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### The International Law Commission Between Codification, Progressive Development, or a Search for a New Role

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## THE INTERNATIONAL LAW COMMISSION BETWEEN CODIFICATION, PROGRESSIVE DEVELOPMENT, OR A SEARCH FOR A NEW ROLE

Pavel Šturma\*

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### I. SETTING THE SCENE

In 2018, the UN International Law Commission commemorated its 70th anniversary. Indeed, 70 years of an institution’s existence is a very important occasion for reflection on the contributions of the institution. In the case of the ILC, which is a subsidiary body of the UN General Assembly (“GA”), this cannot and should not be just a pretext for celebrations and discussions within the system. It is rather a unique opportunity to hear how the Commission and its work is viewed from the outside, meaning from the community or, in other words, “invisible college” of international lawyers.

Therefore, the invitation by the Florida International University and its Law Review to get together a number of members of the Commission and other lawyers from Governments (such as legal advisers), international organizations, and the academia is welcome. I do not view it as a competition to the official commemoration that took place in New York and Geneva or to other forms of dialogue between the Commission and Member States.<sup>1</sup> It seems rather one of various side events complementary to the official debate. It is indeed my honor and pleasure to share with the readers some views on the different forms of contribution of the International Law Commission to the development of international law.

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<sup>1</sup> It is, indeed, first and foremost the debate on the Report of the ILC and its individual chapters, presented by the Chairperson of the ILC, which takes place in the Sixth (Legal) Committee of the GA in New York. However, there are also other fora, including regional organizations, e.g., the meetings of the Committee of Legal Advisers for Public International Law of the Council of Europe (CAHDI).

The Commission has a long and glorious history. It contributed greatly to the codification and development of international law. In the past, it contributed mainly through its draft articles that became later multilateral conventions. Such codification conventions cover a vast area of contemporary international law. It is possible to say that the development of general international law during the past 70 years was, to the great extent, achieved directly or indirectly as a result of the Commission's efforts. Codification has been carried out in various places, by various organs, and by various methods; nevertheless, the key role has been performed by the International Law Commission as the main body of the United Nations for the codification and promotion of the progressive development of international law.

Both the concepts of codification and development of international law appear in Article 13, paragraph 1 of the UN Charter, which states that "the General Assembly shall initiate studies and make recommendations for the purpose of: ... encouraging the progressive development of international law and its codification." The translation of the Charter in some languages was based on the French original—*développement progressif*—which means development "gradual" or "step by step." Conversely, an equally authentic English version of the Charter—*progressive development*—allows for two translations: both gradual and progressive. This distinction in meaning was debated in Czech (or Czechoslovak) international law theory; however, the debates were not very productive. Apparently, the development of international law (as well as its codification) is a process that cannot be but gradual. On the other hand, the States would hardly be prepared to adopt a text that would endeavour to fix obsolete rules or even adopt a regressive change under the label of "codification" or "development".

A more detailed explanation of concepts used in Article 13, paragraph 1 of the UN Charter is provided in the Statute of the International Law Commission.<sup>2</sup> According to Article 1, the Commission shall have for its object the promotion of the progressive development of international law and its codification.<sup>3</sup> Article 15 of the Statute then specifies that the expression "codification of international law" is used for the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent, and doctrine. Conversely, "progressive development of international law" is used as meaning the preparation of draft conventions on subjects that have not yet been regulated

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<sup>2</sup> G.A. Res. 174 (II) (Nov. 21, 1947); *see also* 1 THE WORK OF THE INTERNATIONAL LAW COMMISSION 245 (United Nations, 6th ed. 2004).

<sup>3</sup> THE WORK OF THE INTERNATIONAL LAW COMMISSION, *supra* note 2 at 245.

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by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.<sup>4</sup>

Today, however, the situation has changed in a sense that more and more final products of the work of the Commission are not codification conventions. In addition, many new instruments are produced through interstate multilateral negotiations or in other fora. Moreover, there is a rise of informal law-making, soft law instruments and the like. The new situation also gave rise to certain backlash against codification and progressive development of international and a criticism to the role of the ILC.

