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## The International Law Commission's Return to the Law of Sources of International Law

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## THE INTERNATIONAL LAW COMMISSION’S RETURN TO THE LAW OF SOURCES OF INTERNATIONAL LAW

Danae Azaria\*

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### I. INTRODUCTION

In the first two decades of the twenty-first century alone, the International Law Commission (“Commission” or “ILC”) has adopted and has begun work on seven documents in the field of sources of international law. All of its outputs on these topics are intended to remain non-binding documents. These are: the Guide to Practice on Reservations to Treaties,<sup>1</sup> the

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<sup>1</sup> Int’l Law Comm’n, Rep. on the Work of Its Sixty-Third Session, UN Doc. A/66/10/Add.1, at 34 (2011) [hereinafter Guide to Practice on Reservations].

Articles on the Effect of Armed Conflicts to Treaties,<sup>2</sup> the Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties,<sup>3</sup> the Conclusions on the Identification of Customary International Law,<sup>4</sup> the Draft Guidelines on Provisional Application,<sup>5</sup> and its work on Jus Cogens.<sup>6</sup> In 2018, the Commission also decided to begin work on General Principles of Law.<sup>7</sup> This article primarily focuses on the Conclusions on the Identification of Customary International Law, the Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties and the work on Jus Cogens but makes references to the rest of these topics.

For this line of work, the Commission has faced a dual criticism. On the one hand, the Commission appears unsuccessful, because it no longer prepares treaties. On the other hand, some of these sets of conclusions and guidelines deal with topics that the Commission has worked on in the past and find reflection in the 1969 Vienna Convention on the Law of Treaties (“VCLT”).

This article argues that this criticism is misplaced. Instead the Commission’s work on the law of sources is part of the Commission’s long-standing project to strengthen the international rule of law by instilling international law with clear, certain, and predictable secondary rules on sources. This argument is laid out in two steps. Part II explains some reasons behind the choice of the Commission not to recommend to the United Nations (“UN”) General Assembly to prepare conventions on the basis of the Commission’s draft articles, draft conclusions, and draft guidelines on the aforementioned topics. It argues that the rise of instruments in the Commission’s work that are intended to remain non-binding does not

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<sup>2</sup> Int’l Law Comm’n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10 (2011), reprinted in [2011] 2 Y.B. Int’l Law Comm’n 108, U.N. Doc. A/CN.4/SER.A/2011/Add.1. See also G.A. Res. 66/99 (Dec. 9, 2011).

<sup>3</sup> Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, UN Doc A/73/10, at 12 (2018). See also G.A. Res. 73/202 (Dec. 20, 2018).

<sup>4</sup> Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, UN Doc. A/73/10, at 122 (2018). See also G.A. Res. 73/203 (Dec. 20, 2018).

<sup>5</sup> Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, UN Doc. A/73/10, at 245–70 (2018).

<sup>6</sup> Only the Statement of the Chairperson of the Drafting Committee (available for information only on the ILC’s website, and occasionally in footnotes in the ILC Report) refer to the draft provisions provisionally adopted by the Drafting Committee. The latest available rolling text is cited here: Chairperson of the Drafting Committee, Titles and Texts of Draft Conclusions 1, 2[3(2)], 3[3(1)], 4, 5, 6[6, 8], 7, 8[9(1), (2)], 9[9(3), (4)], 10[10(1), (2)], 11, 12, 13, and 14 Provisionally Adopted by the Drafting Committee at the Sixty-Eighth, Sixty-Ninth and Seventieth Sessions, annex (July 26, 2018), [http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018\\_dc\\_chairman\\_statement\\_jc\\_26july.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_jc_26july.pdf&lang=E).

<sup>7</sup> Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, UN Doc A/73/10, at 299 (2018).

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undermine the normative value of the Commission's pronouncements. Part III demonstrates that there are sound reasons that call for the Commission's return to the law of sources: the nature of international law as a field; the structural changes that have taken place in international law in the previous century; the current inclination of some States to "disengage" from international law, and especially multilateralism; and the Commission's own "rising power," in light of the persuasive force that its pronouncements have exercised on the reasoning of national courts and international courts and tribunals, and especially of the International Court of Justice ("ICJ"). Part IV concludes with the significance of the Commission's recent work on the law of sources for modern international law.

## II. FROM "CODIFICATION BY CONVENTION" TO "CODIFICATION BY NON-BINDING DOCUMENTS"

### A. *The Reasons Behind the "Treaty on the Law of Treaties"*

The VCLT was a ground-breaking achievement of the Commission and of the collective effort of States in the previous century. It instilled international law with stability, certainty, and predictability, because it provides clearer rules on how treaties across all fields of international law come about, operate, and are terminated. Its importance further stems from the fact that a number of its provisions gave rise over time to customary international law.<sup>8</sup> Customary rules on the law of treaties apply in the relationship between parties to the VCLT and those States that are not parties to it; in the relationship between States not parties to the VCLT; as well as to treaties that fall outside the temporal scope of the VCLT, which covers only treaties which are concluded by States after the entry into force of the VCLT with regard to such States (VCLT Article 4), i.e., those treaties concluded after 27 January 1980.

