

**ESTABLISHING THE GROUND RULES OF
INTERNATIONAL LAW: WHERE TO FROM HERE?**

(The work of the International Law Commission at its
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I WHY WAS THE COMMISSION ESTABLISHED?

Under the UN Charter (Article 13 para.1) the General Assembly is obliged to encourage the progressive development and codification of international law. At the first session of the General Assembly it held thirty meetings to discuss how best to discharge this obligation and the result, late in 1947 was the establishment of the International Law Commission.

The background to the decision was essentially the following. The Governments involved in drafting the UN Charter were firmly opposed to any idea of giving the United Nations the power to enact binding rules of international law or impose treaty rules on states by majority vote. On the other hand although Governments did not want rules imposed on them by majority decision they did want the predictability that comes with rules.

Accordingly, if a true legislative process was not acceptable the only real alternative was to arrive at the rules by agreement. In practical terms this has meant and continues to mean the inevitably slow process of finding out what the rules are or should be and then reaching agreement on them. The first part of this process of arriving at rules by agreement, rather than by majority decision as in a legislative body, involves analysing state practice and setting it down in as specific and precise a manner as possible. This is what has occupied the International Law Commission since its formation. The second part of the process – the achievement of agreement on the rules – is reflected most obviously in the list of Conventions based on the Commission's work.

There are two other points to be noted about the scope of the Commission's work and the method by which it would approach that work. First, the drafters of the Commission's Statute were not inclined to agree to suggestions that there should be different commissions for public international law, private international law and international criminal law and accordingly the Statute specifically states that the Commission is not precluded from entering the field of private international law. In practice, however, it has confined itself to public international law. Second, the Statute distinguishes between "progressive development" and "codification" and envisages slightly different methods for the two types of work. But over the years the Commission has found it both difficult and unhelpful to attempt to distinguish between those parts of its work that involve codification and those that involve progressive development. It has essentially disregarded the distinction and states have not suggested it has been wrong to do so.

So where has it got to in its work of setting down rules in ways that have led to agreement or acceptance of them? In the introduction to his three volume work bringing together the corpus of the Commission's work Sir Arthur Watts notes that "approximately half the modern law of peace has been directly dealt with by the Commission in such a way as to lead to the conclusion of sixteen conventions (and six Optional Protocols), several of them comprehensive codifications in the widest sense of major sectors of international law which underpin the main structures of today's international relations." He goes on to say that "the Commission's completed work on a wide range of other topics, and its nearly completed work on state responsibility, (that work was in fact completed in 2001) represents a substantial contribution to a further significant portion of international law." He concludes that "[t]aken together, this body of work completed by the Commission over the past half century has been both far-reaching in its scope and authoritative in its content."

A complete listing of all the topics the Commission has dealt with would take too long to go through. Simply by way of illustration I would mention the following:

Rights and Duties of States

Nuremberg Principles

Definition of Aggression

Offences against Peace and Security

Nationality, including statelessness

Law of the Sea

Arbitral procedure

Diplomatic and Consular immunities

Law of Treaties

Relations between states and international organisations

Succession of states in respect of treaties and in respect of matters other than treaties

Most favoured nation clause

Treaties between states and international organisations or between international organisations

Jurisdictional immunities of states and their property

Non-navigational uses of international watercourses

Statute of the International Criminal Court

State responsibility for internationally wrongful acts

Prevention of transboundary harm from hazardous activities

II COMPOSITION, MEMBERSHIP AND METHODS OF WORK OF THE COMMISSION

The task of the Commission, together with its size, composition, and methods of work is governed by the Commission's Statute which was adopted by the General Assembly in 1947. It has been modified by the Assembly on several subsequent occasions to enlarge it to reflect the increase in membership of the United Nations. The current membership of 34 was established by a General Assembly resolution of 1981. That resolution also specified the regional distribution which is nine from African States, eight from Asian States, three from Eastern Europe, six from Latin American and Caribbean States and eight from Western European and other States.

The Statute says the Members of the Commission should individually be persons of recognised competence in international law and that the Commission as a whole should assure representation of the main forms of civilisation and of the principal legal systems of the world. It does not say anything about gender balance and the 2001 election is the first time that women have been elected to the Commission. (The ICJ has had its first woman judge since 1995 when Judge Rosalyn Higgins of the UK became a member of the Court.)

