THE INTERNATIONAL LAW COMMISSION IS 70 … STAYING WITH THE OLD AND PLAYING WITH THE NEW? REFLECTIONS ON THE WORK OF THE COMMISSION DURING ITS COMMEMORATIVE YEAR

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Abstract

*In 2018, the International Law Commission (ILC) celebrated its 70th anniversary. In this commemorative year, the Commission had a number of topics on its agenda. It completed, on second reading, draft conclusions on the identification of customary international law and draft conclusions on subsequent practice in relation to treaty interpretation. These two topics are of particular importance because of their systemic influence on international law. The Commission also completed, on first reading, the draft guidelines on the protection of the atmosphere and the draft guidelines on the provisional application of treaties. Other topics considered by the Commission include peremptory norms of general international law (*jus cogens*), immunity of state officials from foreign criminal jurisdiction and the protection of the environment in relation to armed conflict. The Commission also considered the topic on succession of states in respect of state responsibility. In other decisions, the Commission placed on its agenda the topic of general principles of law. The Commission also included two topics on its long-term programme of work, namely universal criminal jurisdiction and sea-level rise in international law. The topics on the agenda of the Commission reflect the broad spectrum of issues, ranging from classical international law topics such as customary international law, treaties and* jus cogens *to more contemporary topics such as sea-level rise and the protection of the atmosphere. This range suggests that the Commission is attempting to integrate the new and the old into its work.*

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law; peremptory norms of general international law; protection of the environment; immunity of state officials

1 Introduction

The International Law Commission (the ILC or Commission) came into being in 1948 after the adoption of its Statute by the United Nations General Assembly.[1] Its session of 2018 therefore marked its 70th anniversary, with commemorative events held in New York during the first half of the session, in May, and in Geneva during the second half of the session, in July.

The commemorative events were addressed by eminent persons in international law, with keynote speakers being, for the New York event, the president of the *Institut de Droit International,* Nico Schrijver, and for the Geneva event, the president of the International Court of Justice (ICJ), Abdulqawi Yusuf.

At both the New York and the Geneva commemorative events, panels composed of academics, members of the Commission and former members of the Commission reflected on the state of the Commission. These panels addressed diverse issues, such as the working methods of the Commission, in particular how the Commission chose topics, the appropriateness of the topics selected by the Commission in the present times, the proper balance between codification and progressive development of international law and the relationship between the Commission and other entities, such as states and civil society. The predominant theme in these panels was the question of equity: why is it that in 70 years since the establishment of the Commission, only seven women have been elected to the Commission; why is it that out of a total of 64 Special Rapporteurs that had been appointed, only seven came from Africa and five from Asia, both with 53 member states? All of these, and other interesting issues, are covered in two forthcoming volumes of conference proceedings.[2]

While all these commemorative events were going on, however, the Commission also continued with its mandate of codification and progressive development. In the 70th session, the Commission

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1 See Statute of the International Law Commission, adopted by the General Assembly in Resolution 174 (II) of 21 November 1947.

2 United Nations *The International Law Commission at 70: Proceedings of the Commemorative Event of the ILC's 70th Session* (2019, forthcoming). The *Florida International University Law Review* also held a symposium on 'The International Law at Seventy: Progressive Development and Codification' and will publish a special commemorative issue of the proceedings.

completed two topics on second reading,[3] namely the identification of customary international law, and subsequent agreements and subsequent practice in relation to the interpretation of treaties – two topics that are the traditional public international law topics of the sort that the Commission is known for. These two topics are also significant because of their systemic influence on the whole of the international legal system.

Two other topics were completed on first reading, namely the protection of the atmosphere and provisional application of treaties. The Commission also considered the topics of peremptory norms of general international law (*jus cogens*), the protection of the environment in relation to armed conflict, and succession of states in respect of state responsibility. Although the topic of immunity of state officials from foreign criminal jurisdiction was on the agenda, it could not be fully considered because the report of the Special Rapporteur could not be translated into all official languages in time for the debate.

Finally, with respect to new topics, the Commission placed on its long-term programme of work[4] the topics sea-level rise in relation to international law[5] and universal criminal jurisdiction.[6] The Commission also included in its active agenda yet another source-related topic, namely general principles of law.

This contribution will focus on the two topics whose texts were adopted on second reading, namely the identification of customary international law and subsequent agreements and subsequent practice in relation to the interpretation of treaties. A few comments will then be made about some interesting issues arising in respect of some of the other topics.