From a scientific point of view, a treaty on the law of treaties was not necessary. The rules on the law of treaties, as the rules on the identification of customary international law, *jus cogens* and general principles of law, are secondary rules of recognition (and change)—they determine how primary rules come about, operate, and terminate. They are default rules (unless deviated from by *lex specialis*). In contrast, a treaty is based on consent and binds only its parties, thus undermining the universality/default nature of the project.

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<sup>8</sup> For an article by article examination of whether each provision sets forth a customary international law rule, see *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* (Oliver Corten and Pierre Klein eds. 2011).

Sir Ian Sinclair (a former member of the Commission) provides an excellent exposition of how this question was discussed in and decided upon by the Commission.<sup>9</sup> When Sir Gerald Fitzmaurice was elected to the Commission, after Sir Lauterpacht's election to the International Court of Justice ("ICJ"), and became Special Rapporteur on this topic, he proposed to the Commission that the draft articles on the law of treaties should take the form of a "code and not of a draft convention."<sup>10</sup> His reasoning was scientific. He explained:

First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based.<sup>11</sup>

At its eighth session (1956), the Commission approved Sir Gerald's proposal. As the Commission's work on the topic progressed, some concerns about the issue arose among Commission members. In 1961, Sir Humphrey Waldock succeeded Sir Gerald (upon the latter's resignation from the Commission owing to his election to the ICJ). That year, the Commission decided that "its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention."<sup>12</sup> Sir Ian Sinclair observes that Roberto Ago, in his capacity as Chairman of the Commission, made a statement in the Sixth Committee (1965) disclosing that Sir Humphrey Waldock had made his acceptance to the post of Special Rapporteur on the Law of Treaties conditional on the draft articles being given the form of a draft convention.<sup>13</sup>

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<sup>9</sup> IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 3–5 (1984).

<sup>10</sup> *Documents of the Eighth Session Including the Report of the Commission to the General Assembly*, [1956] 2 Y.B. Int'l Law Comm'n 106–107, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

<sup>11</sup> *Id.* at 107.

<sup>12</sup> *Documents of the Thirteenth Session Including the Report of the Commission to the General Assembly*, [1961] 2 Y.B. Int'l Law Comm'n 128, U.N. Doc A/CN.4/SER.A/1961/Add.1.

<sup>13</sup> SINCLAIR, *supra* note 9, at 4–5 (1984) (citing the Statement of Roberto Ago, U.N. GOAR, 20th Sess., 851st mtg, U.N. Doc. A/C.6/SR 851 (Oct. 14, 1965)).

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The reasoning behind a “treaty on the law of treaties” was political. The preparation of the Draft Articles on the Law of Treaties took place in the aftermath of the decolonisation process. Newly independent States distrusted the international rules in the formation of which they had not participated and the institutions that they feared might undermine their newly acquired independence.<sup>14</sup> Numerous scholars, such as Roberto Ago, did not consider that codification by treaty was the only option; nor did they consider that codifying by treaty addressed the need for formulating general rules, since treaties bind only their parties. But they considered that treaty negotiations and expressing consent to be bound individually would address the skepticism of the newly independent States.<sup>15</sup> Newly independent States would participate in the formation of the secondary rules on the law of treaties thus determining how they would be bound by treaties across all fields of international law.

### *B. The Deflated Interest of States in Multilateral Treaties*

Contrary to the time when the Commission was called to decide whether to recommend a convention on the basis of its draft articles on the law of treaties and when the VCLT was negotiated, the current state of international law and the current political context is vastly different from that of the time when the VCLT was concluded. The political reasons that encouraged the negotiation of a “treaty on the law of treaties” are absent, while at the same time given the universal and default nature of the secondary rules on the identification of customary international law, *jus cogens* and general principles of law, the conclusion of a convention on these issues is not particularly attractive.<sup>16</sup>

#### 1. The Enthusiasm for Multilateral Treaties and the “Treatification” of International Law

In 2014, Pauwelyn, Wessel, and Wouters demonstrated that for each decade from the 1950s to 1990s, around 35 new multilateral treaties were

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<sup>14</sup> Robert Ago, *La Codification du Droit International et Les Problèmes de sa Réalisation*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM 93, 96 (1968).

<sup>15</sup> *Id.* at 99–100. Charles De Visscher, *Stages in the Codification of International Law*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY, ESSAYS IN HONOR OF PHILIP C. JESSUP 17, 22 (W. Friedmann, L. Henkin, O. Lissitzyn eds., 1972).

