

‘WHAT’S A GUIDELINE ANYWAY?’, OR RATHER: THE FUNCTION OF “FORM” IN THE WORK OF THE INTERNATIONAL LAW COMMISSION

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The form (draft guidelines, conclusions, articles, principles) in which the International Law Commission (‘ILC’) concludes its output is repeatedly discussed both in- and outside the halls of the United Nations. This article moves beyond the codification/progressive development and binding/non-binding dichotomies and asks instead what form does for the work of the ILC. By closely reading ILC debates on the question of form from as early as 1950 up until the present day, this article illustrates that questions about form essentially mirror and replace a more fundamental question about the role of the Commission and the purpose that its output serves. Rather than answering these questions, the Commission relies on the instrument of form, which functions as a message and a label that can be understood in different ways by different actors.

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I INTRODUCTION

‘What’s a guideline anyway?’ — an assistant asks one afternoon in the group chat connecting all the assistants of members of the International Law Commission (‘ILC’) during its 75th session. The message popped up during a Drafting Committee meeting, which is a private meeting of which no publicly available summary record exists.¹ For the purpose of this article, it suffices to say that, in this particular meeting, a considerable amount of time was spent discussing whether guidelines should merely be describing practice or could contain strong normative language — whether they should regulate or prescribe or recommend or guide action.² In other words, what’s a guideline anyway?

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¹ The Chair of the Drafting Committee does, however, write quite an extensive report on the decisions made by the Committee on each topic: see ‘Analytical Guide to the Work of the International Law Commission’, *International Law Commission* (Web Page, 9 August 2023) <<https://legal.un.org/ilc/guide/gfra.shtml>>, archived at <<https://perma.cc/33QW-P4RP>>.

² International Law Commission, *Settlement of Disputes to which International Organizations are Parties: Statement of the Chair of the Drafting Committee, Ms Phoebe Okowa*, 75th sess, 1st pt (31 May 2024); International Law Commission, *Provisional Summary Record of the 3673rd Meeting*, 75th sess, 1st pt, 3673rd mtg, Agenda Items 1 and 6, UN Doc A/CN.4/SR.3673 (12 July 2024) 3–9 (Okowa).

For more than a while now, the International Law Commission spends a significant amount of time discussing the particular *form* in which it drafts its output³ rather than the recommendation it is required to formulate to the United Nations General Assembly ('General Assembly') once it concludes the drafting process. Aside from the occasional report, draft code or draft principles, the Commission's 20th century practice was predominantly characterised by the drafting of articles, which were recommended to the General Assembly with a view to the conclusion of a convention. As the century turned and states no longer seemed as eager to turn the ILC's draft articles into binding conventions,⁴ the ILC changed its own practice: first its recommendations, and then the forms of its outputs. Yet, it seems that only the Commission's intense three-year long debate on what to recommend the General Assembly to do with its 2001 Draft Articles on State Responsibility ('(D)ARSIWA') has been analysed in scholarly work.⁵ Today, as much of the ILC's work is prepared and concluded in new forms — guidelines, conclusions, principles, guides to practice, study group conclusions, guiding principles — (scholarly) attention has become centred on the form of the ILC's outputs rather than the recommendations it formulates to the General Assembly.

Outputs concluded in these newer forms are generally not intended to become legally binding instruments, meaning they are often referred to as 'soft' or 'non-

³ See below Parts II–V.

⁴ For example, the 1989 Draft Articles on the Status of the Diplomatic Courier and Diplomatic Bag Not Accompanied by Diplomatic Courier were never turned into a convention: see International Law Commission, *Report of the International Law Commission on the Work of its Forty-First Session*, UN GAOR, 44th sess, Supp No 10, UN Doc A/44/10 (1989); the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property did lead to the adoption of the *UN Convention on Jurisdictional Immunities* in 2004, but only after extensive negotiations and it has yet to enter into force: see *Report of the International Law Commission on the Work of its Forty-Third Session*, UN GAOR, 46th sess, Supp No 10, UN Doc A/46/10 (1991); *United Nations Convention on Jurisdictional Immunities of States and Their Property*, opened for signature 2 December 2004, 44 ILM 802 (not yet in force) ('*UN Convention on Jurisdictional Immunities*').

⁵ See, eg, David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96(4) *American Journal of International Law* 857. For an overview of working procedures, see generally Michael Wood, 'The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?' in Isabelle Buffard et al (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff, 2008) 373.

binding' by members of the ILC,⁶ as well as by state representatives⁷ and scholars.⁸ However, this classification has averted neither calls nor attempts to clarify what these newer forms entail or how they relate to one another. In 2018, a member of the Commission argued that a difference in form implied 'a difference in the Commission's evaluation of [the outputs'] relative meaning or importance'.⁹ That same meeting, another member advocated for 'some serious soul-searching' and developing and using a consistent set of criteria for the final form of the ILC outputs.¹⁰ Since then, the ILC's Working Group on methods of work has been deliberating the matter.¹¹ During the same period, delegates of the United Nations' Sixth Committee have also repeatedly asked for 'greater clarity ... on the effect of the nomenclature relating to the outcomes',¹² potentially in the form of 'a practice

⁶ See, eg, International Law Commission, *Summary Record of the 3308th Meeting*, 68th sess, 1st pt, 3308th mtg, Agenda Item 8, UN Doc A/CN.4/SR.3308 (2016); International Law Commission, *Summary Record of the 3311th Meeting*, 68th sess, 1st pt, 3311th mtg, Agenda Item 8, UN Doc A/CN.4/SR.3311 (2016) ('*ILC Summary Record 3311th Meeting*'); International Law Commission, *Summary Record of the 3359th Meeting*, 69th sess, 1st pt, 3359th mtg, Agenda Item 5, UN Doc A/CN.4/SR.3359 (2017); International Law Commission, *Provisional Summary Record of the 3580th Meeting*, 73rd sess, 1st pt, 3580th mtg, Agenda Item 5, UN Doc A/CN.4/SR.3580 (16 June 2022). See below Part III.

⁷ See, eg, *Summary Record of the 20th Meeting*, UN GAOR, 6th Comm, 72nd sess, 20th mtg, Agenda Item 81, UN Doc A/C.6/72/SR.20 (2017) 9 [43] (Bagherpour Aredekani), 13 [74] (Piiskop); *Summary Record of the 23rd Meeting*, UN GAOR, 6th Comm, 73rd sess, 23rd mtg, Agenda Item 82, UN Doc A/C.6/73/SR.23 (2018) 4 [28] (Eidelman) ('*Sixth Committee Summary Record 23rd Meeting*'); *Summary Record of the 16th Meeting*, UN GAOR, 6th Comm, 76th sess, 16th mtg, Agenda Item 82, UN Doc A/C.6/76/SR.16 (2021) 12 [65] (Asiabi Pourimani), 15 [87] (Hutchison); *Summary Record of the 17th Meeting*, UN GAOR, 6th Comm, 76th sess, 17th mtg, Agenda Item 82, UN Doc A/C.6/76/SR.17 (2021) 5 [25] (Bandeira Galindo), 9 [46] (Nir-Tal), 16 [86] (Nguyen); *Summary Record of the 22nd Meeting*, UN GAOR, 6th Comm, 77th sess, 22nd mtg, Agenda Item 77, UN Doc A/C.6/77/SR.22 (2022) 5 [27] (Nordin), 14 [86] (Bandeira Galindo); *Summary Record of the 31st Meeting*, UN GAOR, 6th Comm, 77th sess, 31st mtg, Agenda Item 77, UN Doc A/C.6/77/SR.31 (2022) 11 [77] (Turay).

⁸ Jacob Katz Cogan, 'The Changing Form of the International Law Commission's Work' in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill Nijhoff, 2015) 275; Elena Baylis, 'The International Law Commission's Soft Law Influence' (2019) 13(6) *FIU Law Review* 1007; Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63(3) *International and Comparative Law Quarterly* 535; Luigi Crema, 'The ILC's New Way of Codifying International Law, the Motives behind It, and the Interpretive Approach Best Suited to It' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (Cambridge University Press, 2022) 161; Yejoon Rim, 'The Authority of the Work of the International Law Commission and Its Final Form' (2025) 27(1) *Max Planck Yearbook of United Nations Law* 422.

⁹ International Law Commission, *Provisional Summary Record of the 3399th Meeting*, 70th session, 1st pt, 3399th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3399 (18 June 2018) 12 (Nolte) ('*ILC Provisional Summary Record 3399th Meeting*').

¹⁰ *Ibid* 7 (Jalloh).

¹¹ International Law Commission, *Report of the International Law Commission: Seventy-Third Session*, UN GAOR, 77th sess, Agenda Item 77, Supp No 10, UN Doc A/77/10 (2022) 344 [255] ('*ILC Report 73rd Session*'). So far, the (unfortunately, private) discussions of the Working Group on methods of work related to the meaning of output described as draft articles, draft conclusions, draft guidelines, and draft principles are expected to result in 'a recommendation ... for sharing with States': see International Law Commission, *Report of the International Law Commission: Seventy-Fifth Session*, UN GAOR, 79th sess, Agenda Item 79, Supp No 10, UN Doc A/79/10 (2024) 115 [430] ('*ILC Report 75th Session*').

¹² *Summary Record of the 31st Meeting*, UN GAOR, 6th Comm, 77th sess, 31st mtg, Agenda Item 77, UN Doc A/C.6/77/SR.31 (2022) 10 [74] (Turay).

guide’ which would have to include criteria for ‘the selection of a particular [form], the types of provisions that might be included within that [form], and what might be the legal implications, if any’.¹³ So far, attempts to clarify or differentiate between articles, conclusions, principles and guidelines have tended to employ the language found in the ILC’s mandate. It has been claimed, for example, that documents which are not intended to be adopted in the form of a convention — such as conclusions, principles, guidelines or guides — ‘should strive to codify existing law’,¹⁴ and that ‘the normative value of draft conclusions as a final output ... would reflect primarily codification and possibly elements of progressive development’.¹⁵ Yet others have argued precisely the reverse, namely that ‘soft’ outcomes allow the Commission to focus more on the progressive development of law than on its codification.¹⁶

Against this background, I believe there is more to be said about form than that it is a (rather vague) indicator of normativity. The implied yet confused connection between form and the codification/progressive development dichotomy suggests that questions of form are intrinsically linked to the mandate of the ILC. To explore this point further, I approach form through a lens that is inspired by the logic of a boundary object, which is ‘a sort of arrangement that allow[s] different groups to work together without consensus’.¹⁷ This lens shifts the focus from the ontology (or “thingness”) of individual forms, to form as an instrument that fulfils a specific function in the work of the International Law Commission. The notion of boundary objects is insightful in the sense that it demonstrates that individuals are able to cooperate through employing an object that — due to certain characteristics — resolves distinct perceptions into a single representation, while continuing to

¹³ *Summary Record of the 13th Meeting*, UN GAOR, 6th Comm, 75th sess, 13th mtg, Agenda Item 80, UN Doc A/C.6/75/SR.13 (2020) 6 [32] (Simonoff).

¹⁴ International Law Commission, *Peremptory Norms of General International Law (Jus Cogens): Comments and Observations Received from Governments*, 73rd sess, UN Doc A/CN.4/748 (9 March 2022) 18. See also, eg, International Law Commission, *Identification of Customary International Law: Comments and Observations Received from Governments*, 70th sess, UN Doc A/CN.4/716 (14 February 2018) 8; *Sixth Committee Summary Record 23rd Meeting*, UN Doc A/C.6/73/SR.23 (n 7) 4 [23], [29] (Eidelman); *Summary Record of the 24th Meeting*, UN GAOR, 6th Comm, 74th sess, 24th mtg, Agenda Items 79 and 171, UN Doc A/C.6/74/SR.24 (2019) 7 [27] (Weiss Ma’udi), 14 [73] (String).

¹⁵ Charles Chernor Jalloh, Special Rapporteur, *Second Report on Subsidiary Means for the Determination of Rules of International Law*, 75th sess, UN Doc A/CN.4/769 (30 January 2024) 6 [15]. See also Charles Chernor Jalloh, Special Rapporteur, *First Report on Subsidiary Means for the Determination of Rules of International Law*, 74th sess, UN Doc A/CN.4/760 (13 February 2023) 19–20 [55]; International Law Commission, *Report of the International Law Commission: Seventy-Fourth Session*, UN GAOR, 78th sess, Supp No 10, UN Doc A/78/10 (2023) 76 [7] (*‘ILC Report 74th Session’*).