As in the case of judges of the ICJ the members of the Commission sit in their individual capacity and not as representatives of their governments. This question of independence is a somewhat sensitive one. The present membership ranges from academics, that in one or two cases are inclined to stress what they see as their arms length relationship with their governments, to current foreign ministry legal advisers to, in one case, a foreign minister. To me the important thing is not past or present positions but the capacity to approach and analyse issues reasonably free of pre-determined positions or at least with the weight to be able to influence existing positions. After all, regardless of our present or past positions we are all influenced by our backgrounds.

For my part I chose to make this explicit. In one of my earliest interventions in plenary session I said that I considered myself to be as independent as anyone else but that like anyone else my approach to the issues before us in the Commission inevitably would be influenced by my background and experience. In my case that had mainly involved looking at international legal issues through the lens of a small, remote and in some ways rather vulnerable state that was also frequently made aware of the perspectives of even smaller, more remote and more vulnerable states in our region. Whether that particular optic would offer any useful insights in relation to the issues I was not sure but it was the optic I was bound to bring and I would do so consciously.

Unlike the judges on the ICJ the whole of the ILC membership comes up for election every five years. In practice, however, there is considerable continuity in membership with usually half or more of the Commission standing for re-election and in fact being re-elected. The election is by the General Assembly alone unlike the ICJ where candidates have to get a majority in the Security Council as well as the General Assembly.

The Commission's Statute specifies that member states can nominate up to four candidates; two of whom can be their own nationals, and two who are nationals of other states. In practice, states tend to nominate only one of their nationals for obvious reasons but the nomination of nationals of other states can have some significance as an indication of a candidate's standing outside their own country. (I was fortunate that in addition to being nominated by the New Zealand Government I was also nominated by the Governments of Australia, Canada, Mexico, Samoa, Singapore and South Africa to whom I was known from my international conference work down the years.)

The elections are always hotly contested. As an indication, the polling at last year's election for the eight successful Western Europe and Others candidates ranged from 161 votes to 139 and the unsuccessful candidate, who was actually a well regarded sitting member, obtained 125 votes.

The other interesting aspect of the election of members is the provision in the Statute that where a casual vacancy arises the Commission itself can fill it having due regard to the requirements regarding individual qualifications and the balance of regions and legal systems. This provision is quite important. In fact the new Commission had to exercise it at its first session as a result of the assassination of the Attorney-General of Nigeria before he could take up his seat on the Commission. Now that two members of the new Commission have been elected to the ICJ at last month's election the provision it will have to be exercised again at the start of next year's session.

The way the Commission traditionally goes about its work is unusual and reflects the particular nature of its task and the relationship it must have with the General Assembly and governments if it is to be successful in carrying it out. Some topics are referred to the Commission by the General Assembly but in practice many of the topics are selected through an interaction between the Commission and the General Assembly in which the Commission makes proposals and the General Assembly signals its agreement.

Once a topic is selected the Commission usually appoints a Special Rapporteur who prepares reports and draft articles for discussion by the Commission in accordance with a work plan. The Special Rapporteur may be assisted by a working group and a drafting committee works over draft articles once the full Commission considers that their form and content has reached a sufficiently advanced stage. The Commission reports to the General Assembly and the Special Rapporteur reviews the work in the light of the debate in the General Assembly and written comments of governments. The Commission then adopts a final report and submits it to the General Assembly with a recommendation on further action.

This high level of interaction with the General Assembly and, to a lesser degree, direct with governments is an essential feature of the Commission's work and, together with the way the Commission is composed, is generally considered to account for its relatively high "strike rate" i.e. the level of acceptance of its work as an authoritative statement of international law or as a sound basis on which to proceed to an international convention. As regards the composition of the Commission the key point is one made by Sir Arthur Watts that "the experience of a high proportion of the members is rooted in the realities of international affairs...." He notes that while many hold or have held high academic positions "they are seldom academics pure and simple. Many are former diplomats or international officials with practical experience as advisers to foreign ministries or international organisations, and some have appeared as counsel before the International Court of Justice or other international tribunals." This means, he says, that "[t]heir contribution is not that of a theoretical academic exercise aimed at establishing what, in an ideal world, the law ought to be, but rather a realistic appraisal of what, in the real world of international affairs, international law can be regarded as being."