<sup>16</sup> See also James Crawford & Simon Olleson, *The Continuing Debate on a un Convention on State Responsibility*, 62 INT'L & COMP. L.Q. 959 (2005) (reasoning vis-à-vis this debate about the Articles on State Responsibility).

deposited with the UN Secretary General.<sup>17</sup> This enthusiasm for multilateral treaties also found reflection in the recommendations that the Commission made to the General Assembly concerning its outputs. Helfer and Meyer showed that between 1947 and 1999 the Commission mainly concluded its work on a topic by recommending to the General Assembly the elaboration of a convention on the basis of the Commission's adopted draft articles.<sup>18</sup> From 1949 to 1974, the Commission recommended 14 conventions out of 21 completed projects. Twelve of those fourteen entered into force.<sup>19</sup>

Owing to this enthusiasm for treaties, today the Commission operates against a normative background that is "treatified" in some areas. For instance, the VCLT has entered into force and has 116 parties. Unless the Commission proposes a formal amendment of the VCLT, documents that are intended to remain non-binding are a reasonable option, whenever the Commission decides to work on a topic that touches on the rules set forth in the VCLT.

## 2. The Decline of Multilateral Law-Making and the Rise of "Informal Law-Making"

However, today, the enthusiasm of States for the conclusion of multilateral treaties has dissipated. Contrary to the prolific multilateral law-making, in the 1950s to 1990s, from 2005 to 2013, only nine multilateral treaties had been registered with the UN Secretary-General.<sup>20</sup> The decline of the enthusiasm of States has recently been coupled with some inclination by some States to withdraw from multilateral and bilateral treaties.<sup>21</sup>

Yet, "[w]hereas formal international law-making has slowed down, a rich tapestry of novel forms of cooperation, ostensibly outside international law, is thriving."<sup>22</sup> Some examples are the Kimberley Scheme on conflict diamonds, the Ruggie Guiding Principles on Business and Human Rights, and more recently the 2018 Global Compact for Safe, Orderly and Regular Migration.<sup>23</sup> It is against this wider background that the Commission's

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<sup>17</sup> Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733, 734 (2014).

<sup>18</sup> Laurence R. Helfer & Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence*, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 305 (Curtis Bradley ed., 2016).

<sup>19</sup> *Id.*

<sup>20</sup> Pauwelyn et al., *supra* note 17, at 734.

<sup>21</sup> See *infra* further discussion in Section III.D.

<sup>22</sup> Pauwelyn et al., *supra* note 17, at 738.

<sup>23</sup> Adopted on 11 December 2018 by an Intergovernmental Conference in Marrakesh and endorsed by the UN General Assembly. G.A. Res. 73/195 (Dec. 19, 2018).

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paradigm has shifted from “codification by convention” to the rise of “codification by non-binding instruments.”

### 3. The Value of the Commission's Documents that Remain Non-Binding

The fact that the Commission adopts documents, including in the field of sources, that are intended to remain non-binding does not undermine the normative influence of such outputs. They are not part of the preparatory works of a treaty thus serving as a supplementary means of interpretation of a treaty later concluded by States, as have the Commission's draft articles that have been used as the basis of multilateral negotiations, such as the Commission's Draft Articles on the Law of Treaties vis-à-vis the VCLT. But, they have a further dual function.

First, they are an influential subsidiary means for determining rules of law, within the meaning of the term in Article 38(1)(d) of the ICJ Statute. This is because these documents, and especially the commentaries, often record and assess State practice (as well as international jurisprudence and doctrine), and often explain whether (and to what extent) agreement or *opinio juris* exists. In this way, they may (and often do) guide the reasoning of international courts and tribunals,<sup>24</sup> as well as of national courts.<sup>25</sup> Second, the Commission's non-binding documents may trigger the reaction of States and thus contribute to the clarification and further development of international law. They may solicit the agreement of States as to the interpretation of existing treaties (such as the VCLT) or the practice and *opinio juris* of States concerning the clarification of existing or future development of customary international law.

The Commission itself recognises this dual function of its non-binding outputs. The 2018 Conclusions on the Identification of Customary International Law do not include a draft conclusion specifically dedicated to the Commission's outputs. Rather, a reference is made to the Commission in the introductory commentary to part five of the conclusions entitled “Significance of certain materials for the identification of customary international law,” which indicates that the Commission's determinations “may have particular value [flowing from, *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

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<sup>24</sup> As indicated in Section III.C below, as of 30 December 2018, the ICJ has relied expressly on the Commission's work in 22 cases (19 decisions in contentious proceedings and 3 advisory opinions).

<sup>25</sup> For instance, the English Court of Appeal in *The Freedom and Justice Party and Ors v. The Secretary of State for Foreign and Commonwealth Affairs*, [2018] EWCA Civ 1719, para. 18, referred to the draft conclusions on the identification of customary international law adopted on first reading.