2 Topics Adopted on Second Reading

2.1 The Identification of Customary International Law

The adoption of the draft conclusions on the identification of customary

3 The Commission adopts its work in two stages. The first stage, known as first reading, is when the Commission adopts a full text, whether a set of draft articles, draft conclusions or draft guidelines, for the first time and transmits the full text for comment by states and other entities. Second reading occurs after the passage of a full year, when the Commission adopts a final text after making any adjustments based on the comments received on its first reading text.

4 This refers to topics that could be considered in the future by the Commission.

5 *Report of the International Law Commission, Seventieth Session*, General Assembly Official Records (A/73/10), Annex B http://legal.un.org/ilc/reports/2018 (accessed 18 October 2019).

6 Id Annex A.

international law was fairly straightforward and not controversial.[7] The purpose of the Commission's work on the topic was mainly to explain, in simple terms, the process and methodology for the identification of customary international law. It proceeds from the premise that many people and courts, including those that may not be experts in international law, are being called upon to identify rules of customary international law. The draft conclusions are therefore meant to offer a practical guide on how to identify rules of customary international law.[8]

There was, in my view, a second, hidden rationale for the Commission's work on this topic. It was to buttress, notwithstanding practice to the contrary – or perhaps because of an emerging practice to the contrary – the two-requirement rule for the identification of customary international law, namely that to establish a rule of customary international law it is necessary to show two elements: first, that there is a widespread and general practice and, second, that the widespread and general practice must be accepted as law (*opinion juris*).[9]

As a matter of doctrine, this approach has always been accepted. It is reflected in just about every major international law textbook and the ICJ routinely refers to it.[10] Yet, this methodology is rarely ever followed. To take the ICJ as an example: in the *Military and Paramilitary Activities* case,[11] the court goes into a lengthy search for *opinio juris* for the prohibition on the use of force but is never explicit about the practice on which this *opinio juris* is based. Even more so, in the *Arrest Warrant* case, the court does not search for either practice or *opinio juris* in its determination that ministers for foreign affairs enjoy immunity *ratione*

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7 Id 119 (Draft Conclusions on the Identification of Customary International Law, adopted on Second Reading).

8 Id 122, para 2 of the general commentary: 'They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. This is not only of concern to specialists in public international law: others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.'

9 Id 119. See draft conclusion 2, which states: 'To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).'

10 See eg *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* 2012 ICJ Reports 99 para 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta),* 1985 ICJ Reports 13 para 27; *North Sea Continental Shelf* 1969 ICJ Reports 3 para 77 and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Merits, 1986 ICJ Reports 1 para 184, although there the court inverts the two requirements.

11 *Military and Paramilitary Activities* case (n 10 above).

personae.[12] Similarly, in the *Pulp Mills* case, the court determines that the duty to conduct environmental impact assessments for activities with potentially transboundary effects is a rule of customary international law without showing any practice or *opinio juris.*[13]

There are, to be fair, cases in which the court has gone through the process and meticulously applied the requirements for the identification of customary international law. The *North Sea Continental Shelf* cases are a case in point.[14] More recently, in the *Jurisdictional Immunities of the State* case, the court was also methodical in showing how there was no *jus cogens* exception in customary international law to the rule on state immunities.[15] It might also be pointed out that whereas in the *Arrest Warrant* case the court did not illustrate its methodology for coming to the conclusion that there is a rule of customary international law that ministers for foreign affairs have immunity *ratione personae,* it did so when, in the same judgment, it sought to show that there were no exceptions to this rule. But such cases, in which the court methodically shows the existence of practice and *opinio juris,* are rather exceptional.

Draft conclusion 2 sets out this basic approach, which, as I have suggested above, was a hidden motive behind the draft conclusions. Draft conclusion 3 sets out a general rule of law, namely that the assessment of practice and whether that practice is accepted as law must be done in context, taking into account specific circumstances.

Part III of the draft conclusions consists of draft conclusions 4 to 8 and pertains to the first element for the identification customary international law, namely practice. Draft conclusion 4, although broadly titled the 'Requirement of practice' deals with something more specific, namely the question of whose conduct constitutes practice for the purposes of customary international law. The general thrust of the draft conclusion is that it is the practice of states that counts and that in exceptional circumstances, the conduct of intergovernmental organisations might also count as practice. It also states that the practice of non-state actors does not constitute practice, although it 'may be relevant when assessing the practice'. Generally, states commented favourably on this provision, although some states viewed it as incorrect to suggest that the conduct

12 See generally *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* 2002 ICJ Reports 3.

13 *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ Reports 1 para 204. Although the court, when describing Argentina's argument, referred to instruments that Argentina itself had referred to. But nowhere does the court share which instruments constitute practice and which *opinio juris,* as the draft conclusions would require.

14 *North Sea Continental Shelf* cases (n 10 above).

