

# 1. The UN International Law Commission and Customary International Law

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1. It is an honour to take part in this fourth series of the Gaetano Morelli Lectures. Morelli was a jurist in the great Italian tradition, a scholar in both public and private international law. He had a distinguished career as an academic, a practitioner, and a Member of the International Court of Justice (1961-1970).<sup>1</sup>

2. I would like to think that Gaetano Morelli would have appreciated the subject of this year's lecture series, entitled "Rethinking the doctrine of customary international law". Morelli devoted much of his writings to fundamental questions of international law, including sources. His views on customary international law seem to have been mainstream and straightforward, and he had the opportunity to express and to apply these views as a judge.

3. Customary international law plays a large role in the work of the UN International Law Commission (hereafter "Commission" or "ILC"), as it still does in international law generally.<sup>2</sup> In 1947, when the Commission's Statute was adopted, international law was largely uncodified, with a few exceptions, such as the law relating to the use of force and the laws of war.<sup>3</sup> In its essentials, and leaving aside technical fields, international law remained largely unwritten law, that is, uncodified customary international law (or occasionally "general principles of law" within the meaning of Article 38.1(c) of the ICJ Statute). Now the position is quite different, in large part as a result of texts adopted on the basis of the Commission's work. A glance at any general manual on international law will show that many chapters have the Commission's work at their heart, including those on the law of the sea; diplomatic and other immunities; the law of treaties; international responsibility; and State succession.

4. This lecture covers the following matters: the progressive development of international law and its codification as functions of the Commission, and in particular the distinction between them that was included in the Commission's Statute of 1947 (I), as well as in the practice of the Commission since 1949 (II); the Commission's current work on the topic "Identification of customary international law" (III); and, finally, how to describe the Commission's own role in the customary process (IV).

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<sup>1</sup> Gaja, G. *Introduction*, 1-4. Among Morelli's major writings on public international law are *Nozioni di diritto internazionale*, and his *Cours générale de droit international public*. For a more recent bibliography, see 14 *Comunicazioni e studi* (1975) ix-xiv.

<sup>2</sup> Sender, O. and Wood, M. *Custom's Bright Future: The Continuing Importance of Customary International Law*, 360-369.

<sup>3</sup> Primarily in the UN Charter and in the Hague Regulations/Geneva Conventions, respectively.

5. But, first, a preliminary point. It is often suggested, and rightly so, that international law aspires to be a 'common language' for the international community.<sup>4</sup> To this end, it is important to have well-understood terminology to describe its principal concepts, and to use terminology consistently. Over the years, the Commission has made significant contributions in this regard. Terms and concepts used by the Commission have become standard usage in legal argument and in the decisions of international courts and tribunals, as well as in the writings. This is just one way in which the Commission makes an important contribution to the system of international law, to its coherence, clarity and consistency.

6. Agreement on terminology is perhaps even more important in relation to the subject-matter of the present lecture, which seeks to address some fundamental issues concerning the identification and development of international law. It may therefore be helpful to mention some terminological points at the outset. The following terms, or pairs of terms, need to be distinguished, or at least explained: codification/progressive development; existing rules of international law (*lex lata*)/proposals for new rules (*lex nova*); *lex ferenda*; even *lex desiderata*.

7. Such terminological questions are distinct from another important matter: the need for terms that correspond and are understood in the same way in the various languages. The Commission is always mindful of the importance of ensuring that its texts correspond, so far as possible, in the six official UN languages.<sup>5</sup> And it is also important that there is well-understood terminology in non-UN languages, not least because nowadays the national courts of many States are called upon to decide questions of international law.

8. A related preliminary point is this. It is important, essential indeed, at least for a practitioner, whether judge, legal adviser or advocate, to distinguish between existing rules of international law (sometimes called *lex lata*) and proposals for new rules of law (*lex nova*), whether rules that are claimed to be developing (*lex ferenda*) or rules as one would like them to be (*lex desiderata*). To illustrate the practical importance of this distinction in the Commission's work, one may refer to a current topic, *Immunity of State officials from foreign criminal jurisdiction*, where the question of exceptions to immunity *ratione materiae* raises just this issue.<sup>6</sup>

## **I. The distinction between progressive development and codification in the Statute of the International Law Commission**

9. The International Law Commission is a subsidiary organ of the UN General Assembly, composed of thirty-four persons "of recognized competence in international law" and mandated, in fulfilment of Article 13, paragraph 1(a) of the UN Charter, with promoting "the progressive development of international law and its codification".<sup>7</sup> It was established by General Assembly resolution 174(II) of 21 November 1947, to which the Statute of the Commission is annexed. Nowadays, the Commission meets for 10 to 12 weeks each year, usually at the UN Office in Geneva.

10. It is important to recall that, however influential it may sometimes seem, the Commission is not a legislature. This is clear from the cautious wording of Article 13 of the Charter as well as Article

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<sup>4</sup> See, as one example among many, Crawford, J. *Brownlie's Principles of Public International Law* ("International law provides – in significant part – not merely the vocabulary of interstate relations but its underlying grammar").

<sup>5</sup> Frequent references are made in this connection to the importance of 'multilingualism' (see, for example UNGA resolution 71/328 of 11 September 2017). The ILC certainly benefits from drafting in two or more languages, since this can play a major role in promoting greater precision and understanding.

<sup>6</sup> Wood, M. *The UN International Law Commission: lessons from the topic immunity of state officials*.

<sup>7</sup> Statute of the International Law Commission (1947, as amended), Articles 2(1) and 1(1) respectively.

1 of the Commission's Statute. Article 13.1(a) of the Charter provides that the General Assembly "shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification". Pursuant to this, Article 1 of the Commission's Statute provides that

"The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification".<sup>8</sup>

11. Thus, neither the General Assembly, nor its subsidiary organ, the Commission, has the power to make law. This reflects a deliberate choice by the negotiators of the Charter. As is said in the Simma Commentary on the Charter, "[a]t the San Francisco Conference .... all attempts to give the GA any power to establish the content of international law with binding force were rejected".<sup>9</sup>

12. It has been suggested that the expression "progressive development of international law and its codification" limits the mandate of the Commission, and that the Commission (and perhaps even the General Assembly) would be acting *ultra vires* if they purported to go beyond codification and the progressive development of existing law to work on proposals for entirely new law, except perhaps where the Commission receives a special assignment, in particular from the General Assembly. This is just one reason to seek to understand the terms used in the Statute, in particular as the Commission has on occasion prepared instruments that propose new law. A current example is the topic *Crimes against humanity*, where the Commission is drafting articles that for the most part represent new law and which are in any event plainly intended to be embodied in a treaty. More generally, the meaning of the terms employed in the Statute (and thus the proper role of the Commission) has a long and fascinating history and continues to be debated today.<sup>10</sup>

13. Chapter II of the Commission's Statute envisages the progressive development of international law and the codification of international law as distinct functions. Article 15 attributes to "codification of international law" the following meaning:

"the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".<sup>11</sup>

14. The expression "progressive development of international law", on the other hand, has the following meaning:

"the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".<sup>12</sup>

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<sup>8</sup> For the drafting history of Art. 13.1(a) of the Charter, see *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. III, documents 1 and 2; vol. VIII, document 1151; and vol. IX, documents 203, 416, 507, 536, 571, 792, 795 and 848. Article 1 of the Statute goes on to say that the Commission "shall concern itself primarily with public international law, but is not precluded from entering the field of private international law" (but this has hardly happened in practice).

<sup>9</sup> Fleischhauer, C.-A. *Article 13*. See also H. Briggs, *The International Law Commission*, 4-12; *The Work of the International Law Commission*, 9th edition (United Nations, 2017) 4: "The Governments participating in the drafting of the Charter of the United Nations were overwhelmingly opposed to conferring on the United Nations legislative power to enact binding rules of international law".

<sup>10</sup> See, for example, the 2017 debate on the Special Rapporteur's first report on *Succession of States in respect of State responsibility*, especially the statement of Mr Reinisch (A/CN.4/SR.3374).

<sup>11</sup> Statute of the International Law Commission, Article 15.

<sup>12</sup> *Ibid.* McRae has pointed to the ambiguity inherent in the word 'progressive' as used in the expression "progressive development", which could refer to a step-by-step process or to something that is 'forward-looking': McRae, D. *The*

Thus, the definition of ‘progressive development’ in the Statute of the Commission itself includes the preparation of conventions on ‘subjects which have not yet been regulated by international law’.

15. Both meanings, of codification and of progressive development, are said to be “used for convenience”,<sup>13</sup> a testimony perhaps to the difficulties encountered by the drafters of the Statute to distinguish clearly between the two concepts.

16. For each of these functions of codification and progressive development the Statute sets out a different working procedure. A major difference lies in the power of initiative: it was envisaged that projects involving progressive development would be taken up by the Commission following proposals referred by the General Assembly, while codification would be undertaken when the Commission itself “considers that the codification of a particular topic is necessary and desirable”.<sup>14</sup> Labelling a project as codification or progressive development was also to be relevant for purposes of identifying the procedure to be followed in working on it and, in some measure, the form of the Commission’s output. The Commission’s Statute contemplates the preparation of draft conventions as the output of any effort of progressive development of international law,<sup>15</sup> but prescribes two additional possible results for products of codification: (1) simple publication of the Commission’s final report on the topic; and (2) a resolution of the General Assembly, taking note of or adopting the report.<sup>16</sup>

17. The seemingly clear distinction between codification and progressive development that appears in the Commission’s Statute was drawn by the Committee for the Progressive Development of International Law and its Codification (the Committee of Seventeen), charged by the General Assembly in 1946 with recommending how to implement the relevant part of Article 13(1)(a) of the Charter. The report of the Committee did, however, recognize that

“the terms employed are not mutually exclusive as, for example, in cases where the formulation and systematization of the existing law may lead to a conclusion that some new rules should be suggested for adoption by States”.<sup>17</sup>

18. Indeed, the terms ‘codification’ and ‘progressive development’ are both unclear, in different ways.<sup>18</sup> That may even be a reason why they found their way into the UN Charter, and then into the Commission’s Statute: ‘constructive ambiguity’ can be useful in negotiations, even if sometimes it just postpones a problem for others to grapple with later. *Lex ferenda* is also a term that seems to be used (or abused) in various ways; sometimes it seems to be used to mean, to continue in

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*Interrelationship of Codification and Progressive Development in the Work of the International Law Commission*, 80.

