

# Progressive development and codification of international law: The work of the International Law Commission during its sixty-sixth session

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## **1 Introduction**

The International Law Commission (the Commission) finds itself at somewhat of a crossroad. It was established to promote and facilitate the progressive development and codification of international law.<sup>1</sup> The Commission has, however, already codified the main areas of international law during what many have referred to as its golden years.<sup>2</sup> Moreover, many organisations are now taking on the role of law-making in their own specialised fields, eg the International Maritime Organisation is adopting its own treaties<sup>3</sup> and even the

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<sup>1</sup> Article 13(1)(a) of the Charter of the United Nations bestows the responsibility for the codification and progressive development of international law on the General Assembly. By Resolution 174 (II) of 21 November 1947, the General Assembly established the International Law Commission to fulfil this function. See article 1 of the Statute of the International Law Commission.

<sup>2</sup> See, eg the statement by M de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to the International Law Commission, 14 May 2014. See also SM Williams 'Book review: *The International Law Commission, 1949-1998* by Sir Arthur Watts' (2002) 51 *International and Comparative Law Quarterly* 475 at 476.

<sup>3</sup> The list of conventions adopted by the International Maritime Organisation (IMO) include the 1974 International Convention for the Safety of Life at Sea, the 1973 International Convention for the Prevention of Pollution from Ships, and the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. For a comprehensive list of all IMO conventions see <http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx> (accessed 20 November 2014). Other organisations that routinely conclude their own conventions include the International Civil Aviation Authority and the United Nations Education, Scientific and Cultural Organisation.

General Assembly often engages in its own treaty-making processes.<sup>4</sup>

For international law and international lawyers, however, the Commission remains the principal body responsible for the codification and progressive development of international law. Its work remains highly influential. In this post-golden-years era in which the Commission has to share the law-making functions with other bodies, it has had to address specialist topics that are not typical, pure, public international law topics for which the Commission was principally established.<sup>5</sup> The work of the Commission at its sixty-sixth session shows a fine balance between general public international law topics and more specialist topics. The Commission's current agenda includes, for example, specialist topics such as the protection of the atmosphere; the protection of the environment in relation to armed conflict; the protection of persons in the event of disasters; and the most favoured nation clause. The agenda also contains pure, classical international law topics such as the identification of customary international law; subsequent agreements and subsequent practice in relation to the interpretation of treaties; the provisional application of treaties; *aut dedere aut judicare* (extradite or prosecute); and immunity of state officials from foreign criminal jurisdiction.

The purpose of this contribution is to provide an assessment of the work of the Commission at its sixty-sixth session. As is clear from the above, the Commission's agenda is very full. Not all agenda items can, consequently, be considered in equal depth. I have therefore selected the topics on which the Commission made the most significant decisions – it is, after all, not the importance of the topic but the significance of the decision by the Commission that determines the relevance of a particular topic for present purposes. With this in mind, I consider the work of the Commission on the identification of customary international law, on subsequent agreements and subsequent practice in relation to the interpretation of treaties, on the immunity of officials from foreign criminal jurisdiction, on the protection of persons in the event of disasters, and on the expulsion of aliens. I also touch on new topics considered by the Commission.

## **2 The identification of customary international law**

The Commission inscribed the identification of customary international law at its sixty-fourth session in 2012. During the current session, the Commission had before it the second report of the Special Rapporteur, Michael Wood, with

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<sup>4</sup>The most recent example of the General Assembly adopting a convention is the Arms Trade Treaty, adopted on 2 April 2013.

<sup>5</sup>Article 1(2) of the Statute of the International Law Commission states that the Commission 'shall concern itself primarily with public international law, but is not precluded from entering the field of private international law'.

several proposals for draft conclusions. Although the Commission did not adopt any of the draft articles,<sup>6</sup> the Drafting Committee on the topic did adopt a number of conclusions which indicate the general approach of the Commission to the topic.

In his second report, Wood proposed eleven draft conclusions, most of which were well supported by practice and jurisprudence.<sup>7</sup> Of the eleven, Draft Conclusion 3 which sets out the basic approach to the identification – and indeed the formation – of customary international law, is perhaps the most significant. Other important conclusions proposed by the Special Rapporteur concerned: the actors who contribute to practice (Draft Conclusion 5); the role of inaction in the formation of customary international law (Draft Conclusion 7); and the requirement that practice must be general and consistent (Draft Conclusion 9). Although the Special Rapporteur also proposed draft conclusions on the element of *opinio juris*, the Drafting Committee was not able to consider these. The Drafting Committee debated the content of the proposals and adopted slightly revised draft conclusions.

With respect to the basic approach, the Special Rapporteur proposed that to determine whether there is a rule – and the content of that rule – ‘it is necessary to ascertain whether there is a general practice accepted as law’.<sup>8</sup> The general proposition that the formation and identification of customary international law rests on two requirements, namely practice which is accepted as law, was generally accepted by the members of the Commission. This proposition, of course, is one that is supported by the jurisprudence of the International Court of Justice (the ICJ)<sup>9</sup> – at least by rhetoric if not by actual judicial practice. While the Commission generally accepted the two-element approach advanced by the Special Rapporteur, some members suggested that there were certain nuances in the application of the two-element approach which would need to be accounted for in the commentary to the draft

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<sup>6</sup>The Commission will only adopt text if it is accompanied by commentaries. Because the Drafting Committee was not able to complete the drafting in time, the Special Rapporteur was not able to prepare draft commentaries with the result that the Commission itself could not adopt the text.

<sup>7</sup>Second Report on the Identification of Customary International Law by the Special Rapporteur on the topic Identification of Customary International Law, 22 May 2014 (A/CN.4/672).

<sup>8</sup>Draft Conclusion 3 proposed by the Special Rapporteur in the Second Report of the Special Rapporteur on the Identification of Customary International Law n 7 above.

