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

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Abstract

This article argues that the International Law Commission (ILC) interprets international law. In recent years, in documents intended to remain non-binding, the Commission has made interpretative pronouncements about a treaty in force, the Vienna Convention on the Law of Treaties, and customary international law reflected therein. This development is called the ‘codification by interpretation’ paradigm in this article. This article argues that interpretation falls within the ILC’s function, and it analyses the effects of the Commission’s interpretative pronouncements. It explains that the ILC’s interpretative pronouncements are not per se binding or authentic. However, they may trigger an interpretative dialogue with states. The ILC’s interpretative pronouncements may constitute a focal point for coordination among states, a subsidiary means for determining rules of law and a supplementary means of (treaty) interpretation. The aim of the ILC’s ‘codification-by-interpretation’ paradigm in the four topics considered in this article is to introduce clarity and predictability into secondary rules on the law of treaties, thus ensuring the clarity and predictability of primary treaty rules across all fields of international law. The ILC endeavours to convince states to use international law as a medium by which they regulate their affairs.

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1 Introduction

In the previous century, the International Law Commission (ILC) followed a ‘codification-by-convention’ paradigm, whereby it mainly prepared texts intended to form the basis of future conventions. This paradigm was perceived as the central way of codifying and developing customary international law (CIL). The 1969 Vienna Convention on the Law of Treaties (VCLT) is the prime example of the ‘codification-by-convention’ paradigm in the law of treaties.¹ On the cusp of a new era, the ILC has returned to the law of treaties. In four topics of work, the ILC – in documents that are intended to remain non-binding – has filled gaps in, and interpreted, a treaty in force – the VCLT – and developed CIL set forth therein and beyond the VCLT. This article focuses on one aspect of this new development in the ILC’s work: the fact that the ILC interprets international law. The ILC has interpreted and interprets in other topics for different reasons and to various degrees.² However, while in other topics interpretation is tangential, in the four topics discussed here the interpretation of the VCLT’s rules is a central focus of the ILC. This development, which this article calls the ‘codification-by-interpretation’ paradigm,³ is impactful and significant – impactful because it leverages the VCLT as a treaty and its impact on CIL by ensuring the clarity and relevance of the rules therein; significant because, by reaffirming and clarifying the secondary rules on the law of treaties, the ILC influences the creation, operation and termination of treaty primary rules across all fields of international law and has the potential to instil international law with continued legitimacy.

It has been argued that, because interpretation operates as the functional equivalent of truth, ‘whoever controls the process of interpretation, controls the truth’.⁴ It is not surprising that some governments in their statements in the Legal Committee

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

² See the interpretation of the term ‘genocide’ in Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 1948, 78 UNTS 277 (ILC, Draft Code of Crimes against the Peace and Security of Mankind (Draft Code of Crimes), UN Doc. A/51/10 (1996), at 17–56, 44–47), and of the terms ‘widespread or systemic attack’ and ‘attack directed against any civilian population’ in the definition of crimes against humanity in ICC Statute (Article 7) (ILC, Draft Articles on Crimes against Humanity (adopted on first reading), UN Doc. A/72/10 (2017), at 10–127). See also commentary to Article 51 of the Articles on State Responsibility (on proportionality of countermeasures), which refers to the articulation by the International Court of Justice (ICJ) of the customary international law (CIL) rule in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, that ‘countermeasures must be commensurate with the injury suffered, taking account of the rights in question’, and interprets this pronouncement by the Court (and CIL reflected therein) that ‘the rights in question’ involve a quantitative and qualitative assessment of proportionality and include ‘the effect of a wrongful act on the injured State [and] on the rights of the responsible State’. ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries Thereto’ (ILC Articles on State Responsibility), 2(2) *ILC Yearbook* (2001) 30, at 135, paras 6–8. Statute of the International Law Commission (ILC Statute), GA Res. 174(II), 21 November 1947, as amended: GA Res. 485(V), 12 December 1950; GA Res. 984(X), 3 December 1955; GA Res. 985(X), 3 December 1955; GA Res. 36/39, 18 November 1981.

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

⁴ Klabbbers, ‘Virtuous Interpretation’, in M. Fitzmaurice, O. Elias, P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010) 15, at 20.

of the United Nations General Assembly (UNGA) (Sixth Committee) appear eager to clarify whether the ILC's outputs are a 'binding tool for treaty interpretation'⁵ or 'a subsequent agreement and/or practice with respect to the interpretation of ... the VCLT'.⁶ Further, the ILC's interpretative paradigm comes at a time when the ILC faces numerous challenges: some states appear sceptical about how much authority international courts and tribunals, and especially the International Court of Justice (ICJ), may give to the ILC's pronouncements.⁷ Because international lawyers place emphasis on the pronouncements of international courts and tribunals, the ILC's power is enhanced through the influence that its pronouncements may have on the reasoning of the ICJ and other international courts and tribunals. As of 31 January 2020, the ICJ has relied on the ILC's work expressly in 23 decisions.⁸ Faced with the ILC's

⁵ Japan, Summary record of 17th meeting, Sixth Committee, 28 October 2013, A/C.6/68/SR.17, at 15, para. 83.

⁶ Slovenia, Sixth Committee, Summary record of 21st meeting, 23 October 2018, A/C.6/73/SR.21, at 8–9, para. 49.

⁷ Commenting that the ILC should expressly draw a distinction between *lex lata* and *lex ferenda* China, 27 October 2017, UN Doc. A/C.6/72/SR.23, at 9; Comments on Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction: Spain, 27 October 2017, UN Doc. A/C.6/72/SR.24, at 7; Comments on Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction: Switzerland, 26 October 2017, UN Doc. A/C.6/72/SR.22, at 12.

⁸ Contentious proceedings include: *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, paras 48–50, 54–55, 95; *Continental Shelf (Tunisia v. Libia)*, Judgment, 24 February 1982, ICJ Reports (1982) 18, paras 41, 100, 119; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, ICJ Reports (1986) 14, para 190; *Gabčíkovo-Nagymaros Project*, *supra* note 2, paras 47, 50–54, 58, 123; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, 11 June 1998, ICJ Reports (1998) 275, para. 31; *Kasikili/Sedudu Island (Botswana v. Namibia)*, Merits, 13 December 1999, ICJ Reports (1999) 1045, para. 49; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, 16 March 2001, ICJ Reports (2001) 40, para. 113; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Merits, 10 October 2002, ICJ Reports (2002) 303, para. 265; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Merits, 19 December 2005, ICJ Reports 168, paras 160, 293; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, 26 February 2007, ICJ Reports (2007) 43, paras 173, 186, 199, 344, 385, 398, 420, 431; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Merits, 8 October 2007, ICJ Reports (2007) 659, para. 280; *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo)*, Preliminary Objections, 24 May 2007, ICJ Reports (2007) 582, paras 39, 64, 84, 91, 93; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Merits, 3 February 2009, ICJ Reports (2009) 61, para. 134; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ Reports (2010) 14, para. 273; *Maritime Dispute (Peru v. Chile)*, 27 January 2014, ICJ Reports (2014) 3, paras 112–117; *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Merits, 3 February 2012, ICJ Reports (2012) 99, paras 56, 69, 89, 137; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Island v. India)*, Jurisdiction and Admissibility, 5 October 2016, ICJ Reports (2016) 255, para. 42; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, 5 October 2016, ICJ Reports (2016) 833, para. 45; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, 2 February 2018, ICJ Reports (2018) 15, para. 151; *Jadhav Case (India v. Pakistan)*, ICJ judgment of 17 July 2019, paras 77–85, 108, available at: www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf. Advisory opinions include: *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, paras 47, 49–50; *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 29 April 1999, ICJ

increased authority, states might endeavour to downplay the ILC's interpretative work by criticizing it as falling outside the ILC's mandate.

This article argues that interpretation falls within the ILC's existing functions – 'the progressive development of international law and its codification' – and that although the ILC's interpretations are not *per se* a binding or 'authentic'⁹ means of interpretation, they constitute an 'offer of interpretation' to states – the actors that make international law – and are intended to trigger their reaction and lead to their future agreement or *opinio juris*. Further, the ILC's interpretations serve as a subsidiary means for determining rules of law, including their content, and may constitute a supplementary means of treaty interpretation. Ultimately, the ILC's 'codification-by-interpretation' paradigm in the four topics examined in this study forms part of the ILC's long-lasting goal to instil international law with legitimacy.

This article focuses on four topics in the law of treaties: (i) the 2011 Guide to Practice on Reservations to Treaties (Guide to Practice), which interprets, *inter alia*, Articles 19–23 of the VCLT on reservations and clarifies the CIL rules set forth therein;¹⁰ (ii) the Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (Conclusions on SASP), adopted by the ILC on second reading in 2018,¹¹ which interpret Articles 31 and 32 of the VCLT on treaty interpretation and clarify the CIL rules set forth therein; (iii) the Draft Guidelines on Provisional Application of Treaties (Draft Guidelines on Provisional Application), adopted on first reading in 2018, which interpret Article 25 of the VCLT on provisional application and clarify CIL rules set forth therein;¹² and (iv) the Draft Conclusions on *Jus Cogens*, adopted on first reading in 2019,¹³ which interpret to some extent Articles 53 and 64 of the VCLT and clarify the CIL rules set forth therein.

The ILC's interpretations in these four topics are part of the Commission's exercise of legal reasoning. In some instances, the ILC identifies law beyond the scope of the VCLT – for instance, the Guide to Practice addresses the severability of invalid reservations and the assessment of permissibility of reservations by treaty-monitoring bodies. In these instances, it does not interpret (and clarify) the VCLT, except insofar as it finds that the VCLT is silent on these matters. Against this background, where the

Reports (1999) 62, para. 62; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, at 175, 176, 195, para. 140.

⁹ The meaning of this term for the purpose of this article is explained in Part 4, subpart B.

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

¹¹ ILC, Text of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties with Commentaries (Conclusions on SASP), UN Doc. A/73/10 (2018), at 12–116.

¹² ILC, Text of the Draft Guidelines on Provisional Application of Treaties with Commentaries (Draft Guidelines on Provisional Application), UN Doc. A/73/10 (2018), at 246–272. The second reading of the Draft Guidelines on Provisional Application is expected to be adopted at the ILC's 2020 session and is not available at the time of writing.

¹³ ILC, Text of the Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) with Commentaries (Draft Conclusions on *Jus Cogens*), UN Doc. A/74/10 (2019), at 142–208.

ILC's work involves interpretation and other reasoning, it is important to show that the ILC also interprets and to consider the implications of its interpretative activity, which may become more prominent in the future.

Additionally, although the rules on sources suffer from 'infinite regress',¹⁴ this article follows the 'ruleness perception' that the actors that use them have,¹⁵ which is also reflected in the conclusion of the VCLT. As a separate matter, although it may be argued that, in line with the ICJ's reasoning in *North Sea Continental Shelf*, the VCLT's provisions lack 'norm-creating character' and cannot give rise to CIL,¹⁶ this analysis follows the ICJ's recognition that some VCLT rules, such as Articles 31 and 32, reflect CIL.¹⁷ It is not claimed here that interpretation (including by the ILC) is the 'omnipotent antidote' to all 'failings' or 'incompleteness' of the VCLT, including *vis-à-vis* topics discussed in this article. Such 'failings' may be owed to political or philosophical disagreements and compromise.¹⁸ But there is value in reflecting on the ILC's interpretations and their effects from a positive law perspective, given that the Commission's interpretative paradigm may continue in the future.