Assembly and States (including receiving oral and written comments from States as it proceeds with its work).”<sup>26</sup>

Additionally, the 2018 Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties do not address the relevance of the Commission’s own outputs vis-à-vis the interpretation of treaties previously concluded. However, they deal with the relevance of “non-State actors.” Conclusion 5(2) provides that “[o]ther conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32 [of the VCLT]. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.” The commentary explains that the terms “relevant when assessing the subsequent practice of parties” means that the statements of a non-State actor may “provide valuable information about subsequent practice of parties, [and] contribute to assessing this information.”<sup>27</sup> Although the commentary does not refer to the Commission, the term “non-State actor” may include a body, such as the Commission, which is an organ of an international organization but which is not mandated specifically to exercise interpretative powers in relation to treaties (other than the UN Charter), such as the VCLT.<sup>28</sup>

### III. THE “RETURN” TO SOURCES

The following analysis explains that the Commission’s work addresses a need for the clarification of rules over time (Section A), as well as a need to reaffirm systemic secondary rules (Section B). On the basis of Thomas Franck’s understanding of legitimacy and the factors that make rules legitimate, Section C argues that because the Commission’s authority has risen, especially in the eyes of international courts and tribunals, which often “outsource” part of their reasoning to the Commission,<sup>29</sup> the Commission ought to adhere to a clear and consistent methodology (secondary rules on sources) when identifying and interpreting rules of law in all the topics of its work. The Commission’s work on sources is a “self-imposed statement of methodology,” which ensures that the Commission maintains and enhances its influence over States and international courts and tribunals, as a legitimate authority for determining international law. Finally, Section D shows that the

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<sup>26</sup> Int’l Law Comm’n, Rep. on the Draft Conclusions on Identification of Customary Int’l Law, With Commentaries, U.N. Doc. A/73/10, 2018, at 142 (2018) (general commentary to part five, ¶ 2) (emphasis added).

<sup>27</sup> Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, UN Doc A/73/10, at 12 (2018).

<sup>28</sup> The commentary to Conclusion 5(2) states, however, that such non-State actors “can also pursue their own goals, which may be different from those of States parties. Their documentation and their assessments must thus be *critically reviewed*.” *Id.* at 42 (emphasis added).

<sup>29</sup> Stefan Talmon, *Determining Customary International Law: The ICJ’s Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT’L L. 417, 420, 434 (2015).

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Commission's work on sources of international law is an endeavour to provide international courts and tribunals with a coherent and consistent guidance on issues on the law of sources of international law, so as to ensure their continued legitimacy in the eyes of States.

A. *The Need to Elucidate Secondary Rules on Sources over Time*<sup>30</sup>

The Commission's non-binding outputs in the field of sources of international law, listed in Part I, *clarify* over time the rules on sources. More specifically, from its inception, the Guide to Practice was expressly intended to remove ambiguities<sup>31</sup> and fill gaps<sup>32</sup> that existed in the VCLT, as well as the 1978 and 1986 Vienna Conventions, without amending or departing from them.<sup>33</sup> In the Conclusions on Subsequent Agreements and Subsequent Practice, the Commentary to Draft Conclusion 1, "[t]he present draft conclusions aim at *explaining* the role that subsequent agreements and subsequent practice play in the interpretation of treaties."<sup>34</sup> The Draft Guidelines on Provisional Application are intended to provide "clarity to States when . . . implementing provisional application clauses."<sup>35</sup> Finally, the Commission's work on jus cogens is driven by the need for "*clarity* on jus cogens, its formation and effects."<sup>36</sup>

Rules may need elucidation over time, either because meaning was ambiguous since the rule's inception or because ambiguity may arise subsequently to the rule's formation. For instance, the Guide to Practice on Reservations deals with whether the rule set forth in VCLT Article 19 sets thresholds of impermissibility and if so what the effect of impermissible reservations is. Whether Article 19 sets thresholds of permissibility or opposability of reservations is important because a reservation, which has been accepted, gives effect to the reserving State's consent to be bound by the treaty (VCLT Article 20(4)(c)), and modifies the treaty provisions to which the reservation relates to the extent of the reservation in the

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<sup>30</sup> See Danae Azaria, *Codification by Interpretation: The International Law Commission as an Interpreter of International Law* (forthcoming 2019).

<sup>31</sup> Int'l Law Comm'n, Rep. on the Work of Its Forty-Fifth Session, UN Doc. A/48/10, at 231–32 (1993).

<sup>32</sup> For example, the effect of reservations on the treaty's entry into force. *Id.* at 232–35.

<sup>33</sup> Int'l Law Comm'n, Rep. on the Work of Its Forty-Seventh Session, UN Doc A/CN.4/470, at 154 (1995); see also Int'l Law Comm'n, Rep. on the Work of Its Forty-Fifth Session, *supra* note 31, at 236; Int'l Law Comm'n, Rep. on the Work of its Sixty-Third Session, UN Doc. A/66/10, at 38 (2011).

<sup>34</sup> Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, UN Doc A/73/10, at 12 (2018).

<sup>35</sup> Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth Session, UN Doc. A/68/10, at 104 (2013).

