

**‘Codification by Interpretation’: The International Law Commission as an Interpreter
of International Law**

1 Introduction

In the previous century, the International Law Commission (ILC or Commission) followed a ‘codification by convention’ paradigm in relation to the law of treaties, whereby it mainly prepared texts intended to form the basis of future conventions. The 1969 Vienna Convention on the Law of Treaties (VCLT)¹ is the prime example of the ‘codification by convention’ paradigm in the law of treaties. This paradigm was perceived as the central way of codifying and developing customary international law (CIL). On the cusp of a new era, the Commission has returned to the law of treaties. In four topics, the Commission – in documents that are intended to remain non-binding – fills gaps in and interprets a treaty in force, the VCLT, and develops CIL set forth therein and beyond the VCLT. This article focuses on one aspect of this new development in the Commission’s work: the fact that the Commission interprets. The Commission has interpreted and interprets in other topics for different reasons and to various degrees.² However, while in other topics interpretation is tangential, in the four topics discussed

¹ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

² See interpretation of ‘genocide’ in 1948 Genocide Convention (ILC, Draft Code of Crimes against the Peace and Security of Mankind, at 17-56, UN Doc. A/51/10, 1996, at 44-47), and of ‘widespread or systemic attack’ and of ‘attack directed against any civilian population’ in definition of crimes against humanity in ICC Statute (Article 7) (ILC, Draft Articles on Crimes Against Humanity (adopted on first reading), at 10-127, UN Doc. A/72/10, 2017). See commentary to Article 51 of the Articles on State Responsibility (on proportionality of countermeasures), which refers to the ICJ’s articulation of the CIL rule in *Gabčvkovo-Nagymaros Project* that ‘countermeasures must be commensurate with the injury suffered, taking account of the rights in question,’ and interprets the Court’s pronouncement (and CIL therein) that ‘the rights in question’ as involving a quantitative and qualitative assessment of

here the interpretation of VCLT rules is a central focus of the Commission. This development, which is called the ‘codification by interpretation’ paradigm in this article,³ is impactful and significant. Impactful, because it leverages the VCLT as a treaty and its impact on CIL by ensuring the clarity and relevance of the rules therein. Significant, because by reaffirming and clarifying the secondary rules on the law of treaties the Commission influences the creation, operation and termination of treaty primary rules across all fields of international law, and has the potential to instil international law with continued legitimacy.

It has been argued that because interpretation operates as the functional equivalent of truth, ‘whoever controls the process of interpretation, controls the truth.’⁴ It is not surprising that some governments in their statements in the Legal Committee of the United Nations General Assembly (UNGA) (Sixth Committee) appear eager to clarify whether the Commission’s outputs are a ‘binding tool for treaty interpretation’⁵ or ‘a subsequent agreement and/or practice with respect to the interpretation of [...] the VCLT’.⁶ Further, the Commission’s interpretative paradigm comes at a time when the Commission faces numerous challenges: some States appear sceptical about how much authority international courts and tribunals, and especially the

proportionality and include ‘the effect of a wrongful act on the injured State [and] on the rights of the responsible State’. ILC, ‘Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries thereto’ ILCYB (2001), Vol. II, Part 2, 30, at 135, paras. 6-8. (Hereinafter ILC Articles on State Responsibility). It also interprets its own Statute.

³ While new paradigms are not always manifest, they are themselves a matter of assessment after seemingly incremental changes have occurred. See *mutatis mutandis*, T. Kuhm, *The Structure of Scientific Revolutions* (2nd ed, 1970).

⁴ J. Klabbers, ‘Virtuous Interpretation’, in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010) 15 at 20.

⁵ Japan (28 October 2013, p. 5).

⁶ Slovenia (23 October 2018, p. 3).

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International Court of Justice (ICJ), may give to the Commission's pronouncements.⁷ Because international lawyers place emphasis on the pronouncements of international courts and tribunals, the Commission's power is enhanced through the influence that its pronouncements may have on the reasoning of the ICJ, and other international courts and tribunals. As of 30 March 2019, the ICJ has relied on the Commission's work expressly in twenty-two decisions.⁸

⁷ Comments on draft articles on immunity of State officials from foreign criminal jurisdiction: China (UN Doc A/C.6/72/SR.23, 9), Spain (UN Doc A/C.6/72/SR.24, 7), Switzerland (UN Doc A/C.6/72/SR.22, 12).

⁸ Contentious Proceedings: *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands)* [1969] ICJ Rep 3, paras 48-50, 54-55, 95; *Continental Shelf (Tunisia v. Libya)* [1982] ICJ Rep 18, paras 41, 100, 119; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) [1986] ICJ Rep 14, 100 at para 190; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7, paras 47, 50-54, 58, 123; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Preliminary Objections) [1998] ICJ Rep 275, para 31; *Kasikili/Sedudu Island (Botswana v. Namibia)* (Merits) [1999] ICJ Rep 1045, para 49; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Merits) [2001] ICJ Rep 40, para 113; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Merits) [2002] ICJ Rep 303, para 265; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (Merits) [2005] ICJ Rep 168, paras 160, 293; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, paras 173, 186, 199, 344, 385, 398, 420, 431; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (Merits) [2007] ICJ Rep 659, para 280; *Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)* (Preliminary Objections) [2007] ICJ Rep 582, paras 39, 64, 84, 91, 93; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Merits) [2009] ICJ Rep 61, para 134; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep 14, para 273; *Maritime Dispute (Peru v. Chile)* [2014] ICJ Rep 3, paras 112-117; *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (Merits) [2012] ICJ Rep 24, paras 56, 69, 89, 137; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Island v. India)*

Faced with the Commission's increased authority, States might endeavour to downplay the Commission's interpretative work by criticising it as falling outside the Commission's mandate.

This article argues that interpretation falls within the Commission's existing functions – 'the progressive development of international law and its codification' – and that although the Commission's interpretations are not per se binding or 'authentic' means of interpretation, they constitute an 'offer of interpretation' to States – the actors that make international law – and are intended to trigger their reaction and lead to their future agreement or *opinio juris*. Further, the Commission's interpretations serve as a subsidiary means for determining rules of law, including their content, and may also constitute a supplementary means of treaty interpretation. Ultimately, the Commission's 'codification by interpretation' paradigm in the four topics examined in this study forms part of the Commission's long-lasting goal to instil international law with legitimacy.

This article focuses on four topics in the law of treaties. More specifically, on the 2011 Guide to Practice on Reservations to Treaties (Guide to Practice), which interprets inter alia VCLT Articles 19-23 on reservations, and clarifies the CIL rules set forth therein;⁹ the Conclusions on Subsequent Agreements and Subsequent Practice in relation to the

(Jurisdiction and Admissibility) [2016] ICJ Rep 255, para 42; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833, para 45; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica) 2 February 2018, para 151. Advisory Opinions: *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1980] ICJ Rep 73, paras 47, 49-50; *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62, para 62; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 175, 176, 195 at para 140.

⁹ ILC, Text of the Guide to Practice on Reservations to Treaties, at 1-603, UN Doc. A/66/10/Add.1, 2011 (Hereinafter Guide to Practice).

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Interpretation of Treaties adopted by the Commission on second reading in 2018,¹⁰ which interpret VCLT Articles 31 and 32 on treaty interpretation, and clarify the CIL rules set forth therein; the Draft Guidelines concerning the Provisional Application of Treaties (Draft Guidelines on Provisional Application), which interpret VCLT Article 25 on provisional application, and clarify CIL rules set forth therein;¹¹ and the work on Peremptory Norms of International Law (Jus Cogens),¹² which to some extent interpret VCLT Articles 53 and 64, and clarify the CIL rules set forth therein.

The Commission's interpretations in these four topics are part of the Commission's wider legal reasoning exercise. In some instances, it identifies law beyond the scope of the VCLT: for instance, the Guide to Practice addresses the severability of invalid reservations and the assessment of permissibility of reservations by treaty monitoring bodies. In these instances, it does not interpret (and clarify) the VCLT, except insofar as it finds that the VCLT is silent on these matters. Against this background, where the Commission's work involves interpretation and other reasoning, it is important to show that the Commission also interprets and to consider the implications of its interpretative activity, which may become more prominent in the future.

¹⁰ ILC, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries, at 12-116, UN Doc. A/73/10, 2018. (Hereinafter Conclusions on SASP).

¹¹ ILC, Text of the draft guidelines on provisional application of treaties with commentaries thereto, at 245-270, UN Doc. A/73/10, 2018 (Hereinafter Draft Guidelines on Provisional Application).

¹² The latest available rolling text is: ILC, Titles and texts of draft conclusions 1, 2[3(2)], 3[3(1)], 4, 5, 6[6, 8], 7, 8[9(1), (2)], 9[9(3), (4)], 10[10(1), (2)], 11, 12, 13 and 14 provisionally adopted by the Drafting Committee at the sixty-eighth, sixty-ninth and seventieth sessions, Annex to Oral Report of the Chairperson of the Drafting Committee, 26 July 2018, available at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_jc_26july.pdf&lang=E.

Additionally, although the rules on sources suffer from ‘infinite regress’,¹³ this article follows the ‘ruleness perception’ of the actors that use them,¹⁴ as reflected in the conclusion of the VCLT. As a separate matter, although it may be argued that in line with the ICJ’s reasoning in *North Sea Continental Shelf* VCLT provisions lack ‘norm-creating character’ and cannot give rise to CIL,¹⁵ this analysis follows the ICJ’s recognition that some VCLT rules, such as Articles 31 and 32, reflect CIL.¹⁶ It is also not claimed here that interpretation (including by the Commission) is *the* ‘omnipotent antidote’ to all ‘failings’ or ‘incompleteness’ of the VCLT, including vis-à-vis topics discussed in this article. Such ‘failings’ may be owed to political or philosophical disagreements and compromise.¹⁷ But, there is value in reflecting on the Commission’s interpretations and their effects from a positive law perspective, given that the Commission’s interpretative paradigm may continue in the future.

This article analyses the Commission’s ‘codification by interpretation’ paradigm in five steps. Part 2 explains the meaning of ‘interpretation’ for the purpose of this analysis, and provides examples of the Commission’s interpretative pronouncements. Part 3 explains that interpretation falls within the Commission’s existing functions. Part 4 considers the legal effects of the Commission’s interpretative pronouncements. Part 5 argues that the Commission’s ‘codification by interpretation’ paradigm is part of the Commission’s long-term effort to convince States to continue to use international law as a significant medium by which they

¹³ J. D’Aspremont, ‘The Idea of ‘Rules’ in the Sources of International Law’, 84 *BYIL* (2014) 103.

¹⁴ *Ibid*, at 126.

¹⁵ Klabbers, *supra* note 4, 24-26; *North Sea Continental Shelf*, *supra* note 8, para. 72.

