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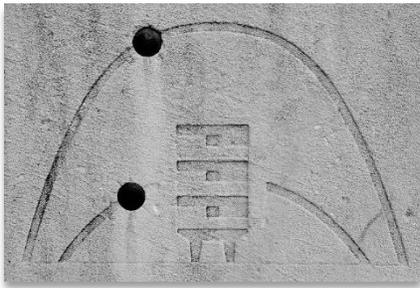


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The International Law Commission Celebrating Its 70th Anniversary: *Dresser le bilan pour l'avenir 'à venir'*

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Introduction

The International Law Commission (the ILC or the Commission), which was established in 1948, celebrated its 70th anniversary this year. The timing of the ceremony offers us an opportunity to take stock of the balance that has been constructed between the *object* and *subject* in international law-making: codification and progressive development, on the one hand, and States (at the United Nations General Assembly) and other actors (including the Commission), on the other hand. A threefold claim is made here. Firstly, I point out how the Commission has in a piecemeal fashion shifted the balance from traditionally privileged notions (concerning codification and the State) to unprivileged notions (concerning progressive development and non-State actors). Secondly, I argue that while acting on behalf of the State and the people (*demos*) constituting it, the Commission de-privileges the people in this dichotomy, the so-called autoimmunity of democracy. Thirdly, in order to overcome such paradoxical self-destruction, which conditionally excludes the unprivileged, this Reflection endeavours to re-think the notion of autoimmunity and to introduce the ethics of unconditional hospitality in the ILC's activities for *l'avenir 'à venir'*.

The need to re-consider the role of the ILC in creating a balance in international law-making has in practice been acknowledged in the long-awaited dialogue between the Commission and its principal organ, the UN General Assembly, in New York and Geneva. The title of the 70th anniversary ceremony is 'Drawing a Balance for the Future' or '*Dresser le bilan pour l'avenir'*'. Typical questions that emerged in these discussions include: 'In what ways have the Sixth

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Committee [of the UN General Assembly] and the Commission interacted, formally and informally, to advance the progressive development of international law and its codification?’¹ This Reflection does not intend to nihilistically discourage the great efforts and fruitful discussions of the General Assembly and the Commission. It also refrains from rigidly sticking to the ceremony’s title as to do so would superficially suggest a routine assessment (balance sheet or *bilan*) of the Commission’s work over the past decade with a view to its future work. The aim of this Reflection is to uncover the hidden agenda, which falls under the guise of balance, and to criticise the political purpose in order to re-evaluate the ILC’s role in international law-making.²

I. From Democratic Codification to Managerial Progressive Development

The first pole of the ILC’s role in international law-making concerns the *object* of international law-making. Article 1 of the ILC Statute defines for its object the promotion of the progressive development of international law and its codification. According to Article 15, the promotion of progressive development of international law is the future-oriented ‘preparation of draft conventions’ which corresponds to the law as it should be (*lex ferenda*), while the codification of international law is past-oriented and ‘the more precise formulation and systematization of rules of international law’ relating to the law as it is (*lex lata*).³ Despite this distinction, it is widely acknowledged 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’, and consequently, ‘in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments’.⁴ Although the ILC drafted scores of important international law documents, the most obvious topics requiring codification have already been undertaken. Therefore, the Commission’s current work is geared towards the progressive development end of the spectrum.⁵

This gradual shift from codification to progressive development has affected methodologies and in particular the choice of topics and products. Although some traditional topics remain to be codified, the majority of contemporary topics is intended to produce normative content to fill out the existing normative containers already codified. For this reason, Commission members are in agreement that ‘the Commission should not restrict itself to traditional topics, but should also consider those [topics] that reflect new developments in international law and pressing concerns of the international community as a whole’.⁶ In this situation, specialised topics in specific fields are also designed to provide normative content for the purpose of progressively developing the

¹ Christiane Ahlborn and Bart L Smit Duijzentkunst, ‘70 Years of the International Law Commission: Drawing a Balance for the Future’ *EJIL Talk!*, on 3 May 2018 available at: <https://www.ejiltalk.org/70-years-of-the-international-law-commission-drawing-a-balance-for-the-future/>.

