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The International Law Commission as an Interpreter of International Law

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6. Interpretation as a Means of Strengthening International Law
7. Conclusions

1. Introduction

The success of the International Law Commission ('ILC' or 'Commission') in the twenty-first century has been questioned. It has been criticized for running out of topics, and for rarely engaging in drafting conventions, as it did in the previous century, but rather mainly preparing non-binding instruments.[1] This study argues that the Commission in numerous recent topics of work, which have resulted or will result in non-binding instruments, *interprets* international law, and that its interpretative activity is part of its wider and continued vision to strengthen international law. The Commission has interpreted and interprets international law (treaties and custom) in numerous topics of work in relation to different areas of international law. This study focuses on four projects that either exclusively deal with or partly touch on the law of treaties, because these demonstrate starkly the Commission's interpretative activity, where treaty and customary rules co-exist.

The Commission played a significant role in drafting the conventions on the law of treaties: the 1969 Vienna Convention on the Law of Treaties ('VCLT');[2] the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT);[3] and the 1978 Vienna Convention on Succession of States in respect of Treaties ('VCSST').[4] Since the 1990s, it has undertaken topics of work in the same field conceived and presented from their inception as non-binding instruments with no intention that they be transformed into conventions. Some instruments are not even formulated as 'draft articles'.[5]

The first of these topics was Reservations to Treaties, which was conceived as a set of guidelines,[6] and was adopted by the ILC as a final draft of the Guide to Practice on Reservations to Treaties ('Guide to Practice on Reservations') in 2011.[7] Since then, the

[1] C. Tomuschat, The International Law Commission – An Outdated Institution?, 49 GYIL (2006) 77-105.
[2] Vienna Convention on the Law of Treaties (done 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[3] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (done 21 March 1986, not yet in force) Doc. A/CONF.129/15, reproduced in 25 ILM 543.
[4] Vienna Convention on Succession of States in respect of Treaties (done 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3.
[5] In 2011, the ILC adopted the Draft Articles on the Effects of Armed Conflict on Treaties, with commentaries, ILCYB 2011, Vol. II, Part 2. These deal with rules that fall outside the scope of the VCLT (Article 73), the 1986 VCLT (Article 74) and the VCSST (Article 39). Since the Draft Articles do not touch on rules set forth in these treaties, they are not examined here.
[6] In 2006, a ILC Study Group adopted the 'Conclusions on Fragmentation of international law: difficulties arising from the diversification and expansion of international law', which together with the analytical study finalized by the Study Group Chairman, Martti Koskenniemi, interpret VCLT Articles 30, 31(3)(c) and 41. These are not examined here, because they were adopted by a Study Group of the Commission. Report of the Commission to the General Assembly on the work of its fifty-eighth session, ILCYB (2006), Vol. II, Part 2, p. 176, paras. 238-239. The ILC took note of the Conclusions and commended them to the attention of the UNGA. GA Res. 61/34, 4 December 2006, para. 4. Other earlier work of the Commission was also intended not to take the form of a convention, yet it was composed of 'articles': e.g. Draft Code of Crimes against the Peace and Security of Mankind, ILCYB 1996, Vol. II, Part 2, pp. 17-56; Draft Declaration on Rights and Duties of States, ILCYB (1949), p. 287-288; Model Rules on Arbitral Procedures, ILCYB, 1958, Vol. II, pp. 83-86.
[7] Text of the Guide to Practice, comprising an introduction, the guidelines and commentaries thereto, Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011), A/66/10/Add.1.

ILC has continued to work on topics that either exclusively deal with or may touch on the law of treaties and the VCLT. These are designed to become sets of 'Conclusions' or 'Guidelines': the Draft Conclusions on Subsequent Agreements and Practice in relation to the Interpretation of Treaties adopted by the Commission on first reading in 2016 ('Draft Conclusions on SASP');[8] the Draft Guidelines concerning the Provisional Application of Treaties ('Draft Guidelines on PA');[9] and the Draft Conclusions on Peremptory Norms of International Law ('Draft Conclusions on Jus Cogens').[10]

These four projects involve (or may involve, in the case of the topic on jus cogens) (wholly or partly) the interpretation of some provisions of the VCLT. The Guide to Practice on Reservations involves the interpretation of Articles 19 to 23 of the VCLT (on reservations). The Draft Conclusions on SASP involve the interpretation of Articles 31 and 32 of the VCLT (on treaty interpretation). The Draft Guidelines on Provisional Application involve the interpretation of Article 25 of the VCLT (on provisional application of treaties, and to some extent other provisions of the VCLT). Any future Draft Conclusions on Jus Cogens will touch on Articles 53 and 64 of the VCLT (concerning the invalidity and termination of treaties that are in conflict with a peremptory norm, and especially the definition of jus cogens norms).

While any actor may interpret international law, that the ILC makes interpretative pronouncements is important for four reasons in addition to demonstrating the Commission's wider goal concerning international law. *First*, states in the United Nations General Assembly ('UNGA') have expressly noticed that the Commission is involved in interpretation of treaties after their conclusion, and specifically the VCLT.[11] This raises the question about *the reasons behind* the Commission's interpretative activity. *Second*, the rules that the Commission interprets are both treaty rules and customary rules. The Commissions interpretative activity offers evidence that custom is susceptible to interpretation, and raises the question as to the *methods* that it employs for treaty interpretation, but also for custom interpretation.

Third, while state practice has legal effects for treaty interpretation and custom identification, the Commission's pronouncements do not have the same legal effects. However, experience has shown that the non-binding instruments adopted by the Commission exert some influence on the interpretation of treaties and of custom. International courts and tribunals rely on them. As at 30 September 2017, the International Court of Justice ('ICJ') has expressly[12] referred to the Commission's work in twenty-two cases (nineteen decisions in contentious proceedings and three advisory

[8] Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission, Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, pp. 120-240.

[9] Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), A/72/10, pp. 128-146.

[10] Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), A/72/10, p. 193, para. 146.

[11] Statement by Borut Mahnič, Head of International Law Department, Ministry of Foreign Affairs of the Republic of Slovenia, 71st session of the Sixth Committee, 25 October 2016.

[12] In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, paras. 67-69 the Court did not expressly refer to the ILC ASR when it pronounced on Belgium's standing on the basis of a breach of an *erga omnes partes* obligation. Yet it may have done so implicitly. This case is not taken into account in the data presented here. Additionally, this study does not take into account cases where the parties to the dispute made arguments (expressly referring to the Commission's work), which the Court noted in its Judgment, but where the Court did not address the particular aspect of the dispute and thus did not resort to the Commission's work: *Application of the Interim Accord of 13 September 1995 (the former Yugoslav, Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, ICJ Reports 2011, p. 644, paras. 121-122, 164; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, paras. 190-192: http://www.icj-cij.org/docket/files/152/18848.pdf.

opinions).[13] Within each case the ICJ has relied on the same or different work of the Commission once or multiple times, and in a number of different ways. But, for the first and sole time, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,[14] the ICJ relied on a pronouncement by the Commission in order to interpret a treaty, the 1948 Genocide Convention, without the Commission having been involved in the latter's drafting. In order to determine the meaning of the terms in Article II of the 1948 Genocide Convention, the ICJ referred to a pronouncement made by the Commission in the 1996 Draft Code of Crimes against the Peace and Security of Mankind.[15] Thus, it is essential to explain the *legal effects* of the Commission's interpretative pronouncements.

Fourth, the Commission's purpose and mandate is the progressive development of international law and its codification. Exploring whether interpretation is part of this mandate allows us to reflect on the *meaning of 'progressive development of international law and its codification'*, and how the Commission implements its mandate in practice.

This study demonstrates that some non-binding instruments drafted and adopted by the Commission involve the *interpretation* of (treaty and customary) rules set forth in the VCLT. It argues that the Commission's interpretative activity falls within its existing mandate. It explains that the Commission's interpretative pronouncements are not binding; nor do they constitute themselves part of the agreement of treaty parties or the belief of law by states. However, first they may record means of interpretation; and second they may constitute an 'offer of interpretation' to states - the actors that make, apply and enforce international law - that may trigger their reaction individually or collectively thus eventually contributing to the establishment of an agreement concerning the interpretation of treaty rules and of *opinio juris* concerning the content of customary rules. As a separate matter, the Commission's interpretations may constitute supplementary means for interpreting the VCLT or subsidiary means for the determination of the content of rules of customary international law set forth therein. Finally, it is argued that the Commission's interpretative pronouncements in these topics, and the very choice to undertake work on these topics, serve a wider and traditional goal that the Commission has pursued: the strengthening of international law – this time by providing clarity as to the content of international law rules.

2. The ILC's Function and Procedures: an Overview

The UNGA established the ILC by Resolution 174/1947.[16] Since then, the Commission's Statute has been amended four times.[17] As at 30 August 2017, the ILC is composed of thirty-four members,[18] who are 'persons of recognized competence in international law'.[19] Even though its Statute does not expressly provide that the ILC

[13] These are: XX

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, ICJ Reports 2007, p. 43.

[15] Ibid, para. 186 ('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)').

[16] UNGA Resolution 174(II), Establishment of an International Law Commission, 21 November 1947.

[17] UNGA Resolution 485(V), 12 December 1950; UNGA Resolution 984(X), 3 December 1955; UNGA Resolution 985(X), 3 December 1955; UNGA Resolution 36/39, 18 November 1981. For the development of the composition and procedures set out in its Statute between 1948-1981: I.M. Sinclair, *The International Law Commission* (1987), pp. 13-21.

[18] Article 2a(1), UNGA Resolution 36/39, 18 November 1981, increased the number of members to third-four.

[19] Ibid.

members do not represent states but act in their individual capacity, there is a general consensus that they act in the latter capacity.[20] ILC members are elected for (renewable) five years[21] by the UNGA from a list of candidates nominated by the governments of UN Members based on geographic representation.[22]

The Commission's twofold goal and function is the progressive development of international law and its codification (Article 1 ILC Statute). Section 4 explains the meaning and content of the Commission's existing functions, and shows that interpretation falls within them. This section provides a brief overview of the Commission and its procedures. The Statute is premised on the understanding the progressive development and codification are distinct, and hence different procedures to be followed when the ILC is faced with a proposal for the progressive development of international law (Articles 16–17 ILC Statute) and when it is dealing with the codification of a particular topic (Articles 18–23 ILC Statute) are laid down in the Statute. However, the ILC has not elaborated its work on the basis of a strict distinction between progressive development and codification, and most of its projects include both elements in varying degrees.[23] The Governments and the UNGA have not objected to this well-established practice of the Commission.[24]

The process that the ILC follows concerning its work can be summarized as follows. The Special Rapporteur submits a report, which includes her or his proposals backed by her or his analysis, to be considered by the Commission in Plenary. In Plenary, whose proceedings are public, ILC members comment on the Special Rapporteur's report and the Plenary decides whether the proposals can be referred to the Drafting Committee. If so, the Drafting Committee, composed of ILC members who wish to participate, meets (in closed proceedings) in order to draft provisionally adopted texts, which it then submits to Plenary for consideration. If and when the provisionally adopted texts by the Draft Committee are adopted on first reading by the Commission (in Plenary), the Commission submits them (along with Commentary) to the UNGA, as part of its annual Report, and invites comments from the Governments.

The UNGA considers the Commission's annual Report in the Legal Committee (widely known as the 'Sixth Committee'),[25] which is composed of delegates of all UN Members. During the week when the ILC Report is considered, UN Members are represented usually by the legal advisors of Ministries of Foreign Affair. The delegates make comments to the ILC's annual Report, including on each topic at any stage at which it is being considered by the Commission. The Special Rapporteur and the Commission take into account the governments' comments in the consideration of the topic in the following session of the Commission, as well as before the work on a topic is adopted in second reading. The Special Rapporteur revisits the texts, adopted on first reading, taking into account the comments of governments, and submits them to Plenary that may refer them again to the Drafting Committee. When the Commission in Plenary

[20] S. Rosenne, The International Law Commission, 1949-1959, 36 *BYIL* (1960) pp. 104-173 at 123-124.
[21] Article 10a, UNGA Resolution 36/39.
[22] Article 3, ibid.
[23] G. Gaja, Interpreting Articles Adopted by the International Law Commission, 85 *BYIL* (2016) 10-20 at 15; A. Watts, Codification and Progressive Development of International Law, MPEPIL online, paras. 20-22 (accessed 23 September 2017); D. McRae The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission, 111 *Journal of International Law and Diplomacy* (2013) 75-94 at 81-86.
[24] This approach may have been facilitated by the trend in the first fifty years of Commission's work to promote (and consider as a criterion of a project's success), the formulation of draft conventions, which would lead to the conclusion of treaties. C. Tomuschat, The International Law Commission – An Outdated Institution?, 49 GYIL (2006) 77-105 at 84.
[25] Rule 98, Rules of Procedure of the General Assembly, A/520/Rev.18.

finally adopts the texts in second reading, the ILC concludes its work on the topic, and submits them to the UNGA making a recommendation concerning the future outcome of the document.

The Commission is part of a wider institutional framework for the progressive development and codification of international law established by the UN Charter (Article 13). It interacts with the UNGA, with other UN organs, international and national organisations, and experts in different degrees, for different purposes and through different procedures pursuant to its Statute.[26] But, its main interaction involves the governments either individually or collectively through the UNGA.

3. The ILC's Interpretative Activity

The ILC may make interpretative pronouncements either in the process of dealing with a topic that systematizes rules some of which may form part of an existing treaty or custom, or in a process, which primarily involves the interpretation of existing rules. The following analysis begins with setting out the definition of interpretation and distinguishes it from other terms and processes, such as 'clarification', 'modification', and 'application' (section 3.1). It then demonstrates that the ILC in its work on the Guide to Practice on Reservations (section 3.2), the Conclusions on SASP (section 3.3), the Guidelines on Provisional Application (section 3.4) and the Conclusions on Jus Cogens (section 3.5) is advertently engaged in interpretation of rules set forth in the VCLT, and of rules of customary international law. It explains the reasons driving the Commission's interpretative activity in each of these topics of work, and argues that its overarching goal is to contribute to the clarity and certainty of international law over time and in a legal context where treaty and custom coexist (section 3.6).

3.1 Definitions: Interpretation, Clarification, Modification and Application

Interpretation. Despite the fact that the term 'interpretation' appears in the VCLT twelve times, no definition of this term has been included in the treaty. The term 'interpretation' encircles both the process of interpretation (the activity) and the outcome of interpretation (the pronouncement). The ordinary meaning of the term 'interpretation' according to Oxford English Dictionary Online is 'the action of interpreting or explaining; explanation, exposition' and 'signification, meaning'.[27] For the purpose of precision, this study will use the term 'interpretative pronouncement' to indicate the latter meaning, and the term 'interpretative process' or 'interpretative activity' to indicate the former meaning. Whenever the terms 'interpret' or 'interpretation' are being used, both meanings are intended to be captured.

The Permanent Court of International Justice ('PCIJ') and the ICJ have interpreted the term 'to construe' in their Statutes (Articles 60 respectively), as equivalent to 'to interpret'. They have both pronounced that the term means 'to give a precise definition of the meaning and scope',[28] and that a request as to the meaning or scope of the Court's Judgment signifies the 'clarification of [its] meaning and [its] scope.'[29] Scholars define the term 'interpretation' as 'the process of *determining* the meaning of [or *giving* meaning to]' a

[26] See Articles 17(1), 21(1), 25 and 26 of the ILC Statute.
[27] Oxford English Dictionary online. Accessed 30 September 2017.
[28] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, PCIJ, Judgment of 16 December 1927, Series A, No. 13, at 10.
[29] *Request for interpretation of the Judgment of November 20th, 1950*, Judgment of 27 November 1950, I.C.J. Reports 1950, p. 395 at 402.

text[30] or a rule.[31] The interpretative process in this sense is about determining the content of rules (content-determination).

Clarification. Interpretation is not confined to cases where the meaning of a term or a rule is unclear.[32] But, in such cases it would constitute 'clarification'. Clarification is an aspect of interpretation and means providing precision about content and meaning. In his Dissenting Opinion in the *North Sea Continental Shelf cases*, Judge Tanaka considered that '[…] *being vague* and containing gaps, [customary law] *requires precision* […] *about its content*. This task, [is] in its nature […] interpretative.'[33] The Guide to Practice on Reservations defines an 'interpretative declaration' as 'a unilateral statement […] whereby [a] State or [an] international organization purports to specify or *clarify* the meaning or scope of a treaty or of certain of its provisions.'[34] The Commentary explains that '[s]ince the phrase "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions" paraphrases the commonly accepted definition of the word "interpretation", […] it would be tautological to include the term "to interpret" in the body of guideline 1.2.'[35] But, there may a wider meaning to clarification. According to the ILC Commentary to the Draft Conclusions on SASP, 'interpretation is the process by which the meaning of a treaty, including of one or more of its provisions, is *clarified*.'[36] Subsequent agreements and subsequent practice examined in the Draft Conclusions on SASP involve a period of time after the conclusion of the treaty: rules that may be (or perceived to be) clear at one point in time, may no longer be clear a few decades later. Clarification in this context may also be perceived as a process of providing precision over time; but it still involves an interpretative activity.

Modification: In the VCLT, the term 'modification' is a term of art and signifies the revision of a treaty by some of its parties between themselves (VCLT Article 41). It is contrasted to the term 'amendment', which involves a different process and the treaty's revision between all treaty parties (VCLT Articles 39-40). However, the terms 'modify' and 'modification' may also encompass the meaning of 'revision' in a wider sense, such as the term 'modify' in the definition of a reservation (VCLT Article 2(1)(d)). The Commission uses this meaning of the term in its subsequent work discussed here.[37] The term 'modification' for the purpose of this study means the application of the treaty 'in a manner different from that laid down in […] its provisions'.[38] By contrast, interpretation

[30] Emphasis added. Harvard Draft Codification of International Law, 29 AJIL Supp (1935) 653-1227 at 938 and 946. See also Special Rapporteur Waldock adopted this definition in his work on the law of treaties: ILCYB (1964), Vol. II, p. 53, para. 1.
[31] Dissenting Opinion by Judge Ehrlich, Case Concerning the Factory at Chorzów (Jurisdiction), Judgment of 26 July 1927, PCIJ (1927), Series A, No. 9, p. 4 at 39.
[32] M.K. Yasseen, L'Interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités, 151 *RCADI* (1976) 1–114 at 47. Contra: Lord McNair, *The Law of Treaties* (OUP, 1961), p. 365, footnote 1. See criticism: R. Gardiner, *Treaty Interpretation* (OUP, 2nd ed, 2015), pp. 28-29.
[33] Emphasis added. Dissenting Opinion of Judge Tanaka, North Sea Continental Shelf cases (Germany v. Denmark and the Netherlands), ICJ Rep. 1969, p. 3 at 181.
[34] Emphasis added. Guideline 1.2 and Commentary, Guide to Practice on Reservations, p. 67, para. 18.
[35] Ibid.
[36] Emphasis added. ILCYb 2016, p. 171, para. 3.
[37] Guide to Practice on Reservations, p. 36, para 6.
[38] See also the meaning of 'modification' in the work of the ILC concerning treaty modification by subsequent practice: ILCYB (1966), Vol. II, at 236, para. 1.

does not involve the revision of a text,[39] but the determination of the meaning of terms and the content of treaty provisions.[40]

Application. Because interpretation often is sought in connection with the application of a rule to a given situation or a prospective situation,[41] the meaning of 'application' and its relationship to interpretation becomes pertinent. Two senses of application can be envisaged that have to be differentiated from interpretation. First, 'application' may have the sense of implementation by those to whom the rules are addressed. For instance, VCLT Article 31(3)(b) provides the following means of interpretation to be taken into account together with the context of the treaty: 'any subsequence *practice in the application* of the treaty which establishes the agreement of the parties regarding its interpretation'. 'Application' in this sense encompasses '[actual conduct (acts or omissions)] by which the rights under a treaty are exercised or its obligations are complied with, in full or in part,' while 'interpretation' refers to 'a mental process'.[42] Second, application may mean the application of rules to the facts of a case by a third party determination.[43] The PCIJ and the ICJ have been called to establish their jurisdiction on the basis of treaty clauses containing the terms 'interpretation' and 'application' of the treaty in question. Neither the PCIJ nor the ICJ have pronounced on the meaning of 'application' and its distinction from 'interpretation'. However, dissenting opinions of judges have addressed the meaning of these terms. Judge Ehrlich in his Dissenting Opinion to *Factory at Chorzów (Jurisdiction)* explained the two terms as follows: 'interpretation [is the process] of *determining the meaning of a rule*, while […] application, is […] that of determining the consequences which the rule attaches to the occurrence of a given fact; […] application is the action of bringing about the consequences which, according to a rule, should follow a fact.'[44]

Interpretation and application are two linked processes (and outcomes), but they are distinct.[45] Interpretation logically precedes all instances of application.[46] First one determines the meaning of a rule, and then he or she applies the outcome of that interpretation to the facts. But, interpretation can take place without application.[47] The general rule of treaty interpretation requires the interpreter to take into account together with the context: 'any subsequent agreement between the parties *regarding the interpretation of the treaty* or the application of its provisions' (VCLT Article 31(3)(a)).[48] '[A]n agreement or conduct "regarding the interpretation" of the treaty and an agreement or conduct "in the application" of the treaty both imply that the parties *assume, or are attributed, a position*

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[39] *Rights of nationals of the United States of America in Morocco*, Judgment of 27 August 1952, I.C.J. Reports 1952, p. 176 at 196; *Interpretation of Peace Treaties (second phase)*, Advisory Opinion: I.C.J. Reports 1950, p. 221 at 229. See also distinction between reservations (VCLT Article 2(1)(d)) and interpretative declarations (ILC Guideline 1.2).