¹⁶ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 47.

¹⁷ See also O. Dorr, ‘Codifying and Developing Meta-Rules: The ILC and the Law of Treaties’, 49 *German Yearbook of International Law* (2007) 129 at 131-132.

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regulate their affairs. Part 6 considers the importance of the Commission's interpretative paradigm in this field for the Commission and international law.

2 The Meaning of 'Interpretation' and The Commission's Interpretative Pronouncements

A. The Meaning of 'Interpretation'

1 Interpretation and Other Concepts

Interpretation in international law is commonly understood as 'the process of determining the meaning of' a text¹⁸ or a rule.¹⁹ The Permanent Court of International Justice (PCIJ) and the ICJ have also interpreted the term 'to construe' in their Statutes (Articles 60 respectively) as '[giving] a precise definition of the meaning and scope'.²⁰ Literature has considered: that the intention of the author of the object of interpretation limits the interpreter;²¹ that there cannot be one correct meaning because different interpretations are possible,²² and that the interpreter 'creates meaning', and camouflages her attempt to provide her own subjective opinion;²³ that

¹⁸ 'Harvard Draft Codification of International Law', 29 *American Journal of International Law* (AJIL) (1935) Supp 653, 938 & 946.

¹⁹ Dissenting Opinion by Judge Ehrlich, *Factory at Chorzów* (Jurisdiction), Judgment of 26 July 1927, PCIJ (1927), Series A, No. 9, p. 4 at 39.

²⁰ *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, 16 December 1927, PCIJ (Series A) No. 13, at 10; *Asylum Case (Colombia v. Peru)*, 27 November 1950, ICJ Reports (1950) 3950, at 402.

²¹ S. Fish, 'Intention Is all There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law', 29 *Cardozo Law Review* (2007-2008) 1109 at 1129.

²² H. Kelsen, *Reine Rechtslehre* (1934), 94; M. Koskenniemi, *From Apology to Utopia* (2005) 531-533; Klabbers, *supra* note 4, at 25-28.

²³ Koskenniemi, *ibid* at 22, 530-531, 597.

the audience to which the particular interpretation is intended to ‘speak’ is relevant,²⁴ as is the interplay between various actors that make up the interpretative community;²⁵ and that interpretation creates law.²⁶ However, the practice of law operates on the assumption that there is one correct interpretation and that this meaning has to be found.²⁷ This article does not deal with the philosophical, social, political or other aspects of interpretation in general and of that by the Commission in particular. Rather, it undertakes a positive law analysis.

Interpretation is concerned with determining the content and scope of rules,²⁸ and encompasses (albeit not exhaustively) ‘clarification’.²⁹ Interpretation is different from rule-ascertainment,³⁰ which is concerned with whether a rule exists: for instance, whether an international agreement exists.³¹ It is also different from ‘application’, which is concerned with

²⁴ A. Bianchi, ‘The Game of Interpretation in International Law’, in A. Bianchi et al (eds), *Interpretation in International Law* (2015) 34 at 36.

²⁵ D. Vagts, ‘Treaty Interpretation and the New American Ways of Law Reading’, 4 *European Journal of International Law* (EJIL) (1993) 480.

²⁶ J. Raz, *Between Authority and Interpretation* (2009) 224; I. Venzke, *How Interpretation Makes International Law* (2012) 17; J. d’Aspremont, ‘The Multidimensional Process of Interpretation’, in A. Bianchi et al (eds), *Interpretation in International Law* (2015) at 113, 115.

²⁷ J. Crawford, *Chance, Order, Change: The Course of International Law*, *Recueil des Cours de l’Académie de Droit International* (RCADI) (2013) 13 at 119, paras. 189-190.

²⁸ S. Sur, *L’Interprétation en Droit International Public* (1974), 317. Kolb distinguishes between (a) interpretation (*stricto sensu*), which is concerned with meaning and content, (b) determining the rule’s scope, and (c) rule-ascertainment. R. Kolb, *Interprétation et Création Du Droit International* (2006) 221-222.

²⁹ *North Sea Continental Shelf*, Dissenting Opinion of Judge Tanaka, at 181; Guide to Practice, at 67, para. 18.

³⁰ M. Bos, *A Methodology of International Law* (1984) 109. Cf: D. Hollis, ‘The Existential Function of Interpretation in International Law’, in A. Bianchi et al (eds), *Interpretation in International Law* (2015), 79 and 86.

³¹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, 19 December 1978, ICJ Reports (1978) 39, para. 96.

Danae Azaria (accepted for publication 2019, *European Journal of International Law*) bringing about the consequences of a rule to the facts (real or hypothetical),³² and may also take the form of ‘conduct by which the rights under a [rule] are exercised or its obligations are complied with’.³³ Additionally, although it may be difficult to distinguish between them, amendment and modification differ from interpretation: the former create new law (and derive from a distinct ‘legislative act’); the latter falls within the scope of the original rule.³⁴ Finally, nothing inherent in ‘interpretation’ restricts the Commission from interpreting.

In relation to CIL, rule-ascertainment and content-determination are tightly intertwined and may be difficult to distinguish. But, while usually both the existence and the content of a CIL rule need to be determined, there are cases where the existence of a CIL rule is undisputed, but its content is imprecise or disputed. For instance, although the CIL obligation to pay compensation in case of expropriation of foreign property is established, for decades international lawyers have disagreed about the meaning of ‘prompt, adequate and effective’ compensation.³⁵ However, although some argue that CIL is subject to interpretation,³⁶ the rules

³² Dissenting Opinion by Judge Ehrlich, *supra* note 19, at 39.

³³ Conclusions on SASP, at 43, para. 3.

³⁴ ILCYB (1966), Vol. II, at 236, para. 1. G. Hafner, ‘Subsequent Agreements and Practice: Between Interpretation, Informal Modification and Formal Amendment’, in G. Nolte (ed), *Treaties and Subsequent Practice* (2013), 105 at 114-117; Conclusions on SASP, at 58-60, paras. 22-27.

³⁵ See also regarding ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investment: ICSID, *Mondev International Ltd. v. USA*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, para. 113.

³⁶ *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 8, para. 178; Dissenting Opinion of Judge Tanaka, *supra* note 29, at 181; C. de Visscher, *Problèmes d’Interprétation Judiciaire en Droit International Public* (1963) at 219-251.

Danae Azaria (accepted for publication 2019, European Journal of International Law) on CIL interpretation are unclear.³⁷ Others argue that CIL is only subject to identification:³⁸ because ‘content merges with existence’.³⁹

In 2018, the Commission adopted on second reading the Conclusions on the Identification of Customary International Law (Conclusions on CIL Identification).⁴⁰ Conclusion 1 states that ‘the present draft conclusions concern the way in which the existence *and content* of [CIL rules] *are to be determined*’.⁴¹ No separate rules on CIL interpretation have been included: CIL identification is subject to evidence of State practice and *opinio juris*. The Commission’s approach implicitly rejects that CIL interpretation takes place separately from and by rules separate to those concerning CIL identification.⁴² This article uses the term ‘CIL identification’ as encompassing rule-ascertainment *and* content-determination, and the term ‘CIL

³⁷ Sur, *supra* note 28, at 286-302. On grammatical, systemic and teleological CIL interpretation: Bleckmann, ‘Zur Feststellung und Auslegung von Volkergewohnheitsrecht’, 37 *Heidelberg Journal of International Law* (HJIL) (1977) 504, at 526-528. On teleological CIL interpretation: A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) 496-510.

³⁸ Bernhardt, ‘Interpretation in International Law’, in R. Bernhardt et al (eds) *Encyclopedia of Public International Law (Vol. II)* (1992) 1417; V.D. Degan, *L’Interprétation des Accords en Droit International* (1963) 162.

³⁹ Bos, *supra* note 30.

⁴⁰ ILC, ‘Draft conclusions on the identification of customary international law, with commentaries’ (2018) UN Doc A/73/10, 122 (Hereinafter Conclusions on CIL Identification), at 150. UNGA Res 73/203 (20 December 2018).

⁴¹ Emphasis added. Conclusions on CIL Identification, at 122, para. 2.

⁴² However, in earlier work, the Commission implied that CIL may be subject to interpretation and that the object and purpose of a CIL rule may be a means of CIL interpretation: ILC Articles on State Responsibility, at 35, para. 3 (‘[s]uch standards [...] vary from one context to another [owing] to the object and purpose of the treaty provision or other rule giving rise to the primary obligation’; ‘[this] is a matter for the interpretation [of] the primary rules’).

Danae Azaria (accepted for publication 2019, *European Journal of International Law*) interpretation' as meaning 'content-determination'. It does not deal with whether the latter takes place by reliance on rules separate to those on CIL identification.

B. Instances of 'Interpretation' by the International Law Commission

Individual members of the Commission may interpret rules differently. However, the Commission's work is a collegiate output through a process of consolidation (in plenary and in the Drafting Committee) and represents the Commission's interpretative pronouncements, which may find reflection in the adopted draft texts (being articles, conclusions or guidelines) and the accompanying commentaries.

The following analysis shows that the Commission in some instances interprets the VCLT and considers that CIL has identical content;⁴³ and in others it identifies CIL and assumes that the VCLT has identical content. The latter exercise may be explained as an application of the rule of systemic integration (VCLT Article 31(3)(c)).⁴⁴ Further, the draft texts and commentaries do not offer evidence that the Commission follows a particular order in applying the means of treaty interpretation, or that it emphasises a particular means of treaty interpretation. There is also no evidence that it applies rules of CIL interpretation, separate from the means of CIL identification (unless one considers that 'State practice subsequent to the formation of a CIL rule that may establish (subsequent) *opinio juris*' and/or 'relevant treaty rules' are means of CIL interpretation). Finally, as illustrated below, the Commission interprets

⁴³ This is consistent with the criticism that 'the conventional norm [has been] cunningly outflanked': P. Weil, *Towards Relative Normativity?*, 77 *AJIL* (1983) 413 at 438. But, it may be somewhat downplayed here, because some treaty rules that the Commission interprets are well-established CIL rules.

⁴⁴ VCLT Article 31(3)(c) is not free from ambiguities: ILC Study Group, *Fragmentation of International Law*, A/CN.4/L.682, 2006, at 232-244, paras. 461-480.

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in order (albeit not exclusively) to remove ambiguities (either foreseen or unforeseen at the time of the conclusion of VCLT) and to determine the scope of existing rules in light of new legal developments.