<sup>13</sup> Statute of the International Law Commission, Article 15.

<sup>14</sup> *Ibid*, Articles 16, 18(2) respectively. Under Article 17 the Commission may also consider proposals submitted by UN Members, other UN organs, specialized agencies and others.

<sup>15</sup> Statute of the International Law Commission, Article 16.

<sup>16</sup> *Ibid*, Article 23, paragraph 1. Some observe (or complain) that nowadays the output of the Commission does not usually lead to the adoption of international conventions. A good example is the work on State responsibility. But it is clear from the terms of Article 23 that it was not the intention that the product should always be a convention, at least not when a topic consisted largely of codification.

<sup>17</sup> Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, UN Doc. A/AC.10/51, 4. One member of the Committee of Seventeen, Mr. Bartoš, warned that “it would be impossible to say where codification ends and development begins” (Summary record of the sixth meeting of the Committee (20 May 1947), A/AC.10/SR.6, 7).

<sup>18</sup> “There has never been a consistent view either within the Commission or outside over the meaning of the terms codification and progressive development”: McRae, *supra* note 12, 92-93.

Latin, *lex nova* or *lex desiderata*.<sup>19</sup> The term *lex desiderata* should perhaps be used more frequently as it is often what is meant when the term *lex ferenda* is invoked.

19. The idea that the law “should be embodied in a systematic written form”<sup>20</sup> has guided the movement for the codification of international law since the early nineteenth century. Unwritten, customary international law was considered as uncertain and incomplete, and thus in need of clarification and systemization. In the words of one author, “[t]he temple of international justice on near inspection appear[ed] to be rather a storehouse filled with lumber of the ages—a medley of things new and old showing as yet little evidence of order or purpose”.<sup>21</sup>

20. Attributing a precise meaning to ‘codification’ of international law has not been free from difficulty. Is codification simply a process of reducing *lex non scripta* to written form, or is it the case that, given the desire to eliminate any uncertainties and inconsistencies found in unwritten law, “all codification involves as an incidence in the process an element of what is really legislation”<sup>22</sup>?

21. McNair observed in 1927 that codification of international law

“has at least two distinct meanings, (1) the process of translating into statutes or conventions customary law and the rules arising from the decisions of tribunals with little or no alteration of the law”; and “(2) the process of securing, by means of general conventions, of agreement among the States upon certain topics of International Law, these conventions being based upon existing International Law, both customary and conventional, but modified so as to reconcile conflicting views and render agreement possible”.<sup>23</sup>

This dual view of the meaning of codification occurs time and time again in later writings and discussions.

22. Differing views as to the meaning to be given to the term ‘codification’ were also among the reasons for the disappointing results of the first international conference specifically called for the purpose of codification, the Hague Codification Conference of 1930. Hudson wrote of the Conference that “[s]entiment grew quite rapidly against any attempt to state what was the existing law as distinguished from new legislation, and after two weeks it became clear that even the use of the term declaration was stoutly opposed. The discussion in the lobbies of the difference between conventions and declarations was quite interesting”.<sup>24</sup> And reflecting on the Conference, Brierly (later a member of the Committee of Seventeen) expressed the view that

“The legislative element in the attempt to codify any part of international law is not merely incidental and subordinate; it outweighs the codifying element to such an extent that it becomes misleading to describe the process as one of codification at all”.<sup>25</sup>

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<sup>19</sup> In his presentation on the occasion of the commemoration of the Commission’s 50th anniversary, Owada made an interesting distinction between three kinds of international legislation namely “codification”, “progressive development” and “law making *de novo*”: Owada, H. *Presentation*, 70-72.

<sup>20</sup> Brierly, J.L. *The Future of Codification*, 2 (noting, however, that the ideal could never completely be realized, “because law that is living contains an element of growth and cannot be finally or exhaustively imprisoned in a series of propositions however detailed and numerous”).

<sup>21</sup> Morris, R.S. *Codification of International Law*, 452.

<sup>22</sup> Brierly, *supra* note 20, 2-3.

<sup>23</sup> McNair, A.D. *The Present Position of the Codification of International Law*, 129.

<sup>24</sup> Hudson, M.O. *The First Conference for the Codification of International Law*, 449.

<sup>25</sup> *Supra* note 20, 3.

23. The Assembly of the League of Nations, for its part, did not make things any clearer. Having adopted in 1924 a resolution establishing a Committee of Experts for the Progressive Codification of International Law to prepare the Hague Conference, it later reaffirmed, when taking note of the work of the Conference, “the great interest taken by the League of Nations in the development of international law, *inter alia*, by codification”.<sup>26</sup>

24. Hurst, observing in 1946 renewed support for the idea that “the prescriptions of international law should be more clearly stated and that there should be general agreement as to what those principles are, in order that all men may understand them and appreciate them”, found that the term codification had come to embody “two possible ideas, two possible methods”.<sup>27</sup> One of them, “in the strict and proper sense and as the term has generally been understood by British writers”, had to do with

“ascertaining and declaring the existing rules of international law, irrespective of any question as to whether the rule is satisfactory or unsatisfactory, obsolete or still adequate to modern conditions, just or unjust in the eyes of those who formulate it”.<sup>28</sup>

The second idea, Hurst explained, was

“looser and more prevalent on the Continent of Europe. It incorporates the idea of amending the law as well as defining it, so that the provisions in the code shall state the rules of international law as they ought to be, regardless of whether they are so. ... Codification in this sense is legislative in character”.<sup>29</sup>

25. In keeping with the Charter formulation, in which ‘progressive development’ was apparently intended to refer to a way of modifying or adding to existing rules of international law,<sup>30</sup> the members of the Committee of Seventeen, which drafted the Commission’s Statute, must have generally referred to codification in its narrower sense. But they did not insist on a strict, abstract distinction between the two methods; on the contrary, they took the view that “no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice”.<sup>31</sup>

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<sup>26</sup> Resolution of the Assembly of 22 September 1924 (League of Nations, *Official Journal, Special Supplement*, No. 21, p. 10); Resolution of the Assembly of 25 September 1931 (League of Nations, *Official Journal, Special Supplement*, No. 92, p. 9).

<sup>27</sup> C. Hurst, *A Plea for the Codification of International Law on New Lines*, 146.

<sup>28</sup> *Ibid.*, at p. 146.

<sup>29</sup> *Ibid.* Watts has similarly observed that “codification has a double meaning: it carries on the one hand the broad meaning of establishing a systematic body of rules, including both existing rules and those which have had to be developed for achieving a coherent and comprehensive treatment of the subject, and on the other hand—and more narrowly—the written formulation of rules which already existed whether in unwritten, i.e. customary, form or in existing treaties, but in either case primarily as a matter of consolidation with little or no alteration of the law” (Watts, *A. Codification and Progressive Development of International Law*, para. 17).

<sup>30</sup> See also Document 848-II/2/46, *The United Nations Conference on International Organization*, 177–178. McRae likewise concludes that “given the definition in Article 15 [of the Commission’s Statute] the term ‘development’ [in Article 13 of the Charter and in the Statute of the Commission] must have meant the articulation of conventions on matters that were not yet law” (McRae, *supra* note 12, at 80). For the view that the reference to ‘progressive development’ in Article 13 of the UN Charter “was intended to indicate that international law was not to be codified at once in a single code but was to be done in stages” see R. Higgins et al., *Oppenheim’s International Law: United Nations*, 929.

<sup>31</sup> *Supra* note 17, para. 10.

## II. Codification in the practice of the International Law Commission

26. The codification/progressive development debate that was live during the drafting of the Statute continued from the very outset of the Commission's work. Underlying the legal arguments were no doubt deeper political divisions, this being the Cold War. The Soviet Union and its followers remained deeply suspicious of unwritten law, in which they considered they had had no hand.

27. As members of the Committee of Seventeen had foreseen, a rigid distinction between codification and progressive development proved impractical. The Commission early on gave up any attempt to uphold the distinction envisaged in its Statute or to follow the different procedures set out there. Although initially several delegations in the General Assembly complained, it has long been accepted that the Commission does not and cannot follow the distinction made in its Statute, at least so far as working methods are concerned. This early abandonment by the Commission of the theoretically attractive but practically hard distinction between progressive development and codification "set the pattern for the future".<sup>32</sup>

28. Already at its first session, in 1949, when preparing (at the request of the General Assembly) the Draft Declaration on Rights and Duties of States, the Commission concluded that the Draft Declaration constituted a special assignment and that it was thus competent to adopt in relation to this task any procedure it deemed conducive to the effectiveness of its work.<sup>33</sup> The General Assembly, for its part, deemed the draft "a notable and substantial contribution towards the progressive development of international law and its codification".<sup>34</sup>

29. Also in 1949, the Commission had before it a memorandum entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission*,<sup>35</sup> which was submitted by the UN Secretary-General. In fact, it was largely the work of Hersch Lauterpacht. The report began:

"The selection of topics for codification must depend to a large extent upon the meaning which the Commission will attach to the term 'codification' having regard to its Statute, to the discussions which preceded it, and to the experience of the previous efforts at codification. ... These definitions [in the Statute] of what constituted 'progressive development' and 'codification' were adopted for the sake of convenience. In particular it may be assumed that there was no intention that the Commission should limit itself, in the matter of codification, to mere recording, in a systematized form, of the existing law, i.e., of the law as to which there exists an agreed body of rules".<sup>36</sup>

The report also noted that there were anyway

"only very few branches of international law with regard to which it can be said that they exhibit such a pronounced measure of agreement in the practice of States as to call for no more than what has been called consolidating codification".<sup>37</sup>

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<sup>32</sup> Sinclair, I. *The International Law Commission*, 46.