¹⁶ See, eg, International Law Commission, *Expulsion of Aliens: Comments and Observations Received from Governments*, 66th sess, UN Doc A/CN.4/669 (21 March and 1 October 2014) 27–8; International Law Commission, *Summary Record of the 2886th Meeting*, 58th sess, 2nd pt, 2886th mtg, Agenda Item 6, UN Doc A/CN.4/SR.2886 (2006); International Law Commission, *Summary Record of the 3306th Meeting*, 68th sess, 1st pt, 3306th mtg, Agenda Item 8, UN Doc A/CN.4/SR.3306 (2016) (*‘ILC Summary Record 3306th Meeting’*); International Law Commission, *Provisional Summary Record of the 3582nd Meeting*, 73rd sess, 1st pt, 3582nd mtg, Agenda Items 4 and 5, UN Doc A/CN.4/SR.3582 (16 June 2022).

¹⁷ Susan Leigh Star, ‘This is Not a Boundary Object: Reflections on the Origin of a Concept’ (2010) 35(5) *Science, Technology and Human Values* 601, 602. The concept originates in science studies and is part of an analytical framework that is used to study the process of collecting, managing and coordinating knowledge among actors who reside in different social worlds and are aiming to collaborate.

mean different things to different people.¹⁸ This analytical shift also requires a change in the material that is being studied. Instead of studying the ILC *outputs* in their respective forms, the analysis presented in this article is based on a close reading of the ILC *debates* in which members discuss the form in which to draft its output. These debates — which are publicly available as summary records — are supplemented by information included in relevant reports written by Special Rapporteurs.

Unlike the ILC's debate on the final form of its (D)ARSIWA — which very nicely illustrates that members of the Commission held disparate views regarding its mandate and the best way to fulfil it¹⁹ — the debates analysed in this article are not so explicitly and openly dedicated to questions about the traditional lawmaking process or the role that the Commission should have in response to any (perceived) shortcomings of that process. In fact, what stands out in the ILC's debates I analyse below is what remains unsaid: the fact that members view the role of the ILC differently. These views are translated into views about form: about what form can(not) do or should (not) do. Indeed, as I witnessed and analysed numerous debates related to this question of form, I realised that the (seemingly technical) question 'what can *this form* do?' essentially replaces the (inherently political) question 'what can we — the International Law Commission — do?' And so, rather than deciding upon its own supposed role in dealing with a specific topic, the Commission discusses form. Again and again and again.

Yet, as I illustrate throughout this article, it remains fundamentally unclear what form can or should do — despite the many debates. Attempts by members to clarify and draw boundaries around specific forms continuously fail. The very moment some clarity arises as to what a specific form is or should be, or how one form can be differentiated from another, this clarity dissipates again through discussions on another topic. And yet, the ILC's choice for one form rather than another is far from arbitrary: form matters — a lot. I suggest that this is the case not because form is intrinsically linked to outputs' 'meaning or importance',²⁰ but because form is a stand-in for 'the message that the Commission would like to convey'.²¹ Paradoxically (perhaps), form only fulfils this function *because* it is unclear, because it moves and adapts, suggests rather than dictates. As such, and as will increasingly become clear, the debates related to the form of the Commission's outputs essentially echo the long-standing debate about the distinction (or intrinsic link) between progressive development and codification. It is precisely the vagueness of these concepts that enables the Commission to continue its work.²² As per the boundary object logic, uniting around such a plastic concept fulfils a specific function.

The article is structured as follows. First, I reflect on the ILC's practice of drafting articles and its turn to other forms (Part II). Then, I analyse debates on topics that were drafted in the form of principles (Part III), conclusions (Part IV)

¹⁸ Ibid.

¹⁹ Caron (n 5).

²⁰ *ILC Provisional Summary Record of the 3399th Meeting*, UN Doc A/CN.4/SR.3399 (n 9) 12 (Nolte).

²¹ *ILC Report 75th Session*, UN Doc A/79/10 (n 11) 88 [298].

²² Keri van Douwen, 'Seventeen Men at Lake Success: In Search of the International Law Commission' (2024) 37(3) *Leiden Journal of International Law* 557.

and guidelines (Part V). Each of these parts is structured chronologically, and included in the analysis are debates on the following topics: the Nürnberg principles, allocation of loss in the case of transboundary harm arising out of hazardous activities, protection of the environment in relation to armed conflict, identification of customary international law, subsequent agreements and subsequent practice in relation to interpretation of treaties, provisional application of treaties, succession of states in respect of state responsibility, and protection of the atmosphere. Part VI concludes.

II ARTICLES

The ILC has been known mostly for its drafting of articles. Still, it would be a mistake to assume that the form of its outputs played no role in the Commission's earlier practice. Out of the first six projects that the Commission worked on from 1949 onwards, only two were finalised in the form of articles, leading to the adoption of the four *Conventions* and the *Optional Protocol* on the law of the sea and the *Vienna Convention on the Law of Treaties* ('VCLT').²³ The other four projects were concluded as a report,²⁴ principles,²⁵ model rules²⁶ and a draft code.²⁷ Only in the case of the model rules did the Commission itself decide the form in which to cast its output, and only after the General Assembly had made a

²³ *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966); *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964); *Optional Protocol of Signature concerning the Compulsory Settlement of Disputes*, opened for signature 29 April 1958, 450 UNTS 169 (entered into force 30 September 1962); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT').

²⁴ See the project concerning the ways and means for making the evidence of customary international law more readily available: International Law Commission, *Report of the International Law Commission on its Second Session*, UN GAOR, 5th sess, Agenda Item 52, Supp No 12, UN Doc A/CN.4/34 (1950) 367–74 [24]–[94] ('*ILC Report 2nd Session*').

²⁵ See the project concerning the principles of international law recognized in the *Charter of the Nürnberg Tribunal* and in the judgment of the Tribunal: *ibid* 374–8 [95]–[127].

²⁶ See the project concerning the model rules on arbitral procedure: International Law Commission, *Report of the International Law Commission Covering the Work of its Tenth Session*, UN GAOR, 13th sess, Agenda Item 56, Supp No 9, UN Doc A/CN.4/117 (1958) 83–6 [22] ('*ILC Report 10th Session*').

²⁷ See the project concerning the draft code of offences against the peace and security of mankind: International Law Commission, *Report of the International Law Commission Covering the Work of its Sixth Session*, UN GAOR, 9th sess, Agenda Item 49, Supp No 9, UN Doc A/CN.4/88 (1954) 149–52 [41]–[54].

request to that end.²⁸ Yet, during the 1960s ('the golden era of codification'),²⁹ '70s and '80s — times characterised almost exclusively by the (quite successful) drafting of articles — debates about the form of the output did arise within the International Law Commission. For example, lengthy and repetitive debates about the most appropriate form in which to cast the law of treaties indicate the existence of quite fundamental disagreements about the nature of legal instruments (for example, whether a code is very different from a convention) as well as the role of the International Law Commission itself (for example, whether it should try to regulate the relations between states or restate existing international law).³⁰ Similar albeit less protracted debates took place in relation to other topics, such as diplomatic intercourse and immunities,³¹ special missions³² and succession of

²⁸ In line with art 24 of the *Statute of the International Law Commission*, a 'report' was submitted to the General Assembly on the ways and means of making the evidence of customary international law more readily available: *Establishment of an International Law Commission*, GA Res 174(II), UN GAOR, 2nd sess, 123rd plen mtg, UN Doc A/RES/174(II) (21 November 1947) Annex. The General Assembly instructed the Commission to formulate 'principles' and a 'draft code': *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, GA Res 177(III), UN GAOR, 2nd sess, 123rd plen mtg, UN Doc A/RES/177(III) (21 November 1947); *ILC Report 2nd Session*, UN Doc A/CN.4/34 (n 24) 367–74 [24]–[94], 374 [95], 379 [146]. In contrast, the Commission itself decided to cast its output in the form of 'model rules' after its initial draft on arbitral procedure was rejected by the General Assembly: see *ILC Report 10th Session*, UN Doc A/CN.4/117 (n 26) 80–1 [10]–[15]. For the Commission's debate on the form of its work on arbitral procedure, see International Law Commission, *Summary Record of the 417th Meeting*, 9th sess, 417th mtg, Agenda Items 1 and 5, UN Doc A/CN.4/SR.417 (1957); International Law Commission, *Summary Record of the 418th Meeting*, 9th sess, 418th mtg, Agenda Items 1 and 5, UN Doc A/CN.4/SR.418 (1957); International Law Commission, *Summary Record of the 419th Meeting*, 9th sess, 419th mtg, Agenda Item 1, UN Doc A/CN.4/SR.419 (1957); International Law Commission, *Summary Record of the 420th Meeting*, 9th sess, 420th mtg, Agenda Item 1, UN Doc A/CN.4/SR.420 (1957); International Law Commission, *Summary Record of the 433rd Meeting*, 10th sess, 433rd mtg, Agenda Items 1 and 2, UN Doc A/CN.4/SR.433 (1958).

²⁹ Laurence Boisson de Chazournes, 'The International Law Commission in a Mirror — Forms, Impact and Authority' in United Nations (ed), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill Nijhoff, 2021) 133, 135; Patrícia Galvão Teles, 'The Work of the International Law Commission in the Present Quinquennium (2012–2016) and Possible Future Topics: How to Remain Relevant in the 21st Century' in Faden et al, *Anuário Português de Direito Internacional (2014–2015)* (2016) 215, 215; Pavel Šturma, 'The International Law Commission between Codification, Progressive Development or a Search for a New Role' (2019) 13(6) *FIU Law Review* 1125, 1130.

³⁰ See, eg, International Law Commission, *Summary Record of the 620th Meeting*, 13th sess, 620th mtg, Agenda Item 4, UN Doc A/CN.4/SR.620 (1961); International Law Commission, *Summary Record of the 621st Meeting*, 13th sess, 621st mtg, Agenda Items 4 and 5, UN Doc A/CN.4/SR.621 (1961); International Law Commission, *Summary Record of the 776th Meeting*, 17th sess, 1st pt, 776th mtg, Agenda Item 2, UN Doc A/CN.4/SR.776 (1965); International Law Commission, *Summary Record of the 880th Meeting*, 18th sess, 880th mtg, Agenda Items 1 and 5, UN Doc A/CN.4/SR.880 (1966).

³¹ See, eg, International Law Commission, *Summary Record of the 448th Meeting*, 10th sess, 448th mtg, Agenda Item 3, UN Doc A/CN.4/SR.448 (1958).

³² See, eg, International Law Commission, *Summary Record of the 712th Meeting*, 15th sess, 712th mtg, Agenda Items 2 and 5, UN Doc A/CN.4/SR.712 (1963); International Law Commission, *Summary Record of the 878th Meeting*, 18th sess, 878th mtg, Agenda Item 2, UN Doc A/CN.4/SR.878 (1966); International Law Commission, *Summary Record of the 882nd Meeting*, 18th sess, 882nd mtg, Agenda Item 2, UN Doc A/CN.4/SR.882 (1966); International Law Commission, *Summary Record of the 897th Meeting*, 19th sess, 897th mtg, Agenda Item 1, UN Doc A/CN.4/SR.897 (1967).

states in respect of treaties.³³ Yet, while these earlier debates are insightful for illustrating that not all members of the Commission saw merit in automatically or uncritically recommending its draft articles be transformed into a convention, they rarely touched upon the form of their *own* work.

In 1999, two years before the (D)ARSIWA were finalised, the ILC recommended the General Assembly to adopt its Draft Articles on Nationality in Relation to the Succession of States ('Draft Articles on Nationality') 'in the form of a declaration'.³⁴ While the recommendations on both topics departed from the ILC's usual practice, the form of its own output had not changed: they were draft articles, even if the Draft Articles on Nationality were recommended to take *the form* of a declaration. Around the same time, the Commission was also working on the topics of unilateral acts of states, and reservations to treaties. Although work on these topics would finish years later, it was already envisaged during the 1990s that they would not (necessarily) be concluded as draft articles. The work on unilateral acts of states led to drafting in the form of guiding principles, after the drafting of articles — which could have become 'a convention, guidelines, restatement or any other outcome'³⁵ — had met with criticism from a number of ILC members. The work on reservations to treaties was finalised in the form of a guide to practice. Still, it would take a few more years for the Commission to fully shift from mostly drafting articles to using mostly other forms. Six out of 11 projects that were started in the early 2000s were drafted and finalised in the form of articles,³⁶ whereas 12 out of the 14 projects that were initiated between 2012

³³ See, eg, International Law Commission, *Summary Record of the 965th Meeting*, 20th sess, 965th mtg, Agenda Items 1(a) and 1(b), UN Doc A/CN.4/SR.965 (1968) 130–3 [39]–[77]; International Law Commission, *Summary Record of the 966th Meeting*, 20th sess, 966th mtg, Agenda Item 1(a), UN Doc A/CN.4/SR.966 (1968); International Law Commission, *Summary Record of the 967th Meeting*, 20th sess, 967th mtg, Agenda Item 1(a), UN Doc A/CN.4/SR.967 (1968); International Law Commission, *Summary Record of the 968th Meeting*, 20th sess, 968th mtg, Agenda Items 1(a) and 1(b), UN Doc A/CN.4/SR.968 (1968).