This article analyses the ILC's 'codification-by-interpretation' paradigm in five steps. Part 2 explains the meaning of 'interpretation' for the purpose of this analysis and provides examples of the ILC's interpretative pronouncements. Part 3 explains that interpretation falls within the ILC's existing functions. Part 4 considers the legal effects of the ILC's interpretative pronouncements. Part 5 argues that the ILC's 'codification-by-interpretation' paradigm is part of the Commission's long-term effort to convince states to continue to use international law as a significant medium by which they regulate their affairs. Part 6 considers the importance of the ILC's interpretative paradigm in this field for the Commission and international law.

2 The Meaning of 'Interpretation' and the ILC's Interpretative Pronouncements

A The Meaning of 'Interpretation'

1 Interpretation and Other Concepts

Interpretation in international law is commonly understood as 'the process of determining the meaning of' a text¹⁹ or a rule.²⁰ The Permanent Court of International

¹⁴ D'Aspremont, 'The Idea of "Rules" in the Sources of International Law', 84 *British Yearbook of International Law (BYIL)* (2014) 103.

¹⁵ *Ibid.*, at 126.

¹⁶ Klabbers, *supra* note 4, at 24–26; *North Sea Continental Shelf*, *supra* note 8, para. 72.

¹⁷ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports (2009) 213, para. 47.

¹⁸ See also Dorr, 'Codifying and Developing Meta-Rules: The ILC and the Law of Treaties', 49 *German Yearbook of International Law* (2007) 129, at 131–132.

¹⁹ 'Harvard Draft Codification of International Law', 29 *American Journal of International Law (AJIL) Supplement* (1935) 653, at 938, 946.

²⁰ *Factory at Chorzów*, 1927 Series A, No. 9, at 39, Dissenting Opinion of Judge Ehrlich.

Justice (PCIJ) and the ICJ have also interpreted the term ‘to construe’ in their statutes (Articles 60 respectively) as ‘[giving] a precise definition of the meaning and scope’.²¹ The literature has considered that the intention of the author of the object of interpretation limits the interpreter;²² that there cannot be one correct meaning because different interpretations are possible²³ and that the interpreter ‘creates meaning’ and camouflages her attempt to provide her own subjective opinion;²⁴ that the audience to which the particular interpretation is intended to ‘speak’ is relevant,²⁵ as is the interplay between various actors that make up the interpretative community;²⁶ and that interpretation creates law.²⁷ However, the practice of law operates on the assumption that there is one correct interpretation and that this meaning has to be found.²⁸ This article does not deal with the philosophical, social, political or other aspects of interpretation, in general, and of that by the ILC, in particular. Rather, it undertakes a positive law analysis.

Interpretation is concerned with determining the content and scope of rules²⁹ and encompasses (albeit not exhaustively) ‘clarification’.³⁰ Interpretation is different from rule ascertainment,³¹ which is concerned with whether a rule exists – for instance, whether an international agreement exists.³² It is also different from ‘application’, which is concerned with bringing about the consequences of a rule to the facts (real or hypothetical),³³ and may also take the form of ‘conduct

²¹ *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, 1927 PCIJ Series A, No. 13, at 10; *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colombia v. Peru)*, Judgment, 27 November 1950, ICJ Reports (1950) 395, at 402. Statute of the International Court of Justice 1945, 33 UNTS 993; Statute of the Permanent Court of International Justice (PCIJ Statute) 1920, 6 LNTS 379, 390.

²² Fish, ‘Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law’, 29 *Cardozo Law Review* (2007–2008) 1109, at 1129.

²³ H. Kelsen, *Reine Rechtslehre* (1934), at 94; M. Koskenniemi, *From Apology to Utopia* (2005), at 531–533; Klabbers, *supra* note 4, at 25–28.

²⁴ Koskenniemi, *supra* note 23, at 22, 530–531, 597.

²⁵ Bianchi, ‘The Game of Interpretation in International Law’, in Bianchi *et al.*, *supra* note 25, 34, at 36.

²⁶ Vagts, ‘Treaty Interpretation and the New American Ways of Law Reading’, 4 *European Journal of International Law (EJIL)* (1993) 480.

²⁷ J. Raz, *Between Authority and Interpretation* (2009), at 224; I. Venzke, *How Interpretation Makes International Law* (2012), at 17; d’Aspremont, ‘The Multidimensional Process of Interpretation’, in Bianchi *et al.*, *supra* note 25, at 113, 115.

²⁸ Crawford, ‘Chance, Order, Change: The Course of International Law’, *Recueil des Cours de l’Académie de Droit International (RCADI)* vol. 365 (2013) 13, at 119, paras 189–190.

²⁹ S. Sur, *L’Interprétation en Droit International Public* (1974), at 317. Kolb distinguishes between (i) interpretation (*stricto sensu*), which is concerned with meaning and content, (ii) determining the rule’s scope and (iii) rule ascertainment. R. Kolb, *Interprétation et Création du Droit International* (2006), at 221–222.

³⁰ *North Sea Continental Shelf*, *supra* note 8, at 181, Dissenting Opinion of Judge Tanaka; Guide to Practice, *supra* note 10, at 67, para. 18.

³¹ M. Bos, *A Methodology of International Law* (1984), at 109. Cf. Hollis, ‘The Existential Function of Interpretation in International Law’, in Bianchi *et al.*, *supra* note 25, 79, at 86.

³² *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 19 December 1978, ICJ Reports (1978) 3, para. 96. However, interpretation may be part of the process of rule ascertainment. *Ibid.*; Hollis, *supra* note 31.

³³ *Factory at Chorzów*, *supra* note 20, at 39, Dissenting Opinion by Judge Ehrlich.

by which the rights under a [rule] are exercised or its obligations are complied with'.³⁴ Additionally, although it may be difficult to distinguish between them, amendment and modification differ from interpretation: the former create a new law (and derive from a distinct 'legislative act'); the latter falls within the scope of the original rule.³⁵ Finally, nothing inherent in 'interpretation' restricts the ILC from interpreting.

In relation to CIL, rule ascertainment and content determination are tightly intertwined and may be difficult to distinguish. But, while usually both the existence and the content of a CIL rule need to be determined, there are cases where the existence of a CIL rule is undisputed but where its content is imprecise or disputed. For instance, although the CIL obligation to pay compensation in case of expropriation of foreign property is established, for decades international lawyers have disagreed about the meaning of 'prompt, adequate and effective' compensation.³⁶ Although it can be argued that CIL is subject to interpretation,³⁷ the rules on CIL interpretation are unclear.³⁸ Others argue that CIL is only subject to identification:³⁹ because 'content merges with existence'.⁴⁰

In 2018, the ILC adopted on second reading the Conclusions on the Identification of Customary International Law (Conclusions on CIL Identification).⁴¹ Conclusion 1 states that 'the present draft conclusions concern the way in which the existence and content of [CIL rules] are to be determined'.⁴² No separate rules on CIL interpretation have been included: CIL identification is subject to evidence of state practice and *opinio juris*. The ILC's approach in this topic may suggest that the ILC implicitly rejects that CIL interpretation takes place separately from, and by rules separate to, those

³⁴ Conclusions on SASP, *supra* note 11, at 43, para. 3.

³⁵ 2(2) *ILC Yearbook* (1966) 236, para. 1. Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification and Formal Amendment', in G. Nolte (ed.), *Treaties and Subsequent Practice* (2013) 105, at 114–117; Conclusions on SASP, *supra* note 11, at 58–60, paras 22–27.

³⁶ Regarding 'fair and equitable treatment' and 'full protection and security' of foreign investment, see also ICSID, *Mondev International Ltd. v. USA*, 11 October 2002, ICSID Case no. ARB(AF)/99/2, para. 113.

³⁷ *Military and Paramilitary Activities*, *supra* note 8, para. 178; *North Sea Continental Shelf*, *supra* note 30, at 181. Dissenting Opinion of Judge Tanaka: C. de Visscher, *Problèmes d'Interprétation Judiciaire en Droit International Public* (1963), at 219–251; Merkouris, 'Interpreting the Customary Rules on Interpretation', 19 *International Community Law Review* (2017) 126, at 140.

³⁸ Sur, *supra* note 29, at 286–302. On grammatical, systemic and teleological CIL interpretation, see Bleckmann, 'Zur Feststellung und Auslegung von Volkergewohnheitsrechten', 37 *Heidelberg Journal of International Law* (1977) 504, at 526–528. On teleological CIL interpretation, see A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), at 496–510.

³⁹ Bernhardt, 'Interpretation in International Law', in R. Bernhardt *et al.* (eds), *Encyclopedia of Public International Law*, vol. 2 (1992) 1417; V.D. Degan, *L'Interprétation des Accords en Droit International* (1963), at 162.

⁴⁰ Bos, *supra* note 31.

⁴¹ ILC, Draft Conclusions on the Identification of Customary International Law, with Commentaries (Conclusions on CIL Identification), UN Doc. A/73/10 (2018), 119–156, at 150. GA Res 73/203, 20 December 2018.

⁴² Conclusions on CIL Identification, *supra* note 41, at 122, para. 2 (emphasis added).

concerning CIL identification. However, in its earlier⁴³ and subsequent⁴⁴ work, the ILC accepted that CIL is subject to interpretation. For the purpose of this article, ‘CIL identification’ encompasses rule ascertainment and content determination; the term ‘CIL interpretation’ means ‘content determination’, and these terms are used interchangeably. The analysis does not deal with whether CIL interpretation takes place by relying on rules separate to those on CIL identification and, if so, by which rules.⁴⁵

B Instances of ‘Interpretation’ by the ILC

Individual members of the ILC may interpret rules differently. However, the ILC’s work is a collegiate output through a process of consolidation (in plenary and in the Drafting Committee) and represents the Commission’s interpretative pronouncements, which may find reflection in the adopted draft texts (being articles, conclusions or guidelines) and the accompanying commentaries. The following analysis shows that the ILC interprets the VCLT and considers that CIL has identical content in some instances⁴⁶ and that it identifies CIL and assumes that the VCLT has identical content in other cases. The latter exercise might be explained as an (implicit) application of the rule of systemic integration (Article 31(3)(c) of the VCLT).⁴⁷ Further, the draft texts and commentaries do not offer evidence that the ILC follows a particular order in applying the means of treaty interpretation or that it emphasizes a particular means of treaty interpretation. There is also no evidence that it applies rules of CIL interpretation, separate from the means of CIL identification (unless one considers that ‘State practice subsequent to the formation of a CIL rule that may establish (subsequent) *opinio juris*’ and/or ‘relevant treaty rules’ are means of CIL interpretation). Finally, as illustrated below, the ILC interprets in order (albeit not exclusively) to remove ambiguities (either foreseen or unforeseen at the time of the conclusion of VCLT) and to determine the scope of existing rules in light of new legal developments.