<sup>33</sup> Liang, Y.-L. *The First Session of the International Law Commission: Review of its Work by the General Assembly*, 535.

<sup>34</sup> UNGA resolution 375 (IV) of 6 December 1949.

<sup>35</sup> *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission - Memorandum submitted by the Secretary-General (1949)*, A/CN.4/1/Rev.1.

<sup>36</sup> *Ibid*, 3, para. 3.

<sup>37</sup> *Ibid*, 7, para. 10.

30. The Commission itself, in 1949, having considered that “the codification of the whole of international law was the ultimate objective”, concluded that nevertheless “it was desirable for the present to begin work on the codification of a few topics, rather than discuss a general systematic plan which might be left for later elaboration”.<sup>38</sup> It also decided that it had the competence to proceed with the work of codification without awaiting the approval by the General Assembly of topics selected by it.<sup>39</sup> No decision was taken as to more precise definitions of the terms ‘codification’ and ‘progressive development’.

31. In 1950, it was the General Assembly that requested the Commission to study the question of reservations to multilateral conventions “both from the point of view of codification and from that of the progressive development of international law”.<sup>40</sup>

32. By 1951, during the Commission’s third session, Hudson had no hesitation in asserting that “there could be no codification without development”.<sup>41</sup> Two years later, in connection with its draft on arbitral procedure that admittedly had such “a dual aspect”, the Commission said:

“The Statute of the Commission clearly envisages, and regulates separately, these two functions [of codification and progressive development]. This does not mean that these two functions can be invariably — or even normally — kept apart in the drafts prepared by the Commission. In the case of some topics it may be possible to limit the function of the Commission to one or the other of these two fields of its activity. In the case of other topics these two functions must be combined if the Commission is to fulfil its dual task of, in the language of Article 13 of the Charter of the United Nations, “progressive development of international law and its codification”.<sup>42</sup>

At the same time, the Commission went on to add that it “considers it of utmost importance that the difference between these two aspects of its activity should be constantly borne in mind”.<sup>43</sup> One can sympathise with those involved in a discussion that led the Commission to reach such seemingly contradictory positions in one and the same paragraph.

33. Ultimately, however, after conceding again that “the present final draft of the Commission falls within the category both of the progressive development and the codification of international law”, the Commission said that “[i]t is probable that the same cumulation of functions must apply, in varying proportions, to other aspects of the work of the Commission”.<sup>44</sup> And it added that

“So far as recommendations proposed by the Commission [as to action to be taken by the General Assembly on the basis of the Commission’s output] are concerned, it seems to matter little whether a final draft falls within the category of development or that of codification ... There seems to be no reason for any differentiation between the two kinds of recommendation. Neither does it appear that any such differentiation was intended”.<sup>45</sup>

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<sup>38</sup> Report of the International Law Commission on the work of its first Session, *Yearbook of the International Law Commission 1949*, Vol. I, 280, para. 14.

<sup>39</sup> Liang, *supra* note 33, 528. The Sixth Committee was divided as to this decision of the Commission (see 529-532).

<sup>40</sup> UNGA resolution of 478(V) of 16 November 1950.

<sup>41</sup> Summary record of the Commission’s 96th meeting (5 June 1951), *Yearbook of the International Law Commission 1951*, Vol. I, 123, para. 120 (adding that he “would be in favour of minimizing the distinction by adopting the same procedure for both”).

<sup>42</sup> Report of the International Law Commission Covering the Work of its Fifth Session (1 June-14 August 1953), *Yearbook of the International Law Commission 1953*, Vol. II, 201-202, para. 15.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 208, para. 54.

<sup>45</sup> *Ibid.*



In fact, just such a differentiation seems to have been intended by the authors of the Statute, though it proved unworkable in practice.

34. The Commission was even less hesitant in 1956 when it said that

“In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already ‘sufficiently developed in practice’, but also several of the provisions adopted by the Commission, based on a ‘recognized principle of international law’, have been framed in such a way as to place them in the ‘progressive development’ category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either”.<sup>46</sup>

35. In fact, the law of the sea was probably one field where such a distinction could be maintained, to some degree at least. In the preamble to the 1958 Geneva Convention on the High Seas, for example, the States Parties state that they desire “to codify the rules of international law relating to the high seas”.

36. Hersch Lauterpacht, who was member of the Commission between 1952 and 1954, explained that

“there is very little to codify if by that term is meant no more than giving, in the language of Article 15 of the Statute of the International Law Commission, precision and systematic order to rules of international law in fields ‘where there already has been extensive State practice, precedent and doctrine’”.<sup>47</sup>

For Lauterpacht, the Statute’s dichotomy between ‘codification’ and ‘development’ was anyhow defective since it did not cover the widest and typical cases of codification on the international plane: where there exists practice but no agreement, or where development is called for because existing practice ought to be changed.<sup>48</sup> He continued:

“It is probable that the result thus achieved is due to an oversight in drafting; it is so drastically out of keeping with experience and with the views persistently expressed on the subject that it cannot be regarded as intentional. It is not surprising that the relevant Article 15 of the Statute of the Commission has been disregarded in practice. It must be so left out of account in the future unless the work both of codification and development is to be reduced to nominal dimensions”.<sup>49</sup>

37. While one can understand and agree with this assessment overall, it seems improbable that Brierly, Hudson and the other members of the Committee of Seventeen committed an ‘oversight in drafting’. It is more likely that the Statute was deliberately crafted as it was, taking into account political considerations, and perhaps without an expectation that it would be followed to the letter.

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<sup>46</sup> Report of the International Law Commission covering the work of its eighth session (23 April–4 July 1956), *Yearbook of the International Law Commission 1956*, Vol. II, 255-256, para. 26.

<sup>47</sup> Lauterpacht, H. *Codification and Development of International Law*, 17.

<sup>48</sup> *Ibid*, 29.

<sup>49</sup> *Ibid*, 29-30.

38. Speaking in 1961, one of the Commission's members, Mr. Amado, indeed said that he

“had been a member of the Committee which had drafted the Statute of the International Law Commission. It had not been the intention to draw in that Statute a clear-cut distinction between the codification of international law and its progressive development. A codification should fill any gaps which might appear; the rules had to be arranged, clarified and if necessary amplified. The task of codification and that of development of international law could not therefore be separated”.<sup>50</sup>

39. The Commission expressly conflated the two working procedures in 1958, when referring to both in seeking the views of governments on its provisional set of draft articles on diplomatic intercourse and immunities.<sup>51</sup> In 1960 the Commission reported that its work on the subject of consular intercourse and immunities “is both codification and progressive development of international law in the sense in which these concepts are defined in article 15 of the Commission's Statute”.<sup>52</sup> Such was also the approach explicitly adopted with respect to later topics, such as succession of States in respect of treaties (1974);<sup>53</sup> the most-favoured-nation clause (1978);<sup>54</sup> and the law of treaties between States and international organizations or between international organizations (1982).<sup>55</sup>

40. By 1979 the Commission considered that

“the techniques and procedures provided for in the Statute of the Commission, as they have evolved in practice, are well suited to the tasks entrusted to the Commission by the General Assembly ... [and] are flexible enough to allow the Commission to make, within its general framework, such adjustments as the specific features of a topic or other circumstances may demand”.<sup>56</sup>

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<sup>50</sup> Summary record of the Commission's 615th meeting (21 June 1961), *Yearbook of the International Law Commission 1961*, Vol. I, 215, para. 46.

<sup>51</sup> See Report of the International Law Commission covering the work of its tenth session (28 April-4 July 1958), *Yearbook of the International Law Commission 1958*, Vol. II, 89, para. 48 (“In accordance with articles 16 and 21 of its statute, the Commission decided to transmit this draft, through the Secretary-General, to Governments for their observations”).

<sup>52</sup> Report of the International Law Commission covering the work of its twelfth session (25 April-1 July 1960), *Yearbook of the International Law Commission 1960*, Vol. II, 145, para. 23. The Commission explained that “[t]he codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law, and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perform remain incomplete and have little practical value. For this reason the Commission agreed, in accordance with the Special Rapporteur's proposal, to base the articles which it is now drafting not only on customary international law, but also on the material furnished by international conventions, especially consular conventions” (para. 20).

<sup>53</sup> Report of the International Law Commission on the work of its twenty-sixth session (6 May-26 July 1974), *Yearbook of the International Law Commission 1974*, Vol. II (Part One), 174, para. 83 (“The Commission's work on succession of States in respect of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements of both progressive development as well as of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls”).

<sup>54</sup> Report of the International Law Commission on the work of its thirtieth session (8 May-28 July 1978), *Yearbook of the International Law Commission 1978*, Vol. II (Part Two), 16, para. 72.

<sup>55</sup> Report of the International Law Commission on the work of its thirty-fourth session (3 May-23 July 1982), *Yearbook of the International Law Commission 1982*, Vol. II, 15, para 55.

<sup>56</sup> Report of the International Law Commission on the work of its thirty-first session (14 May-3 August 1979), *Yearbook of the International Law Commission 1979*, Vol. II (Part Two), 188, para. 95.