³⁴ International Law Commission, *Summary Record of the 2580th Meeting*, 51st sess, 2580th mtg, Agenda Item 6, UN Doc A/CN.4/SR.2580 (1999) 93 [21].

³⁵ International Law Commission, *Report of the International Law Commission on the Work of its Fiftieth Session*, UN GAOR, 53rd sess, Agenda Item 150, Supp No 10, UN Doc A/53/10 (1998) 59 [196].

³⁶ Transboundary Aquifers (between 2002 and 2008); Responsibility of International Organizations (between 2002 and 2011); Effects of Armed Conflicts on Treaties (between 2004 and 2011); Expulsion of Aliens (between 2004 and 2014); Protection of Persons in the Event of Disasters (between 2007 and 2016); Immunity of State Officials from Foreign Criminal Jurisdiction (since 2007, ongoing); Fragmentation of International Law (study group conclusions, between 2002 and 2006); International Liability (draft principles, between 2002 and 2006); Obligation to Extradite (report, between 2005 and 2014); Most Favoured Nation Clause Part Two (report, between 2008 and 2015) Treaties over Time in Particular: Subsequent Agreement and Practice (draft conclusions, between 2008 and 2018): see 'Summaries of the Work of the International Law Commission' *International Law Commission* (Web Page, 9 August 2023) <<https://legal.un.org/ilc/summaries/summaries.shtml>>, archived at <<https://perma.cc/E6JV-2HQ7>>.

and 2023 are (expected to be) concluded in the form of draft (study group) conclusions, draft guidelines or draft principles.³⁷

What distinguishes draft articles from these other forms is most notably the recommendation that the ILC formulates at the end of the drafting process. Except for the Draft Articles on Nationality, the ILC has always recommended the General Assembly to elaborate a convention on the basis of its draft articles, albeit sometimes 'at a later stage'.³⁸ This is also why draft articles have been considered 'draft conventions'.³⁹ In contrast, draft conclusions, draft guidelines and draft principles are generally considered 'non-binding' from the very start of the project, and so the recommendation that needs to be formulated to the General Assembly

³⁷ Identification of Customary International Law (conclusions, between 2012 and 2018); Subsequent Agreements and Practice in Relation to Interpretation of Treaties (conclusions, between 2013 and 2018); Crimes against Humanity (articles, between 2014 and 2019); Provisional Application of Treaties (guidelines, between 2012 and 2021); Protection of the Atmosphere (guidelines, between 2013 and 2021); *Jus Cogens* (conclusions, between 2015 and 2022); Protection of the Environment in Relation to Armed Conflict (principles, between 2013 and 2022); Succession of States in Respect of State Responsibility (first draft articles, then draft guidelines, now most likely a report, since 2017); General Principles of Law (conclusions, since 2018); Sea-Level Rise in Relation to International Law (study group conclusions, between 2019 and 2025); Subsidiary Means of International Law (conclusions, since 2022); Prevention and Repression of Armed Robbery at Sea (articles, since 2022); Settlement of Disputes to which International Organizations are Parties (guidelines, since 2022); Non-Legally Binding Agreements (conclusions, since 2023); *ibid*; Mathias Forteau, Special Rapporteur, *Second Report on Non-Legally Binding International Agreements*, 76th sess, UN Doc A/CN.4/784 (18 February 2025) 4 [4]–[6] ('*Forteau Second Report*').

³⁸ International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN GAOR, 56th sess, Agenda Item 162, Supp No 10, UN Doc A/56/10 (2001) 25 [73]; International Law Commission, *Report of the International Law Commission on the Work of its Sixtieth Session*, UN GAOR, 63rd sess, Agenda Item 75, Supp No 10, UN Doc A/63/10 (2008) 19 [49] ('*ILC Report 60th Session*'); International Law Commission, *Report of the International Law Commission on the Work of its Sixty-Third session*, UN GAOR, 66th sess, Agenda Item 118, Supp No 10, UN Doc A/66/10 (2011) 39 [85], 106 [97] ('*ILC Report 63rd Session*'); International Law Commission, *Report of the International Law Commission: Sixty-Sixth Session*, UN GAOR, 69th sess, Agenda Item 78, Supp No 10, UN Doc A/69/10 (2014) 11 [42] ('*ILC Report 66th Session*').

³⁹ See International Law Commission, *Report of the International Law Commission: Sixty-Fifth Session*, UN GAOR, 68th sess, Agenda Item 81, Supp No 10, UN Doc A/68/10 (2013) annex II ('*Crimes Against Humanity*'); Sean D Murphy, Special Rapporteur, *First Report on Crimes Against Humanity*, 67th sess, Agenda Item 10, UN Doc A/CN.4/680 (17 February 2015); International Law Commission, *Summary Records of the 3256th Meeting*, 67th sess, 1st pt, 3256th mtg, Agenda Item 10, UN Doc A/CN.4/SR.3256 (2015); International Law Commission, *Summary Records of the 3257th Meeting*, 67th sess, 1st pt, 3257th mtg, Agenda Items 1, 10 and 11, UN Doc A/CN.4/SR.3257 (2015); International Law Commission, *Summary Records of the 3258th Meeting*, 67th sess, 1st pt, 3258th mtg, Agenda Item 10, UN Doc A/CN.4/SR.3258 (2015); Sean D Murphy, Special Rapporteur, *Second Report on Crimes Against Humanity*, 68th sess, Agenda Item 9, UN Doc A/CN.4/690 (21 January 2016); International Law Commission, *Summary Records of the 3296th Meeting*, 68th sess, 1st pt, 3296th mtg, Agenda Items 2 and 9, UN Doc A/CN.4/SR.3296 (2016); Sean D Murphy, Special Rapporteur, *Third Report on Crimes Against Humanity*, 69th sess, Agenda Item 6, UN Doc A/CN.4/704 (23 January 2017); Sean D Murphy, Special Rapporteur, *Fourth Report on Crimes Against Humanity*, 71st sess, UN Doc A/CN.4/725 (18 February 2019). See also 'draft articles were draft treaties': Katz Cogan (n 8) 277.

has rarely (if ever) led to a substantive debate.⁴⁰ There is simply no longer a need to discuss whether negotiations are desirable to, or feasible for, the completion of the ILC's project, as there is with draft articles. On the flip side, this also means that discussions about maintaining less obviously recognised rules of international law in the text cannot be pre-empted by the realisation that states have the final say about the text anyway. As the Commission now generally has 'the last word' on outputs that are not intended to be negotiated by states, the 'blending' of codification and progressive development is more frowned upon by some,⁴¹ and (divergent) considerations about how the work of the ILC will or should be viewed have found their way into debates related specifically to form.

As I will illustrate in the next few sections, form fulfils the function of absorbing these 'multiple viewpoints, translations and incomplete battles'.⁴² It is perfectly situated to do so by being able to generate a specific conception tailored to individual projects, while functioning merely as a label or message in general use. Put differently, depending on the specific requirements of the project, draft conclusions, for example, can be both descriptive and normative, or exclusively descriptive. These conceptions, however, are specific to the individual project, thereby offering some structure to their drafting process. In general use, form continues to function as a label that is merely suggestive of the message that the ILC would like to convey about the output it has drafted. This message itself, however, is not straightforward or easily understood — not just because not all members necessarily have the same message in mind, but also because the message is influenced by factors beyond the Commission's reach, some of which only come to the surface *after* the Commission has finished its drafting process. In fact, it seems to me that the widespread acceptance of the (D)ARSIWA as a work of 'non-legislative codification'⁴³ has led to the need for new or different forms, as the label 'draft articles' is now strongly associated with codification. Or, in other words, this label is understood to suggest that the Commission would like

⁴⁰ The Commission generally recommends the General Assembly to take note of these outputs, annex them to a resolution, ensure their widest dissemination and commend them to the attention of states and all who may be called upon: see, eg, *ILC Report 63rd Session*, UN Doc A/66/10 (n 38) 25 [73]; International Law Commission, *Report of the International Law Commission: Seventieth Session*, UN GAOR, 73rd sess, Agenda Item 82, Supp No 10, UN Doc A/73/10 (2018) 12 [49], 118 [63]; International Law Commission, *Report of the International Law Commission: Seventy-Second Session*, UN GAOR, 76th sess, Agenda Item 82, Supp No 10, UN Doc A/76/10 (2021) 10 [37], 53 [49] (*ILC Report 72nd Session*); *ILC Report 73rd Session*, UN Doc A/77/10 (n 11) 11 [41], 91 [55].

⁴¹ Omri Sender, 'Two Views of the International Law Commission: A Conversation with Professor Alain Pellet and Sir Michael Wood' (2023) 27(1) *Max Planck Yearbook of United Nations Law* 16, 23; Sean D Murphy, 'The Heritage of the Articles on State Responsibility for the International Law Commission' in Patrícia Galvão Teles and Pierre Bodeau-Livinec (eds), *Article-by-Article Commentary of the Articles on State Responsibility* (Oxford University Press, forthcoming). This document is available through the GW Legal Studies Research Paper series: Sean D Murphy, 'The Heritage of the Articles on State Responsibility for the International Law Commission' (GW Legal Studies Research Paper No. 2023-21, George Washington University Law School, 6 April 2023) 15.

⁴² Susan Leigh Star and James R Griesemer, 'Institutional Ecology, "Translations" and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology' (1989) 19(3) *Social Studies of Science* 387, 413.

⁴³ Judge Maria Teresa Infante Caffi et al, 'Modern Challenges in International Law' (Essex Public International Law Series, University of Essex School of Law, 28 June 2021) 01:25:10–01:25:15; 01:28:24–01:28:29; 01:30:00–01:30:06 <<https://www.youtube.com/watch?v=NA18BASjzPk>>.

to convey the message that the provisions reflect existing rules of (customary) international law. I now turn to the other forms.

III PRINCIPLES

Mr HUDSON ... [was] wondering how the Commission could formulate principles of international law if it could not decide whether they were or were not principles of international law.⁴⁴

The CHAIRMAN agreed that it was difficult to decide without knowing whether the principles were principles of international law or not.⁴⁵

Mr BRIERLY ... the Commission might decide that some of those principles were not principles of international law.⁴⁶

The CHAIRMAN asked whether Mr. Brierly meant that the principles to be formulated by the Commission would be formulated as principles of international law and the others would be rejected as not being principles of international law.⁴⁷

Mr BRIERLY suggested passing on to examine the principles in the hope that this embarrassing question might be avoided.⁴⁸

As mentioned above, it was not the International Law Commission itself that decided to draft its output in the form of principles when it first did. In fact, formulating the Nürnberg principles was one of the first tasks given to the Commission by the General Assembly.⁴⁹ Yet, as the excerpt above indicates, the members of the Commission find it difficult to know whether 'the principles were or were not principles of international law'. Even if the form of its output had been decided by the General Assembly, the members of the Commission were utterly divided over the kind of principles they had been instructed to formulate: only the principles which were recognised by the Charter, the Nürnberg judgment and international law,⁵⁰ *all* principles applied in the Charter and by the tribunal 'without any indication of their authority',⁵¹ or additional principles which 'would constitute innovations'.⁵² These different interpretations of the word 'principle' align with different visions of the Commission's task. Some members view the Commission as a normative body that should critically analyse the work of the Nürnberg tribunal and distil and formulate only those principles which were in conformity with existing international law at the time. Others think the

⁴⁴ International Law Commission, *Summary Record of the 44th Meeting*, 2nd sess, 44th mtg, Agenda Items 3(a) and 4, UN Doc A/CN.4/SR.44 (1950) 28 [69].

⁴⁵ *Ibid* 28 [70].

⁴⁶ International Law Commission, *Summary Record of the 45th Meeting*, 2nd sess, 45th mtg, Agenda Item 3(a), UN Doc A/CN.4/SR.45 (1950) 30 [1].

⁴⁷ *Ibid* 30 [2].

⁴⁸ *Ibid* 30 [3].

⁴⁹ *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, UN Doc A/RES/177(III) (n 28).

⁵⁰ International Law Commission, *Summary Record of the 17th Meeting*, 1st sess, 17th mtg, Agenda Item 3, UN Doc A/CN.4/SR.17 (1949) 131 [15] (Spiropoulos) ('*ILC Summary Record 17th Meeting*').