<sup>9</sup>See, eg *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands)* ICJ (20 February 1969) ICJ Reports 3 par 77; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (merits) ICJ (27 June 1986) ICJ Reports 14 par 183; *Asylum case (Colombia v Peru)* ICJ (20 November 1950) ICJ Reports 266 at 277; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* ICJ (3 February 2012) ICJ Reports 99 par 55.

conclusion.<sup>10</sup> Some members of the Drafting Committee expressed the view that the draft proposed by Wood did not sufficiently draw the distinction between the constituent elements. The solution in the Drafting Committee was simply to add ‘that is’ between the first and second elements so that the text reads ‘general practice that is accepted as law’. The third area of discussion with respect to Draft Conclusion 3 involved Wood’s decision to rely on the language of the Statute of the ICJ, ie ‘accepted as law’, rather than the Latin phrase accepted in the doctrine, namely *opinio juris*. In the end, the simple solution was to include the Latin phrase in brackets. In the text adopted by the Drafting Committee, Draft Conclusion 2,<sup>11</sup> the Commission decided that in order to determine the existence of a rule of customary international law (including its content) ‘it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)’.<sup>12</sup>

Proposed Draft Conclusion 5, stated that as an element of customary international law, general practice ‘means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law’. The most contentious issues, both in the plenary debate and in the Drafting Committee, concerned the actors whose practice is material to the establishment of customary international law. There was general agreement that the text could be drafted with much further clarification. However, there were fundamental differences in the Commission about the substance of any such clarification.<sup>13</sup> At one end of the spectrum, certain members argued that the text of the draft conclusion should make it clear that only states could contribute to the development of customary international law. At the other end of the spectrum, a few members suggested that other actors, including intergovernmental organisations and civil society, should be recognised as producing practice capable of contributing to the formation of customary international law. Occupying a somewhat intermediate position, were some members of the Commission in whose view it is primarily the practice of states that is relevant, together with, in certain instances, the practice of intergovernmental organisations.

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<sup>10</sup>See, eg, the summary of the debate by the Special Rapporteur, International Law Commission Provisional Summary of the 3227th meeting, 18 July 2014 (A/CN.4/SR.3227) 5.

<sup>11</sup>The numbering of draft conclusions adopted by the Drafting Committee differ from the numbering of the draft conclusions proposed by the Special Rapporteur.

<sup>12</sup>See Draft Conclusion 2 adopted by the Drafting Committee on the Topic Identification of Customary International Law, Annex to the Statement of the Chairman of the Drafting Committee, 7 August 2014.

<sup>13</sup>See Report of the International Law Commission on the Work of Its Sixty-Sixth Session (5 May to 6 June and 7 July to 8 August 2014), GA 66th Session Supplement No 10 (A/69/10) Chapter X, par 159.

This debate, particularly as it relates to civil society, is probably indicative of the ambiguity in the current state of international law. While international law is traditionally state-centred, there has been a widely discussed shift away from a purely state-centred system.<sup>14</sup> With respect to intergovernmental organisations, the debate focused on the practice of intergovernmental organisations themselves, rather than the practice of the state operating through intergovernmental organisations. The latter type of practice in fact constitutes the practice of states, while the former includes, for example, the practice of the UN Secretary-General in his capacity as depository for many multilateral conventions. The Drafting Committee decided to retain the notion that it is ‘primarily the practice of States that contributes to the formation’ of the rules of customary international law.<sup>15</sup> What is intended by ‘primarily’ is to be addressed in the commentary to the draft conclusion. However, the text agreed upon also suggests that it is ‘primarily’ the practice of states which is relevant to the formation of customary international law, with the practice of intergovernmental organisations potentially also making some contribution. The implication, therefore, is that the practice of civil society does not, in itself, contribute to the formation of customary international law.<sup>16</sup> To this end the second paragraph of Draft Conclusion 4 states that ‘[i]n certain cases, the practice of international organisations also contributes to the formation of customary international law’.<sup>17</sup> It is anticipated that in his third report, the Special Rapporteur will provide further information on the role of intergovernmental organisations in the formation of customary international law.<sup>18</sup>

In his report, Wood proposed that practice may take various forms, and

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<sup>14</sup>See on the shift away from a purely state-centred international law J Dugard ‘The future of international law: A human rights perspective – with some comments on the Leiden School of International Law’ (2007) 20 *Leiden Journal of International Law* 729; E Jouannete ‘Universalism and imperialism: The true-false paradox of international law’ (2007) 18 *European Journal of International Law* 379. See especially on the role of non-state actors T Marauhn ‘The changing role of the state’ in D Bodansky, J Brunnée and E Hey (eds) *The Oxford handbook of international environmental law* (2006) 736.

<sup>15</sup>Draft Conclusion 4(1) adopted by the Drafting Committee on the Topic Identification of Customary International Law (n 12 above).

<sup>16</sup>See Statement of the Chairman of the Drafting Committee on the Topic Identification of Customary International Law (n 12 above).

<sup>17</sup>See above, Draft Conclusion 4(2).

<sup>18</sup>It is worth mentioning that while I intuitively supported the substance of text agreed to by the Drafting Committee, I did feel that as a matter of process it was inappropriate to first agree to the text and then provide justification in subsequent reports. The practice of the Commission is that the text is agreed on the basis of justification provided.

pointed out the different manifestations of practice.<sup>19</sup> Perhaps the most controversial aspect of the forms of practice addressed by the Drafting Committee concerned the role of inaction. The Special Rapporteur had proposed that inaction ‘*may* also serve as practice’. Some members of the Commission, however, questioned whether inaction on its own could constitute practice which forms the basis of customary international law.<sup>20</sup> During the course of the discussions in the Drafting Committee, the options considered were whether ‘inaction where action is called for’ and ‘conscious inaction’ could also serve as practice for the purposes of customary international law. Both options were intended to address a concern about the possibility of practice in a particular direction being imputed to states in circumstances under which their inaction might not be intended to represent practice. The Drafting Committee was unable to agree on either option and, as a compromise, agreed simply to state that practice ‘*may, under certain circumstances, include inaction*’.<sup>21</sup> As with the role of international organisations, it was agreed that the Special Rapporteur would provide further information on the role of inaction in future reports.