[40] ILCYB (1966), Vol. II, at 236, para. 1. G. Hafner, Subseuqnt Agreements and Practice: Between Interpretation, Informal Modification and Formal Amendment, in G. Nolte (ed), *Treaties and Subsequent Practice* (OUP, 2013), pp. 105-122 at 114-117; S. Sur, *L'Interprétation en Droit International Public* (LGDJ, 1974), pp. 200-210.

[41] R. Gardiner, *Treaty Interpretation* (OUP, 2nd ed, 2015), p. 28.

[42] ILCYB 2016, p. 171, para. 3.

[43] 'Application' means ascertaining the meaning of a rule by 'reference to some factual field (even if taken hypothetically)': Separate Opinion of Judge Shahabuddeen, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, p. 57 at 59.

[44] Emphasis added. Dissenting Opinion by Judge Ehrlich, Case Concerning the Factory at Chorzów (Jurisdiction), Judgment of 26 July 1927, PCIJ (1927), Series A, No. 9, p. 4 at 39.

[45] Ibid.

[46] G. Scelle, *Precis de Droit de Gens* (Sirey, 1932-34), Vol. II, p. 488.

[47] '*In many, if not most*, instances an interpretation of a treaty will be sought in connection with [the] application of a treaty' [emphasis added]: Gardiner, XX, p. 28. Cf: ILCYB 2016, A/71/10, p. 157, para. 4.

[48] Emphasis added.

regarding the interpretation of the treaty'.[49] In fact, interpretation may take place in order not to apply a rule, because the scope of the rule does not cover the facts.

Who Can Interpret? Interpretation is not an activity reserved to the judge, nor to organs of the state that implement rules of international law. As Sur observes '[l'interprétation] ne pas liée nécssairement à la nature d'un organe'.[50] Any professional dealing with international law engages in interpretation. However, the fact that someone interprets does not necessarily mean that his or her interpretative pronouncements have legal effect. The legal effects of interpretative pronouncements are discussed in Section 5. Whether the Commission's mandate includes interpretative pronouncements is also a separate matter discussed in Section 4. But, the meaning of 'interpretation' does not prevent the ILC from undertaking interpretative activity.[51]

The following section provides evidence of the Commission's interpretative activity, and discusses the reasons for the Commission's activity and the method it employs. Section 3.2 discusses the Guide to Practice on Reservations; section 3.3 the Draft Conclusions on SASP; section 3.4 the Draft Guidelines on PA; and section 3.5 the Draft Conclusions on Jus Cogens. Section 3.6 provides some systemic analysis of the simultaneous interpretation of treaty and custom in which the Commission is involved in all these topics of work.

3.2 Guide to Practice on Reservations to Treaties

The Commission has considered the topic of reservations to treaties on several occasions. First, upon the specific request by the UNGA in 1950,[52] and in parallel to the request for an Advisory Opinion by the ICJ concerning Reservations to the Genocide Convention.[53] On that occasion, the Commission - contrary to the ICJ Advisory Opinion - recommended the traditional rule requiring unanimous consent for admitting a state as a treaty party subject to a reservation.[54] The UNGA was divided vis-à-vis the Commission's position and requested the UN Secretary-General to conform with the ICJ Advisory Opinion.[55] Second, the Commission dealt with reservations in the draft articles on the law of treaties, on which the VCLT was based, and more specifically Articles 19-23. The Commission's work in that context was based on the Court's Advisory Opinion. Third, rules on reservations were included in the draft articles that formed the basis of 1978 VCSST (Article 20) and of 1986 VCLT.

In 1993, the ILC decided to include the topic in its agenda of work, and the following year Alain Pellet was appointed as Special Rapporteur for this topic.[56] The Commission worked on this topic for eighteen years, during which the Special Rapporteur submitted seventeen reports. Although the draft guidelines went through the Drafting Committee and were adopted on first reading by the Commission in 2010, the procedure according to which the Commission awaits for a year the written comments by governments before taking them into account and adopting its products on second and final reading was not followed. The final version of the Guide to Practice was

[49] Emphasis added. ILCYB (2016), p. 172, para. 4. Gardiner, XX, p. 266.
[50] S. Sur, *L'Interprétation en Droit International Public* (LGDJ, 1974), p. 97.
[51] Section 4 examines whether the mandate of the ILC permits it to undertake interpretation.
[52] GA Res. 16 November 1950, para. 2.
[53] *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15 (28 May 1951).
[54] Draft of Report to the General Assembly by J. L. Brierly, Special Rapporteur, A/CN.4/L.18, ICLYB 1951, Vol.II, pp. 26-27.
[55] GA Res. 598(VI), 1 January 1952.
[56] ILCYB (1994), Vol. II, Part 2, p. 179, para. 381.

completed in an exceptional and expedited manner in 2011, pursuant to the decision of the UNGA.[57]

The Guide to Practice is the first document in which the Commission has primarily undertaken an interpretative task. It has done so owing to two reasons: first, ambiguities in the existing law; and second, gaps in the existing law. There was an understanding that 'even the provisions of the [1969] Vienna Convention may not have eliminated all these difficulties';[58] that there are ambiguities[59] and lacunae[60] in the provisions concerning reservations in the VCLT, the 1986 VCLT and the 1978 VCSST; and that despite the fact that these ambiguities have rarely degenerated into 'real disputes', 'great uncertainty continues to surround the legal regime governing reservations, and there is reason to believe that difficulties may arise increasingly in the near future'.[61]

It was understood that this project would deal with a 'somewhat *exceptional* [situation] because there are already some provisions on the very subject matter that [was] to be codified.'[62] In relation to eliminating gaps no problem was envisaged, since the activity would involve adding to existing texts, rather than derogating from them.[63] Since its inception, the topic was conceived with the aim [to] '[fill] the gaps *and* [...] remov[e] the ambiguities in the existing rules, but without embarking on their amendment'.[64] The Commission considered that 'there was *no reason to modify or depart from* the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions [Yearbook of the International Law Commission 1995, vol. II, part 2, para. 467] in drafting the Guide to Practice, which incorporates all of them.'[65]

Both functions (removing ambiguities and filling gaps) involve some interpretative activity of treaty and customary rules. The following analysis offers some examples of where the Guide first 'removes ambiguities in the existing rules' (section 3.2.1), and second where it interprets in order to fill gaps (section 3.2.2). While for Brierly, gap-filling involves the introduction of *lex ferenda* and is an exercise inevitably performed by any codifier,[66] the Commission's 'gap-filling' exercise here is different: it also involves the recording of customary rules, which exist separately to the VCLT, and which regulate issues that the VCLT does not.

3.2.1 Interpretation for Removing Ambiguities

In the Guide to Practice the Commission engages purely in an interpretative activity inter alia in relation to: (1) the definition of the term 'objection' to a reservation, and (2) the effects of a reservation.[67] The first is an ambiguity that was not contemplated at the

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[57] UNGA Resolution 65/26 of 6 December 2010, para. 4.
[58] Doc. A/CN.4/454, ILCYB (1993), Vol. II, Part 1, pp. 228–237, citing also at p. 229 P. Reuter, 10th report on the question of treaties concluded between States and international organizations or between two or more international organizations, Doc. A/CN.4/341 and Add.l, ILCYB (1981), Vol. II, Part 1, p. 56, para. 53
[59] The document provides as examples the definition of a reservation, of an interpretative declaration, the validity of reservations, and the rules on objections: ILCYB (1993), Vol. II, Part 1, pp. 228–237 at 231-232.
[60] The document includes as examples the effect of reservations on the treaty's entry into force and issues connected to specific objects of some treaties: ILCYB (1993), Vol. II, Part 1, pp. 228–237 at 232-235.
[61] ILCYB (1993), Vol. II, Part 1, p. 235, para. 50.
[62] Ibid, p. 236, para. 59.
[63] Ibid., para. 60.
[64] Emphasis added. ILCYB (1995), at 154, para. 168. See also ILCYB (1993), Vol. II, Part 1, p. 236, paras. 63 and 67.
[65] Emphasis added. Guide to Practice, Introduction, para (6).
[66] See analysis in section 4.1.2.2, and infra note XX.
[67] Other examples: the meaning of interpretative declarations regarding which the Commission interprets VCLT Article 31(3)(b). Guideline XX.

time of the conclusion of the VCLT. The second is an ambiguity, which was identified before the conclusion of the VCLT. Although the Guide to Practice on Reservations built on both the VCLT and 1986 VCLT, the following analysis focuses on the VCLT, which only applies to treaties between states, and the customary rules set forth therein.

(1) Although the Special Rapporteur considered that the work of the Commission on the definition of an 'objection' is a 'gap-filling' exercise,[68] the Commission's exercise is better understood as primarily interpretative. Even though the VCLT does not contain a definition of 'objection', the term appears in VCLT Articles 20-23, which establish rules concerning the (acceptance of and) objection to reservations, their effects, their withdrawal and their procedure. Guideline 2.6.1 and its commentary determine the meaning of a treaty term (and a term under customary rules).

States make statements in response to reservations that may be critical of a reservation in a number of ways. But, not every critical reaction to a reservation constitutes an objection under VCLT Articles 20–23.[69] Yet, the VCLT does not define objections. The ILC Commentary to the 1966 Draft Articles on the Law of Treaties, which were used as part of the negotiations in the Vienna Conference, and are thus part of the VCLT's preparatory works, uses the term 'rejection' as equivalent to 'objection'.[70] This suggests that objections are a narrower circle of critical reactions. However, ambiguities arising from a precise definition of the term 'objection' were not contemplated at the time of the conclusion of the VCLT. In its Commentary to the Draft Articles, the ILC had not defined the term, nor is there evidence that any imprecision was contemplated by the use of the term.[71] The question of defining the term 'objection' did not come up at the Vienna Conference either.

Guideline 2.6.1 entitled 'Definition of objections to reservations', defines 'objection' as 'a unilateral statement, however phrased or named, made by a State […] in response to a reservation formulated by another State […], whereby the former State […] *purports to preclude the reservation from having its intended effects or otherwise opposes the reservation*.'[72] The Commentary denotes that the Commission has applied the general rule of interpretation in order to determine the meaning of the term 'objection'. It identifies the ordinary meaning of the term 'objection' in the Dictionnaire de droit international public,[73] and models the definition on the definition of a reservation (VCLT Article 2(1)(d)).[74] It has also taken into account the context of the term 'objection' in the VCLT:[75] the VCLT provisions that determine the author of an objection (Article 20(4)(b)), partly the content and effect of an objection (Article 21(3)), and the formal requirements of an objection (Article 23(1) and (3)), as well as the determination of an acceptance, as the opposite counterpart of an objection (Article 20(5)).[76]

Guideline 2.6.1 clarifies the meaning of the term 'objection'. While an ambiguity about its meaning had not been contemplated at the time of the conclusion of the VCLT, after the latter's conclusion the term became less clear. The Commission applied the rules of treaty interpretation and has presumed that the treaty rules and the

[68] Special Rapporteur Pellet, *Eighth Report on Reservations to Treaties*, A/CN.4/535 and Add.1, p. 43, para. 74.
[69] Ibid, p. 45, para. 85.
[70] Draft Articles on the Law of Treaties with commentaries, ILCYB 1966, Vol. II, p. 203, para. 1.
[71] Ibid, pp. 187-274, especially pp. 202-209.
[72] Emphasis added.
[73] Guide to Practice on Reservations, p. 237, para. 9.
[74] Ibid, p. 235, para. 1; Special Rapporteur Pellet, *Eighth Report on Reservations to Treaties*, A/CN.4/535 and Add.1, p. 43, para. 75.
[75] Special Rapporteur Pellet, *Eighth Report on Reservations to Treaties*, A/CN.4/535 and Add.1, p. 43, para. 73.
[76] See e.g. Commentary to Guide to Practice: 'The *refusal to accept* a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning' (emphasis added), p. 237, para. 3.

customary rules concerning objections have identical content, and that the term 'objection' has identical meaning within the VCLT and under custom.

(2) The VCLT provisions concerning the legal effect of objections are 'so sibylline',[77] that they have been construed as having the same effect as those concerning the effects of acceptance.[78] Under the VCLT, the legal effects of objections and acceptances are distinct in two ways: in terms of the entry into force of the treaty and in terms of the relationship between the reserving state and other states. The focus here is the latter. Under VCLT Article 20(4)(b) and Article 21(3) the objecting state may choose at its own discretion either (a) to definitely express its opposition to the entry into force of the treaty as between the objecting and reserving States (VCLT Article 20(4)(b)); or (b) not to oppose to the treaty's entry into force between itself and the reserving State, in which case 'the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation' (VCLT Article 21(3)).[79] The latter option is the focus here.

The preparatory works of this provision show that before the VCLT's conclusion there was some perceived lack of clarity. During the Commission's work on the effects of an objection to a reservation, the starting point of the debate was whether the decision of the objecting state was what produced the effect of such reservation (proposed by the US delegation),[80] or whether the agreement of the reserving and the objecting state was required (supported by Special Rapporteur Waldock).[81] In the 812th meeting of the Commission, the issue raised considerable debate. Rosenne, Ruda and Briggs supported the unilateral approach proposed by the US,[82] while Yasseen, Tunkin and Pal preferred the consensual approach proposed by the Special Rapporteur.[83] But, within the latter group, there were different reasons for supporting this approach. Tunkin considered that 'for practical purposes the mutual consent between the two states to apply the treaty would probably exist.'[84] For Yasseen, the consent of the reserving state was called for because the objection has the effect of applying the treaty without the provision to which the reservation has been formulated,[85] and that the occasion where the treaty relationships would still exist between the objecting and reserving states would be rare.[86]

The matter was referred to the Drafting Committee,[87] which submitted to Plenary a newly drafted provision that was discussed in the Commission's 813th meeting. The term 'to the extent of the reservation' had been introduced, and the debates refocused on the

[77] A. Pellet and D. Muller, Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance, in E. Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011), pp. 37-59 at 37.
[78] J. Klabbers, Accepting the Unacceptable? A Nordic Approach to Reservations to Multilateral Treaties, 69 *Nordic Journal of International Law* (2000) 179-193 at 179. See also in relation to a particular effect vis-à-vis the relationship between the reserving and objecting states: ILCYB 1965, Vol. I, p. 271, para. 5 (Yasseen).
[79] G. Gaja, Unruly Treaty Reservations, in P. Lamberti Zanardi et al, *Le Droit international à l'heure de sa codification: études en l'honneur de Roberto Ago* (A. Giuffrè, 1987), pp. 305-330 at 325-326.
[80] Comment by United States of America, ILCYB 1965, Vol. II, p. 55.
[81] Observations and proposal by the Special Rapporteur (on Article 21), ILCYB 1965, Vol. II, p. 55, para. 3; Statement by Special Rapporteur Waldock, ILCYB 1965, Vol. I, p. 171, para. 3.
[82] ILCYB 1965, Vol. I, p. 172, para. 10 (Rosenne); ILCYB 1965, Vol. I, p. 172, para. 13 (Ruda); ILCYB 1965, Vol. I, p. 173, para. 30 (Briggs).
[83] ILCYB 1965, Vol. I, p. 171, para. 7 (Yasseen); ILCYB 1965, Vol. I, p. 172, para. 18 (Tunkin); ILCYB 1965, Vol. I, p. 172-173, para. 24 (Pal).
[84] ILCYB 1965, Vol. I, p. 173, para. 25.
[85] ILCYB 1965, Vol. I, p. 173, para. 26.
[86] ILCYB 1965, Vol. I, p. 172, para. 22 (Yasseen). The USA also made a comment to this effect, ILCYB 1965, Vol. II, p. 55. However, Tunkin considered that the practice 'frequently arose': ILCYB 1965, Vol. I, p. 271, para. 8.
[87] ILCYB 1965, Vol. I, p. 173, para. 30.

term's meaning. Yet the discussion in Plenary's 813th[88] and the 814th meetings was limited, and revolved around an objection having the effect of excluding the provisions to which the reservation had been made.[89] This was due to Yasseen's persistent concern that an objection entails the same effect as an acceptance if the objecting state does not oppose to the entry into force of the treaty between itself and the reserving state.[90] The provision's insertion was considered 'indispensable' as long as the provision, which gave the option to the objecting state to consider that the treaty enters in force between itself and the reserving state, was retained in order to 'forestall ambiguous situations'.[91]

The Plenary decided to send Draft Article 21 to the Drafting Committee again.[92] The revised text of Draft Article 21(3) retained this provision with minor drafting changes.[93] The Plenary discussed anew the amended provision, but the discussion was limited and did not address the wording 'to the extent of the reservation'.[94] Article 21 was finally adopted unanimously, as amended, by 17 votes to none.[95] However, the lack of understanding about the precise content of this language persisted in the Vienna Conference.

In the Vienna Conference (during the second session in 1969), the Drafting Committee, whose Chairman was Yasseen, submitted to the Plenary a revised version of draft Article 21(3) – Article 19(3) – which took into account a proposed amendment by the USSR,[96] and read 'the reservation has the effects provided for in paragraphs 1 and 2'.[97] Without any opposition to its content, the revised provision was adopted by the Plenary unanimously by 94 votes to none. However, on 20 May 1969, the Netherlands together with India, Japan and the USSR brought an amendment proposal to Plenary, as they considered that the Drafting Committee 'had made a mistake in altering the wording in paragraph 3' and that their proposal would ensure the distinction between the effects of acceptance and of objection.[98] The proponents of this proposal observed that the effects of an acceptance and an objection may be the same in the case 'where a reservation declared that the reserving State excluded an article from a treaty, and that idea might lie at the root of the drafting error,'[99] but that other situations had been overlooked by the Drafting Committee's revised version.[100] Their proposal was based on the wording of Draft Article 21(3) of the ILC.