⁵¹ *Ibid* 133 [35] (Hudson).

⁵² *Ibid* 131 [16] (Alfaro).

Commission should go further than the judges of the tribunal to ensure that international criminal law is progressively developed. Yet others consider the role of the Commission to be more modest in that it should not try to determine — and thereby play a role in establishing or decreasing — the legal value of the principles it would formulate, whatever they may be.⁵³

Although the ILC decides at the end of their first meeting dealing with the topic that it will work on the understanding that its task is to formulate the Nürnberg principles without ascertaining their authority,⁵⁴ the debates that follow this ‘agreement’ illustrate that the men are nowhere near having reached consensus on the matter.⁵⁵ In fact, they only agree that whatever they formulate should be in the form of principles — as instructed by the General Assembly. What that entails, or how the principles should be interpreted, remains in the eye of the beholder, especially because the Commission decides not to express to what extent it considers the principles it eventually formulates as principles of international law.⁵⁶ As such, what these earliest debates illustrate is that form says very little about the “thingness” of the provisions but is instead used as a label that keeps all members with distinct views about the role of the Commission on board and working towards the same goal — in this case, formulating principles.

Half a century later, the ILC would again draft principles, now in relation to its work on the topic of allocation of loss in the case of transboundary harm arising out of hazardous activities. While members of the Commission were divided over the feasibility of the project, as well as the form in which the final output should be cast, Special Rapporteur Rao decided to ‘present his recommendations in the form of general principles’.⁵⁷ This form is not justified on the basis of the provisions of the text, but in relation to its purpose: principles would offer states flexibility and guidance as they developed their own national laws or negotiated

⁵³ For a concrete example that illustrates these different interpretations of the Commission’s task, in which the Commission discusses whether or not it should include a principle stating that the taking of hostages is illegal, see International Law Commission, *Summary Record of the 48th Meeting*, 2nd sess, 48th mtg, Agenda Item 3(a), UN Doc A/CN.4/SR.48 (1950); International Law Commission, *Summary Record of the 49th Meeting*, 2nd sess, 49th mtg, Agenda Items 3(a) and 5, UN Doc A/CN.4/SR.49 (1950).

⁵⁴ *ILC Summary Record 17th Meeting*, UN Doc A/CN.4/SR.17 (n 50) 133 [35] (Hudson).

⁵⁵ See International Law Commission, *Summary Record of the 25th Meeting*, 1st sess, 25th mtg, UN Doc A/CN.4/SR.25 (1949); International Law Commission, *Summary Record of the 26th Meeting*, 1st sess, 26th mtg, UN Doc A/CN.4/SR.26 (1949); International Law Commission, *Summary Record of the 27th Meeting*, 1st sess, 27th mtg, UN Doc A/CN.4/SR.27 (1949); International Law Commission, *Summary Record of the 28th Meeting*, 1st sess, 28th mtg, UN Doc A/CN.4/SR.28 (1949); International Law Commission, *Summary Record of the 29th Meeting*, 1st sess, 29th mtg, UN Doc A/CN.4/SR.29 (1949).

⁵⁶ *ILC Report 2nd Session*, UN Doc A/CN.4/34 (n 24) 374 [96].

⁵⁷ Pemmaraju Sreenivasa Rao, Special Rapporteur, *Second Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities*, 56th sess, Agenda Item 4, UN Doc A/CN.4/540 (15 March 2004) 75 [37] (‘Rao Second Report’).

agreements.⁵⁸ The debate also highlights that nothing about the proposed text makes the provisions inherently draft 'principles'. In the view of those who favour a binding instrument, 'the draft principles were essentially draft articles',⁵⁹ 'could henceforth be described as draft articles',⁶⁰ or 'more closely resembled articles of a convention' even if 'the Special Rapporteur described his text as a series of draft principles'.⁶¹ Those who do not favour a binding instrument argue instead that the Commission could produce 'a non-binding text in the form of guiding principles or in any other appropriate form'.⁶² In other words, the term 'principles' functions as a label indicating a certain purpose, while the provisions themselves could also be labelled differently.

Two years later, Special Rapporteur Rao shifts the way in which he refers to his text, which no longer contains his own recommendations in the form of general principles,⁶³ but rather principles that could potentially be cast in a different form.⁶⁴ During the debate, the Special Rapporteur refers to the output as *consisting* of principles, for example, when he argues that national courts are more likely to apply principles than an unratified convention,⁶⁵ and maintains that '[t]he format would have to be that of draft principles'.⁶⁶ Others refer to the draft principles as 'non-binding recommendations',⁶⁷ remarking also that states 'supported them as guidelines and calls for action'.⁶⁸ At the end of that year's session, the chairperson puts forward a draft recommendation which asks the General Assembly to 'endorse the draft principles *as guidelines*'.⁶⁹ Although the words 'as guidelines' are eventually replaced by 'in a resolution',⁷⁰ these debates further illustrate that form says very little about the "thingness" of the provisions but is instead

⁵⁸ Ibid 75 [36]; Pemmaraju Sreenivasa Rao, Special Rapporteur, *Third Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities*, 58th sess, Agenda Item 3, UN Doc A/CN.4/566 (7 May 2006) 75–6 [4] ('*Rao Third Report*'). See also 'the draft principles are ... intended to contribute to the process of development of international law ... both by providing appropriate guidance to States in respect of hazardous activities not covered by specific agreements, and by indicating the matters that should be dealt with in such agreements': International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Eighth Session*, UN GAOR, 61st sess, Agenda Item 78, Supp No 10, UN Doc A/61/10 (2006) 59 [5].

⁵⁹ International Law Commission, *Summary Record of the 2804th Meeting*, 56th sess, 2804th mtg, Agenda Items 1 and 4, UN Doc A/CN.4/SR.2804 (2004) 95 [19] (Kateka).

⁶⁰ International Law Commission, *Summary Record of the 2808th Meeting*, 56th sess, 2808th mtg, Agenda Item 4, UN Doc A/CN.4/SR.2808 (2004) 130 [37] (Al-Baharna), 128 [19] (Chee).

⁶¹ International Law Commission, *Summary Record of the 2807th Meeting*, 56th sess, 2807th mtg, Agenda Item 4, UN Doc A/CN.4/SR.2807 (2004) 120 [55] (Gaja).

⁶² Ibid 118 [34] (Fomba).

⁶³ *Rao Second Report*, UN Doc A/CN.4/540 (n 57) 75 [37].

⁶⁴ *Rao Third Report*, UN Doc A/CN.4/566 (n 58) 75–6 [4].

⁶⁵ International Law Commission, *Summary Record of the 2873rd Meeting*, 58th sess, 1st pt, 2873rd mtg, Agenda Item 3, UN Doc A/CN.4/SR.2873 (2006) 55 [50] (Rao) ('*ILC Summary Record 2873rd Meeting*').

⁶⁶ International Law Commission, *Summary Record of the 2875th Meeting*, 58th sess, 1st pt, 2875th mtg, Agenda Item 3, UN Doc A/CN.4/SR.2875 (2006) 62 [23] (Rao).

⁶⁷ *ILC Summary Record 2873rd Meeting*, UN Doc A/CN.4/SR.2873 (n 65) 54 [45] (Economides).

⁶⁸ Ibid 49 [7] (Matheson).

⁶⁹ International Law Commission, *Summary Record of the 2910th Meeting*, 58th sess, 2nd pt, 2910th mtg, UN Doc A/CN.4/SR.2910 (2006) 298 [22] (Pambou-Tchivounda) (emphasis added).

⁷⁰ Ibid 298 [23] (Escarameia), [24] (Pambou-Tchivounda).

mobilised as a label, indicating that the text need not be turned into a convention but can exist independently, either as ‘guidelines’ or ‘in a resolution’. This use of form as a label is maintained by emphasising time and again that principles could be anything: articles, non-binding recommendations or guidelines. In this specific case, provisions are labelled as principles and serve as guidelines.

The work on the more recently finished set of Draft Principles on the Protection of the Environment in Relation to Armed Conflict illustrates that attempts are now regularly made to standardise principles in opposition to other forms. If successful, this would mean that form no longer functions as a label that is suggestive but actually has demarcated boundaries and characteristics. Put differently, principles could then not be articles, non-binding recommendations or guidelines. However, as the debates on this topic indicate, attempts to draw boundaries continuously fail.

The syllabus of the topic, produced in 2011, refers to the final outcome as possibly either ‘a draft framework convention or a statement of principles and rules’⁷¹ but also ‘whatever form the Commission may deem most appropriate’.⁷² After informal consultations in 2013, Special Rapporteur Jacobsson suggests that a slightly different approach than the one initially described in the syllabus ‘would facilitate the development of concrete conclusions or guidelines’⁷³ as the topic itself was more suited to developing a non-binding output than a draft convention.⁷⁴ But then, in her first report, the Special Rapporteur describes the ILC’s work again as ‘identifying and clarifying ... guiding principles and/or obligations’,⁷⁵ which sounds more similar to her preliminary plan of drafting ‘a statement of principles and rules’ than to developing conclusions or guidelines. This framing also suggests that Special Rapporteur Jacobsson considers the Commission to be dealing with already existing principles which need to be identified and clarified, much like the Commission of 1950 may have been doing with the Nürnberg principles. Still, the next report is foreseen to ‘contain proposals for guidelines (conclusions/recommendations)’ rather than principles.⁷⁶

From these reports a plan emerges that entails drafting guidelines that will be principles, as the ILC has drafted principles that would function as guidelines on the topic analysed above. The way in which Special Rapporteur Jacobsson refers to form in her initial reports illustrates that form is used as label: while she is attempting to identify and clarify ‘guiding principles and/or obligations’, she plans to formulate ‘guidelines (conclusions/recommendations)’.

A year later, the Special Rapporteur formulates draft principles instead.⁷⁷ Rather than arguing that this form fits better with the ILC’s task of ‘identifying and clarifying the guiding principles and/or obligations’ as set out in the

⁷¹ *ILC Report 63rd Session*, UN Doc A/66/10 (n 38) annex V (‘*Protection of the Environment in Relation to Armed Conflicts*’) 215 [33].

⁷² *Ibid* 215 [34].

⁷³ International Law Commission, *Summary Record of the 3188th Meeting*, 65th sess, 2nd pt, 3188th mtg, Agenda Items 7, 9 and 11, UN Doc A/CN.4/SR.3188 (2013) 122 [33] (Jacobsson).

⁷⁴ *Ibid* 122 [35] (Jacobsson).

⁷⁵ Marie G Jacobsson, *Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts*, 66th sess, Agenda Item 10, UN Doc A/CN.4/674 (30 May 2014) 217 [62] (‘*Jacobsson Preliminary Report*’).

⁷⁶ *Ibid* 231 [167].

⁷⁷ Marie Jacobsson, Special Rapporteur, *Second Report on the Protection of the Environment in Relation to Armed Conflicts*, 67th sess, Agenda Item 8, UN Doc A/CN.4/685 (28 May 2015).

preliminary report,⁷⁸ Jacobsson considers the form of guidelines to be inappropriate because it might be taken to (mistakenly) suggest that none of the provisions 'reflect existing law'.⁷⁹ Hence, form is considered to the extent that it may correctly or mistakenly *suggest* something to the user of the output about the provisions it labels. What a particular form suggests, however, is not so easily determined. And whether this suggestion (as imagined by the Special Rapporteur in this case) is correct or mistaken also seems to depend on one's understanding of the role of the Commission in general, and with regard to this topic more specifically.

Then, during the plenary debate, a draft principle is said to 'read more like a guideline'⁸⁰ — which suggests that form is *not* just a label but has particular characteristics. Still, members do not immediately object to the choice for principles over guidelines (conclusions/recommendations). Instead, the *formulation* of the draft principles is problematic to a number of members, who argue that principles cannot assert 'what States "shall" or "must" do'.⁸¹ According to them, only draft articles have the prerogative to prescribe. Thus, the suggestion is made that the provisions should be redrafted: 'shall' should be replaced by 'should', 'must' should become 'may'. If a decision is made to keep the mandatory tense, then the form would have to change to draft articles. In other words, attempts are made to standardise form by restricting what it can do. Members, however, clearly disagree on this point. In fact, some argue that the word 'should' should be replaced by 'shall' in some provisions.⁸² They do so not because they consider the verb 'shall' to fit better with the form of draft principles, but because 'the provision codified an existing obligation'⁸³ or because '[i]nternational obligations in that context must be strengthened and progressively developed'.⁸⁴ Marja Lehto — the second Special Rapporteur on the topic — is supported by others in claiming that there can be no limit placed on the ILC to use only a specific verb in work produced in a specific form.⁸⁵ As such, form resists becoming linked to a specific formulation of individual provisions, or to be specifically suggestive of only

⁷⁸ *Jacobsson Preliminary Report*, UN Doc A/CN.4/674 (n 75) 217 [62].