<sup>36</sup> Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, UN Doc. A/69/10, at 281–82 (2014).

relationship between the reserving and the accepting States (VCLT Article 21(1)). If no distinction were drawn, impermissible reservations would be susceptible to acceptance. According to the Guide to Practice, only permissible reservations can be accepted or objected to with the effects set forth in Articles 20–21, and “[the VCLT] says nothing about the effects [of impermissible reservations].”<sup>37</sup> The Guide to Practice makes clear that the scope of the existing provisions of the VCLT does not cover and address the effect of impermissible reservations and thus Articles 20–23 do not apply to impermissible reservations. It further explains that impermissible reservations are null and void, irrespective of the reactions of other contracting States (Guideline 4.5.1).<sup>38</sup>

Further, VCLT Article 53 provides a definition of *jus cogens* for the purpose of the VCLT, which is considered an authoritative definition beyond the confines of the treaty.<sup>39</sup> During its work on the draft articles on the law of treaties, the Commission considered that the criteria by which *jus cogens* norms are to be identified are “not free from difficulty.”<sup>40</sup> The statements of governments in the negotiations in the Vienna Conference also demonstrate that they considered that the constitutive elements of *jus cogens* norms were unclear.<sup>41</sup> Instances of imprecision are the meaning of “international community of States as a whole,” and the meaning of “accepted and recognized.”<sup>42</sup> The recent Commission’s work on *jus cogens* is likely to clarify some of these ambiguities within the VCLT provisions and beyond.

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<sup>37</sup> Int’l Law Comm’n, Rep. on the Work of Its Sixty-Third Session, UN Doc. A/66/10 at 505–07 (2011); see also *id.* at 508 (“the treaty rules . . . are silent on the question of the effects of invalid reservations.”).

<sup>38</sup> *Id.* at 509.

<sup>39</sup> THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 6 (2015).

<sup>40</sup> *Draft Articles on the Law of Treaties*, [1966] 2 Y.B. Int’l L. Comm’n 177, 247–48, U.N. Doc. A/CN.4/190.

<sup>41</sup> See Statement of Mexico (Suarez), Vienna Conference, First Session, 52nd meeting of the Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.52, 4 May 1968, at 294, para. 6; Statement of Finland (Carsten), *id.*, para. 12; Statement of Greece (Evrigenis), *id.*, at 295, para. 19; Statement of Chile (Barros), *id.*, at 298, para. 54; Statement of UK, (Sinclair), Vienna Conference, First Session, 53rd meeting of the Committee of the Whole, UN Doc. A/CONF.39/C.1/SR.53, 6 May 1968, at 304, para. 53. Contra (considering the provision proposed by the Commission “a masterpiece of precision”); Statement of India (Jagota), Vienna Conference, First Session, 54th meeting of the Committee of the Whole, UN Doc A/CONF.39/C.1/SR.54, 4 May 1968, at 307, para 12; Statement of Romania (Bolinteanu), *id.*, 312, para. 58.

<sup>42</sup> See also Charles De Visscher, *Stages in the Codification of International Law*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP* 17, 30 (Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn eds., 1972). See draft conclusions 6 and 7. Aniruddha Rajput (Chairman of the Drafting Committee), *Peremptory Norms of General International Law (Jus Cogens)*, (July 26, 2017),

[http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017\\_dc\\_chairman\\_statement\\_jc.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf&lang=E) (“the requirement of acceptance and recognition for peremptory norms is different from the acceptance as law for customary international law and recognition for the purpose of general principles of

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Additionally, rules may need clarification owing to new legal developments. For instance, in the Conclusions on Subsequent Agreements and Practice in Relation to the Interpretation of Treaties, Conclusions 11 and 13 assess whether the new legal development of “Conferences of Parties” and “expert treaty bodies” fall within the scope of Articles 31 and 32 and the customary international law rules set forth therein. The terms “Conferences of Parties” and “expert treaty bodies” do not appear in the VCLT, because they mainly emerged after the conclusion of the VCLT.<sup>43</sup> However, today “Conferences of Parties” and “expert treaty bodies” are a common feature of numerous (mainly multilateral) treaties covering various subjects.<sup>44</sup> Conclusion 11 provides that a decision of a Conference of Parties may embody a subsequent agreement under VCLT Article 31(3)(a), in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus. Conclusion 13 provides that pronouncements of expert treaty bodies may give rise to a future subsequent agreement or subsequent practice by parties under Article 31(3), or other subsequent practice under Article 32; or may refer to existing subsequent agreements and subsequent practice within the meaning of Articles 31(3) or subsequent practice under Article 32. The Commentary clarifies that the subsequent practice envisaged in Article 31(3)(b) does not encompass the pronouncements of expert treaty bodies *per se*, because that provision requires subsequent practice of treaty parties.<sup>45</sup>

### B. *The Need to Reaffirm the Secondary Rules on the Sources of International Law*

Besides the inherent need for clarity over time owing to the nature of legal meaning and legal development, international law has proliferated and grown in recent years, and more actors influence its formation and are

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law.”); Dire Tladi (Special Rapporteur), *Second Rep. on Jus Cogens*, U.N. Doc. A/CN.4/706, at 18–19 (Mar. 16, 2017) (“Textually, there are other ways that article 53 could be interpreted.”).

<sup>43</sup> Treaties that foresaw the establishment of expert treaty bodies were concluded some years prior to the VCLT and entered in force either a few months prior to the conclusion of the VCLT or after the conclusion of the VCLT. States had no experience yet in relation to the interpretative functions of ETBs. International Convention on the Elimination of All Forms of Racial Discrimination arts. 8–14, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]; International Covenant on Civil and Political Rights arts. 28–45, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>44</sup> Examples of treaties establishing Conferences of Parties: Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 2354 U.N.T.S. 67; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3. Examples of treaties establishing ETBs: ICERD, *supra* note 43; ICCPR, *supra* note 43.