1 Guide to Practice on Reservations to Treaties

In 2011, the ILC adopted on second reading the Guide to Practice, and, in 2013, the UNGA ‘encouraged its widest possible dissemination’.⁴⁸ From its inception, the Guide

⁴³ The ILC implied that CIL may be subject to interpretation and that the object and purpose of a CIL rule may be a means of CIL interpretation. ILC Articles on State Responsibility, *supra* note 2, at 35, para. 3 (‘[s]uch standards ... vary [owing] to the object and purpose of the treaty provision or other rule giving rise to the primary obligation’; ‘[this] is a matter for the interpretation [of] the primary rules’).

⁴⁴ Draft Conclusions on *Jus Cogens*, *supra* note 13, at 199, paras 5, 7 (‘[the] rule in draft conclusion 20 constitutes a concrete application of [VCLT, *supra* note 1, Art. 31(3)(c)], it does not apply only in relation to treaties but to the interpretation ... of all other rules of international law’).

⁴⁵ The ILC seems to have recognized that the object and purpose of a CIL rule is a means of CIL interpretation (see note 43 above) and that a rule similar to Art. 31(3)(c) of the VCLT applies to CIL. Draft Conclusions on *Jus Cogens*, *supra* note 13, at 199, para. 5.

⁴⁶ This raises the criticism that ‘the conventional norm [has been] cunningly outflanked’. Weil, ‘Towards Relative Normativity?’, 77 *AJIL* (1983) 413, at 438. This criticism may be somewhat downplayed here because some treaty rules that the ILC interprets are well-established CIL rules.

⁴⁷ VCLT, *supra* note 1, Art. 31(3)(c) is not free from ambiguities. ILC Study Group, Fragmentation of International Law, Doc. A/CN.4/L.682 (2006), at 232–244, paras 461–480.

⁴⁸ GA Res 68/111, 16 December 2013, para. 3.

was intended to remove ambiguities and fill gaps that existed in the VCLT and the 1978 and 1986 Vienna Conventions,⁴⁹ without amending or departing from these conventions.⁵⁰ There are numerous examples where the Guide to Practice interprets the VCLT.⁵¹ This analysis focuses on a major ambiguity in the VCLT: whether Article 19 of the VCLT sets thresholds of permissibility or opposability and whether impermissible reservations are subject to acceptance/objection or not and, if not, what their legal effects are. According to the Guide to Practice, Article 19 sets permissibility requirements, and only permissible reservations can be accepted or objected to with the effects of Articles 20–21. Impermissible reservations are null and void, irrespective of the reactions of other contracting states (Guideline 4.5.1).⁵² The commentary demonstrates the ILC's interpretative process. The ILC considered that the text of Article 21(1) of the VCLT ('a reservation established with regard to another party in accordance with articles 19, 20 and 23') means only permissible (in accordance with Article 19) and formally valid reservations (in accordance with Article 23) that have been accepted by another contracting state (in accordance with Article 20).⁵³ On the basis of 'effective interpretation', the ILC considered that Article 19 of the VCLT would be deprived of 'any real impact' if states could validate an impermissible reservation by accepting it.⁵⁴ The ILC also resorted to the preparatory works of the VCLT, which 'confirm that the 1969 Convention says nothing about the consequences of invalid reservations'.⁵⁵ Having reached the conclusion (by way of interpretation) that the VCLT does not deal with the effects of impermissible reservations (and, thus, that the rules on acceptance and objection do not apply to impermissible reservations),⁵⁶ the commentary moves outside the VCLT's normative limits (and of the CIL rules reflected therein). It states that 'the nullity of an impermissible reservation ... is solidly

⁴⁹ ILC, Outlines Prepared by Members of the Commission on Selected Topics of International Law, Work of ILC's Forty-fifth Session, UN Doc. A/CN.4/454 (1993), at 231–235. Vienna Convention on Succession of States in Respect of Treaties 1978, 1946 UNTS 3; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, 25 ILM 543 (1986).

⁵⁰ ILC Special Rapporteur Pellet, First Report on the Law and Practice Relating to Reservations to Treaties, UN Doc. A/CN.4/470 (1995), at 154, para. 168; see also ILC, *supra* note 49, at 236, paras 63, 67. Guide to Practice, *supra* note 10, at 38, para. 6.

⁵¹ Guideline 2.6.1 sets out the meaning of 'objection', an ambiguity not foreseen prior to the VCLT's conclusion. It does so partly by interpreting the VCLT, *supra* note 1. Guide to Practice, *supra* note 10, at 236–237, paras 8–10. *Vis-à-vis* late reservations, the ILC interprets the VCLT, finds that it does not permit such reservations and proposes a pragmatic solution (consistent with the spirit of the VCLT about the primacy of consent): unanimous acceptance of all contracting states is necessary for making a late reservation. *Ibid.*, at 174, para. 2; 177–180, paras 9–20.

⁵² Guide to Practice, *supra* note 10, at 509, para. 3.

⁵³ *Ibid.*, at 505, para. 9.

⁵⁴ *Ibid.*, at 510, para. 6.

⁵⁵ *Ibid.*, at 505, para. 11; see also detailed analysis of Vienna Conference discussions: *ibid.*, at 506–507, paras 11–13; at 515–516, para. 18.

⁵⁶ *Ibid.*, at 507, para. 16.

established in State practice [without drawing a distinction between VCLT parties and those that are not]⁵⁷ and ‘is [positive CIL].’⁵⁸

2 Conclusions on SASP in Relation to Treaty Interpretation

In 2018, the ILC adopted on second reading the draft Conclusions on SASP, and the UNGA annexed them to a resolution and encouraged their widest possible dissemination.⁵⁹ The ILC’s goal has been to ‘give those who interpret and apply treaties an orientation, ... and thereby contribute to a common background understanding, minimizing possible conflicts’.⁶⁰ [The conclusions] are based on the [VCLT]⁶¹ and situate subsequent agreements and practice ‘within the framework of the rules on [treaty interpretation] set forth in articles 31 and 32’,⁶² which Conclusion 2 recognizes as CIL rules. The Conclusions on SASP and their commentary interpret Articles 31–32 of the VCLT. Conclusion 4 and its commentary interpret the terms ‘subsequent agreement’ and ‘subsequent practice’ in Articles 31(3)(a) and (b) of the VCLT respectively.⁶³ Conclusion 10(1) interprets the term ‘agreement’ in Article 31(3)(a) and (b). The ordinary meaning of the term ‘agreement’ is determined,⁶⁴ and recourse is had to the preparatory works of the VCLT to confirm this interpretation.⁶⁵ By implication, the ILC also determines the content of CIL rules.

Further, Conclusions 11 and 13 assess whether the new legal developments of ‘Conferences of Parties’ (COPs) and ‘expert treaty bodies’ (ETBs) fall within the scope of Articles 31–32 and CIL therein. The terms ‘COPs’ and ‘ETBs’ (or equivalent) do not appear in the VCLT because they mainly emerged after the conclusion of the VCLT.⁶⁶ But, today they are a common feature of (mainly multilateral) treaties.⁶⁷ Conclusion 11(3) explains that a COP decision may embody a subsequent agreement under Article 31(3)(a) of the VCLT in so far as it expresses agreement in substance between the parties regarding the treaty’s interpretation, regardless of their form or procedure by which the decision was adopted.⁶⁸ The commentary relies on the (implicit)

⁵⁷ *Ibid.*, at 511, para. 8. For an analysis of state practice, judicial decisions and doctrine, see *ibid.*, at 517–519, paras 23–29.

⁵⁸ *Ibid.*, at 519, para. 28. There is no evidence that the ILC ‘read into’ the VCLT the rule that impermissible reservations are null and void. This may imply the ILC’s understanding that it would exceed the limits of interpretation and of the rule of systemic integration. VCLT, *supra* note 1, Art. 31(3)(c).

⁵⁹ GA Res. 73/202, 20 December 2018.

⁶⁰ ILC, Report on the Work of Its Sixtieth Session, Annex A, UN Doc. A/63/10 (2008), at 375, para. 22.

⁶¹ Conclusions on SASP, *supra* note 11, at 16, para. 2.

⁶² *Ibid.*, 17, para. 1.

⁶³ *Ibid.*, 27–37.

⁶⁴ *Ibid.*, at 28, paras 4–5 and 77, para. 7.

⁶⁵ *Ibid.*, at 28, para. 5 note 89, and 77, para. 10.

⁶⁶ Treaties foreseeing the establishment of expert treaty bodies (ETBs) were concluded some years before the VCLT and entered into force a few months prior to, or some years after, the VCLT’s conclusion. International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195, Arts 8–14; International Covenant on Civil and Political Rights 1966, 999 UNTS 171, Arts 28–45.

⁶⁷ For Conferences of the Parties, see Convention for the Protection of the Marine Environment of the North-East Atlantic 1992, 2354 UNTS 67. For ETBs, see note 66 above.

⁶⁸ Conclusions on SASP, *supra* note 11, at 91, para. 31.

pronouncement of the ICJ in *Whaling*,⁶⁹ where the ICJ applied CIL reflected in Article 31(3) of the VCLT.⁷⁰ In this respect, it may be argued that the ILC (implicitly) took the CIL rule into account in order to interpret the VCLT. Further, the commentary to Conclusion 13 clarifies that the pronouncements of ETBs *per se* do not fall within the meaning of subsequent practice under Article 31(3)(b) because that provision requires the subsequent practice of the treaty parties.⁷¹

3 Draft Guidelines on Provisional Application

In 2018, the ILC adopted on first reading the Draft Guidelines on Provisional Application, which are intended to provide 'clarity to States when ... implementing provisional application clauses'⁷² and 'guidance regarding the law and practice on [provisional application], on the basis of [Article 25 of the VCLT] and other [CIL] rules of international law'.⁷³ For instance, the commentary to Guideline 3 shows that the ILC's understanding of the terms 'pending its entry into force' in Article 25(1) means 'both the entry into force of the treaty itself and the entry into force for each State ... concerned'.⁷⁴ On other occasions, it is unclear whether the ILC is interpreting the VCLT. For instance, Draft Guideline 11 on 'Provisions of internal law of States ... regarding competence to agree on [provisional application]' essentially replaces the terms 'competence to conclude treaties' in Article 46 with the term 'competence to agree to the provisional application of treaties'. The commentary uses the ambiguous term 'follows closely the formulation of article 46 [of the VCLT]', which leaves unclear whether the ILC determines whether the scope and content of Article 46 encompasses the agreement on provisional application.⁷⁵ Assuming that it implicitly does (or that it does so expressly in the future), the ILC would be interpreting Article 46.

4 Jus Cogens

In 2016, the ILC began its work on *jus cogens* with a view to introducing 'clarity on jus cogens, its formation and effects',⁷⁶ thus not distinguishing between the rules on *jus cogens* in the VCLT and CIL,⁷⁷ and, in 2019, the ILC adopted a set of draft conclusions on first reading. Article 53 of the VCLT provides a definition of *jus cogens* for the purpose of the VCLT, which is considered an authoritative definition of *jus cogens*

⁶⁹ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, ICJ Reports (2014) 226, para. 83.