On Yasseen's suggestion, the Plenary decided to send the provision (Article 19(3)) back to the Drafting Committee so as to dispel any doubts about its meaning.[101] The next morning, Yasseen, as the Chairman of the Drafting Committee, explained in Plenary's 33rd Meeting that the wording had been replaced with the proposed amendment in order to distinguish between objections and acceptances.[102] The discussion indicates the lack of full understanding of the language 'the provisions to which the reservation relates do not

[88] ILCYB 1965, Vol. I, p. 270-271, paras. 94-109.
[89] ILCYB 1965, Vol. I, p. 272, para. 14 (Briggs).
[90] ILCYB 1965, Vol. I, p. 271, para. 5 (Yasseen).
[91] ILCYB 1965, Vol. I, p. 271, para. 7 and p. 272, para. 11 (Ago).
[92] Ibid, p. 272, para. 121.
[93] Ibid, p. 284, para. 57.
[94] Ibid, p. 284, paras. 56-60.
[95] Ibid, p. 284.
[96] A/CONF.39/L.3.
[97] Summary Records, 11th Plenary Meeting, 30 April 1969, XX, p. 36.
[98] Statement of the Netherlands delegate, Summary Records, 32th Plenary Meeting, 20 May 1969, p. 179, para. 54.
[99] Ibid, para. 55. See also statement of the USSR delegate, Ibid, p. 180, para. 60.
[100] Statement of the Netherlands delegate, ibid, p. 179, para. 55. See also statement of the USSR delegate, Summary Records, 32th Plenary Meeting, 20 May 1969, p. 180, para. 60.
[101] Ibid, p. 180, para. 66.
[102] Summary Records, 33rd Plenary Meeting, 21 May 1969, p. 181, para. 2.

apply as between the two States to the extent of the reservation'. For Ago, acting as President of the Plenary, the wording meant that in cases of an objection where the treaty enters into force between the reserving and objecting state the 'provision to which the reservation had been made' would not be applicable.[103] The UK delegate (Vallat) considered that there was an implicit distinction in the wording between exclusion and modification. However, he was concerned that the provision was unclear as to the effect of a reservation purported to modify, rather than exclude the provision's application.[104] No explanation was given to his concern, while the USA delegate (Kearney) said that he was 'rather puzzled' about the meaning of the words 'to the extent of the reservation.'[105] Nevertheless, no formal objection was raised and it was agreed that the text was finally adopted.[106]

In the Vienna Conference, the meaning of these terms, and the provision's potential implications were not fully understood. Some considered that the wording 'to the extent of the reservation' excluded the provision in the relationship between the reserving and objecting state, when the latter did not oppose to the treaty's entry into force between the two of them. Others saw the possibility that a reservation may modify the treaty's provisions. Others understood this language to cover situations where the objecting state conditions a reservation upon a particular interpretation by the objecting state.[107]

Guideline 4.3.6 on the 'Effect of an objection on treaty relations' determines the meaning of the terms used in the VCLT Article 21(3). The Commentary to Guideline 4.3.6 explains that the language 'to the extent of the reservation' needs 'further clarification'.[108] Paragraph 1 of Guideline 4.3.6 reproduces the text of VCLT Article 21(3), and paragraphs 2 and 3 'provide details regarding the effect of an objection on treaty relations'.[109] Paragraph 2 provides that if the reservation is intended to exclude the legal effect of certain provisions of the treaty, the objecting state and the reserving state are not bound, in their treaty relations, by the provisions of the treaty as intended to be excluded by the reservation. It is only in this case that the objection has the same result as an acceptance. This particular point was foreseen in the Commission's earlier work on the law of treaties.[110] Paragraph 2 states that if the reservation is intended to modify the legal effect of certain provisions of the treaty, the objecting state and the reserving state are not bound, in their treaty relations, by the treaty's provisions as intended to be modified by the reservation.

The Commission's interpretative exercise places emphasis on case law and scholarship[111] after the conclusion of the VCLT. The findings of the Arbitral Tribunal in the case concerning the *Delimitation of the Continental Shelf between the UK and France*[112] are the main focus of the Guideline's Commentary: the precise effect of VCLT Article 21(3) is to render the provision to which the reservation has been made inapplicable as between the two states 'to the extent, *but only to the extent*, of the reservation.'[113] The

[103] Statement of President of Plenary (Ago), ibid, p. 181, para. 6.
[104] Statement of United Kingdom delegate, Summary Records, 33rd Plenary Meeting, 21 May 1969, p. 181, para. 3.
[105] Statement of United States of America delegate, ibid, para. 9.
[106] Statement of the President of Plenary (Ago), ibid, para. 12.
[107] Statement of the Netherlands delegate, Summary Records, 32th Plenary Meeting, 20 May 1969, p. 179, para. 55.
[108] Guide to Practice on Reservations, p. 487, para. 23.
[109] Ibid, p. 482, para. 2.
[110] ILCYB 1965, Vol. I, p. 174, para. 40 (Tsuruoka).
[111] D.W. Bowett, Reservations to Non-Restricted Multilateral Treaties, 48 *BYIL* (1976–1977) pp. 67-90 at 86.
[112] *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, 30 June 1977, XVIII RIAA 3-413, paras. 59-61.
[113] Ibid, para. 61.

language in Article 21(3) does not mean that the provision is entirely inapplicable (unless the reservation specifically excluded the whole provision) nor that the provisions apply without any modification.[114] The use of this Award also offers evidence of the fact that the Commission considered that VCLT Article 21(3) sets forth a rule of customary international law. The Tribunal had (implicitly) pronounced on the customary law nature of the rule set forth in VCLT Article 21(3) as at 30 June 1977.[115] This illustrates that the Commission's interpretative pronouncements in Guidelines 4.3.6 involve the interpretation of customary international law.

The Commentary's starting point is not the interpretation of the treaty text pursuant to the rules of treaty interpretation, but the determination of the content of the customary rule. This may be understood in two different ways. First, the Commission interpreted the treaty rule by resorting to jurisprudence and doctrine as supplementary means of interpretation (VCLT Article 32). Second, the Commission took into account a relevant (customary) rule applicable in the relationship between the parties to the VCLT. In the latter case, which is more persuasive, the ILC would have made use of the general rule of interpretation, and more specifically VCLT Article 31(3)(c): 'there shall be taken into account together with the context: […] any relevant rules of international law applicable in the relations between the parties.'

3.2.2 Interpretation for Gap-Filling

In attempting to fill gaps in the VCLT, as a matter of treaty law, the Commission has also been involved in interpretation. The Commission considers that customary international law exists outside the VCLT, which addresses the issues on which the VCLT is silent. Customary international law is seen as complete at least in relation to particular legal questions, as opposed to the VCLT as a treaty text. The following analysis focuses on the effects of impermissible reservations.

Whether Article 19 - and especially paragraph (c), which sets out the test of compatibility of the reservation with the object and purpose of the treaty - is a provision which provides thresholds of permissibility or of opposability of reservations has long been debated in scholarship.[116] This is mainly owing to the combination of two reasons. First, the provisions of the VCLT concerning reservations (Articles 19-23) do not expressly distinguish between permissible reservations and those that are accepted or objected to, and some provisions have allowed for arguments that impermissible reservations are subject to acceptance or objection. Second, not all treaties provide for mandatory judicial settlement of disputes, and thus the assessment of whether a reservation is permissible is left to the contracting states. The distinction between permissible and impermissible reservations is important because a reservation, which has been accepted, gives effect to the reserving state's consent to be bound by the treaty (VCLT Article 20(4)(c), and modifies the treaty provisions to which the reservation relates to the extent of the reservation in the relationship between the reserving and the accepting state (VCLT Article 21(1)).

If no distinction were drawn, impermissible reservations would be susceptible to acceptance, including tacit acceptance by non-objection within the twelve-month period

[114] These were the two opposing views of France and the UK in this case: ibid, para. 60.
[115] Although the Tribunal did not expressly pronounce that the rule in VCLT Article 21(3) is customary, the applicable law vis-à-vis the law of treaties in the case was customary international law: the VCLT entered into force on 27 January 1980 (after the arbitral award was issued in 1977), and France never expressed consent to be bound.
[116] D.W. Bowett, Reservations to Non-Restricted Multilateral Treaties, 48 BYIL (1976–1977) pp. 67-90.

pursuant to VCLT Article 20(5). The 'opposability school' supports this position.[117] The test of compatibility of the reservation with the treaty's object and purpose is a guide for states to decide whether they will object to a reservation; not a separate requirement before deciding whether to accept or object the reservation. In accordance with this line of argument, objecting states can choose not to oppose to the treaty's entry into force between themselves and the author of the impermissible reservation within the confines of Article 21(3). To support this proposition the following argument coming from the text of Articles 19 and 20 paragraphs 4 and 5 has been made. Paragraphs 4 and 5 of Article 20 set out the effects of an acceptance of a reservation. They both preface their provisions with the language '*unless the treaty otherwise provides*' (emphasis added). It follows *a contrario* that reservations falling within Article 19(c) can be accepted or objected to, since Article 19(c) deals with treaties that do not include a provision concerning reservations.[118]

In contrast, the 'permissibility school' posits that only permissible reservations can be accepted or objected to.[119] Impermissible reservations are void of legal effect and the separate question arises whether they are severable from the consent to be bound or whether they entail the invalidity of the consent to be bound.[120] In the former case, the treaty enters in force for the author of the impermissible reservation without the reservation. In the latter case, the treaty does not enter into force for the author of the impermissible reservation.

The Commentary of the 1966 ILC Draft Articles on the Law of Treaties does not dispel the uncertainty about the distinct regulation of permissible and impermissible reservations (under Article 19(c)). The Commentary's Introduction to Articles 16 and 17 (which correspond to VCLT Articles 19 and 20) points out that some Commission members were concerned about the eventuality of an impermissible reservation being accepted thus entailing that its author would become a treaty party. However, even this group of members did not altogether support the complete dissection of impermissible reservations from the opposability regime: '[s]ome members […] thought it inadmissible that a State, having formulated a reservation incompatible with the objects of a multilateral treaty, should be entitled to regard itself as a party to the treaty, on the basis of the acceptance of the reservation *by a single State or by very few States*.'[121] They considered it essential to introduce a 'collegiate system' whereby 'if more than a certain proportion of the interested States […] objected to a reservation, the reserving State would be barred altogether from considering itself a party to the treaty.[122] But, even this proposition goes eventually against the essence of impermissibility: contracting states may accept such a reservation. The Commission decided not to adopt this approach not because of the discrepancy between impermissibility and acceptance/objection, but because such 'collegiate system' would undermine the interest of universality.[123] The Commentary to Draft Article 16 (which was the basis of what became VCLT Article 19) expressly provides that '[t]he admissibility or otherwise of a reservation under paragraph (c), […] is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 regarding acceptance of and

[117] Ibid, at XX.
[118] D.W. Greig, Reservations: Equity as a Balancing Factor?, 16 *Australian Yearbook of International Law* (1995) 21-172 at 83-84.
[119] D.W. Bowett, Reservations to Non-Restricted Multilateral Treaties, 48 BYIL (1976–1977) pp. 67-90 at XX.
[120] Ibid at XX.
[121] Emphasis added. ILCYB 1966, Vol. II, p. 205, para. 11.
[122] Ibid, p. 205, para. 11.
[123] Ibid, p. 206, para. 14.

objection to reservations.'[124] The Commission saw acceptance and objection as a way of filling the gap created by the lack of a mandatory third party determination in relation to most treaties. Because the Commentary does not explain that an impermissible reservation is invalid, the Commentary may be resorted to in support of the argument that impermissible reservations are subject to acceptance/objection and to their effects.

The ILC in its 2011 Guide to Practice has taken the view that permissibility and opposability are two distinct issues. Only permissible reservations can be accepted or objected to with the effects set forth in Articles 20-21. Impermissible reservations, along with reservations that do not meet the formal requirements of VCLT Article 23, are null and void. They are invalid independently from the reactions of other contracting states (Guideline 4.5.1).[125] Objections can be made for any reason (Guideline 4.3). An objection can in some circumstances operate as persuasive evidence that the reservation is impermissible (Guideline 4.5.2), but may have legal effect only if it is made against a valid reservation.

To reach these conclusions, the Commission first demonstrated that Articles 20 (on acceptance and objection) and 21 (on the effects of an established reservation) do not apply to impermissible reservations. It interpreted the terms of VCLT Articles 19 in their context, and more specifically Article 21(1). It began with the text of Article 21(1) '[a] reservation *established* with regard to another party in accordance with articles 19, 20 and 23'.[126] For the Commission, this wording signified that 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) 'can be considered established under the terms of this provision.' These conditions are cumulative.[127] The Commission first took note of the fact that Article 21(3) does not include the language '[a] reservation established with regard to another party in accordance with articles 19, 20 and 23' as Article 21(1) does. Second, it noted that in this respect, the provision gives the impression that impermissible reservations (as well as those that do not meet the formal requirements of Article 23) are subject to an objection. For the Commission, this interpretation is 'highly debatable.'[128]

In what it appears to be an 'effective interpretation' of treaty provisions,[129] the Commission considered that leaving the assessment of permissibility to the contracting states deprives VCLT Article 19 of 'any real impact' - states could validate a reservation that does not meet the conditions for permissibility by accepting it.[130] Furthermore, the Commentary records state practice,[131] without drawing a distinction between VCLT

[124] Ibid, p. 207, para. 17.
[125] Guide to Practice on Reservations, p. 509, para. 2.
[126] Emphasis added.
[127] Guide to Practice on Reservations, p. 505, para. 9.
[128] Ibid, p. 515, para. 18.
[129] PCIJ: *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)*, Order of 19 August 1929, PCIJ (1929), Series A, No. 22, p. 5 at 13; Acquisition of Polish Nationality, Advisory Opinion of 15 September 1923, PCIJ (1923) Ser B, No. 7, p. 6 at 16–17. ICJ: *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports 1995, p. 6, para. 35; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, p. 6, para. 47; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353, para. 134. WTO: Appellate Body Report, *Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para. 81; G. Fitzmaurice, Vae Victis or Woe to the Negotiators! Your Treaty or our 'Interpretation' of it?, 65 *AJIL* (1971) 358-373 at 373.
[130] Guide to Practice on Reservations, p. 510, para. 6.
[131] Ibid, p. 516-518, paras. 20-23.

parties and those that are not.[132] The preparatory works are also widely resorted to in order to conclude that although the text of Article 21(3) does not exclude impermissible reservations from its scope, 'it seems clear from the *travaux preparatoires* that this question was no longer considered relevant to the draft article that was the basis of this provision'.[133]

Having established that Article 21 does not apply to impermissible reservations, the Commission then took the view that the VCLT does not address the effects of impermissible reservations. It resorted to the preparatory works of the VCLT that 'confirm that the 1969 Convention says nothing about the consequences of invalid reservations, still less their effects.'[134] '[This] gap is all the more troubling in that the *travaux préparatoires* do not offer any clear indications as to the intentions of the authors of the 1969 Convention, but instead give the impression that they deliberately left the question open.'[135]

In its 2006 session, the Commission considered the Tenth Report of the Special Rapporteur. In the debate in Plenary, '[i]t was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the Vienna Conventions.'[136] However, in the Sixth Committee, states emphasized the need for the Commission to address this issue. France stated that this issue was key for the Guide to Practice;[137] Sweden, Austria and France supported the idea that impermissible reservations were invalid;[138] and Canada expressed hope that the Guide to Practice would spell out the specific consequences arising from invalidity.[139]

The Commission assumed that 'the treaty rules — which are silent on the question of the effects of invalid reservations — are established.'[140] It ascertained the existence of a customary rule in parallel with the treaty rule, and considered them identical in content. Then it considered that under customary international law impermissible reservations are null and void. This proposition 'is not *lex ferenda*, but rather firmly established in state practice'. [141] It also resorted to subsidiary means for determining rules of law: international jurisprudence (of the Inter-American Court of Human Rights and of the European Court of Human Rights), [142] and pronouncements of treaty monitoring bodies.[143] The Commission concluded that 'the principle that an invalid reservation has no legal effect is part of positive law.'[144]

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[132] For state practice outside the comments to the Commission on this topic: Summary in Guide to Practice on Reservations, pp. 516-518, paras. 21-23. For responses of Governments: Sweden on behalf of the Nordic countries (A/C.6/60/SR.14, para. 22), Malaysia (A/C.6/60/SR.18, para. 86) and Greece (A/C.6/60/SR.19, para. 39) stated that reservations incompatible with the treaty's object and purpose are not formulated in accordance with Article 19 and so the effects listed in Article 21 do not apply.

[133] Guide to Practice on Reservations, p. 516, para. 18.

[134] Ibid, p. 505, para. 11, and see detailed analysis of the works at the Vienna Conference: pp. 506-507, paras. 11-13.

[135] Guide to Practice on Reservations, p. 507, para. 16.

[136] Emphasis added. Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), para. 142.

[137] Summary record of the 17th meeting, Sixth Committee, 31 October 2006, A/C.6/61/SR.17, para. 5 (France).

[138] Summary record of the 17th meeting, Sixth Committee, 31 October 2006, A/C.6/61/SR.16, para. 43 (Sweden); ibid., para. 51 (Austria); A/C.6/61/SR.17, para. 7 (France).

[139] Ibid, A/C.6/61/SR.16, para. 59 (Canada).

[140] Guide to Practice on Reservations, p. 508, para. 17.

[141] Guide to Practice on Rereservations, p. 511, para. 8, and p. 516, para. 20.

[142] Ibid, p. 519, paras. 26-27.

[143] Ibid, p. 518-519, paras. 24-25.

[144] Ibid, p. 519, para. 28.

The Commentary explains the exercise that the Commission has undertaken as follows: it has 'tried to fill the gaps and, where possible and desirable, to remove their ambiguities […]'.[145] It 'did not intend […] to establish *ex nihilo* rules concerning the effects of a reservation that does not meet the criteria for validity. *State practice, international jurisprudence and doctrine have already developed approaches and solutions* […]. It is a question *not of creating* but of *systematizing the applicable principles and rules in a reasonable manner, while introducing elements of progressive development, and of preserving the general spirit of the Vienna system.*'[146] From the point of view of customary international law, this exercise is one of codifying positive law. From the point of view of the VCLT, as a treaty, the Commission was faced with a gap in treaty law, and perhaps this is what the Commission perceives this exercise as progressive development.

The gap-filling exercise is one that involves the identification of a limited scope of the VCLT by virtue of treaty interpretation. The Commission interpreted the VCLT and identified the lacuna. It did not interpret the treaty by taking into account the customary rules by virtue of VCLT Article 31(3)(c). Rather, the Commission seems to suggest that rules of general customary international law, which the Commission ascertained, would apply concerning the issue that is left outside the scope of the VCLT.

3.2.3 Interim Conclusion

The Guide to Practice on Reservations involves some interpretation of existing rules set forth in the VCLT as a matter of treaty law and as a matter of customary international law. The Introductory section of the Commentary to the Guide to Practice on Reservations focuses on the 'relevant provisions of the 1969, 1978 and 1986 Vienna Conventions' as a matter of treaty law. However, the Commentary to individual guidelines does not only record the subsequent practice of parties to the Vienna Conventions, but also practice of states and *opinio juris* outside the Vienna Conventions.