1 Guide to Practice on Reservations to Treaties

In 2011, the Commission adopted on second reading the Guide to Practice and in 2013 the UNGA ‘encouraged its widest possible dissemination’.⁴⁵ From its inception, the Guide was intended to remove ambiguities and fill gaps⁴⁶ that existed in the VCLT and the 1978 and 1986 Vienna Conventions without amending or departing from them.⁴⁷ There are numerous examples where the Guide interprets the VCLT.⁴⁸ This analysis focuses on a major ambiguity in the VCLT: whether VCLT Article 19 sets thresholds of permissibility or opposability, and whether impermissible reservations are subject to acceptance/objection or not, and if not, what their effects are. According to the Guide, Article 19 sets permissibility requirements and only permissible reservations can be accepted or objected to with the effects of Articles 20-21. Impermissible reservations are null and void, irrespective of the reactions of other contracting

⁴⁵ GA Res 68/111, 16 December 2013, para. 3.

⁴⁶ ILC, Report on the work of its Forty-Fifth Session, UN Doc. A/CN.4/454, 1993, 231-235.

⁴⁷ ILC, Report on the work of its Forty-Seventh Session, UN Doc A/CN.4/470, 1995, at 154, para 168. See also ILC Forty-Fifth, *supra* note 46, at 236, paras. 63, 67. Guide to Practice, at 38, para 6.

⁴⁸ Guideline 2.6.1. sets out the meaning of ‘objection’, an ambiguity not foreseen prior to the VCLT’s conclusion. It does so partly by interpreting the VCLT: Guide to Practice, at 236-237, paras. 8-10. *Vis-à-vis* late reservations, the Commission first interprets the VCLT, it finds that it does not permit such reservations, and proposes a pragmatic solution (consistent with the spirit of the VCLT about the primacy of consent): unanimous acceptance of all Contracting States is necessary for making a late reservation. *Ibid*, at 174, para. 2, and 177-180, paras. 9-20.

Danae Azaria (accepted for publication 2019, European Journal of International Law) States (Guideline 4.5.1).⁴⁹ The commentary demonstrates the Commission's interpretative process. The Commission considered that the text of VCLT Article 21(1) ('a reservation *established* with regard to another party in accordance with articles 19, 20 and 23') means only permissible (in accordance with Article 19) and formally valid reservations (in accordance with Article 23) that have been accepted by another contracting State (in accordance with Article 20).⁵⁰ On the basis of 'effective interpretation', the Commission considered that VCLT Article 19 would be deprived of 'any real impact' if States could validate an impermissible reservation by accepting it.⁵¹ The Commission also resorted to the preparatory works of the VCLT, which 'confirm that the 1969 Convention says nothing about the consequences of invalid reservations.'⁵² Having reached the fundamental conclusion (by way of interpretation) that the VCLT does not deal with the effects of impermissible reservations (and thus that the rules on acceptance and objection do not apply to impermissible reservations),⁵³ it moved outside the VCLT's normative limits (and of the CIL rules therein). It stated that 'the nullity of an impermissible reservation [...] is solidly established in State practice [without drawing a distinction between VCLT parties and those that are not],'⁵⁴ and 'is [positive CIL]'.⁵⁵

⁴⁹ Guide to Practice, at 509, para. 3.

⁵⁰ Ibid, at 505, para. 9.

⁵¹ Ibid, at 510, para. 6.

⁵² Ibid, at 505, para. 11, and see detailed analysis of Vienna Conference discussions: *ibid.* at 506-507, paras. 11-13. See also, *ibid.*, at 515-516, para. 18.

⁵³ Ibid at 507, para. 16.

⁵⁴ Ibid, at 511, para. 8. For analysis of State practice, judicial decisions and doctrine, *ibid.*, at 517-519, paras. 23-29.

⁵⁵ Ibid, at 519, para. 28. There is no evidence that the Commission 'read into' the VCLT the rule that impermissible reservations are null and void. This may imply the Commission's understanding that it would exceed the limits of the rule of systemic integration (VCLT Article 31(3)(c)).

2 Conclusions on Subsequent Agreements and Practice in relation to Treaty Interpretation

In 2018, the ILC adopted on second reading the draft Conclusions on SASP and the UNGA annexed them to a Resolution and encouraged their widest possible dissemination.⁵⁶ The Commission's goal has been to 'give those who interpret and apply treaties an orientation [...], and thereby contribute to a common background understanding, minimizing possible conflicts.'⁵⁷ '[The conclusions] are based on the [VCLT],'⁵⁸ and situate subsequent agreements and practice 'within the framework of the rules on [treaty interpretation] set forth in articles 31 and 32',⁵⁹ which Conclusion 2 recognises as CIL rules.

The Conclusions on SASP and their commentary interpret VCLT Articles 31 and 32, and by implication determine the content of CIL reflected therein. Conclusion 4 and its commentary interpret the terms 'subsequent agreement' and 'subsequent practice' in VCLT Articles 31(3)(a) and (b) respectively.⁶⁰ Conclusion 10(1) interprets the term 'agreement' in Article 31(3)(a) and (b). The ordinary meaning of the term 'agreement' is determined⁶¹ and recourse is had to the preparatory works of the VCLT to confirm this interpretation.⁶² By implication, the Commission also determines the content of CIL rules.

Further, Conclusions 11 and 13 assess whether the new legal developments of 'Conferences of Parties' ('COPs') and 'expert treaty bodies' ('ETBs') fall within the scope of Articles 31 and 32 and CIL set forth therein. The terms COPs and ETBs do not appear in the VCLT, because

⁵⁶ UNGA Res 73/202 (20 December 2018).

⁵⁷ ILC, Report on the work of its Sixtieth Session, Annex A, UN Doc. A/63/10, 2008, at 375, para. 22.

⁵⁸ Conclusions on SASP, at 16, para. 2.

⁵⁹ Ibid, 17, para.1.

⁶⁰ Ibid, 27-37.

⁶¹ Ibid, at 91, para. 3.

⁶² Ibid. at 95, para. 10.

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they mainly emerged after the conclusion of the VCLT. However, today they are a common feature of numerous (mainly multilateral) treaties.⁶³ Conclusion 11(3) explains that a COP decision may embody a subsequent agreement under VCLT Article 31(3)(a), in so far as it expresses agreement in substance between the parties regarding the treaty's interpretation, regardless of their form or procedure by which the decision was adopted.⁶⁴ The commentary relies on the (implicit) pronouncement of the ICJ in *Whaling*,⁶⁵ where the ICJ applied CIL reflected in VCLT Article 31(3).⁶⁶ It may be argued that the Commission (implicitly) took the CIL rule into account in order to interpret the VCLT. Further, the commentary to Conclusion 13 clarifies that the pronouncements of ETBs per se do not fall within the meaning of subsequent practice under Article 31(3)(b): that provision requires subsequent practice of treaty parties.⁶⁷

3 Draft Guidelines on Provisional Application

In 2018, the Commission adopted on first reading the Draft Guidelines on Provisional Application, which are intended to provide 'clarity to States when [...] implementing

⁶³ For COPs: Convention for the Protection of the Marine Environment of the North-East Atlantic 1992, 2354 UNTS 67. Treaties foreseeing the establishment of ETBs were concluded some years before the VCLT and entered in force a few months prior to the conclusion of the VCLT or after its conclusion. Arts. 8-14, International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 (entry in force: 4 January 1969); Arts. 28-45, International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (entry in force: 23 March 1976).

⁶⁴ Conclusions on SASP, at 112, para. 31.

⁶⁵ *Ibid.*

⁶⁶ The VCLT did not apply to the 1948 International Convention for the Regulation of Whaling, which was applicable: it applies to treaties concluded after its entry in force (VCLT Article 4).

⁶⁷ Conclusions on SASP, at 110, para. 9.

Danae Azaria (accepted for publication 2019, European Journal of International Law) provisional application clauses’,⁶⁸ ‘guidance regarding the law and practice on [provisional application], on the basis of [VCLT Article 25] and other [CIL] rules of international law.’⁶⁹

For instance, the commentary to Guideline 3 shows that the Commission’s understanding of the terms ‘pending its entry into force’ in Article 25(1) means ‘both the entry into force of the treaty itself and the entry into force for each State [...] concerned.’⁷⁰ On other occasions, it is unclear whether the Commission interprets the VCLT. For instance, Draft Guideline 11 on ‘Provisions of internal law of States [...] regarding competence to agree on [provisional application]’ essentially replaces the terms ‘competence to conclude treaties’ in Article 46 with the term ‘competence to agree to the provisional application of treaties’. The commentary uses the ambiguous term ‘follows closely the formulation of [VCLT] article 46’, which leaves unclear whether the Commission determines whether the scope and content of Article 46 encompasses the agreement on provisional application.⁷¹ Assuming that it implicitly does (or it does so expressly in the future), the Commission would be interpreting Article 46.

4 Jus Cogens

In 2016, the Commission began its work on jus cogens, with a view to introducing ‘clarity on jus cogens, its formation and effects’.⁷² The topic’s goal does not distinguish between the VCLT and CIL.⁷³ VCLT Article 53 provides a definition of jus cogens for the purpose of the VCLT, which is considered an authoritative definition of jus cogens beyond the confines of the

⁶⁸ Special Rapporteur, ILC, Report on the work of its Sixty-Fifth Session, UN Doc. A/68/10, 2013, at 104, para. 126.

⁶⁹ Draft Guideline 2 on Provisional Application, at 207.

⁷⁰ Draft Guide to Provisional Application, at 210, para. 5.

⁷¹ *Ibid*, at 221, para. 2.

⁷² ILC, Sixty-Sixth Session, *supra* note 57, at 281-282, paras. 18-19.

⁷³ *Ibid*, at 274 and 277.

Danae Azaria (accepted for publication 2019, European Journal of International Law) treaty.⁷⁴ During its earlier work on the law of treaties, the Commission considered that the criteria by which *jus cogens* is to be identified are ‘not free from difficulty’.⁷⁵ The negotiations in the Vienna Conference also demonstrate that the constitutive elements of *jus cogens* norms were unclear among delegates.⁷⁶ Instances of imprecision within the definition of *jus cogens* in VCLT Article 53 are the meaning of ‘international community of States as a whole’, and the meaning of ‘accepted and recognized’. The Commission’s recent work demonstrates that the Commission may interpret VCLT Article 53 in order to clarify the constitutive elements of *jus cogens*,⁷⁷ and through that process to identify the rules concerning the identification of *jus cogens*.

3 Interpretation as ‘Progressive Development of International Law and Its Codification’

The following analysis considers the Commission’s objective and functions: the ‘progressive development of international law and its codification’. It explains the meaning of

⁷⁴ T. Weatherall, *Jus Cogens: International Law and Social Contract* (2015), 6; ILC Articles on State Responsibility, at 85, para. 5.

⁷⁵ ILC, Draft Articles on the Law of Treaties with commentaries, UN Doc. A/6309/Rev.1, 1966, at 247-248, para. 2 (Hereinafter ILC Draft Articles on the Law of Treaties).