## II. NEW CHALLENGES TO THE ILC

At present, the crisis of codification is under discussion, the phenomenon of fragmentation of international law (an issue which was on the agenda of the Commission) is being researched,<sup>5</sup> the topic of constitutionalization of international law has emerged,<sup>6</sup> etc. Therefore, it is important to ponder the current as well as future assignments of the International Law Commission in the area of codification of international law.

The lower number of final products that takes the form of convention, in and by itself, does not necessarily mean a crisis. On one hand, it is an undeniable fact that most parts of general international law have been already codified. Therefore, the Commission more and more often selects new, not traditional topics which bear on progressive development of international law or even differ from both codification and progressive development (for example studies, interpretative guides). On the other hand, today, States seem to be less interested in binding treaties, in particular the general codification conventions elaborated by the expert body, such as the ILC, instead of inter-governmental negotiations. This may push the Commission, in turn, to search for and adopt new, non-traditional topics and methods of work.

It seems, however, that the challenges to the Commission go far beyond the issue-areas of international law that are available and can be selected for codification today or in a near future. This is certainly one of the crucial tasks for the Commission and its methods of work to have an in-depth debate with a view of choosing good topics.

Nevertheless, this is only a part of the picture. The Commission works in circumstances that are different from the world as it existed 70 years ago,

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<sup>4</sup> *Id.* at 247.

<sup>5</sup> *See, e.g.*, Czech Society of International Law, *Od kodifikace mezinárodního práva k jeho fragmentaci* [From Codification of International Law to its Fragmentation] (Pavel Šturma ed., 2009).

<sup>6</sup> *See, e.g.*, JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 19–25 (2009).

when it had been established, or 50 years ago, when their articles gave rise to the Vienna Convention on the Law of Treaties (1969), to put just one of the examples of success.

Arguably, at least from the point of view of international legal doctrine, international law has changed. It means that the Commission also has to face the changes in contemporary international law that are of a structural nature.<sup>7</sup> These changes include, in addition to fragmentation, also phenomena such as the rise of informal international law-making,<sup>8</sup> the decay of State consent,<sup>9</sup> or the recently emerged project of comparative international law.<sup>10</sup>

However, deformalization comes with some costs and perils for the normative character and authority of international law. Some elementary formal law-ascertainment is a necessary condition to preserve the normative character of international law.<sup>11</sup> Therefore, as a reaction to trends of informalism, reverse trends can be identified, including the comeback of formalism or positivism.<sup>12</sup>

In this context, the situation of the ILC seems to be specific when it comes to new trends. On the one hand, M. Koskenniemi, a former member of the Commission and chair of its Study Group on Fragmentation, pointed out that certain topics, in particular those related to environmental law, largely reflected soft law approach, the language of compliance and allocation of harm, instead of binding norms, responsibility and reparation.<sup>13</sup> However, many other topics do not confirm this trend but follow the traditional patterns of codification.

On the other hand, as mentioned by another former member of the ILC, Matthias Forteau, the Commission may be perceived as a too “old-fashioned” body, especially “in a time of deformalization in international law.” However, given its nature as a subsidiary organ of the General Assembly,

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<sup>7</sup> Cf. Alejandro Rodiles, *The ILC's Role in Understanding New Global Normative Trends*, in 70 YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE (forthcoming 2019).

<sup>8</sup> See INFORMAL INTERNATIONAL LAWMAKING 15–22 (Joost Pauwelyn et al. eds., 2012).

<sup>9</sup> See Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 1 (2014).

<sup>10</sup> See Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467, 467 (2015); see also COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al. eds., 2018).

<sup>11</sup> See JEAN D'ASPREMONT, EPISTEMIC FORCES IN INTERNATIONAL LAW: FOUNDATIONAL DOCTRINES AND TECHNIQUES OF INTERNATIONAL LEGAL ARGUMENTATION 95 (2015).