41. In 1996, in reply to a request by the General Assembly that it “examine the procedures of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law”,<sup>57</sup> the Commission again said that

“As is well known ... the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in order to give more precise effect to a principle. Moreover, it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons”.<sup>58</sup>

42. The Commission further said that it has thus

“inevitably proceeded on the basis of a composite idea of ‘codification and progressive development’. In other words, its work has involved the elaboration of multilateral texts on general subjects of concern to all or many States, such texts seeking both to reflect accepted principles of regulation, and to provide such detail, particularity and further development of the ideas as may be required”.<sup>59</sup>

43. Against this background, the Commission called for a revision of its Statute by which the distinctions drawn between the procedures of codification and progressive development would be eliminated.<sup>60</sup> But this has not happened, and no real difficulties seem to have arisen in practice.

44. Neither the Statute nor the Commission’s views have since changed. In its 2011 *Guide to Practice on Reservations to Treaties*, for example, the Commission stated that

“The very concept of a ‘codification convention’ is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and its progressive development”.<sup>61</sup>

A similar approach may be found in the Commission’s draft articles on the responsibility of international organizations (2011), which refer to “the border between codification and progressive development”.<sup>62</sup> The 2014 articles on the expulsion of aliens are similarly said to be “both a work of codification of international law and an exercise in its progressive development”. As already noted, such an approach may also be evident among some members of the Commission in the context of the current work on immunity of State officials from foreign criminal jurisdiction.<sup>63</sup>

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<sup>57</sup> UNGA resolution 50/45 of 11 December 1995.

<sup>58</sup> *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, 86, para. 156.

<sup>59</sup> *Ibid*, para. 157.

<sup>60</sup> *Ibid*, 84, para. 147(a) and 97, para. 242.

<sup>61</sup> A/66/10/Add.1, 373, para. 11. The introduction to the *Guide to practice* indicates that “the various provisions in the guidelines cover a wide range of obligatoriness and have very different legal values”. In footnote 5, the Commission stated that “This range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion — made, *inter alia*, during discussions in the Sixth Committee of the General Assembly — that a distinction should be made between guidelines reflecting *lex lata* and those formulated *de lege ferenda*.”

<sup>62</sup> A/66/10, 70 (general commentary, para. 5).

<sup>63</sup> *Supra* note 6.

45. Thus, from the very beginning of the Commission's work, the "formal, rather rigid, distinction between codification and progressive development was both unclear and unworkable and it quickly became rather irrelevant".<sup>64</sup> The result, in Rosenne's words, has been that

"in practice a single consolidated procedure has been made applicable to both types of work, and the formal differentiation established in the Statute has been blurred. This result seems to be, on the whole, uncontroversial, and is probably inevitable".<sup>65</sup>

46. By treating the concepts of codification and progressive development as closely interlinked or even inseparable (or, to put it another way, by adopting a "looser" definition of codification), the Commission has afforded itself greater freedom in elaborating and proposing international legal texts. And as a result it is likely to be difficult to disregard a rule proposed by it solely as an exercise of "progressive development" unless the Commission itself has acknowledged this to be the case.

47. Yet at the same time, in the words of the Commission, it is "of utmost importance that the difference between these two aspects of its activity should be constantly borne in mind".<sup>66</sup> For States, for courts, for international lawyers generally, it may be crucially important to know how far a particular text emanating from the Commission is intended to reflect existing law or amount to a proposal for new law, even if at the end of the day one may have to make an independent assessment of the matter, taking into account whatever can be gleaned from the Commission's work.

48. In fact, within the Commission, the notions of 'codification' and 'progressive development' remain very much present, and it has not always sought to blur or ignore them. The question whether (and if so how) to distinguish between the two concepts remains a live one within the Commission, both in general and with regard to particular topics or draft provisions. Such a discussion is often held by reference to the terms *lex lata* and *lex ferenda*, which are indeed "a variation on the question of what constitutes customary international law".<sup>67</sup>

49. To begin with, the Commission has not infrequently labelled particular draft articles expressly as codification or as progressive development. For the Commission to state that in its view a draft provision, especially one that the Commission considers to be central to a topic it has worked on, represents codification of an already existing rule, can carry great weight and help to clarify and consolidate the law. Draft articles and other provisions adopted by the Commission are accompanied by commentaries, which often indicate the sources underlying the adopted provisions and which provides the Commission with the opportunity to specify, as appropriate, if a particular provision is an exercise of codification or progressive development.

50. Clarifying that a certain draft article represents an effort at progressively developing the law, on the other hand, has been done on occasions where the Commission sought to suggest a change to a clearly established rule; or where State practice and/or *opinio juris* was clearly lacking or insufficient to distil a rule from, if only in the eyes of certain members of the Commission.

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<sup>64</sup> McRae, *supra* note 12, 79. McRae suggests that the Commission has been through three broad phases (the 'fused model' of avoiding making a distinction between codification and progressive development; the 'clear separation model' beginning in the 1980s; and the more recent 'responsibility of international organizations model', by which the Commission provides only a general "consumer warning" that some (unspecified) draft articles may be progressive development while others are a codification). While that is an interesting perspective, it tends to rationalize what has been somewhat messier in reality (indeed McRae himself suggests, at p. 91, that "there is overlap and no clear distinction").

<sup>65</sup> Rosenne, S. *The International Law Commission, 1949-59*, 142.

<sup>66</sup> *Supra* note 43.

<sup>67</sup> McRae, *supra* note 12, 90.

51. The label “progressive development” is also a way to secure the agreement of such members to the inclusion of the provision in the Commission’s eventual output, as it may offer them comfort that it is indeed recognized as a policy preference rather than positive law.<sup>68</sup> An example is article 41 of the Articles on State responsibility, which proclaims a duty to cooperate to bring to an end a serious breach of *jus cogens*. The Commission’s commentary states:

“It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law”.<sup>69</sup>

52. It may also be that the Commission, or the General Assembly, may wish a certain topic or certain issues within a topic to be approached as an exercise in codification *stricto sensu* or, on the other hand, as clear progressive development. This depends of course on the subject-matter, including how well established and indeed satisfactory the existing law is thought to be. For example, the law of treaties and State responsibility, being well established in the case-law and literature, were for the most part exercises in codification.

53. Somewhat paradoxically, then, differentiating between codification and progressive development has been seen to be both difficult (if not undesirable) and useful for the Commission. Again, perhaps it all depends on the context. It is important for some topics, particularly those that are likely to come before the domestic courts, such as all issues relating to international immunities and privileges. It is less important where the topic concerns largely practical issues between States especially in relatively new fields, such as the protection of persons in the event of disasters.

54. Whatever the approach ultimately adopted in a particular topic or provision, it must also be borne in mind that the Commission should always approach a topic by first surveying State practice in order to ascertain whether and which relevant customary rules already exist. Already at the preliminary stage of considering whether or not to add a topic to its work programme, it looks into, inter alia, the question whether the topic is sufficiently advanced in terms of State practice to permit progressive development and codification. In other words, the Commission does seek to identify the *lex lata* in the strict sense for purposes of assessing the legal situation as part of its work on any particular topic.

55. In so doing, the Commission has consistently adhered to the definition of customary international law enshrined in the Statute of the International Court of Justice: “a general practice accepted as law”.<sup>70</sup> Its methodology in seeking to identify rules of customary international law has recently been described in a memorandum by the Commission’s Secretariat, on the basis of a systematic review of the final versions of the various drafts adopted by the Commission over the years:

“To identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as

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<sup>68</sup> McRae has similarly suggested that “[t]he distinction becomes important when Commission members wish to oppose the inclusion of a particular provision. Characterizing it as progressive development is a way to diminish its weight and authority and the claim for its inclusion”: *supra* note 12, 93-94. He adds that “[a] reference to progressive development may well have been reached in the drafting committee in order to gain support for a particular provision, rather than a considered collective judgment that the Commission was engaging in codification in some cases and progressive development in others”, 92.

<sup>69</sup> *Yearbook of the International Law Commission 2001*, Vol. II (Part Two), 114, art. 41, commentary (3).

<sup>70</sup> Statute of the International Court of Justice (1945), Article 38.1(b).

well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists”.<sup>71</sup>

56. The care and thorough manner of identifying rules of customary international law when the Commission engages in such a task may endow its eventual analysis (output) with much authority. As Watts observed, the Commission’s formulations

“constitute a reasonable *prima facie* indication of the ‘world view’ on a particular legal question. They are a convenient articulation of the position in international law, which is what one is always seeking in an essentially customary law regime. By virtue of its global and collegiate basis, the Commission’s articulation is not just convenient but authoritative”.<sup>72</sup>

### III. The ILC’s work on the topic “Identification of customary international law”

57. At a time when questions of customary international law increasingly fall to be dealt with also by “those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations”,<sup>73</sup> and given the considerable differences of approach amongst writers, the Commission considered in 2012 that there was a need for some reasonably authoritative guidance on the process of identifying customary international law. It was thought that the Commission itself, given its role and experience, its privileged relationship with States, and its composition and working methods, might be well placed to offer such guidance. While very much aware of the difficulties inherent in an attempt to “codify the relatively flexible process by which rules of customary international law are formed”,<sup>74</sup> the Commission added the topic ‘Identification of customary international law’ to its current programme of work. Members of the Commission agreed that the outcome of the project should be of an essentially practical nature; it was not the aim to seek to resolve largely theoretical controversies. Nor, of course, is the topic concerned with the substantive rules of customary international law; it deals only with the methodology for identifying such rules.

58. This is a good moment to discuss the Commission’s work on the topic, given that in August 2016 the Commission adopted, on first reading, a set of 16 draft conclusions that concern, in the words of draft conclusion 1, “the way in which the existence and content of rules of customary international law are to be determined”.<sup>75</sup> The conclusions – together with commentaries – seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, they aim to offer clear and concise guidance without being overly prescriptive. A second and final reading is expected in 2018, bringing the topic to completion after taking into account input from States and others on the first reading text.