15 *Jurisdictional Immunities of the State* case (n 10 above).

of international organisations may constitute practice for purposes of customary international law.[16] Although there was a strong push within the Commission to modify the text, the Commission ultimately decided, correctly in my view, that the text struck a fine balance which ought not to be disturbed.

Draft conclusion 5 is titled 'Conduct of the state as practice'. The objective of draft conclusion 5 is not, however, to state that it is the conduct of states that constitute practice – this is already done in draft conclusion 4. Draft conclusion 5 merely states which conduct will constitute the conduct of the state. Not surprisingly, it states that any conduct of the state, whether in the exercise of its legislative, executive or judicial or any other function, will constitute the conduct of state. The only mystery in this provision is the 'or other functions' part, which is not explained in the commentary. Presumably all state conduct can be classified either as executive, legislative or judicial. It was, it seems, for caution that the phrase was inserted and to take into account that it is possible, for example, to view administrative functions as not falling into any of these three functions of the State.

Draft conclusion 6 is an important one. It identifies the various forms of practice. It is useful to quote it here in full before highlighting certain aspects of it:

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.
2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.
3. There is no predetermined hierarchy among the various forms of practice.

The first point is to emphasise that practice can take a wide variety of forms and, importantly, includes verbal practice. It may be attractive to see practice as only physical acts, or what the second paragraph refers to as 'conduct "on the ground"'. But what states say may also constitute practice. The first paragraph also highlights that inaction may

[16] See M Wood (Special Rapporteur) *Fourth Report on Identification of Customary International Law* (A/CN.4/695) paras 32 *et seq* for the wealth of views on the draft conclusion 4, especially para 2.

also 'under certain circumstances' constitute practice. This, however, is not to be lightly assumed. The commentary to the draft conclusion states that for inaction to constitute practice 'the State in question needs to be conscious of refraining from acting in a given situation'. In other words, lack of action must be a 'deliberate' choice of inaction in order to constitute practice.[17] Paragraph 2 then provides a non-exhaustive list of materials that may constitute practice. It will be noted that they all have something in common: they emanate from the state.

Draft conclusion 7 addresses how state practice is to be assessed, including how it is weighed, particularly when there is conflicting practice from a state. The case of immunities in South Africa is an interesting case in point. The judiciary, an organ of state, has stated (consistently) that there are exceptions to immunity while the executive has expressed the view that there are no exceptions – although not always as coherently. Draft conclusion 7 and its accompanying commentaries are intended to assist in giving appropriate weight to such conflicting practice of a state. Draft conclusion 8 is, on its terms, a simple provision. Yet the requirement did raise some controversial questions. Initially, the Special Rapporteur had proposed as part of the text of the draft conclusion itself that, when assessing whether a practice was general 'due regard is to be given to the practice of States whose interests are specially affected'.[18] This conclusion was problematic both from a legal and political perspective. From a legal perspective, the Special Rapporteur had not provided sufficient material to justify that conclusion.[19] From a political perspective, the language of 'specially affected States' is prone to be abused by the powerful states, who often claim that they are specially affected by the most sensitive rules and that any practice that does not include them cannot constitute a rule of customary international law.[20]

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17 *Report of the International Law Commission* (n 5 above) 133; see para 3 of the commentary to draft conclusion 6 of the Draft Conclusions on the Identification of Customary International Law.

18 See draft conclusion 9 of the *Second Report on Identification of Customary International Law* (A/CN.4/672) by the Special Rapporteur.

19 Id para 54. The conclusion is based on one judgment of the International Court of Justice, *North Sea Continental Shelf* (n 10 above) para 73 ('With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'), a series of dissenting and separate opinions, and writings of scholars.

20 A typical example of this can be seen in the dissenting opinion of then Vice-President of the court, Judge Schwebel, in *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion*,* 1996 ICJ Reports 226, 312 and 319: 'This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a Pariah government crying out in the wilderness of otherwise adverse international

On first reading, the Commission decided not to include the proposed text, but instead agreed on language in the commentary, which stated simply that '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 to be concerned with the alleged rule have participated in the practice'.[21]

On second reading, the Special Rapporteur proposed strengthening the text in the commentary.[22] After much debate, the Commission decided to adopt the following language in the commentary (para 4):

> Thus, in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule ('specially affected States') have participated in the practice. While in many cases all or virtually all States will be equally affected, it would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of relevant coastal States and flag States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made. It should