⁷⁹ International Law Commission, *Summary Record of the 3264th Meeting*, 67th sess, 2nd pt, 3264th mtg, Agenda Items 5 and 8, UN Doc A/CN.4/SR.3264 (2015) 147 [26] (Jacobsson) ('*ILC Summary Record 3264th Meeting*').

⁸⁰ International Law Commission, *Summary Record of the 3265th Meeting*, 67th sess, 2nd pt, 3265th mtg, Agenda Items 8 and 13, UN Doc A/CN.4/SR.3265 (2015) 160 [42] (Forteau) ('*ILC Summary Record 3265th Meeting*').

⁸¹ *ILC Summary Record 3264th Meeting*, UN Doc A/CN.4/SR.3264 (n 79). See also *ILC Summary Record 3265th Meeting*, UN Doc A/CN.4/SR.3265 (n 80); International Law Commission, *Summary Record of the 3267th Meeting*, 67th sess, 2nd pt, 3267th mtg, Agenda Items 1 and 8, UN Doc A/CN.4/SR.3267 (2015); International Law Commission, *Summary Record of the 3268th Meeting*, 67th sess, 2nd pt, 3268th mtg, Agenda Items 8 and 13, UN Doc A/CN.4/SR.3268 (2015).

⁸² International Law Commission, *Provisional Summary Record of the 3572nd Meeting*, 73rd sess, 1st pt, 3572nd mtg, Agenda Item 3, UN Doc A/CN.4/SR.3572 (16 June 2022) 4–5 (Grossman Guiloff), 8 (Forteau) ('*ILC Provisional Summary Record 3572nd Meeting*').

⁸³ *Ibid* 4 (Grossman Guiloff).

⁸⁴ *Ibid* 8 (Forteau).

⁸⁵ Marja Lehto, Special Rapporteur, *Third Report on Protection of the Environment in Relation to Armed Conflicts*, 73rd sess, Agenda Item 3, UN Doc A/CN.4/750 (16 March 2022) 11 [26] ('*Lehto Third Report*'); International Law Commission, *Provisional Summary Record of the 3573rd Meeting*, 73rd sess, 1st pt, 3573rd mtg, Agenda Item 3, UN Doc A/CN.4/SR.3573 (16 June 2022) 10 (Jalloh).

codification *or* progressive development. Instead, the draft principles operate in the same way as the Nürnberg principles and the Draft Principles on the Allocation of Loss: as principles that can be principles of international law, existing or developing rules of customary international law, recommendations for progressive development or guidelines. It is through using form as a suggestive label that the Commission — in the absence of consensus about what it is (or should be) doing⁸⁶ — is able to conclude its work on the topic.

IV CONCLUSIONS

[A] set of conclusions with commentaries, guidelines might be an equally appropriate term. Whatever they were called ...⁸⁷

In 2012, Sir Michael Wood — the Special Rapporteur on the topic of identification of customary international law — suggests that ‘the appropriate outcome’ would be a set of conclusions with commentaries.⁸⁸ Although this was a new form for the ILC,⁸⁹ no arguments were (publicly) offered in support of it other than that ‘[a] similar approach was adopted by the International Law Association’.⁹⁰ The main idea — the Commission would not be drafting ‘a series of hard-and-fast rules’,⁹¹ let alone a “‘Vienna convention on customary international law’”⁹² but would instead ‘produce authoritative guidance’⁹³ — is repeated by Special Rapporteur Wood both at the beginning and at the end of the first plenary debate, as well as by some of the other members.⁹⁴ They speak of providing ‘a practical guide’,⁹⁵ ‘practical guidelines’,⁹⁶ ‘guidance and practical

⁸⁶ For a discussion about what the work entails — from a normative project that follows the traditional approach of contributing to the codification and progressive development of international law, to attempting to create new norms and going beyond the Commission’s statutory object — see *ILC Provisional Summary Record 3572nd Meeting*, UN Doc A/CN.4/SR.3572 (n 82).

⁸⁷ International Law Commission, *Summary Record of the 3148th Meeting*, 64th sess, 2nd pt, 3148th mtg, Agenda Items 7 and 12, UN Doc A/CN.4/SR.3148 (2012) 136 [14] (Wood) (*‘ILC Summary Record 3148th Meeting’*).

⁸⁸ Sir Michael Wood, Special Rapporteur, *Note*, 64th sess, Agenda Item 7, UN Doc A/CN.4/653 (30 May 2012) 56 [25] (*‘Wood Note’*).

⁸⁹ I consider the ILC draft conclusions to be different from ILC Study Group conclusions, based on their respective working methods that lead to the final outcome, as well as the way in which the final outcome is presented on paper (ie their ‘form’).

⁹⁰ *Wood Note*, UN Doc A/CN.4/653 (n 88) 56 [25] n 22.

⁹¹ *Ibid* 56 [24].

⁹² *ILC Summary Record 3148th Meeting*, UN Doc A/CN.4/SR.3148 (n 87) 136 [14] (Wood).

⁹³ *ILC Report 63rd Session*, UN Doc A/66/10 (n 38) annex I (*‘Formation and Evidence of Customary International Law’*) 183 [4]; *Wood Note*, UN Doc A/CN.4/653 (n 88) 56 [24].

⁹⁴ *ILC Summary Record 3148th Meeting*, UN Doc A/CN.4/SR.3148 (n 87); International Law Commission, *Summary Record 3152nd Meeting*, 64th sess, 2nd pt, 3152nd mtg, Agenda Items 3, 4, 7, 8 and 10, UN Doc A/CN.4/SR.3152 (2012).

⁹⁵ International Law Commission, *Summary Record of the 3150th Meeting*, 64th sess, 2nd pt, 3150th mtg, Agenda Items 7, 10 and 12, UN Doc A/CN.4/SR.3150 (2012) 159 [48] (Petrič), 160 [58], [61] (Forteau); International Law Commission, *Summary Record of the 3151st Meeting*, 64th sess, 2nd pt, 3151st mtg, Agenda Items 6, 7 and 9, UN Doc A/CN.4/SR.3151 (2012) 161 [2], 162 [8] (Escobar Hernández), 165 [31] (Wisnumurti), 166 [42] (Park). (*‘ILC Summary Record 3151st Meeting’*).

⁹⁶ *ILC Summary Record 3151st Meeting*, UN Doc A/CN.4/SR.3151 (n 95) 162 [11] (Gevorgian).

advice'⁹⁷ or 'practical guidance'.⁹⁸ Indeed, using a form other than draft articles that could be turned into a 'Vienna convention' is understood to indicate that the Commission is not 'seek[ing] to codify "rules" for the formation of customary international law'.⁹⁹

To put it briefly, the form that is used should not be prescriptive; it should not order or instruct states (or anyone really) what to do; it should not set out *rules*. In line with this view, the Special Rapporteur formulates 'the overall purpose' of the draft conclusions¹⁰⁰ as setting out 'the *methodology* for determining the existence and content of rules of customary international law'.¹⁰¹ During the debate, it is argued that 'rules' is a more accurate term than 'methodology', considering that the topic 'dealt with the secondary rules of international law that helped to determine how and when a rule could be deemed to form part of custom'.¹⁰² Others, however, warn against using this term because doing so 'would change the entire nature of the Commission's work on the topic'¹⁰³ or 'might alarm some States'.¹⁰⁴ After all, the Commission's aim is to produce authoritative guidance, not to elaborate secondary rules, even if the topic is effectively concerned with secondary rules regarding the identification of customary international law.¹⁰⁵ This is illustrated, for example, in Special Rapporteur Wood's third report, which includes an analysis of the 'persistent objector rule'¹⁰⁶ and a proposal for a draft conclusion entitled 'persistent objector'.¹⁰⁷

As this debate demonstrates, the form of conclusions is used to indicate a guiding function, without saying much about the "thingness" of the provisions included in the draft. Provisions may very well reflect rules, even if they are called conclusions. This is also illustrated by the fact that the Special Rapporteur always keeps the possibility open of (later) replacing the term 'conclusions' with

⁹⁷ Ibid 166 [46] (Kamto).

⁹⁸ Ibid 168 [55] (Nolte).

⁹⁹ *Wood Note* (n 88) 56 [24].

¹⁰⁰ International Law Commission, *Identification of Customary International Law: Statement of the Chair of the Drafting Committee, Mr Gilberto Saboia*, 66th sess, 2nd pt (7 August 2014) 2; International Law Commission, *Summary Record of the 3242nd Meeting*, 66th sess, 2nd pt, 3242nd mtg, Agenda Item 9, UN Doc A/CN.4/SR.3242 (2014) 217–8 [36]–[47] (Saboia).

¹⁰¹ Sir Michael Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, 66th sess, Agenda Item 9, UN Doc A/CN.4/672 (22 May 2014) 170 [15] (emphasis added) ('*Wood Second Report*'). Cf *Forteau Second Report* (n 37) 5–7 [9]–[13].

¹⁰² International Law Commission, *Summary Record of the 3225th Meeting*, 66th sess, 2nd pt, 3225th mtg, Agenda Items 1 and 9, UN Doc A/CN.4/SR.3225 (2014) 123 [25] (Forteau).

¹⁰³ Ibid 128 [78] (Kamto).

¹⁰⁴ International Law Commission, *Summary Record of the 3226th Meeting*, 66th sess, 2nd pt, 3226th mtg, Agenda Item 9, UN Doc A/CN.4/SR.3226 (2014) 136 [84] (Gevorgian).

¹⁰⁵ Ibid 131 [24] (Nolte).

¹⁰⁶ Sir Michael Wood, Special Rapporteur, *Third Report on Identification of Customary International Law*, 67th sess, Agenda Item 7, UN Doc A/CN.4/682 (27 March 2015) 128–32 [85]–[95].

¹⁰⁷ Ibid 132 [95] (Draft Conclusion 16).

‘guidelines’.¹⁰⁸ Eventually, in response to states¹⁰⁹ as well as one specific member asking whether the term ‘guidelines’ might be more appropriate than ‘conclusions’ to describe the ILC’s output on the topic,¹¹⁰ Wood admits that it is a matter of personal preference, but that he considered the term ‘conclusions’ appropriate and not inconsistent with the provision of guidance.¹¹¹ In contrast to the debates analysed above in which a few members draw a clear boundary between draft articles and draft principles, conclusions are here presented as guidelines — in the sense that conclusions could also be guidelines, as long as they are not prescriptive. This actually seems rather clear: conclusions and guidelines are both meant to guide, meaning that they should not include prescriptive language (in contrast to both articles and principles), and the form that is chosen depends on a Special Rapporteur’s personal preference. Once we look at debates on other topics, however, it becomes clear that this is only one conception of conclusions, tailored specifically to Special Rapporteur Wood’s work on customary international law.

Between 2009 and 2012, the ILC deals with the topic of subsequent agreements and practice within the framework of a Study Group on ‘Treaties over Time’.¹¹² The first goal of this work is ‘to derive some general conclusions or guidelines from the repertory of practice’ which could provide a ‘reference point’ for its intended users: ‘those who interpret and apply treaties’.¹¹³ In any case, the conclusions or guidelines are not envisaged to result in a draft convention.¹¹⁴ When Georg Nolte is eventually appointed Special Rapporteur in 2012, he suggests producing several reports containing ‘conclusions or guidelines’.¹¹⁵ A year later, Nolte presents proposals for four draft conclusions without offering an explanation as to why he has decided to draft conclusions rather than guidelines.¹¹⁶ Like the work on customary international law, the project is introduced as an attempt to provide guidance and to contribute to ‘the development of a common

¹⁰⁸ See, eg, *Wood Second Report*, UN Doc A/CN.4/672 (n 101) 169 [6]; International Law Commission, *Summary Record of the 3222nd Meeting*, 66th sess, 2nd pt, 3222nd mtg, Agenda Items 1, 5 and 9, UN Doc A/CN.4/SR.3222 (2014) 109 [15] (Wood); International Law Commission, *Summary Record of the 3301st Meeting*, 68th sess, 1st pt, 3301st mtg, Agenda Items 6 and 9, UN Doc A/CN.4/SR.3301 (2016) 94 [60] (Wood); International Law Commission, *Provisional Summary Record of the 3396th Meeting*, 70th sess, 1st pt, 3396th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3396 (12 June 2018) 13 (Wood).