In Draft Conclusion 9, the Special Rapporteur proposed that practice must be general and consistent in order to form the basis for customary international law.<sup>22</sup> While this proposition was uncontroversial, the proposal by the Special Rapporteur that ‘due regard is to be given to the practice of States whose interests are specially affected’ did raise concerns within the Commission.<sup>23</sup> Certain members of the Commission questioned whether such a far-reaching conclusion could be justified with so little support from judgments of the ICJ. While the doctrine of ‘specially affected states’ was relied upon by the ICJ in the

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<sup>19</sup>See Draft Conclusion 7(1) and 7(2) proposed by the Special Rapporteur in Report of the International Law Commission on the Work of its Sixty-Sixth Session (n 13 above) footnote 829.

<sup>20</sup>A debate within the Commission during the 2013 session between the current author and Sean Murphy on the topic immunity of State officials illustrates the problem. In his statement on the topic, Sean Murphy had said that he was not aware of any national court case in which a sitting foreign minister had been prosecuted, suggesting that this practice by omission could form the basis of a customary international law rule that foreign ministers had the same immunity as heads of state. The author noted that empirically it may be correct that there hadn’t been any prosecutions, the more pertinent question was what the reason for this. The author asserted that this omission could only constitute practice where the authorities of a state had considered prosecuting but declined on account of the fact that the person was a sitting foreign minister. See Provisional Summary Record of the 3166th meeting of UN International Law Commission, 17 May 2013, 10am (A/CN.4/SR.2116), at 4 (Murphy) and 5 (Tladi).

<sup>21</sup>See Draft Conclusion 6(1) of the Draft Conclusions adopted by the Drafting Committee on the Topic Identification of Customary International Law (n 12 above).

<sup>22</sup>See Draft Conclusion 9(1) and 9(2) proposed by the Special Rapporteur in Chapter X of the Report of the International Law Commission on the Work of its Sixty-Sixth Session n 13 above n 830.

<sup>23</sup>As above Draft Conclusion 9(4).

*North Sea Continental Shelf* cases,<sup>24</sup> it has never been applied in any other of its judgments – although it has been referred to in minority and separate opinions.<sup>25</sup> Other members of the Commission, including myself, raised questions about the meaning of ‘specially affected states’ noting that in some opinions, such as Judge Schwebel’s dissenting opinion in the *Nuclear Weapons Advisory Opinion*, the term appeared to mean powerful states or even the permanent members of the Security Council.<sup>26</sup> On the other hand, the term might, in a classical sense, mean states with a particular interest in a particular issue.<sup>27</sup> While the first interpretation offends against the basic principle of the sovereign equality of states,<sup>28</sup> the second interpretation is unclear. In this context, I observed that:

While, [this interpretation] of specially affected States might justify the conclusion that a coastal State ... is specially affected by oceans issues this will probably be denied by landlocked States [who have a deep interest in oceans issues]. Even with respect to ... the continental shelf, where it could be argued that States without a continental shelf couldn’t be specifically affected, the fact that the extension of the continental shelf will affect the extent of the Area (or deep Seabed) shows how limited such a view is.<sup>29</sup>

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<sup>24</sup>See *North Sea Continental Shelf cases* (n 9 above) 73. It should be pointed out that even in the *North Sea Continental Shelf cases*, the Court does not lay out the practice of specially affected states as a factor to be taken into account in general but rather in relation to the formation of a customary international law rule ‘without the passage of any considerable period of time’.

<sup>25</sup>The Second Report of the Special Rapporteur on the Identification of Customary International Law (n 7 above) list a number of dissenting and separate opinions, including the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf cases* (n 9 above) 175; separate opinion of Judge de Castro in the *Fisheries Jurisdiction case (United Kingdom v Iceland)* (merits) ICJ (25 July 1974) ICJ Reports 3, 90.

<sup>26</sup>See dissenting opinion of Judge Schwebel in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (8 July 1996) ICJ Reports 1996, 226 at 312 who states as follows: ‘This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a Pariah (*sic*) Government ... This is the practice of five of the world’s major Powers, of the permanent members of the Security Council ... that is to say, it is the practice of States ... that together represent the bulk of the world’s military and economic and financial and technological power ... .’ Elsewhere, at 319, Judge Schwebel dismisses the possibility of a General Assembly resolution reflecting customary international law on account of the fact that four out of the five members of the Security Council voted against it. *Cf.* dissenting opinion of Judge Weeramantry in the same *Threat or Use of Nuclear Weapons* Advisory Opinion.

<sup>27</sup>See, eg, dissenting opinion of Judge Tanaka in *North Sea Continental Shelf Cases* (n 9 above) 175.

<sup>28</sup>See, eg, remarks by Forteau on the Second Report of the Special Rapporteur on the Identification of Customary International Law, in the Provisional Summary Record of the 3225th meeting of UN International Law Commission, 17 July 2014, 10am (A/CN.4/SR.3225).

<sup>29</sup>Statement by Dire Tladi on the Second Report of the Special Rapporteur on the Identification of Customary International Law (on file with the author). For a summary view, see the Provisional Summary Record of the 3225th meeting of UN International Law Commission, 17 July 2014, 10am (A/CN.4/SR.3225).

With only a few members of the Commission supporting the assertion, the Special Rapporteur decided not to pursue the provision in the Drafting Committee. He decided that he would, instead, include references to specially affected states in the commentaries. Nonetheless, given the importance of the commentaries, how the position of ‘specially affected states’ is described in the commentaries should be carefully assessed.