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opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas. That is to say, it is the practice of States – and practice supported by a large and weighty number of other States – that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population.' See also D Bethlehem 'Self-defence against an imminent or actual armed attack by nonstate actors' (2012) 106 *American Journal of International Law* 770–771, where the practice of United States and United Kingdom officials in respect of the US is exclusively relied upon. At 773, Bethlehem states that the principles contained in his article are derived from 'detailed discussions over recent years with foreign ministry, defence ministry and military advisers from a number of states *who have operational experience in these matters'* (own emphasis), no doubt mainly from the US and the UK and a few other allies. See also HH Koh *The Trump Administration and International Law* (2018) ch 5, in which the author calls for a determination for clearer standards to be established for humanitarian intervention, but he calls for these clearer standards to be developed by 'the United States government and its allies'. See for a critique D Tladi 'Trump vs international law: Unilateral use of force' *Opinio Juris* 5 October 2018 http://opiniojuris.org/2018/10/05/trump-vs-international-law-unilateral-use-of-force/ (accessed 1 September 2019).

21 Paragraph 4 of the commentary to draft conclusion 8 of the Draft Conclusions on the Identification of Customary International Law adopted on First Reading, *Report of the International Law Commission, Sixty-eighth Session*, General Assembly Official Records (A/71/10).

22 See para 70 of the *Fourth Report on Identification of Customary International Law* (n 16 above).

> be made clear, however, that the term 'specially affected States' should not be taken to refer to the relative power of States.[23]

This language is clearly one of compromise. First, there is a definite acceptance of the doctrine of specially affected states. Yet, the commentary makes clear that this is limited and exceptional, when it provides that 'in many cases all or virtually all States will be equally affected'. Second, by providing a list of examples, it circumscribes the genus of the type of cases that may be viewed as encompassing specially affected states. Third, and most importantly, it makes explicit that the doctrine of specially affected states, to the extent that it applies, does not relate to the relative power of states.

Part IV of the draft conclusions, consisting of draft conclusions 9 and 10, concerns the second element of *opinio juris.* Draft conclusion 9 explains what *opinio juris* means, namely the belief that the conduct in question is required or permitted by international law, and what it does not include, namely conduct that constitutes mere usage or habit. Draft conclusion 10 concerns forms of evidence of *opinio juris.* Like its counterpart for practice (draft conclusion 6), draft conclusion 10 contains a wide range of materials, all of which emanate from the state. Similarly, like draft conclusion 6, draft conclusion 10 provides that silence, or '[f]ailure to react over time to a practice', may also constitute *opinio juris*. However, again as with inaction as practice, this should not be lightly assumed. In the context of *opinio juris,* the caveat is that the failure to react will only constitute *opinio juris* if the states in question 'were in a position to react and the circumstances called for some reaction'.

Part V, ranging from draft conclusions 11 to 14, addresses particular types of materials and sources relevant to customary international law. These include treaties (draft conclusion 11), resolutions of international organisations and intergovernmental conferences (draft conclusion 12), decisions of courts and tribunals (draft conclusion 13) and teachings, or academic writings (draft conclusion 14). The golden thread running through each of these is that they do not, in and of themselves, constitute customary international law. The latter two, teachings and judicial decisions, are subsidiary means for determining rules of customary international law, while treaties and resolutions may either reflect customary international law or may contribute to its formation.

Part VI and Part VII each consists of one draft conclusion and relates to peculiar applications of the rules of customary international law. Draft conclusion 15, in Part VI, provides for the persistent objector

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[23] *Report of the International Law Commission* (n 5 above) 136–137 (Draft Conclusions on the Identification of Customary International Law adopted on Second Reading).

rule and defines the circumstances in which a state can be said to be a persistent objector. Draft conclusion 16, in Part VII, addresses what the draft conclusions refer to as 'particular customary international law', but which is more generally known as 'regional or local customary international law'.

2.2 Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation

The topic subsequent agreements and subsequent practice concerns the application of article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties. It will be recalled that article 31(3) concerns those means of interpretation that 'shall' be taken into account in the interpretation of treaties. Article 31(3) identifies three particular means, namely subsequent agreements,[24] subsequent practice,[25] and other applicable principles of international law.[26] The main issue of contention in the course of the adoption of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties on second reading concerned the question whether pronouncements of treaty bodies, such as the Human Rights Committee, constituted subsequent practice under international law. In 2016 the Commission had, on first reading, adopted the following provision:

> 3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3(b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.[27]

This provision implies that, while the pronouncements of treaty bodies may give rise to or reflect subsequent practice, they are not, in and of themselves, subsequent practice. In recognition of the significance of pronouncement by treaty bodies, the Commission had included a savings or without prejudice clause that specified that this provision 'is without prejudice to the contribution that a pronouncement of an expert treaty

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[24] Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties in UN *International Law Handbook: Collection of Instruments, Book One* (2017) 37.