There is obviously a fine line here. It is inevitable that the business of developing draft articles in any area of international law will throw up some issues or choices that have a significant policy content. A body composed, as the Commission is, of people who have experience of government work and/or maintain contact with governments is more likely to grapple effectively with these issues than an academic body. On the other hand, for the acceptance of its work it is critically important that the Commission does not come to view itself or be viewed by governments as a political rather than technical body. This goes to the nature of the topics it undertakes and also to the extent to which it engages at the creative end of law making. In recognition of the fact that it has no political authority as such the Commission has tended to leave topics that may involve a high level of policy making to more appropriate fully inclusive political forums.

One other point is relevant here. Although particular members of the Commission may have expertise in particular areas of international law the overall expertise of the Commission is seen as being in general international law rather than in particular specialised fields of international law. It is inevitable that there is a great deal of specialisation in international law today. There are a number of bodies doing codification and progressive development work in particular fields such as human rights, trade law, environmental law and humanitarian law. This is clearly both necessary and appropriate. But the ILC is the only official international body whose mandate relates to the codification of international law as a whole and hence, in theory at least, requires it in its work to look across the different fields at the coherence of the international legal system as a whole.

This is not to say that the ILC either has or should attempt to assert a mandate to review or coordinate the work of other specialised bodies. That would be unacceptable and not even desirable at this stage in the development of the

international system. But it is not irrelevant to the work that the Commission itself decides to undertake and I will come back to this point.

How did the Commission decide on what work it should undertake and where does it head now?

III THE LAUTERPACHT WORK PLAN AND VISION

The Commission's work programme at the outset was based on a Secretariat survey that was in fact written by Sir Hersch Lauterpacht as he later became. This survey focussed on the law of peace and identified 22 possible topics. The Commission added three more, giving a total of 25 topics from which the Commission selected an initial list of fourteen topics.

This was a selection of topics from the whole field of international law. In fact the Lauterpacht survey saw the task of the Commission as the codification of the entire field of international law and believed this might be accomplished in two decades, an objective and time frame that turned out to be somewhat unrealistic.

One significant aspect of the survey was that although it attempted to cover the major branches of international law it did not try to place all aspects of international law and the various topics into which they can be subdivided into an overall framework and timetable. The reason for that at the time was that, as in the case of domestic law, the content of international law is not static. This remains equally true today. As international society changes new legal issues emerge, just as they do in domestic law. And other issues that seemed pressing at one point in time either lose their significance or need to be approached from a different angle.

IV THE 1971 SURVEY

A little over twenty years later the Secretariat was asked by the Commission to prepare another survey to assist it with a revision of its long term programme of work. It is a very interesting and impressive document and certainly a worthy successor to the Lauterpacht survey. This could be expected in light of the calibre of the international lawyers involved who included our own Ken Keith, as he then was, who was a member of the Codification Division of the UN's Legal Office at that time.

I want to quote from a part of the introduction to that survey because of the resonance it has for us today.

It notes that there have been developments on a wider scale that have broadly affected the evolution of international law over the previous twenty to twenty-five years. It goes on to say that "[t]he need to encourage 'the progressive development of international law and its codification' has been one which, on the whole, States have come increasingly to recognise and to which they have given steadily growing attention during this period." It points out that the annual sessions of the Commission and the General Assembly have provided the previously lacking regular means for systematically examining international law.

It then says "[t]he reasons why States have sought, on an increasing scale, to use the opportunity so provided to endeavour to strengthen international law and to extend the range of its functions may be attributed to a variety of causes, but the most fundamental no doubt remains the connection between the maintenance of international peace and security (which it may be recalled is foremost in the list of purposes of the United Nations included in Article 1 of the Charter) and the development of international law. There is an immediate and basic link between the effective operation of a system of legal rules relating to the conduct of States, including the prohibition of the threat or use of force, and the codification and progressive development of international law....."

The two other factors it lists as having led States to attach growing importance to the process of the continuing development of international law are the growing degree of inter-dependence of States and the increasing membership of the international community. On the first of these it said "[t]he years since 1945 have witnessed a growing degree of inter-dependence of States, brought about by the ease of modern communications and the necessities of economic progress, which in turn has created demands for the development of international law in fields hitherto untouched. Scientific and technological inventions have also played their part by producing a need for legal regulation of activities – such as those in outer space or on the sea-bed – which even twenty years ago were beyond man's capabilities."