59. The Commission has long dealt with items concerning the sources of international law, and it was not for the first time that, in 2012, it took up a topic concerning customary international law. An earlier foray into this field (“Ways and means of making the evidence of customary international law

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<sup>71</sup> Formation and evidence of customary international law – Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat (14 March 2013), A/CN.4/659, 7.

<sup>72</sup> Watts, A. *The International Law Commission 1949-1998*, 15.

<sup>73</sup> *Report of the International Law Commission on the work of its sixty-third session* (2011), para.3.

<sup>74</sup> *Report of the Study Group on the Future Work of the International Law Commission*, 42.

<sup>75</sup> The draft conclusions together with their accompanying commentaries, adopted by the Commission on 5 and 8 August 2016, may be found in the Report of the Commission on the work of its sixty-eighth session (2016), UN Doc. A/71/10, 79-117.

more readily available”) was mandated by Article 24 of its Statute, leading the Commission in 1950 to call on States to make evidence of their practice more accessible.<sup>76</sup> In his working paper on this topic, Hudson thought that “sub-heading (b) of article 38 of the Statute of the International Court of Justice was not very happily worded”,<sup>77</sup> and sought to offer “a few guiding principles” as to the “elements which must be present before a principle or rule of customary international law can be found to have become established”.<sup>78</sup> Almost 70 years later, much of that (rather brief) discussion remains highly instructive.

60. Dealing as they do with the identification of rules of customary international law, the 2016 draft conclusions do not address, at least not directly, the processes by which customary international law develops over time. But, as the commentary indicates, in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules; they do not, however, deal systematically with how rules emerge, or how they change or terminate.

61. In approaching this topic, the first place for the Commission to look for guidance in determining how to identify customary international law was Article 38.1(b) of the Statute of the ICJ, which in a sense tells you all you need to know with its now almost century-old formula: “international custom, as evidence of a general practice accepted as law”. Then there is what States do and say about the methodology, although that is often hard to come by – at least it was until the Commission commenced work on the topic. Fortunately, there is considerable guidance in decisions of the International Court of Justice and – to a lesser extent – in those of other international courts and tribunals as well as regional courts. We have of course looked at national courts as well, studying carefully the decisions of the courts of as many States as possible.

62. The draft conclusions are to be read together with the commentaries.<sup>79</sup> Although not part of the draft conclusions *per se*, the draft commentaries are not separable from them and should be read in combination with them: they provide more detailed explanation on each conclusion as well as the context, wording and interrelation between the conclusions. In addition, they often provide concrete examples supporting the points made. One question within the Commission and among States is whether the balance between conclusions and commentary is right. Some wish to see more detail in the conclusions themselves, but that is not always easy. Also noteworthy is that the commentaries themselves do not refer to any of the vast literature on the subject, but there is an extensive bibliography has been prepared to accompany the conclusions and commentaries.

63. Draft conclusion 2 reads:

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<sup>76</sup> Report of the International Law Commission covering its second session (5 June - 29 July 1950), A/1316, *Yearbook of the International Law Commission 1950*, Vol. II, 367–74, especially paras. 90-94.

<sup>77</sup> Summary record of the Commission’s 40th meeting (6 June 1950), *Yearbook of the International Law Commission 1950*, Vol. I, 4, para. 5.

<sup>78</sup> *Ibid.* See also Working Paper by Manley O. Hudson, Special Rapporteur, A/CN.4/16, in *Yearbook of the International Law Commission 1950*, Vol. II, p. 26, para. 10.

<sup>79</sup> A concern to emphasise this for users who may not be conversant with the work of the International Law Commission led to the inclusion in the commentaries of an initial footnote (245 in the ILC Report 2016) reading “As is always the case with the Commission’s output, the draft conclusions are to be read together with the commentaries.”

“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*)”.<sup>80</sup>

64. This basic approach would have likely won the approval of Morelli, who, in his 1956 Hague lectures, said that

“The custom arises from two elements: (a) an objective or material element, consisting in the use, that is to say, in a conduct constantly held by the States with regard to certain conflicts of interest; and (b) a subjective or psychological element consisting in the conviction, gradually acquired by the same States, that that conduct is in conformity with a rule of law, that it is, in other words, the obligation or the exercise of a legal right (*opinio juris sive necessitatis*)”.<sup>81</sup>

65. Draft conclusion 2 confirms the two-element approach to the identification of rules of customary international law, which has been widely endorsed not only by the members of the Commission but also by States in the Sixth Committee of the General Assembly and in abundant international practice and international jurisprudence. That is already a significant conclusion to be drawn from the Commission’s work. Significant, if not particularly surprising. It is important because in recent years there have been calls to abandon the two-element approach - essentially, to abandon custom as we know it. Several writers have called for a reduced role for “acceptance as law”, arguing that in most cases widespread and consistent State practice alone is sufficient for constructing customary international law. Others, particularly those working in the field of human rights, as also international humanitarian law and international criminal law, have claimed the opposite – reducing the significance of the practice requirement and concentrating instead on the *opinio juris* element. Yet the two-element approach has withstood both political pressures and the test of time: customary international law continues to require “a general practice accepted as law”. The identification of a rule of customary international law, in all fields of international law, requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).

66. Draft conclusion 2’s reference to determining the “existence and content” of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise contours are disputed. This may be the case, for example, where there is disagreement as to whether a particular formulation (usually found in written texts such as treaties or resolutions) does in fact equate to an existing rule of customary international law; consider, for example, the issue of freedom from arbitrary detention, where the International Covenant on Civil and Political Rights and the European Convention on Human Rights formulations are quite different. Instances where the precise content may be disputed also include cases where the question arises whether there are exceptions to a recognized rule of customary international law.

67. There may, however, be a difference in the application of the two-element approach by a careful assessment that considers, in each case, the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found. This is reflected in the latter part of draft conclusion 3, paragraph 1, which, as the commentary indicates, is “an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence

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<sup>80</sup> *Supra* note 75, 82.

<sup>81</sup> 89 *Recueil des cours* (1956) 453 (my translation).



must be careful and contextual”.<sup>82</sup> It implies, among other things, that the type of evidence consulted (and consideration of its availability or otherwise) may be adjusted to the situation, with certain forms of practice and evidence of acceptance as law being of particular significance. This was the case, for example, in the *Jurisdictional Immunities of the State* case, where the ICJ said that for purposes of identifying the scope and extent of the customary rule on State immunity.

In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.<sup>83</sup>

68. Regard must be had to the particular circumstances in which any evidence is to be found because relevant conduct may often be fraught with ambiguities. As the commentary to draft conclusion 3 explains,

“When considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State’s failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. And practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law”.<sup>84</sup>

69. Taking account of the particular circumstances and context in which an alleged rule has arisen and operates affords flexibility, while respecting the essential nature of customary international law as a general practice accepted as law. In other words, the underlying approach is the same: both elements are required. Any other approach would risk artificially dividing international law into separate fields, and would run counter to the systemic nature of international law.

70. Draft conclusion 3, paragraph 2, specifies that “Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element”.<sup>85</sup> In other words, as the commentary explains,

“practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, but two distinct inquiries are to be carried

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<sup>82</sup> *Supra* note 75, 85.

<sup>83</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports (2012), 123, para. 55.

<sup>84</sup> *Supra* note 75, 86.

<sup>85</sup> *Ibid*, 84.

out. While the constituent elements may be intertwined in fact (in the sense that practice may be accompanied by a certain motivation), each is conceptually distinct for purposes of identifying a rule of customary international law”.<sup>86</sup>

71. Part Three of the draft conclusions deals with the constituent element of “a general practice”, which “both defines and limits” customary international law,<sup>87</sup> and seeks to provide guidance as to what this requirement is about and how it may be evidenced. Also known as the “material” or “objective” element, this element refers (in the aggregate) to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. Judge Morelli similarly said in his Dissenting Opinion in the *North Sea Continental Shelf* cases that State practice may at times be “relevant not as a constitutive element of a custom which creates a rule, but rather as a confirmation of such rule”.<sup>88</sup>

72. Part Three begins with draft conclusion 4, which seeks to answer the question: whose practice counts? It will be recalled that the basic text, Article 38.1(b) of the Court’s Statute, does not answer this question. It refers simply to “a general practice”, without saying whose practice. Draft conclusion 4 consists of three paragraphs: the first deals with States; the second with international organizations; and the third with ‘other actors’, that is, actors other than States and international organizations. Draft conclusion 4, paragraph 1, explains that the requirement of a general practice refers primarily to the practice of States as contributing to the formation, or expression, of rules of customary international law.<sup>89</sup>

73. The practice of States, the primary subjects of international law, is self-evidently of paramount importance to the identification of customary international law. But draft conclusion 4, paragraph 2, indicates that “[i]n certain cases” the practice of international organizations may also contribute to the identification of rules of customary international law.<sup>90</sup> This statement deals with practice attributed to international organizations themselves, not that of their member States acting within or in reaction to them (which is to be attributed to the States in question). It has not been free from controversy. And it is indeed a difficult area, not least given the great number of international organizations, the many and significant differences between them, and their limited power and functions (the principle of speciality).

74. Paragraph 2 reflects, first, the fact that although most international organizations lack a genuinely autonomous law-making power, their contribution to the creation and expression of customary international law seems undeniable where the member States have transferred exclusive competences to them, such that the States themselves do not engage in practice with respect to the issue at hand. In such cases, international organizations exercise some of the public powers of their member States, and their practice may (some would say must) thus be equated with the practice of those States. This is sometimes the case with the European Union, and possibly also with some other international organizations, including regional international economic organizations.

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<sup>86</sup> *Ibid*, 86.

<sup>87</sup> See Judge Spender’s Dissenting Opinion in *Case concerning Right of Passage over Indian Territory*, Merits, Judgment of 12 April 1960, I.C.J. Reports (1960), 99: “The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined”.