² The author gets inspirations for this deconstructive purpose from postmodern philosophers cited below as well as the way of thinking to ‘temporarily suspend the belief system of international law’. See Jean d’Aspremont, *International Law as a Belief System* (CUP 2017).

³ Shabtai Rosenne, ‘The Perplexities of Modern International Law: General Course on Public International Law’ (2001) 291 *Recueil des cours* 9, 77–83.

⁴ UN Doc A/AC.10/51; also UN General Assembly, 2nd Sess., Official Records, 6th Committee, 178 (A/331) (1947).

⁵ ‘Introduction’ in Michael M Wood and Arnold Pronto (eds), *The International Law Commission 1999-2009: Volume IV: Treaties, Final Draft Articles, and Other Materials* (Oxford University Press 2010) 10.

⁶ Report of the International Law Commission fiftieth session, UN Doc A/53/10 (1998), 110, para 553.

future normative containers that will be established subsequently. Following these changes, the Commission has extensively diversified the category of 'soft' international law products to include principles, guidelines and reports, and not just draft conventions.⁷

The second pole in the ILC's role in international law-making concerns the *subject* of international law-making. Since its *raison d'être* is dedicated to international law, the Commission has traditionally contributed to law-making efforts through the main subject of the international community: the nation-State. This idea has been formalized in the ILC Statute, whereby the UN General Assembly delegates the authority concerning international law-making to the Commission, while simultaneously exerts political control over the Commission, as a subsidiary organ, in several respects.⁸ This principal/agent relationship does not imply, however, that the Commission does or should solely implement the General Assembly's requests. To the contrary, it is assumed that international bodies grant agents wide-ranging independence and discretion.⁹ In practice, by shifting its role from 'originator' to 'finaliser' of international law products, the Commission, who 'depends not solely on the approval of States but also on the endorsement of a wide range of international actors'¹⁰, views itself as the softer law-maker with a broader audience.

This diversification of actors beyond the nation-State places a new emphasis on the legitimacy of the ILC in international law-making. Under the traditional framework, the legitimacy of international law was based on the idea that the international system was composed of voluntary association among States in accordance with the State consent model.¹¹ As the President of the UN General Assembly emphasised in the 70th anniversary ceremony, the legitimacy of international law-making derives more fundamentally from the power (*kratos*) of the ultimate beneficiaries, namely, the people (*demos*).¹² Nevertheless, and as noted already, the Commission has recently circumvented the democratic route of the General Assembly and has established the legitimacy of international law-making in its expertise.¹³ If the Commission continues to finalize soft products (principles, guidelines and reports) instead of draft conventions, the situation would be akin to the

⁷ Sean D Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product', in M Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill/Nijhoff 2013) 29

⁸ See in general, Jeffrey S. Morton, *The International Law Commission of the United Nations* (University of South Carolina Press 2000) 83–92.

⁹ Laurence R. Helfer and Timothy Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence', in Curtis A. Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016)

¹⁰ Jacob Katz Cogan, 'The Changing Form of the International Law Commission's Work', in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill 2015)

¹¹ Thomas Christiano, 'Democratic Legitimacy and International Institutions', in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 119, at 122-126; Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405, 412-414.

¹² Statement by H E Mr Miroslav Lajčák, President of the 72th session of the UN General Assembly, at Commemorative Meeting to Mark the 70th Anniversary of the International Law Commission, available at <https://www.un.org/pga/72/2018/05/21/70th-anniversary-of-the-international-law-commission/>.