On the second it noted that membership of the United Nations had more than doubled since 1945 when 50 States signed the Charter. It then commented that the fact that the codification process had been open to a much broader range of countries, had served to accentuate the role which codification can play as an element in peaceful development. It allowed the law to be revised in the light of fresh requirements while securing broader endorsement of the law and thereby contributing to the maintenance of stability in international relations.

One could be forgiven for thinking that these general comments on the significance of codification and progressive development, the technological changes and increased interdependence of states that drive it and the expanding membership of the international community that needs to be involved in the process, could have been written yesterday rather than more than a quarter of a century ago.

V THE CURRENT SITUATION

So what is the state of the Commission's current work programme, what is it focussing on now and where does it see its role taking it in the future?

It is fair to say that the issues involved in these questions have been the subject of some discussion and debate in recent years both within the Commission itself and amongst commentators on its work.

The fact is that the scale of the work completed by the Commission raises questions about its future directions. As Sir Arthur Watts says after describing the extent of the Commission's work, "[m]uch of the Commission's initial task has now been completed." He notes that "[t]he large architectural subjects having been mostly dealt with, the Commission is now inevitably left with more compact items – none the less important for that, although less eye-catching." This comment is even truer now that the Commission has completed its work on State responsibility.

I will list the topics that were on the Commission's work programme at the start of this quinquennium (i.e. inherited from the last quinquennium), outline some of the work it did at this last session on the topic it concentrated on and, by reference to one of the new topics it has added, suggest some of the ways in which it may be able contribute to the development of the international legal system.

The established topics on the programme were Reservations to Treaties, Diplomatic Protection and Unilateral Acts of States. The new topics added this year were the second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the topic of responsibility of international organisations, the topic of risks ensuing from the fragmentation and expansion of international law and the topic of shared natural resources.

I will talk about the diplomatic protection and fragmentation topics in a moment. But before that I will just say a word or two about the other topics.

With the Reservations to Treaties topic the Commission has departed from its traditional approach of preparing draft articles and is working towards a guide to practice in respect of reservations which is one of the more difficult subjects covered by the Vienna Convention on the Law of Treaties that was based on the Commission's earlier work on that subject. It is fair to say that this topic is taking much longer to complete than had been envisaged.

In many ways the most interesting and controversial question discussed under this topic at the last session was the role of the depositary of a treaty when a reservation submitted on ratification seems to be manifestly impermissible under the that treaty. The issue is whether, faced with such a reservation, the depositary should be entitled to draw the attention of the reserving state to what, in its view, causes the reservation to be impermissible and, if the reservation is maintained, draw the attention of the other parties to the alleged problem. The Commission was divided on the issue. The majority were against the depositary having more than the traditional mailbox role that is described in the Vienna Convention and believed that by assessing reservations for manifest impermissibility a depositary could compromise its neutrality.

Others, including me, argued that neutrality is not the same as passivity, that depositaries already have to exercise judgement in a range of matters such as whether a reservation is in fact a reservation and whether it is due and proper form, that in some cases a manifestly impermissible reservation may be made simply through a lack of knowledge or expertise in the relevant government ministry or department, that depositaries often communicate informally and usefully with states about reservations and are most unlikely to come lightly to the view that a reservation is impermissible. I also said that as a practical matter I was reluctant simply to leave it to states to respond to impermissible reservations as for many smaller states the volume of treaty notifications was so high they were unlikely to notice a potentially impermissible reservation unless its doubtful character was drawn to their attention.

The unilateral acts topic concerns the highly problematic and controversial question of whether it is possible to codify the circumstances in which a state may be held to be bound by its own unilateral acts as opposed to what it may have agreed to be bound by through bilateral or multilateral treaties or through customary international law. It is well accepted that a state may find itself bound by its previous conduct (the most frequently cited example is, of course, the first *Nuclear Tests* case) but the debate is whether the circumstances in which this situation may arise can be specified in advance.

The so-called liability topic is the second part of the topic on “International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law” for which Professor Quentin-Baxter was the first Special Rapporteur and on which he produced ground breaking and controversial reports in the late 70s and early 80s. The Commission last year completed draft articles on “Prevention of Transboundary Harm from Hazardous Activities” and many members of the Commission clearly felt that, with those articles, they had completed the work they could usefully do on the topic and were very reluctant to attempt anything more. There were extensive discussions in a working group set up to consider the matter and in the end, on the basis of a report from this working group, the Commission is now seized of the second part of the topic which is subtitled “International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities”.

