The Draft Conclusions on the Identification of Customary International Law were adopted by the International Law Commission on first reading along with commentaries in 2016 and are considered by the Commission on second reading in the current session. They systematise and clarify secondary rules concerning the identification of CIL. And for this reason they make a tremendous contribution to international law, as a legal order, and to the practice of international law: because they ensure clarity, certainty and predictability of secondary rules and thus have a systemic impact ensuring clarity, certainty and predictability of primary rules of CIL across all fields.

I will comment on two issues.

First, I will touch on the silence of States, as evidence of *opinio juris*.

Second, I will discuss how the Draft Conclusions deal with 'Teachings' and the outputs of the Commission, and the implications of the Draft Conclusions for the practice of international law and the Commission's place and authority in international law.

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Starting with silence, the inaction of States vis-à-vis the practice of other States may be evidence of *opinio juris*. Because a number of reasons may explain State inaction other than the belief of law~~, Some states may not have the bureaucratic capacity to react. A state may not consider that a particular situation affects its interests or it may wish to keep its options open or may prefer to avoid drawing attention to an issue by responding~~. Draft Conclusion 10(3) introduces considerable limitations for an assessment of inaction as opinio juris. According to it: 'failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction'.

Two conditions have to exist in order for silence to constitute evidence to *opinio juris*: first, circumstances exist that call for some reaction; and second, the 'silent' State is in a position to react within reasonable time.[1] The requirement that the silent State is able to react does not deal with whether the State has the available resources to react, but whether it has knowledge of the conduct that calls for reaction.[2]

Two points arise in relation to circumstances that call for some reaction:

[1] Regarding CIL: Draft Conclusion 10(3) on CIL Identification and Commentary, ILC Sixty-Eighth, *supra* note 47, at 99-101; Ian C. McGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y.B. INT'L L. 293, 307 (1953).
[2] Commentary to Draft Conclusion 10(3) on CIL Identification, ILC Sixty-Eighth, *supra* note 47, at 101, para 7.

First, when read in the context of the Commentary, Draft Conclusion 10(3) only covers inaction vis-à-vis the practice of States. It does not seem to include State inaction vis-à-vis the practice of international organisations; and as a separate matter, it does not include the inaction of States vis-à-vis the conduct of other non-state actors.

The Commission's view in the Draft Conclusions on SASP has been that the pronouncements of 'expert treaty bodies', which have a close connection and explicit functions vis-à-vis particular treaties, are NOT circumstances calling for the reaction of treaty parties in the absence of which their agreement is tacitly reached.[3] I presume that in the topic of Identification of CIL the Commission implicitly takes the position that the pronouncements of non-state actors as to the existence or non-existence of rules of CIL are not circumstances that call for the reaction of States; and thus state silence in such cases cannot constitute evidence of *opinio juris*.

~~In 2010, the Special Tribunal for Lebanon found that: "[t]he combination of a string of decisions [of international courts and tribunals] coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved."[4]~~

In *Kasikili/Sedudu Island*, the ICJ held that the fact that a state did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not entail that a (tacit) agreement had been reached between the parties to the dispute.[5] *A fortiori*, given that the Commission has no specific mandate concerning particular customary rules, its pronouncements are not circumstances that call for the reaction of states, in the absence of which their inaction is to be interpreted as acceptance of law.

Second, the Commentary to Conclusion 10(3) indicates that practice that *directly or indirectly* affects the interests or rights of the State failing or refusing to react may constitute a circumstance that calls for reaction. The word 'indirectly' may open up considerably the situations, which may call for the reaction of States. And I suspect that this may be further addressed in the Commentary on second reading.

But, I think it is worth remembering that the International Court of Justice has taken into account the inaction of States in the Sixth Committee vis-à-vis the Commission's work on topics of general scope (and where perhaps State conduct

[3] Draft Conclusion 13(3) on SASP and Commentary, Report of the International Law Commission on the work of its Sixty-eigtth Session (2 May-10 June and 4 July-12 August 2016), A/71/10, p. 229 and 236, paras. 18-19.
[4] Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, Case No. CH/AC/2010/02, para. 47 (Special Tribunal for Lebanon, November 10, 2010).
[5] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, ICJ Reports 1999, p. 1045 at 1089-1091, paras. 65-68.

may have been seen as indirectly only affecting the interests of other States) in order to identify some rule of CIL (for instance in the Jurisdiction Immunities case), but it has not *solely* relied on State inaction. Inaction was only one instance of evidence among a variety of other evidence for the ascertainment of *opinio juris*.