<sup>45</sup> *Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. No. 10, at 12, 26, U.N. Doc. A/73/10 (2018).

involved in its application. International courts and tribunals as well as of expert treaty bodies have multiplied. These apply and interpret specialized treaties, but they also apply general international law: for example, rules for the identification of customary international law, rules on treaty interpretation, rules on reservations to treaties, rules concerning the provisional application of treaties, rules on the identification of *jus cogens*.<sup>46</sup> Furthermore, more domestic courts are involved in the application and interpretation of such rules of general international law. Their pronouncements may lead to inconsistencies between them in the way that they interpret and apply secondary rules of international law. More specifically, inconsistencies may arise: (a) between the findings of various domestic courts; (b) between the findings of international courts and tribunals; (c) between the findings of international courts and tribunals on the one hand, and domestic courts on the other hand.<sup>47</sup> All these features may undermine the certainty and predictability of the secondary rules on sources, and may have wide-ranging implications for the predictability of primary rules across all fields of international law, and ultimately the belief of States in international law as a legal order.

The Commission is aware of these dangers and aims at preventing (and addressing) possible “assaults” to the international legal order. A telling example is the Commission’s express overarching goal in the Conclusions on the Identification of Customary International Law. More specifically, the commentary explicitly states that:

the present draft conclusions concern the *methodology* for identifying rules of customary international law. They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. This is not only of concern to specialists in

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<sup>46</sup> Georg Nolte, *The International Law Commission Facing the Second Decade of the Twenty-First Century*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 781 (Ulrich Fastenrath et al. eds., 2011).

<sup>47</sup> See generally *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, Case No. AA 227, Interim Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0910.pdf>; *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, No. C/09/477160/HA ZA 15-1, Decision, Hague District Court, (Apr. 20, 2016), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230>; *Sanum Invs. Ltd. v. Government of the Lao People’s Democratic Republic*, Case No. 2013-13, Award on Jurisdiction (Perm. Ct. 2013), <https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf>; *Government of the Lao People’s Democratic Republic v. Sanum Invs. Ltd.*, No. 2015 SGHC 15, Judgment, Singapore High Court, (Jan. 20, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4107.pdf>; *Sanum Invs. Ltd. v. The Government of the Lao People’s Democratic Republic*, No. 2016 SGCA 57, Judgment, Court of Appeal of the Republic of Singapore, (Sept. 29, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf>. See also Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008).

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public international law: others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a *structured and careful process of legal analysis and evaluation* is required to ensure that a rule of customary international law is properly identified, *thus promoting the credibility of the particular determination as well as that of customary international law more broadly*.<sup>48</sup>

Finally, the traditional rules concerning the sources of international law favour the 'primacy' of States. However, today, many more actors claim some authority in the formation or determination of the rules of international law, such as the 'authority' of pronouncement of international courts and tribunals beyond the confines of the binding effects of their judgments, the pronouncements of expert treaty bodies, and the work of non-governmental organisations. These (explicitly or implicitly) contest the primacy of the authority of States in creating and interpreting international law. The fact that the Commission in its recent work on sources reiterates the centrality of States in the formation, change and termination of secondary rules on sources may be symptomatic of the need to "soothe the anxiety" of States as to who holds the master key to the building of international law. It may be seen as part of an endeavour to guarantee that States remain engaged with international law.

### C. *Taming the Commission's Power by Setting Out a Method*<sup>49</sup>

Some States appear skeptical about how much authority international courts and tribunals, and especially the International Court of Justice ("ICJ"), may give to the Commission's pronouncements.<sup>50</sup> This is not surprising given that as of 30 December 2018, the ICJ has relied expressly on the Commission's work in 22 cases (19 decisions in contentious proceedings and

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<sup>48</sup> *Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. No. 10, at 117, 122, U.N. Doc. A/73/10 (2018) (emphasis added).

<sup>49</sup> This section is heavily based on: Danae Azaria, *The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making*, in 70 YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE (forthcoming).

<sup>50</sup> See, for instance, the comments of the following governments in the Sixth Committee concerning the draft articles on immunity of State officials from foreign criminal jurisdiction as provisionally adopted by the Commission in 2017: China (U.N. GAOR, 72nd Sess., 23rd mtg. at 9, U.N. Doc. A/C.6/72/SR.23 (Nov. 17, 2017)); Spain (U.N. GAOR, 72nd Sess., 24th mtg. at 7, U.N. Doc. A/C.6/72/SR.24 (Nov. 30, 2017)); Switzerland: (U.N. GAOR, 72nd Sess., 22nd mtg. at 12, U.N. Doc. A/C.6/72/SR.22 (Nov. 27, 2017)).