The Commission's interpretation takes place for two reasons. First, in order to dispel ambiguities in the treaty text and the identical rules of custom, which were either not contemplated at the time of the conclusion of the VCLT or because the perceived ambiguity during the negotiations was not fully addressed. Removing ambiguities is purely consumed with elucidating the meaning and content of existing rules. As a matter of method, the Commission either presumes that the customary rules have identical content to that of the treaty rules or it determines the content of custom and then implicitly resorts to the rule set forth in VCLT Article 31(3)(c) to interpret the treaty (here the VCLT). Second, the Commission interprets the VCLT with a view to assisting in a 'gap-filling' exercise: the recording of existing (customary) rules that do not exist in the treaty text. In this case, interpretation is the necessary first step for determining that a lacuna exists in the treaty text; how it would be best filled (in the sense of applying a separate set of customary rules) in a way that is consistent with the treaty text. Overall, in a normative landscape, which involves a multilateral (largely) codifying treaty (at the time when the Guide was being prepared) and customary rules, the Commission's central goal in its work on this topic has been to achieve clarity, certainty and consistency of general rules of international law (treaty and custom).

3.3 Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation

[145] Ibid, p. 508, para. 17.
[146] Emphasis added. Ibid, p. 508, para. 18.

In 2008, the Working-Group on the Commission's long-term programme of work '[s]uggested that the Commission *revisit* the law of treaties as far as the evolution of treaties over time is concerned'.[147] It noted '[t]he interest in *clarifying* the legal significance and effect of subsequent agreement and subsequent practice.'[148] On the basis of this recommendation, the Commission decided to include the topic 'Treaties over Time' in its programme of work, and the UNGA took note of this decision.[149] Initially the idea was to deal with numerous legal issues, including interpretation, termination or withdrawal, denunciation and suspension. In 2009, the ILC Study Group on Treaties over Time decided to start work on subsequent agreements and practice and to leave open whether and how to explore the broader topic.[150] The Chairman of the Study Group prepared three consecutive reports in 2010-2012. In 2012, the ILC decided to change the format of its work on this topic by appointing the Study Group's Chairman as a Special Rapporteur on Subsequent Agreements and Practice in Relation to the Interpretation of Treaties with effect on 2013.[151] From 2013 to 2016, the Special Rapporteur, Georg Nolte, prepared four reports and proposed a set of Draft Conclusions on Subsequent Agreements and Practice in Relation to the Interpretation of Treaties, which were considered by the ILC (in Plenary and the Drafting Committee) and were adopted on first reading in 2016.[152]

Since the beginning of the Commission's work on this topic, the 'goal [was] to derive some general conclusions or guidelines from the repertory of practice [that] *should not result in a Draft Convention*.' The reason for the choice of the topic and its form is that it could 'give those who interpret and apply treaties an orientation [...], and thereby contribute to a *common background understanding, minimizing possible conflicts and making the interpretive process more efficient*.'[153] It has also been assumed that the 'delimitation between the various means of interpretation provided for in article 31, paragraph 3 of the 1969 Vienna Convention is not clear.'[154]

The following analysis illustrates that the Commission interprets (and how it interprets) VCLT Articles 31 and 32, and the identical customary rules in order to clarify their meaning (section 3.3.1), and interprets the existing rules in order to determine whether and how they may apply to new legal developments that emerged after the VCLT's conclusion (section 3.3.2). At all times, the Commission is adamant that the rules being interpreted are treaty rules and customary rules.

3.3.1 Interpreting Articles 31 and 32

The entire set of Conclusions on SASP and the Commentary adopted by the Commission on first reading focus on and interpret VCLT Articles 31 and 32. At the same time, the Conclusions are based on the assumption that the clarification of the rules in VCLT Articles 31 and 32 simultaneously involves the determination of the content of the separate yet identical rules of customary international law. According to the Commentary to Draft Conclusion 1, '[t]he present draft conclusions aim at *explaining* the

147 Emphasis added, ILCYB 2008 Vol. II, Part Two, Annex A, para. 6.
148 Emphasis added, ibid. para. 15.
149 UNGA Resolution 63/123, 15 January 2009, para. 6.
150 Report of the International Law Commission Sixty-first session (4 May-5 June and 6 July-7 August 2009), A/64/10, pp. 353 and 355.
151 Provisional summary record of the 3136th meeting of the International Law Commission, 31 May 2012, A/CN.4/SR.3136.
152 Report of the International Law Commission on the work of its sixty-eighth session (2 May–10 June and 4 July–12 August 2016), A/71/10, p. 137, para. 2.
153 Emphasis added, ILCYB 2008 Vol. II, Part Two, p. 375, para. 22.
154 Ibid., para. 24.

role that subsequent agreements and subsequent practice play in the interpretation of treaties. They are based on the Vienna Convention on the Law of Treaties of 1969'.[155] The Commentary to Draft Conclusion 2 [formerly Draft Conclusion 1] explains that 'Draft conclusion 2[1] situates subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention.'[156] It then reiterates that the rules set forth in VCLT Articles 31 and 32 are rules of customary international law.[157]

The Commission interprets the terms 'subsequent agreement' and 'subsequent practice' appearing in VCLT Articles 31(3)(a) and (b). For instance, Draft Conclusion 4 determines the meaning of the terms 'subsequent agreement' and 'subsequent practice' in VCLT Articles 31(3)(a) and (b) respectively (Draft Conclusion 4 paragraphs 1 and 2 respectively),[158] whereas Conclusion 6 clarifies the meaning of the terms 'in the application of the treaty or regarding its interpretation' in VCLT Article 31(3)(b).[159] Draft Conclusion 10 [formerly 9], paragraph 1, interprets the term 'agreement' in paragraphs (a) and (b) of Article 31(3). The ordinary meaning of the term 'agreement' is identified in a negative manner in the Commentary: 'conflicting positions expressed by different parties to a treaty preclude the existence of an agreement',[160] and the Commentary explains that the term 'agreement' 'need not, as such, be legally binding, in contrast to other provisions of the 1969 Vienna Convention in which the term "agreement" is used in the sense of a legally binding instrument'.[161] The ordinary meaning of the term 'agreement' is read in its context (that of other VCLT provisions where the term appears). Draft Conclusion 10(1) explains that the term 'agreement' in these two provisions 'requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept'. Recourse to the preparatory works of the VCLT is also had to confirm this interpretation.[162]

Draft Conclusion 10 paragraph 2 clarifies that acceptance as to the treaty's interpretation by those not engaged in the conduct in question may be established by inaction under Article 31(3)(b).[163] The Commentary draws support from the preparatory works of the VCLT, particularly the work of the ILC: '[e]xplaining why it used the expression "the understanding of the parties" in draft article 27, paragraph 3(b) (which later became "the agreement" in article 31, paragraph 3 (b) […] and not the expression "the understanding of *all* the parties", the Commission stated [in 1966] that: "It considered that the phrase 'the understanding of the parties' necessarily means 'the

[155] Emphasis added. Commentary to Draft Conclusion 2, Report of the International Law Commission on the work of its sixty-eighth session (2 May–10 June and 4 July–12 August 2016), A/71/10, p. 124, para. 1. See also the ILC Report in 2013 on this topic: Commentary to Draft Conclusion 1, Report of the International Law Commission Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), A/68/10, p. 12, para. 1.
[156] Commentary to Draft Conclusion 2, Report of the International Law Commission on the work of its sixty-eighth session (2 May–10 June and 4 July–12 August 2016), A/71/10, p. 125, para. 1.
[157] Draft Conclusion 2(1) and Commentary, ibid, p. 126, para. 4.
[158] Ibid, p. 142, para. 17.
[159] Ibid, p. 156-162, paras. 2-18.
[160] Ibid, p. 194, para. 3.
[161] Ibid, p. 196, para. 9.
[162] Report of the International Law Commission on the work of its sixty-eighth session (2 May–10 June and 4 July–12 August 2016), A/71/10, p. 196, para. 10.
[163] Emphasis added. Ibid, p. 197, para. 13.

parties as a whole".'[164] Support is also drawn from jurisprudence of international courts and tribunals prior and subsequently to the conclusion of the VCLT.[165]

Finally, Draft Conclusion 4(3) determines the scope and content of the term 'supplementary means of interpretation' in VCLT Article 32. It explains that subsequent practice in the treaty's application, which does not otherwise meet the criteria of VCLT Article 31(3)(b), falls within the scope of 'supplementary means of interpretation' (VCLT Article 32). To support this interpretation, the Commentary resorts to the preparatory works of the VCLT that confirm this interpretation,[166] and to the jurisprudence of international courts and tribunals.[167]

3.3.2 Interpretation in order to Determine whether the Scope of Existing Rules Covers New Legal Developments

The terms Conference of Parties ('COPs') (or an equivalent term, such as, Meeting of Parties or Assembly of Parties) and 'expert treaty bodies' ('ETBs') (or an equivalent such as 'monitoring bodies'[168] or 'expert bodies'[169]) do not appear in the VCLT. This is not surprising: COPs mainly made their appearance after the conclusion of the VCLT (although some existed before its conclusion), and 'expert treaty bodies' ('ETBs') mainly emerged after the conclusion of the VCLT, even though some were envisaged, and others had just been established without having sufficiently been in operation when the VCLT was concluded.[170] However, today COPs and expert treaty bodies are a common feature of numerous (mainly multilateral) treaties covering various subjects.[171]

The Commission has adopted on first reading Draft Conclusion 11[formerly 10] and 13, which define the terms 'COPs' and 'ETBs' respectively and address the manner in which their pronouncements may fall within the scope of Article 31(3)(a) and (b) and Article 32 or may have an impact on subsequent agreements and practice within the scope of Article 31(3)(a) and (b) and Article 32. The term 'COPs' is 'a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty,

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[164] Ibid, pp. 197-198, para. 14, citing *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15).
[165] Report of the International Law Commission on the work of its sixty-eighth session (2 May–10 June and 4 July–12 August 2016), A/71/10, pp. 198-200, paras. 15-22.
[166] Ibid, p. 144, para. 23.
[167] Ibid, pp. 144-147, paras. 25-34.
[168] The Guide to Practice on Reservations uses this term to describe the same expert bodies as Conclusions on SASP do by the term 'expert treaty bodies'. The Guide does not provide a definition but works on the assumption that these are created by treaty (and exceptionally by a decision of the treaty parties or a international organization) (see Guide to Practice, p. 400, footnote 1845), and that they are competent to apply and interpret the treaty in question: Guide to Practice, p. 397, para. 9.
[169] Special Rapporteur Nolte, Fourth Report on SASP, A/CN.4/694, 7 March 2016, pp. 5-6.
[170] The Human Rights Committee was to be established pursuant to ICCPR, which was concluded in 1966, but entered in force subsequently to the VCLT. The Committee on the Elimination of Racial Discrimination was established pursuant to the International Convention for the Elimination of All Forms of Racial Discrimination, which was concluded in 1965 and entered in force only a few months before the VCLT's conclusion. Articles 8-14, International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered in force 4 January 1969), 660 UNTS 195; Articles 28-45, International Covenant on Civil and Political Rights (adopted 19 December 1966, entered in force 23 March 1976), 999 UNTS 171.
[171] Examples of treaties establishing COPs: Convention for the Protection of the Marine Environment of the North-East Atlantic (22 February 1992) 2354 UNTS 67; Protocol on Substances that Deplete the Ozone Layer (16 September 1987) 1522 UNTS 3; Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey Through Baku-Tbilisi-Ceyhan Main Export Pipeline (signed 18 November 1999, entered into force 9 October 2000): http://subsites.bp.com/caspian/BTC/Eng/agmt4/agmt4.pdf. Examples of treaties with ETBs: *supra* note 171.

except if they act as members of an organ of an international organization' (Draft Conclusion 11[10]). The term 'ETBs' (Draft Conclusion 13(1)) is defined as bodies 'consisting of experts serving in their personal capacity, which [are] established under a treaty and [are] not an organ of an international organization'.[172] The Commission's interpretative activity and pronouncement in Draft Conclusions 11 and 13 determines whether the pronouncements of COPs and ETBs fall within the scope of the existing rules set forth in VCLT Article 31(3)(a) and (b) and Article 32.

More specifically, paragraph 2, second sentence, of Conclusion 11[10] states that '[d]epending on the circumstances, [a COP] decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3(a), or give rise to subsequent practice under article 31, paragraph 3(b), or to subsequent practice under article 32.' To support this proposition, the Commentary offers evidence of state practice within the framework of numerous COPs.[173] COPs decisions that do not reflect agreement in substance among all the parties may constitute 'other subsequent practice' under Article 32.[174]

Paragraph 3 of Conclusion 11[10] explains that 'a decision adopted within the framework of a [COP] embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, *in so far as it expresses agreement in substance* between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus' (emphasis added). Adoption by consensus is not a sufficient condition for an agreement to fall within the ambit of Article 31(3)(b),[175] because 'rules of procedure only determine how the [COP] shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3.'[176] To confirm this interpretation the Commission resorts to the (implicit) pronouncement of the ICJ in *Whaling in the Antarctic* that there is a distinction between the form of a collective decision and the agreement in substance.[177] In that case, although Australia and Japan were parties to the VCLT at the time of the dispute, the VCLT does not apply to treaties concluded before its entry into force (27 January 1980), and the International Convention for the Regulation of Whaling, which was applicable, was concluded in 1946 and entered in force in 1948. The Court's pronouncement was about the content of the customary rule in VCLT Article 31. The Commission established the content of the customary rule and then that of the identical treaty rule (presumably by virtue of the rule set forth in VCLT Article 31(3)(c)).

Paragraph 3 of draft Conclusion 13 explains that pronouncements of ETBs may give rise to a future subsequent agreement or subsequent practice by parties under Article 31(3), or other subsequent practice under Article 32; or may refer to existing subsequent agreements and subsequent practice within the meaning of Articles 31(3) or other subsequent practice under Article 32. The Commentary clarifies that the subsequent practice envisaged in Article 31(3)(b) does not encompass the pronouncements of ETBs

[172] The Special Rapporteur had proposed Draft Conclusion 12, a variation of which was renumbered in the Draft Conclusions adopted on first reading as Draft Conclusion 13, which used the term 'expert body' instead and defined it as 'a body, consisting of experts serving in their individual capacity, which is established under a treaty for the purpose of contributing to its proper application'. It also excluded from the term's scope organs of an international organization (paragraph 1). Special Rapporteur Note, Fourth Report, A/CN.4/694, 7 March 2016, p. 36, para. 94.
[173] Report of the International Law Commission on the work of its sixty-eighth session (2 May–10 June and 4 July–12 August 2016), A/71/10, pp. 204-208, paras. 11-22.
[174] Ibid, p. 213, para. 35.
[175] Ibid, p. 211, para. 31.
[176] Ibid, pp. 211-212, para. 31.
[177] Ibid, pp. 211-212, para. 31.

per se, because it requires subsequent practice of the *parties*.[178] In order to support this proposition, the Commentary refers to subsequent practice of a third state (vis-à-vis the VCLT): the United States, which has only signed but not expressed consent to be bound by the VCLT.[179] The practice of a third state is used by the Commission to determine the content of the customary rule set forth in VCLT Article 31(3)(b), rather than drawing conclusions *per se* vis-à-vis the content of the treaty rules.[180] The Commission establishes the content of the customary rule, which is relevant and applicable in the relationship between VCLT parties, and then gives meaning to the treaty rule, implicitly by recourse to the rule in VCLT Article 31(3)(c).

3.3.3 Interim Conclusion

In its work on SASP, the Commission clarifies the meaning of VCLT Articles 31 and 32 by applying the rules on treaty interpretation. It assumes that the rules set forth in these provisions are customary, thus determining the scope and meaning of custom simultaneously as interpreting the VCLT and vice versa. It reaches out to a repertory of relevant state practice and jurisprudence of international courts and tribunals. In relation to the interpretation of the VCLT as a treaty, also implicitly uses the rule set forth in VCLT Article 31(3)(c) having established the content of customary rules. The Commission's overarching express goal is to contribute to the clarity of international law, by facilitating the harmonious application of (treaty and customary) rules on treaty interpretation.

3.4 Draft Guidelines on the Provisional Application of Treaties

On the basis of a proposal by ILC member, Giorgio Gaja, before his election to the ICJ,[181] the Commission, in 2012, decided to include the topic 'Provisional application of treaties' in its programme of work, and Juan Gómez-Robledo was appointed Special Rapporteur.[182] In 2013, the Secretariat produced a memorandum, which traced the negotiating history of VCLT Article 25, both in the Commission's work and at the Vienna Conference in 1968 and 1969.[183] From 2013 to 2016, the Special Rapporteur submitted four reports. In 2015, the Commission referred six draft guidelines, proposed by the Special Rapporteur, to the Drafting Committee. In 2016, the Commission referred draft guideline 10 (proposed by the Special Rapporteur) to the Drafting Committee. Subsequently (during the same session), it took note of (but did not adopt on first reading) draft guidelines 1-4 and draft guidelines 6-9, as provisionally adopted by the Drafting Committee in its 2015 and 2016 sessions.[184] In 2017, adopted draft guidelines 1-11 on first reading, as presented by the Drafting Committee, after that it adopted the

[178] Draft Conclusion 13[12] and Commentary, p. 233, para. 9.
[179] Ibid, p. 233, para. 10.
[180] This practice is not subsequent practice of a VCLT party, and in any event, the Commission cannot have considered that the lack of opposition of VCLT parties to the statement of a third state establishes their agreement as to the interpretation of the VCLT, pursuant to the rule in VCLT Article 31(3)(b), because the Commission has taken a different position as to what the circumstances calling for a reaction of treaty parties are. Draft Conclusion 10[9], paragraph 2, and Commentary, p. 198-201.
[181] ICJ Judge since 6 February 2012.
[182] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), 2012, para. 267.
[183] Memorandum by the Secretariat, Provisional application of treaties, International Law Commission, Sixty-fifth session (6 May-7 June and 8 July-9 August 2013), 1 March 2013.
[184] Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, p. 365, para. 257.

commentaries to the draft guidelines provisionally adopted at that session [185] ('Commentary to the Draft Guidelines').

Since its inception, the work on this topic has been envisaged as one that 'may lead to the drafting of a few articles that would *supplement* the *scant rules contained in the Vienna Convention*,'[186] and has been intended to provide '*clarity* to states when [...] implementing provisional application clauses'.[187] According to Draft Guideline 2, the purpose of the draft guidelines 'is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of [VCLT Article 25] and other rules of international law.' The Commentary explains that the draft guidelines 'reflect existing rules of international law' and are mainly based on Article 25 of the VCLT and the 1986 VCLT, 'which they try to *clarify and explain* […]'.[188]

In the Commission's Plenary concerning the First Report the Special Rapporteur was encouraged to ascertain whether rules on provisional application existed under custom,[189] and he took note of this point.[190] Although his subsequent reports focus expressly on the interpretation of Article 25[191] of the VCLT (and the 1986 VCLT),[192] without reference to customary international law, Draft Guideline 2 states that 'the purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the [VCLT] *and other rules of international law*' (emphasis added). The Commentary explains that 'the basic approach taken throughout the draft guidelines [is] that article 25 of the 1969 and the 1986 Vienna Conventions does not necessarily reflect all aspects of contemporary practice on the provisional application of treaties,'[193] and that the wording 'other rules of international law' 'reflects the understanding within the Commission that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.'[194] Nevertheless, the Commentary to each Draft Guideline does not determine which rules may be rules of customary international law.