⁷⁶ See Mexico, Finland, Greece, Chile: Vienna Conference, First Session, 52nd meeting, Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.52, 4 May 1968; UK, Vienna Conference, First Session, 53rd meeting, Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.53, 6 May 1968, at 304, para. 53. Contra (considering the provision ‘a masterpiece of precision’): India, Romania: Vienna Conference, First Session, 54th meeting, Committee of the Whole, UN Doc A/CONF.39/C.1/SR.54, 4 May 1968.

⁷⁷ Special Rapporteur Tladi, *Second report on jus cogens*, A/CN.4/706, 2017, paras 37-38, (‘Textually, there are other ways that article 53 could be interpreted’). No provisionally adopted text and commentaries on first reading have been adopted by the Commission for years on this topic; hence a more precise assessment cannot be made at the time of writing.

Danae Azaria (accepted for publication 2019, *European Journal of International Law*) progressive development and codification within the ILC Statute (Section A). Then, it explores the Commission's practice, the practice of the UNGA and of individual governments in order to assess whether the Commission and governments consider interpretation within or beyond the Commission's mandate, and argues that interpretation can be classified as codification or as progressive development depending on each interpretative pronouncement (Section B).

A. The Meaning of 'Progressive Development' and of 'Codification' in the ILC Statute

The ILC Statute implements Article 13(a) of the UN Charter pursuant to which the UNGA 'shall [...] make recommendations for the purpose of: (a) [...] encouraging the progressive development of international law and its codification.' On the basis of this provision the UNGA established the Committee on the Progressive Development and its Codification,⁷⁸ which recommended the establishment of the ILC.⁷⁹ In 1947, the Sixth Committee (Sub-Committee 2) drafted the resolution on the establishment of the ILC.⁸⁰

Article 15 of the ILC Statute defines 'for convenience' the terms 'progressive development of international law' and 'codification of international law'. 'Progressive development' is defined as 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. It encompasses two situations: (a) areas where there is no existing law and

⁷⁸ UNGA Res 94(1), 31 January 1947.

⁷⁹ Report of the Committee on the Progressive Development of International Law and Its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, A/AC.10/51, 17 June 1947, reproduced 41 *AJIL Supp* (1947) 18.

⁸⁰ GA Res. 174(II), 21 November 1947. The ILC Statute has been amended: GA Res. 485(V), 12 December 1950; GA Res. 984(X), 3 December 1955; GA Res. 985(X), 3 December 1955; GA Res. 36/39, 18 November 1981.

no instances of practice towards the development of a rule – here the Commission’s pronouncements are solely concerned with how the law ought to be; and (b) an instance of *lex ferenda*, where there is some *insufficiently* developed State practice (and in that sense some new law being proposed). Although the ordinary meaning of the term ‘codification’ indicates ‘a written form of law’ without any implication concerning the normative value of the material used for making the code, in the ILC Statute the term is defined as ‘the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine’. It includes: (a) systematizing existing rules (*lex lata*) (codification *stricto sensu*); and (b) systematizing ‘rules’ where there is extensive State practice but no agreement as to what the law is.⁸¹ Article 20 (in Part B of Chapter II entitled ‘Codification of International Law’) provides that the Commission shall prepare and submit to the UNGA draft articles together with a commentary containing *inter alia* conclusions concerning *the extent of agreement* on each point in State practice and in the doctrine. When the term ‘codification’ in Article 15 is read in the context of the Statute (Article 20), it captures the formulation of texts that include provisions where no agreement in State practice has been found. The term ‘rules’ in Article 15 of the ILC Statute refers to a ‘provision’ without any bearing on the legal force of the alleged rule outside a written instrument.

⁸¹ H. Lauterpacht, ‘Codification and Development of International Law’, 49 *AJIL* (1955) 16, at 29.

The preparatory works of the ILC Statute, especially the discussions in the Committee⁸² and its Report,⁸³ which were informed by memoranda of the UN Secretariat,⁸⁴ indicate that there was no intention to limit the Commission's codification function to recording existing law, and that ' [...] in any work of codification, the codifier inevitably has to fill in gaps in and amend the law in the light of new developments.'⁸⁵ In practice, the Commission does not usually classify its output on a topic as either progressive development or codification. Rather, sometimes, it indicates in the introduction to its commentary that there are instances of both in the topic.⁸⁶

B. Classifying Interpretation as Progressive Development or Codification

1 The Preparatory Works of the ILC Statute

⁸² According to Briery, the Committee's Special Rapporteur: '[W]here the rule is uncertain, [the codifier] will suggest how it can best be filled. [I]n this aspect of his work he will be [...] working on *lex ferenda*, not the *lex lata* – he will be extending the law and not merely stating the law that exists.' Survey of International Law in relation to the work of codification of the International Law Commission, at 3, UN Doc. A/CN.4/1/Rev.1, reproduced in Memorandum by the Secretary-General, at 2-3, UN Doc. A/AC.10/30.

⁸³ Report of the Committee on the Progressive Development of International Law and Its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, *supra* note 79, at 20, para. 7 and at 22, para. 10.

⁸⁴ Memorandum on Methods for Encouraging the Progressive Development of International Law and its Eventual Codification, UN Doc. A/AC.10/7, 6 May 1947.

⁸⁵ *Ibid*, at 22, para. 10.

⁸⁶ ILC, 'Text of the Articles concerning the Law of the Sea with commentaries' ILCYB (1956) Vol. II, 254, 255-256 at paras 25-26; ILC Articles on State Responsibility, at 31, para 1.

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There is no evidence in the ILC Statute or in its preparatory works that interpretation is excluded from the Commission's function. Although the Statute's preparatory works do not reveal that interpretation was specifically considered, a 1943 Memorandum of the US State Department for the US President in preparation of the Dumbarton Oaks Conference for a General International Organization proposed that 'the General Assembly should [make recommendations about] the *interpretation and revision* of rules of international law'.⁸⁷ The subsequent US State Department draft referred to 'development and revision' and was communicated to the British, Soviet and Chinese governments,⁸⁸ but was not retained in the Dumbarton Oaks Proposals. However, prior to and during the San Francisco Conference, numerous States proposed that the UNGA be given a mandate regarding international law. Although none mentioned interpretation, their proposals indicate that the terms 'progressive development' and 'codification' were chosen because they 'establish a nice balance between stability and change.'⁸⁹ There is no indication that interpretation was excluded from the scope of progressive development and codification or that it fell exclusively within the scope of one or the other.

2 The Practice of the International Law Commission and of UN Member States

Neither the Commission nor the UNGA have contested that interpretation falls within the Commission's functions. Some governments have indicated that the Commission interprets the VCLT. None has opposed the Commission's interpretative activity on the ground that interpretation falls outside the Commission's function. Further, there is no evidence that governments classify interpretation generally as codification or as progressive development.

⁸⁷ H. Briggs, *The International Law Commission* (1965), 4.

⁸⁸ *Ibid.*, 5.

⁸⁹ *Ibid.*, 5-12.

(a) The Practice of the International Law Commission

When the Commission selects a topic on its long-term programme of work or on its agenda, it is guided by four criteria, all of which relate to progressive development and codification.⁹⁰ In all the topics examined in this study, the proponents suggested that ‘there are already some provisions on the very subject matter that [was] to be codified’, implicitly recognising that some interpretation of existing treaty rules would take place;⁹¹ that the work would ‘contribute to a common background understanding [of the treaty interpretation rules set forth in the VCLT];’⁹² that it ‘could address [the] meaning of provisional application, its preconditions and its termination;’⁹³ or that it would ‘clarify the nature, meaning and consequences taking into account that some of these issues are set forth in the VCLT’.⁹⁴ The Commission was aware that its work on the topics would (to some extent) interpret the VCLT (and CIL rules reflected therein) when it decided that its selection criteria were met and included them in its programme of work and its agenda.⁹⁵

(b) The Practice of UN Member States

⁹⁰ ILCYB (1997) Vol. II (Part Two), pp. 71-72, para. 238.

⁹¹ ILC, The law and practice relating to reservations to treaties, by Mr. Alain Pellet, UN Doc. A/CN.4/454, 1993, at 236, para. 59.

⁹² ILC, Report on the work of its Sixtieth Session, UN Doc A/63/10, at 375, para. 22.

⁹³ ILC, Report on the work of its Sixty-Third session, UN Doc A/66/10, 2011, p. 333, para. 11; ILC, Report on the work of its Sixty-Fourth session, UN Doc A/67/10, 2012, pp. 105-107.

⁹⁴ ILC, Sixty-Sixth Session, *supra* note 57, paras. 267-290. Annex, *Ibid*, pp. 274-286.

⁹⁵ For provisional application: ILC, Sixty-Third session, *supra* note 93, at 365-367. For jus cogens: ILC, Sixty-Sixth Session, *supra* note 57, para. 269. For SASP: ILC, Sixty-Sixth Session, *supra* note 57, paras. 351-352.

The UNGA has amended the ILC Statute four times,⁹⁶ but has introduced no reference to ‘interpretation’. Further, since the four topics examined are grounded on the VCLT, it is more likely that States would oppose the Commission’s interpretative activity in these topics, if they viewed interpretation outside the Commission’s function. The UNGA has not opposed the Commission’s interpretative activity. Instead, it has endorsed it by taking note of the Commission’s annual reports, which included the Commission’s decisions to introduce these topics on its agenda, and by encouraging the dissemination of the Commission’s products.⁹⁷

From 1993, when the topic on reservations was added to the Commission’s agenda, to 2013, when the UNGA encouraged the Guide’s widest possible dissemination,⁹⁸ some States made statements implying that the Commission interprets the VCLT (and implicitly the CIL rules).⁹⁹ No State objected to the Commission’s interpretative activity. In relation to the Conclusions on SASP, no State objected to the Commission’s interpretative activity, but numerous governments noted that the Commission interprets, clarifies or explains rules of the VCLT (and the CIL rules set forth therein) in 2013,¹⁰⁰ when the Commission began its work on this topic,

⁹⁶ See *supra* note 80.

⁹⁷ GA Res. 68/111, 16 December 2013; GA Res 73/202, 20 December 2018.

⁹⁸ GA Res. 68/111, 16 December 2013.

⁹⁹ Pakistan (UN Doc. A/C.6/54/SR.17, 1999, para. 59) (‘was not opposed to the clarification of any ambiguities in the Vienna Conventions [...], provided that they in no way altered the existing regime of reservations’, which ‘had acquired [customary status]’); Slovenia (UN Doc. A/C.6/54/SR.22, 1999 para. 35) (‘The draft guide [...] proposed [...] clarifications in respect of reservations [...]’); New Zealand (68th Session, 2013) (‘welcomes the interpretation [that] a declaration that excludes the application of a treaty as a whole to a particular territory is not a reservation in the sense of the [VCLT]’).