<sup>88</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports (1969), 202, para. 6.

<sup>89</sup> *Supra* note 75, 87.

<sup>90</sup> *Ibid*, 88.

75. Relevant practice may also arise, in certain cases, where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are functionally equivalent to the powers exercised by States. For example, the practice of secretariats of international organizations when serving as treaty depositaries, the deployment of military forces (such as for peacekeeping), or the taking of positions on the scope of privileges and immunities for the organization and its officials.

76. The practice of international organizations is likely to be of particular relevance with respect to rules of customary international law that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties.

77. The Commission made sure to warn, however, that caution is required in assessing the relevance and weight of such practice by international organizations. As the commentaries stipulate, international organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. The reaction of member States to such practice is of importance. Among other factors to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; the subject matter of the rule in question and whether the organization itself would be bound by the rule; whether the conduct is *ultra vires* the organization or the organ; and whether the conduct is consonant with that of the member States of the organization.

78. The formula “a general practice accepted as law”, enshrined in Article 38.1(b) of the ICJ Statute, is flexible enough to include the practice of international organizations: the suggested Root-Phillimore formulation of “International custom, as evidence of a common practice in use between nations and accepted by them as law”, like Baron Descamps’s original reference to international custom as “being practice between nations accepted by them as law”, ended up on the cutting room floor. Authors have thus argued that “custom ... [is] not required to be followed or acknowledged ‘by states’ only, as it is actually required [in the Statute] ... when referring to conventions. So that, in principle, practices may emanate from state and non-state actors”.<sup>91</sup>

79. At the same time, draft conclusion 4, paragraph 3, provides that the conduct of actors other than States and international organizations – for example, NGOs, non-State armed groups, transnational corporations and private individuals – is neither creative nor expressive of customary international law.<sup>92</sup> As such, their conduct does not serve as direct (primary) evidence of the existence and content of rules of customary international law. Paragraph 3 recognizes, however, that such conduct may have an important indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law by States (and international organizations). For example, the official statements of the International Committee of the Red Cross (ICRC), such as appeals and memoranda on respect for international humanitarian law, play an important role in shaping the practice of States when reacting to such statements; and publications of the ICRC may serve as helpful records of relevant practice. Such activities may contribute to the development and determination of customary international law; but they are not practice as such. Similarly, although the conduct of non-State armed groups is not practice that may be constitutive or expressive of customary international law, the reaction of States to it may well be. All of this is consistent with the Commission’s approach in the context of its work on the topic ‘subsequent agreements and

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<sup>91</sup> For example, Bohoslavsky, J.P., Li, Y. and Sudreau, M. *Emerging Customary International Law in Sovereign Debt Governance?*, 63.

<sup>92</sup> *Supra* note 75, 88.

subsequent practice in relation to the interpretation of treaties'. There it was decided that "Other conduct, including by non-State actors, does not constitute subsequent practice ... Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty".<sup>93</sup>

80. Draft conclusion 5 provides that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions".<sup>94</sup> This is fairly straightforward, though in the past it was sometimes argued that relevant practice may emanate only from those authorized to represent the State in its international relations. The draft conclusion and its commentary do raise a few interesting points, however, including those relating to attribution of conduct and to confidential practice.

81. Draft conclusion 6, which lists prominent examples of practice (and states that "[t]here is no predetermined hierarchy among the various forms of practice"),<sup>95</sup> provides further illustration that the Commission's work on the topic has shown that several longstanding theoretical controversies related to customary international law have by now been put to rest. It is no longer seriously contested, for example, that verbal acts, and not just physical conduct, may count as "practice". Writers have also been divided on whether practice may only be relevant for the purposes of customary international law when it relates to a situation at the international level and to some actual incident of claim-making (as opposed to assertions *in abstracto*),<sup>96</sup> a position that seems by now to have been abandoned.

82. Draft conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of draft conclusion 8). As the two paragraphs of draft conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.<sup>97</sup>

83. As the commentary explains, the requirement to assess all available practice "as a whole" is illustrated by the *Jurisdictional Immunities of the State* case, where the Hellenic Supreme Court had decided in one case that, by virtue of the "territorial tort principle", State immunity under customary international law did not extend to the acts of armed forces during an armed conflict. Yet a different position was adopted by the Greek Special Supreme Court; by the Greek Government when refusing to enforce the Hellenic Supreme Court's judgment and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision. Assessing such practice "as a whole" led the International Court of Justice to conclude "that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument".

84. Draft conclusion 8 seeks to capture the essence of the requirement that the relevant practice be 'general' as well as the inquiry that is needed in order to verify whether this requirement has been met in a particular case. It defines 'general' as "sufficiently widespread and representative, as well as consistent", the commentary explaining that this "does not lend itself to exact formulations, as circumstances may vary greatly from one case to another". Citing to case-law of the ICJ, the commentary further explains that complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform; some inconsistencies and

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<sup>93</sup> *Ibid*, 46 (Draft conclusion 5(2)).

<sup>94</sup> *Ibid*, 90.

<sup>95</sup> *Ibid*, 91.

<sup>96</sup> See, for example Kunz, J.L. *The Nature of Customary International Law*, 666.

<sup>97</sup> *Ibid*, 92-93.

contradictions are thus not necessarily fatal to a finding of “a general practice”.<sup>98</sup> It is no longer questioned that no particular duration is required for the emergence of a rule of custom (if the practice is general and accepted as law), as is made clear in draft conclusion 8, paragraph 2.

85. Draft conclusions 9 and 10 deal with the second constituent element, that of “acceptance as law”, sometimes referred to as the “subjective” or “psychological” element and also known as *opinio juris*.<sup>99</sup> The Commission has followed the Statute of the Court in referring to acceptance as law (a term that also seems to capture more accurately what is involved); but the Latin term *opinio juris* appears in brackets, mainly out of deference to its frequent use in practice.

86. Acceptance as law is yet another issue that provided scholars with much to ponder. As in the past, the Commission has been able to avoid much of the theoretical debate connected with *opinio juris* (to a large extent given its focus on identification, as opposed to the formation of customary international law), seeking to clarify its nature and function as well as how it may be proved. The non-exhaustive list of potential forms of evidence of acceptance as law offered by the Commission refers to public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; and inaction (under certain circumstances). Guidance has also been provided on how to distinguish between acceptance as law and other motives that may accompany a certain practice.

87. The relevance of treaties to the formation or identification of customary international law is familiar ground. It is dealt with in draft conclusion 11, which indicates that (a) a treaty rule may codify a rule existing at the time of the conclusion of the treaty; (b) a treaty rule may have led to the crystallization of a rule that had started to emerge prior to the conclusion of the treaty; and (c) a treaty rule may give rise to a general practice that is accepted as law, thus generating a new rule of customary international law.<sup>100</sup> As the draft conclusion indicates, caution is needed when establishing whether this is so. Treaty texts alone cannot serve as conclusive evidence as to the existence or content of rules of customary international law: in order to establish the existence in customary international law of a rule found in a written text, the rule must find support in external instances of practice coupled with acceptance as law. In the words of the *Libya/Malta* judgment,

“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”.<sup>101</sup>

88. One may also recall in this context Judge Morelli’s thoughtful methodological approach in his Dissenting Opinion in the *North Sea Continental Shelf* cases, where he said that he thought that

“in order to find the principles and rules of general international law concerning the delimitation of the continental shelf it might be useful, whenever the circumstances so require, to take account of the Convention [on the Continental Shelf] as a very important evidential factor with regard to general international law, because the purpose of the

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<sup>98</sup> *Ibid*, 94-96

<sup>99</sup> *Ibid*, 97-101.

<sup>100</sup> *Ibid*, 102.

<sup>101</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports (1985), 29–30, para. 27.

Convention is specifically, at any rate in principle, to codify general international law and because this purpose has been, within certain limits, effectively realized".<sup>102</sup>

89. The role of resolutions adopted by international organizations or at international conferences used to be controversial. Draft conclusion 12 deals with this matter and begins with a negative statement, perhaps a word of warning:

"A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law".<sup>103</sup>

In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law. There is no 'instant custom' arising out of such resolutions on their own account.

90. Draft conclusion 12, paragraph 2, strikes a more positive note. As the International Court of Justice observed in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, resolutions "even if they are not binding ... can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".<sup>104</sup> This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, "[t]he effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".<sup>105</sup> Conversely, negative votes, abstentions, or disassociations from a consensus may be evidence that there is no acceptance as law, and thus that there is no rule.

91. Draft conclusion 12, paragraph 3, as a logical consequence of paragraphs 1 and 2, clarifies that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law.<sup>106</sup> Thus, a provision in a resolution may reflect a rule of customary international law only if it is established that the provision corresponds to a general practice that is accepted as law.

92. The next point addressed in the draft conclusions is the role of judicial decisions in relation to customary international law. This is dealt with in draft conclusion 13.<sup>107</sup> As is well-known, Article 38.1(d) of the ICJ Statute refers to "judicial decisions" and to "teachings of the most highly qualified publicists of the various nations" as "subsidiary means for the determination of rules of international law". What does "subsidiary" imply here? It indicates that judicial decisions and teachings are not primary sources of law in the same way as international conventions, international custom, and general principles of law. Rather they are secondary means for assisting in determining the law: for

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<sup>102</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports (1969), 197, para. 1.

<sup>103</sup> *Supra* note 75, 106.

<sup>104</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports (1996), 254-255, para. 70 (referring to UN General Assembly resolutions).

<sup>105</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports (1986), 100, para. 188. See also *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award (24 March 1982), 21 ILM (1982), 1032, para. 143.

<sup>106</sup> *Supra* note 75, 106.