There is no doubt that this subject is both technically difficult and very sensitive. But the points I kept making in the working group and gained support for were the following:

- the Commission had conceived state responsibility as limited to internationally wrongful acts (as suggested by some commentators a different conceptual approach was possible)
- complete fulfilment of the prevention and response obligations developed by the Commission can never entirely eliminate the risk of accident
- if loss occurs despite fulfilment of the prevention obligations there is no wrongful act on which a claim can be founded
- unless that loss is to lie where it falls (i.e. potentially on the innocent victim) there is a gap in the Commission’s work to date
- the gap is sufficiently obvious that the Commission has to address it or lose credibility.

It is difficult to anticipate the outcome of the Commission’s work on this subject but I believe it is important that it has accepted that it needs to grapple with it. Personally I regard it as strategically one of the two most important decisions taken by the Commission at this last session, the other being the decision to take up the topic of “Fragmentation of International Law”.

The new topic of “Responsibility of International Organisations” is really the counterpart of the work completed by the Commission last year on state responsibility. At the conceptual level it is in a sense reasonably straightforward but it involves a number of quite tricky issues such as to what extent does a state remain responsible for the conduct of officials it has seconded to an international organisation and whether in some circumstances states may be responsible for the conduct of an international organisation of which they are a member.

The new topic of “Shared Natural Resources” is seen as a logical continuance of the Commission’s earlier work on the non-navigational use of international watercourses. For this reason, although there are a range of resources that can be regarded as shared, the initial focus is going to be on the very important and topical issue of transboundary confined groundwater. The plan is that the work might then move to oil and gas and perhaps further on to other issues such as migrating animals.

Let me now attempt to give you an overview of the Commission’s work on the topic to which it devoted most of its time at this last session.

VI DIPLOMATIC PROTECTION

What is it?

It stems from the fact that a state has no obligation to admit aliens to its territory. But if it does so it has an obligation to the alien’s state of nationality to treat or protect his or her person and property in accordance with the international minimum standard for the treatment of aliens. If it fails to do so then as a matter of international law it has engaged in an internationally wrongful act of omission and its international responsibility is engaged. Diplomatic Protection is the procedure used by the injured alien’s state to either a) secure compliance or b) claim compensation.

What are the difficult questions?

- (1) Whose right is being asserted?

First, and quite controversially, is the question of whose right is being asserted. The traditional doctrine (going back to Vattel in 1758) is that the right involved is the right of the state of nationality because “whoever ill treats a citizen indirectly injures the state.”

There are a lot of problems with this notion – not least the development of human rights law and foreign investment law that in some circumstances allow the individual to bring proceedings in their own right before international tribunals. In any event it certainly seems something of an exaggeration to say that whenever a national is injured in a foreign state his own state is also injured.

The underlying notion of diplomatic protection is therefore generally regarded today as something of a fiction. But fiction or not it is still an important part of customary international law and it is still important in securing the protection of the person and property of aliens.

So, the first article adopted by the Commission makes it clear that the right of diplomatic protection belongs to the state, not the individual. It defines diplomatic protection as the “resort to diplomatic action or other means of peaceful settlement by a State *adopting in its own right* the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State”. (emphasis added). That definition also makes it clear that the articles deal with the exercise of diplomatic protection by a State and not with functional protection by an international organisation of its officials which is based on a different premise. They also do not deal with the protection of diplomatic and consular officials as they are covered by the relevant Conventions on diplomatic and consular relations.

The first and second articles are also drafted in such a way as to make it clear that although the state has the right to exercise diplomatic protection it is under no obligation to do so.

There are a number of subsidiary issues e.g. who decides the question of nationality? The answer to this question is that it is for each state to decide this in accordance with its internal law. Proof of nationality is sufficient. As adopted by the Commission the draft articles make it clear that for the purposes of diplomatic protection it is not necessary to establish an effective or genuine link with the state of nationality as in the *Nottebohm* case. There was a general feeling in the Commission that in the mobile world today a genuine link requirement would potentially exclude many people from the benefit of diplomatic protection.