¹⁰⁰ Of the 29 States that made statements on this topic, two suggested that the Commission interprets: Japan (68th Session, 2013) (‘Do [these conclusions] constitute a binding tool for treaty interpretation?’); Netherlands (68th Session, 2013) (‘The [...] commentaries provide [...]’).

2014,¹⁰¹ 2015,¹⁰² 2016,¹⁰³ and 2018,¹⁰⁴ when UNGA Resolution 73/202 encouraged the Conclusions' widest dissemination, as well as in the written comments submitted in relation to

interpretation [...] of [the VCLT provisions]'). Five States implied that the ILC interprets the VCLT: Austria, (68th Session, 2013) ('it clarified a number of aspects [of VCLT] article 31 [...]'); Hungary (68th Session, 2013) ('[looks] forward to the [ILC's] discussion on the exact interpretation of the relevant articles of the [VCLT]'); South Africa (68th Session, 2013) ('this topic should [...] clarify [...] the rules set out in the [VCLT]'); Slovakia, (68th Session, 2013) ('[ILC's] attempt to elucidate the terms "subsequent agreements" and "subsequent practice" in [VCLT Articles 31 and 32].'); Korea (68th Session, 2013) ('by identifying and clarifying the scope and role of various agreements and practices related to [treaty interpretation]').

¹⁰¹ Of the 23 States that made statements on this topic, one State implied that the ILC interprets the VCLT and CIL therein: Romania (29 October 2014) ('the topic [...] aims at clarifying significant aspects concerning the law of the treaties. Although Romania is not a party to the [VCLT], Romania applies most of its provisions as [CIL].').

¹⁰² Of the 26 States that made statements, one State implied that the ILC interprets the VCLT: Malaysia (6 November 2015) ('draft conclusion 11 provides greater understanding on the applicability of the VCLT [...].').

¹⁰³ In 2016, of the 29 States that made statements, one State stated that the ILC interprets: Slovenia (25 October 2016) ('The Commission has [...] discussed [the interpretation of several conventions] after their adoption. [...] For example, [...] Article 25 of the VCLT'). Three States implied that the ILC interprets the VCLT (one of these implied the interpretation of CIL): Romania (not party to the VCLT) (25 October 2016) ('[the topic] aims to clarifying [...] the law of the treaties'); USA (24 October 2016) ('fails to explain how Article 31(1) can properly be interpreted – consistent with the [VCLT].'); Sri Lanka (26 October 2018) ('the draft conclusions [...] add clarity to the principles of treaty interpretation as contained in [VCLT] Articles 31&32').

¹⁰⁴ No State stated that the ILC interprets. Five States implied that the ILC interprets the VCLT: Slovenia (23 October 2018) ('[...] whether these conclusions could [...] be considered as a subsequent agreement and/or practice with respect to the interpretation of [VCLT Articles 31 and 32]. [C]ould that apply to any other Commission pronouncements on the VCLT [...]?'); Germany (23 October 2018) ('[the] conclusions clarify the law. '); India (22 October 2018) ('bring clarity to the meaning and scope of [...] these articles'); Sri Lanka (23 October 2018) ('provides a degree of clarity within the general framework of the [VCLT] rules, specifically

Danae Azaria (accepted for publication 2019, European Journal of International Law) the Conclusions' first reading.¹⁰⁵ Similarly, from 2012, when the Commission decided to include the topic of provisional application in its agenda, to 2018, once the topic was adopted on first reading,¹⁰⁶ some governments implied that the Commission interprets the VCLT,¹⁰⁷ but no State opposed. Finally, from 2016, when *jus cogens* was included in the Commission's

Articles 31&32, by identifying and elucidating relevant aspects [of] those rules.');

South Africa (24 October 2018) ('While the [VCLT] remains the primary source of the rules of treaty interpretation, we welcome the clarity [...] provided in [the] Draft Conclusions.');

USA (31 October 2018) ('this topic [...] primarily addresses [...] how best to interpret certain provisions of a particular treaty, the [VCLT]');

¹⁰⁵ Only the USA implied that the ILC interprets the VCLT: Comments and observations received from Governments, 21 February 2018, A/CN.4/712, p. 6.

¹⁰⁶ ILC, Report on the work in its Seventieth Session, UN Doc A/73/10, 2018, 203, para. 88.

¹⁰⁷ El Salvador (72nd Session, 2017) ('su interpretacion debe ser sistematica v conerente con el contenido de otras normas existentes en materia de aplicacion provisional de los Tratados. tales como, la Convencion de Viena sobre Derecho de los Tratados de 1969 y la Convencion de Viena sobre el Derecho de los Tratados entre Estados y Organizaciones Internacionales o entre Organizaciones Internacionales de 1986 y otras normas de derecho internacional');

Greece (24 October 2017) ('[...] the commentaries [...] provide [...] clarification on the scope and operation of existing rules of international law [...]);

Poland (24 October 2017) ('There is a need for a comprehensive analysis of provisions of [the VCLT] in the context of provisional application [...]);

Algeria (25 October 2017) ('These draft guidelines [...] provide [...] clarification regarding the law and practice on the provisional application [...] on the basis of [VCLT Article 25]');

USA (25 October 2017) ('[...] the Draft Guidelines [...] fail to make clear that provisional application within the meaning of [VCLT Article 25] requires the agreement of all');

Cuba (25 October 2017) ('considera importante el mismo por la necesidad de determinar el alcance del principio basico de la aplicacion provisional de un tratado, recogido en el articulo 25 de la Convencion de Viena sobre el Derecho de Tratados [...]);

Malaysia (26 October 2017) ('The draft guidelines must provide a clear [...] interpretation');

agenda, to 2018,¹⁰⁸ no State objected, but some States suggested that the Commission interprets the VCLT.

3 Interpretation as ‘Codification’ or as ‘Progressive Development’

Although the ILC Statute’s preparatory works do not exclude interpretation from the Commission’s function, and the subsequent practice of the Commission and UN Members supports that interpretation is within the Commission’s function, there is no evidence that interpretation is exclusively an aspect of codification or exclusively one of progressive development. It is argued that it can be either.

Interpretation can be part of codification. A codifier of existing law first determines the existence and content of a rule before systematizing it into a restatement. An interpretation forms part of codification, if the interpretative pronouncement coincides with that made by those that have established the rule. For instance, that ‘agreement’ in Article 31(3)(a) and (b) means ‘a common understanding regarding the interpretation of a treaty which the parties are

¹⁰⁸ In 2016, of the States that made statements on this topic, Ireland implicitly suggested that the Commission interprets (‘[VCLT Articles 53 and 64] ought to be central [...] it is important to remain faithful to these provisions. [We] encourage an in-depth study of the travaux-préparatoires of the [...] Convention’). In 2017, of the States that made statements on this topic, two States suggested that the Commission interprets the VCLT: Malaysia (1 November 2017) (‘efforts to clarify the topic, Malaysia encourages a thorough analysis of article 53 of the VCLT’); Thailand (1 November 2017) (‘the interpretation of the definition of jus cogens, as contained in Article 53, should [follow] Articles 31 and 32 of the VCLT, respectively’). In 2018, of the States that made statements on this topic, two States indicated their understanding that the Commission interprets the VCLT: Russia (26 October 2018) (‘avoid any interpretation of the [VCLT] different from the meaning contained therein’); Malaysia (30 October 2018) (‘clarity on [...] sources of jus cogens and a thorough analysis on the element of modification under article 53 of the VCLT’).

Danae Azaria (accepted for publication 2019, *European Journal of International Law*) aware of and accept' is supported by the preparatory works.¹⁰⁹ Similarly, unless otherwise provided by a treaty, the expression of consent to be bound constitutes, the last time when a reservation may be formulated.¹¹⁰ Further, an interpretation based on 'extensive State practice, precedent and doctrine' vis-à-vis a treaty falls within the ambit of codification, even if such practice is not accompanied by the agreement of treaty parties concerning the treaty's interpretation (VCLT Article 31(3)(b)). For instance, that a decision of a COP may embody a subsequent agreement (VCLT Article 31(3)(b)), may constitute such instance of codification.¹¹¹

However, an interpretation may constitute progressive development, if there is no evidence that it coincides with that by those that established the rule. For instance, assuming that in Guideline 11 on Provisional Application the Commission makes an interpretative pronouncement as to the content of Article 46 (and the CIL rules therein), there is no evidence that such proposition finds any (or some 'insufficient') support (at the time it was made) in State practice, judicial decisions or doctrine.¹¹²

Overall, it cannot be presumed that the Commission's interpretative pronouncements fall necessarily within codification as opposed to progressive development and vice versa. The challenges of classifying an interpretative pronouncement within the one or the other category are similar to those for the classification of any other pronouncements of the Commission.

4 The Legal Effects of the Commission's Interpretative Pronouncements

¹⁰⁹ Conclusions on SASP, at 77-78, para. 10.

¹¹⁰ Guide to Practice, at 174, para. 2.

¹¹¹ Ibid, at 85-89, paras. 10-23.

¹¹² No evidence of such support is provided in the commentary, Guide on Provisional Application, at 221-222.

After summarising the Commission's working methods and its interaction with governments (section A), the following analysis demonstrates that the Commission's interpretations are not binding. They are also not an authentic means of interpretation (section B). Rather, they may trigger the reaction of States thus potentially giving rise to their agreement as to the interpretation of the VCLT and the identification of CIL reflected therein (section C). Since they record and assess means of interpretation they may constitute a (persuasive) means for determining rules of law and/or a supplementary means of interpretation (section D).

A. The ILC's Working Methods and Its Interaction with Governments

The Commission is part of an institutional framework for the progressive development and codification of international law. As part of this framework, and pursuant to its Statute, the Commission interacts with many actors,¹¹³ but especially with governments at numerous stages.

The Commission's working methods have changed over the years, but they usually take the following form. When introducing a topic on its agenda, the Commission decides whether to appoint a Special Rapporteur. Once appointed, the Special Rapporteur prepares and submits her or his report(s) to be considered by the Commission in plenary, where proceedings are public. In plenary, Commission members comment on the Special Rapporteur's report, and the Commission decides whether the proposals will be referred to the Drafting Committee. If so, the Drafting Committee meets (in closed session) in order to prepare and provisionally adopt draft texts (being draft articles, conclusions, guidelines or principles), which it then submits to plenary for approval, along with draft commentaries prepared by the Special Rapporteur. At each session the Commission (in plenary) provisionally adopts on first reading the draft texts proposed by the Drafting Committee, when commentaries on the draft texts are available at that

¹¹³ See Arts 16(e), 17(1), 21(1), 25 and 26 of the ILC Statute.

session. This process repeats itself in subsequent years, until such time as a full set of draft texts is completed, at which point they are adopted as a whole on first reading.