¹³ For the expertise of the ILC, Phillip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* 1, 9.

so-called 'deformalisation' phenomenon, in which the law-making authority is exercised through rules and managerialism among experts who are beyond democratic control.¹⁴

II. Autoimmunity of Democracy against Managerialism

The analysis has roughly illustrated that there has been a gradual shift in the ILC's role in international law-making from democratic codification to managerial progressive development. Given this current trend, one that undermines the traditional hierarchy between the privileged and the unprivileged, what does the 70th anniversary ceremony's title 'Drawing a Balance for the Future' imply? This Reflection questions whether any attempt to draw a balance, consciously or unconsciously, would re-configure the balance. In other words, any effort to draw a balance will re-prioritise the privileged over the unprivileged. Given that world politics and nation-States inevitably encroach upon the Commission's work, as testified by a former commissioner,¹⁵ the subsidiary organ is not completely separate from the principal organ, which is composed of sovereign States, and thus is always haunted by the risk of re-democratisation (as will be explored below). This risk has been recently aggravated by, as a current commissioner points out, democratic scepticism against government-appointed and inter-governmentally elected experts who have proactively engaged in the progressive development of international law.¹⁶ Against this backdrop, the long expected dialogue in the anniversary ceremony between the UN principal democratic organ and the Commission, as its subsidiary expert organ, might convey a political message exerting pressure by the former on the latter. In essence, the slogan 'Drawing a Balance for the Future' is not only about 'the future' in the literal sense of the word; rather it evokes nostalgic pleas for the recovery of the privileged State-centric vision of international law continuing 'from the past to the present'.

Such an interpretation might sound cynical but the latest practice of the ILC reveals that such an interpretation is not delusional. Trends of such practice emerged when the Commission decided to adopt the 2013 understanding of the *Protection of the Atmosphere*, which resulted in a strictly restrained interpretation of this topic.¹⁷ According to this understanding, the Special Rapporteur was required to develop the project so that sensitive issues relevant to 'political negotiations' would be excluded (a). It also prevented the Special Rapporteur from 'seek[ing] to "fill" the gaps in the treaty regimes' (b) and 'seek[ing] to impose on *current* treaty regimes legal rules or legal principles not already contained therein' (d). The purpose of introducing such an understanding is clear: codification and the international community of States are re-privileged, while progressive development and actors other than the State are de-privileged. The literature outside, and even

¹⁴ Jarna Petman, 'Deformalization of International Organizations Law', in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 398.

¹⁵ Bernhard Graefrath, 'The International Law Commission Tomorrow: Improving Its Organization and Methods of Work' (1991) 85 *American Journal of International Law* 595.

¹⁶ Georg Nolte, 'The International Law Commission Facing the Second Decade of the Twenty-First Century', in U Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP Oxford 2011) 781.

¹⁷ Report of the International Law Commission Sixty-fifth session, UN Doc A/68/10 (2013), 115.

among members inside, harshly criticized the Commission for such an unprecedented leash that tightly constrained the scope of the project to a narrow residual range.¹⁸

This self-attacking phenomenon under the pressure of privileged notions, albeit embryotic as identified in *Protection of the Atmosphere*, can be explained by employing the biopolitical term *autoimmunity*. In a biological sense, autoimmunity denotes that a living being can spontaneously destroy, in an autonomous fashion, the very thing within it that is supposed to protect it against the other; put differently, to immunize from within against the aggressive intrusion of the other.¹⁹ From the philosophical perspective of de-construction, Jacques Derrida re-formulates this 'illogical logic' of autoimmunity as *constitutive*, a political process of preserving life by self-violation, excluding the other as a constitutive element of itself: '[democracy] has wanted, on the one hand, to welcome only men, and on the condition that they be citizens, brothers, and compeers, excluding all the others [...], and, on the other hand, at the same time or by turns, it has wanted to open itself up, to offer hospitality, to all those excluded. *In both cases [...] this hospitality remains limited and conditional.*'²⁰ The conditional aspect of autoimmunity is comparable to the conditional aspect of hospitality, or put differently, *tolerance*, which 'is a supplementary mark of sovereignty, which says of the other from its elevated position'.²¹ In terms of autoimmunity, the Commission attached several conditions to the 2013 understanding of the project on the *Protection of the Atmosphere*, making this organ hospitable to the unprivileged others to the extent that they are tolerable to the *demos*.