<sup>107</sup> *Ibid*, 109.

interpreting treaties, for identifying the existence of rules of customary international law and their content, and for the determination of general principles of law. Judicial decisions, and the writings of learned authors, may be looked to for guidance as to the law, but are not themselves law. On the other hand, the word “subsidiary” should not be taken as suggesting that they are of no great importance, which is clearly not true, especially for judicial decisions.

93. What is the position of national courts? It is clear that decisions of national courts may count as State practice and as evidence of the *opinio juris* of States, and thus contribute directly to the formation (and evidence) of customary international law under Article 38.1(b).<sup>108</sup> But may they also be used as a subsidiary means for the determination of rules of customary international law under Article 38.1(d) in the same way as decisions of international courts and tribunals? There is no reason in principle not to include decisions of national courts within article 38.1(d) as it relates to customary international law. Such landmark cases as *Paquete Habana* and *McLeod* have contributed greatly to international law. But the decisions of domestic courts have to be approached with great care, and in context, since they may reflect national legal systems and approaches, not necessarily the position under international law. This is perhaps particularly so with respect to domestic judgments dealing with human rights, which are situated within a particular legal (and political) framework.<sup>109</sup>

94. Next comes another subsidiary means for the determination of rules of international law, “teachings of the most highly qualified publicists” as the ICJ Statute puts it.<sup>110</sup> As with decisions of courts and tribunals, referred to in draft conclusion 13, writings are not themselves a source of customary international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that they may have in systematically compiling State practice and synthesizing it; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law. This is what draft conclusion 14 seeks to capture.<sup>111</sup>

95. There is a need for caution when drawing upon writings. Their value for determining the existence of a rule of customary international law varies markedly; this is reflected in the words ‘may serve as’. First, and this is often the case for example with writings on international human rights law, writers may aim not merely to record the state of the law as it is but also to advocate its development. In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual positions of their authors. Third, writings differ greatly in quality. Assessing the authority of a given work is thus essential; in the well-known words of the United States Supreme Court in *Paquete Habana*,

“the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is”.<sup>112</sup>

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<sup>108</sup> See draft conclusions 6(2), and 10(2), *ibid*, 91, 99.

<sup>109</sup> See UN Doc. A/CN.4/691, *Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law – Memorandum by the Secretariat* (2016).

<sup>110</sup> The word “publicists” in the ICJ Statute is a curious one in English. It seems that the French word *publicistes* refers to lawyers qualified in public law, as opposed to those who teach or practice private law.

<sup>111</sup> *Supra* note 75, 111.

<sup>112</sup> *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900), 700. In the same case, Chief Justice Fuller, dissenting, said of writers that “[t]heir lucubrations may be persuasive, but not authoritative”. Compare the much-quoted

96. Draft conclusion 15 concerns the persistent objector rule, and provides that

“[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection”.<sup>113</sup>

This is another issue that has proven less contentious than in the past, perhaps given the amount of State practice now available in support of the rule’s existence.<sup>114</sup> But the draft conclusion emphasises that in each case, stringent conditions must be met: “The objection must be clearly expressed, made known to other States, and maintained persistently”.

97. Draft conclusion 16 concerns ‘particular customary international law’, that is, rules of customary international law, whether regional, local or other, that apply only among a limited number of States.<sup>115</sup> In his Hague Academy lectures, Morelli, too, chose to refer to “particular” custom rather than “special custom”, “regional custom”, “local custom” etc.<sup>116</sup> The draft conclusion and its commentary explain that the two-element approach applies in the identification of such rules, too, but taking into account the special nature of rules of particular customary international law by virtue of their limited reach. The practice must be general in the sense that it is a consistent practice “among the States concerned”, that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves.

98. The fourth report on “Identification of customary international law”,<sup>117</sup> presented to the Commission in May 2016, envisaged three parts to the final output of the Commission on this topic. First, the conclusions and commentaries; second, a bibliography; and, finally, a new study of ways and means for making the evidence of customary international law more readily available. So far as the study is concerned, the Commission has requested its Secretariat to prepare a memorandum, which will survey the present state of the evidence of customary international law and make suggestions for its improvement. The Commission looked into this matter some sixty-five years ago. Revisiting it is appropriate given what even 20 years ago was referred to as the

“enormous proliferation of the available material on the many aspects of international law and relations ... the rising costs associated with its accumulation, storage, and distribution ... [and the] revolutionary developments in global information technology”.<sup>118</sup>

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remarks of the English Court of Admiralty in the *Renard Case* (1778): “A pedantic man in his closet dictates the law of nations; and who shall decide, when doctors disagree? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius...” (165 English Law Reports 51).

<sup>113</sup> *Supra* note 75, 112.

<sup>114</sup> See, for example, the practice collected in Third report on identification of customary international law by Michael Wood, Special Rapporteur (2015), A/CN.4/682, 60-61, para. 87; and in Green, J.A. *The Persistent Objector Rule in International Law*.

<sup>115</sup> *Supra* note 75, 114.

<sup>116</sup> *Supra* note 81, 458.

<sup>117</sup> UN Doc. A/CN.4/695 and Add.1: *Fourth report on identification of customary international law by Michael Wood, Special Rapporteur*.

<sup>118</sup> To borrow the words of Watts, A. *The International Law Commission 1949-1998*, 2106.



#### IV. The International Law Commission's role in the customary process

99. An interesting question is the weight to be given to pronouncements emanating from the ILC itself when one is seeking to determine whether a rule of international law exists or not, the precise contours of such rule, or even when a rule came into existence. Such questions arise most often in connection with the identification of customary international law, but could also arise in relation to the interpretation of a treaty.

100. The importance of the Commission's role is clear. This is particularly the case where the Commission's output is endorsed by States within the General Assembly and elsewhere. But even where States do not endorse the work, expressly or otherwise, the Commission's output may be influential and even contribute to the formation of new law. This is not a recent phenomenon, as some suppose. What was almost the Commission's very first output, the Nürnberg Principles, was not endorsed by the General Assembly yet became highly influential.<sup>119</sup> Even 'failed' topics, those that the Commission has begun to work on but at some point chose not to proceed with,<sup>120</sup> may have an impact. The Commission's output often constitutes a reference point that serves as a catalyst for State practice and expressions of legal opinion;<sup>121</sup> and it has also been a significant influence on courts and on writers, shaping international law through their distinct roles as well.

101. Still, the Commission has not found it easy to describe its own role in relation to the identification of rules of customary international law. Its output undoubtedly merits special consideration because, as may easily be observed in many decisions of the ICJ and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may be given particular weight (as may a conclusion by it that no such rule exists). Judge Tomka has said that indeed

"the codifications produced by the International Law Commission have proven most valuable [to the Court in ascertaining whether a rule of customary international law exists], primarily due to the thoroughness of the procedures utilized by the ILC".<sup>122</sup>

Judicial decisions of national courts and tribunals referring to the work of the ILC are also abundant.

102. One of the main questions was (and remains) whether the Commission's output falls within Article 38.1(d) of the ICJ Statute as 'teachings of the most highly qualified publicists of the various nations' that may serve as subsidiary means for the determination of customary rules. If not, how is it to be classified?

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<sup>119</sup> See UNGA resolution 488(V) of 12 December 1950.

<sup>120</sup> Such as the topic "Question of defining aggression" (1950-1951), where the Commission decided not to prepare a conclusive definition of aggression but to continue considering the matter in the context of the Draft Code of Offences against the Peace and Security of Mankind: *Yearbook of the International Law Commission 1951, Vol. II*, 131-133, paras. 35-53.

<sup>121</sup> This reality is referred to in several of the draft conclusions on the identification of customary international law, in particular those dealing with forms of practice, forms of evidence of acceptance as law (*opinio juris*), and the potential relevance of treaties. Of course, the Commission's work may also feed into resolutions of the General Assembly, which may serve as impetus to legal development as well.

<sup>122</sup> Tomka, P. *Custom and the International Court of Justice*, 202. It has been said that "the ICJ and other tribunals ... rely on ILC conventions without overtly enquiring whether particular articles represent existing law, revision of existing law or a new development of the law": A. Boyle, C. Chinkin, *The Making of International Law*, 200. Villalpando has noted that, where the ICJ has applied ILC draft articles: "the Court's finding that these provisions reflect customary international law is as brief and categorical as its own autonomous determinations of rules of law, which apparently indicates an increasing trust placed by the Court in the Commission": S. Villalpando, *On the International Court of Justice and the Determination of Rules of Law*, 26. For an (no longer fully up-to-date) account of the ICJ's reliance on the work of the ILC up to 1987, see Sinclair, *supra* note 32, 127-138.

103. The 1949 *Survey of International Law in Relation to the Work of Codification of the International Law Commission* suggested that texts produced by the Commission but not turned into conventions

“would be at least in the category of writings of the most qualified publicists, referred to in Article 38 of the Statute of the International Court of Justice as a subsidiary source of law to be applied by the Court”.<sup>123</sup>

It went on to say that

“Most probably their authority would be considerably higher. For they will be the product not only of scholarly research, individual and collective, aided by the active co-operation of Governments, of national and international scientific bodies, and the resources of the United Nations. They will be the result of the deliberations and of the approval of the International Law Commission. Outside the sphere of international judicial settlement they will be of considerable potency in shaping scientific opinion and the practice of Governments”.<sup>124</sup>

104. A number of ICJ judges have agreed with this classification.<sup>125</sup> Judge Shi, addressing the Commission in 1997 on behalf of the ICJ, said that

“ICJ had always held the Commission’s work in very high esteem. It viewed the draft articles produced by the Commission and the reports prepared for it as sources at least as authoritative as the writings of the most eminent publicists”.<sup>126</sup>

105. Several authors have taken the same view.<sup>127</sup> According to David Caron, for example,

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<sup>123</sup> *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission (Memorandum submitted by the Secretary-General)*, UN Doc. A/CN. 4/1/Rev.1 (1949), p. 16.