43. One argument could be that all states may have an interest in the formation and interpretation of secondary rules on the law of treaties, on *jus cogens* or the law on state responsibility, because these are systemic rules that will apply in relation to all fields of international law (unless deviated from by *lex specialis*). The same could be said – albeit for different reasons connected to the community-based nature of obligations established - for rules concerning the prohibition of genocide[6] or crimes against humanity[7] or even those concerning the high seas[8] or the protection of the atmosphere.[9] However, it does not necessarily follow that an acceptance or rejection by a State of the content of these rules directly affects the interests of all other states.

Perhaps an approach that allows for some degree of gradation may be useful. In relation to some pronouncements, the practice of states may be concordant and overwhelming in accepting or rejecting a pronouncement as restating the content of an existing rule. Inaction by other states in that context may be relevant as acquiescence. Further, an interpreter and applier of the law will **not only** consider the responses of governments to the ILC's work in order to distil some tacit agreement or *opinio juris* concerning the rule's content. Numerous means will be examined together and the assessment of the responses of governments will not depend exclusively on instances of inaction in the Sixth Committee. In *Jurisdiction Immunities*, the ICJ took into account the states' silence in the Sixth Committee in order to identify some common understanding in the preparatory works of a treaty for the purpose of interpreting it (and from that determining the content of a customary rule)[10] and in order to identify a rule of custom.[11] However, it has done so in the context of negotiations of a convention, owing to the pleadings of the parties to the dispute, and in any event, the Court did not exclusively focus on instances of inaction, but examined additional evidence outside the Sixth Committee.[12]

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[6] E.g. Article 17, Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its Forty-eighth Session, ILCYB 1996, Vol. II, Part Two, pp. 45-46.
[7] Draft Articles on Crimes Against Humanity, Report of the International Law Commission on the work of its Sixty-ninth Session (1 May-2 June and 3 July-4 August 2017), A/72/10, pp. 9-127.
[8] Draft Article 26-48 concerning the Law of the Sea, ILCYB 1956, Vol. II, pp. 277-286.
[9] Guidelines on the Protection of the Atmosphere, Report of the International Law Commission on the work of its Sixty-ninth Session (1 May-2 June and 3 July-4 August 2017), A/72/10, pp. 147-162.
[10] *Jurisdiction Immunities*, para. 69.
[11] Ibid, para. 89.
[12] In relation to custom: J. Crawford, Chance, Order, Change: The Course of International Law, 2013 *RCADI* 13 at 109-110.

Moving on to teachings and the Commission's work, it could be argued that international courts and tribunals, and especially the ICJ, often rely on the Commission's work because States by their inaction have provided evidence of acceptance of the Commission's pronouncements as law. But, there is hardly any evidence to this effect.

Rather, the International Court of Justice ('ICJ') pursuant to Article 38 of its Statute is instructed to apply teachings of the most highly qualified publicists of the various nations 'as subsidiary means for the determination of rules of law'. These are not sources of international law, but they provide a toolkit that can be used by an applier of international in order to receive guidance as to the existence and content of rules, including CIL rules.

In practice, the Court has rarely invoked teachings in its Judgments, Advisory Opinions, and Orders, with the perhaps of the Commission's outputs. More specifically, the Court has relied upon the Commission's work in 23 cases (20 contentious proceedings and 3 Advisory Opinions). Additionally, counsel routinely calls the attention of the Court to teachings of publicists in written and oral arguments. Moreover, judges very often cite 'teachings' in their individual opinions.

The way in which the Draft Conclusions on Identification of CIL deal with teachings and the Commission's own work is thus crucial in the practice of international law before international courts and tribunals.

The Draft Conclusions do not include a draft conclusion specifically dedicated to the Commission's own outputs. The Special Rapporteur had proposed to refer to the Commission's outputs in the Commentary to Draft Conclusion 14 on 'Teachings'. Other ILC members supported the option of having a special Draft Conclusion dedicated to the Commission, which would signify its special status in the identification of CIL.