The Draft Guidelines interpret VCLT Article 25 (and arguably the customary rules set forth therein). For instance, Draft Guideline 3 states that '[a] treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States […]

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[185] Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), A/72/10, p. 128, paras. 50-53.
[186] Emphasis added. ILCYB 2011, Vol. II (Part Two), Annex C, Provisional Application (Giorgio Gaja), p. 333, para. 11.
[187] Emphasis added. Concluding Remarks of Special Rapporteur in Plenary, ILCYB 2013, Vol. II (Part Two), Report of the International Law Commission Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), A/68/10, p. 104, para. 126.
[188] Emphasis added. General Commentary to Draft Guidelines, p. 131, para. 2.
[189] Summary of Debate in Plenary, ILCYB 2013, Vol. II (Part Two), Report of the International Law Commission Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), A/68/10, p. 103, para. 122.
[190] Concluding Remarks of Special Rapporteur in Plenary, ibid, p. 104, para. 126.
[191] Special Rapporteur Gómez-Robledo, Third report on the provisional application of treaties, International Law Commission, Sixty-seventh session (4 May-5 June and 6 July-7 August 2015), A/CN.4/687, para. 133.
[192] He recognizes that the 1986 VCLT has not entered in force, but that practice indicates that provisional application has legal effects. This proposition implies that in so far as treaties between states and international organizations or between international organizations are concerned, the Report may deal with rules of customary international law. Special Rapporteur Gómez-Robledo, Third report on the provisional application of treaties, International Law Commission, Sixty-seventh session (4 May-5 June and 6 July-7 August 2015), A/CN.4/687, para. 122; Special Rapporteur Gómez-Robledo, Fourth report on the provisional application of treaties, International Law Commission, Sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, A/CN.4/699, para. 18.
[193] Commentary to Draft Guideline 2, Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), A/72/10, p. 133, para. 3.
[194] Ibid.

concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.' The Commission clarified that the term 'entry into force' in VCLT Article 25, is inclusive of both to the date when the treaty enters in force or the date at which the treaty enters in force for a particular state.[195]

However, the Draft Guidelines on first reading avoid addressing clearly the relationship of the Draft Guidelines with other provisions of the VCLT. For instance, draft guideline 10 on 'Provisions of internal law of States […] regarding competence to agree on the provisional application of treaties' 'follows closely the formulation of [VCLT] article 46'.[196] Yet this statement is unclear and does not answer the basic question. Two lines of reasoning exist both of which entail some interpretation of the VCLT and the customary rules set forth therein. First, the scope of Article 46 applies to provisional application. This would require an interpretation of the existing rule in Article 46. Second, a completely separate branch of law (even if in content the rules are identical) applies to invalidation, termination and suspension of the provisional application's operation. In this latter case, since there is no sufficient practice and the VCLT provisions do not cover this topic, the Commission would be involved in progressive development, which may assume some interpretation of the existing rules set forth in Part V of the VCLT (in order to draw analogies with the new rules proposed).

The Draft Guidelines on Provisional Application involve the interpretation of the VCLT, especially Article 25 (and implicitly a determination of the content of identical custom). This work is driven by the need for clarity of international law in this area. This is particularly so against the background of the rise of disputes in investor-state arbitral tribunals and annulment proceedings in domestic courts involving the provisional application of treaties since the conclusion of the VCLT.[197]

3.5 Draft Conclusions on Jus Cogens

In 2015, the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Dire Tladi as Special Rapporteur.[198] The reasons behind the choice of the topic is 'clarity on *jus cogens*, its formation and effects. Several recent disputes between States have implicated *jus cogens* or potential *jus cogens* norms [and] the dispute has often related to the effect of the *jus cogens* norms on other rules of international law. Clarifying some of the legal aspects of *jus cogens* could facilitate the resolution of international disputes. […] As with the topic on customary international law, clarifying the rules on *jus cogens* would be particularly useful for domestic judges and other lawyers not experts in international law who may be called upon to apply […] *jus cogens*. In particular, the study could provide useful guidelines for national courts on how

[195] Commentary to Draft Guideline 3, ibid, p. 134, para. 5.
[196] Commentary to Draft Guideline 10, ibid, p. 145, para. 2.
[197] *Ioannis Kardassopoulos v. Georgia*, ISCID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007; *Yukos Universal Ltd. (UK—Isle of Man) v. Russian Federation*, PCA Case No. AA 227, UNCITRAL (Energy Charter Treaty), Interim Award on Jurisdiction and Admissibility, 30 November 2009. Domestic procedures : *Russian Federation v. Yukos Universal Limited*, Hague District Court, Judgment of 20 April 2016, C/09/477160/HA ZA15-1: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230.
[198] At its 3257th meeting, on 27 May 2015 (*Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (ibid., *Sixty-ninth Session, Supplement No. 10* (A/69/10)).

to identify norms of *jus cogens* and how such norms interact with other rules of international law.'[199]

In 2016, the Commission considered the First Report of the Special Rapporteur. It referred Draft Conclusions 1 and 3, as contained in the Special Rapporteur's First Report, to the Drafting Committee, which provisionally adopted one draft conclusion and the first paragraph of another draft conclusion,[200] but the Commission did not adopt any draft conclusion on first reading. In 2017, the Commission dealt with the Special Rapporteur's Second Report.[201] It decided to refer draft conclusions 4-9 (as contained in the report of the Special Rapporteur) to the Drafting Committee, and decided to change the title of the topic from 'Jus cogens' to 'Peremptory norms of general international law (jus cogens)', as proposed by the Special Rapporteur.[202] The Commission took note of the interim report of the Drafting Committee's Chairperson on draft conclusions 2 [3 (2)], 4-6 and 7 provisionally adopted by the Committee.[203] Since the Commission's work on this topic is at an early stage, it is only possible to hypothesise about the extent to which this topic will touch on existing rules under custom and the VCLT, on the basis of the Special Rapporteur's reports and the summaries of the debates in Plenary and in the Drafting Committee.

Draft Conclusion 1 (provisionally adopted by the Drafting Committee) sets out that the draft conclusions concern the identification of norms of *jus cogens* and their legal consequences. VCLT Article 53 provides a definition of *jus cogens* for the purpose of the VCLT, which is considered an authoritative definition. Since the constitutive elements of *jus cogens* are prescribed in the VCLT, the Commission's work will involve to some extent the interpretation of VCLT Article 53. Draft Conclusions 1-9 as proposed so far by the Special Rapporteur deal with this aspect of the topic. Should the topic touch on the consequences of jus cogens in the law of treaties (e.g. the effects of *jus cogens* on treaties of the formation of new and operation of existing norms of *jus cogens* character), it will also to some extent interpret other parts of VCLT Article 53 as well as Articles 64 and 66, and any customary rules that are reflected therein.[204]

One example is the Special Rapporteur's proposal to address the 'nature' of *jus cogens*, which, according to his proposal, 'protect the fundamental values of the international community.'[205] If such draft conclusion is included in the topic, it would add to the requirements prescribed in VCLT Article 53, with the effect of either watering down or leveling up the thresholds for the formation of a *jus cogens* norm and permitting abuse owing to the inconclusive definition of 'fundamental values of the international community'.

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[199] Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), A/69/10, Annex, p. 282, para. 19.

[200] Statement of the Chairman of the Drafting Committee, 9 August 2016, International Law Commission, Sixty-eighth session (2 May – 10 June and 4 July – 12 August 2016): http://legal.un.org/ilc/documentation/english/statements/2016_dc_chairman_statement_jc.pdf.

[201] Special Rapporteur Tladi, *Second Report on Jus Cogens*, Sixty-ninth session, (1 May-2 June and 3 July-4 August 2017) 16 March 2017: http://legal.un.org/docs/?symbol=A/CN.4/706.

[202] Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), A/72/10, http://legal.un.org/docs/?path=../ilc/reports/2017/english/a_72_10.pdf&lang=EFSRAC, p. 192, para. 144.

[203] Ibid.

[204] See in relation to Article 66: Special Rapporteur Tladi, *Second Report on Jus Cogens*, Sixty-ninth session, (1 May-2 June and 3 July-4 August 2017) 16 March 2017: http://legal.un.org/docs/?symbol=A/CN.4/706, para. 31.

[205] Draft Conclusion 3 ('General nature of jus cogens norms'), Special Rapporteur Tladi, *First Report on Jus Cogens*, Sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, A/CN.4/693, p. 45: http://legal.un.org/docs/?symbol=A/CN.4/693; Second Report, p. XX, para. XX.

Any endeavour to determine the rules for identifying *jus cogens* norms will be based on the interpretation of VCLT Article 53. The Commission's work on this topic illustrates at its best its goal to strengthen international law by clarifying its content and by doing so re-confirming the importance of retaining it as a tool for conducting international relations. As explained by Georg Nolte in the Plenary of the ILC in 2016, 'almost fifty years after the adoption of articles 53 and 64 of the Vienna Convention on the Law of Treaties, the question is not anymore whether *jus cogens* exists, and, if so, on which basis. [W]e are not living anymore in the early period, shortly after the Second World War, when it was necessary to establish that international law contained certain basic peremptory norms, such as the prohibition of genocide, of the use of force, or of torture. Such peremptory norms are established. Today, we are faced with a different issue[:] the difficulty of determining which among the many claims according to which a particular rule has the character of *jus cogens* is well-founded.'[206] The Commission's work intends to empower international law by preventing farfetched claims about *jus cogens* norms that may undermine the place of *jus cogens* norms in international law, as a legal system.

3.6 Interpretation of Customary International Law and of Treaties

The analysis in this section has shown that the ILC makes interpretative pronouncements about the provisions of the VCLT as a matter of treaty law, as well as about rules of customary international law set forth in the VCLT. A major question that arises is whether customary rules are subject to interpretation (Section 3.6.1), and, if so, how the Commission interprets simultaneously customary and treaty rules (Section 3.6.2).

3.6.1 Interpretation of Custom

The process of determining the content of a rule (content-ascertainment) is separate from the process of ascertaining whether a given norm qualifies as a rule: what is and what is not law (rule-ascertainment).[207] In relation to treaty rules, content-ascertainment is governed by the customary rules on treaty interpretation set forth in VCLT Articles 31-33; while rule-ascertainment is concerned with whether consent to be bound has been given and whether the treaty has entered in force or whether provisional application is prescribed. The first involves interpretation, in the sense of giving and clarifying meaning. The second involves mainly evaluation but also at times some interpretation; for instance, in some cases the disagreement will be whether an international agreement exists, and '[the document's] actual terms and to the particular circumstances in which it was drawn up' will be evaluated,[208] but whether the language used in the document in question is for instance prescriptive or not will involve interpretation.

In relation to customary international law, these two operations (rule-ascertainment and content-determination) are firmly entangled and may be difficult to distinguish,[209]

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[206] Mr. Nolte, Speech in ILC Plenary, XX, 2016.

[207] A. Orakhelashvili, The Interpretation of Acts and Rules in Public International Law (OUP 2008), pp. 496-510. J. d'Aspremont, The Multidimensional Process of Interpretation, A. Bianchi et al, *Interpretation in International Law* (OUP, 2015), pp. 112-130, especially at 117.

[208] *Aegean Sea Continental Shelf*, Judgrnent, I.C.J. Reports 1978, p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994. p. 112 at 121, para. 23.

[209] Against the proposition that custom can be interpreted: R. Bernhardt, "Interpretation in International Law", in R. Bernhardt and R.L. Bindschedler (eds.), *Encyclopedia of Public International Law*, Vol. II (1992), p. 1417 ('it is neither usual nor advisable to use the notion of interpretation in connection with the

but they are distinct. This is important because although often the need is to determine both the existence and the content of a customary rule, and the process of content determination is subsumed in a wider operation, there may be cases where the existence of a customary rule is undisputed, but its content is imprecise or disputed. For instance, although the customary obligation to pay compensation in case of expropriation of foreign property is established, for decades international lawyers have disagreed as to the precise standard of compensation or even the precise meaning of 'prompt adequate and equitable' compensation,[210] and investor-state arbitrations turn around the content of customary rules on 'fair and equitable treatment' and 'full protection and security' of foreign investors (through treaty reference to these).[211]

The ICJ has implicitly pronounced that custom is susceptible to interpretation. For instance, on *Military and Paramilitary Activities* the Court pronounced that 'rules which are identical in treaty law and in customary international law are also *distinguishable by reference to the methods of interpretation* and application'.[212] Furthermore, scholarship supports the possibility of custom interpretation.[213] Judge Tanaka in his Dissenting Opinion in *North Sea Continental Shelf cases* admitted that:

> '[c]ustomary law, being vague and containing gaps compared with written law, requires precision and completion *about its content*. This task, in its nature *being interpretative*, would be incumbent upon the Court.
>
> The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law.'[214]

Although the Commission adopted in 2016 on first reading the Draft Conclusions on the Identification of Customary International Law ('Draft Conclusions on CIL'),[215] these do not expressly deal with the interpretation of customary international law, but there is no evidence in the Commission's Reports (nor in the Special Rapporteur's Reports and the debates in Plenary) that the Commission rejects the interpretation of custom as a process. Quite the contrary, Draft Conclusion 1 states that 'the present draft conclusions

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clarification of norms of customary law'); V D. Degan, *L' Interprétation des Accords en Droit International* (Nijhoff, 1963), p. 162.

[210] For instance, 'prompt' compensation raises the question as to whether it should be made immediately or within reasonable time or in due time. See for instance, F.G. Dawson and B.H. Weston, 'Prompt, Adequate and Effective: A Universal Standard of Compensation?', 30 *Fordham Law Review* (1962) 727-758 at 736.

[211] See interpretative note of the Free Trade Commission concernig Article 1105 of NAFTA: Section B(2), Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp. e.g. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 113 ('the issue was not to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the *content of customary international law* providing for fair and equitable treatment and full protection and security in investment treaties […].') (emphasis added).

[212] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14 at 95.

[213] In support of interpetation of custom: D. Anzilotti, *Cours de Droit International* (Sirey, 3ed, 1929), vol I, p. 112; Ch. de Visscher, *Problèmes d'Interprétation Judiciaire en Droit International Public* (Pedone, 1963), pp. 219-251; S. Sur, *L'Interprétation en Droit International Public* (LGDJ, 1974), p. 97; A. Bleckmann: Zur Feststellung und Auslegung von Volkergewohnheitsrechtorv 37 *Heidelberg J.Int'l L.* (1977) 504-529 at 526-528. A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008), pp. 496-510.

[214] Emphasis added. Dissenting Opinion of Judge Tanaka, North Sea Continental Shelf, (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, 20 February 1969, ICJ Rep. 1969, p. 3 at 181.

[215] Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, pp. 74-117.

concern the way in which the existence *and content* of rules of customary international law *are to be determined*';[216] this is what the term 'identification' in the title of the Draft Conclusions means. The Commentary to Draft Conclusion 1 explains that 'the reference to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases *it is accepted that the rule exists, but its precise scope is disputed*'.[217] The Commission thus accepts that interpretation of custom can take place. Moreover, the Commission's interpretative activity examined in this study illustrates this very point. For instance, in the Draft Conclusions on SASP the Commission recognizes that the rules on treaty interpretation (set forth in the VCLT Articles 31-32) are customary, but that parts of them need precision or more clarity.[218]

However, crucially the Commission has not addressed in the Draft Conclusions on CIL or any other topic of work the rules pursuant to which interpretation of custom is to take place. The customary rules of treaty interpretation set forth in the VCLT apply to treaties, as defined in the VCLT, and to written international agreements between states that do not fall within the scope of application of these VCLT,[219] and arguably to written international agreements between states and international organisations or between international organisations.[220] They do not apply to the interpretation of other textual instruments.[221] The ICJ has interpreted binding texts other than treaties (for instance, Security Council Resolutions,[222] and its own Judgments)[223] but not by use of the rules on treaty interpretation. Nor do treaty interpretation rules apply to the interpretation of customary international law.[224] Although the rules on custom interpretation fall beyond this study, there can be no presumption that the rules on treaty interpretation apply *ipso facto* to custom interpretation, or that the rules on custom interpretation are identical to the rules on treaty interpretation – albeit some similarities *mutatis mutandis* may exist.

Scholarship has addressed the rules on custom interpretation. In 1974, Sur, who accepted that custom is subject to interpretation,[225] highlighted that rules on custom

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[216] Emphasis added. Ibid, p. 80.
[217] Emphasis added. Ibid, p. 81, para. 3.
[218] See analysis in Section 3.3.
[219] The Court has applied the customary rules of treaty interpetation to international agreements that were concluded before the entry into force of the VCLT: *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, ICJ Reports 2009, p. 213, para. 47.
[220] *European Molecular Biology Laboratory Arbitration*, 29 June 1990, 105 ILR (1997) 1–74 at 30, 52; M.E. Footer, International Organizations and Treaties: Ratification and (Non)-Implementation of the Other Vienna Convention on the Law of Treaties, in A. Orakhelashvili and S. Williams (eds.), 40 Years of the Vienna Convention on the Law of Treaties (BIICL, 2010), pp. 183–203 at 200–201. Villiger argues that the verbatim transposition of the provisions of the VCLT into the 1986 VCLT constitutes evidence that the latter's provisions are of customary nature: M.E. Villiger, The 1969 Vienna Convention on the Law of Treaties: 40 Years After, 344 *RCADI* (2011) 9–192 at 54–55.
[221] For instance, non-binding instruments (e.g. UNGA Resolutions, conference resolutions, or draft articles adopted by the ILC) or agreements between states and non-state actors, such as indigenous peoples, armed groups or multinational companies. On interpretation of ILC adopted 'articles': G. Gaja, Interpreting Articles Adopted by the International Law Commission, 85 *BYIL* (2016) 10-20.
[222] The ICJ has interpreted Resolutions of the Security Council, by rules other than those of treaty interpretation: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403, para. 94.
[223] The method used by the ICJ resembles but departs from the rules on treaty interpretation. It mainly focuses on the textual and contextual interpretation of its judgments: *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand),* Judgment, ICJ Reports 2013, p. 281, paras. 68-69, 75-99.
[224] R.Y. Jennings, The Progressive Development of International Law and Its Codification 24 *BYIL* (1947) 301 at 305.
[225] S. Sur, *L'Interprétation en Droit International Public* (LGDJ, 1974), p.75.

interpretation are not clear.[226] In 1977, Bleckmann argued that the grammatical, systemic and teleological interpretation apply to customary rules,[227] and Orakhelashvili building on the latter's argument has provided a solid analysis of international case law (of the ICJ and investor-state arbitral tribunals) that support the teleological interpretation of customary rules (albeit not as an exclusive method).[228] Clarity as to these rules is important for their consistent application and as a result the consistency and foreseeability of international law. If the Commission identified the rules of custom interpretation would assist states and international courts and tribunals[229] in better identifying custom in a methodical, clear and consistent manner, but also it would ensure consistency in its work, which as demonstrated above involves custom interpretation as well as treaty interpretation.

3.6.2. The Interpretation of Customary and Treaty Rules by the ILC

The ILC does not distinguish (at least not overtly) between the process of interpretation of treaties and the process of interpretation of custom. However, the interpretation of custom is often made easier for the Commission, because in relation to topics where it asserts that provisions of the VCLT set forth rules of custom, it assumes that a particular provision of the VCLT sets forth a customary rule, and that the two have identical content. It then proceeds to interpret the treaty provision by virtue of the rules on treaty interpretation, and by effect determines also the identical content of the customary rule.[230] In other cases, the Commission ascertains the existence of a customary rule and its content - mainly by recourse to international jurisprudence - and presumes that the treaty rule has identical content. This latter exercise may be (implicitly) understood as an application of the rule set forth in VCLT Article 31(3)(c).