The Commission's progress is recorded in its annual report, which is submitted to the UNGA, which considers the Commission's report annually in the Sixth Committee, where States may comment on the Commission's report. If and when the Commission adopts a full set of draft texts on first reading, it submits it along with commentaries to the UNGA, and invites written comments from governments. After the written submissions are received, the Special Rapporteur produces a final report that revisits the draft texts and commentaries, considering the comments of governments and making proposals for changes. When the Commission in plenary finally adopts the draft texts on second reading with commentaries, the Commission concludes its work on the topic. It submits the draft texts with commentaries to the UNGA, making a recommendation about the document's future treatment.

At that stage, governments are invited to make comments in the Sixth Committee, which also prepares a UNGA Resolution concerning the future form of the text. The Sixth Committee may decide to reconsider the topic's future form in future sessions thus allowing governments to make more comments in the Sixth Committee. There frequently remains debate as to the meaning of a treaty provision to which the Commission refers in its commentary, whether a rule provided in a text reflects CIL, or whether the commentary is accurate.

B. The Commission's Pronouncements Are Not Formally an Authentic Means of Interpretation (or a Constituent Element of CIL)

Under the current state of positive law, the Commission's interpretative pronouncements are not binding. They are also not an 'authentic means of interpretation': they do not 'relate to the agreement between the parties at the time when or after it received authentic expression in

Danae Azaria (accepted for publication 2019, *European Journal of International Law*) the text.’¹¹⁴ Nor are they an ‘authoritative’ interpretation, because ‘the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it’.¹¹⁵

Vis-à-vis the VCLT, only its parties have that power; and vis-à-vis CIL (concerning treaties between States), only States have such authority. There is also no evidence in the ILC Statute (or State practice) that States through the UNGA have delegated to the Commission the power to give on their behalf an authentic interpretation of treaties or of CIL rules that have emerged on the basis of documents, once prepared by the Commission, such as the 1966 Draft Articles on the Law of Treaties.

C. Making an ‘Offer of Interpretation’

1 Stimulating the Responses of Governments

The Commission’s work may be seen as an ‘offer of interpretation’ to States – the actors that make international law. The diminished enthusiasm of States for the negotiation of multilateral conventions¹¹⁶ and the Commission’s distinctive features, may make attractive to States an interpretative dialogue with the Commission. Thomas Shelling drew on game theory to predict behaviour in conditions that resemble the absence of communication¹¹⁷ (such as the lack of interest in the Sixth Committee in negotiating treaties), but where there is a pressing

¹¹⁴ ILC, Report on the Work of its Seventeenth Session and on its Eighteenth session, UN Doc. A/6309/Rev.1, 1966, at 220, para. 10; P. Daillier et al, *Droit International Public* (8th ed, 2009), 277-279.

¹¹⁵ *Jaworzina*, Advisory Opinion, 6 December 1923, PCIJ Series B, No.8, at 5.

¹¹⁶ J. Pauwelyn, R.A. Wessel and J. Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’, 25 *EJIL* 733.

¹¹⁷ T. Schelling, *The Strategy of Conflict* (1980), 74.

need to coordinate (such as the need to reaffirm and clarify secondary rules on the law of treaties).¹¹⁸ He argued that in such conditions actors coordinate tacitly by meeting at the ‘obvious focal point’.¹¹⁹ What makes a ‘focal point’ is its simplicity, uniqueness or some other qualitatively distinct feature.¹²⁰ The Commission enjoys distinctive features: its composition is geographically representative of the world’s legal systems; its pronouncements are summarized in simple draft provisions accompanied by concise commentaries often based on the expert recording and assessment of evidence of State practice; and the framework within which the Commission operates requires it to interact with governments and take their comments into account – government officials ‘have some ownership’ over the Commission’s final output.¹²¹

Within the UN framework, the reactions of governments during the Commission’s work on a topic are important because they frame the debate and guide the Commission’s work. Their reactions after the final adoption (and publication) of the output may take the form of acceptance of an output (or parts of it) thus confirming the Commission’s pronouncement of law or of rejection of an output (or parts of it) thus revealing that the Commission’s interpretative pronouncement is not accepted. The correct interpretation of international law cannot take place without considering the Commission’s output together with the responses of governments. Beyond the UN framework, the Commission’s work may trigger the reactions of States, for instance, in the form of reliance on the Commission’s pronouncements by domestic courts or governments, including it in their pleadings before international courts or tribunals.

If the subsequent practice of VCLT parties establishes the agreement of all parties concerning the VCLT’s interpretation, it has to be taken into account for the interpretation of the VCLT. If their subsequent practice falls short of establishing the agreement of all parties, it

¹¹⁸ For analysis of the need for reaffirmation and clarification see Part 5.

¹¹⁹ Schelling, *supra* note 117, 71.

¹²⁰ *Ibid*, at 70.

¹²¹ O. Schachter, *International law in Theory and Practice*, 178 *RCADI* (1985) 9 at 97.

Danae Azaria (accepted for publication 2019, European Journal of International Law) may be a supplementary means of interpretation.¹²² Further, the Commission's pronouncements vis-à-vis the meaning and content of CIL may trigger State practice (especially of those not parties to the VCLT) and may provide evidence of *opinio juris* concerning the content of CIL reflected in the VCLT.

The following analysis examines whether the UN institutional (permanent) interaction between States and the Commission, which distinguishes the Commission from other expert bodies (such as the Institut de Droit International), may warrant the reaction of States in the absence of which their silence is to be construed as acquiescence.

2 State Silence vis-à-vis the Commission's Pronouncements within the UN

The ILC Statute requires the Commission to cooperate with governments and the UNGA.¹²³ However, the UN Charter does not require UN members to respond to the Commission's work. It can be argued that the very existence of the interaction between the Commission and the governments envisaged by the Commission's Statute would be rendered meaningless if governments did not cooperate with the Commission. Even so, it does not follow that States are obliged to accept or reject an output finally adopted by the Commission.

In practice, relatively few governments make comments on particular topics, and the content, length and quality of their comments vary. Numerous reasons may explain the lack of response. Some States might be unaware of the content of the whole output or may not have the bureaucratic capacity to assess the Commission's pronouncements. Even States that have a legal adviser in New York and/or legal directorates in ministries in their capital may face challenges in assessing and responding to the Commission's periodical outputs, ad hoc requests

¹²² Conclusion 2(4) on SASP.

¹²³ Arts 16-22, 23, ILC Statute.

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and final outputs, especially given that the quantity of the Commission's outputs is increasing as does the detail of its work. Further, a State may not consider that a particular pronouncement affects its interests; it may wish to keep its options open or may prefer to avoid drawing attention to an issue by responding.

However, the silence of States may have legal significance under specific conditions: circumstances exist that call for some reaction; and the 'silent' State is in a position to react within sufficient time.¹²⁴ Two questions arise: whether State silence vis-à-vis the Commission's pronouncements per se may establish acquiescence concerning the interpretation of a treaty or *opinio juris* vis-à-vis the content of CIL; and whether State silence vis-à-vis the reactions of other States to the Commission's work may establish acquiescence of the 'silent States' concerning the interpretation of a treaty or the content of CIL.

In relation to both these situations the requirement that the State has knowledge of the conduct calling for reaction is met.¹²⁵ The Commission's work at all stages is made public to UN Members through the UN Secretariat. All UN Members are invited to respond to it annually, as well as when the Commission adopts a topic on first reading and once its work is adopted on second reading. Additionally, the UN Secretariat makes public to all UN Members the reactions of all UN Members. As a separate matter, governments may respond to the

¹²⁴ On CIL: Conclusion 10(3) on CIL Identification, at 140-142, para. 8; McGibbon, 'Some Observations on the Part of Protest in International Law', 30 *BYIL* (1953) 293, at 307. On treaty interpretation: Conclusion 10(2) on SASP, at 79-82; WTO, *EC—Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body*, 27 September 2005, WT/DS269/AB/R, WT/DS286/AB/R, para. 272. On acquiescence: Barale, 'L'Acquiescement dans la Jurisprudence Internationale', 11 *Annuaire Français de Droit International* (1965) 389, at 405.

¹²⁵ Situations that have been recognised as affecting (under law) a State's capacity to react: *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, 9 October 1998, RIAA XXII, 209 at 304, para. 415.

Commission's pronouncements outside the UN framework, but whether their response is made known to other governments will depend on the manner of the response.¹²⁶ The critical point in time for assessing whether the Commission's pronouncements per se and the responses of other governments to the Commission's pronouncements may be circumstances calling for some reaction is the final stage of the Commission's work: when the Commission has provided a concrete product, which it will not revise further (unless the UNGA requests the Commission to do so).

(a) State Silence vis-à-vis the Commission's Pronouncements

In *Kasikili/Sedudu Island* (1999), the ICJ held that the fact that a State did not react to the findings of a joint commission of experts entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not mean that a (tacit) agreement had been reached between them.¹²⁷ Further, the Commission itself has doubted whether the pronouncements of ETBs, which have a close connection and explicit functions vis-à-vis particular treaties, such as the Human Rights Committee, call for the reaction of treaty parties in the absence of which their agreement is tacitly reached.¹²⁸ Given that the Commission has no specific mandate concerning a particular treaty or a CIL rule, its pronouncements are not circumstances that call for the reaction of States, in the absence of which their silence is to be interpreted as acquiescence vis-à-vis treaty interpretation (or CIL identification).

¹²⁶ Domestic parliamentary and court proceedings do not call the reaction of other States: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, 17 December 2002, ICJ Report (2002) 625, at 650, para. 48; *EC— Customs Classification of Frozen Boneless Chicken Cuts*, *supra* note 124, para. 334.

¹²⁷ *Kasikili/Sedudu Island* *supra* note 8, paras. 65-68.

¹²⁸ Conclusion 13(3) on SASP, at 130 and 138, paras. 18-19.

Additionally, the argument that the Commission's pronouncements are circumstances that call for the reaction of States would entail that the ILC Statute and the process of oral statements process in the Sixth Committee is an opt-out system – States would have to react in the Sixth Committee in order *not* to agree with the Commission's pronouncements. However, in practice this is not the case. Further, whenever the ICJ has relied explicitly on the Commission's pronouncements, there is no evidence that it has done so because it considered that States acquiesced to them. In only three cases, the Court expressly considered the responses of governments to the Commission's work: *North Sea Continental Shelf* (1969),¹²⁹ *Jurisdictional Immunities* (2012) and *Peru v. Chile* (2014).¹³⁰

Among these, only *Jurisdictional Immunities* was concerned with the legal relevance of silence. The Court considered the silence of States *relevant* for CIL identification, but not *determinative* on its own. Italy argued that under CIL States were no longer entitled to immunity in respect of acts committed on the territory of the forum State by the armed forces of a foreign State, in the course of an armed conflict. The ICJ considered whether the adoption of Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property supported Italy's argument. Since the Convention was not in force between the parties to the dispute, the Court examined whether the provision and the process of its adoption and implementation 'shed light on the content of customary international law'.¹³¹ It noted that, when presenting the Ad Hoc Group's Report, the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of

¹²⁹ *North Sea Continental Shelf*, *supra* note 8, para. 61.