Ultimately, the Commission's outputs are expressly dealt with in the introductory commentary to Part V of the Draft Conclusions concerning the 'Significance of certain materials for the identification of CIL'. The Commission's pronouncements are not given a special status over 'Teachings' under Draft Conclusion 14, which seems to also apply to the Commission.

More specifically, drawing on Article 38(1)(d) of the Statute of the International Court of Justice, Draft Conclusion 14 reads:

'Teachings of the most highly qualified publicists of the various nations *may serve as* a subsidiary means for the determination of rules of customary international law'

The crucial aspect of this Draft Conclusion for the practice of international law is that it introduces limitations on which teachings can serve as a subsidiary means

for the determination of rules of CIL. The term 'may serve as' *calls for the caution of those who interpret and apply international law* when drawing support from writings.[13]

In relation to the outputs of international expert bodies, such as the Institut de Droit International or the International Law Association, the Commentary clarifies that the authority of a given work [of such an international expert body], is essential for it to serve as a subsidiary means for the determination of rules of law.[14] 'The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, *the care and objectivity with which it works on a particular issue*, the support a particular output enjoys within the body and the reception of the output by States'.[15]

Similarly to the Commentary to Draft Conclusion 14, the Introductory Commentary to Part V introduces some non-exhaustive criteria for assessing 'the *weight* to be given to the Commission's determinations [as to the existence or non-existence of CIL]'. More specifically, such weight 'depends […] on various factors, *including* sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output.'[16]

These parts of the Commentary, but also the whole of the Draft Conclusions are crucial for the Commission itself.

Today, States at times express concern that international courts and tribunals give the Commission's pronouncements too much authority by assuming that all of its pronouncements reflect existing law.[17] In an era where the Commission is moving away from its 'codification by convention' paradigm and codification through non-binding instruments becomes the main pattern, such criticisms may become more pronounced. The Commission may thus be encouraged to demonstrate a consistent adherence to methodology, and to be more expressive about the results of the application of such methodology.

The Commentary to Draft Conclusion 14 refers to 'the care and objectivity with which an expert body works on a topic' as one of the factors that will determine whether a particular output may be used as a subsidiary means for the determination of rules of CIL. What the Commission calls 'care and objectivity' in this topic, Thomas Franck called 'adherence'. He argued that rules that are legitimate are more likely to be complied with, and one of the factors that make rules legitimate is their adherence to secondary rules.[18]

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[13] p. 111, para. 3.
[14] Int'l Law Comm'n, Rep. on the work of its Sixty-Eighth Session, 74-117, UN Doc. A/71/10 (2016), p. 111, para. 3.
[15] Emphasis added. Ibid, p. 112, para. 5.
[16] Int'l Law Comm'n, Rep. on the work of its Sixty-Eighth Session, 74-117, UN Doc. A/71/10 (2016), pp. 101-102, para. 2.
[17] See for instance the statements of Spain, China, Switzerland in Sixth Committee (2017) in relation to the ILC's Report (2017).
[18] T. Franck, *Fairness in International Law and Institutions* (OUP, 1995), pp. 30, 40-46.

Consistent 'adherence' to the secondary rules for identifying rules of CIL is an important basis on which the Commission's work is and will be relied upon. This is because adherence to methodology operates as a restraint over the Commission's discretion: it anchors its output in State practice, rather than on policy preferences.

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To conclude, the Commission's Draft Conclusions on Identification of Customary International Law are invaluable for the practitioner of international law. But, also crucially they are invaluable for the Commission itself. The Draft Conclusion on Identification of Customary International Law should consciously guide the Commission's work, if the Commission is to retain and even expand its influence.

~~However, it should not come as a surprise that the Commission moved to consensus in the 1970s: in the aftermath of the *North Sea Continental Shelf* (1969), where the Court found that the 'status of the rule [set forth in Article 6] of the [Geneva] Convention [as customary or not] depended mainly on the *processes* that led the Commission to propose it'. The Court noted that some doubts had been voiced in the Commission about whether the equidistance principle was a customary rule, and concluded that Article 6 of the Geneva Convention did not crystallise a rule of CIL.~~