¹⁰⁹ Sir Michael Wood, Special Rapporteur, *Fourth Report on Identification of Customary International Law*, 68th sess, Agenda Item 6, UN Doc A/CN.4/695 (8 March 2016) 218 [12].

¹¹⁰ International Law Commission, *Provisional Summary Record of the 3397th Meeting*, 70th sess, 1st pt, 3397th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3397 (11 June 2018) 4 (Murase).

¹¹¹ International Law Commission, *Provisional Summary Record of the 3402nd Meeting*, 70th sess, 1st pt, 3402nd mtg, Agenda Item 6, UN Doc A/CN.4/SR.3402 (25 June 2018) 8 (Wood).

¹¹² For an overview of the general conclusions and considerations of the Study Group, see International Law Commission, *Summary Record of the 3119th Meeting*, 63rd sess, 2nd part, 3119th mtg, Agenda Item 9, UN Doc A/CN.4/SR.3119 (2011); International Law Commission, *Summary Record of the 3135th Meeting*, 64th sess, 1st pt, 3135th mtg, Agenda Items 1, 2 and 8, UN Doc A/CN.4/SR.3135 (2012) 48–50 (*ILC Summary Record 3135th Meeting*).

¹¹³ *ILC Report 60th Session*, UN Doc A/63/10 (n 38) annex I (*‘Treaties over Time in Particular: Subsequent Agreement and Practice’*) 374–5 [20]–[22].

¹¹⁴ *Ibid.*

¹¹⁵ *ILC Summary Record 3135th Meeting*, UN Doc A/CN.4/SR.3135 (n 112) 48 [65] (Nolte).

¹¹⁶ Georg Nolte, Special Rapporteur, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, 65th sess, Agenda Item 6, UN Doc A/CN.4/660 (19 March 2013) (*‘Nolte First Report’*).

approach'¹¹⁷ rather than prescribing 'hard and fast rules'.¹¹⁸ However, the draft conclusions themselves are formulated rather differently. They set out a 'general rule' and include the mandatory language 'shall be taken into account'.¹¹⁹

As may be expected by now, the plenary debate focuses on the question of how prescriptive the draft conclusions should be. It is pointed out that, in order to 'supply guidance to states', the draft conclusions could not be purely descriptive.¹²⁰ Yet, drawing up *normative* conclusions could imply that the ILC would strip the inherent flexibility of, or go beyond, the rules of treaty interpretation as set out in the *VCLT*.¹²¹ According to one member, some conclusions are too descriptive to be useful, whereas others are too normative.¹²² A suggestion is made to change the form to draft guidelines instead.¹²³ Initially, Special Rapporteur Nolte seems understanding of this proposal because, even though he has drafted the conclusions 'as normatively as possible', calling the text guidelines may 'avoid any misunderstandings'.¹²⁴ As such, an image arises of conclusions and guidelines as being distinct; one being more descriptive, the other more normative or prescriptive. If conclusions are understood as more descriptive, then this view partly aligns with the conception of conclusions tailored to the work on identification of customary international law, in which conclusions were presented as descriptive rather than prescriptive. Yet, at the same time, those conclusions were presented as potential guidelines, which would indicate that guidelines are as descriptive as conclusions, rather than more normative or prescriptive.

Thus, another conception of conclusions is created. Indeed, according to Wood — the Special Rapporteur on customary international law — the draft conclusions on *this* topic should be both descriptive and normative.¹²⁵ When a change in form is suggested again a year later, Special Rapporteur Nolte concludes that 'the term "conclusions" refer[s] not only to purely factual statements but ... might also

¹¹⁷ International Law Commission, *Summary Record of the 3159th Meeting*, 65th sess, 1st pt, 3159th mtg, Agenda Items 1, 2 and 6, UN Doc A/CN.4/SR.3159 (2013) 3 [10] (Nolte).

¹¹⁸ International Law Commission, *Summary Record of the 3205th Meeting*, 66th sess, 1st pt, 3205th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3205 (2014) 33 [2] (Nolte) ('*ILC Summary Record 3205th Meeting*').

¹¹⁹ *Nolte First Report*, UN Doc A/CN.4/660 (n 116) 56–66 [8]–[64].

¹²⁰ International Law Commission, *Summary Record of the 3206th Meeting*, 66th sess, 1st pt, 3206th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3206 (2014) 38 [1] (Park).

¹²¹ International Law Commission, *Summary Record of the 3207th Meeting*, 66th sess, 1st pt, 3207th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3207 (2014) 41 [18] (Šturma); International Law Commission, *Summary Record of the 3259th Meeting*, 67th sess, 1st pt, 3259th mtg, Agenda Item 4, UN Doc A/CN.4/SR.3259 (2015) 117 [40]–[41] (Tladi); International Law Commission, *Summary Record of the 3261st Meeting*, 67th sess, 1st pt, 3261st mtg, Agenda Items 1 and 4, UN Doc A/CN.4/SR.3261 (2015) 129 [8] (Murphy); International Law Commission, *Summary Record of the 3262nd Meeting*, 67th sess, 1st pt, 3262nd mtg, Agenda Item 4, UN Doc A/CN.4/SR.3262 (2015) 134 [2] (Nolte) ('*ILC Summary Record 3262nd Meeting*').

¹²² *ILC Summary Record 3205th Meeting*, UN Doc A/CN.4/SR.3205 (n 118) 36 [19]–[20] (Forteau).

¹²³ *Ibid* 37 [23] (Murase); International Law Commission, *Summary Record of the 3208th Meeting*, 66th sess, 1st pt, 3208th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3208 (2014) 43 [10] (Niehaus) ('*ILC Summary Record 3208th Meeting*').

¹²⁴ International Law Commission, *Summary Record of the 3209th Meeting*, 66th sess, 1st pt, 3209th mtg, Agenda Items 6 and 10, UN Doc A/CN.4/SR.3209 (2014) 47 [2] (Nolte).

¹²⁵ *ILC Summary Record of the 3208th Meeting*, UN Doc A/CN.4/SR.3208 (n 123) 45 [34] (Wood).

include normative statements'.¹²⁶ This is quite different from how conclusions were being discussed on the topic of identification of customary international law. As the debates on these topics take place around the same time, the existence of multiple conceptions should have been quite apparent to the members of the Commission. Conclusions can be both descriptive and normative, or purely descriptive, as specific topics require. This, however, complicates the view that a clear boundary exists between guidelines and conclusions. If guidelines are considered more normative or prescriptive than purely descriptive conclusions, but conclusions can also contain normative provisions, then the boundary between the two forms seems to vanish, and form has to be understood as a label that suggests but never dictates.

That is until Special Rapporteur Nolte includes a proposal for a draft conclusion which he presents as 'somewhat unusual' because it contains 'recommendations, or guidelines, that were addressed specifically to domestic courts'.¹²⁷ The draft conclusion, Nolte continues,

was a conclusion in the sense that it was based on a collection of materials, it differed ... in that it was not aimed at elucidating and clarifying the pertinent rules of interpretation as such ... [R]ather, it served to identify certain issues ... and offered approaches.¹²⁸

As becomes clear, none of the members are in favour of including this 'guideline', and the Special Rapporteur eventually withdraws his proposal.¹²⁹ Still, the debate is remarkable because it draws a rather clear boundary between conclusions and guidelines again. In the words of the Special Rapporteur, a guideline serves as a recommendation that offers an approach. Another member sees it as an attempt to 'regulate the conduct of domestic courts',¹³⁰ while he also argues that anyone who would follow the rules set out in the draft conclusions would do precisely as the (therefore repetitive) guideline instructs.¹³¹ This last point is repeated by others as well. It is argued, for example, that 'explicit instructions ... to act in a certain way' would not be well received by judges, and that 'the same principles [included in the proposed draft conclusion/guideline/recommendation] were stated elsewhere more categorically'.¹³²

What this implies, then, is that draft conclusions should not 'issue directives'; they should not tell their users what to do.¹³³ The conclusions should rather be formulated in such a way that anyone who uses them is guided through the process of treaty interpretation, just like the conclusions on customary international law

¹²⁶ *ILC Summary Record of the 3262nd Meeting*, UN Doc A/CN.4/SR.3262 (n 121) 139 [27] (Nolte).

¹²⁷ International Law Commission, *Summary Record of the 3303rd Meeting*, 66th sess, 1st pt, 3303rd mtg, Agenda Items 4 and 6, UN Doc A/CN.4/SR.3303 (2016) 112 [60] (Nolte).

¹²⁸ *Ibid.*

¹²⁹ International Law Commission, *Summary Record of the 3307th Meeting*, 66th sess, 1st pt, 3307th mtg, Agenda Items 1, 4 and 8, UN Doc A/CN.4/SR.3307 (2016) 141 [21] (Nolte) ('*ILC Summary Record 3307th Meeting*').

¹³⁰ International Law Commission, *Summary Record of the 3304th Meeting*, 66th sess, 1st pt, 3304th mtg, Agenda Item 4, UN Doc A/CN.4/SR.3304 (2016) 120 [37] (Forteau).

¹³¹ *Ibid.* 120 [38] (Forteau).

¹³² *ILC Summary Record 3306th Meeting*, UN Doc A/CN.4/SR.3306 (n 16) 137 [62]–[63] (Wood).

¹³³ *Ibid.* 138 [72] (Kamto).

guide their users through the process of identifying custom. A specific boundary is thus drawn again between conclusions and guidelines in the sense that guidelines instruct, whereas conclusions guide. At the same time, the debate highlights that the complete set of draft conclusions effectively establishes an (authoritative) approach to use subsequent agreement and practice in the interpretation of treaties. Whether a user is guided or instructed seems to have little effect on the result of using the product — a specific approach is followed. The form of conclusions or guidelines thus merely suggests how a reader should approach the text. This use of form as a label is further illustrated if we focus on debates specifically related to draft guidelines. That is, it is only in the specific context of drafting *this* set of draft conclusions on subsequent agreement and practice that guidelines are conceptualised as prescriptive instructions or recommendations.

V GUIDELINES

Draft guideline 2: Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with]*...

*The alternative formulations in brackets will be subject to further consideration.¹³⁴

As the topic of subsequent agreements and practice dealt with arts 31 and 32 of the *VCLT*, so the topic of provisional application of treaties builds on art 25 of the *VCLT*. From the start, all forms are on the table, even preparing draft articles,¹³⁵ but the first report of Special Rapporteur Gómez-Robledo refers only to ‘guidelines or model clauses’¹³⁶ and members of the ILC seem to prefer either conclusions or guidelines.¹³⁷ Thus, in his third report, the Special Rapporteur includes six preliminary draft guidelines.¹³⁸ During the debate, members argue in favour of drafting conclusions instead,¹³⁹ because ‘the proposals were not guidelines as such, but rather statements of law already in force’¹⁴⁰ and ‘looked more like general norms rather than detailed guidelines’¹⁴¹ or — according to

¹³⁴ International Law Commission, *Protection of the Atmosphere: Texts and Titles of Draft Conclusions 1, 2 and 5, and Preambular Paragraphs Provisionally Adopted by the Drafting Committee on 13, 18, 19 and 20 May 2015*, 67th sess, Agenda Item 8, UN Doc A/CN.4/L.851 (22 May 2015) 2.

¹³⁵ *ILC Report 63rd Session*, UN Doc A/66/10 (n 38) annex III (‘*Provisional Application of Treaties*’) 200 [11].

¹³⁶ Juan Manuel Gómez-Robledo, Special Rapporteur, *First Report on the Provisional Application of Treaties*, 65th sess, Agenda Item 7, UN Doc A/CN.4/664 (3 June 2013) 88 [54].

¹³⁷ *ILC Report 66th Session*, UN Doc A/69/10 (n 38) 260 [243].

¹³⁸ Juan Manuel Gómez-Robledo, Special Rapporteur, *Third Report on the Provisional Application of Treaties*, 67th sess, Agenda Item 6, UN Doc A/CN.4/687 (5 June 2015) 73 [131].

¹³⁹ International Law Commission, *Summary Record of the 3278th Meeting*, 67th sess, 2nd pt, 3278th mtg, Agenda Items 1, 3 and 6, UN Doc A/CN.4/SR.3278 (2015) 269 [45] (Niehaus) (‘*ILC Summary Record 3278th Meeting*’).

¹⁴⁰ International Law Commission, *Summary Record of the 3269th Meeting*, 67th sess, 2nd pt, 3269th mtg, Agenda Items 1, 6 and 8, UN Doc A/CN.4/SR.3269 (2015) 196 [65] (Forteau).