### **3 Subsequent agreements and subsequent practice in relation to treaty interpretation**

The topic ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’ was first considered by the Commission as part of a study group – a more informal process within the Commission. In 2012 the Commission decided to change the format under which the topic was considered, from a study group to a more traditional format, and to appoint Georg Nolte as Special Rapporteur. The focus of the Commission’s study is article 31(3) of the Vienna Convention on the Law of Treaties (the VCLT) which, it will be recalled, provides that in addition to context, *inter alia*, the following means of interpretation shall be taken into account in the interpretation of treaties

- (i) subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and
- (ii) subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

At the sixty-fifth session, in 2013, the Commission had before it the first report of the Special Rapporteur which proposed four draft conclusions, based on jurisprudence from a diverse range of national and international courts and doctrine.<sup>30</sup> On the basis of the work of the Drafting Committee, the Commission adopted five draft conclusions which set out the general orientation of the project. Draft Conclusion 1 adopted by the Commission provides that article 31 of the VCLT sets out the general rule of interpretation while article 32 sets out the rule on supplementary means of interpretation.<sup>31</sup> This text may appear to be stating the obvious, and perhaps restating the VCLT, but it reflects a conscious choice by the Commission. First, several members of the Commission wished to clarify that the means of interpretation

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<sup>30</sup>See First Report by the Special Rapporteur on the topic Subsequent Agreement and Subsequent Practice in relation to the Interpretation of Treaties (A/CN.4/660).

<sup>31</sup>See Draft Conclusion 1(1) of the Draft Conclusions provisionally adopted by the Commission, in Chapter IV of the Report of the International Law Commission on the Work of its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013), General Assembly Official Records, 68th Session, Supplement No 10 (A/68/10).

provided for in article 32 were supplementary in nature. In the context of subsequent agreements and subsequent practice, this distinction is important because while in the context of article 31 of the VCLT, subsequent agreements and subsequent practice carry certain weight, subsequent practice not ‘establishing the agreement of the parties’ may also be relied upon as a supplementary means in the circumstances provided for in article 32. Secondly, the Commission intended to emphasise that, in its collective view, the general rule of treaty of interpretation is not embodied only in article 31(1), but in the whole of article 31 of the VCLT.<sup>32</sup> There is, of course, a contrary view, namely that the general rule of interpretation is to be found in article 31(1), and that the other means in article 31 – including subsequent agreements and subsequent practice – function to shed light on the ordinary meaning, in context, and in the light of the object and purpose of the treaty, ie the general rule in article 31(1) of the VCLT.<sup>33</sup> Phrased differently, other means of interpretation aid the interpreter to apply the general rule in article 31(1) of the VCLT. This debate is not purely academic but goes to the heart of the meaning of subsequent agreements and subsequent practice as authentic means of interpretation. In particular, does the fact that subsequent agreements and subsequent practice constitute authentic means of interpretation imply that they can override a meaning identified through the application of article 31(1) of the VCLT?

In its work at the sixty-sixth session, the Commission adopted other conclusions bearing on the role of subsequent agreements and subsequent practice in the interpretation scheme established under the VCLT. Draft Conclusion 7 asserts that subsequent agreements and subsequent practice ‘contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty’.<sup>34</sup> Importantly, paragraph one of the commentary to Draft Conclusion 7 states that subsequent agreements and

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<sup>32</sup>Article 31(1) famously provides that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose’. Article 31(2) does not lay down a rule of treaty interpretation but only serves to explain what is meant by ‘context’ in art 31(1). It is in art 31(3) that we find other means of interpretation such as a subsequent agreements, subsequent practice and other relevant rules of international law. Article 31(4) addresses the question of special meaning of terms if intended by parties.

<sup>33</sup>See D Tladi ‘Interpretation of Treaties in an international law-friendly framework: The case of South Africa’ in G Nolte and H Aust (eds) *Converging approaches? Domestic courts and the interpretation of international* (forthcoming, 2015) especially n 48.

<sup>34</sup>Draft Conclusion 7(1) of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties in Chapter VII of the Report of the International Law Commission in the Work of its Sixty-Sixth Session (n 13 above).

subsequent practice ‘are therefore not *necessarily* conclusive’.<sup>35</sup> This rather tentative conclusion, for what should be an obvious statement, reflects in part a division within the Commission concerning the possible consequences of subsequent agreements and subsequent practice in the context of treaty interpretation.

The Commission’s approach to whether subsequent agreements and subsequent practice can, as a matter of interpretation, lead to the modification of treaty provisions is equally tentative. Draft Conclusion 7(3) states only that it is ‘*presumed* that the parties to a treaty [by a subsequent agreement or subsequent practice] intend to interpret the treaty, not to amend or modify it’. This conclusion, which is correct at face value, does not tell us whether, in the context of interpretation, the text of a treaty can be modified or amended. The commentary to Draft Conclusion 7 appears to suggest that the ICJ in *Dispute regarding Navigational and Related Rights* accepted that subsequent practice can lead to the modification of a treaty.<sup>36</sup> In truth, however, the ICJ stated something less far-reaching, namely that subsequent practice can lead to a ‘departure from the original intent’ of a treaty.<sup>37</sup> As the commentary itself notes, the ‘scope for “interpretation” is not necessarily determined by a fixed “original intent”’.<sup>38</sup> Departing from the original intent does not, therefore, amount to modification or amendment.

#### **4 Immunity of state officials from foreign criminal jurisdiction**

The topic ‘Immunity of state officials from foreign criminal jurisdiction’ first featured on the agenda of the Commission in 2007. In 2012, the Commission appointed Concepción Escobar Hernández as the Special Rapporteur. In 2013, the Commission adopted three draft articles with commentaries.<sup>39</sup> As discussed below, these draft articles set the tone for the Commission’s future work on the topic. Although the Special Rapporteur had proposed several definitions, the Commission decided not to adopt any definitions during the session but nonetheless retained Draft Article 2 as a definitions clause with a view to including definitions if it should become necessary in the future. In 2014,

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<sup>35</sup> Paragraph 1 of Commentary to Draft Conclusion 7 of the Draft Conclusions on Subsequent Agreements and Subsequent (n 33 above). Emphasis added.

<sup>36</sup> As above par 24.

<sup>37</sup> See *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* ICJ (13 July 2009) ICJ Reports 2009, 231, par 64.

<sup>38</sup> Commentary to Draft Conclusion 7 of the Draft Conclusions on Subsequent Agreements and Subsequent Practice (n 33 above) par 24.

<sup>39</sup> See Report of the International Law Commission on the Work of its Sixty-Fifth Session (n 30 above) Chapter IV.

during its sixty-sixth session, the Commission adopted one draft article plus one definition.