<sup>12</sup> See INTERNATIONAL LEGAL POSITIVISM IN A POSTMODERN WORLD 5–10 (Jörg Kammerhofer & Jean D'Aspremont eds., 2014); see also Jörg Kammerhofer, *International Legal Positivism*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 407–26 (Anne Orford et al. eds., 2016).

<sup>13</sup> See Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, in MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 341–43 (2011).

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“the ILC operates in a specific context, driven mainly by orthodox attitudes toward international law.”<sup>14</sup>

This is true, because of its institutional background, membership and methods of work, the Commission has a different role and legitimacy than academic institutions and private codification bodies. Although its topics and working methods may evolve (and indeed do evolve), the Commission still should keep its unique role. It is the codification organ that seems to be best placed to deal with general international law and to preserve the relative autonomy of international law.

### III. VARIETY OF CODIFICATION FORMS OR A NEW ROLE FOR THE COMMISSION?

One must acknowledge that the Commission has a great variety of forms of its final products. Some of the most authoritative and frequently relied upon instruments arising from the work of the Commission are today in the form of texts that have not, so far, become multilateral treaties or were never intended to be. The Guide to Practice on Reservations to Treaties (2011),<sup>15</sup> for instance, is a significant example of such a non-binding document. It seems that it may be followed by another, though much shorter document, “Guide to Provisional Application of Treaties,” provisionally adopted by the Commission (on first reading) in 2018.<sup>16</sup>

The variety of forms of codification does not imply that the Commission is not intending to contribute to the adoption of new multilateral treaties. In recent years, it has recommended to the General Assembly the adoption of conventions on the basis of its draft articles. This was the case recently for the topic “Protection of Persons in the Event of Disasters,”<sup>17</sup> which is to be considered by the General Assembly in Fall 2018; and it may be the case in relation to the topic—Crimes Against Humanity—that will be considered next year in second reading.

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<sup>14</sup> Mathias Forteau, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission*, in *COMPARATIVE INTERNATIONAL LAW*, *supra* note 10, at 167.

<sup>15</sup> See the text of guidelines in: 2 UNITED NATIONS, *THE WORK OF THE INTERNATIONAL LAW COMMISSION: INSTRUMENTS AND FINAL TEXTS* 451–91 (9th ed. 2017); or the Guide with commentaries, Int’l Law Comm’n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10/Add.1, at 19 (2011).

<sup>16</sup> See Int’l Law Comm’n, Draft Rep. of the Int’l Law. Comm’n on the Work of Its Seventieth Session, U.N. Doc A/CN.4/L.920 (2018); Int’l Law Comm’n, Draft Rep. of the Int’l Law Comm’n on the Work of Its Seventieth Session, U.N. Doc A/CN.4/L.920/Add.1 (2018); *see also* Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session., U.N. Doc. A/73/10, at 201–23 (2018).

<sup>17</sup> See UNITED NATIONS, *supra* note 15, at 523–27; Int’l Law Comm’n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 13–73 (2016).

It is true that the last example of the ILC's draft articles transformed into a multilateral treaty dates back to 2004 when the UN Convention on Jurisdictional Immunities of States and their Property was adopted.<sup>18</sup> It still took 13 years from 1991 when the Commission had adopted the final text of draft articles on the topic, with commentaries.<sup>19</sup> In accordance with Article 23 of its Statute, the ILC submitted the draft articles to the General Assembly, together with a recommendation that the GA convene an international conference of plenipotentiaries to examine the draft articles and to conclude a convention on the subject.<sup>20</sup> The years between 1991 and 2004 were devoted to extensive negotiations conducted first in the open-ended working group of the Sixth Committee, then, on the invitation of the General Assembly,<sup>21</sup> also within the ILC Working Group on Jurisdictional Immunities of States and their Property (1999), and finally in the Ad Hoc Committee on Jurisdictional Immunities of States and their Property (2000-2003). Although the General Assembly adopted the text of the Convention in December 2004, this Convention has not yet entered into force to date.<sup>22</sup>

Why recall this example? First, it seems that it is not only the community of international lawyers of today (inside or outside the Commission) who may look back. Most likely, our predecessors one or two decades ago also dreamed about the "golden era" of codification in 1960s. The era when almost all final products of the ILC became codification conventions within a few years from the submission of the adopted draft articles to the General Assembly. On balance, not all conventions have entered into force and, if so, it also took quite some years.