[25] Id art 31(3)(b).

[26] Id art 31(3)(c).

[27] Draft conclusion 13(3) of the Draft Conclusion on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties adopted on First Reading, *Report of the International Law Commission, Sixty-eighth Session,* General Assembly Official Records (A/71/10).

body may otherwise make' to the interpretation of the treaty.[28] The only states to question this sentiment, according to the report of the Special Rapporteur, were Germany and the Republic of Korea, who both proposed that this text be reconsidered.[29] The Chairperson of the Human Rights Committee had, however, written a letter to the Commission, on behalf of the Human Rights Committee, in which he stated that, in Committee's view, 'the contribution that pronouncements of expert treaty bodies can have, whether or not they give rise to a subsequent practice by the parties, would merit clearer recognition in the draft conclusions than in the form of a saving clause in paragraph 4 of conclusion 13'.[30]

On the strength of this, the Special Rapporteur proposed that the Commission take up an earlier proposal and include, in the second reading, the following text: 'A pronouncement of an expert treaty body, in the interpretation and application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32'.[31]

Under the Special Rapporteur's proposal, this provision would be inserted between the third paragraph quoted above and the savings clause. It bears mentioning, before discussing this proposal, that there had been a proposal from the United States of America to insert a new paragraph which would explicitly state that pronouncements of the treaty bodies did not constitute subsequent practice, thus making explicit that which is implicit.

It is important to understand why pronouncements of treaty bodies do not constitute subsequent practice. Subsequent agreements and subsequent practice refer to agreements and practice of parties to the treaty being interpreted. Since treaty bodies are not parties to the treaties they are called upon to interpret, their practices and pronouncements do not constitute a means of interpretation under article 31(3).[32] It is for this reason that draft article 13 is couched in reference to how

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28 Id draft conclusion 13(4).

29 G Nolte (Special Rapporteur) *Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties* (A/CN.4/715) para 137.

30 Id para 123.

31 Id para 146.

32 See *Report of the International Law Commission* (n 5 above) 13–14: draft conclusions 4 and 5 of the Draft Conclusions on Subsequent Agreements and Subsequent Practice adopted on Second Reading. See, however, *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 187, where the Constitutional Court erroneously identifies instruments not emanating from the parties as subsequent practice within the meaning of art 31(3) of the Vienna Convention. See for discussion D Tladi 'The interpretation and identification of international law in South African courts' (2018) 4 *South African Law Journal* 720–721.

pronouncements 'may give rise to, or refer to' subsequent practice. In other words, a treaty body may give a particular interpretation, which parties to the treaty may start implementing and applying. In such a case, the pronouncements of a treaty body would be said to give rise to a subsequent practice. On the other hand, an interpretation of a treaty by a treaty body may be based on the (subsequent) practice of parties. In such a case, the interpretation by the treaty body reflects (or refers to) subsequent practice. In neither of these cases, however, is the interpretation of the treaty body itself a subsequent practice.

The proposal of the Special Rapporteur to provide that the pronouncements of treaty bodies are relevant under article 31(1) or article 32 of the Vienna Convention is probably correct as a matter of law. Yet, it is not without difficulties in the context of these draft conclusions. It should be pointed out that the purpose of the draft conclusions was to reflect on subsequent agreements and subsequent practice in the interpretation of treaties within the meaning of article 31(3) and, to a limited extent, article 32. It is for this reason that draft articles 3 and 4 define subsequent agreements and subsequent practice in accordance with those provisions. Not every interpretation that is relevant for interpretation of treaties falls within the scope of these draft conclusions and it is unclear why pronouncements of treaty bodies should be singled out. The International Court of Justice (ICJ), and even the ILC itself, play a prominent role in the interpretation of treaties, yet they are not mentioned.

A more substantive problem is that there is no indication of how pronouncements of treaty bodies fit within the scope of article 31(1) of the Vienna Convention. Do they constitute ordinary meaning, good faith, context object and purpose or are they an additional element in article 31(1) of the Vienna Convention? For these and other reasons, the Commission decided not to insert the provision proposed by the Special Rapporteur and retained the text as adopted on first reading.[33]

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[33] The full text reads:

Conclusion 13 Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.
2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.
3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3(b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.
4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.