4. Interpretation as 'Progressive Development of International Law and its Codification'

The ILC Statute gives effect and was adopted pursuant to Article 13(1)(a) of the UN Charter, which requires the UNGA to initiate studies and make recommendations for the purpose of '[…] encouraging the progressive development of international law and its codification'.[231] The object of the ILC, which translates into its twofold function,[232] is set out in its Statute (Article 1(1)), which uses identical terms to those of Article 13(1)(a) of

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[226] Ibid. at 286-302.
[227] A. Bleckmann: Zur Feststellung und Auslegung von Volkergewohnheitsrecht,orv 37 *Heidelberg J.Int'l L.* (1977) 504-529 at 526-528.
[228] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008), pp. 496-510.
[229] Talmon argues that the ICJ in ascertaining the existence and determining the content of custom applies a combination of methods in the following alterantive order: induction, deduction and assertion. S. Talmon, Determining Customary International Law: The ICJ's Methodology between Induction, Deducion and Assertion, 26 *EJIL* (2015) 417-443. However, Talmon's analysis does not prove that interpretation does not take place.
[230] This effort is premised on the assumption that the treaty rule and the customary rule are identical. But, this is not necessary. It is possible that different rules of interpretation (for a treaty and for a rule of custom) may lead to different determinations of the content of the two separate rules. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14 at 95.
[231] Charter of the United Nations (done 26 June 1945, entered in force 24 October 1945), 1 UNTS XVI.
[232] Dhokalia views the Commission's function as threefold: progressive development (Article 15 of the ILC Statute), codification (Article 15, ILC Statute) and making evidence of custom more readily available (Article 24). R.P. Dhokalia, *The Codification of Public International Law* (Manchester University Press, 1970), pp. 201-202.

the UN Charter: 'the progressive development of international law and its codification'. Article 15 of the ILC Statute is located in Chapter II entitled 'Functions of the International Law Commission', and defines the terms 'Progressive development of international law' and 'codification of international law' that are used 'for convenience' in the Statute. This section deciphers the meaning of 'progressive development' and 'codification' in the ILC Statute and the relationship of these terms with *lex lata* and *lex ferenda* (section 4.1), and argues that interpretation falls squarely within the twofold function of the Commission (section 4.2).

4.1 Deciphering 'Progressive Development of International Law and its Codification'

The Commission (and others) often employ the distinction between *lex lata* and *lex ferenda* as an equivalent of the distinction between codification and progressive development.[233] In the practice of the Commission, characterising a provision as 'progressive development' is at times a way to reach a compromise in the drafting committee in order to gain support for a particular provision[234] or 'to diminish its weight [..] and the claim for its inclusion' in the draft product.[235] This is owing to the fact that progressive development is seen as *lex ferenda* and codification as equivalent to *lex lata*. This section explains the meaning of *lex lata* and *lex ferenda* (section 4.1.1), and the meaning of progressive development and codification by illustrating their relationship to *lex lata* and *lex ferenda* (section 4.1.2). It argues that this surrogacy is unhelpful and inaccurate, because both progressive development and codification may include instances of *lex lata* and of *lex ferenda*.

4.1.1 Meaning of *Lex Lata* and *Lex Ferenda*

While *lex lata* means existing law,[236] *lex ferenda* is the opposite, i.e. not yet law in force. Yet, *lex ferenda* may include different instances of non-law. In Latin, the verb 'fero' in Latin means (in relation to law): 'to propose' in English.[237] *Lex ferenda* in Latin means proposed law, and the same meaning given to the term in the context of international law today.[238] Yet, the term *lex ferenda* today has been explained (especially in the context of international law) as the law that 'ought' to be[239] or the law that is developing. These three instances may coincide: a proposed rule may be one as it ought to be and reflect the way that it is developing). However, it is not necessary that the law is developing in the way that the law ought to be, or that a rule that is being proposed reflects either the law that is developing or how the law ought to be. Moreover, a rule may be proposed

[233] D. McRae, The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission, 111 *Journal of International Law and Diplomacy* (2013) 75-94 at 94.
[234] Ibid, at 92.
[235] Ibid, at 94.
[236] A. Fellmeth and M. Horowitz, *Guide to Latin in International Law* (OUP, 2009) (accessed online: 1 October 2017) ('The positive law currently in force, without modification to account for any rules subjectively preferred by the interpreter').
[237] Entry 28 of term 'fero', P.G.W. Glare, *Oxford Latin Dictionary* (OUP, 1985). *Lex ferenda* would be a proposal that is about to be put to the comitia to be voted on, and - if approved - become a lex. Strictly speaking, the equivalent today would be a bill before Parliament.
[238] A. Fellmeth and M. Horowitz, *Guide to Latin in International Law* (OUP, 2009) (accessed online: 1 October 2017) (The law considered to be normatively preferable when the existing rule of law causes an unclear or undesirable result. *Lex ferenda* is thus a proposed law or proposed interpretation of law rather than a statement of law in force as reflected by positive sources of authority).
[239] John P. Grant and J. Craig Barker, *The Parry and Grant Encyclopaedic Dictionary of International Law* (OUP, 3rd ed, 2009) (accessed online: 1 October 2017).

only from the point of custom, while the same rule may already be *lex lata* under a treaty in force. The term *lex ferenda* may encircle numerous different instances of non-law, and a distinction between these instances should be maintained in order to allow for more precision.

As a separate matter, *lex ferenda* is part of legal reform.[240] However, it is a term different from *ius novum*, which means new law, law of recent origin.[241] The latter term does not say anything about whether the content of the new rule is different from the earlier state of the law. *Ius novum* is concerned with *lex lata*: a rule that is recently established, while there was no rule before, or an existing customary rule is changed by a subsequent customary rule, or a treaty is new law vis-à-vis a pre-existing customary rule that continues to be in force. However, it is possible to have proposals for new law, where no law exists, or where there is a need to change the law (either by modification of an existing one or by creation of a new parallel one which may or may not deviate in content).

For the purposes of the following analysis, the following terms within the realm of non-law will be used as follows. *Lex condenda* means the law that someone believes it ought to be.[242] All instances of law and non-law might coincide with the law as it ought to be. Yet the instance where *lex condenda* may exist without other instances of non-law (i.e. where there is some development towards a particular future rule) appears only in one instance of progressive development (Table 1). *Lex ferenda* will mean the more specific instance of non-law, where some practice of states exists towards the proposed rule. *Proposed ius novum* will mean proposal of new law.

4.1.2 The Meaning of 'Progressive Development' and 'Codification'

This section explains the meaning of progressive development (section 4.1.2.1) and codification (section 4.1.2.2) and their relationship to *lex lata* and *lex ferenda*. It shows that both may deal with *lex ferenda* and with *lex lata*.

4.1.2.1 'Progressive Development'

Article 15 defines 'progressive development' 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'. Table 1 below provides all instances that may fall within that definition. That definition provides two cases covered by the term progressive development. *First*, it covers 'subjects that are not yet regulated by international law'. This aspect includes two situations: first, where there is no practice or *opinio juris*, and at the same time there is no treaty or general principle of law on the subject. In this case, there is no *lex lata* and no *lex ferenda*. There is only *lex condenda*. Second, where there is sufficient state practice but no *opinio juris*, and at the same time no treaty or general principle of law on the subject. In this case, there is *lex ferenda*.

Second, progressive development includes subjects 'in regard to which the law has not yet been sufficiently developed in the practice of States'. There are six different scenarios here: where there is no state practice or *opinio juris*, but there is either a treaty or a general principle of law (there is no *lex ferenda* in these cases); where there is insufficient state

[240] Y. Dinstein, Restatements of International Law by Technical/Informal Bodies, in R. Wolfrum and V. Roben (eds), *Developments of International Law in Treaty Making* (Springer, 2005), pp. 93-100 at 93.
[241] A. Fellmeth and M. Horowitz, *Guide to Latin in International Law* (OUP, 2009) (accessed online: 1 October 2017).
[242] B.A. Garner, *Black's Law Dictionary* (Thomson Reuters, 10th ed, 2014); D. Anzilotti, *Cours de Droit International*, Vol I (Sirey, 1929), p. 19.

practice and no *opinio juris*, and there are no treaties or general principles of law; or there is insufficient state practice and no *opinio juris*, there is either a treaty (or treaties) or a general principle of law. There is *lex ferenda* in all these four cases. Thus, the definition of progressive development encircles both *lex condenda* and *lex ferenda*.

	ILC Statute definition	**Latin denomination**	**Custom**	**Treaty**	**General Pples of Law**
Progressive Development	'subjects not yet regulated by international law'	*lex condenda* / proposed *ius novum*	No practice / no OJ	No	No
		lex ferenda / proposed *ius novum*	Sufficient practice / no OJ	No	No
	'Subjects in regard to which the law has not yet been sufficiently developed in the practice of States'	proposed *ius novum*	No practice / no OJ	No	Yes
		proposed *ius novum*	No practice / no OJ	Yes	No
		lex ferenda / proposed *ius novum*	Not sufficient practice / no OJ	No	No
		lex ferenda / proposed *ius novum*	Not sufficient practice / no OJ	No	Yes
		lex ferenda / proposed *ius novum*	Not sufficient practice / no OJ	Yes	No
		lex ferenda / proposed *ius novum*	Not sufficient practice / no OJ	Yes	Yes

Table 1: Progressive Development

The focus of Table 1 concerning the Latin denomination is custom. However, nothing in the wording 'in regard to which the law has not yet been sufficiently

developed in the practice of States' restricts the 'practice of States' to state practice as an element for the formation and identification of custom. Rather such practice may be relevant to an existing treaty (or a general principle of law). Although Table 1 does not elaborate on all possibilities from the point of view of practice under the treaty (or vis-à-vis general principles of law), progressive development may include cases where there is *lex lata* (a treaty exists but not yet a rule of custom). Additionally and as a separate matter, progressive development may take place in relation to *lex lata*: an existing treaty may be outdated (and the practice under the treaty is not elaborate/sufficient) and may thus need change.[243]

4.1.2.2 'Codification'

The ordinary meaning of the term 'codification' indicates 'a written form of law' without any implication concerning the material used in making the code.[244] An instrument, which may systematise articles, may be composed of material that is not binding as pre-existing and separate law (wider sense of codification). This is why for Jennings 'codification properly conceived is itself a method for the progressive development of the law.'[245] But, even codification in the narrow sense (systematizing existing rules – *lex lata*) in order to be properly done involves the development and improvement of the law.[246] For Brierly, who was the Rapporteur of the Committee on the Progressive Development of International Law and its Codification that prepared the ILC Statute,[247] changing the law is part of the codifier's work.[248]

'Codification of international law' in Article 15 of the ILC Statute 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.' Owing to the use of the word '*rules* […] where there already has been extensive state practice, precedent and doctrine' (emphasis added), the definition of 'codification' in Article 15 appears narrow: encompassing only a written form of *existing* rules, but not situations where there is extensive state practice but no agreement as to what the law is.[249] However, Article 20 (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

[243] Lauterpacht suggested that 'progressive development' means only the creation of new law where there is no law; but not the change in the law, where there is a need for it. H. Lauterpacht, Codification and Development of International Law, 49 *AJIL* (1955), pp. 16-43 at 29. However, the preparatory works of Article 13(1)(a) of the UN Charter indicate that the concept of 'revision' was perceived to fall within the meaning of the term 'development'. Third Report, Sub-Committee II/2/A, U.N.C.I.O., Vol. 9, p. 419.
[244] R.Y. Jennings, The Progressive Development of International Law and Its Codification 24 *BYIL* (1947) 301 at 302.
[245] Ibid.
[246] Ibid, p. 29.
[247] UNGA Resolution 94(I), 11 December 1946, established the Committee and directed it to report on methods of implementing Article 13 of the UN Charter.
[248] Brierly, UN Doc A/AC.10/30, pp. 2-3 reproduced in Survey of International Law in relation to the work of codification of the International Law Commission, A/CN.4/1/Rev.1, p. 3: 'As soon as you set out to [codify existing law], you discover that the existing law is often uncertain, that […] there are gaps in it which are not covered. If you were to disregard these uncertainties and these gaps and simply include in your code rules of existing law, which are absolutely certain and clear, the work would have little value. Hence the codifier, if he is competent for his work, will make suggestions of his own; where the rule is uncertain, he will suggest how it can best be filled. [I]n this aspect of his work he will be suggesting legislation – 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.'
[249] Nor does the definition of 'progressive development' capture such situation. H. Lauterpacht, Codification and Development of International Law, 49 *AJIL* (1955), pp. 16-43 at p. 29.

point in state practice and in the doctrine, and divergences and disagreements, as well as arguments in favour of one or another solution. 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 has been achieved.

Table 2 on Codification illustrates that 'codification' within the meaning of the ILC Statute thus includes not only *lex lata*, but also *lex ferenda*. The focus of the classification upon Latin denomination in Table 2 is custom. However, the term 'codification' in the ILC Statute does not restrict this function to custom. The definition of 'codification' refers to 'rules *of international law*'. Treaties (and general principles of law) are also subject to codification. This may appear as an oxymoron in relation to treaties, because the latter is a written source of law. However, for instance, practice of treaty parties under a treaty may also be the subject of codification.

		Latin Denomination	**Custom**	**Treaty**	**General Pples of Law**
Codification	'more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'	*lex ferenda* / proposed *ius novum*	extensive practice / no *opinio juris*	Yes	No
		lex ferenda / proposed *ius novum*	extensive practice / no *opinio juris*	No	Yes
		lex ferenda / proposed *ius novum*	extensive practice / no *opinio juris*	No	No
		lex lata	extensive practice / *opinio juris*	No	No
		lex lata	extensive practice / *opinio juris*	Yes	No
		lex lata	extensive practice / OJ	No	Yes

Table 2: Codification

Although progressive development and codification are premised on a rigid distinction in the ILC Statute, especially evident in the procedures of the ILC provided in

its Statute,[250] but also illustrated by the fact that Chapter II of the ILC Statute contains two parts (Part A on the Progressive Development of International Law, and Part B on the Codification of International Law), the Commission's two functions overlap. Moreover, although equating the distinction between codification and progressive development with the distinction between *lex lata* and *lex ferenda* is common practice, such surrogacy is imprecise and unhelpful.

The above analysis denotes that the definition of 'progressive development' in the ILC Statute encompasses cases, where from the point of view of custom (or general principles of law) there is no *lex lata*, but only *lex condenda* or *lex ferenda*. It also includes cases where from the point of view of a treaty there is *lex lata*, but the pronouncements made by the Commission are *lex ferenda* in the sense that there is insufficient practice under the treaty. On the other hand, codification encompasses from the point of view of custom *lex lata* (where there is an existing customary rule) and *lex ferenda* (where there is extensive practice but no *opinio juris*). It also encompasses cases of *lex ferenda* where *lex lata* exists. For instance, a treaty exists (*lex lata*), but the subsequent practice under the treaty may be extensive but does not establish the agreement of all parties as to the treaty's interpretation (*lex ferenda*).

4.2 Codification and Progressive Development Encompass Interpretation

This section shows that interpretation falls squarely within the Commission's existing functions. It shows that the ILC and of UN Members consider that interpretation falls within the Commission's existing functions – albeit there is no evidence that they classify interpretation as codification or as progressive development (Section 4.2.1). It explains that interpretation may be an aspect of codification or progressive development depending on the particular case (Section 4.2.2).

4.2.1 The Practice of the ILC and of UN Members

4.2.1.1 The Practice of the ILC

Section 3 showed that the proposals of individual ILC members for the topics of work discussed in this study, on which the Commission relied, when it decided to include them in its agenda, indicate that each topic would involve the interpretation of existing (treaty and customary) rules. For instance, in relation to the Guide to Practice on Reservations, it was remarked that 'there are already some provisions on the very subject matter that [was] to be *codified*.'[251] The Commentary to some guidelines expressly suggests that they include *lex ferenda*, while others that they are based on positive law.[252] Furthermore, when the topic on SASP was proposed, it was explained that: '[t]he nature of the topic as a cross-cutting issue requires an approach that is different from the one to be adopted if the goal would be to *codify* a specific area of international law,'[253] and that although the topic relates to numerous subject areas, 'this does not mean that [it] is not sufficiently concrete and suitable for *progressive development*.'[254] It was finally suggested that 'the Commission shed light on the necessary balance between stability and change in the law of treaties through the codification and progressive development of international law

[250] See section 2.
[251] Empahsis added. Ibid, p. 236, para. 59.
[252] See section 3.
[253] Emphasis added. YBILC 2008, Vol. II, Annex I, 2008 recommendation of the Working-Group on the long-term programme of work, p. 159, para. 38.
[254] Emphasis added. Ibid, para. 45.

on the matter.'[255] For instance, when the Commission's Planning Group recommended the inclusion on the long-term programme of work of the topic on subsequent agreements and subsequent practice, it pointed out that the topic (as initially proposed) met the relevant criteria outlined by the Commission: '[it was] concrete and feasible and presented theoretical and practical utility in terms of codification and progressive development of international law.'[256]

The Commission's practice provides evidence that it considers its work on these topics, which involve interpretative pronouncements, as falling within the realm of its existing functions. However, it was not made clear that the topics would fall within codification or within progressive development. This issue is discussed in Section 4.2.2. The following section examines the practice of UN Members.

4.2.1.2 The Practice of UN Members

The ILC Statute is a UNGA Resolution. The UNGA can and has amended the Statute four times,[257] but has not introduced a reference to 'interpretation' in the functions of the Commission. The UNGA has not opposed to the ILC undertaking work that involves interpretation of treaty and customary rules. Quite the contrary, the UNGA has actively endorsed the interpretative projects of the ILC. It has taken note of the ILC Reports, which have included the ILC's decisions to introduce these topics on its agenda;[258] and it has annexed the Guide to Practice to a UNGA Resolution and has encouraged its widest possible dissemination of the Guide.[259]

Moreover, in the Sixth Committee governments have not opposed to the fact that interpretation falls within the Commission's mandate. Instead, some governments have endorsed the Commission's work on these topics and have expressly or implicitly indicated their understanding that the Commission makes interpretative pronouncements vis-à-vis the VCLT and custom. In relation to the Guide to Practice on Reservations, Pakistan 'was *not opposed* to the *clarification of any ambiguities in the Vienna Conventions* by means of guidelines, provided that they in no way altered the existing regime of reservations', which 'had acquired the status of customary norms'.[260] New Zealand welcomed 'the *interpretation set out* 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 Vienna Convention*.'[261] In relation to the Conclusions on SASP, South Africa stated that the Commission's work should 'clarify [...] the rules set out in the Vienna Convention,'[262] and the United Kingdom stated that 'the work of the Commission *should be firmly based on* Articles 31, 32 and 33 of the Vienna Convention.'[263] In 2016, Slovenia stated concerning

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[255] Ibid, p. 160, para. 46.
[256] Report of the International Law Commission, Sixtieth session (5 May-6 June and 7 July-8 August 2008), General Assembly, Official Records, Sixty-third session, Supplement No. 10 (A/63/10), ILCYB, Vol. II, paras. 351-352.
[257] By Resolutions 485(V), 12 December 1950, 984(X), 3 December 1955, 985(X), 3 December 1955 and 36/39, 18 November 1981.
[258] The Commission itself adopted the recommendations made by its Planning Group to introduce these topics of work on its agenda. which became part of its reports submitted to the UNGA. E.g. Report of the International Law Commission, Sixtieth session (5 May-6 June and 7 July-8 August 2008), General Assembly, Official Records, Sixty-third session, Supplement No. 10 (A/63/10), ILCYB, Vol. II, paras. 351-352.
[259] UNGA Res. 68/111, 16 December 2013.
[260] Statement by Pakistan, Sixth Committee, Summary record of the 17th meeting, 27 October 1999, A/C.6/54/SR.17 (15 November 1999), para. 59.
[261] Statement by New Zealand, Sixth Committee, ILC Report, Cluster II, 30 October 2013.
[262] Statement by South Africa, Sixth Committee, Sixty-eighth session (2013), on Item 81, p. 2.
[263] Emphasis added. Statement by United Kingdom, Sixty-eighth session (2013), on Item XX, p. XX.

the ILC's work on SASP that the ILC is undertaking some interpretation of treaties after their adoption, and specifically of the VCLT.[264] This practice provides evidence of some understanding that the ILC's interpretation activity is not outside its existing mandate.