The second and more important reason to recall the UN Convention on Jurisdictional Immunities of States is that something similar to the negotiation of that Convention may happen again with respect to the Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA, 2001"). Recent debates in the Sixth Committee and several side events organized in New York (the last one in May 2018, at the margin of the first

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<sup>18</sup> Anna Sotaniemi (Special Rapporteur), *Convention on Jurisdictional Immunities of States and Their Property*, Rep. of the Sixth Committee, U.N. Doc. A/59/508, at 1 (2004).

<sup>19</sup> See Report of the International Law Commission to the General Assembly on the Work of its Forty-Third Session, 46 U.N. GAOR Supp. No. 10, reprinted in [1991] 2 Y.B. Int'l L. Comm'n ¶¶ 23, 28, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

<sup>20</sup> *Id.* at ¶ 25.

<sup>21</sup> See G.A. Res 53/98, at 2 (Dec. 8, 1998).

<sup>22</sup> It requires 30 ratifications; as of 1 October 2018, just 22 instruments of ratification have been deposited. See Depositary: Status of Treaties, Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, etc. Part 13, UNITED NATIONS TREATY COLLECTION (Dec. 2, 2004), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-13&chapter=3&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en).

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part of the ILC's session) have shown that some States would like to have a convention while others were rather reluctant. And members of the Commission seem divided too.<sup>23</sup> In principle, once the Commission submitted its final product (for example draft articles) and recommendation to the General Assembly, it was no longer the master of the product that passed to the hands of States. However, as the example of the Convention on Jurisdictional Immunities shows, the Commission may be asked by the General Assembly to resume its work and to contribute to clarification of certain issues in the final stage of codification process.

Nevertheless, the impact or authority of the ILC's products does not depend only on the binding nature of a document. Even a non-binding document, resolution, or another soft law product, including the final draft articles with commentaries, may serve the needs of the international society.

One of the best examples has already been mentioned. The codification of the law of State responsibility belongs, together with the law of treaties achieved in the 1969 Vienna Convention, to the most important results of the ILC's codification work.<sup>24</sup> Unlike the Vienna Convention, however, the ARSIWA still remains in a non-binding form. Although proposals to convoke a diplomatic conference have appeared more often during the past few years, there are still some strong arguments in favor of the *status quo*. On the request of the Secretary-General, some States responded to the question of the final form of the Articles. Most of them showed reservations towards the idea of a convention. For example, according to the comments of the United Kingdom,

[I]t is difficult to see what would be gained by the adoption of a convention... The draft articles are already providing their worth and are entering the fabric of international law through State practice, decisions of courts and tribunals and writings. They are referred to consistently in the work of foreign ministries and other Government departments. The impact of the draft articles on international law will only increase with time, as is demonstrated by the growing number of references to the draft articles in recent years. ... Our view remains that any move at this point towards the crystallization of the draft articles in a treaty text would raise

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<sup>23</sup> One of such side events took place already in 2014. See Pavel Šturma, *Responsibility of States: State of Play and the Way Forward*, in ANUARIO DE DIREITO INTERNACIONAL 95–102 (2013) (Lisboa, 2015).

<sup>24</sup> See Pierre-Marie Dupuy, *Quarante ans de codification du droit de la responsabilité internationale des Etats. Un bilan*, 107 RGDIP 2, 306 (2003).



a significant risk of undermining the currently broad consensus on the scope and content of the draft articles.”<sup>25</sup>

Arguably, the ARSIWA is one of the outcomes of the codification work whose impact does not depend so much on its form, as both the practice and writings refer to the content of the draft articles as an expression of customary international law. Clearly, the level of acceptance of the customary nature of the Articles is not equal for all single rules. At the same time, the Articles as a whole form a balanced document, covering all consequences of the internationally wrongful acts, at least from the point of view of the Commission.<sup>26</sup>