III. Penser autrement Autoimmunity pour l'avenir 'à venir'

That said, is there another way of thinking in order to overcome the self-destructing logic of the constitutive autoimmunity of democracy? Derrida answers: 'Democracy has always been suicidal, and if there is a *to-come* [*à-venir*] for it, it is only on the condition of thinking life otherwise, life and the force of life'.²² In this way of *penser autrement pour l'avenir 'à venir'*, 'autoimmunity is the very condition of the unconditionality of the event; it is what opens the *autos*, what opens *us*, to time, space, language, and the other'.²³ Derrida continues: '[A]utoimmunity is not an absolute ill or evil. It enables an exposure to the other, to what and to who comes – which means that it must remain incalculable. Without autoimmunity, with absolute immunity, nothing would ever happen or arrive;

¹⁸ See Peter H Sand & Jonathan B. Wiener, 'Towards a New International Law of the Atmosphere?' (2016) 7 *Goettingen Journal of International Law* 195, 208-216.

¹⁹ Jacques Derrida, *Rogues: Two Essays on Reason* (Pascale-Anne Brault and Michael Naas tr, Stanford University Press 2005) 123; *Voyous: deux essais sur la raison* (Galilée 2003) 173.

²⁰ *ibid* 63; 95 (emphasis added).

²¹ Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* (University of Chicago Press 2013) 127. To illuminate this conditional aspect, Derrida refers to the Third Definitive Article in Immanuel Kant's *Perpetual Peace*: 'The Law of World Citizenship Shall Be Limited to Conditions of Universal Hospitality'. For a comparison between Derrida's *autoimmunity* and Roberto Esposito's *autotolerance*, see Michael Lewis, 'Of (Auto-)Immune Life: Derrida, Esposito, Agamben', in Darian Meacham (ed), *Medicine and Society, New Perspectives in Continental Philosophy* (Springer 2015) 213.

²² Derrida (n 19) 33; 57(emphasis added). The concept of 'to come'.

²³ Michael Naas, *Derrida from Now on* (Fordham University Press 2008) 139 (emphasis in the original text).

we would no longer wait, await, or expect, no longer expect one another, or expect any event'.²⁴ This paradoxical, aporetic aspect of autoimmunity corresponds to the unconditional aspect of hospitality which is 'always to come [*à venir*], but a "to come" that does not and will never present itself as such'.²⁵ Although '[a]n unconditional hospitality is, to be sure, practically impossible to live', its hyperbolic demand opens democracy to the impossibility of a non-sovereign future that would welcome all vulnerable individuals.²⁶ While a community is threatened by its own mode of immunisation, the threat against itself presupposes the openness to the other with the risk of destroying itself and entails the ethics of unconditional hospitality to welcome alterity.²⁷

To discover the ethics of unconditional hospitality in the ILC's role in international law-making for *l'avenir 'à venir'*, we would have to think of the Commission's authority as *destitutive*, not constitutive. In this respect, Giorgio Agamben helps elucidate 'the opposition between constituent power, which destroys and always recreates new forms of law, without ever completely destituting it, and destituent power, which, in deposing law once and for all, immediately inaugurates a new reality'.²⁸ The disengagement function is derived from, in Derrida's futural inference of '*l'à-venir*', 'a *demos* without *kratie* (power), and an equality which does not simply draw no distinctions, but which welcomes the absolute stranger, thereby disrupting the return of the people to itself'.²⁹ This destituent logic provides normative guidance to the ILC's role in international law-making with respect to its *object* and *subject*.

On the one hand, the self-destructive effect of autoimmunity in the ILC's role in international law-making runs the risk of terminating its *object*, namely, progressive development and codification; in our attempt to *penser autrement pour l'avenir 'à venir'*, it conversely means the possibility of withdrawing from this object. This approach for the future 'to come' would be different not only from codification that bridges the past to the present, but also from progressive development, which is complicit, whereby the progressive language self-referentially reifies progress towards the future part of the present.³⁰ Rather it disengages from the dichotomy between the binary to make a futural space for welcoming disregarded alterity. This attempt of temporarily suspending the object creates the possibility to liberate methodologies, including choice of outcomes and topics.³¹ One possible approach is to study issue 'reports' for unfamiliar topics. As Sean Murphy points out, although the concern is sometimes expressed that the ILC is not an academic think-tank and that its *raison d'être* remains the development of draft treaties, the issuance of reports is probably right given that a key and unique function of the Commission is its ability to speak the

²⁴ Derrida (n 19) 152; 210.