3 advisory opinions).<sup>51</sup> In each case, the ICJ relies on the Commission's work to address a range of legal questions, and may also use more than one document for each legal question. Overall, the ICJ has relied on Commission documents in relation to 39 different legal questions. Because international lawyers place emphasis on the pronouncements of international courts and tribunals, the Commission's influence may be enhanced through the influence that its pronouncements may have on the reasoning of the ICJ (and other international courts and tribunals). Further, the Commission has adopted a practice whereby it does not denote whether its pronouncements fall within codification or progressive development. Sometimes, it indicates in the introduction to its commentary that there are instances of both in the topic.<sup>52</sup> Occasionally, it clarifies in the commentary to a specific provision

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<sup>51</sup> Contentious Proceedings: North Sea Continental Shelf (Federal Republic of Ger./Den.; Federal Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶¶ 48-50, 54-55, 95 (Feb. 20); Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18, ¶¶ 41, 100, 119 (Feb. 24); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, 1986 I.C.J. 14, ¶ 190 (June 27); Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. 7, ¶¶ 47, 50-54, 58, 123 (Sept. 25); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 275, ¶ 31 (June 11); Kasikili/Sedudu Island (Bots. v. Namib.), Merits, 1999 I.C.J. 1045, ¶ 49 (Dec. 13); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, 2001 I.C.J. 40, ¶ 113 (Mar. 16); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Merits, 2002 I.C.J. 303, ¶ 265 (Oct. 10); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Merits, 2005 I.C.J. 168, ¶¶ 160, 293 (Dec. 19); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), Merits, 2007 I.C.J. 43, ¶¶ 173, 186, 199, 344, 385, 398, 420, 431 (Feb. 26); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Merits, 2007 I.C.J. 659, ¶ 280 (Oct. 8); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, ¶¶ 39, 64, 84, 91, 93 (May 24); Maritime Delimitation in the Black Sea (Romania v. Ukraine), Merits, 2009 I.C.J. 61, ¶ 134 (Feb. 3); Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. 14, ¶ 273 (Apr. 20); Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. 3, ¶¶ 112-117 (Jan. 27); Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Merits, 2012 I.C.J. 24, ¶¶ 56, 69, 89, 137 (Feb. 3); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, 2016 I.C.J. 255, ¶ 42 (Oct. 5); Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, 2016 I.C.J. 833, ¶ 45 (Oct. 5); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, ¶ 151 (Feb. 2, 2018), <https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>. Advisory Opinions: Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶¶ 47, 49-50 (Dec. 20); Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶ 62 (Apr. 29); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 140 (July 9).

<sup>52</sup> Int'l Law Comm'n, Rep. on the Work of Its Eighth Session, UN Doc. A/CN.4/104, at 254 (1956); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, UN Doc. A/56/10, at 31 (2001).

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that it represents *lex lata*<sup>53</sup> or *lex ferenda*, and the extent of *lex ferenda*.<sup>54</sup> In light of this practice and in an era where codification through non-binding instruments becomes the main paradigm, the concern of States about how much authority international courts and tribunals place on the Commission's pronouncements may become more pronounced.

Thomas Franck argued that rules that are legitimate are more likely to be complied with, and one of the factors that make rules legitimate is their adherence to methodology: adherence to secondary rules of international law for identifying and interpreting primary rules.<sup>55</sup> Consistent "adherence" to such secondary rules is an important basis on which the Commission's work is and will be relied upon. This is because adherence to such methodology operates as a restraint on the Commission's discretion: it anchors its output in State practice, *opinio juris* and international jurisprudence, rather than on mere policy preferences of the Commission's members.

Evidence that the Commission is cognizant that adherence to secondary rules is important for the persuasion of its own work can be found in the Commission's work on customary international law. In the 2018 conclusions on the identification of customary international law, the Commission has introduced in the commentary some qualitative criteria for the reliance on the Commission's work. It states that the Commission's determinations "may have particular value [flowing from, *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)."<sup>56</sup> It concludes that "the weight to be given to the Commission's determinations depends . . . on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output."<sup>57</sup>

Further, conclusion 14, entitled "Teachings," recognizes that teachings may constitute a subsidiary means for determining rules of customary international law. The commentary to conclusion 14 introduces some crucial criteria for teachings to be used as a subsidiary means for determining rules

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<sup>53</sup> See, e.g., Draft Articles on the Law of Treaties: Text as Finally Adopted by the Commission on 18 July 1966, UN Doc. A/CN.4/190, at 246 (1966) ("The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of to-day.").

<sup>54</sup> See, e.g., Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, UN Doc. A/56/10, at 137 (2001) (concerning measures taken by States other than the injured State) ("Practice on this subject is limited and rather embryonic.").

<sup>55</sup> THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 30, 40–46 (1995).

<sup>56</sup> Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, UN Doc. A/73/10, at 142 (2018) (emphasis added).

<sup>57</sup> *Id.* (emphasis added).



of customary international law. The Commission states that “assessing the authority of a given work is essential”<sup>58</sup> for it to be a subsidiary means for the determination of rules of law.

The value of each output [of an international expert body] needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, *the care and objectivity with which it works on a particular issue*, the support a particular output enjoys within the body, and the reception of the output by States and others.<sup>59</sup>

These criteria apply to outputs by the Commission as well.<sup>60</sup> What the Commission calls “care and objectivity” in this topic, Thomas Franck called “adherence.”