Draft Article 1, adopted during the sixty-fifth session, sets out the scope of the draft articles and includes a ‘without prejudice’ clause to safeguard, for example, the law on diplomatic immunities. The basic approach adopted by the Commission is that there are generally two types of immunity: immunity *ratione personae* and immunity *ratione materiae*. Draft Articles 3 and 4, also adopted in 2013, relate to immunity *ratione personae*.

The Commission determined that immunity *ratione personae* ‘covers all acts performed, whether in a private or official capacity ... during or prior to their [the state officials] term of office’.<sup>40</sup> This type of immunity, however, is only enjoyed during the term of office of the beneficiary.<sup>41</sup> This means that immunity cannot be claimed once the individual no longer holds that office.<sup>42</sup> The temporal limitation on immunity *ratione personae*, however, is without prejudice to the application of immunity *ratione materiae*.<sup>43</sup> While these aspects of immunity *ratione personae* were agreed to with relative ease, there were deep divisions within the Commission over who should qualify as beneficiaries of immunity *ratione personae*. While certain members of the Commission took the rather expansive view that the beneficiaries of immunity *ratione personae* include, but are not limited to, the so-called troika (Heads of State, Heads of Government and Ministers of Foreign Affairs), other members felt that only Heads of State, and possibly Heads of Government, should be entitled to immunity *ratione personae*.<sup>44</sup> The Commission eventually decided that the troika enjoy immunity *ratione personae*.

At the sixty-sixth session the Commission adopted a definition of ‘state official’ as ‘any individual who represents the State or who exercises State functions’. This is a broad definition unlimited by the ‘form’ of the relationship, eg employment.<sup>45</sup> Nonetheless, the range of persons qualifying

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<sup>40</sup>Draft Article 4(2) of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction in Chapter V of the Report of the International Law Commission on the Work of its Sixty-Fifth Session (n 30 above).

<sup>41</sup>As above Draft Article 4(1).

<sup>42</sup>As above Commentary to Draft Article 4 par 2 in which the Commission states that immunity *ratione personae* ‘loses its significance when the person enjoying it ceases to hold’ the relevant office.

<sup>43</sup>As above Draft Article 4(3).

<sup>44</sup>As above Commentary to Draft Article 3 pars 5-10. See also D Tladi ‘The Immunity Provision in the AU Amendment Protocol: Separating the (doctrinal) wheat from the (normative) chaff’ (2015) 13 *Journal of International Criminal Justice* 3 7 especially at n 17.

<sup>45</sup>See for discussion Commentary to Draft Article 2 of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction in Chapter IX of the Report of the International Law Commission on the Work of its Sixty-Sixth Session (n 13 above) par 13.

as state officials is not without limits. The commentary to the definition suggests that it should not be ‘interpreted so broadly as to cover all *de facto* officials’ noting that whether an individual is a state official ‘will depend on each specific case’.<sup>46</sup> The Commission also adopted the rather obvious provision that state officials ‘acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction’.<sup>47</sup>

## 5 Expulsion of aliens

Perhaps the most significant output of the Commission during its sixty-sixth session was the adoption by the Commission of the ‘Draft Articles on the Expulsion of Aliens’ on second reading, ie final adoption.<sup>48</sup> The Commission began its work on the topic, which has a rather crude and politically incorrect name, in 2004, appointing Maurice Kamto as Special Rapporteur. In 2012, during its sixty-fourth session, the Commission adopted a full set of Draft Articles on first reading. During the sixty-sixth session, the Commission had before it the full set of Draft Articles adopted on first reading, comments from states, as well as the final report of the Special Rapporteur proposing minor changes to the Draft Articles on the basis of the comments from states.

The final text adopted by the Commission attempts to strike a balance between the sovereign right of a state to expel aliens from its territory, and the human rights of the aliens. Draft Article 3, for example, states that a: ‘State has the right to expel an alien from its territory’.<sup>49</sup> This basic right is, however, subject to the caveat that the right should be exercised ‘in accordance with’ the Draft Articles. Draft Article 4, furthermore, states that aliens ‘may be expelled only in pursuance of a decision reached in accordance with law’, while Draft Article 5 lays down that an alien may only be expelled ‘on a ground that is provided for by law’. The Draft Articles also provide that a state may not expel an alien on a ground that is prohibited by international law.<sup>50</sup> According to the commentaries, an example of a ground prohibited by international law, is the

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<sup>46</sup>As above.

<sup>47</sup>Draft Article 5 of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, in Chapter IX of the Report of the International Law Commission on the Work of its Sixty-Sixth Session (n 13 above).

<sup>48</sup>For the full text, with commentaries, of Draft Articles on the Expulsion of Aliens see Chapter IV of the Report of the International Law Commission on the Work of its Sixty-Sixth Session (n 13 above). Adoption on second reading means the final adoption. The procedure of the Commission is to adopt a full set of draft provisions on first reading and then provide states with an opportunity to provide comments on the full text. On the basis of any comments received from states, the Commission may make amendments and modifications to the text before finally adopting the text (on second reading).

<sup>49</sup>Draft Article 3 of the Draft Articles on the Expulsion Aliens (n 47 above).

<sup>50</sup>As above Draft Article 5(4).

prohibition against discrimination.<sup>51</sup> In addition the Draft Articles include a variety of prohibitions, including a prohibition on the expulsion of aliens,<sup>52</sup> a prohibition of collective expulsion,<sup>53</sup> a prohibition of disguised expulsion,<sup>54</sup> a prohibition of expulsion for the purpose of confiscation of assets,<sup>55</sup> and a prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure.<sup>56</sup> The Draft Articles also set out various human rights, both procedural and substantive, that should be respected in the course of the expulsion process.<sup>57</sup>

Time and space do not permit a full analysis of the text of the Draft Articles. It is, however, worth referring to a debate within the Commission concerning the consistency of the Draft Articles with existing international law. Certain members of the Commission argued that the Draft Articles adopted by the Commission on first reading, unduly curtailed the right of the state to expel aliens and, consequently, were not consistent with existing international law. These comments echoed criticism from the few states which submitted written observations on the text adopted on first reading.<sup>58</sup> The Commission addresses these concerns, at various places and using different techniques, by drawing attention to the fact that these provisions do not reflect international law.