⁷⁰ The VCLT did not apply to the 1948 International Convention for the Regulation of Whaling 1946, 161 UNTS 72, which was applicable: it applies to treaties concluded after its entry into force. VCLT, *supra* note 1, Art. 4.

⁷¹ Conclusions on SASP, *supra* note 11, at 110, para. 9.

⁷² ILC Special Rapporteur, Report on the Work of its Sixty-Fifth Session, UN Doc. A/68/10 (2013), at 104, para. 126.

⁷³ Draft Guidelines on Provisional Application, *supra* note 12, at 207, Guideline 2.

⁷⁴ *Ibid.*, at 210, para. 5.

⁷⁵ *Ibid.*, at 221, para. 2.

⁷⁶ ILC, Report on the Work of Its Sixty-Sixth Session, UN Doc. A/69/10 (2014), at 281–282, paras 18–19.

⁷⁷ *Ibid.*, at 274, 277.

beyond the confines of the treaty.⁷⁸ During its earlier work on the law of treaties, the ILC considered that the criteria by which *jus cogens* is to be identified are ‘not free from difficulty’.⁷⁹ The Vienna Conference negotiations also demonstrate that the constitutive elements of *jus cogens* norms were unclear among delegates.⁸⁰ Instances of imprecision within the definition of *jus cogens* in Article 53 of the VCLT include the meaning of ‘international community of States as a whole’ and the meaning of ‘accepted and recognized’. The ILC’s recent work on the Draft Conclusions on *Jus Cogens* demonstrates that the Commission also interprets Article 53 of the VCLT in the process of clarifying and setting out the rules for the identification of *jus cogens*. For instance, the commentary to Draft Conclusion 4 interprets Article 53 of the VCLT in order to determine the criteria for identifying a *jus cogens* norm,⁸¹ and Draft Conclusion 7(2) explains the meaning of the term ‘as a whole’ in Article 53 of the VCLT.⁸²

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

The following analysis considers the ILC’s objective and functions: the ‘progressive development of international law and its codification’. It explains the meaning of progressive development and codification within the ILC Statute (subpart A).⁸³ Then, it explores the ILC’s practice, the practice of the UNGA and the practice of individual governments in order to assess whether the ILC and governments consider interpretation within or beyond the ILC’s mandate, and it argues that interpretation can be classified as codification or as progressive development depending on each interpretative pronouncement (subpart B).

A The Meaning of ‘Progressive Development’ and of ‘Codification’ in the ILC Statute

The ILC Statute implements Article 13(a) of the UN Charter pursuant to which the UNGA ‘shall ... make recommendations for the purpose of: (a) ... encouraging the progressive development of international law and its codification’. On the basis of this provision, the UNGA established the Committee on the Progressive Development and

⁷⁸ Draft Conclusions on *Jus Cogens*, *supra* note 13, at 148–149, paras 1–2.

⁷⁹ ILC, Draft Articles on the Law of Treaties with Commentaries, UN Doc. A/6309/Rev.1 (1966), at 247–248, para. 2.

⁸⁰ See Mexico, Finland, Greece, Chile: Vienna Conference, First Session, 52nd Meeting, Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.52, 4 May 1968; UK, Vienna Conference, First Session, 53rd meeting, Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.53, 6 May 1968, at 304, para. 53. *Contra* (‘a masterpiece of precision’): India, Romania: Vienna Conference, First Session, 54th meeting, Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.54, 4 May 1968.

⁸¹ Draft Conclusions on *Jus Cogens*, *supra* note 13, at 157–158, paras 4–8; at 165, para. 5.

⁸² *Ibid.*, at 167–168, paras 5–6.

⁸³ ILC Statute, *supra* note 2.

Its Codification,⁸⁴ which recommended the establishment of the ILC.⁸⁵ In 1947, the Sixth Committee (Sub-Committee 2) drafted the resolution on the establishment of the ILC.⁸⁶ Article 15 of the ILC Statute defines 'for convenience' the terms 'progressive development of international law' and 'codification of international law'. 'Progressive development' is defined as 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. It encompasses two situations: (i) areas where there is no existing law and no instances of practice towards the development of a rule – here, the ILC's pronouncements are solely concerned with how the law ought to be – and (ii) an instance of *lex ferenda*, where there is some insufficiently developed state practice (and, in that sense, some new law being proposed). Although, ordinarily, the term 'codification' indicates 'a written form of law' without any implication concerning the normative value of the material used for making the code, in the ILC Statute the term is defined as 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'. It includes (i) systematizing existing rules (*lex lata*) (codification *stricto sensu*) and (ii) systematizing 'rules' where there is extensive state practice but no agreement as to what the law is.⁸⁷ Article 20 (in Part B of Chapter II entitled 'Codification of International Law') provides that the ILC shall prepare and submit to the UNGA draft articles together with a commentary containing, *inter alia*, conclusions concerning the extent of agreement on each point in state practice and in the doctrine. When the term 'codification' in Article 15 is read in the context of the ILC Statute (Article 20), it captures the formulation of texts that include provisions where no agreement in state practice has been found. The term 'rules' in Article 15 of the ILC Statute refers to a 'provision' without any bearing on the legal force of the alleged rule outside a written instrument.

The preparatory works of the ILC Statute, especially the discussions in the Committee⁸⁸ and its report,⁸⁹ which were informed by memoranda of the United Nations (UN) Secretariat,⁹⁰ indicate that there was no intention to limit the ILC's

⁸⁴ GA Res. 94(1), 31 January 1947.

⁸⁵ Report of the Committee on the Progressive Development of International Law and Its Codification on the Methods for Encouraging the Progressive Development of International Law and Its Eventual Codification, UN Doc. A/AC.10/51 (1947).

⁸⁶ ILC Statute, *supra* note 2.

⁸⁷ Lauterpacht, 'Codification and Development of International Law', 49 *AJIL* (1955) 16, at 29.

⁸⁸ According to Brierly, the ILC's special rapporteur: '[W]here the rule is uncertain, [the codifier] will suggest how it can best be filled. [I]n this aspect of his work he will be ... working on *lex ferenda*, not the *lex lata* – he will be extending the law and not merely stating the law that exists.' Survey of International Law in Relation to the Work of Codification of the International Law Commission, UN Doc. A/CN.4/1/Rev.1, 1949, at 3.

⁸⁹ Report of the Committee on the Progressive Development of International Law, *supra* note 85, at 20, para. 7; 22, para. 10.

⁹⁰ Memorandum on Methods for Encouraging the Progressive Development of International Law and Its Eventual Codification, UN Doc. A/AC.10/7, 6 May 1947.

codification function to recording existing law and that ‘in any work of codification, the codifier inevitably has to fill in gaps in and amend the law in the light of new developments’.⁹¹ In practice, the ILC does not usually classify its output on a topic as either progressive development or codification. Rather, sometimes, it indicates in the introduction to its commentary that there are instances of both in the topic.⁹²

B Classifying Interpretation as Progressive Development or Codification

1 The Preparatory Works of the ILC Statute

There is no evidence in the ILC Statute or in its preparatory works that interpretation is excluded from the ILC’s function. Although the ILC Statute’s preparatory works do not reveal that interpretation was specifically considered, a 1943 memorandum of the US State Department for the US president in preparation of the Dumbarton Oaks Conference for a General International Organization proposed that ‘the General Assembly should [make recommendations about] the *interpretation and revision* of rules of international law’.⁹³ The subsequent US State Department draft referred to ‘development and revision’ and was communicated to the British, Soviet and Chinese governments⁹⁴ but was not retained in the Dumbarton Oaks proposals. However, prior to and during the San Francisco Conference, numerous states proposed that the UNGA be given a mandate regarding international law. Although none mentioned interpretation, their proposals indicate that the terms ‘progressive development’ and ‘codification’ were chosen because they ‘establish a nice balance between stability and change’.⁹⁵ There is no indication that interpretation was excluded from the scope of progressive development and codification or that it fell exclusively within the scope of one or the other.

2 The Practice of the ILC and of UN Member States

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

⁹¹ *Ibid.*, at 22, para. 10.

⁹² ILC, ‘Articles Concerning the Law of the Sea with Commentaries’, 2 *ILC Yearbook* (1956) 254, at 255–256, paras 25–26; ILC Articles on State Responsibility, *supra* note 2, at 31, para 1.

⁹³ Reproduced in H. Briggs, *The International Law Commission* (1965), at 4 (emphasis added).

⁹⁴ *Ibid.*, at 5.

⁹⁵ *Ibid.*, at 5–12.

(a) The practice of the ILC

When the ILC selects a topic on its long-term programme of work or on its agenda, it is guided by four criteria, all of which relate to progressive development and codification.⁹⁶ In all of the topics examined in this study, the proponents suggested that 'there are already some provisions on the very subject matter that [was] to be codified', implicitly recognizing that some interpretation of existing treaty rules would take place;⁹⁷ that the work would 'contribute to a common background understanding [of the treaty interpretation rules set forth in the VCLT]';⁹⁸ that it 'could address [the] meaning of provisional application, its preconditions and its termination';⁹⁹ and that it would 'clarify the nature, meaning and consequences taking into account that some of these issues are set forth in the VCLT'.¹⁰⁰ The ILC was aware that its work on the topics would (to some extent, but not exclusively) interpret the VCLT when it decided that its selection criteria were met and included them in its programme of work and its agenda.¹⁰¹

(b) The practice of UN Member States

The UNGA has amended the ILC Statute four times,¹⁰² but it has introduced no reference to 'interpretation'. Further, since the four topics examined are grounded on the VCLT, it is more likely that states would oppose the ILC's interpretative activity in these topics if they viewed interpretation as being outside the ILC's function. The UNGA has not opposed the ILC's interpretative activity. Instead, it has endorsed it by taking note of the ILC's annual reports, which included the Commission's decisions to introduce these topics on its agenda, and by encouraging the dissemination of the Commission's products.¹⁰³ From 1993, when the topic on reservations was added to the ILC's agenda, to 2013, when the UNGA encouraged the Guide to Practice's widest possible dissemination,¹⁰⁴ some states made statements implying that the ILC interprets the VCLT (and implicitly the CIL rules).¹⁰⁵ No state objected to the ILC's interpretative activity. In relation to the Conclusions on SASP, no state objected to the ILC's interpretative activity,

⁹⁶ 2(2) *ILC Yearbook* (1997) 1, at 71–72, para. 238.

⁹⁷ ILC Special Rapporteur Pellet, *supra* note 50, at 236, para. 59.

⁹⁸ ILC, *supra* note 60, at 375, para. 22.

⁹⁹ ILC, Report on the Work of Its Sixty-Third Session, UN Doc. A/66/10 (2011), at 333, para. 11; ILC, Report on the Work of Its Sixty-Fourth Session, UN Doc. A/67/10 (2012), at 105–107.