¹⁴¹ International Law Commission, *Summary Record of the 3279th Meeting*, 67th sess, 2nd pt, 3279th mtg, Agenda Items 1 and 6, UN Doc A/CN.4/SR.3279 (2015) 275 [23] (Vázquez-Bermúdez) (‘*ILC Summary Record 3279th Meeting*’).

Nolte, Special Rapporteur on subsequent agreements — because the Commission was essentially engaged in the task of ‘deriving conclusions ... from diverse sources and materials’.¹⁴² Yet others argue that draft guidelines are the most appropriate form if the work is to ‘be of some practical use to States’.¹⁴³ In response to the proposal to adopt draft conclusions rather than draft guidelines, the Drafting Committee considered and decided — ‘on a provisional basis’ — that ‘the purpose of the exercise ... was to provide guidance for states seeking to apply treaties provisionally, and that developing a text in the form of draft guidelines was more conducive to that purpose’.¹⁴⁴ In other words, guidelines provide guidance — at least in this context.

A similar image of guidelines arises from discussions related to the topic of succession of states in respect of state responsibility, whose form the ILC recently decided to change from draft articles to draft guidelines.¹⁴⁵ Despite the suggestion that a decision on form should be taken at a later stage,¹⁴⁶ Special Rapporteur Šturma had started drafting articles — ‘an appropriate form for this topic ... rather than other options, such as principles or guidelines’¹⁴⁷ — in 2017. With regard to the changes made, the Chair of the Drafting Committee noted that:

In addition to replacing the reference to ‘article(s)’ with ‘guideline(s)’, in some cases the shift in form required more substantive adjustments to texts adopted at previous sessions. The Drafting Committee considered the difference between the two forms of outcomes, namely that draft guidelines were intended to provide guidance to States while draft articles were cast as directions to States, often suitable for incorporation in a treaty. Accordingly, the words ‘shall be’ were replaced by ‘is’ in draft guideline 8, reflecting the descriptive nature of the provision. Likewise, in draft guidelines 9, paragraph 2, 10, 10 bis and 11, the imperative verb ‘shall’ was replaced by ‘should’, thus reframing the provisions as guidance to States.¹⁴⁸

¹⁴² International Law Commission, *Summary Record of the 3277th Meeting*, 67th sess, 2nd pt, 3277th mtg, Agenda Items 3, 5 and 6, UN Doc A/CN.4/SR.3277 (2015) 261 [38] (Nolte).

¹⁴³ *ILC Summary Record 3278th Meeting*, UN Doc A/CN.4/SR.3278 (n 139) 271 [61] (Candiotti). See also *ILC Summary Record 3279th Meeting*, UN Doc A/CN.4/SR.3279 (n 141) 275 [28] (Hassouna).

¹⁴⁴ International Law Commission, *Provisional Application of Treaties: Statement of the Chair of the Drafting Committee, Mr Mathias Forteau*, 67th sess, 2nd pt (4 August 2015) 2; International Law Commission, *Summary Record of the 3284th Meeting*, 67th sess, 2nd pt, 3284th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3284 (2015) 305 [17] (Forteau).

¹⁴⁵ In 2023, the Commission decided to establish a Working Group on the topic, as Pavel Šturma — Special Rapporteur on the topic — was no longer with the Commission: *ILC Report 74th Session*, UN Doc A/78/10 (n 15) 107 [235]. In 2024, the Commission decided that the Working Group should draft ‘a report that would bring the work of the Commission on the topic to an end’: *ILC Report 75th Session*, UN Doc A/79/10 (n 11) 90–1 [308].

¹⁴⁶ International Law Commission, *Report of the International Law Commission: Sixty-Ninth Session*, UN GAOR, 72nd sess, Agenda Item 81, Supp No 10, UN Doc A/72/10 (2017) 209 [244].

¹⁴⁷ Pavel Šturma, Special Rapporteur, *First Report on Succession of States in Respect of State Responsibility*, 69th sess, Agenda Item 8, UN Doc A/CN.4/708 (31 May 2017) 175 [28].

¹⁴⁸ International Law Commission, *Succession of States in Respect of State Responsibility: Statement of the Chair of the Drafting Committee, Mr Ki Gab Park*, 73rd sess, 1st pt (14 July 2022) 2; International Law Commission, *Provisional Summary Record of the 3593rd Meeting*, 73rd sess, 1st part, 3593rd mtg, Agenda Item 5, UN Doc. A/CN.4/SR.3593 (26 September 2022) 3 (Park).

As expected, the ILC is here drawing a rather clear boundary between articles (which instruct) and guidelines (which guide). In line with this boundary, guidelines cannot be formulated in the same way as articles — and some principles (see above) and some guidelines (see below) — can, ie by using language that is prescriptive ('shall be') rather than descriptive ('is'). Although this boundary is rather clear, it is the inverse of how guidelines are understood in the context of conclusions (see above) where conclusions are seen as offering guidance and guidelines as formulating instructions. To complete the circle, zooming in on the ILC's debate related to its Draft Guidelines on the Protection of the Atmosphere illustrates that guidelines may also be principles, in addition to conclusions (when they guide) or articles (when they instruct).

The ILC first included the topic of protection of the atmosphere in its long-term program of work in 2011¹⁴⁹ on the basis of a syllabus which envisioned drafting 'an instrument similar to Part XII of the *United Nations Convention on the Law of the Sea* on protection and preservation of the marine environment'.¹⁵⁰ In other words, Special Rapporteur Murase proposed to draft articles which would 'hopefully lay the groundwork for a future convention'.¹⁵¹ However, the decision to include the topic in the Commission's actual program of work would become dependent on the '2013 Understanding'¹⁵² which determined among other things that the outcome of the work would be draft guidelines, rather than draft articles that could subsequently be considered and negotiated with a view to the conclusion of a convention. The 2013 Understanding, which was disliked by many and described by one member as 'a sword of Damocles',¹⁵³ significantly impacted the work of the Commission, and opened it up to serious critique.¹⁵⁴ More relevant to the present inquiry is the fact that the form of the output continuously surfaces in the debates, despite the 2013 Understanding binding the Commission to the form of draft guidelines. Thus, in contrast to some of the other debates, form is not so much discussed in the sense that the label needs to change — for example, from

¹⁴⁹ *ILC Report 63rd Session*, UN Doc A/66/10 (n 38) annex II ('*Protection of the Atmosphere*').

¹⁵⁰ *Ibid* 191 [5].

¹⁵¹ *Ibid* 194 [26].

¹⁵² For the five-point understanding, see International Law Commission, *Summary Record of the 3197th Meeting*, 65th sess, 2nd pt, 3197th mtg, Agenda Item 14, UN Doc A/CN.4/SR.3197 (2013) 162 [31] (Murase).

¹⁵³ International Law Commission, *Summary Record of the 3247th Meeting*, 67th sess, 1st pt, 3247th mtg, Agenda Item 9, UN Doc A/CN.4/SR.3247 (2015) 22 [61] (Peter) ('*ILC Summary Record 3247th Meeting*'). The same member would later describe the 2013 Understanding as a chain, in the sense that the Commission 'had chained the Special Rapporteur and asked him to run': International Law Commission, *Provisional Summary Record of the 3410th Meeting*, 70th sess, 1st pt, 3410th mtg, Agenda Item 8, UN Doc A/CN.4/SR.3410 (13 July 2018) 13 (Peter) ('*ILC Provisional Summary Record 3410th Meeting*'). See also '[t]he study of the topic had thus been reduced to a game of words for the members' amusement': at 16 (Huang).

¹⁵⁴ See, eg, Peter H Sand, 'The Discourse on "Protection of the Atmosphere" in the International Law Commission' (2017) 26(3) *Review of European, Comparative and International Environmental Law* 201; Peter H Sand, 'Climate Law and Its Skeptics: Whither Protection of the Atmosphere?' (2021) 51(1–2) *Environmental Policy and Law* 5; Benoit Mayer, 'A Review of the International Law Commission's Guidelines on the Protection of the Atmosphere' (2019) 20(2) *Melbourne Journal of International Law* 453; Abishek Trivedi and Stellina Jolly, 'ILC Draft Guidelines on the Protection of the Atmosphere: A Critique' in Asif H Qureshi (ed), *Law Reforms Around the World: Perspectives from National and International Law* (Routledge, 2024) 317. See also International Law Commission, *Protection of the Atmosphere: Comments and Observations Received from Governments and International Organizations*, 72nd sess, UN Doc A/CN.4/735 (11 February 2020).

draft guidelines to draft conclusions or draft principles¹⁵⁵ — but all the more in the sense of how the guidelines are *formulated*, as well as what they entail (ie their “thingness”). This begins with Special Rapporteur Murase’s first report, in which he argues that the Commission can ‘make a significant contribution by identifying the legal principles and rules’ relating to the protection of the atmosphere,¹⁵⁶ and emphasises that he will address ‘only the legal principles and rules’.¹⁵⁷ As such, the Special Rapporteur clearly relies on an understanding of form as a label, by which I mean that the provisions labelled as guidelines can refer to or reflect principles.

It is not just Special Rapporteur Murase who argues in this way. The ILC’s report of that year’s session mentions that some members considered the 2013 Understanding to offer enough flexibility to identify ‘existing general principles’,¹⁵⁸ whereas others suggested that the goal should be to develop guidelines ‘without being prescriptive’.¹⁵⁹ The plenary debate indeed illustrates that the form ‘guidelines’ does not, in the view of many, limit the Commission’s task to formulating guidelines, nor steer it in a specific direction. Instead, the task is considered to consist of ‘discuss[ing] the status of the relevant existing legal principles’,¹⁶⁰ ‘draft[ing] guidelines [which] should be normative principles’,¹⁶¹ ‘identify[ing] the general principles’,¹⁶² ‘systematisation, in the form of normative guidelines, of the general principles’,¹⁶³ and ‘formulating draft guidelines related to the basic principles of protecting the atmosphere, in other words States’ general obligations in that respect’.¹⁶⁴

The Special Rapporteur’s second report thus continues along the same lines, focusing on ‘the basic principles’ which lead to proposals for ‘pertinent draft guidelines reflecting those principles’.¹⁶⁵ In response, attempts are again made to standardise form by trying to limit what guidelines can be or do. For example, ‘true guidelines’ — rather than ‘unrealistic legal “guidelines”’¹⁶⁶ — would refer

¹⁵⁵ I am aware of one suggestion to consider drawing up general conclusions rather than guidelines: International Law Commission, *Summary Record of the 3249th Meeting*, 67th sess, 1st pt, 3249th mtg, Agenda Items 1 and 9, UN Doc A/CN.4/SR.3249 (2015) 32 [28] (Forteau) (*ILC Summary Record 3249th Meeting*); and one suggestion to change the label from draft guidelines to draft principles (by a member who prefers the drafting of articles and considers the formulation of guidelines to fit better with ‘articles’): International Law Commission, *Summary Record of the 3245th Meeting*, 67th sess, 1st pt, 3245th mtg, Agenda Items 1 and 9, UN Doc A/CN.4/SR.3245 (2015) 10 [52] (Tladi) (*ILC Summary Record 3245th Meeting*).

¹⁵⁶ Shinya Murase, Special Rapporteur, *First Report on the Protection of the Atmosphere*, 66th sess, Agenda Item 11, UN Doc A/CN.4/667 (14 February 2014) 247–8 [12].

¹⁵⁷ *Ibid* 248 [15].

¹⁵⁸ *ILC Report 66th Session*, UN Doc A/69/10 (n 38) 221 [88].

¹⁵⁹ *Ibid* 224 [102].

¹⁶⁰ International Law Commission, *Summary Record of the 3212th Meeting*, 66th sess, 1st pt, 3212th mtg, Agenda Item 11, UN Doc A/CN.4/SR.3212 (2014) 58 [5] (Hmoud).

¹⁶¹ *Ibid* 62 [37] (Vázquez-Bermúdez).

¹⁶² International Law Commission, *Summary Record of the 3213th Meeting*, 66th sess, 1st pt, 3213th mtg, Agenda Items 4 and 11, UN Doc A/CN.4/SR.3213 (2014) 67 [12] (Nolte).

¹⁶³ *Ibid* 69 [24] (Candioti).

¹⁶⁴ *Ibid* 69 [28] (Singh).

¹⁶⁵ Shinya Murase, Special Rapporteur, *Second Report on the Protection of the Atmosphere*, 67th sess, UN Doc A/CN.4/681 (2015) 199 [24].