This brings me back to the well-known issue of codification and progressive development of international law. The mandate of the United Nations under Article 13(a) of the UN Charter clearly includes “progressive development of international law and its codification.” So does the Statute of the ILC; however, Article 15 of this Statute provides a definition of these terms. No doubt, the qualification of the topic may have an effect on the procedures to be used and also on the forms of products.<sup>27</sup>

As an example, contrary to the ARSIWA, the current draft articles on Crimes Against Humanity (to be adopted on second reading in 2019) are prepared with a view of a future convention. Otherwise, they could hardly have an expected impact. This does not deny the customary nature of the definition of crimes against humanity, taken over from Article 7 of the 1998 Rome Statute of the International Criminal Court. The main added value of the topic is in provisions on horizontal (inter-state) cooperation in criminal matters, including criminalization of acts under national law, extradition, etc., which may become binding on States only by way of treaty. It seems that the distinction between codification and progressive development, or even treaty law-making is useful in some cases.

However, this distinction in its strict form proved to be unsustainable in practice of the Commission and was quickly abandoned.<sup>28</sup> As pointed out by some eminent commentators and former members of the Commission, the distinction “was hardly defensible scientifically.”<sup>29</sup> Although the actual share

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<sup>25</sup> G.A. Res 62/63, at 6 (Mar. 9, 2007).

<sup>26</sup> Cf. ALAIN PELLET, *The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 86 (James Crawford et al. eds., 2010).

<sup>27</sup> See LAURENCE BOISSON DE CHAZOURNES, *Forms, Impact and Authority*, in *70 YEARS OF THE INTERNATIONAL LAW COMMISSION* (forthcoming).

<sup>28</sup> See *id.*

<sup>29</sup> James Crawford, *The Progressive Development of International Law: History, Theory and Practice*, in *UNITY AND DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR PIERRE-*

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may differ from topic to topic, the final products of the Commission taken under the codification procedure comprise elements of both the codification of general international law and of its development.

That is why it may appear surprising the resurrection of a debate on this distinction within the Commission during past few years. Sometimes, the debate on “codification” and “progressive development” is coupled with that of *lex lata* and *lex ferenda*.<sup>30</sup> Although, strictly speaking, those are slightly different concepts and should not be used interchangeably, it happens from time to time. Indeed, the former dichotomy describes the methods of work of the Commission, while the latter refers to the statues of rules at issue. In other words, the second distinction is a substantive one, as it draws a line between existing law (binding norms) and proposals (what should become law).

One can ask whether this debate is a sign of uncertainty or a lack of confidence of the ILC; a lack of the traditional topics of general international law or a crisis of codification.

True, the argument of transparency in the work of the ILC has certain merits. There are also some situations where a consensus of the members may depend on the “labeling” of a specific provision (draft article, principle or conclusion) by terms of codification or progressive development. However, such practice should remain rather exceptional. The generalization or over-use of such qualifications also entails a risk, which is not negligible.

Apart from the above-mentioned difficulties to draw a scientifically precise dividing line between “codification” and “progressive development,” at least two other problems should be mentioned. First, it is a risk for the dynamic process of interrelation between codification and development, or custom and treaty (or other forms of the final product). As it is well known, a treaty provision may codify (or be *declaratory* of) a pre-existing rule of customary international law; lead to the *crystallization* of a rule of customary international law; or give rise to (or *generating*) a new rule of customary international law.<sup>31</sup>

Indeed, this is a dynamic process. It happens quite often that a rule, which had not been yet established in its customary form before the adoption of the codification convention, has evolved subsequently into a rule of customary international law. However, the strict labeling of each and every

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MARIE DUPUY 3, 14 (Denis Alland et al. eds., 2014); see Alain Pellet, *Between Codification and Progressive Development of the Law: Some Reflections from the ILC*, 6 INT'L L.F. D. INT'L 15, 15 (2004).