Apart from this, the adoption of the draft conclusions on second reading was relatively smooth and uncontroversial. Draft conclusion 2 sets the context of the draft conclusions and situates them within the Vienna Convention. Titled 'The General Rule and Means of Interpretation', it sets out the provisions relevant for subsequent agreements and subsequent practice as a means of interpretation. Thus, the third paragraph of that draft conclusion reproduces article 31(3)(a) and (b) of the Vienna Convention. The fourth paragraph states that other subsequent practice, in other words, subsequent practice not meeting the strict requirements of article 31(3)(b), may be used as supplementary means of interpretation within the meaning of article 32 of the Vienna Convention. It is worth pointing out that the Vienna Convention does not explicitly state that other subsequent practice not meeting the requirements of article 31(3)(b) of the Vienna Convention constitutes supplementary means of interpretation within the meaning of article 32. This was based on the understanding that the list of materials in article 32 of the Vienna Convention was non-exhaustive.[34]

It is in the context of adopting this draft conclusion that a minor, yet significant, (yes, the paradox is intended) debate arose. First, the paragraph of the commentary to draft conclusion 2 states that 'article 31(1) as a whole is the "general rule" of interpretation'. Second, and more interesting, the sixth paragraph of the commentary states as follows:

> Article 31, paragraph 1, is the point of departure for any treaty interpretation according to the general rule contained *in article 31 as a whole*. The reference to it is intended to ensure the balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice in the present draft conclusions, on the other. The reiteration of article 31, paragraph 1, as a separate paragraph, *is not, however, meant to suggest that this paragraph, and the means of interpretation mentioned therein, possess a primacy in substance* within the context of article 31 itself (own emphasis).

[34] See *Report of the International Law Commission* (n 5 above) 66, para 8 of the commentary to draft conclusion 8 of the Draft Conclusions on Subsequent Agreements and Subsequent Practice adopted on Second Reading. See also jurisprudence cited in the commentary, including *Kasikili/Sedudu Island (Botswana/ Namibia)* 1999 ICJ Reports 1045 paras 79–80; *Loizidou v Turkey (Preliminary Objections)*, no 15318/89, 23 March 1995, *ECHR Series A* no 310 paras 79–81; WTO Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment (EC – Computer Equipment),* WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para 90.

The debate was minor because only four members actively participated in the debate – Nolte (Special Rapporteur), Wood, Murphy and Tladi – with only one member taking issue with the proposed text (Tladi). Yet, it is significant because it questions an assumption that is evident in scholarly writings, judicial decisions, student textbooks and so forth.[35] Ask most people with some knowledge of international law who have not thought too deeply about this question, what the general rule of treaty interpretation is in international law, and they will intuitively say 'ordinary meaning of the words of the treaty, in their context and in the light of the object and purpose'. The ICJ certainly assumes this.[36] Incidentally, a few weeks after the adoption of this text, three of the participants in this debate – Wood, Murphy and Tladi – acted as counsel in the Kingdom of Jordan's appeal before the Appeal Chamber of the International Criminal Court where all present (counsel on opposite sides and the judges) seemed to accept article 31(1) of the Vienna Convention as the main rule of interpretation. Wood, for example, in argument made the following statement: 'As a treaty [referring to the Rome Statute] it is to be interpreted in accordance with the rules set forth in the Vienna Convention. The general rule in paragraph 1 of article 31 reads …' and then he proceeded to quote from article 31 paragraph 1 of the Vienna Convention.[37]

Draft conclusion 3 provides that subsequent agreements and subsequent practice, as narrowly defined, constitute 'authentic means of interpretation'. This language, borrowed from the ILC's 1966 draft articles on the law of treaties, means that these means of interpretation are objective evidence of how the parties under the treaty understand their agreement.[38] This provision is intended to explain the importance of these two means of interpretation. As already explained, draft conclusions 4, 5, 6 and 10 define the concepts of 'subsequent agreements' and

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35 The issue has since been the subject of a blogpost: D Tladi 'Is the International Law Commission elevating subsequent agreements and subsequent practice?' *EJILTalk* 30 August 2018 https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice/ (accessed 1 September 2019).

36 See, among many other examples, *Immunities and Criminal Proceedings (Equitorial Guinea v France),* judgment of the International Court of Justice of 6 June 2018 (as yet unreported) para 91: 'Pursuant to customary international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the provisions of the Palermo Convention must be interpreted in good faith and in light of the object of purpose of the Convention. To confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to supplementary means.'

37 ICC Transcript 10-09-2018, 40, lines 3–8.

38 See para 15 of the commentary to draft art 27 of the ILC Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission,* 1966 vol II.