¹⁰⁰ ILC, *supra* note 76, paras 267–290; Annex, at 274–286.

¹⁰¹ For provisional application, see ILC, *supra* note 99, at 365–367. For *jus cogens*, see ILC, *supra* note 76, para. 269. For subsequent agreements and subsequent practice, see ILC, *supra* note 76, paras 351–352.

¹⁰² See note 85 above.

¹⁰³ GA Res. 68/111, 16 December 2013; GA Res. 73/202, 20 December 2018.

¹⁰⁴ GA Res. 68/111, 16 December 2013.

¹⁰⁵ Pakistan (UN Doc. A/C.6/54/SR.17 [1999], para. 59) ('was not opposed to the clarification of any ambiguities in the Vienna Conventions, ... provided that they in no way altered the existing regime of reservations', which 'had acquired [customary status]'); Slovenia (UN Doc. A/C.6/54/SR.22 [1999], para. 35) ('[t]he draft guide ... proposed ... clarifications in respect of reservations'); New Zealand (A/C.6/68/SR.20 [2013], at 6, para. 26) ('supported the view that a declaration that excluded the application of a treaty as a whole to a particular territory was not a reservation in the sense of the [VCLT] ... That interpretation was in line with long-established State practice ...').

but numerous governments noted that the Commission interprets, clarifies or explains rules of the VCLT (and the CIL rules set forth therein) in 2013¹⁰⁶ when the Commission began its work on this topic; in 2014,¹⁰⁷ 2015,¹⁰⁸ 2016¹⁰⁹ and 2018¹¹⁰ when UNGA Resolution 73/202 encouraged the Conclusions on SASP's widest dissemination as well as in the written comments submitted in relation to the conclusions' first reading.¹¹¹ Similarly, from 2012, when the ILC decided to include the topic of provisional application in its agenda, to 2018, once the topic was adopted on first reading,¹¹² some governments implied that the Commission interprets the VCLT,¹¹³ but no state opposed.

¹⁰⁶ Of the 29 states that made statements on this topic, two suggested that the ILC interprets: Japan (68th Session [2013]) ('[d]o [these conclusions] constitute a binding tool for treaty interpretation?'); Netherlands (A/C.6/68/SR.18 [2013], at 6, para. 29) ('[t]he ... commentaries provide ... interpretation ... of [the VCLT provisions]'). Five states implied that the ILC interprets the VCLT: Austria (A/C.6/68/SR.17 [2013], at 12, para. 62) ('it clarified a number of aspects [of VCLT] article 31'); Hungary (A/C.6/68/SR.18 [2013], at 12, para. 61) ('[looks] forward to the [ILC's] discussion on the exact interpretation of the relevant articles of the [VCLT]'); South Africa (A/C.6/68/SR.18 [2013], at 8, para. 39) ('this topic should ... clarify ... the rules set out in the [VCLT]'); Slovakia (68th Session [2013], available on UN PaperSmart) ('[ILC's] attempt to elucidate the terms "subsequent agreements" and "subsequent practice" in [VCLT, *supra* note 1, Arts 31–32]'); Korea (A/C.6/68/SR.18 [2013], at 19, para. 103) ('by identifying and clarifying the scope and role of various agreements and practices related to [treaty interpretation]').

¹⁰⁷ Of the 23 states that made statements on this topic, one state implied that the ILC interprets the VCLT and CIL therein: Romania (A/C.6/69/SR.22 [2014], at 9, para. 42) ('It welcomed the Commission's work on [SASP], as it would clarify significant aspects of the law of treaties. Although Romania was not a party to the [VCLT], it applied most of its provisions as [CIL]').

¹⁰⁸ Of the 26 states that made statements, one state implied that the ILC interprets the VCLT: Malaysia (available on UN PaperSmart, 6 November 2015) ('draft conclusion 11 provides greater understanding on the applicability of the VCLT').

¹⁰⁹ In 2016, of the 29 states that made statements, one state stated that the ILC interprets: Slovenia (25 October 2016) ('[t]he Commission has ... discussed [the interpretation of several conventions] after their adoption. ... For example, [VCLT, *supra* note 1] Article 25'). Three states implied that the ILC interprets the VCLT (one of these implied the interpretation of CIL) (statements available on UN PaperSmart): Romania (not party to the VCLT) (25 October 2016) ('[the topic] aims to clarifying ... the law of the treaties'); USA (24 October 2016) ('fails to explain how Article 31(1) can properly be interpreted – consistent with the [VCLT]'); Sri Lanka (26 October 2016) ('the draft conclusions ... add clarity to the principles of treaty interpretation as contained in [VCLT] Articles 31&32').

¹¹⁰ No state stated that the ILC interprets. Five states implied that the ILC interprets the VCLT (statements available on UN PaperSmart): Slovenia (23 October 2018) ('whether these conclusions could ... be considered as a subsequent agreement and/or practice with respect to the interpretation of [VCLT Articles 31 and 32]. [C]ould that apply to any other Commission pronouncements on the VCLT ...?'); Germany (23 October 2018) ('[the] conclusions clarify the law'); India (22 October 2018) ('bring clarity to the meaning and scope of ... these articles'); Sri Lanka (23 October 2018) ('provides a degree of clarity within the general framework of the [VCLT] rules, specifically Articles 31&32, by identifying and elucidating relevant aspects [of] those rules'); South Africa (24 October 2018) ('[w]hile the [VCLT] remains the primary source of [treaty interpretation rules], we welcome the clarity ... provided in [the] Draft Conclusions'); USA (31 October 2018) ('this topic ... primarily addresses ... how best to interpret certain provisions of a particular treaty, the [VCLT]').

¹¹¹ Only the USA implied that the ILC interprets the VCLT. Comments and Observations Received from Governments, UN Doc. A/CN.4/712, 21 February 2018, at 6.

¹¹² ILC, Report on the Work in Its Seventieth Session, UN Doc. A/73/10 (2018), at 203, para. 88.

¹¹³ El Salvador (72nd Session [2017], available on UN PaperSmart) ('su interpretacion debe ser sistematica v conuerente con el contenido de otras normas existentes en materia de aplicacion provisional de los Tratados. tales como, la Convencion de Viena sobre Derecho de los Tratados de 1969 ... y otras normas de derecho internacional'); Greece (24 October 2017) ('the commentaries ... provide ... clarification on the scope and operation of existing rules'); Poland (A/C.6/72/SR.19, at 9, para. 51) ('[t]here is a need for a comprehensive analysis of provisions of [the VCLT on] provisional application'); Algeria ('[t]hese

Finally, from 2016, when *jus cogens* was included in the ILC's agenda, to 2019,¹¹⁴ no state objected, but some states suggested that the Commission interprets the VCLT.

3 Interpretation as 'Codification' or as 'Progressive Development'

Although the ILC Statute's preparatory works do not exclude interpretation from the ILC's function, and the subsequent practice of the Commission and UN members supports that interpretation is within the ILC's function, there is no evidence that interpretation is exclusively an aspect of codification or exclusively one of progressive development. It is argued that it can be either. Interpretation can be part of codification. A codifier of existing law first determines the existence and content of a rule before systematizing it into a restatement. An interpretation forms part of codification if the interpretative pronouncement coincides with that made by those that have established the rule. For instance, that 'agreement' in Article 31(3)(a) and (b) means 'a common understanding regarding the interpretation of a treaty which the parties

draft guidelines October 2017) ('[t]hese draft guidelines ... provide ... clarification regarding the law and practice on the provisional application ... on the basis of [VCLT, *supra* note 1, Art. 25]'); USA (A/C.6/72/SR.21, 5, para. 29) ('the Draft Guidelines ... fail to make clear that provisional application within the meaning of [VCLT, Art. 25] requires the agreement of all'); Cuba (25 October 2017, available on UN PaperSmart) ('considera importante el mismo por la necesidad de determinar el alcance del principio básico de la aplicación provisional de un tratado, recogido en el artículo 25 de la Convención de Viena sobre el Derecho de Tratados'); Malaysia (A/C.6/72/SR.22, 3, para. 12) ('[t]he draft guidelines must provide a clear ... interpretation').

¹¹⁴ In 2016, of the States that made statements on this topic, Ireland implicitly suggested that the Commission interprets (A/C.6/71/SR.29 at 3, para. 19) ('[VCLT, *supra* note 1, Arts 53 and 64] ought to be central ... it is important to remain faithful to these provisions. [We] encourage an in-depth study of the travaux-préparatoires of the ... Convention'). In 2017, of the states that made statements on this topic, two states suggested that the ILC interprets the VCLT: Malaysia (A/C.6/72/SR.26, 16, para. 115) ('efforts to clarify the topic, Malaysia encourages a thorough analysis of article 53 of the VCLT'); Thailand (A/C.6/72/SR.26, 9, para. 58) ('the interpretation of the definition of *jus cogens*, as contained in Article 53, should [follow VCLT, Arts 31–32], respectively'). In 2018, of the states that made statements on this topic, two states indicated their understanding that the ILC interprets the VCLT: Russia (26 October 2018, available on UN PaperSmart) ('avoid any interpretation of the [VCLT] different from the meaning contained therein'); Malaysia (A/C.6/73/SR.27, 16, para. 102) ('clarity on ... sources of *jus cogens* and a thorough analysis on the element of modification under [VCLT] article 53'). In 2019, of the states that made statements on this topic none specifically indicated that the ILC interprets the VCLT, but implied that the ILC also interprets the rules set forth therein to some extent when setting out identical rules outside it but also rules beyond its scope. See, e.g., Romania (A/C.6/74/SR.23, 13, para. 75) ('[the conclusions] follow closely the [VCLT]'); France (A/C.6/74/SR.23, 16, para. 94) ('s'interroge sur la façon dont le projet de conclusion entend s'articuler avec la [CVDI]. Le projet ... semble en effet, ... s'éloigner des termes de la Convention. Il en est ainsi de la conclusion n°2, relative à la définition du *jus cogens*. ... Sur ces points, des clarifications paraissent nécessaires dans l'intérêt de tous les Etats, parties ou non parties à la [CVDI]'); Brazil (A/C.6/74/SR.24, 20, para. 93) ('[w]e concur with the idea of following the [VCLT] approach and focusing on the acceptance and recognition by the international community of States as a whole. In particular, we agree with ... that only norms that are accepted and recognized by a very large majority of States as *jus cogens* can be considered as such'); Thailand (A/C.6/74/SR.24, 20–21, para. 107) ('agreed with ... using the definition of *jus cogens* ... in Article 53 [VCLT] as basis for draft conclusion 2, which is the most widely accepted definition of *jus cogens* today. [The] "acceptance and recognition by the international community of States as a whole" ... threshold has been raised [in conclusion 7] to "a very large majority of States". ... [I]n our view, it still does not accurately reflect what the negotiators of Article 53 [VCLT] had intended').

are aware of and accept' is supported by the preparatory works.¹¹⁵ Similarly, unless otherwise provided by a treaty, the expression of consent to be bound constitutes the last time that a reservation may be formulated.¹¹⁶ Further, an interpretation based on 'extensive State practice, precedent and doctrine' *vis-à-vis* a treaty falls within the ambit of codification (even if such practice is not accompanied by the agreement of treaty parties concerning the treaty's interpretation). For instance, that a decision of a COP may embody a subsequent agreement (Article 31(3)(b) of the VCLT) may constitute such an instance of codification.¹¹⁷

However, an interpretation may constitute progressive development if there is no evidence that it coincides with the interpretation by those that established the rule. For instance, assuming that in Guideline 11 on Provisional Application the ILC makes an interpretative pronouncement as to the content of Article 46 (and the CIL rules therein), there is no evidence that such a proposition finds any (or some 'insufficient') support (at the time it was made) in state practice, judicial decisions or doctrine.¹¹⁸ Overall, it cannot be presumed that the ILC's interpretative pronouncements fall necessarily within codification as opposed to progressive development and vice versa. The challenges of classifying an interpretative pronouncement within the one or the other category are similar to those for the classification of any other of the ILC's pronouncements.