¹⁶⁶ *ILC Summary Record 3249th Meeting*, UN Doc A/CN.4/SR.3249 (n 155) 29 [3] (Huang).

to practical considerations rather than obligations.¹⁶⁷ These views are repeated in the years that follow, with members pointing out that the guidelines should be cleansed of prescriptive language and ‘words of obligation’,¹⁶⁸ and that they ‘had been drafted as diktats to states’.¹⁶⁹ These debates bring to mind the discussions related to the Draft Principles on the Protection of the Environment in Relation to Armed Conflicts (which took place around the same time), about which it was also said that they should not prescribe or instruct states what to do because such a purpose was reserved for draft articles. As described above, Marja Lehto — the Special Rapporteur on that topic — had argued that the ILC could not be limited to use only specific verbs when it drafts its output in a specific form,¹⁷⁰ meaning that the verb ‘shall’ would not be completely eliminated from the draft principles. That argument does not surface in the debates on these draft guidelines. What is argued instead is that basic principles of international law could very well be articulated in the form of draft guidelines, which ‘need not necessarily be devoid of legal content and non-binding’.¹⁷¹ In other words, the draft guidelines could also contain principles found in treaty or customary international law, which should be formulated in more normative wording than ‘should’.¹⁷² Or in yet another set of words, form is only a label that is suggestive of how the Commission imagines its work to be used or interpreted; it does not determine the formulation or the content or the normative value of the output.

Still, the continued reference to principles raises two questions that the ILC needs to grapple with. Both questions simulate the questions that arose as early as 1950, when the Commission had difficulty knowing whether it was formulating the Nürnberg principles or the Nürnberg principles of international law. Here too, the question is raised whether the principles to which Special Rapporteur Murase

¹⁶⁷ International Law Commission, *Summary Record of the 3246th Meeting*, 67th sess, 1st pt, 3246th mtg, Agenda Item 9, UN Doc A/CN.4/SR.3246 (2015) 11 [3], 13 [13] (Murphy) (*‘ILC Summary Record 3246th Meeting’*). See also *ILC Summary Record 3245th Meeting*, UN Doc A/CN.4/SR.3245 (n 155) 10 [52] (Tladi); *ILC Summary Record 3247th Meeting*, UN Doc A/CN.4/SR.3247 (n 153) 17 [10]–[14] (Wood).

¹⁶⁸ International Law Commission, *Provisional Summary Record of the 3509th Meeting*, 72nd sess, 1st pt, 3509th mtg, Agenda Item 5, UN Doc A/CN.4/SR.3509 (25 May 2021) 13 (Nguyen). See generally International Law Commission, *Summary Record of the 3355th Meeting*, 69th sess, 1st pt, 3355th mtg, Agenda Items 1 and 5, UN Doc A/CN.4/SR.3355 (2017); International Law Commission, *Summary Record of the 3356th Meeting*, 69th sess, 1st pt, 3356th mtg, Agenda Item 5, UN Doc A/CN.4/SR.3356 (2017); International Law Commission, *Summary Record of the 3357th Meeting*, 69th sess, 1st pt, 3357th mtg, Agenda Items 3 and 5, UN Doc A/CN.4/SR.3357 (2017); *ILC Provisional Summary Record 3410th Meeting*, UN Doc A/CN.4/SR.3410 (n 153); International Law Commission, *Provisional Summary Record of the 3411th Meeting*, 70th sess, 1st pt, 3411th mtg, Agenda Item 8, UN Doc A/CN.4/SR.3411 (13 July 2018); International Law Commission, *Provisional Summary Record of the 3412th Meeting*, 70th sess, 1st pt, 3412th mtg, Agenda Item 6, UN Doc A/CN.4/SR.3412 (23 July 2018); International Law Commission, *Provisional Summary Record of the 3510th Meeting*, 72nd sess, 1st pt, 3510th mtg, Agenda Item 5, UN Doc A/CN.4/SR.3510 (25 May 2021).

¹⁶⁹ *ILC Summary Record 3307th Meeting*, UN Doc A/CN.4/SR.3307 (n 129) 150 [84] (Murphy).

¹⁷⁰ *Lehto Third Report*, UN Doc A/CN.4/750 (n 85) 11 [26].

¹⁷¹ *ILC Summary Record 3246th Meeting*, UN Doc A/CN.4/SR.3246 (n 167) 14 [16] (Nolte). See also *ILC Summary Record 3247th Meeting*, UN Doc A/CN.4/SR.3247 (n 153) 17–8 [17]–[18] (Hassouna), 20 [42]–[43] (Hmoud); *ILC Summary Record 3249th Meeting*, UN Doc A/CN.4/SR.3249 (n 155) 33 [38] (Wako).

¹⁷² See, eg, *ILC Summary Record 3311th Meeting*, UN Doc A/CN.4/SR.3311 (n 6) 177 [21] (McRae), 180 [34]–[36] (Vázquez-Bermúdez), 182 [53] (Candiotti); *ILC Summary Record 3356th Meeting*, UN Doc A/CN.4/SR.3356 (n 168) 73 [15] (Oral).

refers are ‘the same as “the general principles of law recognized by civilised nations”’.¹⁷³ Additionally, the Commission could not decide whether ‘the use of that expression [“principles”] implied that the guidelines laid down legal obligations’.¹⁷⁴ To accommodate different views, the proposed draft guideline on scope was adopted by the Commission in 2015 with alternative formulations in brackets. It remained in brackets until 2018, when it was finally decided that ‘[t]he present draft guidelines concern the protection of the atmosphere’ was more appropriate than ‘[t]he present draft guidelines contain guiding principles relating to the protection of the atmosphere’.¹⁷⁵ The text itself, however, refers to both obligations as well as recommendations. The use of these terms is explained by the Chair of the Drafting Committee as neither imposing new obligations nor intending ‘to dilute any normative content of any of the draft guidelines’.¹⁷⁶ What remains is a set of draft guidelines that instructs, guides and recommends; and contains provisions drafted in more and less prescriptive language, which are described as principles, recommendations and procedural guidelines. Thus, whereas guidelines are conceptualised in one context as a less appropriate form than draft principles because it may mistakenly suggest ‘that some parts of the outcome [do] not reflect existing law’,¹⁷⁷ guidelines are used here not only to present principles but also to reflect, reaffirm or refer to existing rules of international law.¹⁷⁸

VI CONCLUSION (GUIDELINE/PRINCIPLE)

When, in 1930, Manley O Hudson reflects on the First Conference for the Codification of International Law, he recalls:

Sentiment grew rapidly against any attempt to state what was the existing law as distinguished from new legislation, and after two weeks ... even the use of the term *declaration* was stoutly opposed. The discussion in the lobbies of the difference between conventions and declarations was quite interesting.¹⁷⁹

Similarly, when the ILC debated its D(ARSIWA) in 2001, members were asked to indicate the criteria that made an instrument either a convention or a

¹⁷³ *ILC Summary Record 3247th Meeting*, UN Doc A/CN.4/SR.3247 (n 153) 18 [27] (Kittichaisaree).

¹⁷⁴ International Law Commission, *Summary Record of the 3260th Meeting*, 67th sess, 1st pt, 3260th mtg, Agenda Items 4 and 9, UN Doc A/CN.4/SR.3260 (2015) 120 [8] (Forteau).

¹⁷⁵ International Law Commission, *Protection of the Atmosphere: Statement of the Chair of the Drafting Committee, Mr Charles Chernor Jalloh*, 70th sess, 2nd pt (2 July 2018) 5 (‘Statement of the Chair of the Drafting Committee’); International Law Commission, *Provisional Summary Record of the 3417th Meeting*, 70th sess, 2nd pt, 3417th mtg, Agenda Items 8 and 9, UN Doc A/CN.4/SR.3417 (2 August 2018) 3–4 (Jalloh) (‘*ILC Provisional Summary Record 3417th Meeting*’).

¹⁷⁶ *Statement of the Chair of the Drafting Committee* (n 175) 9; *ILC Provisional Summary Record 3417th Meeting*, UN Doc A/CN.4/SR.3417 (n 175) 5 (Jalloh).

¹⁷⁷ *ILC Summary Record 3264th Meeting*, UN Doc A/CN.4/SR.3264 (n 79) 147 [26] (Jacobsson).

¹⁷⁸ *ILC Report 72nd Session*, UN Doc A/76/10 (n 40) 10–51; Shinya Murase, Special Rapporteur, *Sixth Report on the Protection of the Atmosphere*, 72nd sess, Agenda Item 5, UN Doc A/CN.4/736 (11 February 2020) 36 [101].

¹⁷⁹ Manley O Hudson, ‘The First Conference for the Codification of International Law’ (1930) 24(3) *American Journal of International Law* 447, 449 (emphasis in original).

declaration.¹⁸⁰ In a response that highlights the then still all-male composition of the Commission,¹⁸¹ it was said that ‘if a convention and a declaration were two women to be wooed by a lawmaker, his preference would have to be for a convention as being more settled and beautiful and having more of a future than a declaration’.¹⁸² In other words, the specific form of a legal document has been causing consternation among legal scholars and practitioners for as long as a century.

As I have argued here, the lack of answers is inherent to the specific function that form fulfils. Some vagueness, uncertainty or even confusion (in the sense that we start to wonder ‘what’s a guideline anyway?’) is both required and created as form continues fulfilling this function. Throughout this article, I have illustrated that form absorbs the divergent viewpoints that members of the Commission hold about its role and the purpose of its work on specific topics. Focusing on what form can or should be — which sounds like a legal exercise — pre-empts the need to hold a more explicitly political debate about what the International Law Commission can or should do.

This is relevant because, despite its authority, the International Law Commission’s role remains difficult to define *before* states decide to turn its output into legally binding instruments (or not). The Commission’s debates illustrate that its role is not just difficult to grasp for outsiders; it is its own members who often seem to struggle with what the Commission is or should be doing. What I mean to say is not that individual members are clueless about their task but rather that the Commission *as a collective* is unclear about where it is heading, or where it wishes to be heading, with its work on specific topics. Still, as one member recently pointed out, there is no need to reflect on the role of the ILC because it is already known: codification and progressive development.¹⁸³ What that means, however, and whether a distinction should or can be made between ‘codification’ and ‘progressive development’ is subject to debate among — and beyond — members of the Commission.

But this debate remains open-ended, and form offers relief in a similarly open-ended way. In fact, the success of the 2001 D(ARSIWA) as a work of codification curtailed the open-endedness of form by conveying the message that draft articles — even if never turned into a legally binding instrument — are binding. As a result, the ILC’s use of other (‘non-binding’) forms offers a sense of relief to states that have become anxious about the Commission establishing binding rules, even if it remains unclear what these forms precisely entail or how they relate to one another. For now, attempts by members to clarify and draw boundaries around specific forms have failed, and so form remains a rather mysterious message — for the user of the output to unravel — about what the

¹⁸⁰ International Law Commission, *Summary Record of the 2668th Meeting*, 53rd sess, 1st pt, 2668th mtg, Agenda Item 2, UN Doc A/CN.4/SR.2668 (2001) 12 [20] (Goco) (‘*ILC Summary Record 2668th Meeting*’).

¹⁸¹ On the International Law Commission’s (lack of) gender representativeness, see generally Penelope Ridings, ‘Women and the International Law Commission: Knocking at the Door of Gender Diversity’ (2025) 27(1) *Max Planck Yearbook of United Nations Law* 390.

¹⁸² *ILC Summary Record 2668th Meeting*, UN Doc A/CN.4/SR.2668 (n 180) 12 [21] (Economides).

¹⁸³ International Law Commission, *Provisional Summary Record of the 3658th Meeting*, 75th sess, 1st pt, 3658th mtg, UN Doc A/CN.4/SR.3658 (18 June 2024) 4 (Forteau).

Commission would like to convey.¹⁸⁴ To confuse further, the debates analysed in this article suggest that members of the Commission do not necessarily agree on this message. If they did, it might have been easier to demarcate boundaries or characteristics of forms. Thus, form continues to function as a label that can be used and understood in different ways by different actors. Guidelines can be principles. Principles can be articles. Articles can be guidelines.¹⁸⁵ Guidelines can be conclusions. Form can be anything you, I, the members of the International Law Commission or states understand it to be. In conclusion, form does not dictate, it only suggests. What's a conclusion anyway?

¹⁸⁴ *ILC Report 75th Session*, UN Doc A/79/10 (n 11) 88 [298].

¹⁸⁵ See, eg, the debates of the UNGA Sixth (Legal) Committee on the ILC Draft Articles on the Protection of Persons in the Event of Disasters, during which delegates have called for the Draft Articles to be used as guidelines: General Assembly, Sixth Committee, 'As Debate Concludes, Sixth Committee Speakers Still Divided on Framework for Draft Texts Addressing Protecting Persons in Event of Disasters' (Meetings Coverage GA/L/3718, 7 October 2024).