'subsequent practice'. Draft conclusion 4 contains a general definition, taken from article 31(3) of the Vienna Convention.[39] Draft conclusion 5 describes what conduct constitutes subsequent practice.[40] Draft conclusion 6 drills deeper into these means by describing how they are to be identified. Draft conclusion 10 explains what is meant by agreement of the parties under article 31(3)(a) and (b). It should be recalled that not just any subsequent agreement or subsequent practice is an authentic means of interpretation. To be relevant for article 31(3), the subsequent agreement and subsequent practice must establish the agreement of the parties as to the interpretation of the treaty concerned.[41]

Draft conclusion 7 discusses the possible effects of subsequent agreements and subsequent practice on treaty interpretation. In the main, subsequent agreements and subsequent practice may narrow, widen or determine the range of possible interpretations.[42] Draft conclusion 7, however, also addresses the question of whether subsequent agreements and subsequent practice could modify treaties. Yet, it does so in a confusing and convoluted manner. It provides as follows:

> It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules

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39 Draft conclusion 4 provides:
Conclusion 4 Definition of subsequent agreement and subsequent practice
1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3(a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.
2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3(b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.
3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

40 Draft conclusion 5 provides, in part:
Conclusion 5 Conduct as subsequent practice
1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial, or other functions
2. ...

41 Under art 31(3)(a) of the Vienna Convention, the subsequent agreement must be 'regarding the interpretation of the treaty or the application of its provision', while under art 31(3)(b), the subsequent practice must 'establish the agreement of the parties regarding its interpretation'.

42 Draft conclusion 7 para 1.

on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.[43]

The first sentence suggests that it is possible for subsequent agreement or practice to modify a treaty, but that this is not to be assumed. The second sentence suggests that doctrinally, the possibility of modification by subsequent practice has not been recognised. The commentary, instead of clarifying this shift from the first to the second sentence, makes it somewhat more cumbersome.[44] The problem, in my view, emanates from the fact that in this provision, the Commission attempts to address an issue that is not within the scope of the topic. However, since the Commission has included this provision, I can share what, in my view, is the correct position. As a *means of interpretation*, subsequent practice and subsequent agreements cannot lead to the modification of an agreement, because interpretation is about searching for and giving meaning to the terms of the treaty, not changing them. Subsequent agreements, not in the context of article 31(3)(a), can modify treaties, but then the rules relating to successive treaties and amendments of treaties will apply and not rules relating interpretation.[45]

Draft conclusion 8 addresses the point that subsequent agreements and subsequent practice may assist in determining whether the meaning of a treaty has evolved or not. Draft conclusion 9 concerns the factors that may determine the weight to be given to a particular subsequent agreement or subsequent practice. Draft conclusions 11 and 12 concern particular types of agreements or practice, namely decisions of

43 Draft conclusion 7 para 3.

44 It is unnecessary to refer at length to specific parts of the commentary (lest this article itself becomes overly complex). It suffices only to state that the commentary reads as if the Commission itself is grappling with the issue. For example, at para 27 the commentary refers to the *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua),* 2009 ICJ Reports 213 para 64, stating that the subsequent practice 'can result in a departure from the original intent on the basis of a tacit agreement'. Instead of telling the reader what this means, the commentary problematises the issue by stating in a long, 19-line paragraph that it 'is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3(b), may also have the effect of amending or modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties, as the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty'. The paragraph concludes that the 'somewhat ambiguous dictum of the Court raises the question of how far subsequent practice under article 31, paragraph 3(b), can contribute to "interpretation" and whether subsequent practice may have the effect of amending or modifying a treaty'. Yet, there is nothing ambiguous or complicated about the dictum from the court and that dictum has nothing to do with modification of treaties. Treaties are not interpreted by searching for the original intent of the treaty. The departure from the original intent of the parties does not, therefore, imply the modification the treaty.

45 Articles 30 and 39–41 of the Vienna Convention.

Conference of the Parties and the practice of international organisations in respect of constituent treaties of that organisation respectively.

3 Brief Overview of the Consideration of Other Topics

The Commission also adopted, on first reading, a complete set of draft conclusions on the protection of the atmosphere. At the current session, however, the Commission adopted only three draft guidelines to complete the set. Guideline 10 describes different ways for states to implement their obligations under international law, namely through 'legislative, executive or administrative measures'. The guideline also provides that states should *endeavour to* give effect to the draft guidelines. Guideline 11 generally provides that states should comply with their obligations under international law in good faith and with procedures set forth in various conventions. Finally, guideline 12 provides a dispute settlement provision, stating that disputes should be settled peacefully. It also suggests that 'due consideration should be given to the use of technical and scientific experts' since disputes relating to the atmosphere are likely to 'be of a fact-intensive and science-dependent character'.