4 The Legal Effects of the ILC's Interpretative Pronouncements

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

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

The ILC is part of an institutional framework for the progressive development and codification of international law. As part of this framework, and pursuant to its Statute, the ILC interacts with many actors,¹¹⁹ but especially with governments at numerous

¹¹⁵ Conclusions on SASP, *supra* note 11, at 77–78, para. 10.

¹¹⁶ Guide to Practice, *supra* note 10, at 174, para. 2.

¹¹⁷ *Ibid.*, at 85–89, paras 10–23.

¹¹⁸ The commentary does not provide evidence of such support, Draft Guidelines on Provisional Application, *supra* note 12, at 221–222. However, the responses of governments to the Draft Guidelines may show support for such a proposition.

¹¹⁹ See ILC Statute, *supra* note 2, Arts 16(e), 17(1), 21(1), 25, 26.

stages. The ILC's working methods have changed over the years, but they usually take the following form. When introducing a topic on its agenda, the ILC decides whether to appoint a special rapporteur. Once appointed, the special rapporteur prepares and submits her or his report(s) to be considered by the ILC in plenary, where proceedings are public. In plenary, ILC's members comment on the special rapporteur's report, and the ILC decides whether the proposals will be referred to the Drafting Committee. If so, the Drafting Committee meets (in closed session) in order to prepare and provisionally adopt draft texts (being draft articles, conclusions, guidelines or principles), which it then submits to plenary for approval, along with draft commentaries prepared by the special rapporteur. At each session, the ILC (in plenary) provisionally adopts on first reading the draft texts proposed by the Drafting Committee, when commentaries on the draft texts are available at that session. This process repeats itself in subsequent years, until such time as a full set of draft texts is completed, at which point they are adopted as a whole on first reading.

The ILC's progress is recorded in its annual report, which is submitted to the UNGA, which considers the Commission's report annually in the Sixth Committee, where states may comment on the Commission's report. If and when the ILC adopts a full set of draft texts on first reading, it submits it along with commentaries to the UNGA and invites written comments from governments. After the written submissions are received, the special rapporteur produces a final report that revisits the draft texts and commentaries, considering the comments of governments and making proposals for changes. When the ILC in plenary finally adopts the draft texts on second reading with commentaries, the Commission concludes its work on the topic. It submits the draft texts with commentaries to the UNGA, making a recommendation about the document's future treatment. At that stage, governments are invited to make comments in the Sixth Committee, which also prepares a UNGA resolution concerning the future form of the text. The Sixth Committee may decide to reconsider the topic's future form in future sessions, thus allowing governments to make more comments in the Sixth Committee. There frequently remains debate as to the meaning of a treaty provision to which the ILC refers in its commentary, whether a rule provided in a text reflects CIL or whether the commentary is accurate.

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

Under the current state of positive law, the ILC's interpretative pronouncements are not binding. They are also not an 'authentic means of interpretation' – that is, they do not 'relate to the agreement between the parties at the time when or after it received authentic expression in the text' and so they do not fall within the means of interpretation in Article 31 of the VCLT.¹²⁰ Nor are they an 'authoritative' interpretation because 'the right of giving an authoritative interpretation of a legal rule belongs

¹²⁰ ILC, Reports on the Work of Its Seventeenth Session and on Its Eighteenth Session, UN Doc. A/6309/Rev.1 (1966), at 220, para. 10.

solely to the person or body who has power to modify or suppress it'.¹²¹ *Vis-à-vis* the VCLT, only its parties have that power, and *vis-à-vis* CIL (concerning treaties between States), only states have such authority. There is also no evidence in the ILC Statute (or state practice) that states through the UNGA have delegated to the ILC the power to give on their behalf an authentic interpretation of treaties or of CIL rules that have emerged on the basis of documents that have been prepared by the ILC, such as the 1966 Draft Articles on the Law of Treaties.¹²²

C Making an 'Offer of Interpretation'

The ILC's work may be seen as an 'offer of interpretation' to states – the actors that make international law. The diminished enthusiasm of states for the negotiation of multilateral conventions,¹²³ and for the ILC's distinctive features, may make attractive to states an interpretative dialogue with the Commission. Thomas Shelling drew on game theory to predict behaviour in conditions that resemble the absence of communication¹²⁴ (such as the lack of interest in the Sixth Committee in negotiating treaties) but where there is a pressing need to coordinate (such as the need to reaffirm and clarify secondary rules on the law of treaties).¹²⁵ He argued that in such conditions actors coordinate tacitly by meeting at the 'obvious focal point'.¹²⁶ What makes a 'focal point' is its simplicity, uniqueness or some other qualitatively distinct feature.¹²⁷ The ILC enjoys distinctive features: its composition is geographically representative of the world's legal systems; its pronouncements are summarized in simple draft provisions accompanied by concise commentaries often based on the expert recording and assessment of evidence of state practice; and the framework within which the ILC operates requires it to interact with governments and take their comments into account – government officials 'have some ownership' over the Commission's final output.¹²⁸

1 Stimulating the Responses of Governments

Within the UN framework, the reactions of governments during the ILC's work on a topic are important because they frame the debate and guide the commission's work. Their reactions after the final adoption (and publication) of the output may take the form of acceptance of an output (or parts of it), thus confirming the ILC's pronouncement of law or of the rejection of an output (or parts of it), thus revealing that the Commission's interpretative pronouncement is not accepted. The correct interpretation of international law cannot take place without considering the ILC's output together with the responses of governments. Beyond the UN framework, the ILC's

¹²¹ *Jaworzina*, 1923 PCIJ Series B, No. 8, at 5.

¹²² ILC Draft Articles on the Law of Treaties, *supra* note 79.

¹²³ Pauwelyn, Wessel and Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25 *EJIL* (2014) 733.

¹²⁴ T. Schelling, *The Strategy of Conflict* (1980), at 74.

¹²⁵ For analysis of the need for reaffirmation and clarification, see Part 5.

¹²⁶ Schelling, *supra* note 124, at 71.

¹²⁷ *Ibid.*, at 70.

¹²⁸ O. Schachter, *International law in Theory and Practice*, 178 RCADI (1985) 9, at 97.

work may trigger the reactions of states, for instance, in the form of reliance on the Commission's pronouncements by domestic courts or governments, including in their pleadings before international courts or tribunals.

If the subsequent practice of the VCLT's parties establishes the agreement of all parties concerning the VCLT's interpretation, it has to be taken into account for the interpretation of the VCLT. If their subsequent practice falls short of establishing the agreement of all parties, it may be a supplementary means of interpretation.¹²⁹ Further, the ILC's interpretative pronouncements *vis-à-vis* the meaning and content of CIL may trigger state practice (especially of those not parties to the VCLT) and may provide evidence of *opinio juris* concerning the interpretation of CIL reflected in the VCLT. The following analysis examines whether the UN institutional (permanent) interaction between states and the ILC, which distinguishes the Commission from other expert bodies (such as the Institut de Droit International), may warrant the reaction of states in the absence of which their silence is to be construed as acquiescence.

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

The ILC Statute requires the ILC to cooperate with governments and the UNGA.¹³⁰ However, the UN Charter does not require UN members to respond to the ILC's work. It can be argued that the very existence of the interaction between the ILC and the governments envisaged by the ILC Statute would be rendered meaningless if governments did not cooperate with the Commission. Even so, it does not follow that states are obliged to accept or reject an output finally adopted by the ILC. In practice, relatively few governments make comments on particular topics, and the content, length and quality of their comments vary. Numerous reasons may explain the lack of response. Some states might be unaware of the content of the whole output or may not have the bureaucratic capacity to assess the ILC's pronouncements. Even states that have a legal adviser in New York and/or legal directorates in ministries in their capital may face challenges in assessing and responding to the ILC's periodical outputs, ad hoc requests and final outputs, especially given that the quantity of the Commission's outputs is increasing as is the detail of its work. Further, a state may not consider that a particular pronouncement affects its interests; it may wish to keep its options open or may prefer to avoid drawing attention to an issue by responding. However, the silence of states may have legal significance under specific conditions: circumstances exist that call for some reaction, and the 'silent' state is in a position to react within sufficient time.¹³¹ Two questions arise: whether state silence *vis-à-vis* the

¹²⁹ Conclusions on SASP, *supra* note 11, Conclusion 2(4).

¹³⁰ ILC Statute, *supra* note 2, Arts 16–22, 23.

¹³¹ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, 1 October 2018, ICJ Reports (2018) 507, para. 152; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment, 23 May 2008, ICJ Reports (2008) 12, para. 121. McGibbon, 'Some Observations on the Part of Protest in International Law', 30 *BYIL* (1953) 293, at 307. On CIL, see Conclusions on CIL Identification, *supra* note 41, Conclusion 10(3), at 140–142, para. 8. On treaty interpretation, see Conclusions on SASP, *supra* note 11, Conclusion 10(2), at 79–82; WTO, *EC – Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body*, 27 September 2005, WT/DS269/AB/R, WT/DS286/AB/R, para. 272. On acquiescence, see Barale, 'L'Acquiescement dans la Jurisprudence Internationale', 11 *Annuaire Français de Droit International* (1965) 389, at 405.

ILC's pronouncements *per se* may establish agreement concerning the interpretation of a treaty or *opinio juris vis-à-vis* the content of CIL and whether state silence *vis-à-vis* the reactions of other states to the ILC's work may establish the agreement of the 'silent States' concerning the interpretation of a treaty or their *opinio juris vis-à-vis* the content of CIL. In relation to both of these situations, the requirement that the state has knowledge of the conduct calling for reaction is met.¹³² The ILC's work at all stages is made public to UN members through the UN Secretariat. All UN members are invited to respond to it annually as well as when the ILC adopts a topic on first reading and once its work is adopted on second reading. Additionally, the UN Secretariat makes public to all UN members the reactions of all UN members. As a separate matter, governments may respond to the ILC's pronouncements outside the UN framework, but whether their response is made known to other governments will depend on the manner of the response.¹³³ The critical point in time for assessing whether the ILC's pronouncements *per se* and the responses of other governments to the Commission's pronouncements may be circumstances calling for some reaction is the final stage of the ILC's work: when the ILC has provided a concrete product on second reading, which it will not revise further (unless the UNGA requests the Commission to do so).

