text of the qualitative criteria by, for example, omitting the reference to taking 'all measures that are necessary' and the requirement for an 'appropriate' impact assessment. The text adopted by the Commission also excludes the requirement for public participation and transparency. The text, as adopted by the Commission, simply provides that '[s]tates have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control'.⁷⁴ In addition, the Commission's text introduces a threshold that is not present in the text proposed by the Special Rapporteur, namely that only those activities that 'are likely to cause significant adverse impact on the atmosphere' are to be made subject to an environmental impact assessment. In truth, the Commission's

⁷⁰ See draft guideline 8 as proposed by the Special Rapporteur, Shinya Murase: 'Third Report on the Protection of the Atmosphere' A/CN.4/692 (25 February 2016).

⁷¹ *Id.* para 2 of draft guideline 5.

⁷² *Id.* draft guideline 4.

⁷³ *Ibid.*

⁷⁴ Draft guideline 5 (note 69 above).

choices are probably consistent with the restricted approach to the obligation to conduct an environmental impact assessment for activities with potential transboundary impacts advocated by the International Court of Justice in the *Pulp Mills* case.⁷⁵ In that case, the ICJ concluded that the duty to conduct environmental impact assessment for planned activities with the potential to cause transboundary harm, is part of the general corpus of international law.⁷⁶ Nonetheless, it should be recalled that the Commission is, in this instance, producing guidelines and not purporting to codify existing international law. The Commission should, therefore, be expected to venture a bit further than the law requires in order to encourage the development of law in a particular direction.

5 Other Decisions

In addition to substantive work on the topics on its agenda, the Commission also adopted some other important decisions. Among others, the Commission decided to include two topics on its long-term programme work.⁷⁷ The first of these topics is the settlement of international disputes to which international organisations are party to; this was included on the basis of a proposal prepared by Wood.⁷⁸ The second topic, proposed by Sturma, concerns the succession of states regarding state responsibility.⁷⁹ Discussion and debate on the first proposal occurred already during the previous quinquennium (2007–2011). The proposal by Sturma was first introduced in 2014 to the Working Group on the Long-term Programme of Work. It remains to be seen whether the Commission will place the two topics on its agenda. Other topics that remain on the long-term programme include: ownership and protection of wrecks beyond the limits of national maritime jurisdiction, jurisdictional immunity of international organisations, protection of personal data and in the trans-border flow of information, extra-territorial jurisdiction, as well as the fair-and-equitable-treatment standard in international investment law.

The year 2018 will mark the 70th anniversary of the International Law Commission and the Commission wishes to commemorate the occasion.

⁷⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ Reports 14 para 204.

⁷⁶ Ibid. See, also, D Tladi 'The Principles of Sustainable Development in the Case Concerning *Pulp Mills on the River Uruguay*' in MC Cordonier Segger & CG Weeramantry (eds) *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992–2012* (2017) chap 8.

⁷⁷ Topics on the long-term programme are not on the active agenda of the Commission, but may be included on the agenda in the future.

⁷⁸ See Annex to the Report (note 5 above).

⁷⁹ Ibid.

For this purpose the Commission recommended to the General Assembly that the commemoration be held in two parts, namely the first part during the first half of its session in New York in 2018,⁸⁰ and the second part during its second half of the session in Geneva.

6 Conclusion

The year 2016 marked the end of the 2012–2016 quinquennium of the Commission. A number of members left the Commission. The year 2016 also marked the completion of a topic that the Commission had been engaged in since 2007, namely the protection of persons in the event of disasters. It further marked the first step towards the completion of two source-based topics, namely the identification of customary international law and the subsequent agreements and subsequent practice in relation to treaty interpretation. In a sense, these two topics reflect the place that the Commission finds itself at. They are, at once, reflective of both the old and the new: of the old, in that they tackle classical topics that the Commission was, in its heyday, most synonymous with — pure public international law and the sources of international law; and new, because they show the willingness of the Commission to embrace new ways of doing things by introducing ‘draft conclusions’ as a novel product of the Commission.

This quinquennium also reveals the transitional place that international law finds itself in from a substantive perspective. The debates within the Commission on immunity and the role of non-state actors reveal a tension between the old and the new. This transitional period is an exciting one for any international lawyer and should be embraced. It is, however, also a cause for caution. The Commission could do too much, and risk destabilising international law. It could also do too little, and act as a barrier to the progressive development of international law.

In 2017 a new set of Commission members is set to take their seats around the table in Geneva with the intent of contributing to a better world, underpinned by the rule of law and respect for international law. As an institution, the Commission will no doubt continue with its important, if sometimes imperfect, work as it attempts to encourage the progressive development and codification of international law.

⁸⁰ While the sessions of the Commission are usually held in Geneva, the Commission has been debating for some time whether a session (or half a session) ought to be held in New York. It was recently decided that the first half of the 2018 session will be held in New York.