<sup>124</sup> *Ibid.*

<sup>125</sup> See also, for example, Declaration of Judge Guillaume in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports (2009), 294, para. 9 (“The question of the effect of the passage of time on treaty interpretation has been the subject of spirited debate in the literature between proponents of “contemporaneous” (also called “fixed reference”) interpretation and advocates of “evolutionary” (also called “mobile reference”) interpretation. Thus, within the International Law Commission “there was support for the principle of contemporaneity as well as the evolutive approach”, but a consensus seems to have emerged to the effect that the problem should be resolved through the application of ordinary methods of treaty interpretation” (citations omitted)); Declaration of Judge *ad hoc* Van den Wyngaert in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Provisional Measures, Order of 8 December 2000, I.C.J. Reports (2000), 232, para. 7, fn. 14 (treating the Commission’s products as “legal doctrine”).

<sup>126</sup> Summary record of the Commission’s 2503rd meeting (2 July 1997), *Yearbook of the International Law Commission 1997*, Vol. I, p. 214, para. 64. Addressing the Commission in 2003 as President of the Court, Judge Shi similarly said that “If the Commission’s work was only a subsidiary means of determining international law, according to Article 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means”; summary record of the Commission’s 2775th meeting (15 July 2003), *Yearbook of the International Law Commission 2003*, Vol. I, 163, para. 4.

<sup>127</sup> See, for example, Villiger, M.E. *Customary International Law and Treaties*; Watts, A. *The International Law Commission 1949-1998*, 14-15 (suggesting, however, that “there is something inappropriate” about such classification); Rosenne, S. *The Perplexities of Modern International Law*, 52; Bordin, F.L. *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 559 (“[c]odification conventions and ILC draft articles are not, of course, to be assimilated with custom, and their characterization as subsidiary sources remains technically correct. And yet, the tendency to associate these texts with customary international law makes it somewhat simplistic to treat them as mere evidence of State practice or as the work of publicists”); Thirlway, H. *The Sources of International Law*; Peil, M. *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*.

“If the Commission's work was only a subsidiary means of determining international law, according to Article 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means”.<sup>128</sup>

106. Others, such as Ian Brownlie, considered the draft articles prepared by the Commission to be “[s]ources *analogous* to the writings of publicists, and at least as authoritative” (emphasis added).<sup>129</sup>

107. Still others, however, have seen the Commission’s output as wholly distinct from writings of the most highly qualified publicists of the various nations. Judge Álvarez, for example, in commenting on sources of international law, stated that, in addition to treaties and customary international law,

“Reference must also be made to the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, *the works of the Codification Commission set up by the United Nations*, and finally, the opinions of qualified jurists (emphasis added)”.<sup>130</sup>

108. In my third report as the Commission’s Special Rapporteur for the topic *Identification of customary international law* (2015), I adopted what I thought was the orthodox view and treated the work of the Commission as falling within the subsidiary means for the determination of rules of law listed in Article 38.1(d) of the ICJ Statute.<sup>131</sup> I did not include any express reference to the Commission’s work in the proposed draft conclusions proposed in that report. I did, however, point to the particular importance of the Commission:

“Special importance may attach to collective works, in particular the texts and commentaries emerging from the work of the International Law Commission, but also those of private bodies such as the Institute of International Law and the International Law Association”.<sup>132</sup>

109. But, on reflection this was perhaps not the best description, especially in apparently equating the Commission, the *Institut de droit international* and the International Law Association, and in the debate on the third report, in 2015, and in the Sixth Committee that year, the matter received much attention. Some members of the Commission and States felt that to omit any explicit reference to the work of the Commission in a guide designated to assist practitioners in the task of identifying rules of customary international law would not do justice to the role played by the Commission in international legal argument. They also protested that placing the Commission’s output under “teachings” did not reflect its real standing or role, as it did not equate to scholarly work given the Commission’s status and relationship with States as a subsidiary organ of the General Assembly. And, after all, the members of the Commission, even those who were academics, were not fulfilling an academic role, but were acting as independent experts in fulfilment of the mandate of the Commission.

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<sup>128</sup> Caron, D. *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 873.

<sup>129</sup> Brownlie, I. *Principles of Public International Law*, 25. This language is retained in Crawford’s eighth edition (Oxford University Press, 2014), 43.

<sup>130</sup> *Fisheries case*, Judgment, 18 December 1951, I.C.J. Reports (1951), 149. See also, for example, the Dissenting Opinion of Judge Ad Hoc Mahiou in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports (2010), 828 (“This viewpoint, widely accepted within the doctrine, is also taken up in the draft Articles adopted by the International Law Commission in 2006 ...”)

<sup>131</sup> Third report on Identification of customary international law (2015), UN Doc. A/CN. 4/682, 45, para. 65.

<sup>132</sup> *Ibid.* See also Wood, M. *Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)*.

110. Others, however, insisted that the Commission's output was "teachings" within the meaning of the term in the ICJ Statute, albeit teachings of the highest authority. At the same time, they also suggested that not all of the Commission's products were deserving of the same status: the weight to be given to any determination by the Commission, they explained, ought to depend on various factors, including the sources relied upon by the Commission, the stage reached in its work, and, above all, upon States' reception of it. They also considered it inappropriate for the Commission to blow its own trumpet, so to speak, by including a draft conclusion dedicated only to this matter.

111. In the end, a compromise was struck. In the first reading draft, the Commission's output and its significance are highlighted in a paragraph dedicated to this matter in the commentary to the draft conclusions. This paragraph is not found under the draft conclusion dealing with 'teachings', but in the introductory commentary to Part Five of the set of conclusions, the part which deals with the significance of certain materials for the identification of customary international law (including teachings).<sup>133</sup>

112. Of course, the Statute of the ICJ and the notion of 'subsidiary means' predate the establishment of the Commission and the very idea of a permanent organ dedicated to promoting the codification (and progressive development) of international law in the service of governments. One may also wonder whether it really matters on what ground the Commission's output is invoked, in any genuine effort to get the law right. The ICJ itself has not concerned itself with this formal question, at least not publicly, when invoking the work of the Commission.

113. It is probably correct that the Commission's output should be treated as a 'subsidiary means'. After all, the Commission, like its parent body, the General Assembly, does not have a mandate to legislate. Nonetheless, it is rightly seen as a particularly influential and important subsidiary means, if only because of its unique mandate from States, which necessarily involves a process of elucidation of customary international law. And what makes the Commission different from other bodies doing more or less the same thing (such as the *Institut de droit international* and the International Law Association) is that it is acting closely with the General Assembly and with States as part of the process envisaged in Article 13.1(a) of the UN Charter. Indeed, there are obvious features that distinguish the Commission's output from other writings. Most significant are the composition, working methods, mandate, and above all the privileged relationship of the Commission with States: at all stages, the work of the Commission is looked at and commented on in the Sixth Committee, and States also have the opportunity to provide examples of their practice and to make written comments on the provisionally adopted texts. So the Commission has the benefit of an interaction with States and the General Assembly on the substance of its work. This and the other factors tend to give the Commission's output a particular authority.

114. At the same time, it is not possible to generalize about the value of the Commission's work in attempts to identify rules of customary international law. Each case should be examined on its own merits, and it thus seems necessary to emphasise the caution with which the product of the Commission needs to be approached. In most cases it is only the final output that carries particular weight, generally not first-reading drafts or reports of the Special Rapporteurs, still less the views of individual Commission members.

115. In addition, and this brings us full circle to where we began, it may sometimes be essential to seek to distinguish between work that is intended to reflect *lex lata* and that which is intended as *lex ferenda* or new law. That, as we have seen, is not always easy in practice. Perhaps most important, then, is the response of States to the Commission's work. Only where the output of the Commission

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<sup>133</sup> *Supra* note 75, 101, commentary para. (2).

receives the general endorsement of States should it be considered as authoritative. At the very least, where significant disagreement by States is recorded it should carry less weight.

## V. Conclusion

116. A number of concluding remarks are in order. First, although it may have been thought that codification would drive out customary international law or push it into the background, in fact, notwithstanding its many achievements, the Commission's work has very much maintained the place of customary international law and its role as a central source of international law. This may be particularly so at a time when States seem generally reluctant to embark on further 'codification' conventions. And it is well established that the conclusion of conventions does not mean that the corresponding rules of customary international law cease; conventional and customary rules continue in parallel. Customary international law continues to be important and indeed has a "bright future".<sup>134</sup>

117. Second, and closely related: while customary international law feeds regularly into and guides the work of the Commission, the same may be said in reverse. As has been explained, the Commission's work not only surveys and evaluates State practice and judicial pronouncements; it also influences them. Thus the output of the Commission, whatever title or form it may take, often contributes to the development of the law. In this sense, too, codification and progressive development go hand in hand.

118. Third, despite the persistent challenges to differentiating between codification of international law and its progressive development, it remains both important and useful to bear the distinction in mind, whether generally or in assessing any particular legal pronouncement. The distinction between *lex lata* and *lex ferenda* (or new law) remains fundamental in the practice of international law: the identification of law is distinct from the progressive development of law.

119. The Commission's recent work on *Identification of customary international law* may be seen in this light as well – an effort to maintain the legitimacy, integrity and effectiveness of custom as a source of international law. Such an impact is highly desirable:

"if custom were truly in crisis, the stability of the international legal system as a whole would be endangered. Even if, admittedly, "it may not be the ultimate source of law, [custom] is still the most basic source of rules to govern the activities of States" and "the principal construction material for general international law" (in the sense of its capability to generally bind all States). Being a central means of bringing under one legal regime all members of a large and heterogeneous international community, and underpinning as it does the other sources of international law, not least treaties, customary international law is now more necessary and important than ever".<sup>135</sup>

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<sup>134</sup> Sender and Wood, *supra* note 2.

<sup>135</sup> *Ibid*, 369.

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