Multiple actors, one task: the joint responsibility of international law making

Marja Lehto 2021-02-22T14:00:47

The 70th anniversary of the International Law Commission (ILC), celebrated in 2018, has provided an opportunity to reflect on the Commission's role in international law-making and its continued relevance at a time when many of the international institutions created in the aftermath of World War II have faced increasing pressure. Danae Azaria's insightful article makes a valuable contribution to this ongoing debate. Original in its analysis of the interpretative method in the Commission's recent work, the article also has the merit of presenting this analysis against the institutional context, the 'UN system of international law-making', within which the Commission operates.

One of the prominent themes discussed in the anniversary events is concerned with the Commission's internal adaptation to a situation, in which major codification projects have been exhausted, and the interest of States for elaborating multilateral conventions based on the Commission's drafts has been on the wane. Much of this discussion has been concerned with the change in the forms of the Commission's output, in particular the increased recourse within the past two decades to final products intended to remain non-binding. This change has been analysed as a question of 'packaging' the final outcomes, or in terms of a shift from a glorious past of codification to an uncertain future of progressive development. Directing the focus at the methodology the Commission has been following in its recent work, Azaria argues that the once dominant 'codification-by-convention' paradigm has been replaced in the Commission's work by a new one: 'codification-by-interpretation'. She furthermore makes clear that interpretation as a method is not particular to either codification or progressive development as the two elements of the Commission's mandate.

Interpretation as a method

Interpretation is not a new phenomenon in the Commission's work – the examples mentioned in the article include the 1996 *Draft Code of Crimes against the Peace and Security of Mankind* as well as the 2001 *Articles on the International Responsibility of States for Internationally Wrongful Acts* – but it has gained new importance recently. In her article, Azaria analyses in detail four topics of the ILC's programme of work: the 2011 *Guide to Practice on Reservations to Treaties*, the 2018 *Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, the 2018 *Draft Guidelines on Provisional Application of Treaties*, and the *Draft Conclusions on Jus Cogens* adopted in first reading in 2019. These four topics have as their major focus the reaffirmation, clarification and interpretation of certain provisions of the 1969 *Vienna Convention of the Law*

of Treaties (VCLT). Similarly, it can be added that the elaboration of instruments intended to remain non-binding has been a constant feature of the Commission's work over the decades, although one that was used more sparingly in the past.

The question, whether interpretation falls within the Commission's function, can be given an intuitive answer: It seems obvious that the Commission may use interpretation as part of its legal reasoning in accordance with the general mandate of promoting the progressive development and codification of international law (*cf*. article 1 (1) of the ILC Statute, article 13 (1) (a) of the UNCharter). Unlike the Commission's procedures, its methodology is not spelled out in the ILC Statute. The fact that interpretation has been used in the context of certain topics in the past also supports the conclusion that it is not excluded from the tools available to the Commission. Azaria, too, comes to this conclusion but does so only after a careful analysis, which covers both the preparatory work on the Statute as well as relevant State practice.

While interpretation thus can be seen as an ordinary legal technique, it is clear that the Commission is not entirely free in its interpretative activity. Interpretation is subject to the same requirements that apply to the Commission's work in general, in particular the need to follow a consistent and transparent methodology. The Commission must thus base its work on authoritative sources and adhere to applicable secondary rules such as the rules of treaty interpretation established in the VCLT. Its own conclusions regarding the *Identification of customary international law* and assessing the *Subsequent agreements and subsequent practice of States in relation to interpretation of treaties* provide further guidance. The thorough procedures of the Commission also serve to ensure that its interpretations are not arbitrary or biased.

The four topics analysed in the article elaborate on certain aspects of the VCLT but this should not be taken to mean that the interpretative method could only be used with regard to secondary rules, or topics that deal with general issues of international law. The 'codification-by-interpretation' paradigm that Azaria puts forward is relevant for a number of recent topics, which take the form of documents intended to remain non-binding and involve the interpretation of an existing treaty aiming to reaffirm and develop the content of treaty rules over time. One example of this is given by the draft principles on *Protection of the environment in relation to armed conflicts*, adopted in first reading in 2019. A number of these draft principles build on and reflect established obligations based on widely ratified treaties or customary international law, which have been interpreted in light of subsequent developments in international law.

In the context of this topic, the Commission has *inter alia* interpreted the 1907 Hague Convention on Land Warfare to conclude that an Occupying Power has certain environmental obligations (*cf*. 2018 *First Report of the Special Rapporteur*, paras. 43 *et seq*). The key to such reading has been found in the general and evolving nature of the term '*l'ordre et la vie publics*' in the authentic French text of article 43 of the Hague Regulations, which requires an Occupying Power to restore and maintain public order and civil life in the occupied territory. This general obligation was interpreted to entail environmental protection as one of the core functions

of a modern State. In doing so, the Commission also took into account that the understanding of the scope and content of article 43 had already developed over time, *inter alia* as a result of the 1949 Fourth Geneva Convention and the rise of international human rights law, to provide that an Occupying Power must administer an occupied territory for the benefit of the occupied population.

The Commission in a context

Another much-debated theme has been related to the Commission's special status as both an independent expert body and a subsidiary organ of the UN General Assembly, and its interaction with States. The Commission is not self-sufficient, but shall be seen as part of an institutional system for the progressive development and codification of international law created to implement article 13 (1) (a) of the UN Charter. In addition to the Commission, this system includes the Sixth Committee of the UN General Assembly as another major actor and relies on the effective interaction between the two. Institutionally, States are provided an annual opportunity to comment on the Commission's ongoing work in the Sixth Committee, and are regularly invited to send in written comments after the first reading of any topic. An opportunity to send in written comments may, depending on the topic, be also offered to relevant international organisations and other stakeholders including civil society organisations, as has recently been done with regard to *Crimes against humanity* and *Protection of the environment in relation to armed conflicts*.

The concepts of 'interpretative offer' and 'interpretative dialogue' that Azaria introduces in the article take into account the institutional framework within which the Commission's work takes place and which also applies to its interpretative activity. She makes it clear that the Commission's interpretations cannot as such amount to 'authoritative' interpretations of any treaty. The authority of the Commission's interpretation, as Azaria points out, is dependent on how persuasively they have been argued and substantiated. Equally important is to recall that the normative value of the Commission's work, whether or not it is intended to remain non-binding, depends on how it is viewed and applied by its end-users: States, international tribunals, domestic courts, and others.

The shift in the Commission's work to topics that are not intended to serve as a basis for treaty negotiations has attracted attention in particular as it may have implications for the functioning of the institutional system for the progressive development and codification of international law. Without the additional scrutiny of States, it has been argued, the Commission's power is enhanced as it will have the last word regarding its topics, many of which may nevertheless influence the practice of international courts and tribunals (see Sean D. Murphy, Yota Negishi and Jan Klabbers). Azaria acknowledges this possibility but urges States to make their position clear when receiving the final product after the second reading in the Commission, underlining that the Commission's output must be considered together with the responses of governments. This too is a fresh perspective and a welcome reminder of the responsibility of both actors for the good functioning of the system.

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