With respect to peremptory norms of general international law (*jus cogens*), as has been the practice with this topic, the draft conclusions have been kept in the drafting committee. The drafting committee adopted four draft conclusions relating to the consequences of invalidity of treaties (draft conclusions 10 to 13) and a draft conclusion on dispute settlement in relation to the invalidation of rules in conflict with peremptory norms (draft conclusion 14).[46] Unlike guideline 12 on the protection of the atmosphere, draft conclusion 14 is detailed and provides as follows:

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law is to notify other States concerned of its claim. The notification is to be in writing and is to indicate the measure proposed to be taken with respect to the rule of international law in question.
2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, shall not be less than three months, the invoking State may carry out the measure which it has proposed.

[46] See draft conclusions 10–14 contained in 'Annex to the Statement of the Chair of the Drafting Committee (Mr Charles Jalloh)' http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_jc_26july.pdf&lang=E (accessed 15 March 2019).

3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.
5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice and other applicable dispute settlement provisions agreed by the States concerned.

The key to draft conclusion 14 is its fourth paragraph. The first to third paragraphs essentially set out amicable procedures. The question of what happens when amicable procedures do not bear fruit, as is often the case, is answered in the fourth paragraph. The fourth paragraph seeks to strike a balance between the need to give effect to peremptory norms and the need to avoid unilateralism, which may threaten the stability of international relations. This provision, in essence, encourages a state that does not agree that a rule is in conflict with international law, to offer to submit the dispute to the ICJ. Where such an offer is not made, it will be accepted that the rule in question is contrary to a norm of *jus cogens*. Where such an offer is made, the determination of the court on whether the rule in question is invalid or not, will be final.

With respect to the protection of the environment in relation to armed conflict, the drafting committee adopted three draft principles, focused on the obligations of occupying powers. Draft principle 19 concerns the general obligations on the occupying power, draft principle 20 concerns the duty of sustainable use of natural resources and draft principle 21 concerns the duty of due diligence. Several themes ran through the debate on the protection of the environment in relation to armed conflict. First, it was questioned whether the situation of occupation constituted a continuation of armed conflict or whether it was rather a post-conflict situation. Second, but related, the debate centred on whether the rules of human rights should apply to situations of occupation or whether the law of armed conflict ought to apply.

Other topics considered, but for which no draft texts were adopted, were immunity of state officials from foreign criminal jurisdiction and the succession of states in respect of state responsibility. The debate on the first of these topics is incomplete and the Special Rapporteur has expressed an intention to submit a further report on procedural issues of safeguard in cases concerning the immunity of state officials.

4 Conclusions and Looking Ahead

In 2018, while celebrating its 70th anniversary, the Commission managed to successfully complete two source-related topics – the identification of customary international law, and subsequent agreements and subsequent practice in relation to the interpretation of treaties. Both of these products represented, incidentally, the first time that the Commission had adopted a type of product called 'draft conclusions', which is akin to the USA's restatement of law. It was, in a sense, a case of the old meeting the new: the old in the form of the bread-and-butter-type of topic for the Commission (sources) and the new in the form of the type of product. The Commission also adopted on first reading, the guidelines on the protection of the atmosphere – a non-traditional topic for the Commission, relying on the non-traditional form of guidelines. At the same time, the Commission continued to make progress (in *some* cases) on other topics.

The year 2019 is shaping up to be an exciting one for the Commission, which will also, like 2018, combine the new with the old. The Commission will, in 2019, finalise its work on crimes against humanity on second reading and do so in a form traditionally associated with the Commission, namely the adoption of draft articles intended to be turned into a treaty (the old). The Commission will also complete on first reading the draft conclusions on peremptory norms of international law (*jus cogens*), a topic whose history is intertwined with that of the Commission. Yet, although the topic itself is a traditional topic (the old), like the customary international law topic and subsequent agreements and subsequent practice topics, it adopts the (new) form of outcomes in the form of draft conclusions. Other topics that the Commission will finalise on first reading are the protection of the environment in relation to armed conflicts and the immunity of state officials – in some ways, both new and old. A new topic, the first report for which will be considered in 2019, general principles of law, is a traditional source-related topic (also bread-and-butter-stuff) and thus represents the old. Yet, like the topics on customary international law, subsequent agreement and subsequent practice and peremptory norms, it will be addressed in the form of draft conclusions and thus reflect the new.

The potential inclusion of new topics onto the active agenda is also indicative of the Commission staying with the old but playing with the new. It is, for example, likely that the Commission will move into unchartered waters with the inclusion of the topic of sea-level rise (the new). Other topics that may be included on the active agenda are universal criminal jurisdiction and the settlement of disputes in disputes involving international organisations (the old). The future seems both exciting and uncertain as the Commission continues to learn to integrate the new with the old.