(a) State silence *vis-à-vis* the ILC's pronouncements

In *Kasikili/Sedudu Island* (1999), the ICJ held that the fact that a state did not react to the findings of a joint commission of experts entrusted by the parties to determine a particular factual situation with respect to a disputed matter did not mean that a (tacit) agreement had been reached between them.¹³⁴ Further, the ILC itself has doubted whether the pronouncements of ETBs, which have a close connection and explicit functions *vis-à-vis* particular treaties, such as the Human Rights Committee, call for the reaction of treaty parties in the absence of which their agreement is tacitly reached.¹³⁵ Given that the ILC has no specific mandate concerning a particular treaty or a CIL rule, its pronouncements are not circumstances that call for the reaction of states, in the absence of which their silence is to be interpreted as agreement *vis-à-vis* treaty interpretation (or CIL identification).

Additionally, the argument that the ILC's pronouncements are circumstances that call for the reaction of states would entail that the ILC Statute and the process of oral statements in the Sixth Committee is an opt-out system – states would have to react in the Sixth Committee in order not to agree with the ILC's pronouncements. However, in practice, this is not the case. Further, whenever the ICJ has relied explicitly on the ILC's

¹³² For situations recognized as affecting (under law) a state's capacity to react, see *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, 9 October 1998, reprinted in UNRIIA, vol. 22, 209, at 304, para. 415.

¹³³ Domestic parliamentary and court proceedings do not call the reaction of other states: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, 17 December 2002, ICJ Reports (2002) 625, para. 48; *EC – Customs Classification of Frozen Boneless Chicken Cuts*, *supra* note 131, para. 334.

¹³⁴ *Kasikili/Sedudu Island*, *supra* note 8, paras 65–68.

¹³⁵ Conclusions on SASP, *supra* note 11, Conclusion 13(3), at 113, paras 18–19.

pronouncements, there is no evidence that it has done so because it considers that states have acquiesced to them. In only three cases has the Court expressly considered the responses of governments to the ILC's work: *North Sea Continental Shelf* (1969),¹³⁶ *Jurisdictional Immunities* (2012) and *Peru v. Chile* (2014).¹³⁷

Among these, only *Jurisdictional Immunities* was concerned with the legal relevance of silence. The Court considered the silence of states relevant for CIL identification but not determinative on its own. Italy argued that, under CIL, states were no longer entitled to immunity in respect of acts committed on the territory of the forum state by the armed forces of a foreign state in the course of an armed conflict. The ICJ considered whether the adoption of Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property supported Italy's argument.¹³⁸ Since the convention was not in force between the parties to the dispute, the Court examined whether the provision and the process of its adoption and implementation 'shed light on the content of customary international law'.¹³⁹ It noted that, when presenting the Ad Hoc Group's report, the chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property stated the general understanding that military activities were not covered by the draft convention,¹⁴⁰ '[n]o State questioned this interpretation'.¹⁴¹ However, the Court did not rely exclusively on state silence in this context but also on other governments' statements (outside the Sixth Committee) and on extensive domestic legislation.¹⁴²

(b) State silence *vis-à-vis* the responses of other states

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

Two questions arise: whether VCLT parties are expected to react if other VCLT parties accept or reject the ILC's interpretative pronouncements concerning the VCLT and whether states are expected to respond to the reactions of other states *vis-à-vis*

¹³⁶ *North Sea Continental Shelf*, *supra* note 8, para. 61.

¹³⁷ *Peru v. Chile* concerned an agreement. The Court considered the practice of the disputing parties during the period when their agreement was established, including their reactions to the ILC's work on the law of the sea. It did not consider the reactions (or silence) as evidence concerning the content of the agreed boundary. *Maritime Dispute (Peru v. Chile)*, *supra* note 8, paras 112–117. In *Jadhav*, the Court examined the preparatory works (as a supplementary means of interpretation) of the treaty applicable, including the negotiations on the basis of the ILC Draft Articles on Consular Relations, but did not examine governments' responses, except with one government's proposal during negotiations. *Jadhav*, *supra* note 8, paras 85, 108.

¹³⁸ United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508, 2 December 2004.

¹³⁹ *Jurisdictional Immunities of the State*, *supra* note 8, para. 66.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* (emphasis added).

¹⁴² *Ibid.*, para. 77.

the ILC's interpretative pronouncements concerning the content of existing CIL set forth in the VCLT. According to the ILC, 'silence on the part of one or more [treaty] parties can constitute acceptance of the subsequent practice [as an authentic means of interpretation] when the circumstances call for some reaction' (Conclusion 10(2) on SASP), and this 'failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*) [for custom identification], provided that States were in a position to react and the circumstances called for some reaction' (Conclusion 10(3) on CIL Identification).

As a separate matter, it has been argued that a state is expected to respond to an act or claim of another state when its interests are specially affected or infringed upon by such an act or claim.¹⁴³ The four topics examined in this study deal with general secondary rules. One cannot identify in relation to such rules a specially affected state whose reaction would be expected. All states have an interest in secondary rules on the law of treaties because all states are in one way or another involved or affected by treaty making and the operation and termination of treaties. To consider that all have acquiesced would be a fiction.¹⁴⁴

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

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

¹⁴³ McGibbon, 'The Scope of Acquiescence in International Law', 31 *BYIL* (1954) 143, at 183–184; Starski, 'Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force', 4 *Journal on the Use of Force and International Law* (2017) 14, at 39.

¹⁴⁴ For explanation of the voluntarist approach (and its limits) *vis-à-vis* CIL, see Mendelson, 'The Subjective Element in Customary International Law', 66 *BYIL* (1995) 177, at 186. Rejecting the application of the 'specially affected states' doctrine in similar situations, see Heller, 'Specially-Affected States and the Formation of Custom', 112 *AJIL* (2018) 191, at 202.

'lead' the interpretative dialogue with the ILC, it is likely that an international court or tribunal will rely on the Commission's pronouncements, given that the ILC's work may be perceived as an 'obvious focal point' where the agreement of States is likely to coincide. The following part discusses the ILC's work as a subsidiary means for determining (the content of) rules or as a supplementary means of treaty interpretation.

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

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

The ILC's role within the 'sources of international law' has long been debated. Some argue that the ILC is 'a source of international law'.¹⁴⁵ However, they consider it a 'material source' that provides evidence of the existence of rules that come about through formal sources. In this sense, they do not deviate from those that consider the ILC's work as a highly influential subsidiary means for determining rules of law.¹⁴⁶ The Commission discussed its own role in the preparation of the 2018 Conclusions on CIL Identification. In his third report, Special Rapporteur Michael Wood, recognizing the need 'to avoid giving the impression that the Commission was inflating its own importance',¹⁴⁷ proposed a conclusion, which included both judicial decisions and writings, with the understanding that the ILC's outputs fell within the latter.¹⁴⁸ For some members, 'the [ILC's] work should not, under any circumstances, be characterized as merely writings',¹⁴⁹ and they favoured a conclusion specifically dedicated to the ILC. Ultimately, the draft conclusions were adopted without a conclusion dedicated to the ILC but with a reference to it in the introductory commentary to Part V, which does not characterize the ILC's work as teachings or a subsidiary means for determining rules of law and does not qualify it as a formal source of international law. It states that the ILC's determinations 'may have particular value [owing to, *inter alia*,] the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work)'.¹⁵⁰ Further, the commentary adds some qualifications that determine the weight to be given to the ILC's pronouncements, such as 'the sources relied upon

¹⁴⁵ C. Parry, *The Sources and Evidences of International Law* (1965), at 114; J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 20, 43–44.

¹⁴⁶ B.G. Ramcharan, *The International Law Commission* (1977), at 26; Bos, *supra* note 31, at 82–83.

¹⁴⁷ Provisional Summary Record of the 3253rd Meeting, UN Doc. A/CN.4/SR.3253, 20 May 2015, at 14.

¹⁴⁸ ILC Special Rapporteur Wood, *Third Report on Identification of Customary International Law*, UN Doc. A/CN.4/682 (2015), at 45, paras 65, 67.

¹⁴⁹ ILC, Provisional Summary Record of the 3252nd Meeting, UN Doc. A/CN.4/SR.3252, 19 May 2015, at 10–11 (Escobar-Hernandez); ILC, Provisional Summary Record of the 3253rd Meeting, UN Doc. A/CN.4/SR.3253, 20 May 2015, at 4 (McRae); 5–6 (Kamto); 10 (Nolte); 10 (Vasquez-Bermudez); ILC, Provisional Summary Record of the 3254th Meeting, UN Doc. A/CN.4/SR.3254, 21 May 2015, at 6 (Kolodkin).

¹⁵⁰ Conclusions on CIL Identification, *supra* note 41, at 142, para. 2.

by the Commission, the stage reached in its work, and above all upon States' reception of its output'.¹⁵¹ Not all of the ILC's pronouncements will carry the same weight *vis-à-vis* the identification of CIL (the same logically applies *vis-à-vis* to the interpretation of treaty rules or of general principles of law). Each pronouncement of the ILC should be assessed separately in order to determine whether it reflects the current state of the law or not.

As a separate matter, although the ILC is not mentioned, Conclusion 5(2) on SASP provides that conduct by non-state actors¹⁵² may be relevant when assessing the subsequent practice of treaty parties: they may 'provide valuable information about subsequent practice of parties, [and] contribute to assessing this information'.¹⁵³ However, since these can pursue their own goals, which may differ from those of treaty parties, their assessments 'must be critically reviewed'.¹⁵⁴ The ILC's documents record and assess the means of treaty interpretation, such as subsequent practice in a treaty's application or the preparatory works of a treaty or provide evidence of state practice or (subsequent) *opinio juris vis-à-vis* the interpretation of CIL. For this reason, the ILC's interpretative work may serve as a subsidiary means for determining rules of law (treaties, CIL and general principles of law) within the meaning of Article 38(1)(d) of the ICJ Statute.¹⁵⁵ That Article 38(1)(d) of the ICJ Statute only mentions judicial decisions and teachings, but not the ILC, can be explained by the fact that the provision was originally drafted in 1920 and was retained without much discussion in 1946,¹⁵⁶ prior to the adoption of the ILC Statute in 1947.

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

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

The fact that the ILC's interpretative pronouncements subsequent to the conclusion of a treaty may constitute subsidiary means within the meaning of Article 38(1)(d) of

¹⁵¹ *Ibid.*

¹⁵² Although the ILC is an organ of an international organization, it is not mandated specifically to exercise interpretative powers in relation to treaties such as the VCLT and, for this purpose, may fall within the 'non-state actors' classification in Conclusions on SASP, *supra* note 11.

¹⁵³ *Ibid.*, at 42, para. 17.

¹⁵⁴ *Ibid.*

¹⁵⁵ Ramcharan, *supra* note 146, at 28; Pellet, 'Article 38', in A. Zimmermann *et al.*, *The Statute of the International Court of Justice: A Commentary* (2nd edn, 2012) 824, at 870; S. Rosenne, *Law and Practice of the International Court: 1920–2005* (2006), vol. 3, at 1551.