The Commission’s recent work on how international law may be identified and interpreted, whether in the context of the law of treaties, customary international law, or *jus cogens*, and in the future with respect to general principles of law,<sup>61</sup> is a map that the Commission prepared for States, international courts and tribunals, and others who identify customary international law, including itself. They are a guide of methodology that the Commission indicates to States and to international courts and tribunals that the Commission itself uses when it codifies existing law. Its discretion is restricted and its influence is thus enhanced.

#### D. Reinforcing International Adjudication

In recent years, some States seem inclined to “retreat” from international law, and especially from treaties and from international adjudication. Some of the arguments supporting decisions of withdrawal from bilateral

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<sup>58</sup> *Id.* at 151 (commentary to draft conclusion 14 para. (3)).

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> The commentary to draft conclusion 14 mentions “international expert bodies.” *Id.* Examples of such bodies mentioned are the Institut de Droit International and the International Law Association, which are different from the Commission. *Id.* The Commission is a subsidiary organ of an organ of an international organisation and has a direct relationship with governments. Footnote 774 of the Commission’s report in the commentary to conclusion 14 states that “[t]he special consideration to be given to the output of the International Law Commission is described in paragraph (2) of the general commentary to the present Part (Part Five) above.” *Id.* at 151 n.774. This does not mean that the general requirements for other collective expert bodies would not apply to the Commission’s determinations. As indicated above, paragraph (2) of the commentary to part five also refers to some (non-exhaustive) qualitative criteria, which overlap with the “care and objectivity” referred in the commentary to conclusion 14: e.g. “the sources relied upon.” *Id.* at 142–43.

<sup>61</sup> *Id.* at 299.

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investment treaties (e.g., India)<sup>62</sup> or the ICSID Convention (e.g., Bolivia, Ecuador, and Venezuela have denounced the ICSID Convention), the ICC Statute (e.g., Philippines),<sup>63</sup> regional economic integration organizations (e.g., the UK's decision to withdraw from the European Union), and human rights treaties (e.g., suggestions that Russia is considering to withdraw from the European Convention on Human Rights)<sup>64</sup> revolve (at least partly) around the interpretations of these treaties by international courts and tribunals, and some disbelief that States should subject themselves to international adjudication. These trends may undermine the belief of States in the international rule of law.<sup>65</sup>

Further, some have pointed out that the ICJ and the ILC create international law through their circular interaction.<sup>66</sup> By cross-referring to each other's 'authoritative' pronouncements, they dispense of the inductive approach of identifying State practice and distilling States' belief of law. States may criticize (and undermine) international courts and tribunals on the basis that their reasoning is flawed because they merely rely on the Commission's non-binding outputs and do not deploy themselves a method for identifying and interpreting international law.

Such criticisms can be seriously addressed by ensuring that the Commission and international courts and tribunals consistently adhere to a methodology for identifying and interpreting rules of international law. The Commission's clarification and reaffirmation of the basic secondary rules on the law of sources of international law may assist in addressing some States' criticisms against international adjudication.

#### IV. CONCLUSION

The Commission's overarching goal with its "project in the law of sources" is to clarify and reaffirm secondary rules and through clear and

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<sup>62</sup> Kavaljit Singh & Burghard Ilge, *India Overhauls Its Investment Treaty Regime*, FINANCIAL TIMES (July 15, 2016), <https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc>.

<sup>63</sup> On 17 March 2018, the Philippines deposited to the UN Secretary-General a written notification of withdrawal from the ICC Statute. Press Release, International Criminal Court, ICC Statement on the Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law, (Mar. 20, 2018), available at <https://www.icc-cpi.int/Pages/item.aspx>.

<sup>64</sup> Vladimir Kara-Murza, *Russia is Preparing to Back Out of Its Last Human Rights Commitments in Europe*, WASH. POST (Oct. 30, 2018), <https://www.washingtonpost.com/news/democracy-post/wp/2018/10/30/russia-is-preparing-to-back-out-of-its-last-human-rights-commitments-in-europe/>.

<sup>65</sup> For a wealth of research papers on this subject, see *The International Rule of Law—Rise or Decline?*, KOLLEG-FORSCHUNGSGRUPPE, <http://www.kfg-intlaw.de/> (last visited April 11, 2019).

<sup>66</sup> See, e.g., Santiago Villalpando, *Le Codificateur et le Juge Face à la Responsabilité Internationale de l'État: Interaction Entre la CDI et la CIJ Dans la Détermination des Règles Secondaires*, 55 ANNUAIRE FRANÇAIS DE DROIT INT'L 39 (2009).

predictable secondary rules on sources to ensure the clarity, certainty and predictability of primary rules across all fields of international law. In so doing, it contributes to the strengthening of international courts and tribunals by providing them with a 'methodological map' when they discharge their functions, and reinforces its own authority by placing some methodological limits to the manner in which it may discharge its own function (of progressively developing international law and its codification). Overall, the Commission's work is part of its goal to instill international law with legitimacy: to convince States to use international law, its processes and institutions, as an important medium by which they regulate their international affairs.