The first technique used by the Commission to reflect concerns about possible inconsistency with international law, is the use of ‘without prejudice’ clauses. The effect of the without prejudice clause is to shield existing law from the effects of the Draft Articles. The limitation of the right of a state to expel aliens, for example, is said to be ‘without prejudice to other applicable rules of international law’.<sup>59</sup> Other examples can be found in the provisions relating to the expulsion of refugees,<sup>60</sup> expulsion of stateless persons,<sup>61</sup> and collective

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<sup>51</sup>As above Commentary to Draft Article 5 par 5.

<sup>52</sup>As above Draft Article 6.

<sup>53</sup>As above Draft Article 9.

<sup>54</sup>As above Draft Article 10.

<sup>55</sup>As above Draft Article 11.

<sup>56</sup>As above Draft Article 12.

<sup>57</sup>See, eg, Draft Article 14 (obligation to respect human dignity and human rights of aliens subject to expulsion), Draft Article 15 (Prohibition of discrimination), Article 16 (obligation to protect the right to life of an alien subject to expulsion), Draft Article 17 (prohibition of torture or cruel, inhuman or degrading treatment or punishment) and Draft Article 26 (procedural rights).

<sup>58</sup>See Comments and Observations received from Governments on the Draft Articles on Expulsion of Aliens adopted on First Reading, 21 March 2014 (A/CN.4/669).

<sup>59</sup>Draft Article 3 of the Draft Articles on Expulsion of Aliens (n 47 above).

<sup>60</sup>As above Draft Article 6.

<sup>61</sup>As above Draft Article 7.

expulsion.<sup>62</sup> The second technique used by the Commission to suggest inconsistency with current law is to describe certain parts of the Draft Articles as progressive development and not codification. In this regard, the general commentary accompanying the text states that ‘the entire subject area does not have a foundation in customary international law’.<sup>63</sup> Similarly, the commentary to Draft Article 23 declares that Draft Article 23(2), which provides that a state ‘that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty’ constitutes progressive development.<sup>64</sup> The commentary to Draft Article 26 on procedural rights is even more categorical. The commentary suggests that under current international law, aliens unlawfully present on the territory of a state are not entitled to the procedural rights enumerated in Draft Article 26.<sup>65</sup> Similarly, the commentary to Draft Article 27 on the suspensive effect of an appeal against an expulsion decision asserts that ‘practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law’ and that Draft Article constitutes progressive development.<sup>66</sup>

Although it is not uncommon for the Commission to declare that a particular product is both progressive development and codification, the practice of identifying specific provisions as progressive development undermines the provision in question and could prevent its development and entrenchment as a rule of law. Moreover, this practice ignores the fact that the work of the Commission is almost always a seamless combination of codification and progressive development, and that a strict separation of the respective processes is neither consistent with the practice of the Commission, nor is it likely to reflect an accurate state of the law on any given topic.

## **6 Protection of persons in the event of disasters**

The Commission also adopted a set of Draft Articles on first reading on the topic of the protection of persons.<sup>67</sup> This means that the Commission will not

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<sup>62</sup>As above Draft Article 9.

<sup>63</sup>See General Commentary to Draft Articles on the Expulsion of Aliens (n 47 above) par 1. See also par 2 of the Commentary to Draft Article 3.

<sup>64</sup>Commentary to Draft Article 23 of the Draft Articles on the Expulsion of Aliens (n 47 above) par 4.

<sup>65</sup>As above Commentary to Draft Article 26 par 11.

<sup>66</sup>As above Commentary to Draft Article 27 par 1. See also par 1 of the Commentary to Draft Article 29 on the right of readmission in the event that it is established that the expulsion was unlawful.

<sup>67</sup>For the full text of the Draft Articles on the Protection of Persons in the Event of Disasters adopted on First Reading see Chapter V of the Report of the Commission on the Work of Its Sixty-Sixth Session (n 13 above).

do any work on the topic next year in order to allow states time to study and comment on the full set of Draft Articles with a view to final adoption in the sixty-eighth session (2016). The Commission has considered the topic of the protection of persons in the event of disasters since its sixtieth session. During the current session, the Commission had before it the seventh report of the Special Rapporteur proposing a provision on the protection of relief personnel and various provisions on the relationship between the Draft Articles and other rules of international law.

As is the case with the Draft Articles on Expulsion of Aliens, the Draft Articles on the Protection of Persons shows a clear intention by the Commission to strike a balance between the sovereignty of states, on the one hand, and human rights on the other hand. In particular, the Draft Articles attempt to strike a balance between the human rights of persons affected by disasters and the sovereign right of affected states to control access to their territory in the event of disasters and to direct any relief operation. To this end, the Draft Articles have, as an objective, the facilitation of ‘adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their human rights’.<sup>68</sup> The text also incorporates several human rights provisions.<sup>69</sup>

While the Draft Articles purport to promote cooperation,<sup>70</sup> and include several provisions detailing various aspects of cooperation,<sup>71</sup> the thrust of the Draft Articles is a right-duty relationship established between the affected state and other (assisting) states. It is in this relationship that the text of the Draft Articles attempt to balance the sovereign rights of the affected states and the human rights of the population affected by the disaster. It is also this relationship that has generated the most discussion, both within and outside of the Commission. Draft Article 12 states that the affected state ‘by virtue of its sovereignty, has the duty to ensure the protection of persons on its territory and provision of disaster relief and assistance on its territory’.<sup>72</sup> Draft Article 12 proceeds to provide that the affected state has the ‘primary role in the direction, control, coordination and supervision’ of relief assistance.<sup>73</sup> A further provision highlighting the sovereignty of the affected state is Draft

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<sup>68</sup>Draft Article 2 of the Draft Articles on the Protection of Persons in the Event of Disasters (n 66 above).

<sup>69</sup>As above Draft Articles 5 (human dignity), 6 (human rights) and 7 (humanitarian principles).

<sup>70</sup>As above Commentary to Draft Article 8 par 6.