The only qualification on this proposition that proof of nationality is sufficient is that the acquisition of nationality must have been in accordance with international law. Obviously there would be no issue in respect of the usual methods of acquisition of nationality – birth, descent and naturalisation. But there could be circumstances where intentionally or unintentionally nationality is acquired by operation of domestic law in a manner that contravenes international law. An example might be a compulsory change of nationality on marriage that contravenes the relevant provision of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Commission’s draft therefore allows the possibility that a State against which a claim is made may challenge the nationality of the person in respect of whom the claim is made on the grounds that the nationality has been acquired contrary to international law. But the burden of proof will be on the State challenging the nationality.

(2) Does Nationality have to be Continuous?

The traditional rule has been that a State may exercise diplomatic protection only on behalf of a person who was a national at the time of the injury on which the claim is based and who has been continuously a national of that State right up to and including the presentation of the claim.

This traditional rule has been heavily criticised on the grounds that it can produce hardship in cases where an individual changes their nationality for reasons unrelated to the bringing of the diplomatic claim. It could be particularly harsh where for example there has been an involuntary change of nationality through state succession. On the other hand there was concern in the Commission that if it was abandoned completely this could lead to abuse through nationality shopping to find the State most likely to press the claim.

In the end the Commission decided to maintain the traditional rule but to establish exceptions to it.

So in the relevant draft article (Article 4) the first paragraph states the basic rule and the second paragraph creates an exception to it if the following three conditions are met:

- (a) the individual has lost their former nationality;
- (b) they acquired the nationality of another State for a reason unrelated to the bringing of the claim; and
- (c) the acquisition of the new nationality was in a manner not inconsistent with international law.

There was a lot of debate about whether b), which is obviously a rather subjective test, was really necessary or desirable especially in the light of the third paragraph which provides that the new State of nationality cannot exercise

diplomatic protection against a former state of nationality in cases where, at the time of the injury, the person concerned was a national of that former state and not of the new state of nationality. In the end, however, it was retained.

(3) Multiple Nationality and Claims Against Third States

Multiple nationality is now a common feature of international life and the Commission had no real difficulty in establishing a draft article (Article 5) that in the first paragraph allows a state to exercise diplomatic protection in respect of a dual national and in the second paragraph envisages the possibility of a joint exercise of diplomatic protection by two or more states of nationality against a third state.

The much more difficult question is whether a dual or multiple national may be protected by one state of nationality against another state of nationality.

This is dealt with in the next draft article (Article 6) and the Commission's answer is no **unless** the nationality of the claimant state is **predominant** both at the time of the injury and at the date of the claim. The burden of proof of predominance is on the claimant state.

(4) Stateless Persons and Refugees

The question whether diplomatic protection can be exercised in respect of stateless persons and refugees was very controversial. There was general acceptance that today there should be some exceptions to the general rule of nationality to allow protection of stateless persons and refugees but there was considerable disagreement about the extent of the exceptions.

In the end there was a compromise between those whose sympathies lay with stateless persons and refugees in need of protection (i.e. in need of a State willing to take up their claim) and those, particularly from countries or regions with high refugee flows, who were concerned that the exceptions could lead to burdensome pressures on governments to exercise protection.

The essence of the compromise was the formula that a State could exercise protection in respect of such persons if they were "lawfully and habitually" resident in that State both at the time of the injury and at the date of the presentation of the claim. Some considered that the "lawfully and habitually" test set too high a threshold and suggested lesser tests such as "lawfully staying" which is the formula used in some articles of the 1951 Refugees Convention. Others (the majority) argued that the "lawfully and habitually" formulation which is used in the 1997 European Convention on Nationality was the closest approximation to the criterion of nationality in the regular situation of the exercise of diplomatic protection. They argued that this provision was an exception to the nationality rule for diplomatic protection and was therefore progressive development rather than codification. It was therefore quite appropriate to set a higher threshold than that contained in the Refugee Convention with regard to certain rights of refugees.

There is also a qualification in the final paragraph of the relevant article (Article 7) to the effect that a State cannot exercise diplomatic protection in respect of a refugee lawfully and habitually resident in that State against the State of nationality of that refugee. Although this means that some persons who might be thought deserving of protection will be excluded from the possibility of such protection the majority thought that to provide otherwise would be to run counter to the basic approach of the customary law on this subject and of the draft articles.

That is a summary of where the Commission has got to in the sense of adopting draft articles. It also had a detailed discussion on reports prepared by the Special Rapporteur on the local remedies rule and the exceptions to it. That is the general rule of customary international law that a state may not bring an international claim in respect of an injury to its national until the national has exhausted all available and effective local remedies in the state that is alleged to be responsible for the injury.