¹³⁰ *Peru v. Chile* concerned an agreement. The Court considered the practice of the disputing parties during the period when their agreement was established, including their reactions to the ILC's work on the law of the sea. It did not consider the reactions (or silence) as evidence concerning the content of the agreed boundary. *Maritime Dispute (Peru v. Chile)*, *supra* note 8, paras. 112-117.

¹³¹ *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, *supra* note 8, para. 66.

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States and Their Property stated the general understanding that military activities were not covered by the draft Convention,¹³² ‘[n]o State questioned this *interpretation*’.¹³³ However, the Court did not rely exclusively on State silence in that context, but also on other governments’ statements (outside the Sixth Committee), and extensive domestic legislation.¹³⁴

(b) State Silence vis-à-vis the Responses of other States

In relation to the interpretation of the VCLT, the subsequent practice of VCLT parties in the application of the VCLT may take the form of statements in the Sixth Committee or written observations to the ILC (communicated to all UN member States). In relation to CIL, statements by States not parties to the VCLT (and by VCLT parties expressly addressing the content of CIL) accepting or rejecting the Commission’s interpretative pronouncements would constitute State practice that may be relevant for CIL identification.

Two questions arise: whether VCLT parties are expected to react if other VCLT parties accept or reject the Commission’s interpretative pronouncements concerning the VCLT; and whether States are expected to respond to the reactions of other States vis-à-vis the Commission’s pronouncements concerning the content of existing CIL set forth in the VCLT. According to the Commission ‘silence on the part of one or more [treaty] parties can constitute acceptance of the subsequent practice [as an authentic means of interpretation] when the circumstances call for some reaction’ (Conclusion 10(2) on SASP); and that ‘failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*) [for custom identification], provided that States were in a position to react and the circumstances called for some reaction’ (Conclusion 10(3) on CIL Identification).

¹³² Ibid.

¹³³ Emphasis added. Ibid.

¹³⁴ Ibid. para. 77.

As a separate matter, it has been argued that a State is expected to respond to an act or claim of another State, when its interests are specially affected or infringed by such act or claim.¹³⁵ The four topics examined in this study deal with general secondary rules. One cannot identify in relation to such rules a specially affected State whose reaction would be expected. All States have an interest in secondary rules on the law of treaties, because all States are in one way or another involved or affected by treaty-making, the operation and termination of treaties. To consider that all have acquiesced would be a fiction.¹³⁶

On the other hand, owing to the secondary nature of rules, in order to identify an agreement vis-à-vis the interpretation of the VCLT or *opinio juris* vis-à-vis the identification of a CIL rule (set forth in the VCLT) the assessment of silence of VCLT parties (vis-à-vis the VCLT) or other States (vis-à-vis CIL) outside the UN framework would have to be anchored on some claim or act vis-à-vis particular primary rules. The identification of any subsequent agreement of VCLT parties concerning the VCLT's interpretation or of States in general vis-à-vis CIL rules would be virtually unattainable. The only forum that allows for the systematic interpretation of the (treaty or CIL) rules on the law of treaties is the UN framework. However, the difficulty of assessing State practice exists vis-à-vis all treaties that do not provide a permanent forum for the interpretative interaction between treaty parties; and the same difficulty exists vis-à-vis CIL rules. Further, in practice there is no evidence that the Sixth Committee operates as an opt-out system.

¹³⁵ McGibbon, 'The Scope of Acquiescence in International Law', 31 *BYIL* (1954) 143, at 183-184; P. Starski, 'Silence within the process of normative change and evolution of the prohibition on the use of force', 4 *Journal on the use of force and international law* (2017) 14 at 39.

¹³⁶ See explanation of the voluntarist approach (and its limits) vis-à-vis CIL: M. Mendelson, 'The Subjective Element in Customary International Law', 66 *BYIL* (1995) 177 at 186. Rejecting the application of the 'specially affected States' doctrine in similar situations: K.J. Heller, 'Specially-Affected States and the Formation of Custom' 112 *AJIL* (2018) 191 at 202.

An approach that allows for some degree of gradation may be useful. When State responses are concordant and overwhelming in accepting or rejecting a Commission's pronouncement, silence by other States may be construed as acquiescence vis-à-vis the interpretation of the VCLT or vis-à-vis the CIL rules reflected therein. Additionally, an interpreter will not only consider the responses of governments to the ILC's work in order to distil agreement or *opinio juris* concerning the rule's content: numerous means will be evaluated and the assessment will not depend exclusively on State inaction in the Sixth Committee.

However, whenever States remain silent and do not 'lead' the interpretative dialogue with the Commission, it is likely that an international court or tribunal will rely on the Commission's pronouncements, given that the Commission's work may be perceived as an 'obvious focal point', where the agreement of States is *likely* to coincide. The following section discusses the Commission's work as a subsidiary means for determining (the content of) rules or as a supplementary means of treaty interpretation.

D. The Commission's Pronouncements as a Subsidiary Means for Determining Rules or a Supplementary Means of Interpretation

1 The Commission's Pronouncements as a Subsidiary Means for Determining Rules of Law

The Commission's role within the 'sources of international law' has long been debated. Some argue that the Commission is 'a source of international law'.¹³⁷ However, they consider it a 'material source' that provides evidence of the existence of rules that come about through

¹³⁷ C. Parry, *The Sources and Evidences of International Law* (1965), 114; J. Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012), 20 and 43-44.

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formal sources. In this sense, they do not deviate from those that consider the Commission's work as a highly influential subsidiary means for determining rules of law.¹³⁸

The Commission discussed its own role in the preparation of the 2018 Conclusions on the Identification of Customary International Law. In his Third Report, Special Rapporteur Wood, recognising the need 'to avoid giving the impression that the Commission was inflating its own importance',¹³⁹ proposed a conclusion, which included both judicial decisions and writings, with the understanding that the Commission's outputs fell within the latter.¹⁴⁰ For some members 'the [Commission's] work should not, under any circumstances, be characterized as merely writings',¹⁴¹ and favoured a conclusion specifically dedicated to the Commission. Ultimately, the draft Conclusions were adopted without a conclusion dedicated to the Commission, but with a reference to it in the introductory commentary to part V, which does not characterise the Commission's work as teachings or a subsidiary means for determining rules of law, and does not qualify it as a formal source of international law. It states that the Commission's determinations 'may have particular value [owing to inter alia] the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral

¹³⁸ B.G. Ramcharan, *The International Law Commission* (1977), p. 26; Bos, *supra* note 30, at 82-83; G. Fitzmaurice, 'The Future of Public International Law', in *Livre du Centenaire*, Institut de Droit International (1973), 266-267.

¹³⁹ Provisional summary record of the 3253rd meeting, 20 May 2015, A/CN.4/SR.3253, 14.

¹⁴⁰ Special Rapporteur Wood, *Third Report on Identification of Customary International Law*, 27 March 2015, A/CN.4/682, 45, paras. 65 and 67.

¹⁴¹ Provisional summary record of the 3252nd meeting, 19 May 2015, A/CN.4/SR.3252, 10-11 (Escobar-Hernandez); Provisional summary record of the 3253rd meeting, 20 May 2015, A/CN.4/SR.3253, 4 (McRae); *Ibid*, pp. 5-6 (Kamto); *Ibid*, 10 (Nolte); *Ibid*, p. 10 (Vasquez-Bermudez); Provisional summary record of the 3254th meeting, 21 May 2015, A/CN.4/SR.3254, 6 (Kolodkin).

Danae Azaria (accepted for publication 2019, *European Journal of International Law*) and written comments from States as it proceeds with its work).¹⁴² Further, the commentary adds some qualifications that determine the weight to be given to the Commission's pronouncements, such as 'the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.'¹⁴³ Not all the Commission's pronouncements will carry the same weight vis-à-vis the identification of CIL (the same logically applies vis-à-vis the determination of treaty rules or of general principles of law). Each pronouncement of the Commission should be assessed separately in order to determine whether it reflects the current state of the law or not.

The Commission's documents record and assess means of treaty interpretation, such as subsequent practice in a treaty's application or the preparatory works of a treaty; or provide evidence of State practice and (subsequent) *opinio juris* vis-à-vis CIL. For this reason, the Commission's interpretative work may serve as a subsidiary means for determining rules of law (treaties, CIL and general principles of law) within the meaning of Article 38(1)(d) of the ICJ Statute.¹⁴⁴ That Article 38(1)(d) of the ICJ Statute only mentions judicial decisions and teachings, but not the ILC, can be explained by the fact that the provision was originally drafted in 1920 and was retained without much discussion in 1946,¹⁴⁵ prior to the adoption of the ILC Statute (1947).

2 The Commission's Pronouncements as a Supplementary Means of Treaty Interpretation

¹⁴² Conclusions on CIL Identification, p. 142, para. 2.

¹⁴³ Ibid.

¹⁴⁴ Ramcharan, *supra* note 138, 28; A. Pellet, Article 38, in A. Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (2nd ed. 2012), 824, 870; S. Rosenne, *Law and Practice of the International Court: 1920-2005*, (2006) vol. III, 1551.

¹⁴⁵ See article 38, Statute of the Permanent Court of International Justice (16 December 1920) 6 LNTS 389; Pellet, *supra* note 144, at 738-744, paras. 17-46.

When the Commission's draft texts lead to treaty negotiations, the draft texts with commentaries form part of the preparatory works of the future treaty. The present analysis addresses a different legal question: whether the Commission's interpretative pronouncements *subsequent* to the conclusion of a treaty, which are not part of the preparatory works, may be a supplementary means of treaty interpretation. Since the rule set forth in VCLT Article 32 provides two non-exhaustive examples (the circumstances surrounding the treaty's conclusion and the treaty's preparatory works), the question arises whether the Commission's subsequent interpretative pronouncements are 'other supplementary means of interpretation'.

The fact that the Commission's interpretative pronouncements subsequent to the conclusion of a treaty may constitute subsidiary means within the meaning of Article 38(1)(d) of the ICJ Statute does not exclude the possibility that they may also constitute a supplementary means of treaty interpretation within the meaning of VCLT Article 32. Since the subsidiary means for determining rules of law within Article 38(1)(d) of the ICJ Statute are concerned with all sources of international law, including treaties, they may overlap with some supplementary means of interpretation within VCLT Article 32.