<sup>71</sup>As above Draft Article 9 (forms of cooperation), Draft Article 10 (cooperation for disaster reduction), Draft Article 17 (facilitation of external assistance) and Draft Article 18 (protection of relief personnel, equipment and goods).

<sup>72</sup>As above Draft Article 12(1).

<sup>73</sup>As above Draft Article 12(2).

Article 14 which, in its paragraph one, states that the provision of external assistance by other states and/or entities ‘requires the consent of the affected State’.<sup>74</sup> The Draft Articles, however, take the position that, in view of the human rights of the affected population, the sovereignty of the affected state is not absolute. To this end, the Draft Articles provide that ‘to the extent that a disaster exceeds’ the national response capacity of the affected state, ‘the affected State has the duty to seek assistance’ from other states and entities.<sup>75</sup> Furthermore, while the Draft Articles provide that assistance requires consent, they also provide that such assistance ‘shall not be withheld arbitrarily’.<sup>76</sup>

The balance struck by the Commission has attracted criticism from a diverse range of states<sup>77</sup> and from some members of the Commission. In short, the criticism is that the balance struck does not reflect the practice of states. In particular, some states and members of the Commission have argued that neither the duty to seek assistance nor the duty not to withhold consent arbitrarily, has any basis in practice or international law. The commentaries base these duties on human rights, including the right to life and socio-economic rights,<sup>78</sup> the Guidelines of the International Federation of the Red Cross (‘IFRC’),<sup>79</sup> and the *Institut de Droit International’s* resolution on humanitarian assistance.<sup>80</sup> The human rights argument, however, requires an overly-broad interpretation of the human rights concerned in order to form the basis of the duties. The IFRC’s Guidelines and the *Institut de Droit’s* resolution, on the other hand, do not constitute relevant state practice and on their own cannot form the basis of a duty under international law. Although the commentaries suggest that the IFRC Guidelines have been adopted by the General Assembly, in fact the General Assembly merely recognised them as a framework and encouraged relevant actors to apply them.<sup>81</sup> Indeed, a close study of the relevant resolution suggests that the Assembly was concerned with the technical standards and practical aspects of humanitarian assistance. Moreover, the General Assembly annually adopts comprehensive resolutions on disaster management and relief, yet none of these resolutions contains the type of duties in question. What is interesting is that while these Draft Articles

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<sup>74</sup>As above Draft Article 14(1).

<sup>75</sup>As above Draft Article 13.

<sup>76</sup>As above Draft Article 14(2).

<sup>77</sup>States that have criticised the particular balance include Iran, Israel, Pakistan, South Africa, Russia, China, Cuba, and Singapore amongst others.

<sup>78</sup>Commentary to Draft Article 13 of the Draft Articles on the Protection of Persons in the Event of Disasters (n 66 above) par 4.

<sup>79</sup>As above par 6.

<sup>80</sup>As above.

<sup>81</sup>See UN General Assembly resolution on the Protection of and Assistance to Internally Displaced Person (GA/Res/62/153) par 10.

are not based on practice, the qualifiers of progressive development in the Draft Articles on Expulsion of Aliens, are not repeated.

States will have an opportunity to consider these and other aspects in the course of 2015. If the criticism about rights-duty between the affected state and other states persist, the Commission might well need to realign the Draft Articles, or face the prospect of their being rejected by States.

## 7 New topics

During the sixty-sixth session, the Commission decided to include in its current agenda the topic ‘Crimes against Humanity’ and to include the topic ‘*Jus Cogens*’ on its long-term programme of work. Although work on both topics has yet to begin – with *Jus Cogens* not even serving on the current agenda – both topics have attracted significant attention.

In July 2012, Sean Murphy, a member of the Commission, proposed that the Commission study the topic Crimes against Humanity. In August of 2013, the Commission decided to place the topic on its long-term programme of work on the basis of the proposal.<sup>82</sup> In 2014, the Commission decided to place the topic on its current agenda and to appoint Sean Murphy as the Special Rapporteur.<sup>83</sup>

The proposal is predicated on the assumption that of three main international crimes, ie crimes against humanity, war crimes, and genocide, only crimes against humanity have not been the subject of a comprehensive treaty. War Crimes are the subject of the Geneva Conventions and their Protocols, while genocide is addressed comprehensively in the Genocide Convention.<sup>84</sup> With this study, the Commission intends to propose a draft Convention which would, first of all, provide a standard definition of the crime against humanity in line with the Rome Statute definition. Secondly, the draft Convention would include a duty to criminalise crimes against humanity and prosecute alleged offenders.<sup>85</sup> The envisioned draft Convention would require states to exercise universal jurisdiction over perpetrators if found on the territory of the state. Finally, the draft Convention would put in place a robust interstate cooperation framework, which would include the duty to prosecute or extradite.<sup>86</sup>

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<sup>82</sup>See proposal by SD Murphy ‘Crimes Against Humanity’, Report of the International Law Commission on the Work of its Sixty-Fifth session (n 30 above), Annex B.

<sup>83</sup>See Report of the International Law Commission on the Work of its Sixty-Sixth Session (n 13 above) par 266.

<sup>84</sup>Crimes against Humanity proposal (n 81 above) par 1.

<sup>85</sup>Crimes against Humanity proposal (n 81 above) par 8.

<sup>86</sup>As above.

It should be noted that some states have expressed doubts concerning the Commission's proposed draft Convention.<sup>87</sup> The Nordic countries, for example, expressed concern about the possibility that the proposed topic might lead to the unravelling of compromises arrived at during the negotiations of the ICC Statute in Rome.<sup>88</sup> In addition, the representative of the Netherlands stated that the assumption of the Commission, namely that only crimes against humanity were in need of a comprehensive convention, was erroneous and suggested that what was needed was an international instrument 'that would cover all the major international crimes, including crimes against humanity'.<sup>89</sup> I also raised this issue during the Commission's deliberations and as a consequence, the decision to inscribe the topic notes that 'the view was expressed that the syllabus should have taken a broader perspective, including the coverage of all core crimes'.<sup>90</sup> The point being made is that while it is true that the Geneva and Genocide Conventions do provide for the criminalisation of war crimes and genocide, it could not be said that they provide for the same robust interstate cooperation mechanism as is foreseen in the Commission's envisioned draft Convention.