²⁵ Jacques Derrida, 'Hospitality' (2010) 5 *Angelaki: Journal of the Theoretical Humanities* 3, 14.

²⁶ Borradori (n 21) 129.

²⁷ Inge Mutsaers, *Immunological Discourse in Political Philosophy: Immunisation and Its Discontents* (Routledge 2016) 123.

²⁸ Giorgio Agamben, 'What Is a Destituent Power?' (2014) 32 *Environment and Planning D: Society and Space* 65, 71 (Stephanie Wakefield tr). See also, *The Invisible Committee, Now* (Robert Hurley tr, 2017) 46.

²⁹ Jacques de Ville, *Constitutional Theory: Schmitt After Derrida* (Taylor & Francis 2017) 159.

³⁰ For the concept of 'progress', see Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 *European Journal of International Law* 425–444.

³¹ Sahib Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 *Leiden Journal of International Law* 23, 30.

language of general international law.³² Put differently, the risk of losing its *raison d'être* by destitutively withdrawing its own object would open the Commission itself towards the other who is excluded by the interaction between progressive development and codification.

On the other hand, the self-destructive function of autoimmunity also risks demolishing the subject for the ILC in international law-making, namely, *the international community of States*; in our attempt to *penser autrement pour l'avenir 'à venir'*, it conversely means the possibility of withdrawing from this particular subject. This approach for the futural community would deny the homogeneous international society consisting of only the State as the 'transcendental' significant and the ultimate recourse of all textuality.³³ It would instead envision a community in which the international legal subject is conceived as 'floating' significant that is not automatically or necessarily linked to any particular signifié but is empty of meaning and can be attached to an infinite number of signifiés.³⁴ This idea is in line with Agamben's explanation of the subject of *pouvoir destituant*: 'the thought that seeks to conceive *the 'a-demy'*, the absence of a *demos* or people that defines democracy'.³⁵ In this sense, the recent attempt of the Commission to reinvent itself is incomplete because it remains largely sealed off from private actors who represent the voice of the excluded.³⁶ Assuming the risk of losing its *raison d'être* by destitutively withdrawing its own subject, the international community of States, and more fundamentally, the *demos* constituting the State, is opened to welcoming the other.

The destituent authority exercised in relation to international law-making through the ethics of unconditional hospitality can be illustrated with the case of *Protection of the Atmosphere*, in which constitutive autoimmunity of democracy manifested in the most expressed manner. Despite the fact that the topic is described as 'a pressing concern of the international community as a whole' in the Preamble, the dialectic interaction between progressive development and codification has been virtually disallowed due to the 2013 restrictive understanding. The Special Rapporteur took what he called the 'middle-ground approach': while the project was 'not intended to fill the gaps in treaty regimes, it would certainly *identify* such gaps'.³⁷ This disengagement from the dichotomy between progressive development and codification made it possible to destitute the will of the sovereign State or people. With the approach for the future 'to come' taken, this Reflection will make a brief appraisal of two key points.

The first point concerns the reference to 'the interests of present and future generations' in the draft Guideline 6 – equitable and reasonable utilization of the atmosphere. As James Crawford

³² Sean D Murphy, 'Deconstructing Fragmentation: Koskeniemi's 2006 ILC Project' (2013) 27 *Temple International & Comparative Law Journal* 293, 306.

³³ Jacques Derrida, *Positions* (Éditions de Minuit 1972) 120; (Alan Bass tr, University of Chicago Press 1982) 86.

³⁴ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn to the Century* (Hart 2000) 259.

³⁵ Agamben (n 28) (emphasis in the original text).