<sup>30</sup> E.g., Hugh Thirlway, *Reflections on Lex Ferenda*, 32 NETH. Y.B INT'L L. 4, 10 (2001). According to this author, “*Lex ferenda* serves as a label for something which has at least conceptual existence, as a contrast or opposite to *lex lata*, the law that exists and obliges the subjects of law to adopt, or to refrain from, certain defined courses of conduct in certain defined circumstances. The term is not, however, a mere antithesis, in the sense of referring to something or everything that is not law.”

<sup>31</sup> Cf. North Sea Continental Shelf Cases, Judgment, 1969 I.C.J. 3, ¶¶ 38–41 (Feb. 20); see also Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 143 (2018).

provision (either codification, or development of international law) may sometimes downgrade the status of “development” rules and freeze them in this quality.

The most famous product of the ILC, which is the 1969 Vienna Convention, seems to be the best example how wise it was not to overburden individual provisions by such qualification. Not all articles of the 1966 draft articles that became the 1969 Vienna Convention, including the rules on treaty interpretation, were of customary nature at that time. Nevertheless, today, they are considered as a part of customary international law and applied also by those States that did not ratify the Vienna Convention.

The second argument relates to the changing character of the work of the Commission and of its products. Some new topics and the forms of their presentation hardly obey the dichotomy of the progressive development or codification. In particular, studies and conclusions on fragmentation of international law (as the most typical example),<sup>32</sup> but also more recently adopted conclusions on subsequent agreements and subsequent practice<sup>33</sup> or identification of customary international law<sup>34</sup> can be qualified, *stricto sensu*, neither as codification, nor as progressive development of international law. Instead, they have mostly explanatory or interpretative character.

#### IV. CONCLUSION

Finally, I would like to conclude my reflection on the nature of the Commission’s work. The methods of work of the Commission and the forms of its products may, and indeed do, change over time. Even the current program of the ILC provides examples of traditional and new topics, as well as traditional and innovative forms and methods. To make it clear, these are two different things. As a matter of substance, sources (treaty, customary international law, general principles of law) belong certainly to the traditional topics of international law. What seems new and non-traditional in the work of the ILC, is rather the form of conclusions with commentaries (a kind of non-binding but authoritative restatement of law), as was the case of conclusions on subsequent agreements and subsequent practice or on identification of customary international law. This is equally true for the topic on peremptory norms of general international law (*jus cogens*). In none of them are States expected to take action, other than to take note and

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<sup>32</sup> See Int’l Law Comm’n, Rep. on the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682/Add.1, at 4–15 (2006).

<sup>33</sup> Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 12–16 (2018).

<sup>34</sup> *Id.* at 119–22.

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recommend the final product to the attention of Member States and intergovernmental organizations.

By contrast, some other current topics take the traditional form of draft articles (with commentaries), which gives a chance to States to decide on whether they wish to transform the final product of the Commission into a convention. This does not exclude, however, that such topics may be seen as the most innovative and controversial as a matter of substance. For example, this is the case of draft articles on Immunities of State officials from foreign criminal jurisdiction, namely draft article 7 dealing with exceptions to immunities *ratione materiae* in respect of international crimes.<sup>35</sup>

Put differently, the qualifications of topics as traditional or new may refer either to the substance of the topics, its form, or both, depending on the approach taken by a Special Rapporteur and endorsed by the Commission. Whatever the case may be, I argue that the Commission is still attached to its mandate, which is the progressive development of international law and its codification. However, we should keep a necessary flexibility in using these terms.

After all, the goal of the work is to contribute to the legal certainty and the rule of law on an international level. It is even more important to do so today, when we face to the emergence of the backlash to the existing international legal order, based mostly on multilateral conventions. Sure, the Commission is not a legislator, it cannot replace States in international law making, but it should not shy away to defend and promote the progressive trends in international law. However, it seems that the Commission still can contribute to it by various means, including some interpretative instruments and studies. In my view, today like in the past, we need both codification and progressive development of international law.

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<sup>35</sup> See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Ninth Session, U.N. Doc. A/72/10, at 176–91 (2017).