Having shown that nothing in the practice of the ILC or in the practice of UN members suggests that the Commission's interpretative activity exceeds its existing mandate, the following section examines whether interpretation falls within codification or progressive development or both.

4.2.2 Interpretation as Progressive Development or as Codification

The ILC's interpretative pronouncements fall within the scope of its existing twofold function. Yet, the question is whether interpretation falls within the scope of codification or that of progressive development.

Interpretation is part of codification, because interpretation does not involve the revision of rules, but only the elucidation of the meaning and content of rules.[265] Interpretation is an essential aspect of the process of codification of existing law, because a codifier of existing law will first determine the existence and content of the existing rule (customary or treaty) before systematizing it into a restatement. Moreover, some instruments, which are examined in this study and include interpretations of existing treaty and/or customary rules, determine the content of existing (treaty and/or customary) rules; they 'formulate more precisely and systematize rules of international law', and more particularly they articulate and clarify their meaning and content. This is quintessentially a codification function.

Yet, although there is only one correct interpretation of treaty terms and rules or of rules of customary law, there may be different opinions as to which interpretation is that one correct interpretation.[266] An interpretation that reflects *lex lata* (i.e. one that is authoritative or authentic – by those that have established the rule, in other words the treaty parties or states that have created the customary rule) would necessarily be part of codification. For instance, if that interpretation is supported by the subsequent agreement of treaty parties concerning its application or interpretation, such interpretative pronouncement by the Commission would constitute codification.

On the other hand, an interpretation *de lege ferenda* may fall either within codification or progressive development. An interpretative pronouncement may be *lex ferenda*,[267] in the sense that it provides an interpretation either other than the correct interpretation or one that does not coincide with the authoritative or authentic interpretation made by those that established the rule. For instance, the Commission may propose an interpretation of the VCLT, which is not supported by sufficient practice of treaty parties (as far as the interpretation of the VCLT as a treaty is concerned) or the practice of states generally (as far as the interpretation of the customary rules reflected therein). This may simply be because such practice has not developed or no practice developed as yet. Such interpretations by the Commission would fall within the scope of progressive development ('subjects in regard to which the law has not yet been sufficiently developed in the practice of States'). But, an interpretation that articulates and systematizes the

[264] Statement by Borut Mahnič, Ministry of Foreign Affairs of Slovenia, 71st session of the Sixth Committee, 25 October 2016.
[265] See Section 2.
[266] R. Gardiner, *Treaty Interpretation* (OUP, 2nd ed, 2015), pp. 485-486.
[267] *Lex ferenda* encompasses also interpretation: see A. Fellmeth and M. Horowitz, *Guide to Latin in International Law* (OUP, 2009) (accessed online: 1 October 2017) ('*Lex ferenda* is thus a proposed law or *proposed interpretation of law* rather than a statement of law in force as reflected by positive sources of authority', emphasis added).

'extensive State practice, precedent and doctrine' vis-à-vis a treaty or a customary rule would fall within the ambit of codification, even if it is not possible to establish that such practice is accompanied by either the agreement of treaty parties concerning the treaty's interpretation (VCLT Article 31(3)(b)), if the rule is a treaty rule, or *opinio juris* vis-à-vis a customary rule. This is because of the definition of codification in Article 15 of the ILC Statute read in its context.[268]

Overall, interpretation falls within the Commission's existing functions. Whether a particular interpretation falls either within the function of codification or within that of progressive development depends on the particular rule being interpreted, the practice of states, and the particular pronouncement made by the Commission. The following section examines the legal nature and effects of the Commission's interpretative pronouncements.

5. The Legal Value and Effects of the Interpretative Pronouncements of the International Law Commission

The ICJ and other international courts and tribunals frequently refer to non-binding instruments drafted and/or adopted by the Commission.[269] This section does not deal with the 'perceived authority' that the ILC may have attained in the 'international legal argument'.[270] Nor does it explain the method for interpreting non-binding instruments finally adopted by the Commission.[271] Rather it examines the legal effects of the Commission's interpretative pronouncements. It argues that although the Commission prepared the Draft Articles on the Law of Treaties, which were used in the Vienna Conference for the negotiations of the VCLT, its work on the law of treaties subsequently to the conclusion of the VCLT is not an authentic means of interpretation (Section 5.1). However, the Commission's interpretative pronouncements may record and assess the existence of an agreement as to the interpretation of the VCLT or record and assess the existence of evidence of state practice and/or *opinio juris* concerning the content of identical customary rules (Section 5.2). Additionally, they may solicit the reactive practice of states, which may establish an agreement concerning the interpretation of the VCLT or which may establish *opinio juris* for the determination of the content of customary rules (Section 5.3). Finally, given that the Commission does not only record existing practice but also evaluates state practice and makes interpretative pronouncements as to the content of treaty and customary rules, some parts of the Commission's work on a particular topic *subsequent* to the conclusion of the VCLT may constitute supplementary means of interpretation of the VCLT or subsidiary means for determining the content of a rule of customary international law (Section 5.4).

5.1 The Commission's Pronouncements are Not an Authentic Means of Interpretation

The Commission's interpretative pronouncements are not 'authentic means of interpretation' because they do not 'relate to the agreement between the parties *at the time*

[268] See analysis in section 4.1.2.
[269] XX
[270] F.L. Bordin, Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law, 63 *ICLQ* (2014) 535-567.
[271] G. Gaja, Interpreting Articles Adopted by the International Law Commission, 85 *BYIL* (2016) 10-20 at 17-20. Cf: D. Caron, The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, (2002) 96 *AJIL* 857-873 at 870. The method proposed by Gaja may be employed for interpreting the Guide to Practice on Reservations, the Draft Conclusions on SASP, the Draft Guidelines on Provisional Application, and the Draft Conclusions on Jus Cogens.

when or after it received authentic expression in the text.'[272] Nor are they authoritative interpretations, for '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'.[273] The Commission does not have a special mandate to make authentic or authoritative interpretations of the VCLT (Section 5.1.1). Pursuant to the rules on treaty interpretation and on custom identification (the determination of both the existence and content of a customary rule) the Commission's work on the VCLT and the customary rules set forth therein are not authentic or authoritative means of interpretation (Section 5.1.2).

5.1.1 No Special Mandate

The ILC is a UN organ created by a UNGA Resolution, and if its pronouncements where to have any legal effect in relation to any treaty that would be the UN Charter. It is not, however, endowed with competences vis-à-vis another treaty – albeit such competences could be expanded by a UNGA Resolution or by amending a particular treaty conferring to the Commission such powers.

There is no evidence in the ILC Statute or state practice that the Commission retains any power to give an authentic or authoritative interpretation of the texts that it has adopted,[274] such as the 1966 Draft Articles on the Law of Treaties. Article 23 paragraph 2 of the ILC Statute provides that '[w]henever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting'. Pursuant to this provision, the UNGA may request the Commission to revise its draft articles; not to interpret them.[275] None of the topics of work examined in this study (nor any of the topics currently on the Commission's programme of work) are based on a UNGA request to revise its 1966 Draft Articles on the Law of Treaties or to interpret them. As a separate matter, pursuant to its power of initiative for the progressive development of international law (Article 16, ILC Statute), the UNGA may request the Commission to undertake work involving the revision of an existing treaty, such as the VCLT. This may eventually lead to the conclusion of an amendment agreement by VCLT parties. However, none of the Commission's work is based on a request to adopt articles forming the basis of a future treaty to amend or supplement the VCLT. Furthermore, the Commission holds no inherent power under its Statute to interpret authoritatively treaties only because these have been negotiated on the basis of a set of draft articles adopted by the Commission.[276]

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[272] Existing emphasis. ILCYB 1966, p. 220, para. 10.

[273] *Jaworzina*, Advisory Opinion, Series B, No.8 (1923), p. 5 at 37. See also: D. Anzilotti, *Cours de Droit International*, Vol. I (Sirey, 1929), p. 109.

[274] G. Gaja, Interpreting Articles Adopted by the International Law Commission, 85 *BYIL* (2016) 10-20 at 17.

[275] In 1998, the UNGA established an ad hoc working group for preparing a convention with regard to State immunity, and requested the Commission to consider five 'outstanding substantive issues', which had been identified by the chairman of the informal consultations held in the Sixth Committee, 'taking into account the recent developments of State practice and […] other factors' that had occurred 'since the adoption of the draft articles [on State immunity, which had been adopted by the ILC seven years before this GA Resolution]'. GA Resolution 53/98, 8 December 1998. The Commission was not asked to (nor did it) interpret or modify its articles. Annex to the ILC Report, ILCYB 1999, Vol. II, Part Two, p. 154. Gaja, *supra* note XX, at 17.

[276] Whether parts of the Commission's work, which lead to the conclusion of a treaty, may constitute part of that treaty's preparatory works is a separate matter. Strictly speaking, the preparatory works of a treaty include the documents that the negotiators used as part of the official documentation of negotiations; these may include some documents of the Commission, such as the Draft Articles on the Law of Treaties. *Summary Records of the Eighteenth Session 4 May – 19 July 1966*, I(II) ILCYB (1966), at 201, para. 35 (S. Rosenne); R. Gardiner, *Treaty Interpretation* (OUP, 2015), 115.

Overall, the UNGA has not specifically requested the Commission to interpret the VCLT. Nor is there a specific provision in the VCLT that affords such a power to the Commission. Nor have VCLT parties subsequently agreed to establish such competences for the Commission in relation to the VCLT.

5.1.2 The General Rule

Treaty parties (states and/or international organisations) are the masters of the treaty and states (and exceptionally international organisations) are the masters of customary international law. The general rule of treaty interpretation (set forth in VCLT Article 31) requires the interpreter to take into account subsequent practice only *of treaty parties* and only such practice that establishes the agreement of *all treaty parties* regarding the treaty's interpretation (VCLT Article 31(3)(b)).[277] Determining the content of a customary rule is also found on the practice and *opinio juris* of states.

Vis-à-vis the VCLT and rules of customary international law that do not specifically apply to international organisations or do not fall within the UN competence, the UN is a third international organisation. Pronouncements of the ILC, as a UN organ, vis-à-vis the VCLT are not authentic or authoritative. However, the institutional framework within which the ILC operates provides ample opportunities for direct interaction between states and the Commission: individually states may provide data and periodic comments to the Commission's work or respond to questionnaires circulated by the Commission, and collectively they adopt UNGA Resolutions making comments and decisions about the Commission's work. These allow the Commission to *record* and *assess* that practice as part of its work before it finally adopts its work on a topic in second reading. The Commission may also collect and assess state practice and evidence of *opinio juris* beyond its institutional backdrop on the basis of the research of the Special Rapporteur on a topic and comments by other ILC members, which are assessed by the Commission in Plenary and in the Drafting Committee. Additionally, the Commission's work may stimulate future state practice or the agreement or belief of law by states. Thus, the Commission's work may indirectly affect the interpretation of treaty rules as well as the determination of customary rules. First, it may record (and evaluate) means of treaty interpretation or state practice for custom identification (Section 5.2). Second, the Commission's interpretative pronouncements is a 'offer of interpretation' that may solicit the practice of states; they may stimulate the practice of states (Section 5.3).

The ILC supports this proposition in the Draft Conclusions on SASP and the Draft Conclusions on CIL. The former dissect the practice of 'non-state actors' from the practice of actors whose subsequent practice may constitute a means of treaty interpretation under the rules set forth in VCLT Articles 31(3)(b) and 32:[278] such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty (Draft Conclusion 5(2)). The latter provide that regarding the conduct of non-state actors may be relevant when assessing state practice for the purpose of formation and expression of custom (Draft Conclusion 4(3)).

5.2 Recording and Evaluating Means of Treaty and Custom Interpretation

5.2.1 Recording and Evaluating Means of Interpretation Extraneous to the Treaty

[277] Draft Conclusion 5 on SASP.
[278] Draft Conclusion 5(1)-(2).

The Commission's pronouncements may provide evidence of existing subsequent agreement and subsequent practice of treaty parties by collecting, recording and evaluating them. If the agreement or practice recorded therein meets the criteria of the rule in VCLT Article 31(3)(a) or (b) respectively it shall be taken into account together with the context of the VCLT pursuant to the general rule of interpretation. If the practice recorded is that of some treaty parties in the application of the treaty, but does not establish the agreement of all parties, it may constitute a supplementary means of interpretation under the rule set out in VCLT Article 32.

Additionally, the Commission often resorts to the preparatory works of a treaty in its work on a topic that exclusively deals with that treaty's provisions or touches partly or incidentally on that treaty's provisions. In the Guide to Practice on Reservations to Treaties, the Draft Conclusions concerning SASP and the Draft Guidelines on Provisional Application the Commission has relied on the preparatory work of the VCLT.[279] It has resorted to its own work prior to the conclusion of the VCLT, which it implicitly considers as preparatory work of that treaty.[280] The ICJ has relied on the Commission's recording and construction of the preparatory works of the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') in its Judgment in *Bosnia and Herzegovina v Serbia and Montenegro*.[281] Bosnia and Herzegovina argued that the destruction of historical, cultural and religious heritage of the protected group was an act of genocide within Article II of the Genocide Convention. The Court rejected this interpretation.[282] It resorted to a decision of the UNGA Sixth Committee not to include cultural genocide in the list of punishable acts, and noted that the ILC 'subsequently confirmed this approach'[283] by itself recording the preparatory works of the Genocide Convention.[284]

5.2.2 Recording and Evaluating Means of Custom Interpretation

The ILC Statute (Article 24) requires the Commission to 'consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law'. In order to make a pronouncement as to existence and content of custom within its mandate under Article 24, the Commission does not only compile state practice or instances that may or may not constitute evidence of *opinio juris*, but also *assesses* the material before it and makes an evaluation of state practice for determining whether a rule of customary international law exists (and if not what direction the practice is taking which may lead in law in the future), but also for determining the content of such a rule (in this latter instance, it is involved in interpretation).

5.3 Making a 'Offer of Interpretation': Stimulating State Practice

The Commission's work may solicit the practice of states – parties to the VCLT and third states. This study does not examine whether the Commission's pronouncements

[279] See analysis in Section 3.
[280] Commentary to Draft Conclusion 4, p. 140, para. 9
[281] *in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, ICJ Reports 2007, p. 43, para. 344.
[282] Ibid.
[283] Ibid.
[284] The Court cited the 'Report of the International Law Commission on the work of its Forty-eighth Session, Yearbook of the International Law Commission 1996, Vol. II, Part Two, pp. 45-46, para. 12'.

constitute a 'offer of modification' of the VCLT provisions to the VCLT parties by their subsequent practice,[285] or by the creation of new custom, which may modify treaty provisions.[286] Even assuming that treaty modification can take place on such grounds,[287] there is no evidence that the Commission's work discussed in this study includes pronouncements, which would involve application different from the VCLT's provisions. The Commission expressly suggests that it does not 'propose' the VCLT's modification (and implicitly of the customary rules therein).[288] No government in written and oral comments to the Commission's work has suggested that the Commission's pronouncements would revise the VCLT or that the intention of the state making the comment entails the modification of the VCLT.

The reactive practice of states may take place within and beyond the UN system leading to a wider impact on the interpretation of the VCLT and of customary rules. The Commission is aware of the fact that its work may trigger such practice: the Commission has expressed particular interest to guide domestic courts in interpreting, identifying and determining the legal effects on sources of international law in all the topics discussed in this study,[289] and to provide clarity in order to 'contribute to a common […] understanding' about, for instance, the role of SASP in treaty interpretation.[290]

If the subsequent practice of VCLT parties (solicited by the Commission's interpretative pronouncements) meets the requirements of VCLT Article 31(3)(b) it shall be taken into account when interpreting the VCLT. If not, assuming that it is subsequent practice of some parties in the application of the VCLT, it may constitute supplementary means of interpretation (VCLT Article 32).[291] It is also possible that the practice of non-state actors may give rise to a future subsequent agreement by VCLT parties. Such an agreement does not need to be binding in form.[292] It could take the form of a (non-binding) resolution of the UNGA, as long as it demonstrates a common understanding of VCLT parties concerning the interpretation of the VCLT.[293] As a separate matter, the

[285] The Commission in its work on the law of treaties provisionally adopted in 1964 a provision that dealt with modification of treaties by subsequent practice (Draft Article 38). This provision was later withdrawn in light of the governments' comments. ILCYB 1966, p. 236, para. 3. The VCLT does not include such a provision. The proposition that a treaty may be modified by the the parties' subsuquent practice is doubeted. G. Hafner, Subseuqnt Agreements and Practice: Between Interpretation, Informal Modification and Formal Amendment, in G. Nolte (ed), *Treaties and Subsequent Practice* (OUP, 2013), pp. 105-122 at 117.

[286] A draft article (68(c)) which provided for modification of treaty by the emergence of custom had been included initially in the draft articles on the law of treaties (ILCYB (1964), Vol. II, p. 198), but was later deleted in light of comments of governments. About conditions for such modification: N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (OUP, 1994), pp. 137-139, 146-149.

[287] Supporting the proposition that a treaty may be modified by the parties' subsequent practice: *Delimitation of the Border (Ethiopia v Eritrea)* (2002) 25 RIAA 83, para 3.29; *Soering v United Kingdom* (1989) 11 EHRR 439 at para. 103;. In support of the proposition that a treaty may be modified by emergence of a subsequent cusromary rule: *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 3 at 22-23, paras. 51-52 (However, the Court's prounouncement was an obiter dictum since the 1958 Geneva Convention on the High Seas was not binding on one of the parties to the dispute, Iceland).

[288] See analysis in Section 3. If the Draft Conclusion 3 proposed by the Special Rapporteur on Jus Cogens is introduced, it may be a proposal to depart from the VCLT: it will add a separate requirement for the formation and identification of *jus cogens* beyond VCLT Article 53 and existing custom.

[289] See analysis in Section concerning all topics.

[290] See Section 3.3.

[291] Draft Conclusion 2(4) on SASP.

[292] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 267; G. Nolte, Subsequent Agreements and Subsequent Practice of States Outside of Judicialor Quasi-judicial Proceedings, Third Report for the ILC Study Group on Treaties over Time, in G. Nolte (ed.), *Treaties and Subsequent Practice* (OUP, 2013), pp. 307–386 at 375.

[293] US—Clove Cigarettes, para. 267; Draft Conclusion 10(1) on SASP.

Commission's pronouncements may trigger practice of states. These may lead to the establishment of *opinio juris* concerning the content of customary rules.