However, the proposition that the ILC's subsequent pronouncements may constitute a supplementary means of treaty interpretation faces a conceptual limitation. The interpreter (other than the treaty parties) would constitute at the same time a means of interpretation. VCLT Article 32 provides means of treaty interpretation *per se*,¹⁴⁶ while the subsidiary means in Article 38(1)(d) of the ICJ Statute are tools that assist the applier to identify and assess the means that make and interpret rules.

The Commission has not addressed this issue. However, an analogy may be drawn from the manner in which the Commission approached ETBs in its Conclusions on SASP. The

¹⁴⁶ Special Rapporteur Nolte, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, A/CN.4/694, 7 March 2016, 27, para. 64.

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Commission's final output on this topic does not address whether ETBs' pronouncements constitute a supplementary means of interpretation. However, some ILC Members were keen to consider them as such. In his Fourth Report on SASP, Special Rapporteur Nolte dealt with ETBs, which are composed of independent experts and have been mandated with competences in relation to specific treaties. He argued that the pronouncements of ETBs *inter alia* constitute 'other subsequent practice' within the rule in VCLT Article 32.¹⁴⁷ Among the ILC members that rejected this idea, some accepted that ETBs pronouncements constitute a supplementary means of treaty interpretation, even though they explicitly stated that they are not 'other practice'.¹⁴⁸ Although both the ETBs and the ILC are expert bodies established by States, and the Commission, as shown in Part 3 of this article, has been mandated with some interpretative function as part of 'the progressive development of international law and its codification' (irrespective of the legal effects of such interpretative function), ETBs, as defined for the purpose of Conclusions on SASP, differ from the ILC: they have express functions vis-à-vis particular treaties (and they are not organs of an international organisation), while the Commission does not have such specific mandate.

Finally, the ICJ has relied on the Commission's work that had been adopted after the conclusion of a treaty in one case: *Bosnia and Herzegovina v. Serbia and Montenegro* (2007). In that case, the ICJ applied the 1948 Genocide Convention,¹⁴⁹ in the preparation of which the Commission had not been involved. In order to interpret the Genocide Convention, the Court relied on the commentary of the 1996 ILC Draft Code of Crimes against the Peace and Security

¹⁴⁷ Ibid, especially at 26, para. 62.

¹⁴⁸ Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 7 (Hmoud); Ibid, 11-12 (Forteau); Ibid, 19 (Kolodkin).

¹⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 8, para. 149.

of Mankind. In relation to the meaning of the term ‘genocide’ in Article II of the Genocide Convention, it noted that:

‘Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended”, quite apart from the implications of the words “inflicting” and “imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 44, para. 5).’¹⁵⁰

It may be argued that the Court used the Commission’s pronouncement in the 1996 Code as a supplementary means of interpreting the 1948 Genocide Convention. However, the Court’s reasoning could instead be understood as an implicit reliance on a CIL rule, which the Commission had identified in an earlier paragraph of its commentary.¹⁵¹ In other words, the Court may have used the Commission’s pronouncement as a subsidiary means within the meaning of Article 38(1)(d) of the ICJ Statute, and applied the rule of ‘systemic integration’ (VCLT Article 31(3)(c)) in order to interpret the Genocide Convention. The decision demonstrates that the ICJ has not been clear about (but has not excluded) the possibility that the Commission’s subsequent pronouncements vis-à-vis an existing treaty may be relied upon as supplementary means of treaty interpretation.

¹⁵⁰ Ibid. para. 186.

¹⁵¹ ILC Crimes against Peace, *supra* note 2, at 44, para. 3 (‘the definition of genocide contained in article II of the Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the Code’).

However, even assuming that the Commission's subsequent pronouncements may be relied upon as a supplementary means of interpreting the VCLT, the weight to be given to them will depend on qualitative factors, such as 'the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.'¹⁵²

5 Interpretation as A Means of Reinforcing International Law

It is argued that the Commission's 'codification by interpretation' paradigm in this field is called for by the legal landscape of modern international law. Since the previous century, international law has matured: numerous multilateral conventions have been concluded in various fields and more CIL rules have developed. Further, in the 1990s international courts and tribunals proliferated. These apply and interpret specialized treaties, but they also apply and interpret general international law (e.g. rules on treaty interpretation, reservations to treaties, provisional application, jus cogens). Their pronouncements may lead to inconsistencies between them in the way that they interpret and apply such rules. Additionally, national courts increasingly apply international law, including the law of treaties, which may raise a problem of inconsistency on two levels: (a) different national courts may interpret and apply international law in different ways; (b) national courts may deviate from the way that international courts and tribunals interpret and apply international law.¹⁵³ These trends may

¹⁵² Mutatis mutandis Conclusions on CIL Identification, at 142-143, para. 2.

¹⁵³ *Yukos Universal Ltd. (UK—Isle of Man) v. Russian Federation*, 30 November 2009, UNCITRAL PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility; *Rechtbank Den Haag (Hague District Court)*, 20 April 2016, C/09/477160/HA ZA15-1, 2016 (Russian Federation/Yukos Universal Limited) (Netherlands). *Sanum Investments Ltd v. The Government of the Lao People's Democratic Republic*, Award on Jurisdiction, 13 December 2013, UNCITRAL PCA Case No 2013-13; SGHC Singapore High Court, *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd*, 20 January 2015, 2015, 15;

undermine the clarity and predictability of international law, and may eventually weaken the confidence of States in international law. This danger is pressing today given that some States seem keen to disengage from multilateral treaties.¹⁵⁴

Thomas Franck argued that rules that are legitimate are more likely to be complied with, and two factors that make rules legitimate are their adherence to secondary rules and their clarity ('determinacy').¹⁵⁵ The secondary rules on the law of treaties (and on jus cogens) determine how treaty (and jus cogens) primary rules in all fields of international law come about, operate and are terminated. By reaffirming and clarifying these secondary rules,¹⁵⁶ the Commission contributes to the clarity, certainty and predictability of international law. In this sense, the Commission's 'codification by interpretation' paradigm falls within its long-term goal to reinforce international law,¹⁵⁷ thus convincing States to continue to use international law

SGCA Singapore Court of Appeal, *Sanum Investments Ltd v. The Government of the Lao People's Democratic Republic*, 26 September 2016, (2016) s7.

¹⁵⁴ The African Union warned mass withdrawals from the International Criminal Court: Decision on the International Criminal Court, AU Doc Assembly/AU/Dec. 622, (XXVIII), 31 January 2017, and Annex-Withdrawal Strategy Document to the Decision on the International Criminal Court, AU Doc Assembly/AU/Dec.672 (XXX) (29 January 2018). On 29 March 2017, the UK notified the European Council of its intention to withdraw from the European Union. On 17 March 2018, the Philippines deposited a written notification of withdrawal from the ICC Statute: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>; J. Crawford, The Current Political Discourse Concerning International Law, 81 *Modern Law Review* (MLR) (2018) 1.

¹⁵⁵ T. Franck, *Fairness in International Law and Institutions* (1995), 30-34, 40-46.

¹⁵⁶ G. Nolte, 'The International Law Commission Facing the Second Decade of the Twenty-First Century', in U. Fastenrath et al. (eds) *From Bilateralism to Community Interest: Essays in honour of Judge Bruno Simma* (2011) 781 at 790.

¹⁵⁷ C. Hurst, 'A Plea for the Codification of International Law on New Lines', 32 *Transactions of the Grotius Society* (1946) 135 at 136-140; G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 *MLR* (1956) 1 at 12; R. Ago, 'La Codification du Droit International et Les Problèmes de sa Réalisation', in *Recueil d'Etudes de Droit International en Hommage à Paul Guggenheim* (1968) 93 at 97.

as an important medium for creating, maintaining and destroying norms that regulate their conduct.¹⁵⁸

6 Conclusion

This article was concerned with the Commission's interpretative pronouncements subsequent to the conclusion of a treaty, here the VCLT, and subsequent to the formation of CIL rules set forth therein. It observed a 'codification by interpretation' paradigm in the law of treaties. Because of the current maturity of international law and the fact that some areas are heavily 'treatified' - a development to which the Commission has contributed - the Commission's 'codification by interpretation' paradigm is likely to continue and may be intensified in the future (including in other areas of international law).

This article has shown that interpretation is within the Commission's existing mandate. However, it cannot be presumed that interpretation is singularly an aspect of codification or exclusively one of progressive development. Each interpretative pronouncement has to be assessed separately.

The Commission's pronouncements subsequent to the VCLT (and the formation of CIL rules therein) are not binding or 'authentic' means of interpretation or constituent elements of CIL. However, they are part of an interpretative offer that the Commission makes (primarily) to States with a view to triggering their reaction within and outside the UN system. The reaction of States may eventually lead to an agreement about the interpretation of the VCLT or *opinio juris* concerning the content of CIL rules. The silence of States vis-à-vis the Commission's pronouncements and vis-à-vis the responses of some States to the Commission's pronouncements within the UN system may not outright be construed as acquiescence.

¹⁵⁸ J. Brunnée and S. Toope, *Legitimacy and Legality in International Law* (2010), 20-33.

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However, whenever States fail to engage with the Commission's interpretative offer, international courts and tribunals are likely to rely on the Commission's interpretative pronouncements as a subsidiary means for determining rules of law for the interpretation of a treaty or the identification of a CIL rule, or as a supplementary means of interpreting a treaty, here the VCLT, eventually influencing the content of CIL reflected therein.

The Commission is part of a law-shaping process established by the UNGA and the UN Charter. So far this process has mainly taken the form of shaping CIL through the preparation of draft conventions by the Commission followed by multilateral negotiations between States (and the subsequent pronouncements of international courts and tribunals as to the content of CIL set forth in the treaty in question). The Commission's 'codification by interpretation' paradigm takes the form of documents that are intended from their inception to remain non-binding, involves the interpretation of an existing treaty – here the VCLT – and aims to reaffirm and develop the content of treaty rules over time, and through this process to reaffirm and develop the content of CIL.

One cannot exclude the possibility that through the 'codification by interpretation' paradigm the Commission may provide the opportunity to some States (or other actors) to undermine the content of existing rules, and introduce lack of clarity. However, that risk exists vis-à-vis all efforts of codification and progressive development. States undertook this risk in order to promote the 'progressive development of international law and its codification' under Article 13 of the UN Charter.

The Commission's interpretative pronouncements in the four topics examined in this article are part of the Commission's long-term goal to provide certainty and predictability in the law of treaties (and just cogens) and by implication to rules in all fields of international law. Seen through these lenses, the Commission's 'codification by interpretation' paradigm in the law of treaties is an attempt to instill international law with legitimacy: to encourage States to continue

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to use international law as a significant medium by which they conduct their international affairs.