Next year the Special Rapporteur intends to introduce reports on diplomatic protection of legal persons as opposed to the natural persons covered by the draft articles to date and on the question whether there should be an exception to the nationality rule to deal with the diplomatic protection of the crews of ships and aircraft.

VII THE FUTURE

Finally, I would like to offer a few comments about the new topic entitled "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law".

As I said earlier it is generally recognised that the Commission is coming to the end of the big subjects that establish the ground rules on which the international legal system operates. I hope I have given you an indication

that the Commission is not short of work and that, for the most part, the areas on which it is engaged are of current significance. But there is no doubt in my view that a transition is occurring and that the Commission needs to be alert and open to new developments in international law and actively to look for new ways in which it can make a contribution.

Not only is the Commission reaching the end of most of the subjects that may be seen as part of the foundations of international law and that are susceptible of codification work at this time but also there are now many international organisations that have responsibility for particular aspects of international law.

That in itself is a good thing and the majority in the Commission are quite clear that there are many positive aspects to the so-called fragmentation of international law. Certainly within the Commission's study group on this topic there was a strong body of opinion that thought fragmentation could be seen as evidence of the vitality of international law. The development of new rules, new regimes and new institutions at the international and also the regional level can strengthen international law as a whole. It means that areas not previously being addressed by international law are now being addressed and it also usually means that more voices are being involved in the process of rule making. Further, it is entirely appropriate that rules in new areas of international law are developed by specialists in those areas with the involvement, where appropriate, of technical expertise and relevant sectoral NGOs and business interests.

Another aspect of the issue of fragmentation is the proliferation of international judicial bodies. Successive Presidents of the ICJ have expressed concern about this development. But, by and large, the members of the Commission were not particularly disturbed by it. There has never been a hierarchy of international judicial bodies and it is not a likely development in the reasonably foreseeable future. Moreover many commentators have seen this proliferation as a rather positive development that, in effect, indicates the responsiveness of the international legal system to social change. In any event the Commission was very clear that it should not attempt to involve itself in issues surrounding the creation of international judicial institutions or the relationships between them. Certainly it should not attempt to act as a referee between institutions or conflicting rules although it might have a potential role as a facilitator of communication between institutions.

But undoubtedly there are some aspects of fragmentation that do have the potential to create real difficulties and that fall reasonably directly within the Commission's area of contribution as the only official body with the responsibility to take a broad overview of international law when preparing its reports and proposals. In the first place there may be some areas where there are conflicting rules of international law. Certainly there are areas of tension between say human rights treaties and extradition arrangements and between international criminal law and State immunity. Is there a role for the Commission to look at these "fracture zones" of international law not from the standpoint of some kind of referee but rather with a view to identifying practical solutions to issues that may have arisen or may be on the horizon.

Secondly, problems can emerge when newer bodies in the international system use the rules of general international law in different ways from the older institutions. In many ways this could be the core difficulty with the greatest long term implications. If different specialised bodies, for example, interpret or apply the rules of the Vienna Convention on the Law of Treaties in quite different ways then this could in time have implications for the idea of a single international legal system – a system that may have many sub systems or self-contained regimes or semi-autonomous regimes but is nonetheless more or less coherent.

In any event this is where the Commission has decided to make a start. In a break with its past practice it has decided on an exploratory methodology whereby it will undertake a series of studies, built around the Law of Treaties, without deciding in advance what form its work might eventually take or what specific actions might result or be recommended. The stated aim, however, is to provide what it has called a "toolbox" to assist in solving practical problems "arising from incongruities and conflicts between existing legal norms and regimes.

The first of the studies is on the function and scope of the *lex specialis* rule and the question of "self-contained" regimes. Four other topics have been identified, the last and perhaps most controversial of which is the hierarchy among sources of international law: *jus cogens*, obligations *erga omnes*, and article 103 of the Charter of the United Nations, as conflict rules.

It is very early days. But I think the work the Commission has set itself under this topic and the mindset that will need to accompany it has the potential to establish a constructive new role for the Commission at a time when some of the central ideas that led to its establishment are under challenge. From the standpoint of a small player on the world scene such as New Zealand those central ideas look no less important today than they did in 1945.