5.4 The Commission's Interpretative Pronouncements as a Supplementary Means of Interpretation and a Subsidiary Means for the Determination of Rules of Law

The Commission's interpretative pronouncements may fall within the scope of supplementary means of interpretation set forth in VCLT Article 32, which permits the discretionary recourse to supplementary means in certain circumstances. The rule set forth in VCLT Article 32 provides non-exhaustive examples: the circumstances surrounding the treaty's conclusion and the treaty's preparatory works. The Commission's pronouncements made subsequently to the conclusion of the VCLT do not fall within any of these. Nor do they constitute subsequent practice of the parties in the treaty's application in relation to which agreement of all parties has not been established, which may still fall within VCLT Article 32.[294] However, they may constitute other supplementary means of interpretation.

Some decisions of international courts and tribunals and of domestic courts support the view that academic writing may constitute a supplementary means of interpretation.[295] Some additional support to this proposition may be found in the fact that Article 38 paragraph (d) of the ICJ Statute refers to 'the teachings of the most highly qualified publicists of the various nations' as a subsidiary means for determining rules of law.[296] Determining rules of law involves ascertaining the existence of rules as well as determining their content. Teachings of publicists (within the meaning of Article 38(d) of the ICJ Statute) may serve as a subsidiary means for determining the existence and the content of rules of customary international law.[297] However, the subsidiary means within Article 38(d) of the ICJ Statute is not limited to the determination of customary rules. They are available in relation to all sources provided for in its paragraphs (a) to (c): treaties, custom and general principles of law. In relation to treaties, it is more likely that subsidiary means are useful for determining the content of treaty rules (i.e. more relevant for their interpretation) rather than for determining the existence of a treaty. In any event, although the means in Article 38(d) of the ICJ Statute and Article 32 of the VCLT are different,[298] both are not authentic and recourse to them is voluntary.

It does not follow that any teachings constitute a supplementary means of treaty interpretation. This is not the case even in relation to subsidiary means for the determination of rules of law within the meaning of Article 38(d) of the ICJ Statute. The quality of the 'teaching' in question and its focus on *lex lata* (interpreting by reference to probative evidence), are qualitative factors for determining whether such teachings are to

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[294] Draft Conclusion 2(1) on SASP.

[295] See, R. Gardiner, *Treaty Interpretation* (OUP, 2nd ed, 2015), pp. 402-403.

[296] In relation to the ILC's work in general in this respect: A. Zimmermann, K. Oellers-Frahm, C. Tomuschat, C. Tams, M. Kashgar, D. Diehl (eds), *The Statute of the International Court of Justice: A Commentary* (OUP: 2nd ed, 2012), p. 230; A. Pellet, L'adaptation du droit international aux besoins changeants de la société internationale, 329 *RCADI* (2007), pp. 9-47 at 42.

[297] Commentary to Draft Conclusion 14, Draft Conclusions on Identification of Customary Interantional Law, Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, pp. 76-117 at 111, para. 2.

[298] The former provides the tools that the ICJ may apply in order to determine the applicable law; the latter provides means of interpretation regardless of judicial proceedings. Special Rapporteur Nolte, Fourth Report, International Law Commission Sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, A/CN.4/694, http://legal.un.org/docs/?symbol=A/CN.4/694, p. 27, para. 64.

be resorted to as subsidiary means for determining rules of law under the ICJ Statute.[299] As shown in Section 5.2.2, the Commission not only records, but evaluates state practice to determine whether a customary rule exists and also interprets the rule in order to determine its content. The quality of the Commission's assessment and interpretation (of custom and/or treaty rules) is relevant in determining whether the Commission's pronouncements may be resorted to as supplementary means of interpretation (for treaty interpretation) or as a subsidiary means for determining the content of customary rules (for custom interpretation).

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,[300] the ICJ had jurisdiction over disputes concerning the Convention on the Prevention and Punishment of the Crime of Genocide (1948).[301] When interpreting the terms of Article II of that Convention, the Court resorted to the Commentary to the ILC Draft Code of Crimes against the Peace and Security of Mankind (1996).[302] The Commentary to Article 17 of the 1996 Draft Code of Crimes, which was cited in the ICJ's Judgment, recognises that the rule therein is customary and that Article 17 reproduces the definition of genocide in Article II of the Genocide Convention. The ICJ used the Commission's interpretative pronouncement as a supplementary means to confirm the meaning that it attributed to Article II of the Genocide Convention. In *Jurisdiction Immunities*, the ICJ was called to determine the existence and content of the customary rule concerning state immunity.[303] It noted that the ILC concluded that the rule of State immunity had been 'solidly rooted in the current practice of States' and that the Commission's pronouncement 'was based upon an extensive survey of State practice'.[304] The Court did not only reflect on the Commission's record of state practice, but also on the Commission's assessment of this extensive survey vis-à-vis the existence of the rule, and the content of the alleged rule.

The interpretative pronouncements of the ILC concerning already concluded treaties may (under some circumstances) constitute a supplementary means of interpretation within the meaning of VCLT Article 32, and may (voluntarily) be resorted to by the interpreter under the conditions prescribed in the rule set forth in that provision. They also constitute a subsidiary means for determining rules of law within the meaning of Article 38(d) of the ICJ Statute, which may be resorted to, when determining the content of a customary rule.

5.5 Interim Conclusion

The Commission's interpretative pronouncements, in the texts of the non-binding instruments that it adopts and especially in their Commentaries records and evaluates existing state practice, which may establish the agreement of VCLT treaty parties as to its interpretation or of states generally concerning the content of customary rules set forth therein. The Commission's work (texts and commentaries) also solicits the reactive practice of states that may be relevant for the interpretation of the VCLT (or other treaties that they may interpret) or of customary international law. This is especially so

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[299] Commentary to Draft Conclusion 14, Draft Conclusions on Identification of Customary Interantional Law, Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, pp. 76-117 at 111, para. 3.
[300] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, ICJ Reports 2007, p. 43.
[301] Ibid, para. 149.
[302] Ibid, para. 186.
[303] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, paras. 54-56.
[304] Ibid, para 56; ILCYB (1980) Vol. II, Part 2, p. 147, para. 26.

given that the Commission is composed of 34 international law experts on the basis of geographic representation having been voted by the UNGA, it is institutionally established within a framework that encourages and requires it to interact with states, and it places emphasis and pays attention to thoroughly providing and assessing state practice and determining whether agreement or *opinio juris* exists (vis-à-vis the ascertainment of rules and their content) as well as the extent of such agreement. It is for these reasons that in practice states and national and international courts place particular weight to the Commission's pronouncements. The Commission's pronouncements – depending on their quality - may provide a 'interprétation doctrinale' of particular weight,[305] and may constitute a supplementary means of interpretation vis-à-vis treaties or a subsidiary means for the interpretation of customary international law.

6. Interpretation as a Means of Strengthening International Law

The criticism charged at the Commission that it is no longer successful because it has run out of topics of work and is engaged in the drafting of non-binding instruments relating to topics that it has already dealt with is misplaced both in terms of political background and in terms of normative background. In the context of the Cold War, and especially during the decolonization process and its aftermath, the Commission's success was measured by reference to the form of the topics of work, and conventions were perceived to be the most successful outcomes of the Commission's work,[306] because treaties were perceived as the most appropriate means of codification ('legislative codification'). The negotiation and conclusion of a treaty on the law of treaties was seen as an indispensable medium through which state sovereignty and equality of states would be pronounced by allowing newly independent states to participate in the formation of rules by which they would be bound.[307] Additionally, the choice of 'legislative codification' may also be explained against the normative background of the time: international law was not as yet a mature body of law. In 1955, Sir Hersch Lauterpacht criticized the ILC's objective of 'codification of existing law' for being too narrow, since at the time there was not a sufficient body of customary rules to be codified.[308] Moreover, not necessarily all topics of the Commission's work are appropriate to take the form of a treaty: for instance, a treaty on the identification of custom or on jus cogens would not be a natural choice.

The twenty-first century offers a very different legal and political landscape for international law. More than 60 years after Sir Hersch's assessment, it should not come as a surprise that international law has considerably proliferated and grown. In the first two decades of the twenty-first century the political contours in which international law is formed and applied are different from those during the Cold War. The 1990s was a period of enthusiasm for multilateralism and the rise of multilateral treaties governing different fields of international law with the consequence of numerous specialized areas and their communities being formed.[309] This does not necessarily mean that the Commission has no purpose to serve or that it lacks material scope; it may equally mean that the scope of its work and the means it may use and propose to the UNGA may

[305] D. Anzilotti, *Cours de Droit International* (Sirey, 3ed, 1929), vol I, pp. 111-112.
[306] C. Tomuschat, The International Law Commission – An Outdated Institution?, 49 *GYIL* (2006) 77-105 at 84.
[307] R. Ago, Droit des traités à la lumière de la Convention de Vienne, 134 *RCADI* (1971) pp. 297-331 at 308; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984), pp. 3-5.
[308] Lauterpacht, 49 *AJIL* (1955) 16 at 22-23.
[309] Some examples are the WTO Agreement, numerous regional and global human rights treaties, treaties concerning the protection of the environment.

change. For instance, the questions about the relationship between the special regimes and general international law came about in the beginning of the twenty-first century. The Commission was the natural forum where these issues were debated and lead to the Fragmentation Report by a Study Group of the Commission.[310]

In the two first decades of the twenty-first century, a realization of the fact that the world is multipolar may be a reason for which agreement as to the topics that the Commission should undertake may be more difficult to achieve. However, it may also push towards the identification of rules, which are 'conceived as legitimate by all'.[311] Similarly, numerous topics of general interest have been added to the Commission's agenda since then: 'immunity of state officials from criminal jurisdiction', 'identification of customary international law', 'reservations to treaties', 'subsequent agreements and practice in relation to the interpretation of treaties', 'provisional application of treaties' and 'jus cogens'. Looking at the Commission's work as a repetitive exercise or a 'pedagogical activity' misses the crucial point about why (and how) the Commission engages with issues that have been dealt with in an earlier 'legislative codification'.

In 2011, one of the members of the ILC (2008-), Georg Nolte, pointed out in his writings that some of these topics have found their way into the Commission's work owing to the need for 'reaffirmation and elucidation' of basic rules of international law.[312] This need emerges from two main trends since the ascertainment of general rules in the previous century. First, multiple international courts and tribunals, as well as expert treaty bodies, have been established throughout the past century, and have particularly flourished in the 1990s and the first decade of the twenty-first century. These apply and interpret specialized treaties, but they also apply general international law (e.g. reservations to treaties, provisional application, jus cogens), or apply it in order to interpret the specialized rules. In both cases, they interpret such rules from their own institutional perspective. Second, even though not a phenomenon of the twenty-first century, national courts are increasingly applying international law in a wide variety of areas.[313] But, they interpret and apply international law (both treaties and custom) through their own national lenses – a challenge that appears in its starkest terms in recent national courts annulment proceedings of investor-state arbitration awards.[314] Both these trends may undermine the clarity, certainty and uniform application of international law, and eventually may weaken confidence in it.

Against this background, elucidating and reaffirming rules of general international law is necessary in order to strengthen international law. The ILC work, discussed in detail in section 3, demonstrates that the Commission has been careful in removing

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310 Conclusions on Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Commission to the General Assembly on the work of its fifty-eighth session, ILCYB (2006), Vol. II, Part 2, p. 176, paras. 238-239.

311 G. Nolte, The International Law Commission Facing the Second Decade of the Twenty-First Century, in U. Fastenrath, R. Geiger, D-E Khan, A. Paulus, S. von Schorlemer, and C. Vedder (eds), *From Bilateralism to Community Interest: Essays in honour of Judge Bruno Simma* (OUP, 2011), pp. 781-792 at 789.

312 Ibid, at 790.

313 E. Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, 102 *AJIL* (2008) 241.

314 E.g., Yukos arbitration saga: *Yukos Universal Ltd. (UK—Isle of Man) v. Russian Federation*, PCA Case No. AA 227, UNCITRAL (Energy Charter Treaty), Interim Award on Jurisdiction and Admissibility, 30 November 2009; *Russian Federation v. Yukos Universal Limited*, Hague District Court, Judgment of 20 April 2016, C/09/477160/HA ZA15-1: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230. Sanum arbitration saga: *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; *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd*, High Court of Singapore, [2015] SGHC 15; *Sanum Investments Ltd v The Government of the Lao People's Democratic Republic*, Court of Appeal of Singapore, [2016] SGCA s7, 26 September 201.

ambiguities in the existing law without revising it. It has also shown that the Commission considered that clarification would prevent disputes between states concerning the content of rules, would assist in filling gaps in the VCLT, while reaffirming the content of customary rules, and would contribute to a 'common background understanding, minimizing possible conflicts [in the sense of opposing interpretations]', while establishing whether the existing scope of rules applies to new developments. All these support the proposition that the Commission aims at persuading states to continue to use international law as a medium for creating, maintaining and destroying norms that regulate their conduct.[315]

But, strengthening international law is neither a new goal of the Commission nor is it confined to the law of treaties in the twenty-first century. It has been a long-standing goal of the ILC.[316] In 1946, Sir Cecil Hurst, a former Judge of the PCIJ, had pleaded for the codification of international law as necessary for emergence of a 'sound legal system', of which one (of the five elements) is a 'well developed body of law'.[317] Failure to produce such a legal system 'would render it almost impossible to persuade what we call the man in the street that international law is […] capable of constituting the foundation of law and order on which the new world is to be based.'[318] Similar views were expressed in the 1940s and 1950s.[319] In 1956, Sir Gerald Fitzmaurice, a ILC member and the second Special Rapporteur on the Law of Treaties, wrote that stability, certainty and elimination of the subjective element achieve justice, and that justice is one of the reasons why states comply with international law.[320]

The interpretative pronouncements of the Commission on reservations, interpretation and provisional application of treaties, and partly *jus cogens* remain part of this bigger and traditional vision of the Commission to strengthen international law. In relation to these topics, the Commission's vision is achieved by clarifying and reaffirming existing rules while at the same time adapting them to the needs of the twenty-first century.[321] The need for reaffirmation and elucidation of rules in the twenty-first century as part of the enduring goal of the ILC is not specifically confined to the law of treaties. It also finds expression, for instance, in its ongoing work on the identification of custom and of jus cogens,[322] or its previous work on the Draft Code of Crimes against the Peace and Security of Mankind. But, the rules on the law of treaties owing to their provenance more markedly emphasise the Commission's interpretative activity, which may be seen as a natural by-effect of the Commission's work thus far: the Commission focused on the preparation of draft conventions and operated within the political factors of the previous century.

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[315] J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law* (CUP, 2010), pp. 20-33.
[316] In relation to Article 30 of the VCLT: S. Ranganathan, Between Philosophy and Anxiety? The Early International Law Commission, Treaty Conflict and the Project of International Law, 83 *BYIL* (2013) 82-114.
[317] C. Hurst, A Plea for the Codification of International Law on New Lines, 32 *Transactions of the Grotius Society* (1946) 135-153, at 136-137.
[318] Ibid. at 140.
[319] J.L. Brierly, The Codification of International Law, 47 *Michigan Law Review* (1948-1949) 2-10 at 6; J. Stone, On the Vocation of the International Law Commission, 57 *Columbia Law Review* (1957) 16-51 at 21.
[320] G. Fitzmaurice, The Foundations of the Authority of International Law and the Problem of Enforcement, 19 *Modern Law Review* (1956) 1-13 at 12.
[321] For adaptation of international law: G. Nolte, The International Law Commission Facing the Second Decade of the Twenty-First Century, in U. Fastenrath, R. Geiger, D-E Khan, A. Paulus, S. von Schorlemer, and C. Vedder (eds), *From Bilateralism to Community Interest: Essays in honour of Judge Bruno Simma* (OUP, 2011), pp. 781-792 at 790 (through interpretation); J. Stone, On the Vocation of the International Law Commission, 57 *Columbia Law Review* (1957) 16-51 at 21.
[322] The latter topic inadvertently touches on the work of the ILC on the law of treaties because the fist authoritative definition of jus cogens was introduced in the VCLT.

Contrary to a general perception that customary international law suffers from lack of clarity and that this is a factor for which the ILC prioritises non-binding instruments,[323] the ILC work on topics that relate to the law of treaties demonstrates that lack of clarity may characterize the content of treaty rules too.[324] Lack of clarity in draft conventions was a means for addressing a concern (especially voiced in the 1950s) that 'excessive regard for certainty' in drawing up (treaty) rules may face the rejection of states.[325] One reason for which the content of custom may be unclear is the lack of clarity in a treaty provision, which was the material source of the customary rule. Against this normative background and in the absence of concrete rules concerning custom interpretation, the Commission interprets both custom and treaty rules. It often identifies custom and then takes it into account when interpreting the content of treaty rules, or it assumes that the content of some customary rules is identical to that of treaty rules.

The Commentaries to the topics examined in this study indicate the Commission's intention to reiterate that international law remains a medium in international affairs, and the Commission has a vision about the contribution of its work to international law: to strengthen international law by establishing a common understanding as to the content of basic rules and their application to new developments in an era where the application of international law is becoming the focus of more international and national actors.

7. Conclusions

The Commission's work on the Guide to Practice on Reservations to Treaties, on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, on Provisional Application of Treaties, and on Jus Cogens (and even on Fragmentation) involves interpretative pronouncements as to the content of existing treaty rules (VCLT) and customary rules reflected therein. Its interpretative activity falls within the scope of its existing mandate, but is not authentic, authoritative or binding. It does however set a presumption as to the content of some basic rules of international law, thus inviting states to react to its offer of interpretation. Their reactions within and outside the UN system may lead to an agreement as to the interpretation of the VCLT and give rise to evidence of *opinio juris* concerning the content of rules of customary international law. Moreover, owing to the Commission's composition, the quality of its work and its interaction with governments for the production of its work, the Commission's pronouncements constitute 'interprétation doctrinale' of particular weight, and set a presumption, which states have to make an effort to overturn, and may be used by the interpreter or applier of the law as a supplementary means of interpretation or as a subsidiary means for the determination of rules of law respectively.

Contrary to suggestions that the Commission's work in the twenty-first century has been reduced merely to academic work, which is reflected in the choice of form that its work takes (guidelines and conclusions), seen against the wider legal and political context of its time, the Commission's interpretative pronouncements demonstrate the Commission's own understanding about its potential contribution to international law. This also explains the caution it demonstrates to interpret but not to change existing rules of international law. The Commission has taken upon itself to revisit some intractable legal issues of general international law, such as the effect of impermissible reservations; the effect of pronouncements of conferences of parties and of expert treaty

[323] F.L. Bordin, Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law, 63 *ICLQ* (2014) 535-567 at 546-558.
[324] J. Stone, On the Vocation of the International Law Commission, 57 *Columbia Law Review* (1957) 16-51 at 19.
[325] Ibid, pp. 32-33.

bodies on reservations and on treaty interpretation; as well as the constitutive elements of *jus cogens*. The Commission has also chosen to do so at a very challenging time for itself, when questions have been raised as to whether the preconditions for its past success are disappearing,[326] or are significantly changing.[327] Yet, it addresses the explicit needs of states to clarify the content of some rules on (or touching on) the law of treaties, and its work reveals its vision about international law: the desire to strengthen international law, as a continued medium of interaction between states, by reaffirming and elucidating its content.

[326] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001), XX.
[327] G. Nolte, The International Law Commission Facing the Second Decade of the Twenty-First Century, in U. Fastenrath, R. Geiger, D-E Khan, A. Paulus, S. von Schorlemer, and C. Vedder (eds), *From Bilateralism to Community Interest: Essays in honour of Judge Bruno Simma* (OUP, 2011), pp. 781-792 at 783-785.