It is expected that the Special Rapporteur will produce a first report, including one or two proposals for draft articles, in the sixty-seventh session of the Commission.

In addition to including the topic Crimes against Humanity on its current agenda, the Commission also decided to include the topic *Jus Cogens* on its long-term programme of work.<sup>91</sup> I first proposed the topic in August 2013. The Commission may decide, taking into account the views expressed by states, to place the topic on the active agenda in the sixty-seventh session.

The proposal asserts that while in the 1960s, during the Commission's work

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<sup>87</sup>See generally on the issues concerning the proposed project D Tladi 'A Horizontal treaty on cooperation in international criminal matters: The next step for the evolution of a comprehensive international criminal justice system?' (2014) 29 *SAPL* 368.

<sup>88</sup>See the statement by Mr Fife (Norway), on behalf of the Nordic States, during the Sixth Committee of the General Assembly deliberations, Summary Records of the Seventeenth Meeting during the sixty-eighth session of the General Assembly (A/C.6/68/SR.17).

<sup>89</sup>See statement by Ms Lijnzaard (Netherlands), Sixth Committee of the General Assembly deliberations, Summary Records of the Eighteenth Meeting During the Sixty-Eighth Session of the General Assembly (A/C.6/68/SR.18). See also statement by Mr Joyini (South Africa), Sixth Committee of the General Assembly deliberations, Summary Records of the Eighteenth Meeting During the Sixty-Eighth Session of the General Assembly (A/C.6/68/SR.18).

<sup>90</sup>See Other Decisions, in the Report of the International Law Commission on the Work of its Sixty-Fifth Session (n 30 above) par 170 Chapter XII.

<sup>91</sup>See proposal by Tladi '*Jus Cogens*', Report of the International Law Commission on the Work of its Sixty-Sixth Session (n 13 above), Annex.

on the law of treaties, practice on *jus cogens* was virtually non-existent, there is now sufficient practice, particularly judicial practice, to enable the Commission to flesh out some of the details of *jus cogens*. The proposal approved by the Commission proposes to study several aspects of *jus cogens* and produce draft conclusions. First, according to the proposal, the Commission would study the nature of *jus cogens*, including its relationship to other sources of law.<sup>92</sup> Secondly, the proposal foresees that the Commission would provide the requirements for identifying a norm as a *jus cogens* norm.<sup>93</sup> Thirdly, the proposal foresees that the Commission would provide an illustrative, non-exhaustive list of norms that have acquired the status of *jus cogens*.<sup>94</sup> Finally, the project would consider the consequences, including the legal effects, of *jus cogens*.<sup>95</sup>

Although the Commission decided to include the topic on its long-term programme of work, there were some members of the Commission who expressed reservations or, at any rate, caution during the deliberations but not during the adoption.<sup>96</sup> First, at least one member expressed the view that there should be a glass ceiling of topics that are so sensitive that even the Commission ought not to address them, and that *jus cogens* was one such topic. In the view of this member, there was a real danger that the Commission, in studying this topic and providing conclusions about *jus cogens*, might restrain its further development. At least two members felt that the only element which would be useful for the Commission to study would be the consequences of *jus cogens*. Paradoxically, these members argued, this area was so controversial that it is likely that the Commission would not be able to reach agreement on it.

For the most part, those states who addressed the proposal during the General Assembly deliberations, expressed support for the study of the topic.<sup>97</sup>

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<sup>92</sup>As above par 14.

<sup>93</sup>As above par 15.

<sup>94</sup>As above par 16.

<sup>95</sup>As above par 17.

<sup>96</sup>These discussions took place in the closed session of the Working Group on the Long-Term Programme of Work and, therefore, the various views described herein cannot be attributed to individual members of the Commission.

<sup>97</sup>The states that spoke on the topic are: Finland (on behalf of the Nordic states), Austria, Romania, Portugal, Ireland, the Netherlands, Japan, Chile (on behalf of the 33 states of the Community of Latin American and Caribbean States), Slovakia, El Salvador, South Africa, the United States of America, New Zealand, Spain, France, Italy, Republic of Korea, Chile (in national capacity), Cyprus, and Trinidad and Tobago. Of these only the France, the United States and the Netherlands were opposed to the Commission undertaking the topic. The statement of Spain was somewhat ambiguous. On the one hand, the statement expressed the view that it shared 'Mr Tladi's opinion that ... certain development of practice had taken place' and that *jus*

Nonetheless, even those states who expressed support for the topic raised concern about the proposal to produce an illustrative list of *jus cogens* norms.<sup>98</sup> There may be an even more important reason, from a methodological perspective, why the element of an illustrative list should be excluded. The topic is not concerned with primary rules of international law. Yet, by definition, to produce a list, illustrative or not, of *jus cogens* norms would require the study of specific primary rules of international law. The Commission may wish to consider, if the topic is placed on the active agenda, to consider primary rules only to the extent that they shed light on the specific aspects related to the nature, identification and consequences, and exclude the element of an illustrative list.

## 8 Conclusion

This survey of the work of the International Law Commission shows a significant degree of variation in the topics that the Commission is addressing. This survey also shows that the Commission continues to work in important areas of international law. The products of the Commission continue to impact, for better or for worse, the development of international law. At the same time, the topics surveyed should also show that the Commission itself is often divided, suggesting that its products are not always beyond scrutiny. It is thus important that international lawyers and states actively engage with the work of the Commission to ensure that its products truly reflect the views and aspirations of the community that it serves.

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*cogens* is a 'topic of utmost importance for states and it could be useful to study its contours, effects, limits and precise legal content, as well as defining the process through which international legal norms become *jus cogens*'. On the other hand, the statement continued to declare that Spain 'harbour[ed] some doubts about this exercise'. The latter part, however, appeared to be related primarily to 'any attempt to draft a list of *jus cogens*', ie the illustrative list element.

<sup>98</sup>See, eg, concerns expressed by Spain (n 96 above).