¹⁵⁶ See PCIJ Statute, *supra* note 21; Pellet, *supra* note 155, at 738–744, paras 17–46.

the ICJ Statute does not exclude the possibility that they may also constitute a supplementary means of treaty interpretation. Since the subsidiary means for determining rules of law within Article 38(1)(d) of the ICJ Statute are concerned with all sources of international law, including treaties, they may overlap with some supplementary means of interpretation set forth in Article 32 of the VCLT. The proposition that the ILC's subsequent pronouncements may constitute a supplementary means of treaty interpretation faces a conceptual limitation. An interpreter (other than the treaty parties) would constitute at the same time a means of interpretation. Article 32 of the VCLT provides means of treaty interpretation *per se*,¹⁵⁷ while the subsidiary means in Article 38(1)(d) of the ICJ Statute are tools that assist the applier to identify and assess the means that make and interpret rules.

The ILC has not addressed the question whether its own subsequent interpretative pronouncements (here, regarding the VCLT) may constitute a supplementary means of treaty interpretation. However, the ILC has considered that 'ETBs' pronouncements are to be used in the discretionary way in which [VCLT Article 32] describes supplementary means of interpretation'.¹⁵⁸ An analogy could be drawn to support an argument that the ILC's subsequent interpretative pronouncements may be relied upon as a supplementary means of treaty interpretation. Although the ILC's reasoning *vis-à-vis* ETBs is expressly linked to the specific mandate of each ETB (Conclusion 13(4)), while the ILC does not have such a specific mandate, it has been shown in Part 3 of this article that the Commission has been mandated with some general interpretative function as part of 'the progressive development of international law and its codification' (irrespective of the legal effects of its interpretative pronouncements) and that states have not objected to the ILC's interpretative activity in the four topics examined in this article.

As a separate matter, the ICJ has relied on the ILC's work that had been adopted after the conclusion of a treaty in one case: *Bosnia and Herzegovina v. Serbia and Montenegro* (2007). The ICJ applied the 1948 Genocide Convention, in the preparation of which the ILC had not been involved.¹⁵⁹ In order to interpret the Genocide Convention, the Court relied on the commentary of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind. In relation to the meaning of the term 'genocide' in Article II of the Genocide Convention, it noted that:

Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words 'deliberately' and 'intended', [...]; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 44, para. 5).¹⁶⁰

¹⁵⁷ ILC Special Rapporteur Nolte, Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/CN.4/694 (2016), at 27, para. 64.

¹⁵⁸ Conclusions on SASP, *supra* note 11, at 115, para. 24; see also support for ETBs pronouncements as supplementary means of interpretation: ILC Special Rapporteur Nolte, *supra* note 157, at 25–26, para. 53; ILC, Provisional Summary Record of the 3304th Meeting, UN Doc. A/CN.4/SR.3304, 25 May 2016, at 7 (Hmoud); 11–12 (Forteau); 19 (Kolodkin).

¹⁵⁹ *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 8, para. 149. Genocide Convention, *supra* note 2.

¹⁶⁰ *Ibid.*, para. 186. Draft Code of Crimes, *supra* note 2.

It may be argued that the Court used the ILC's pronouncement in the 1996 Code of Crimes as a supplementary means of interpreting the 1948 Genocide Convention. Alternatively, the Court's reasoning could be understood as an implicit reliance on a CIL rule, which the ILC had identified in an earlier paragraph of its commentary: the Court may have used the ILC's pronouncement as a subsidiary means within the meaning of Article 38(1)(d) of the ICJ Statute and applied the rule of 'systemic integration' (Article 31(3)(c) of the VCLT) in order to interpret the Genocide Convention.¹⁶¹ The decision demonstrates that the ICJ has not been clear about, but has not excluded, the possibility that the ILC's subsequent pronouncements *vis-à-vis* an existing treaty may be relied upon as supplementary means of treaty interpretation.

However, even assuming that the ILC's subsequent pronouncements in the four topics of work examined in this article may be relied upon as a supplementary means for interpreting the relevant VCLT provisions, the weight to be given to them depends on qualitative factors, such as 'the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output'.¹⁶²

5 Interpretation as a Means of Reinforcing International Law

It is argued that the ILC's 'codification-by-interpretation' paradigm in this field is called for by the legal landscape of modern international law. Since the previous century, international law has matured: numerous multilateral conventions have been concluded in various fields, and more CIL rules have developed. Further, in the 1990s, international courts and tribunals proliferated. These apply and interpret specialized treaties, but they also apply and interpret general international law (for example, rules on treaty interpretation, reservations to treaties, provisional application and *jus cogens*). Their pronouncements may lead to inconsistencies between them in the way that they interpret and apply such rules. Additionally, national courts increasingly apply international law, including the law of treaties, which may raise a problem of inconsistency on two levels: (i) different national courts may interpret and apply international law in different ways and (ii) national courts may deviate from the way that international courts and tribunals interpret and apply international law.¹⁶³ These trends may undermine the clarity and predictability of international law and may

¹⁶¹ Draft Code of Crimes, *supra* note 2, at 44, para. 3 ('the definition of genocide contained in article II of the Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the Code').

¹⁶² *Mutatis mutandis*, Conclusions on CIL Identification, *supra* note 41, at 142–143, para. 2.

¹⁶³ UNCITRAL, *Yukos Universal Ltd. (UK—Isle of Man) v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case no. AA 227; Rechtbank Den Haag (Hague District Court), *Russian Federation v. Yukos Universal Limited*, C/09/477160/HA ZA15-1, 20 April 2016; UNCITRAL, *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic*, Jurisdiction, 13 December 2013, PCA Case no 2013-13; SGHC Singapore High Court, *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd*, 20 January 2015, 15; SGCA Singapore Court of Appeal, *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic*, 26 September 2016, s 7.

eventually weaken the confidence of states in international law. This danger is pressing today given that some states seem keen to disengage from multilateral treaties (and international adjudication).¹⁶⁴

Thomas Franck argued that rules that are legitimate are more likely to be complied with and that two factors that make rules legitimate are their adherence to secondary rules and their clarity ('determinacy').¹⁶⁵ The secondary rules on the law of treaties (and on *jus cogens*) determine how treaty (and *jus cogens*) primary rules in all fields of international law come about, operate and are terminated. By reaffirming and clarifying these secondary rules, the ILC contributes to the clarity, certainty and predictability of international law.¹⁶⁶ In this sense, the Commission's 'codification-by-interpretation' paradigm falls within its long-term goal to reinforce international law,¹⁶⁷ thus convincing states to continue to use international law as an important medium for creating, maintaining and destroying norms that regulate their conduct.¹⁶⁸

6 Conclusion

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

This article has shown that interpretation is within the ILC's existing mandate. However, it cannot be presumed that interpretation is singularly an aspect of

¹⁶⁴ The African Union (AU) warned mass withdrawals from the International Criminal Court. Decision on the International Criminal Court, AU Doc. Assembly/AU/Dec. 622 (XXVIII), 31 January 2017; Annex-Withdrawal Strategy Document to the Decision on the International Criminal Court, AU Doc. Assembly/AU/Dec.672 (XXX), 29 January 2018. On 29 March 2017, the United Kingdom (UK) notified the European Council of its intention to withdraw from the European Union, and, as of 1 February 2020, the UK is not an EU member. On 17 March 2018, the Philippines deposited a written notification of withdrawal from the Rome Statute of the International Criminal Court 1998, 2187 UNTS 90. See 'ICC Statement on the Philippines' Notice of Withdrawal: State Participation in Rom Statute System Essential to International Rule of Law', *International Criminal Court*, available at www.icc-cpi.int/Pages/item.aspx?name=pr1371; Crawford, 'The Current Political Discourse Concerning International Law', 81 *Modern Law Review (MLR)* (2018) 1.

¹⁶⁵ T. Franck, *Fairness in International Law and Institutions* (1995), at 30–34, 40–46.

¹⁶⁶ Nolte, 'The International Law Commission Facing the Second Decade of the Twenty-First Century', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 781, at 790.

¹⁶⁷ Hurst, 'A Plea for the Codification of International Law on New Lines', 32 *Transactions of the Grotius Society* (1946) 135, at 136–140; Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 *MLR* (1956) 1, at 12; Ago, 'La Codification du Droit International et Les Problèmes de sa Réalisation', in *Recueil d'Etudes de Droit International en Hommage à Paul Guggenheim* (1968) 93, at 97.

¹⁶⁸ J. Brunnée and S. Toope, *Legitimacy and Legality in International Law* (2010), at 20–33. On ILC's contribution through the law of sources: Azaria, 'The International Law Commission's Return to the Law of Sources of International Law', 13 *FIU Law Review* (2019) 989.

codification or exclusively one of progressive development. Each interpretative pronouncement has to be assessed separately. The ILC's pronouncements subsequent to the VCLT (and the formation of CIL rules therein) are not a binding or 'authentic' means of interpretation or constituent elements of CIL. However, they are part of an interpretative offer that the ILC makes (primarily) to states with a view to triggering their reaction within and outside the UN system. The reaction of states may eventually lead to an agreement about the interpretation of the VCLT or *opinio juris* concerning the content of CIL rules. The silence of states *vis-à-vis* the ILC's pronouncements and *vis-à-vis* the responses of some states to the ILC's pronouncements within the UN system may not be construed outright as acquiescence. However, whenever states fail to engage with the ILC's interpretative offer, international courts and tribunals are likely to rely on the ILC's interpretative pronouncements as a subsidiary means for determining rules of law for the interpretation of a treaty or the identification of a CIL rule (albeit caution is needed when assessing the weight to be given to each) or as a supplementary means of interpreting a treaty – here, the VCLT – eventually influencing the content of CIL reflected therein.

The ILC is part of a law-shaping process established by the UNGA and the UN Charter. So far, this process has mainly taken the form of shaping CIL through the preparation of draft conventions by the ILC followed by multilateral negotiations between states (and the subsequent pronouncements of international courts and tribunals as to the content of CIL set forth in the treaty in question). The ILC's 'codification-by-interpretation' paradigm takes the form of documents intended from their inception to remain non-binding, involves the interpretation of an existing treaty – here, the VCLT – and aims to reaffirm and develop the content of treaty rules over time and, through this process, to reaffirm and develop the content of CIL. One cannot exclude the possibility that, through the 'codification-by-interpretation' paradigm, the ILC may provide the opportunity to some states (or other actors) to undermine the content of existing rules and introduce a lack of clarity. However, all efforts of codification and progressive development involve such a risk. States undertook this risk in order to promote the 'progressive development of international law and its codification' under the UN Charter. The ILC's interpretative pronouncements in the topics examined in this article are part of the Commission's long-term goal to provide certainty and predictability in the law of treaties (and *jus cogens*) and, by implication, to rules in all fields of international law. Seen through these lenses, the ILC's 'codification-by-interpretation' paradigm in the law of treaties is an attempt to instil international law with legitimacy: to encourage states to continue to use international law as a significant medium by which they conduct their international affairs.