³⁶ Kristina Daugirdas, 'The International Law Commission Reinvents Itself?' (2014) 108 *AJIL Unbound, American Journal of International Law* 79, 81–82

³⁷ Second report on the protection of the atmosphere by Shinya Murase, Special Rapporteur, UN Doc A/CN.4/681 para 3 (emphasis added).

notes, such a concept guaranteeing inter-generational equality 'is not law *per se* but, rather, a way of thinking about law and its relationship to policy' in that it 'incorporates a further series of subtle ideas that can be difficult to apply'.³⁸ This way of *penser autrement*, or thinking otherwise, perfectly resonates with Derrida's account of unconditional hospitality that 'is neither juridical nor political, is nonetheless the condition of the political and the juridical'.³⁹ In our attempt of *penser autrement pour l'avenir 'à venir'*, the concept of inter-generational equality embedded in this draft Guideline would normatively guide conditional practice to take into account the sensitive issues 'to come' that were autoimmunely excluded by the 2013 understanding, including the precautionary principle and common but differentiated responsibilities.

The second point is the incorporation of 'persons and groups particularly vulnerable' in Guideline 9 – interrelationship among relevant rules. According to the commentaries on the draft Guidelines, the phrase in the second sentence of paragraph 3 'may include, *inter alia*' suggests that the examples enumerated are not necessarily exhaustive.⁴⁰ It is therefore unconditionally hospitable for other groups 'à venir' to be included as potentially vulnerable people, who will be often seriously affected by atmospheric pollution and atmospheric degradation. This idea of leaving a futural open space corresponds to Derrida's explanation of the aporetic possibility of autoimmunity: 'If an event worthy of its name is to arrive or happen, it must, beyond all mastery, affect a passivity. It must touch an exposed vulnerability, one without absolute immunity, without indemnity; it must touch this vulnerability in its finitude and in a nonhorizontal fashion'.⁴¹ In our attempt to *penser autrement pour l'avenir 'à venir'*, the current personal scope conditioned by this draft Guideline would be substantially re-considered for the benefit of victims 'to come' in terms of the concept of vulnerability enshrined therein.

Concluding Remarks

Sir Robert Jennings expressed the following axiom about realising utopia in Antonio Cassese's *Five Masters of International Law*: 'Given two contradictory ideas [between proposals and what is really law] you may then find that neither represents the truth, but that something that involves both of them and is part of both of them is at any rate a nearer approximation to the truth'.⁴² The dialectic approach seeking the golden mean between *lex lata* and *lex ferenda* would function in most cases, but in certain circumstances the balance may be manipulated by privileging one of the notions embedded therein. This Reflection revealed that there exists a so-called autoimmunity symptom by which the Commission itself re-prioritises the privileged over the unprivileged in the name of democracy. To erase such a supplementary mark of sovereignty which is conditionally hospitable to the other, the Reflection explored the possibility of thinking differently in order to

³⁸ James Crawford, 'Responsibility, Fraternity, and Sustainability in International Law' (2014) 52 *Canadian Yearbook of International Law* 1, 28 (emphasis added).

³⁹ Borradori (n 21) 127, 129.

⁴⁰ Report of the International Law Commission sixty-ninth session, UN Doc A/72/10 (2017), 161–162, para 17.

⁴¹ Derrida (n 19) 152; 210.

⁴² Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Hart 2011) 143, cited by Anne Peters, 'Realizing Utopia as a Scholarly Endeavour' (2013) 24 *European Journal of International Law* 533, 551–552.

introduce the ethics of unconditional hospitality in the ILC's activities for *l'avenir 'à venir'*. The unconditional idea, albeit impossible in reality, provides normative guidance to conditional practice, and in turn, the practice gives a factual basis to normative directions. This conditional and unconditional hospitality is, unlike Hegelian dialecticism, one of 'paradox, aporia [...] at once heterogeneous and indissociable',⁴³ but it is the very paradox, the aporetic nature, that provides the impetus for philosophy, and the motivation and stimulus for ethical action.⁴⁴

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⁴³ Borradori (n 21) 129.

⁴⁴ Andrew Shepherd, *The Gift of the Other: Levinas, Derrida, and a Theology of Hospitality* (Wipf and Stock 2014) 61.